American Rescue Plan Act, Vaccine Rollout, HR Impact From a Biden Administration

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American Rescue Plan Act - COBRA Subsidy

Some Family Members may not be Eligible for the ARPA COBRA Premium Subsidy

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COBRA Subsidy Notice

Employers are required to provide new notices about the subsidy to employees. Synergy Human Resources created an attorney prepared Model COBRA Subsidy Notice template that can be used. The notice template is included as a handout to download, will be in the webinar follow-up email, and can also be found here: https://northriskpartners.com/cobra-subsidy-provisions-of-the-american-rescue-plan-act/

The U.S. Department of Labor (DOL) will eventually be issuing model notices for plans to use. We are awaiting the release of further information and these notices.

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ARPA COBRA Premium Subsidy

The American Rescue Plan Act of 2021 ("ARPA") includes a 100% COBRA premium subsidy for "assistance eligible individuals," for periods of coverage occurring between April 1, 2021 and September 30, 2021. An "assistance eligible individual" is any COBRA "qualified beneficiary" who loses group health coverage on account of a covered employee's reduction in hours of employment or involuntary termination of employment. However, the subsidy is not available if the individual is eligible for other group health coverage or Medicare.

ARPA COBRA Premium Subsidy

In general, COBRA's definition of a "qualified beneficiary" includes only a covered employee and his or her spouse and dependent children who were covered under the health plan on the day before the COBRA qualifying event, as well as children born to or adopted by the employee during a period of COBRA coverage. Thus, other individuals who are receiving continued health coverage are not eligible for the ARPA premium subsidy. For example, some group health plans offer "COBRA-like" continuation coverage to an employee's covered domestic partner, but domestic partners are not qualified beneficiaries under COBRA's definition.

ARPA COBRA Premium Subsidy

In addition, if a former employee gets married while receiving COBRA coverage, the employee may enroll his or her new spouse in COBRA coverage in accordance with HIPAA's special enrollment rules, but the spouse still is not a "qualified beneficiary" for COBRA purposes, because the spouse was not covered by the plan on the day before the employee's qualifying event.

ARPA COBRA Premium Subsidy

If a former employee who is an assistance eligible individual elects COBRA coverage that includes a family member who is not a qualified beneficiary (e.g., a domestic partner or a new spouse to whom the employee was not married at the time of the qualifying event), how much of the premium is not subsidized? And how much is the payroll tax credit to which the employer (or multi-employer plan or insurer) is entitled?

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ARPA COBRA Premium Subsidy

The IRS has not yet issued guidance on the ARPA premium subsidy. However, it may be instructive to review the guidance issued in 2009 when Congress enacted a similar COBRA subsidy as part of the American Recovery and Reinvestment Act (ARRA). Although there is no assurance that the IRS will reach the same conclusions under ARPA, it may be helpful from a planning perspective to understand how this issue was previously addressed.

ARPA COBRA Premium Subsidy

In connection with the 2009 ARRA COBRA premium subsidy (which was a 65% government subsidy), the IRS took an incremental approach when determining the amount eligible for the subsidy (and payroll tax credit). In other words, if the cost of covering a non-qualified beneficiary did not add to the cost of covering the eligible individuals, then the COBRA premium for the non-qualified beneficiary is zero for purposes of the subsidy, and the entire premium was eligible for the subsidy. If the cost of covering a non-qualified beneficiary added to the cost of coverage, then the incremental cost to cover the non-qualified beneficiary was not eligible for the COBRA premium subsidy.

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ARPA COBRA Premium Subsidy

Example 1: Susan, an assistance eligible individual, elects COBRA coverage due to her involuntary termination from employment. She elects coverage for herself and all of her family members (who were covered under the plan on the day before the qualifying event), which includes her two dependent children and her domestic partner. Susan and her family members are not eligible for other group health coverage or Medicare.

ARPA COBRA Premium Subsidy

Under the terms of the plan, COBRA coverage for an employee plus-two-or-more-dependents costs $800 per month. Therefore, the additional cost to cover Susan's domestic partner is $0 per month. As a result, Susan would be entitled to the ARPA COBRA premium subsidy for the full $800 per month, and her former employer may claim the payroll tax credit for the full $800 per month.

