Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

6 Class Action Shifts Employers Can Expect Under Biden

By **Gerald Maatman and Jennifer Riley** (November 9, 2020, 6:24 PM EST)

Gerald Maatman

Jennifer Riley

With the election results in and the White House set to turn Democratic blue for the next four years, employers can expect the change to bring shifts to the workplace class action landscape.

Employers should anticipate that, while leadership of the U.S. Equal Employment Opportunity Commission will remain in place through the short term, President-elect Joe Biden's administration will bring policy changes on other fronts that may take shape through legislative efforts, agency action and regulation, and enforcement litigation.

Contrary to the pro-business approach of the Trump administration, many of these efforts may be intended to expand the rights, remedies and procedural avenues available to workers and, as a result, have the potential to shake up the workplace class action arena. Employers should expect that, as the Biden administration takes charge, multiple trends may take shape on the workplace class action front.

At least six trends appear on the horizon for corporate America.

1. A Continued Refocus Away From Systemic Litigation at the EEOC

President Donald Trump appointed three Republican commissioners to the EEOC whose terms solidify a Republican majority through at least July 2022, irrespective of which party holds the White House. As a result, it is likely that the EEOC will continue its shift away from systemic litigation as a priority at least through the first few years of the Biden presidency.

That being said, a future Democratic chair at the EEOC — operating in the minority — may seek to turn the commission's agenda, even if ever so slightly, or influence it in a way that aligns more closely with the agenda of the Biden administration.

During the past year, the EEOC has undertaken multiple initiatives that reflect a shift away from systemic litigation as a priority. Another change of focus in this context come inauguration day in January 2021 is a wild card for employers.

First, on Feb. 4, EEOC Chair Janet Dhillon announced five priorities for 2020, none of which included a systemic litigation focus. Although the chair acknowledged that the commission will continue to pursue litigation as a vigorous advocate, she opined that "litigation is truly a last resort and not an appropriate substitute for rule-making or legislation."[1]

Second, on March 10, the EEOC released a resolution regarding its authority to commence or intervene in litigation.[2] In short, the resolution removed authority over EEOC litigation activities from the general counsel and reassigned the authority to commence or intervene in systemic discrimination litigation solely to the commissioners. To the extent that Republic-appointed commissioners — who hold the majority — are the decision-makers of last resort when it comes to initiating agency litigation, employers may see fewer rather than more enforcement lawsuits.[3]

Third, on Oct. 8, the EEOC **released** a notice of proposed rulemaking that overhauled the conciliation process with the goal of improving its transparency and effectiveness. The EEOC stated that its proposed amendments will establish "basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful."[4] With more focus on successful conciliations, employers should expect to see fewer enforcement lawsuits.

The agency's filings over the past year reflect this trend and a continued shift away from litigation. For instance, after more than doubling its inventory of systemic filings between fiscal year 2016 and fiscal year 2018 — with 18 in 2016, 30 in 2017 and 37 in 2018 — the EEOC's systemic filings dropped to 17 in fiscal year 2019. Total fiscal year filings followed a similar trajectory, with 136 in 2016, 202 in 2017, 217 in 2018, but only 149 in 2019 and 101 in 2020.[5]

It is unlikely that these initiatives will shift in the short term, but the impact of the Biden presidency remains to be seen on agency litigation.

2. A Resurgent Plaintiffs Class Action Bar

Because the EEOC's leadership likely will remain in place through at least mid-2022, it is likely that the EEOC will remain on its current trajectory into a Biden presidency. But, as forces of change are apt to be in play, employers can expect other factors to fill the void if the commission is not aligned with the Biden administration in terms of a pro-worker litigation focus.

Over the past decade, the plaintiffs class action bar has been both innovative and activist in finding its way around defense-centric legal precedents — such as the more rigorous class action standards established by the U.S. Supreme Court in Wal-Mart Stores Inc. v. Dukes in 2011.[6]

Emboldened by a new public policy focus on workers' rights, the plaintiffs class action bar is apt to ramp up its case filings and efforts to stretch the legal envelope in workplace litigation. The bottom line is that employers can expect to see the void of government enforcement litigation filled by private employment-related litigation.

3. Renewed Efforts to Change the Arbitration and Class Action Waiver Landscape

As the Supreme Court issued a series of rulings culminating in Epic Systems Corp. v. Lewis in 2017,[7] which validated the enforceability of mandatory workplace arbitration agreements with class action waivers, lawmakers launched efforts to modify that landscape. Employers should expect a Biden administration to reinvigorate those efforts, particularly if accompanied by a shift in the landscape of leadership and/or factors of legislative compromise in the Senate.

On Feb. 28, 2019, for instance, Rep. Hank Johnson, D-Ga., and Sen. Richard Blumenthal, D-Conn., introduced the Forced Arbitration Injustice Repeal Act. The FAIR Act would have prohibited predispute arbitration agreements that forced employees and other individuals, such as applicants or independent contractors, to arbitrate future disputes and prohibited agreements that restricted such persons from participating in class or collective actions related to employment, consumer, antitrust or civil rights matters.

