



The Biden Administration

Actions on Labor & Employment in the First 100 Days

May 4, 2021

Seyfarth Shaw LLP

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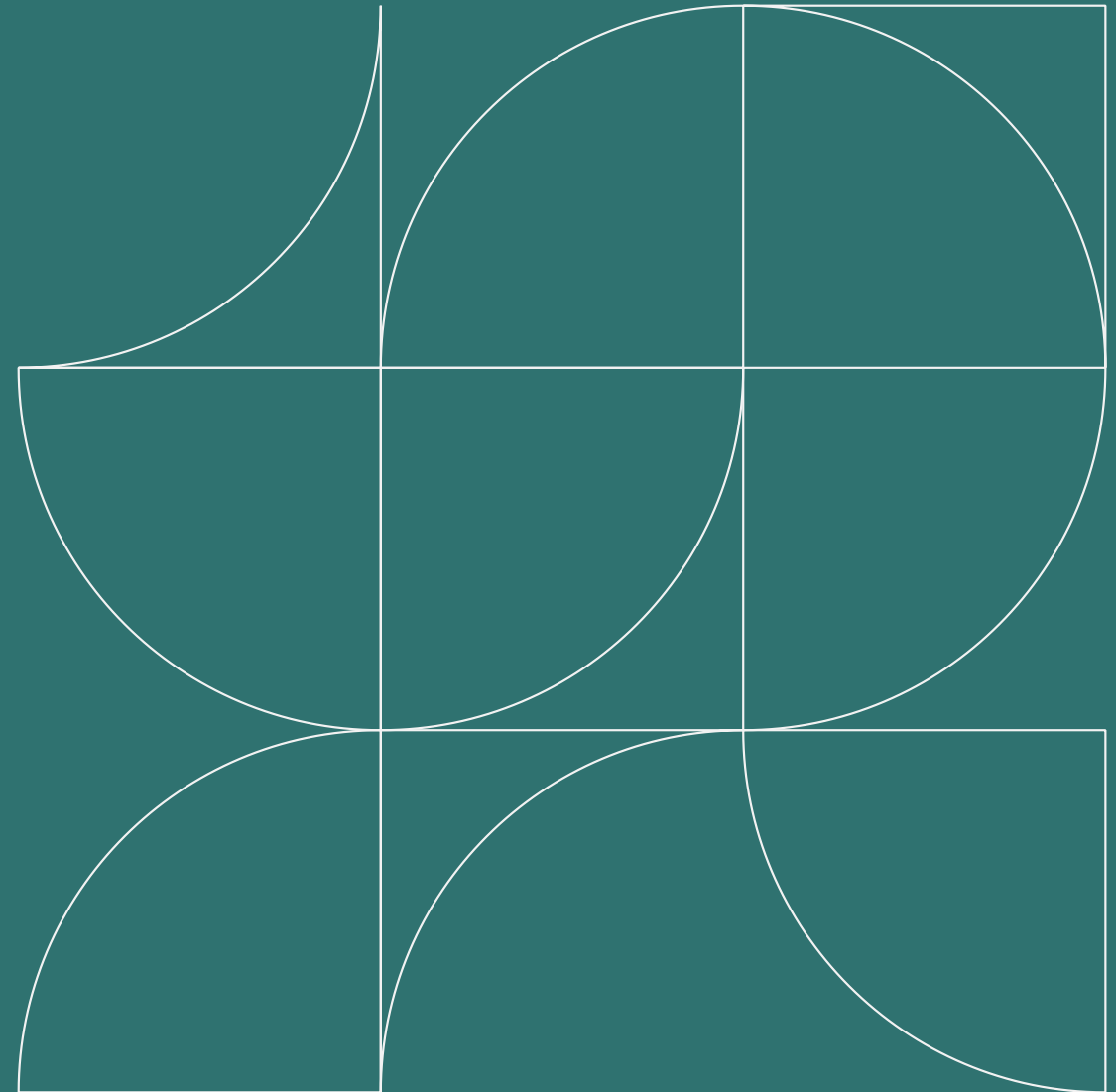


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Agenda

- The New DOL Leadership Team
- Vaccination Roll Out
- OSHA: COVID-19 ETS and Enforcement
- Infrastructure and Labor Related Initiatives
- Immigration

