



SCWA Legislative Update

February 1, 2021



New Law Extends COVID Tax Credit for Employers Who Keep Workers on Payroll

The Internal Revenue Service urges employers to take advantage of the newly-extended employee retention credit, designed to make it easier for businesses that, despite challenges posed by COVID-19, choose to keep their employees on the payroll.

The Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted Dec. 27, 2020, made a number of changes to the employee retention tax credits previously made available under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), including modifying and extending the Employee Retention Credit (ERC), for six months through June 30, 2021. Several of the changes apply only to 2021, while others apply to both 2020 and 2021.

As a result of the new legislation, eligible employers can now claim a refundable tax credit against the employer share of Social Security tax equal to 70% of the qualified wages they pay to employees after Dec. 31, 2020, through June 30, 2021. Qualified wages are limited to \$10,000 per employee per calendar quarter in 2021. Thus, the maximum ERC amount available is \$7,000 per employee per calendar quarter, for a total of \$14,000 in 2021.

Employers can access the ERC for the 1st and 2nd quarters of 2021 prior to filing their employment tax returns by reducing employment tax deposits. Small employers (i.e., employers with an average of 500 or fewer full-time employees in 2019) may request advance payment of the credit (subject to certain limits) on Form 7200, Advance of Employer Credits Due to Covid-19, after reducing deposits. In 2021, advances are not available for employers larger than this.

Effective Jan. 1, 2021, employers are eligible if they operate a trade or business during Jan. 1, 2021, through June 30, 2021, and experience either:

1. A full or partial suspension of the operation of their trade or business during this period because of governmental orders limiting commerce, travel or group meetings due to COVID-19, or
2. A decline in gross receipts in a calendar quarter in 2021 where the gross receipts of that calendar quarter are less than 80% of the gross receipts in the same calendar quarter in 2019 (to be eligible based on a decline in gross receipts in 2020 the gross receipts were required to be less than 50%).

Employers that did not exist in 2019 can use the corresponding quarter in 2020 to measure the decline in their gross receipts. In addition, for the first and second calendar quarters in 2021, employers may elect in a manner provided in future IRS guidance to

measure the decline in their gross receipts using the immediately preceding calendar quarter (i.e., the fourth calendar quarter of 2020 and first calendar quarter of 2021, respectively) compared to the same calendar quarter in 2019.

In addition, effective Jan. 1, 2021, the definition of qualified wages was changed to provide:

- For an employer that averaged more than 500 full-time employees in 2019, qualified wages are generally those wages paid to employees that are not providing services because operations were fully or partially suspended or due to the decline in gross receipts.
- For an employer that averaged 500 or fewer full-time employees in 2019, qualified wages are generally those wages paid to all employees during a period that operations were fully or partially suspended or during the quarter that the employer had a decline in gross receipts regardless of whether the employees are providing services.

Retroactive to the Mar. 27, 2020, enactment of the CARES Act, the law now allows employers who received Paycheck Protection Program (PPP) loans to claim the ERC for qualified wages that are not treated as payroll costs in obtaining forgiveness of the PPP loan.

For more information, see [COVID-19-Related Employee Retention Credits: How to Claim the Employee Retention Credit FAQs](#)



What Employers/Business Can Expect Under the Biden/Harris Administration

With the results of the recent presidential and congressional elections, the Biden presidency will bring a dramatic shift to the federal labor and employment policy landscape. The 180 degree turn in regulatory employment policy priorities that will likely result will undoubtedly create uncertainty for employers, which are already challenged in dealing with a pandemic and a questionable economy moving forward.

The following are our predictions based on previous democratic administrations, laws enacted in democratic controlled states such as Virginia, New York, California and others, as well as Biden's recent comments. Also an excellent indicator as to where this administration will move labor and employment regulations is the recent appointment of Boston Mayor, Marty Walsh, as Labor Secretary.

Walsh, who served as Boston's Mayor since 2014, has an extensive labor background including leading the Boston Metropolitan District Building Trades Council from 2011-2013. He is also the current Chairman of Climate Mayors, a bi-partisan group of 470 Mayors nationwide committed to fighting climate change. Biden said in a statement that

Walsh, "will help us emerge from the most inequitable economic and jobs crisis in modern history by building an economy where every American is in on the deal. They share my belief that the middle class built this country and that unions built the middle class." Further, Richard Trumpka, President of the AFL-CIO, said in a statement that Mr. Walsh, "will be an exceptional Labor Secretary for the same reason he was an outstanding Mayor: he carried the tools. As a long time union member, Walsh knows that collective bargaining is essential to building back better by combatting inequality, beating COVID-19 and expanding opportunities for women and people of color." As such, the Biden administration will be pro-union and pro-labor law that makes it much easier for unions to organize.

So, what can employers expect in the coming months?

I. Executive Action

The newly sworn in President, Joe Biden, will rescind certain Executive Orders issued by the former President Donald Trump and issue his own Executive Orders. This is the quickest and easiest way to enact change. The list will include:

- COVID-19 travel restrictions
- Ban on non-immigrant Visas
- Reinststitute the Deferred Action for Childhood Arrivals (DACA)
- Reinststitute protected status of certain eligible nationals
- Revoke Trump's Executive Order on combatting race and sex stereotyping
- Implement requirements on federal contractors to require diversity and inclusion or implicit bias training and programs
- Resuscitate a version of former President Barak Obama's Fair Pay and Safe Workplaces

II. Congress' Agenda

Within Congress, there will be a number of critical proposals to include:

- Eliminating the filibuster which would allow senators to pass legislation with a simple majority vote (51 votes). This will allow the democrats to expand the number of seats on the Supreme Court, pass legislation on voting rights, gun control, climate action, LGBTQ rights and more.

