



# What's Next? How the Biden Administration Will Impact Employers, and What You Can Do to Plan Ahead

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Moderated by Michael J. Killeen



# Today's Discussion

- **Pandemic Response and OSHA**
- **NLRB and Labor Relations**
- **Immigration Policy**
- **Wage and Hour Changes**
- **Employee Benefits Plans and Healthcare**
- **Diversity, Equity, and Inclusion Initiatives from the EEOC**
- **Q&A**

# Overview

- Quick appointment of Cabinet and key policy agency subheads that don't require Senate approval
- Pause Trump administration rules in pipeline
- Implement policies immediately using executive orders, particularly immigration
- Significant emphasis on COVID-19 relief; more rules and guidelines for employers
- Emphasis on programs favored by unions, including increase in federal minimum wage
- More restrictions on federal contractors and potential revival of the “blacklisting” proposal

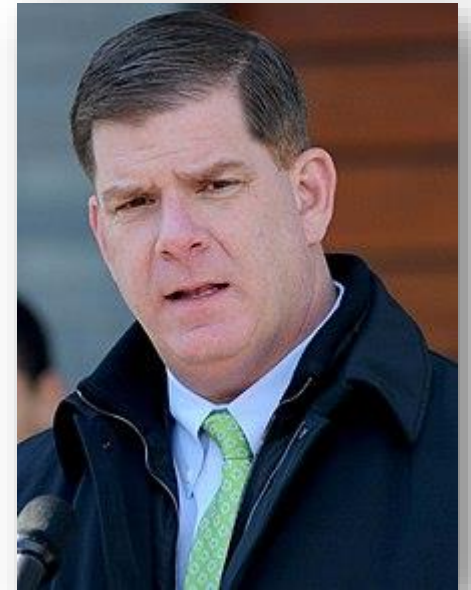
# Overview, Cont.

- A number of major changes will take six months or more due to rulemaking requirements and inability to remove incumbent board members from NLRB, EEOC, and other agencies
- Basic law will remain the same; enforcement will be more aggressive. But many employers will not see an immediate sea change (those changes are more likely to come at state/local level)
- Existing professional staff who oversee guidance and enforcement will remain the same
- New emphasis on collecting pay data and pursuing pay equity initiatives



# Nominee for Secretary of Labor

- Mayor of Boston for past seven years, previously a state representative, and, before that, a top union leader in the building trades
- His political base was largely blue-collar, white, working-class voters
- Comes from somewhat conservative wing of MA politics and has shown willingness to work with business
- Skillful at adapting to political forces
- No experience in enforcing the statutes that he will be charged with overseeing



**Marty Walsh**

# Pandemic Response and OSHA



# COVID-19 – “Joe Biden’s 4-Point Plan for Our Essential Workers”

- **Prong 3: Establish and enforce health and safety standards for workplaces**
- **“Immediately release and enforce an Emergency Temporary Standard”**
  - President Biden re-committed to ask OSHA to reconsider its prior refusal to issue emergency standards for COVID-19 workplace safety
  - Unclear what an ETS would look like
  - Several states have issued emergency COVID-19 workplace safety standards
  - Example: California
    - Mandatory testing obligation
    - Exclusion pay
    - Notification obligations

# COVID-19 – “Joe Biden’s 4-Point Plan for Our Essential Workers”

“Finalize a permanent infectious disease standard”

- Focus on healthcare facilities, “other high-risk environments”
- Obama administration began rulemaking process after H1N1
- Notice of Proposed Rulemaking placed under “long term action” in Spring 2017



# COVID-19 – “Joe Biden’s 4-Point Plan for Our Essential Workers”

- “Double the number of OSHA investigators to enforce the law and existing standards and guidelines”
- Reminder: there currently exist COVID-relevant OSHA standards
  - General Duty Clause
  - Recordkeeping/Reporting
  - Personal Protective Equipment
  - Respiratory



# COVID-19 – Potential Increase in General Duty Clause Citations



- Increase in these and other COVID-related standard violations may grow
- Any increase in federal OSHA enforcement may or may not carry over to state-plan states