The New DOL Leadership Team



Secretary of Labor



Marty Walsh
Mayor of Boston

Nomination announced January 7th

- Nomination announced January 7th
- Organized labor veteran
- Head of Boston Building and Construction Trades Council before entering public office
- Elected Mayor of Boston in 2013
- Was member of Laborers' International Union of North America member
- Headed Building Trades Council, a coalition of Boston-area unions

Deputy Secretary of Labor



Julie Su

- Former Head of Labor Workforce Development Association
- Previous head of Division of Labor Standards Enforcement
- Past recipient of a MacArthur Foundation “genius” grant.
- Lengthy public sector AND nonprofit record -- Litigation director at the Asian Pacific American Legal Center Southern California (APALC)
- Her decisions at the DOL will be guided by principles of racial and economic equity
- Criticized re: oversight of California Unemployment Program

Solicitor, Department of Labor



Seema Nanda

- Visiting Fellow – Harvard Law School Labor & Worklife Program
 - CEO – DNC
 - EVP and COO – The Leadership Conference on Civil and Human Rights
 - Dept. of Labor
 - Chief of Staff, Office of the Secretary
 - Deputy Solicitor of Labor
 - Dept. of Justice – Civil Rights Division
- Boston College – JD; Brown - BA

Director of OFCCP



Jenny R. Yang

- Former Chair of EEOC under Obama Administration
- Expected focus on pay equity & sexual orientation and gender identity rights
- Named a 2018 Leadership in Government Fellow by the Open Society Foundation
- Currently serves as a Senior Fellow at the Center on Labor, Human Services, and Population at the Urban Institute

