

JacksonLewis



**Employment & Labor Law Update**

March 31, 2021

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**Agenda:**

- Employment & Labor Law Potential Changes Under New Administration
- COVID 19 Update
  - Vaccines
- South Dakota Update
  - Marijuana
- Your Questions

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**Employment Law Update**

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**November 3, 2020**

**Election Day**  
Presidential Election Results

Electoral College:  
Biden 306 Trump 232

Raw Votes:  
Biden 81,282,000 Trump 74,223,000

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**Immigration**

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**Biden Immigration Plan**



Undo Trump Executive Orders and Policies (does not require legislation)

- Reinstiate DACA
- Rescind Travel Bans
- Protect Temporary Protected Status and provide path to permanent residency
- Defund Mexico/U.S. border wall

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**Modernize Immigration System (would require legislation)**

- Path to legalization for 11M undocumented
- Reform work visas
  - Increase H1Bs but prioritize by wages
  - Increase seasonal workers and provide more flexibility
  - Increase ag workers and provide a path to permanent residency
  - Exempt STEM visas from quotas
  - Eliminate per-country caps on green cards and increase quotas for family/employment
- Encourage Entrepreneurs through special visas
- Allow cities/counties to petition for immigration visas to stimulate economic development



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**Reprioritize Compliance and Enforcement (does not require legislation)**

- De-emphasize deportation of non-criminals
- Stop workplace raids
- Expand protections for undocumented workers who report labor violations

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**Employment Law**

**Consequences of Election**

Agency

- Appointments
  - EEOC
  - NLRB
  - DOL
- Budget/Enforcement
- Policy

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**EEOC**

- Discrimination
- Harassment
- Retaliation
- Enforcement

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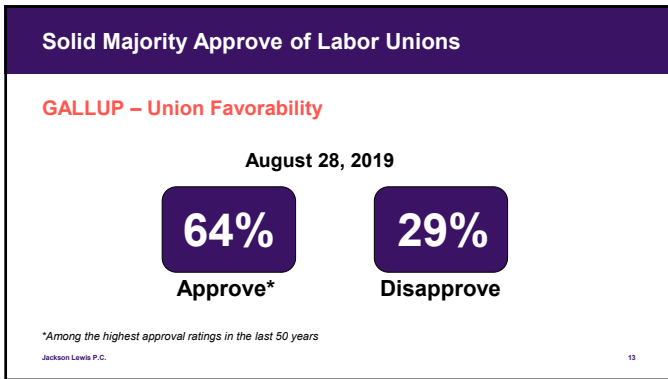
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**What Can We Expect?**

- **Bargaining unit determinations** – a return to the extremely difficult *Specialty Healthcare* micro-unit bargaining unit determination standard.
- **Revision of Trump Board representation case rulemaking** – a return to the burdensome rules that existed prior to the Trump Board’s rulemaking – rules that, among other things, limited employers’ ability to challenge unions’ unit requests and communicate important information about unions to its employees. Expect a return to “quickie elections”
- **Rules and Policies** – a return to the standard under which many seemingly innocuous workplace rules were found to violate the NLRA because they could be “reasonably construed” by an employee to prohibit the exercise of NLRA rights.

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**What Can we Expect?**

- **Joint employer test** – a return, through rulemaking, to the unfriendly *Browning-Ferris* test governing determination of joint-employer status which made it easier for unions to prove that two or more companies were the employer of one of the company’s employees.
- **Past practice and contract coverage defense to unilateral changes** – the elimination of two defenses the Trump Board provided to employers when it is alleged an employer unlawfully unilaterally changed terms and conditions of employment – the “contract coverage” and past practice” defenses.
- **Duty to bargain over discipline** – a return to the requirement where when employees are newly represented by a union, but a first collective bargaining agreement has not been negotiated, an employer is obligated to collectively bargain with the union regarding discretionary “serious discipline” (such as suspension, demotion, or discharge) it intended to impose.

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**What Can We Expect?**

- **Independent contractor status** – a return to the more employee-friendly traditional common-law test for determining whether an individual is an employee or an independent contractor under the NLRA.
- **Use of employer email for personal reasons** – a return to a requirement that employers allow employees who have access to their email systems for work-related purposes be allowed to use that email for personal reasons, on non-work time.
- **Employee abusive conduct during Section 7 activity** – a return to an employee-friendly standard permitting employees significant leeway to use profanity and engage in abusive conduct in connection with Section 7 activity without losing the protection of the Act.

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**What Can We Expect?**

- **Dues deductions after CBA expiration** – a return to a requirement that an employer deduct union dues from employee paychecks even after the expiration of a collective bargaining agreement containing a dues check-off provision on which the deductions were based.
- **Protected concerted activity** – a broadening of what constitutes protected concerted activity.
- **Access to private property** – a return to standards under which a property owner may not limit the circumstances under which it may exclude the off-duty employees of its on-site contractors (or licensees) from accessing its private property to engage in Section 7 activity.