# Other Potential OSHA Developments

## “Regulation by shaming”

- Explicit term used by Obama-era OSHA officials
- “Hard-hitting” press releases that identify cited violators and “explain more clearly why” the employer was cited



# Other Potential OSHA Developments

## Electronic reporting rule

- **Obama-era:** establishments with 250 or more employees, and establishments with 20-249 employees in certain industries, were required to annually submit all OSHA 300 logs, 301 reports, and 300A summaries for the prior calendar year
- Criticized
  - Records include injured or ill workers' sensitive and private personal information that might be publicly available or accidentally disclosed under the Freedom of Information Act
  - Third parties would use the submitted information for purposes the recordkeeping requirements were not intended to support
- Trump administration reversed rule re: 300 logs and 301 reports

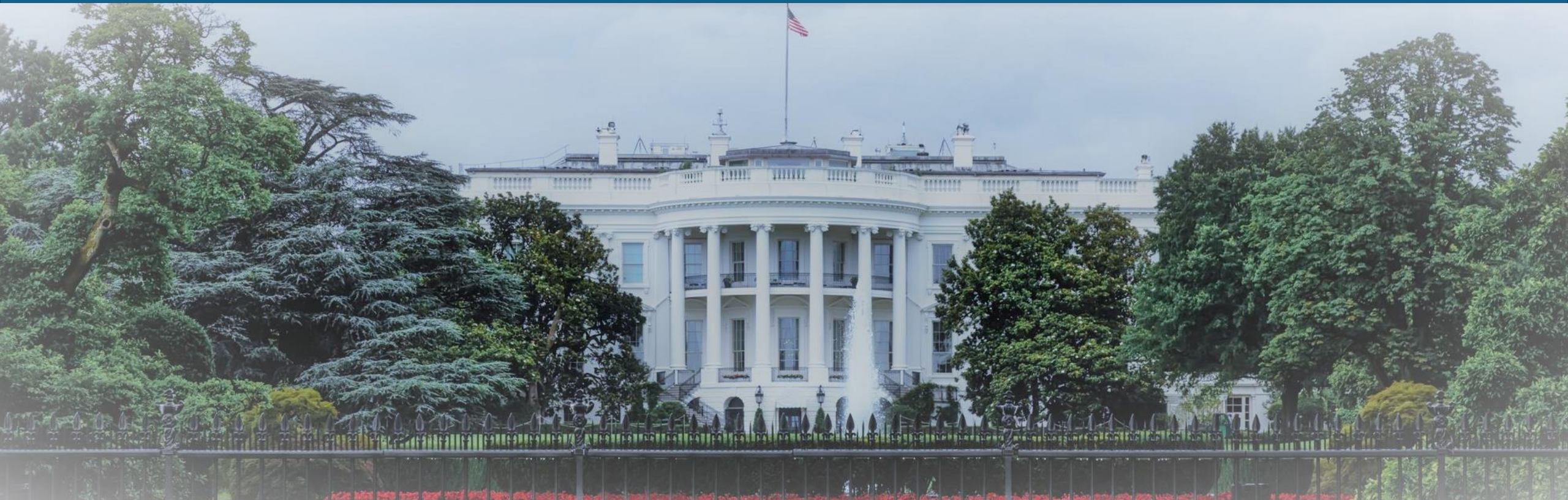


# Other Potential OSHA Developments

## Anti-retaliation rule

- Obama-era recordkeeping and reporting standard amendments preamble
- Suggested:
  - Employer safety-incentive programs are generally suspect because they incentivize workers not to report injuries/illnesses
  - Post-incident drug-testing was facially grounds for proving retaliation against workers for reporting injuries/illnesses
- Trump administration backed off, through “clarifying” memorandum:
  - Employers are not prohibited from adopting policies that provide safety incentives, so long as they do not discourage reporting
  - Post-incident drug-testing is generally permissible