ARPA COBRA Premium Subsidy

Example 2: Same facts as Example 1, except that Susan has only one child. Although Susan still would be required to pay $800 per month for COBRA coverage for herself and two or more dependents, the COBRA premium is only $600 per month for self-plus-one-dependent. Accordingly, the incremental cost of covering her domestic partner is $200 per month. Therefore, Susan would be entitled to the ARPA subsidy in the amount of $600 per month (and must pay $200 per month for COBRA coverage for her domestic partner). The employer could claim the payroll tax credit for only $600 per month for the coverage for assistance eligible individuals.

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ARPA COBRA Premium Subsidy

This is just one of many questions that arise under the ARPA COBRA subsidy. We expect the government agencies to issue guidance soon. Until then, the guidance issued in connection with the 2009 ARRA premium subsidy may be instructive as plan sponsors get ready to administer the ARPA subsidy.

American Rescue Plan Act - FFCRA Continuation

Credits for Paid Sick and Family Leave

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FFCRA Continuation

The Families First Coronavirus Response Act (FFCRA) leave mandate expired on December 31, 2020, including the mandate to covered employers to provide emergency paid sick leave and emergency family and medical leave. The Consolidated Appropriations Act (CAA), enacted in December 2020, did not extend employees' entitlement to FFCRA leave, but extended the tax credit for employers that voluntarily continued to provide such paid leave through March 31, 2021.

FFCRA Continuation

The ARP, like the CAA, does not extend an employer's obligation to provide FFCRA leave, but once again extends the tax credit for an employer that chooses voluntarily to provide such leave through September 30, 2021 for eligible employers and self-employed individuals. The ARP amends the Internal Revenue Code to provide for employer credits for leave against applicable employment taxes equal to 100 percent of the qualified leave wages. For paid sick leave, the term "qualified sick leave wages" means wages paid by an employer which would be required to be paid by reason of the Emergency Paid Sick Leave Act. Similarly, for paid family leave, the term "qualified family leave wages" means wages paid by an employer which would be required to be paid by reason of the Emergency Family and Medical Leave Expansion Act.

FFCRA Continuation

Reacting to the nationwide vaccination efforts, the ARP adds three additional qualifying reasons for leave, including:

- The employee is obtaining immunization related to COVID-19;
- The employee is recovering from any injury, disability, illness or condition related to such immunization; or
- The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 or their employer has requested such a test or diagnosis.

FFCRA Continuation

The ARP also resets the 10-day limit for the tax credit for paid sick leave. Employers that provide paid sick leave for qualifying reasons on or after April 1, 2021 will be eligible to claim the tax credit as they would under the FFCRA. The aggregate limit on the credit for paid family leave is increased to $12,000. It also increases the amount of paid leave credits by the amount of the employer's qualified health plan expenses (those amounts paid by the employer to provide a group health plan) as are properly allocable to the qualified leave wages.

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FFCRA Continuation

The FFCRA provided states with interest-free loans to assist with the payment of unemployment compensation benefits through December 31, 2020. The CAA extended this provision through March 14, 2021. The ARP provides a further extension through September 6, 2021. The ARP also extends through September 6, 2021 the provision in the FFCRA that provides temporary full federal financing of extended benefits for high unemployment states. States are normally required to pay 50% of the cost of extended benefits.

FFCRA Continuation

The ARP extends the Pandemic Unemployment Assistance (PUA) program available to covered individuals for weeks of unemployment, partial unemployment or inability to work caused by COVID-19 until September 6, 2021 and increases the total number of weeks the benefit is available to individuals from 50 weeks to 79 weeks. The extension builds on the framework created by the CARES Act.

OSHA Update

OSHA Launches COVID-19 National Emphasis Program,
Protecting High-Risk Workers and Prioritizing Onsite Inspections

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OSHA Update

On March 12, 2021, in response to a presidential executive order, OSHA issued Directive 2021-01 (CPL-03), establishing a National Emphasis Program (NEP) for COVID-19. With this latest directive, OSHA is spotlighting employers' response to COVID-19 and appropriate workplace protections for employees.

OSHA Update

What is the objective of this program?

