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WORKPLACE SAFETY & LABOR RELATIONS IN 2021

BY JOHN M. POLSON, ESQ.

With the continued threat of COVID and the introduction of the Biden administration into the White House, employers will face a new series of hurdles concerning workplace safety and labor relations in 2021.

WORKPLACE SAFETY

The Biden administration likely will push the Occupational Safety and Health Administration (OSHA) to implement a national Temporary Emergency Standard, requiring employers to develop and submit workplace safety plans to reduce the spread of COVID. Biden has been critical of the current approach, which primarily relies on existing OSHA standards and independent actions by state regulators.

OSHA likely will increase the number of safety inspectors working in the agency. The current number of OSHA safety inspectors is at a historic low point, with approximately 761 inspectors. That number could double. Employers should expect to see a corresponding increase in safety-related inspections throughout 2021 and beyond.

In addition to more inspections, employers can expect larger monetary fines. OSHA watchdogs have responded critically to the number of penalties issued during the pandemic, claiming that OSHA has failed to propose a penalty greater than \$28,000 since the beginning of the pandemic. Higher penalties may trickle down to state-level safety enforcement through stricter federal scrutiny of state programs.

We may see the reinstatement of an Obama-era workplace electronic reporting requirement, originally issued in May 2016 but abandoned by Trump. If reinstated, the rule would require certain employers to provide OSHA with detailed reports about workplace injuries and illnesses. The agency originally planned to post this information online for public viewing on its website, which would

THE BIDEN ADMINISTRATION LIKELY WILL PUSH OSHA TO IMPLEMENT A NATIONAL TEMPORARY EMERGENCY STANDARD, REQUIRING EMPLOYERS TO DEVELOP & SUBMIT WORKPLACE SAFETY PLANS TO REDUCE THE SPREAD OF COVID.

expose employers to public scrutiny and potential trolling by plaintiff attorneys.

Finally, the Biden administration likely will ramp-up enforcement of the 2016 anti-retaliation rule prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. The rule contains an ambiguous statement critical of blanket post-accident drug testing. While under Trump, OSHA stated in October 2018 that drug testing pursuant to a safety incentive program or post-incident drug testing policy would only violate the anti-retaliation rule if testing occurred to penalize an employee for reporting a claim. OSHA under Biden may or may not take the same approach.

What does all this mean for PEOs? At the very least, it means:

- Client companies may ask PEOs for more OSHA compliance assistance;
- Post-accident drug testing policies may require review; and
- Potential increased exposure to citations related to worksite safety violations.

LABOR RELATIONS

In 2021, we will see a return to a pro-labor agenda like that of the National Labor Relations Board (NLRB) under Obama. Biden will return the board to a democratic majority, likely by the end of 2021, which eventually will lead to the reversal of numerous pro-employer rulings. This sort of sea change is typical when there is a change in the political party in control of the executive branch.

Issues taking priority for a Biden NLRB likely will include reinstating pro-labor rules that the Trump NLRB abandoned, such as:

- Accelerated “quickie election” procedures and timetables that facilitate easier union organization of employees;
- Rigid handbook standards for social media, electronic communication systems, and workplace conduct; and
- Agency doctrine invalidating class waivers within binding arbitration agreements.

While the NLRB will have a significant impact, proposed legislation called the PRO Act would have a much greater impact if it is passed. The PRO Act passed in the House last February and is supported by the new administration. The PRO Act is intended to cause a historic shift in the balance of power between employers and employees within labor relations.

The PRO Act would institute substantial monetary and criminal penalties for labor law violations, replace secret ballot representation elections with the concept of a “card check,” and impose collective bargaining agreement terms on employers in the absence of mutual agreement through normal negotiations, among other things. Even if only a fraction of the PRO Act is made law, it will bring sweeping reform to labor relations and corresponding record levels of unionization.

What does all this mean for PEOs? We can expect:

- Worksite employee policies and handbooks will require updating;
- Unionized prospects and clients will present greater risks and compliance burdens;
- More existing client companies will be the subject of union organizing, creating complications for PEOs that are not equipped to handle unionized clients; and
- A potential uptick in NLRB charges, implicating exposure for PEOs and possibly their employment practices liability insurance (EPLI) programs.

CONCLUSION

In 2020, the pandemic brought unparalleled new compliance obligations for PEOs and their clients. In 2021, when a pro-labor agenda is superimposed upon existing conditions, we can expect to see an amplification of those obligations in the areas of safety and labor relations. As with 2020, the challenges of 2021 may present new opportunities to serve client companies, accompanied by the usual potential for heightened legal exposure for PEOs. As with many things, individual PEOs will be forced to consider to what extent they will provide compliance assistance to clients with these matters rather than taking a more hands-off approach and perhaps just providing educational information. ■

▼ This article is designed to give general and timely information about the subjects covered. It is not intended as legal advice or assistance with individual problems. Readers should consult competent counsel of their own choosing about how the matters relate to their own affairs.



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