# NLRB and Labor Relations



# General Counsel



**Peter Robb**



# Status of the NLRB



**Lauren McFerran (D)**  
Term Expiration –  
December 16, 2024



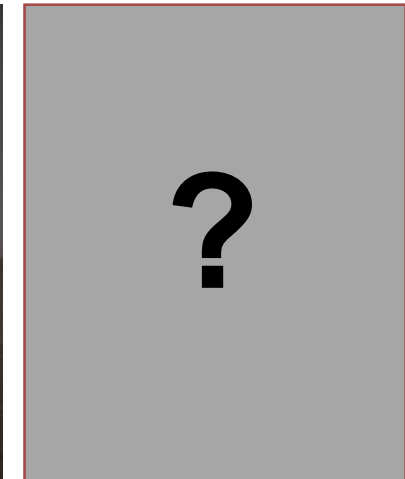
**Marvin Kaplan (R)**  
Term Expiration –  
August 27, 2025



**John Ring (R)**  
Term Expiration –  
December 16, 2022



**William Emanuel (R)**  
Term Expiration –  
August 27, 2021



**Vacant**  
Term Expiration –  
August 27, 2021



# The Pendulum Is Still Swinging Right (Temporarily)

- Contract Bar Doctrine
- Demise of Scabby the Rat
- Scaling Back of Voting List Information



# Anticipated Labor Law Developments Under Democratic Majority

- Reversing Trump Board Decisions
  - Increased scrutiny of facially neutral workplace rules & handbook policies (*The Boeing Company*)
  - Work rules prohibiting employees from using company email for union activity (*Caesars Entertainment*)
  - Return to “overwhelming community of interest” standard for union organizing (*PCC Structural*s)
  - Return to “clear and unmistakable waiver” standard (*MV Transportation*)
  - Continued dues checkoff after expiration of collective bargaining agreement (*Valley Hospital Medical Center, Inc.*)
- Expanded Access to Employer Property
- Enlarging Scope of PCA
- Union-Friendly Union Organizing Rules
- Re-adopting Expansive Joint Employer Rule
- Restoration of Fair Pay and Safe Workplaces Executive Order
- Protecting the Right to Organize (PRO) Act



# Immigration Policy



# What does President Biden Inherit?

## Over 1,000 immigration law changes:

- Executive Orders
- Presidential Proclamations
- Rules and regulatory actions – proposed, interim, and final rules
- Adjudication Manuals
- Foreign Affairs Manual
- Policy memos, guidance, procedural updates
- Law suits



# What does President Biden Inherit?

- Travel bans
- Humanitarian and asylum issues, family separation
- Wage and H-1B rules on the brink of implementation
- Processing slowed to a crawl
  - Improper rejections
  - Lengthy waits for confirmation of filing, receipt notices
  - Backlog of 1.2 million biometrics
  - Stalled visa processing outside U.S., except for National Interest Exception (NIE)



# Midnight Rules

## Key Issues for Foreign Workers

### In the Past Few Weeks:

- Dramatic increase in foreign worker wages – Department of Labor rule
- H-1B “specialty occupation” redefined
- H-1B lottery process upended
- Lifting of COVID travel restrictions on travel primarily from Europe, Brazil, effective January 26



# Day 1 of Biden-Harris Administration

## **Presidential Proclamations and Executive Orders, including:**

- Revoke travel ban on predominantly Muslim and African countries
- Stop building border wall
- Preserve and fortify Deferred Action for Childhood Arrivals (DACA)

**Immigration Reform Bill: Roadmap for 11 undocumented individuals lacking status**

**Freeze on midnight regulations, now under review**

# Day 1 of Biden-Harris Administration: Immigration Reform Bill

## **Earned roadmap to citizenship for undocumented individuals physically in the U.S. on January 1, 2021**

- Apply for temporary legal status
- Pay income taxes
- Pass criminal background check
- After 5 years apply for green card
- After having green card for 3 year, can apply for citizenship



# Day 1 of Biden-Harris Administration: Immigration Reform Bill

## Other actions:

- Options for ag workers with valid H-2A status over last 5 years
- Keep families together
- Clear immigrant visa backlogs
- Increase options for STEM grads to remain in U.S.
- Increase green card options for lower-wage sector workers