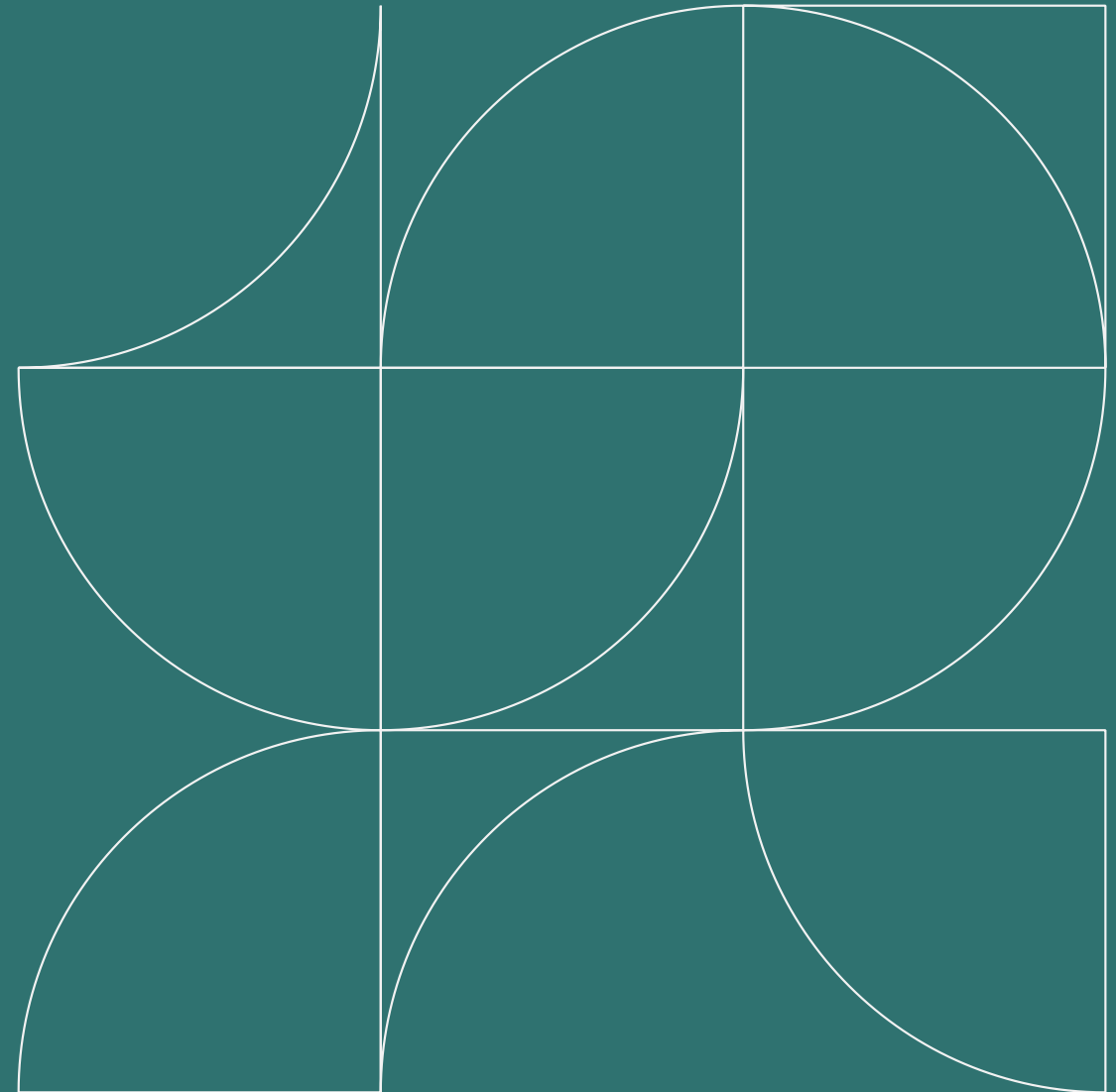
Senior Counsel for Secretary of Labor



Patricia Smith

- Served in Obama administration as DOL Solicitor of Labor
- Former New York State Commissioner of Labor
- Former Senior Counsel with National Employment Law Project (NELP)

Vaccination Roll Out



Vaccination Numbers are Rising - FAST

Over 237 million doses administered.

President Biden reached his goal to administer 200 million doses in his first 100 days.

Over 54.9% of the U.S. population, 18 and older, has received one dose.

82.1% of the U.S. population, 65 and older, has received one dose.

Averaging approximately 1.3 million doses per day, from a high of 2.7 million.

Vaccine Impacts on Workplace Restrictions

- CDC issued April 2 [guidance](#) indicating what fully-vaccinated individuals can do:
 - Visit with other fully vaccinated people indoors without wearing masks or physical distancing
 - Visit with unvaccinated people from a single household who are at low risk for severe COVID-19 disease indoors without wearing masks or physical distancing
 - Refrain from quarantine and testing following a known exposure if asymptomatic
 - Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel.
 - Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States.

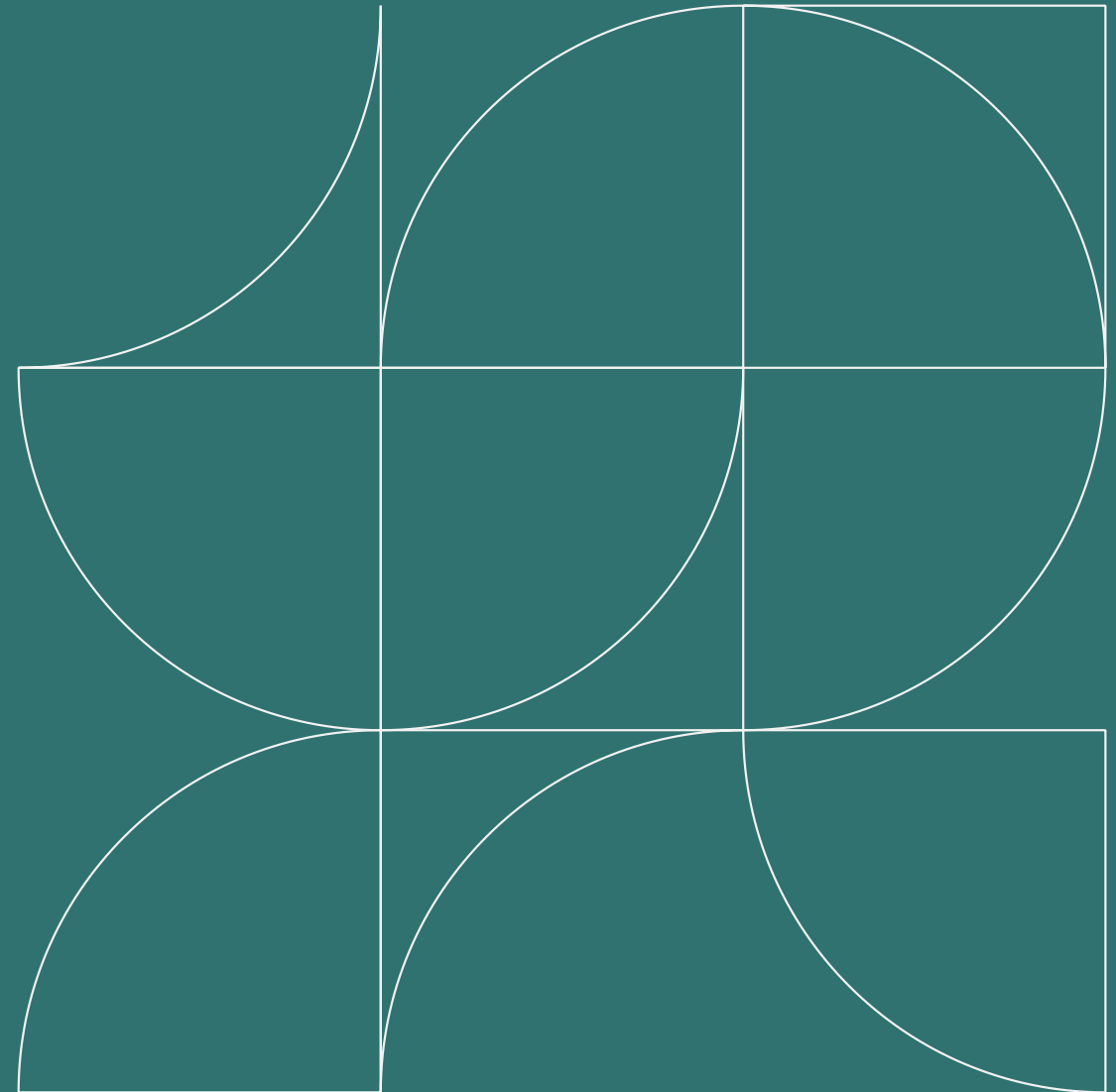
Vaccine Impacts on Workplace Restrictions