Specific employment-related legislation may include:

- Pregnancy Accommodation — This will include the Pregnant Worker's Fairness Act which would require employers to provide reasonable accommodation beyond what is already required.
- Paid Leave — The political debate over paid family/sick leave has evolved dramatically. Expect the democrats to propose paid family leave as an extension of the Family First Coronavirus Response Act (FFCRA) as a national requirement.
- Immigration - Previously the House passed the Fairness for High-Skilled Immigrants of 2019. Expect the bill to be brought to the Senate which would eliminate per country caps for employment-based immigrant Visas.

- Department of Labor Staffing — Expect the team overseeing the DOL to include the National Labor Relations Board and the EEOC among other agencies to include many familiar faces from the Obama administration. Expect the Biden administration to be aggressive from the start in terms of both regulatory actions and enforcement proceedings. They will call back many of the initiatives of the DOL of the Trump administration. Beyond that, expect this DOL to go on the offensive with an agenda that is even more progressive than that of Obama's administration's DOL.

Employers can expect:

- Joint employer — The Biden DOL is expected to "repeal and replace" the rule with a broader and more friendly joint-employer standard which creates significant coverage and liability for arms-length relationships.
- Overtime — Salary Threshold — In 2016 the federal court blocked the enactment of the Obama administration's overtime rule increasing the guaranteed salary basis threshold to \$47,000 or higher. Look for the Biden administration to propose an increase of the salary threshold to \$47,000 or higher and also look forward to the administration to make changes in what positions are allowed to be exempt from overtime.
- Opinion Letters — Opinion letters offer a very easy way for stakeholders to seek assistance from the Department of Labor when confronted with questions. In 2010, the Obama administration ended the opinion letter process. Under the Trump administration, the opinion letter program was reinstated but again may be jettisoned in a Biden administration.
- Office of Federal Contract Compliance Program (Affirmative Action Programs) — It is likely that the OFCCP will pursue the following changes:
 - Roll back policies and processes established by Trump's Executive Order on combatting race and sex stereotyping. This, in essence, will require specified diversity and inclusion and/or implicit bias training.
 - Implement affirmative diversity and inclusion obligations pursuant to an Executive Order.
 - Rescind any regulation relating to religious organizations with federal contracts.
 - Restart the 2014 compensation data collection tool proposal. This regulation greatly expands affirmative action plan compliance to include analysis of compensation.

III. National Labor Relations Board

Republicans will maintain a majority at the NLRB into the Summer of 2021. However, expect a complete change of the Board to democrat members and subsequently, expect a rollback of current Board policies in favor of unions. Expect a very pro-union Board and administration which will include:

- PRO Act — The PRO Act would be the most significant change to labor laws since the National Labor Relations Act (NLRA) was passed in 1935. If enacted, the bill would make at least 50 changes to the NLRA to make it easier for labor to achieve its organizing goals. The bill would:

- Give the NLRB the authority to impose civil fines of \$50,000 for labor violations, which could be doubled for a repeat violation.
- Greatly expand the definition of "employee" and almost expunge the concept of independent contractor.
- Expand the content of the lists of employee contact information to be provided to unions prior to an election.
- Prohibit mandatory arbitration.
- Greatly expand the whistle-blower laws administered by the Department of Labor (DOL).
- Weaken right-to-work laws in 27 states by permitting unions to require workers at unionized companies to pay dues. Currently, employees in right-to-work states may choose not to pay union dues.
- Prevent employers from permanently replacing striking workers in economic strikes. Employers already are prohibited from permanently replacing striking — workers in unfair-labor-practices strikes.
- Allow workers to bring private lawsuits for violation of the NLRA.
- Codify the DOL's persuader regulation, which narrowed the "advice exception" of the Labor-Management Reporting and Disclosure Act, by requiring law firms to participate in financial disclosures about their relationships with employers.
- Prohibit mandatory meetings called by employers to present their views on union-organizing efforts.
- Make it easier to establish that two or more employers are joint employers.
- Codify many union-friendly NLRB decisions.

Most importantly, the PRO Act would codify the "ambush election rule," drastically reducing the amount of time a company has to campaign and speak to its employees about unionization once a union election petition is filed.

- Decisions That May Be Reversed -

- **Caesars Entertainment.** The Trump Board overturned Purple Communications and held that employees do not generally have a protected right to use their employers' e-mail systems for purposes of union-organizing activity.
- **The Boeing Company.** The Trump Board issued a new standard for evaluating challenges to employee-handbook provisions and work rules, overturning a previous standard that held neutral rules were unlawful if an employee could reasonably construe them to interfere with protected rights.
- **Johnson Controls.** The Trump Board upheld the employer's right, within 90 days of labor contract expiration, to suspend bargaining and withdraw recognition from the

incumbent union based on objective evidence that the union no longer has majority support.