# First 100 Days of Biden-Harris Administration

## Types of Actions:

- 60-day regulatory freeze on midnight rules by Memorandum to the Executive Branch ordering that agency
  1. Does not send proposed or final rules to the Office of Federal Register;
  2. Withdraws rules pending at the Federal Register; and
  3. Automatically postpones implementation of rules that have not yet taken effect by 60 days
- Urge Congress to invoke Congressional Review Act (CRA) "clawback" tool to vacate final rule issued by a federal agency within the last 60 legislative days. But agency then is also prevented from reissuing a "substantially similar" rule in the future unless Congress authorizes it to do so via subsequent legislation.

# Regulatory Freeze:

## DOL Increased Wage Scheme

### Example

#### Software Developer (15-1132), Seattle, WA

Level	Wage up to March 15, 2021	Wage effective March 15, 2021	Increase
1	\$92,102	\$139,880	51.87%
2	\$113,110	\$167,918	48.46%
3	\$134,097	\$195,938	46.11%
4	\$155,105	\$223,974	44.40%

# Regulatory Freeze: DOL Increased Wage Scheme

- DOL under Trump administration issued new rule to take effect March 9, 2021
- “Transition period” lasts until June 30, 2021, implementation date for new LCAs and Prevailing Wage requests (H-1B, E-3, green card cases)
- Biden administration 60-day freeze memo on “implementation”
- Unknowns:
  - Issue new rule?
  - Litigation?



# Regulatory Freeze: Overhaul on H-1B Lottery System

- USCIS final rule replacing the annual H-1B visa lottery for 85,000 new H-1Bs for foreign professionals
  - Registration and random selection process implemented March 2020
  - Priority for higher wages for their occupation and geographic area
  - Disadvantage to middle America, higher ed, start-ups, nonprofits
- Biden Administration 60-day freeze memo
- Unknowns:
  - New rule?
  - Raise number of H-1Bs beyond 85,000 per year?
  - Litigation?



# Asylum, Refugee, Humanitarian Priorities



- 100-day deportation moratorium
- DACA protections, temporary protected status, including Venezuela.
- Raise refugee ceiling to 125,000

# Not Done, Yet ...

- New regulations proposed to roll back policies
- Family separation task force created
- Changes to Migrant Protection Policy/remain in Mexico; asylum seekers allowed to enter and present claims
- Travel ban on H-1B, H-2B, J-1 exchange visitors, L-1 intracompany transfers, extended to March 31, 2021
- Technology at the border
- New agency heads

# New Leadership: Nominee for Secretary of Homeland Security, Alejandro Majorkas

- Born in Cuba, grew up in Los Angeles
- Graduated from University of California, Berkeley, and Loyola Law School
- During Obama administration, served in Department of Homeland Security, first as Director of U.S. Citizenship and Immigration Services (USCIS), then as DHS Deputy Secretary
- Key role in EB-5 investor visas
- Keen on process efficiency
- Confirmation process already started, January 19





# New Department Head: Nominee for Secretary of State, Antony Blinken

- Attended high school in Paris, speaks French
- Graduated from Harvard and Columbia Law School
- Under Obama, served as Deputy Secretary of State
- National Security Advisor to then-Vice President Biden
- "Humility and confidence should be the flip sides of America's leadership coin."
- Confirmation process already started, January 19



# Other Potential Changes

Dignity for Detained legislation

Agency Accountability – ICE and CBP at the border

Mandatory E-Verify?

Independent immigration courts?

Further reform to foreign worker, investor, entrepreneurs?

# Wage and Hour Changes



# Minimum Wage Changes



## **Increasing federal minimum wage to \$15 an hour**

- Federal minimum wage has been \$7.25 since 2009
- 24 of 50 states will see minimum wage increases in 2021

## **Raising minimum salary threshold for overtime/white collar exemptions**

- Currently at \$35,568
- \$47,476?