- CDC issued further guidance on April 27 related to fully vaccinated individuals.
 - Engage in outdoor activities like walking, jogging or biking or dining with friends at outdoor restaurants without wearing masks.
 - Attend a small, outdoor gathering with fully vaccinated family and friends without wearing a mask.
 - Attend a small, outdoor gathering with fully vaccinated and unvaccinated people without wearing a mask.
 - Dine at an outdoor restaurant with friends from multiple households without wearing a mask.

Vaccine Impacts on Workplace Restrictions

- **BUT**, CDC says fully-vaccinated folks should continue to:
 - Take precautions in public at a crowded outdoor event or venue (i.e., parade, sporting event) like wearing a well-fitted mask and physical distancing
 - Wear masks, practice physical distancing, and adhere to other prevention measures when visiting with unvaccinated people who are at increased risk for severe COVID-19 disease or who have an unvaccinated household member who is at increased risk for severe COVID-19 disease
 - Wear masks, maintain physical distance, and practice other prevention measures when visiting with unvaccinated people from multiple households
 - Avoid medium- and large-sized in-person gatherings
 - Get tested if experiencing COVID-19 symptoms
 - **Follow guidance issued by individual employers**
 - Follow CDC and health department travel requirements and recommendations

OSHA: COVID-19 ETS and Enforcement



Belated COVID-19 Emergency Temporary Standard

- President Biden’s March 15, 2021 deadline for OSHA to issue a **COVID-19 ETS** came and went . . . over a month ago
- On Monday, April 26, OSHA finally signaled the **delayed issuance** many were expecting.
- Expect OSHA to:
 - Require employers to follow CDC guidance;
 - Rely on its January 29, 2021 publication, “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace,” in developing ETS mandates.
 - Review and incorporate provisions from state ETSs and final standards into the federal ETS.

COVID-19 National Emphasis Program

- On March 12, OSHA announced a COVID-19 National Emphasis Program designed “to ensure that employees in high-hazard industries or work tasks are protected from the hazard of contracting SARS-CoV-2.”
- Targeted industries include healthcare, meat processing, grocery stores, warehousing and storage, restaurants, and correctional institutions.
- The NEP will also focus on preventing and punishing retaliation against workers who complain about unsafe or unhealthy conditions.