With a goal of significantly reducing or eliminating worker exposures to SARS-COV-2, the virus that causes COVID-19, the NEP applies OSHA-wide and seeks to target high-hazard industries and employers with the largest number of potential at-risk employees. To accomplish this, OSHA will implement a combination of inspection targeting, outreach to employers and compliance assistance. The NEP is set to expire after 12 months but can be cancelled early or extended through Further Directives.

The NEP requires state plans to indicate whether they (1) intend to adopt new policies to comply, (2) have a substantially similar policy in place, or (3) do not intend to adopt the OSHA Directive.

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OSHA Update

What are the procedures and what industries are targeted?

In selecting sites for programmed inspections, the NEP will generate Master Lists based on NAICS Codes and 300A data to identify establishments with elevated illness rates. This will likely largely include healthcare industry employers, ranging from physicians' offices and hospitals to ambulance services and home healthcare services. Non-healthcare industry employers targeted include meat and poultry processing, grocery stores, discount department stores, general warehousing and restaurants, among others. In addition, Area Offices may add establishments based on local knowledge of COVID-19 from appropriate sources, such as media referrals, local health departments and other federal agencies. Area Offices will create a randomized programmed inspection schedule.

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OSHA Update

In addition to programmed inspections, unprogrammed inspections will continue, with continued priority for COVID-19 Fatality events. COVID complaints and referrals shall also be given priority for on-site inspections. It is important to note that as part of the NEP, all safety violations that are in plain view during a walkaround on-site inspection must be addressed by Certified Safety and Health Officials and cited, where appropriate.

OSHA Update

Recognizing that, for a number of citations, the General Duty Clause may be the most appropriate standard, OSHA provides guidance that states the CDC guidelines and recommendations in place at the time of the alleged exposure should be consulted as one source for hazard recognition and potentially feasible methods of abatement.

OSHA Update

OSHA also envisions outreach programs to bring this NEP to the attention of employers. This includes continued outreach programs concerning COVID-19, including new guidance and this NEP, by Area Offices. Suggested local outreach efforts could also include: Letters and news releases announcing implementation of the updated COVID-19 NEP; seminars on COVID-19 related topics; working with national and regional offices of federal agencies with similar outreach goals, such as CMS, USDA and others, to disseminate information on the NEP and the pandemic's effects on vulnerable workers; and more strategies outlined within the directive.

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CDC Update

CDC Guidance for Workplace Vaccination Programs

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CDC Update

On March 16, 2021, the CDC issued updated guidance for employers regarding COVID-19 vaccinations and the workplace. This guidance focuses on considerations for mandatory vaccination programs, reopening the workplace after employees have been vaccinated, and general best practices regarding vaccinations. The key aspects of this guidance are highlighted below.

CDC Update

Mandating Vaccination

Similar to recent guidance issued by the EEOC, the CDC appears to acknowledge that mandatory vaccinations are permissible under federal law, provided that employers provide (1) medical exemptions for people who may be at risk of an adverse reaction to the vaccine, and (2) religious exemptions for people who hold a religious belief that prevents them from getting the vaccine. The guidance does note that employers should also consult state or local law before requiring vaccinations.

CDC Update

Reopening the Workplace after Vaccination

Widespread vaccination of the workforce is one factor that employers should take into consideration when deciding whether to reopen the workplace. The CDC advises that even after employees receive the COVID-19 vaccine, they should continue taking steps to protect themselves and others in the workplace, including wearing masks, social distancing, washing hands, and staying home when sick. Moreover, workplace health and safety measures that have already been installed, such as barrier protections, must remain in place.

CDC Update

Workforce Vaccination Options

The CDC's guidance lists several factors for employers to consider when determining how to vaccinate their workforce. Employers who have a large number of workers with predictable schedules, the ability to enroll as a vaccination provider or engage an enrolled vaccination provider, and enough space to set up a vaccination clinic while still maintaining social distancing are well-suited for an on-site vaccination program. Conversely, the CDC recommends an off-site vaccination program for small- or medium-sized employers that have a mobile workforce, workers with highly variable schedules, or a majority of workers who would prefer vaccination in a community clinic.