## **Eliminating tip credits**



# New Independent Contractor Test

- DOL under Trump administration issued new rule to take effect March 8, 2021
  - Economic reality test
  - Under the final rule, two core factors are integral to determining whether someone is an independent contractor: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss based on initiative and investment
- Biden administration expected at least try to:
  - Postpone/Rescind Trump administration's independent contractor rule
  - Implement worker friendly classification test
    - ABC test???
  - Boost enforcement efforts



# Joint Employer Rules

- DOL under Trump administration:
  - Issued business-friendly rule defining the term “joint employer” narrowly as one that exercises “substantial direct and immediate control” over employment conditions
- Biden administration expected to:
  - Rescind/undo Trump administration’s business-friendly joint employment regulations under FLSA
  - Favors broader definition of joint employer

# Employment Agreements

- Eliminating mandatory pre-dispute arbitration as condition of employment
- Eliminating class and collective action waivers
  - In *Epic Systems Corp. v. Lewis*, the United States Supreme Court confirmed that class and collective action waivers are enforceable
- Restricting non-compete, non-solicitation agreements



# Other Potential Changes

- Increasing paid leave time (including COVID paid leave)
- Pursuing liquidated damages
- Revising tip pooling rules
- Increased COVID stimulus
- Pay Equity





# Employee Benefits Plans and Healthcare



# What is the future of the ACA?

## President Biden's Plan to Protect and Build on the Affordable Care Act

- Give Every American Access to Affordable Health Insurance & Provide the Peace of Mind of Affordable Quality Health Care
  - Give Americans a new choice – a public health insurance option like Medicare
  - Increase the value of tax credits to lower premiums
    - Eliminate the 400% income cap on tax credit eligibility and lower the limit on the cost of coverage from 9.86% of income to 8.5%
    - Increase the size of tax credits by calculating them based on the cost of a more generous gold plan, rather than a silver plan
  - Expand coverage to low-income Americans
    - Offering premium-free access to the public option
    - Automatically enrolling certain individuals below 138% of the federal poverty level
- No mention of any changes to the employer mandate and related penalties.
- May try to bring back individual mandate but ...



# What about the Supreme Court case?

## California v. Texas

- Oral arguments held on November 10, 2020; decision expected in Spring 2021
- Issue is constitutionality of individual mandate
  - Congress set individual mandate penalty at \$0 beginning in 2019
  - Trial court and 5th Circuit held that mandate is now unconstitutional because the penalty no longer “produces at least some revenue” for the federal government
  - Supreme Court took the case and will decide:
    - Do plaintiffs (various states) have standing to sue to challenge individual mandate?
    - Did Congress’ act render the individual mandate unconstitutional?
    - If so, can the rest of the ACA survive?
  - Meanwhile ACA remains in effect (e.g., employer mandate, penalties, reporting, etc.)

# What are President Biden's retirement plan priorities?

Change 401(k) contribution tax deduction to a refundable tax credit

- Goal is to “equalize” tax benefit of deferral contributions
- Currently, upper-income families receive a larger tax break on contributions

Provide access to an automatic 401(k) plan for workers without a current plan

Allow caregivers to make catch up contributions regardless of age

Provide federally-backed loans to underfunded multiemployer defined benefit pension plans

Increased tax breaks to small businesses establishing retirement plan for employees



# What can we expect from the DOL EBSA?

- President Biden's nominee for Secretary of Labor is Marty Walsh
  - Deputy Assistant Secretary of Labor (EBSA) not yet named; Senate confirmation not required
- Review of Investment Advice Fiduciary Rule and Exemption
  - Published in FR on December 18, 2020; Scheduled to be effective on February 16, 2021
- Unwind Non-Pecuniary (ESG) Investment Duties and Proxy Voting Rules?
- Additional Priorities (in addition to COVID-19 and ACA)
  - Lifetime Income
  - Multiemployer Plans
  - Additional E-delivery
  - Mental Health
  - State Retirement Plans



# What can we expect from Treasury?

- President Biden's nominee for Secretary of Treasury is Janet Yellen
  - Deputy Assistant Secretary (Tax Policy) for Retirement and Health Policy not yet named
- Priorities
  - COVID-19/SECURE Act guidance
  - Lifetime Income
  - Additional E-delivery
  - Update EPCRS
  - Mental Health and Substance Abuse