Coming Soon to a Worksite Near You

- **Doug Parker**, Cal/OSHA chief, nominated as OSHA Assistant Secretary on April 9
- Current Leadership:
 - **James Frederick**, Principal Deputy Assistant Secretary
 - **Amanda Edens**, Deputy Assistant Secretary
 - **Joseph Hughes, Jr.**, Deputy Assistant Secretary for Pandemic and Emergency Response
 - **Leah Ford**, Chief of Staff
 - **Ann Rosenthal**, Senior Advisor

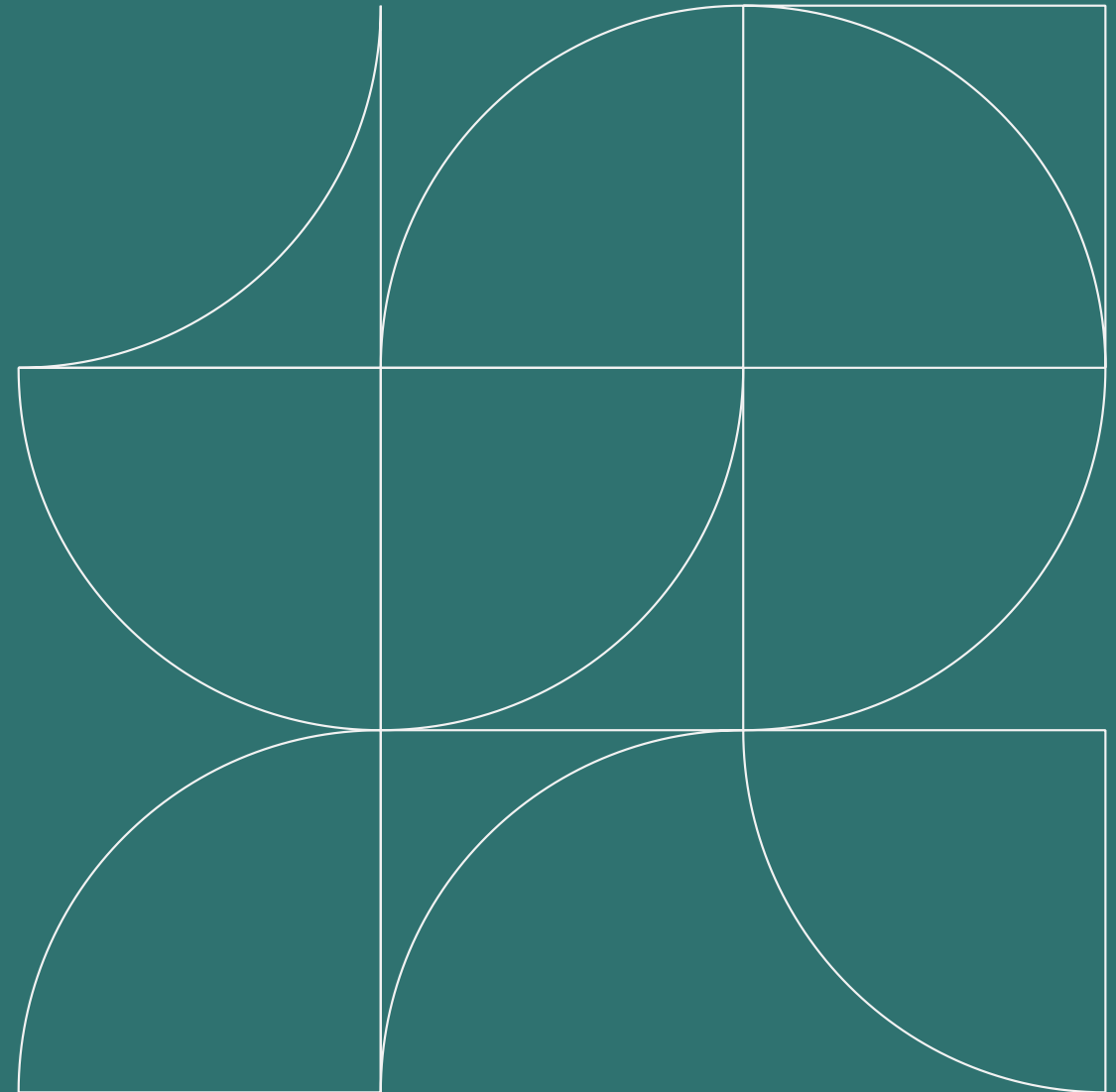
Publicity

- Already in February and March, we have seen OSHA return to a press release policy that announces issued violations and proposed penalties, rather than waiting until the citations and penalties become final orders.
- Employers should expect **public shaming** to continue under President Biden's OSHA.

“Every OSHA press release achieves as much compliance as 210 inspections.”