CDC Update

For employers who choose to implement an on-site vaccination program, the CDC recommends using existing occupational health clinics, establishing an employer-run temporary vaccination clinic, or using mobile vaccination clinics that can be brought to the workplace. The CDC further recommends that employers hosting an on-site program contact their local health department for guidance and seek input from management, HR, employees, and labor representatives. The guidance states that workplace vaccination clinics should offer vaccination to all workers-including independent contractors and temporary employees-at no charge and during work hours. Nevertheless, employers should also develop a plan to prioritize who gets vaccinated first if the vaccine supply is too low to vaccinate all eligible workers. Employers must also ensure that their on-site vaccination provider is prepared to manage allergic reactions to the vaccine.

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CDC Update

The CDC recommends that employers who choose to vaccinate their workforce off-site do so through clinics at community locations, pharmacies, hospitals, and healthcare provider offices. Employers should take steps to encourage off-site vaccination, such as by allowing employees to get vaccinated during work hours or by providing paid leave for employees to get vaccinated (note: New York recently enacted a law requiring paid vaccination leave); supporting transportation to off-site clinics; informing employees about what they will need to bring to their vaccination appointment; educating employees about vaccine eligibility; and assisting eligible employees with making their vaccine appointments.

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CDC Update

All employers should review CDC, state, and local guidance regarding which of their employees are eligible for the vaccine. The CDC recommends that employers who operate in multiple states and countries establish a vaccination committee and/or immunization champion to monitor vaccination rollout across jurisdictions and notify employees when they are eligible. Employers should also consider staggering employee vaccinations to avoid worker shortages due to vaccine side effects.

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CDC Update

Best Practices Regarding Vaccination

Whether offering vaccination on or off-site, the CDC recommends that employers follow certain best practices regarding COVID-19 vaccination, including:

- offering flexible, non-punitive sick leave options for employees who experience signs and symptoms after vaccination;
- allowing time for employees' vaccine confidence to grow over time;
- for on-site vaccination programs, offering employees more than one opportunity to get vaccinated,
- for off-site vaccination programs, providing paid leave and transportation support; and
- asking organizations and individuals who are respected within the employee community to help build vaccine confidence.

CDC Update

Building Employee Vaccine Confidence

The CDC encourages employers to build their employees' trust in the vaccine by making confidence visible in the workplace. The guidance outlines several steps that employers can take to build vaccine confidence, including:

- encouraging leaders who reflect the diversity of the workforce to be "vaccine champions" and inviting them to share with employees the importance of being vaccinated and their personal reasons for getting vaccinated;
- transparently communicating information about the vaccine to employees, and providing regular updates on the vaccine's benefits, safety, side effects, and effectiveness and what is not known about the vaccine; and
- sharing key messages about the vaccine and its benefits with employees through breakroom posters, emails, and other communication channels.

Vaccine Incentives

Vaccine Incentives

As employers wrestle with whether to give employees incentives to get the COVID-19 vaccine, one thing is sure: Many employment attorneys are equally stumped. In fact, the lack of legal guidance about appropriate incentives likely is keeping some employers from moving ahead.

Recent Society for Human Resource Management (SHRM) research shows that 88 percent of employers either are unsure about whether they will offer incentives to encourage employees to get the vaccine or are not offering or planning to offer such incentives.

Some big employers have announced that they will encourage employees to get vaccinated, offering cash, paid time off or extra vacation time to help stop the spread of the coronavirus.

Cash Incentives

Kroger announced on February 5 that it will provide a one-time payment of $100 to all associates who receive the full manufacturer-recommended doses of the COVID-19 vaccine. "As we move into a new phase of the pandemic, we're increasing our investment to not only recognize our associates' contributions, but also encourage them to receive the COVID-19 vaccine as it becomes available to them to optimize their well-being as well as the community's," said Tim Massa, Kroger's chief people officer in Cincinnati.

Paid Leave Incentives

Amtrak is aiming to have all its employees vaccinated "since we believe the vaccine offers the best way to keep our employees safe and contribute to the wellness of local communities," said Olivia Irvin, an Amtrak PR manager in Oakland, California.

Amtrak is allowing excused absences for employees receiving vaccinations during their regularly scheduled work hours and paying employees an allowance equivalent to two hours of straight-time pay when they submit documentation of receiving the vaccine.

