HRPA HR POLICY ASSOCIATION®

EVERYTHING, EVERYWHERE, ALL AT ONCE BIDEN ADMINISTRATION LABOR AND EMPLOYMENT POLICY – "ALL OF GOVERNMENT" APPROACH

G. Roger King
Senior Labor and Employment Counsel
HR Policy Association

Construction Industry Round Table
April 24 – 26, 2023
Washington, D.C.

National Labor Relations Board (NLRB) – The "Epicenter" Of Labor Law Change

- Rulemaking initiatives
  - Goal to hold quicker elections and abbreviated pre-election hearings
  - Proposed broadened joint employer status that would make more employers responsible for labor law violations and bargaining obligations of other entities
    - "Top down" organizing opportunities, especially in franchisor/franchisee situations

- General Counsel initiatives
  - Union card check recognition
  - Prohibition on mandatory employer meetings regarding union organizing issues (captive audience speeches)
  - Increased remedies for unfair labor practice violations, including recovery for speculative damages in failure to bargain in good faith unfair labor practice cases
  - Limits on employer campaign speech
    - Prohibition on employers stating that presence of a union will significantly curtail communications between employers and employees
  - Prohibition on employer "monitoring" of employees in the workplace absent a showing of special circumstances
  - Scrutiny of employer classification of workers
    Narrowing of definition of independent contractor status and broadening of "employee" definition
      - More individuals eligible for union representation
  - Increased scrutiny of employer work rules
    - Return to scrutiny of practically all employer policies for NLRA violations
      - Return of the Board to be "handbook policemen"

- NLRB Decisions to Date
  - *Tesla, Inc.*
    - Broad prohibition on employer dress code policies, absent an employer showing of special circumstances
  - *Thryv, Inc.*
    - New ability to obtain "consequential damages" for unfair labor practice violations – increased damages that are "direct and foreseeable"
  - *T-Mobile USA, Inc.*
    - In non-union environments, employer creation of and financial support for problem-solving committees that include employees potentially illegal – impermissible for employers to create and control employee groups that deal with their employer regarding terms and conditions of employment
  - *McLaren Macomb*
    - Finding that employer's proffer of severance agreements containing facially neutral confidentiality and non-disparagement clauses are illegal
  - *Pittsburgh Post-Gazette*
    - Provisions of a collective bargaining agreement may be extended beyond the termination date of labor contract, even if no clear contract intent language present to extend such provisions
  - *Valley Hospital Medical Center*
    - Dues checkoff clauses are now a term and condition of employment and continue to be in effect after labor contract expiration date
  - *American Steel Construction*
    - Unions can now petition for elections in micro and fractured units

U.S. Department of Labor

- Fair Labor Standards Act (FLSA) – potential for new joint employer rule
  - Expansive definition of joint employer status
- FLSA new independent contractor rule narrowing definition of independent contractor status
- FLSA new exempts status compensation level to be proposed
  - New salary/compensation test for exempt status expected to be in the $80k/year range
- Office of Federal Contract Compliance Programs (OFCCP) new audit requirements for federal contractors (scheduling letter initiative)
  - Increase oversite of federal contractors for compliance with all federal and state labor and employment laws
  - Increased pay, benefits, and other employee metrics reporting
- "Good Jobs" initiative with special emphasis on the southeast quadrant of the country

- Occupational Safety and Health Act (OSHA)
    - New nonemployee (including particularly union representatives) "walkaround" access to employer property during safety audits

Equal Employment Opportunity Commission (EEOC)

- New wellness rules to be proposed
- Potential for new EEO-1 component 2 employer compensation transparency reporting requirements

Federal Trade Commission (FTC)

- Proposed rule to prohibit virtually all noncompete agreements

Securities and Exchange Commission (SEC)

- Approval for shareholder proposals to proceed to an election that would require labor audits of employer labor and employment policies and practices (recent successful Starbucks proposal)
- Potential for Human Capital Metrics reporting
    - Number of full-time and part-time employees, employee turnover, number of independent contractors and similar data

Department of Commerce

- CHIPS Act regulations requiring recipients of federal funding to provide childcare benefits and strong "encouragement" for project labor agreements (PLAs) to be implemented

Other Executive Agency "Labor Strings"

- Inflation Reduction Act (IRA)
    - Regulations on recipients and compliance oversight monitoring
- Bipartisan Infrastructure Law (BIL)
    - Labor requirements on recipients and labor and employment law oversight monitoring
- Broad Executive Branch monitoring of all recipients of federal dollars, including grants, to ensure compliance with state and federal labor and employment laws (e.g., Davis Bacon Act)
- Creation of "labor advisor" positions in virtually all areas of the Executive Branch

- Increased use of memos of understanding and cooperation agreements between various federal agencies and departments to increase compliance with federal labor and employment laws
    - Employers must be careful if they settle a matter with one agency that the information provided to such agency is not inappropriately shared with other parts of the federal government