Similar efforts took the form of the Restoring Justice for Workers Act, introduced in the U.S. House of Representatives on Oct. 30, 2018, and the Ending Forced Arbitration of Sexual Harassment Act, introduced in the U.S. Senate on Dec. 6, 2017. Employers should expect similar efforts during a Biden presidency, particularly if the balance of power shifts to a Democratic majority in the Senate in the next two years.

During the past several years, many large and small employers have adopted mandatory arbitration programs to manage disputes with their prospective hires and existing workforces. As a result, if taken up for a vote and signed into law, employers should anticipate that such measures would work a sweeping

change in both the forums and procedural mechanisms available for dispute resolution in that they would redirect litigation to the courts and reintroduce class and collective action devices into the toolkits of the plaintiffs bar.

4. An Uptick in Wage and Hour Litigation

During his campaign, Biden decried wage theft and claimed that some employers steal billions each year from working people by paying less than the minimum wage. As a candidate, Biden represented that he would push for enactment of legislation that makes worker misclassification a substantive violation of law and build on efforts by the Obama administration to drive an effort to dramatically reduce worker misclassification.

Such statements, among others, signal that the Biden administration will take efforts to reverse pro-business measures of the Trump administration's U.S. Department of Labor that arguably narrowed application of minimum wage and overtime requirements.

On March 16, for instance, the Trump DOL adopted a final rule narrowing the definition of "joint employer," thereby limiting the circumstances under which multiple companies could be deemed to employ the same workers. On Sept. 22, the Trump DOL **proposed a rule** broadening the independent contractor test, thereby making it easier for companies to classify workers as independent contractors under the Fair Labor Standards Act.

Employers can expect the Biden administration to shift these efforts, which may include abandoning defense of the joint employer rule — although business groups may take up the torch in that regard — and may include new rulemaking to rescind the independent contractor rule or adoption of new regulations that provide more worker-protective interpretations of employee status under the FLSA.

By expanding the group of workers who qualify as employees under the FLSA, such measures may expand the application of minimum wage and overtime requirements and, in turn, broaden the scope of litigation and raise the stakes for employers.

5. A Narrowing of Exemption Defenses

Along a similar line, employers may see renewed efforts to narrow exemption defenses applicable to wage and hour litigation. Although the FLSA requires employers generally to pay minimum wage and overtime, DOL regulations identify several exceptions, including multiple categories of workers who are exempt from such requirements due to their duties and salary.

In May 2016, the Obama DOL issued new rules that increased the minimum salary required to qualify for white collar exemptions. After a district judge halted their implementation, however, and found that the DOL exceeded its authority, the agency dismissed its appeal at the U.S. Court of Appeals for the Fifth Circuit.

The Biden administration, however, may pick up the reins on these issues and renew efforts to increase the minimum salary test. Such efforts, if successful, may increase the value of potential litigation over the proper classification of workers, making such suits more attractive to the plaintiffs class action bar and more troublesome for employers.

6. A Potential Litigation Shift Away From Federal Courts

Perceiving that Trump's judicial selections have tilted the federal courts, employers may see the plaintiffs bar file and attempt to pursue more lawsuits in state courts.

As of Nov. 4, the Senate has confirmed 220 Article III judges nominated by Trump, including three associate justices of the Supreme Court, 53 judges for the federal courts of appeals, and 162 judges for the federal district courts. Trump's appointees account for approximately 25% of all active judges in the federal court system.

Given perceived changes to the federal judiciary shaped by successful nominations of judges by Trump, particularly at the appellate level, employers may expect to see the plaintiffs class action bar opting where possible for a state forum or tailoring their complaints to avoid jurisdictional thresholds for removal of state court class actions to federal court.

Conclusion

The workplace class action landscape is anything but static.

As the Biden presidency begins, employers are likely to see shifts. If the Biden administration pursues an expected pro-worker agenda, those shifts may enhance the scope and value of workplace class actions and result in an increase in litigation.

Gerald L. Maatman Jr. and Jennifer A. Riley are partners at Seyfarth Shaw LLP.

[1] https://www.eeoc.gov/chairs-priorities-2020?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[2] https://www.eeoc.gov/resolution-concerning-commissions-authority-commence-or-intervene-litigation-and-commissions#:~:text=The%20Commission%20shall%20decide%20to,pattern%20or%20practice%20of%20discrimination%3B&text=Other%20cases%20rea

[3] https://www.workplaceclassaction.com/2020/03/the-winds-of-change-are-suddenly-gusting-eeoc-commissioners-vote-to-strip-the-general-counsel-of-substantial-litigation-authority/.

[4] https://www.workplaceclassaction.com/2020/10/eeoc-update-the-commission-finally-releases-its-proposed-amendments-for-its-conciliation-process/.

[5] https://www.workplaceclassaction.com/2020/09/eeoc-fiscal-year-2020-fizzle-the-eeocs-year-comes-to-a-surprisingly-quiet-close/.

[6] 564 U.S. 338 (2011).

[7] 138 S. Ct. 1612 (2018).