In addition, employees who miss work due to vaccine side effects will have that absence excused and pay protected for up to 48 hours after vaccination, Irvin said. "With appropriate documentation to medical services, we will also protect pay for employees who are unable to work more than 48 hours after vaccination," she noted.

Vacation Time and Bonus Pay Incentives

Knead Hospitality + Design restaurant company in Washington, D.C., is distinguishing between tipped, nontipped and salaried workers. Each employee who submits written documentation to his or her general manager that the employee has received all required doses of the COVID-19 vaccine will receive the following:

- Tipped employees: A bonus of four hours of pay at regular minimum wage.
- Nontipped employees: A bonus of four hours of pay at the regular pay rate.
- Salaried workers: A bonus day of paid time off (PTO).

Legal Uncertainties

SHRM has asked the Equal Employment Opportunity Commission (EEOC) for guidance on incentives for vaccines. Business leaders are seeking answers about whether incentives of more than minimal value are legal.

The EEOC has advised that employers may need to reasonably accommodate people with disabilities who would be at risk if they were vaccinated by exempting them from any mandatory vaccination policy that an employer may institute. Similarly, an employer may need to accommodate an employee's sincerely held religious belief that opposes vaccinations.

Legal Uncertainties

For those employees who are simply fearful or hesitant about being vaccinated, employer incentives may come into play in order to encourage employees voluntarily to take the time and make the effort to be vaccinated. Employers, especially those whose employees engage with the public, have instituted incentives for vaccination. Unfortunately, at the present time, there are a number of legal gray areas as to the legality of an employer providing incentives.

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Legal Uncertainties

First, as mentioned above, some employees—for health or religious reasons—may decline to be vaccinated. Therefore, if an employer is providing incentives for employees who do get vaccinated, is it discriminatory not to provide the same benefit to employees who for health or religious reasons cannot get the vaccine? The answer to that question is still unknown.

Legal Uncertainties

Similarly, if an employer provides incentives for employees to get vaccinated as part of an employer's wellness plan or program, such incentives may run afoul of the Americans with Disabilities Act. Recently, the EEOC proposed wellness plan regulations that would require an employer to provide only minimal or de minimis incentives for employees to participate in a wellness plan. Should incentives be de minimis so they aren't coercive?

Legal Uncertainties

Under the EEOC's proposal, even a gift card of $100 would be more than de minimis. But the proposal has been put on pause while the agency considers possible next steps.

Legal Uncertainties

Given this legal uncertainty, the best way for employers to proceed is to provide an incentive such as paid time off that roughly mirrors the amount of time that an employee has to take in getting a COVID-19 vaccine shot. Many larger employers provide from two to four hours of PTO to those employees who get the COVID-19 vaccine.

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How the Biden Administration May Impact HR

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How a Biden Administration May Impact HR

In 2016, Donald Trump's election had a significant impact on HR professionals, as it kicked off a process in which many federal regulations implemented by the Obama administration were revised and overturned. Employee handbooks and company policies had to be updated and rewritten on a frequent basis in the years that followed, as the Departments of Labor, Homeland Security, Health and Human Services and many others, as well as a range of federal agencies, shifted priorities and reporting responsibilities for employers.

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Health Care Insurance

President Joseph R. Biden, Jr. favors maintaining and expanding coverage under the Affordable Care Act (ACA). He has said he would keep the employer mandate that requires organizations with 50 or more full-time or equivalent employees to provide ACA-compliant health care to their full-time workers—and to comply with the ACA's employer tracking and reporting requirements.

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Health Care Insurance

The crux of Biden's health plan, however, is his support for a public insurance option similar to Medicare. According to his campaign website, "Whether you're covered through your employer, buying your insurance on your own, or going without coverage altogether, the Biden plan will give you the choice to purchase a public health insurance option like Medicare." A campaign fact sheet explained further: "If you have coverage from your employer but it is inadequate … Joe would give you the ability to choose a new Medicare-like public option, with the federal government providing enhanced premium subsidies."