Dr. David Michaels, Former OSHA Assistant Secretary
October 23, 2020 Tweet

Infrastructure and Labor Related Initiatives



The American Jobs Plan – Redefining The Definition of Infrastructure

- Statutory language has yet to be introduced, but the White House Fact Sheet supplies lots on info.
- Fix highways, rebuild bridges, upgrade ports, airports and transit systems;
- Deliver clean drinking water, a renewed electric grid, and high-speed broadband to all Americans;
- Upgrade residential homes, commercial buildings schools, child-care facilities, and veterans' hospitals;
- Increased wages for caregivers and expand access to long-term care by expanding Medicaid
- Investment in R&D – Keeping up with the Joneses (the Joneses is China for those wondering)
- Invest in Workforce Development
- Finally, make it all in America

The \$Million Question: How to Pay For It?

- As noted in the President's address to Congress, he plans to eliminate the 2017 tax cuts passed by under the Trump Administration.
- Set the Corporate Tax Rate at 28 percent.
- Discourage Offshoring by Strengthening the Global Minimum Tax for U.S. Multinational Corporations.
- Prevent U.S. Corporations from inverting or claiming tax havens as their residence.
- Deny Companies Expense Deductions for Offshoring Jobs and Credit Expenses for Onshoring.
- A 15 percent minimum tax on the income corporations use to report their profits to investors—known as “book income”.
- Eliminate Tax Preferences for Fossil Fuels
- Ramping up IRS Code enforcement

Union, Unions, Unions

- The infrastructure plan will not be just infrastructure: The White House Fact Sheet covering the measure mentions unions 24 times.
- The President's plan includes funding to strengthen the capacity of our labor enforcement agencies to promote union organizing and collective bargaining.
- The President's plan demands that employers benefitting from these investments follow strong labor standards and remain neutral when their employees seek to organize a union and bargain collectively.
- To couple with his Jobs Plan, on Monday, President Biden signed an EO Establishing Pro-Union Task Force Headed by Kamala Harris

The American Families Plan

- **The consists of three main buckets:**
 - \$425 billion into the child care sector
 - providing workers with 12 weeks of paid family and medical leave
 - reforming the unemployment insurance system

Childcare

- \$200 billion for universal pre-K to all 3- and 4-year olds.
- The Child Care Development Block Grant program: \$225 billion into the broader child-care sector
- Requires that families making less than 150 percent of the median state income spend no more than 7 percent of their income on care for children under age 5.
- This is on top of the \$25 billion set-aside for child care facilities included in the American Jobs Plan

Paid Leave

- \$225 billion to create the U.S.'s first national paid family and medical leave program
- 12 weeks of paid family and medical leave including at least two-thirds pay, capped at \$4,000 a month
- After 10 years, workers would also be eligible for three days a year of bereavement leave.
- This is on top of the \$25 billion set-aside for child care facilities included in the American Jobs Plan
- The proposal also requires that Early childhood staff receive a \$15 minimum wage and training or coaching for professional development.

Unemployment Insurance Reform

- Extends the length and amount of unemployment benefits workers can receive.
- The White House Fact Sheet on the proposal is light on details, but some of the specifics can be inferred from the recently introduced “discussion draft” of a bill that would not only expand unemployment insurance but would also impose the ABC Test on the state’s for determining Independent Contractor Classification.
- The proposal would require states to extend eligibility to part-time workers and those who quit their jobs with “good cause”
- These enhanced benefits will be funded by expanding the wages on which employers must pay unemployment taxes while reducing the overall tax rate.
- This, according to the White House, will all be paid for by eliminating the 2017 tax cuts – which would jump the corporate tax rate – and raising taxes on any individual making more than \$400,000 a year.

Labor Relations – Changes in the Legal Landscape

- **Key changes in the interpretation of existing laws**
 - Workplace policies more often considered to interfere with protected activity
 - More activity by employees considered to be protected
 - Process and rules for unionization will become more friendly to unions
 - Employers will be given less freedom to act without bargaining first
- **Emergency Pension Plan Relief Act of 2021**
 - Government monetary relief to underfunded multi-employer pension plans
- **PRO Act**
 - Organized labor's entire wish list in one piece of legislation
 - Bill passed House, but not Senate
 - Not likely to clear Senate in current form
 - Unclear whether some pieces could make it through

Changes in the Legal Landscape – What It Means for Us

Preparing for More Union Organizing

- Increase focus on employee relations
- Assess our vulnerabilities to organizing
- Ensure strong plan for response to active organizing