# What can we expect from Congress?

## Securing a Strong Retirement Act (SECURE 2.0)

- Introduced on October 27, 2020 by House Ways and Means Committee Chairman Neal (D-MA) and Ranking Member Brady (R-TX)
  - Will need to be reintroduced to 117<sup>th</sup> Congress; bipartisan cooperation and support expected
- Key Provisions:
  - Mandatory auto-enrollment & escalation for new 401(k), 403(b) and SIMPLE plans
  - Raise RMD required beginning date from 72 to 75
  - Reduce penalty for failure to take RMDs from 50% to 25%
  - Student loan payments treated as deferral contributions eligible for match
  - Reduce required service for long-term, part-time employees to 2 years
  - Increase catch-up contribution limit at age 60 from \$6,500 to \$10,000
  - Permit self-correction of many inadvertent plan failures
  - Create online lost and found for employees to find information about prior employers' retirement plans
  - Increase startup cost credit for small employer pension plans

# Diversity, Equity, and Inclusion Initiatives from the EEOC





# Expect GOP Control of the Commission Until 2022

- The EEOC is a bipartisan Commission comprised of five presidentially-appointed members, including the Chair, Vice Chair, and three Commissioners
- EEOC's Republican majority is cemented through 2022, absent a resignation
- The Commission
  - Charlotte A. Burrows, Chair (Democrat)
    - Term ends July 1, 2023
  - Jocelyn Samuels, Vice Chair (Democrat)
    - Term ends July 1, 2021
  - Janet Dhillon, Commissioner (Republican)
    - Term ends July 1, 2022
  - Keith E. Sonderling, Commissioner (Republican)
    - Term ends July 1, 2024
  - Andrea R. Lucas, Commissioner (Republican)
    - Term ends July 1, 2025
- General Counsel: Sharon Fast Gustafson
  - Term ends 2023



**Charlotte A. Burrows**



**Jocelyn Samuels**



**Janet Dhillon**



**Keith E. Sonderling**



**Andrea R. Lucas**



**Sharon Fast Gustafson**

# No Major Changes Right Away

- President Biden will most certainly change the Chair and Vice-Chair positions of the EEOC
- The Chair sets the agenda and manages the permanent staff, but new initiatives will need bipartisan support
- Any significant policy changes will require bipartisan compromise



# What Employers Can Expect

## Enforcement of New Legislation

The EEOC is obligated to adhere to any changes for the laws that it enforces, and modifications to some of these statutes are more likely now that the Democrats hold the majority in the House and Senate.

## More Aggressive Enforcement of Federal Employment Laws

President Biden's campaign said he would fully empower the EEOC to address discrimination in the workplace and help close the harmful and unjust gaps in wages and employment opportunities

## Increased Budget

President Biden has said he would double the agency's funding and empower the EEOC to initiate investigations for all areas of discrimination under its purview

## Continued Focus on Mediation Over Litigation Until 2022

The commission strengthened its ability to focus on mediation over litigation earlier this year when it passed a resolution that moved authority over litigation actions from the general counsel to the commission

# What Employers Can Expect

## Updated Religious Discrimination Guidance

The EEOC released new guidance on religious discrimination on January 15, 2021

## Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) Rights

There could be new LGBTQ initiatives based on recent Supreme Court action in this area

## Updated Sexual Harassment Guidance

## Changes to EEO Reporting

The EEOC will likely turn to pay equity issues and revive pay-data collection and reporting through the EEO-1 Survey

# What Employers Should Do Now

- Update anti-discrimination policies and handbooks to include sexual preference and gender identification pursuant to the 2020 U.S. Supreme Court decision in *Bostock v. Clayton County, Georgia*
- Maintain and update employee handbooks and policies to address COVID-19 guidance, including the Families First Coronavirus Response Act, if applicable
- Maintain and update sex harassment in handbooks and policies
- Update race and religion anti-discrimination language in handbooks and policies





# Q&A



# Thank you



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