Health Care Insurance

As with Medicare, the public option Biden supports would cover primary care without co-payments. Biden's website says, "It will bring relief to small businesses struggling to afford coverage for their employees," presumably by allowing them to stop offering coverage. And as a government-run health insurance plan available on the ACA's marketplace exchanges, the public option would compete directly with other qualified health plans.

Health Care Insurance

Biden also proposes allowing Americans ages 60 to 64 to enroll in Medicare. He wrote, "Under this concept, Americans would have access, if they choose, to Medicare when they turn 60, instead of when they turn 65. … This would make Medicare available to a set of Americans who work hard and retire before they turn 65, or who would prefer to leave their employer plans, the public option, or other plans they access through the Affordable Care Act before they retire."

Paid Leave

The Families First Coronavirus Response Act (FFCRA), passed earlier this year in response to the pandemic, became the first federal law to mandate paid leave in the private sector. President Biden has called for 12 weeks of paid family and medical leave, and has supported the FAMILY Act, which would provide workers with up to 12 weeks of partial income funded through a payroll tax when they take time for:

- Their own serious health conditions, pregnancy and recovery from childbirth.
- The serious health condition of a child, parent, spouse or domestic partner.
- The birth or adoption of a child.
- Specific military caregiving and leave purposes.

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Paid Leave

The FAMILY Act would cover workers in all companies, no matter the company size. Under the proposed act, part-time, lower-wage, contingent and self-employed workers would be eligible for benefits.

Labor Relations

President Biden supports a bill known as the Protecting the Right to Organize (PRO) Act that would significantly change labor relations law, making it more difficult to classify workers as independent contractors and expanding the definition of "joint employer." In fact, Biden would go even further by allowing workers to more easily organize unions through the signing of authorization cards and by imposing criminal liability on executives for "interfering with organizing efforts and violating other labor laws," according to Biden campaign materials.

Labor Relations

The National Labor Relations Board (NLRB) has used its rulemaking authority during the Trump administration to make substantive and procedural changes, including modifications to union election rules. Democrats likely will eliminate all pending proposals and look to overturn the Trump administration's rules.

Retirement Plans

President Biden's tax plan calls for changes to the traditional 401(k), ending upfront tax breaks that grow larger as more money is saved and replacing them with flat-tax credits.

Retirement Plans

Current tax benefits for retirement savings are based on savers excluding their retirement contributions from tax in traditional 401(k) plans, and then paying taxes when they withdraw money from their account. "This system provides upper-income families with a much stronger tax break for saving and a limited benefit for middle-class and other workers with lower earnings," according to Biden's website. "The Biden plan will equalize benefits across the income scale, so that low- and middle-income workers will also get a tax break when they put money away for retirement."

Minimum Wage

Joe Biden supports raising the federal minimum wage to $15 an hour by 2026. He also supports ending the tipped minimum wage and the subminimum wage for workers with disabilities.

Marijuana Legalization

The movement to legalize cannabis consumption continued on Election Day as voters in five states approved new laws allowing medical and recreational marijuana use.

In Arizona, Montana and New Jersey—where medicinal use is already permitted—voters approved recreational use. Mississippi voters decided to legalize medical marijuana in the state, and South Dakota voters agreed to legalize both recreational and medical use.

Although all marijuana use is still illegal under federal law, 35 states now will allow medical use, and 15 of those states and Washington, D.C., also will allow recreational use.

LGBTQ Rights

Both Joe Biden and Kamala Harris have been strong supporters of LGBTQ and transgender rights. Biden stated during the campaign: "My administration will enact the Equality Act to end legal discrimination against LGBTQ+ people, expand economic opportunities for LGBTQ+ people, reform our treatment of transgender and gender non-conforming individuals in our criminal justice system, ensure access to accurate identification documents, and improve government data collection to better track violence against the transgender community."

Focus on Equal Pay

Many employers redoubled efforts to address issues of systemic racial inequity and focus on diversity, equity, inclusion, and justice. Within that framework, more employers than ever before have undertaken pay equity analyses.

This work will also support employers' efforts in the post-COVID world. Many workers who left the workforce due to the pandemic will hopefully return in droves. As setting starting pay is the most impactful decision that employers make, ensuring that new and returning hires are placed and paid equitably will be mission critical for employers who are committed to equal pay.

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