Bargaining Objectives

- Maximize contractual right to act without bargaining

Reacting to Employee Activity

- Greater caution in response to certain employee activity
- Development of protocols and training for non-traditional collective action

On the Legislative Front

- EPPRA = possible near-term reduction in our potential withdrawal liability
- Keep tabs on developments with PRO Act but no need to overreact (yet)

Vast Expansion of “Protected Activity” under NLRA

- Types of protected activity:
- Complaining about managers, store, wages, work rules, hours, benefits, safety issues, etc.
 - That the complaints are heated and an employee may swear or yell does not necessarily remove the conduct from the protection of the Act.
- Writing negative things about a manager or employer on social media
 - That it may not be true does not necessarily remove it from protection.
- Talking about a union at work
 - Even during working time this may be acceptable
 - Even if before or after their shift absent a policy requiring that the employee leave

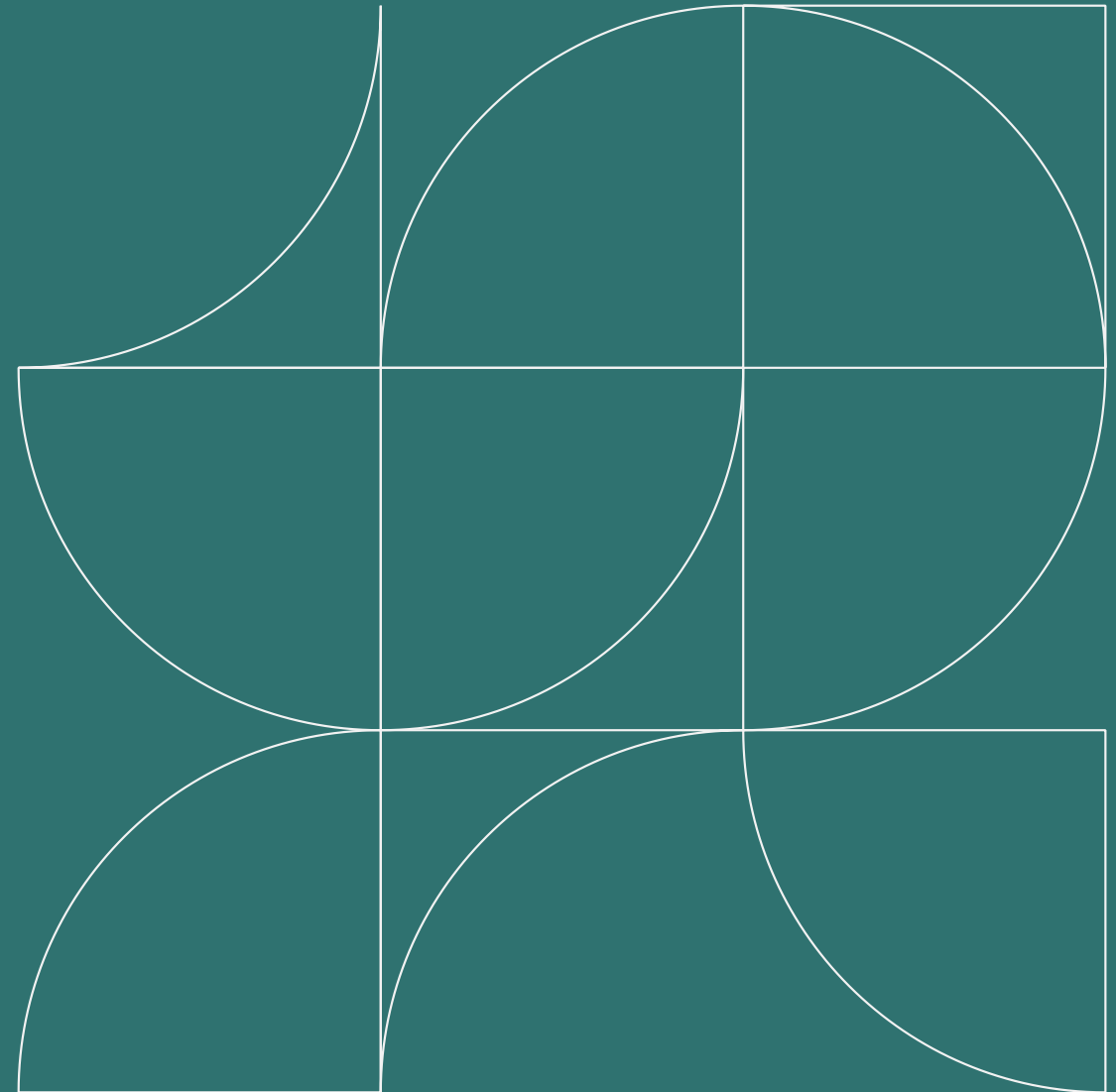
Types of Protected Activity (cont'd)