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**NLRB**

- Enforcement
- Policy Shift
- Organizing Increase
- Limitations Of Employee Defenses

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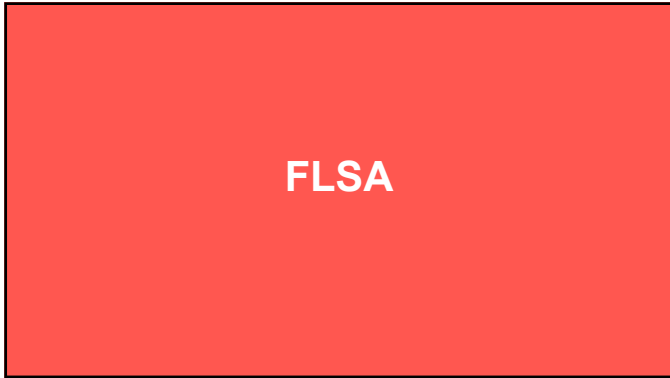
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**What Can We Expect?**

The Forced Arbitration Injustice Repeal (FAIR) Act: President Biden has indicated his support for this law that would prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment.

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**What Can We Expect?**

Independent Contractors: The Biden DOL will withdraw the DOL's proposed independent contractor rule, which has not been finalized yet. The proposed rule clarifies who qualifies as an "independent contractor" under the Fair Labor Standards Act (FLSA). Moreover, the Biden DOL will likely take steps to further expand the definition of who qualifies as an "employee" under federal law, making it harder for businesses to contract with independent contractors without fear of misclassification.

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**What Can We Expect**

Minimum Wage: President Biden previously called for a \$15 federal minimum wage and likely will seek an increase in the minimum salary to qualify as an exempt employee under the FLSA.

South Dakota Minimum Wage = \$9.45

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**DOL**

- Classification
- Time Keeping Protocols
- Off The Clock Issues
- Enforcement

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**Practical Consequences Of New Administration**

- Hiring
- Discipline
- Termination
- Harassment
- Time Keeping
- Union Organizing

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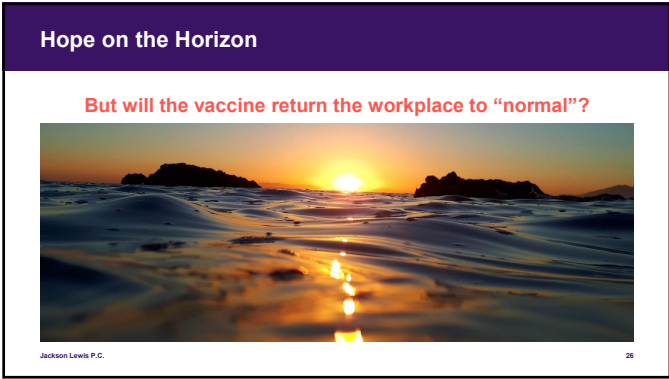
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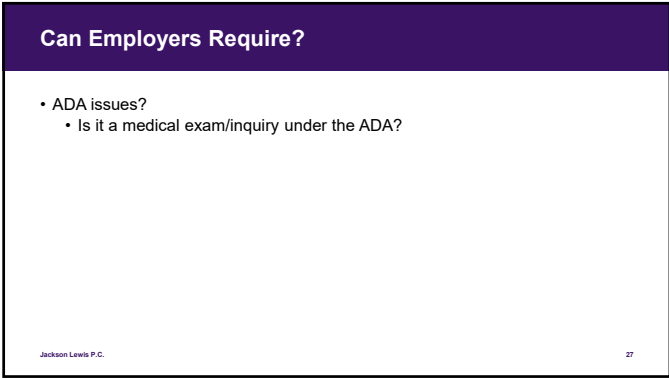
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### Should Employers Require?

- EEOC Guidance.
- Workers comp/liability issues if employee has adverse reaction to vaccine
- Division/Employee morale issue
- Litigation risk
- Both the EEOC and OSHA recommend encouraging, *not requiring*, flu vaccines.

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### Can Employees Refuse?

- Collective objections may be protected
- Accommodation issues
  - Disability/medical conditions
  - Sincerely held religious belief

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### Solution?

**Mandatory?**



**Incentives?**

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**South Dakota**

- Marijuana Update
  - Law/Election
  - Current Status
  - What's Next?

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**Your Presubmitted Questions**

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**Contact**



If you have questions or would like to discuss further issues raised today, you may contact us:

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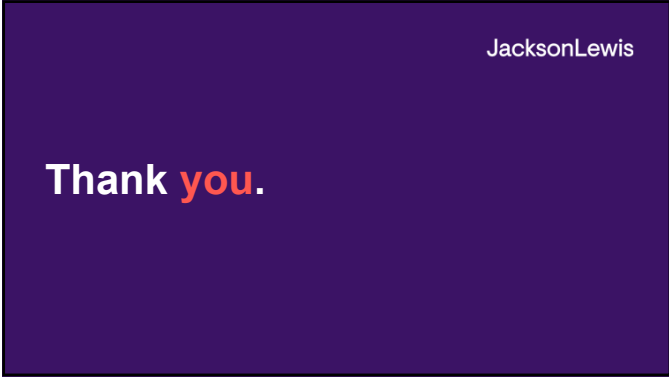
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