- Sharing employee pay or other employee concerns with others, including third parties
 - Could be a union organizer, a government representative, or even a customer
- Wearing a union badge or potentially other similar insignia (some limited exceptions such as if completely offensive or disloyal)
- Handbilling in front of the store or in the parking lot
- Walking off the job, even during work, to protest pay, rules, benefits, etc.
 - An employee need not seek advance permission
 - This would include joining a Fight for 15 rally, an immigration rally, or a workplace safety rally

Responses to Protected Concerted Activity

- Do No Harm
 - Drawing an unfair labor practice charge is what the union wants
 - To the extent employees or others are engaging in unlawful activity, they should be asked to cease and desist. Barring a threat to life or property, the police should be not called without first checking.
- Report any suspicious incident and get direction
 - Incident tracking is important for the Company to understand the big picture and respond appropriately at all locations
 - Store managers should not be taking action on their own given the fine lines between what is protected and what is not.
- Managers should not take disciplinary action over what may be protected activity without approval

Immigration



COVID's Impact on the U.S. Immigration System

- **Travel Restrictions** (watch India)



- Work-based travel bans **EXPIRED**
- Regional travel bans, including: UK, Ireland, Schengen area, South Africa, Brazil, and China remain **IN EFFECT**
- No timeline for expiration of these regional travel bans
- National Interest Exemptions (NIEs) are available – government adopting stricter standards
- Additional countries may be added (India is particularly concerning)
- “COVID passports”?

COVID's Impact on the U.S. Immigration System (cont'd)

USCIS:

- Threatened furlough last summer
- Backlogs continue to be severe, morale low
- New leadership understands this is a high priority



DOS:

- Severe backlogs in countries affected by travel restrictions and/or high COVID rates
- Deterioration of processing capacity, declining staffing at consular posts worldwide—already an issue pre-COVID
- DOS recovery strategy not known



COVID's Impact on the U.S. Immigration System (cont'd)

- **I-9 Verification**

- Remote flexibility utilized by many employers
- SHRM is placing I-9 reform as one of its strategic pillars
- Possible changes:
 - permanent permission for remote I-9 preparation
 - consolidation of I-9 and E-verify

Reversing Trump Era Policies and Practices

- Returning to a customer service orientation (versus watchdog/gatekeeper posture)
- Relaxing or eliminating artificial adjudication obstacles
- Public Charge regulation rescinded
- Effectiveness of substantive policies deferred
 - Registration Modification Regulation
 - Prevailing Wage regulation
 - Future of these regulations not clear
 - If pursued, significant impact on visa availability outside of the IT sphere

Biden-Harris Priorities

- **U.S. Citizenship Act of 2021**
 - Announced on Inauguration Day, 1/20/21
 - Centerpiece: path to citizenship for Dreamers and other long-term undocumented
 - Green card path for Temporary Protected Status Holders
 - Business Immigration elements minimal
 - A pause in Immigration enforcement for certain violations
 - Protecting U.S. workers v. ensuring talent pipeline

Biden-Harris Priorities: Personnel is Policy

White House
Esther Olavarria
Tyler Moran



DHS
Alejandro Mayorkas
Secretary



USCIS
Ur Jaddou
Director Nominee



But the Border...

- The border has consumed all operational and political bandwidth on Immigration
- Border will be a political obstacle to reform in a number of immigration areas, as it was during Obama administration
- DHS has acknowledged that much bandwidth is dedicated to border issues

What can we expect for the future?

Biden will do something re: business immigration, eventually:

- Some potential USCIS /DHS hires signal a real focus on business immigration
- Business is a critical ally for broad-based legislative reform and economic health

Without having to wait for legislation, changes will be:

- Reversal of more Draconian Trump-era measures
- Process improvements
- Some incremental substantive changes
- Improvements for DACA population, refugees, and asylum seekers will persist as higher priorities for the coming year

**Thank You for
Attending**

