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**M&A in the time of
COVID and beyond**

**SWITZERLAND:
A DIFFERENTIATED
APPROACH TO FRAUD**

A LOOK AT THE KEY CHANGES
**PRESIDENT-ELECT
BIDEN**

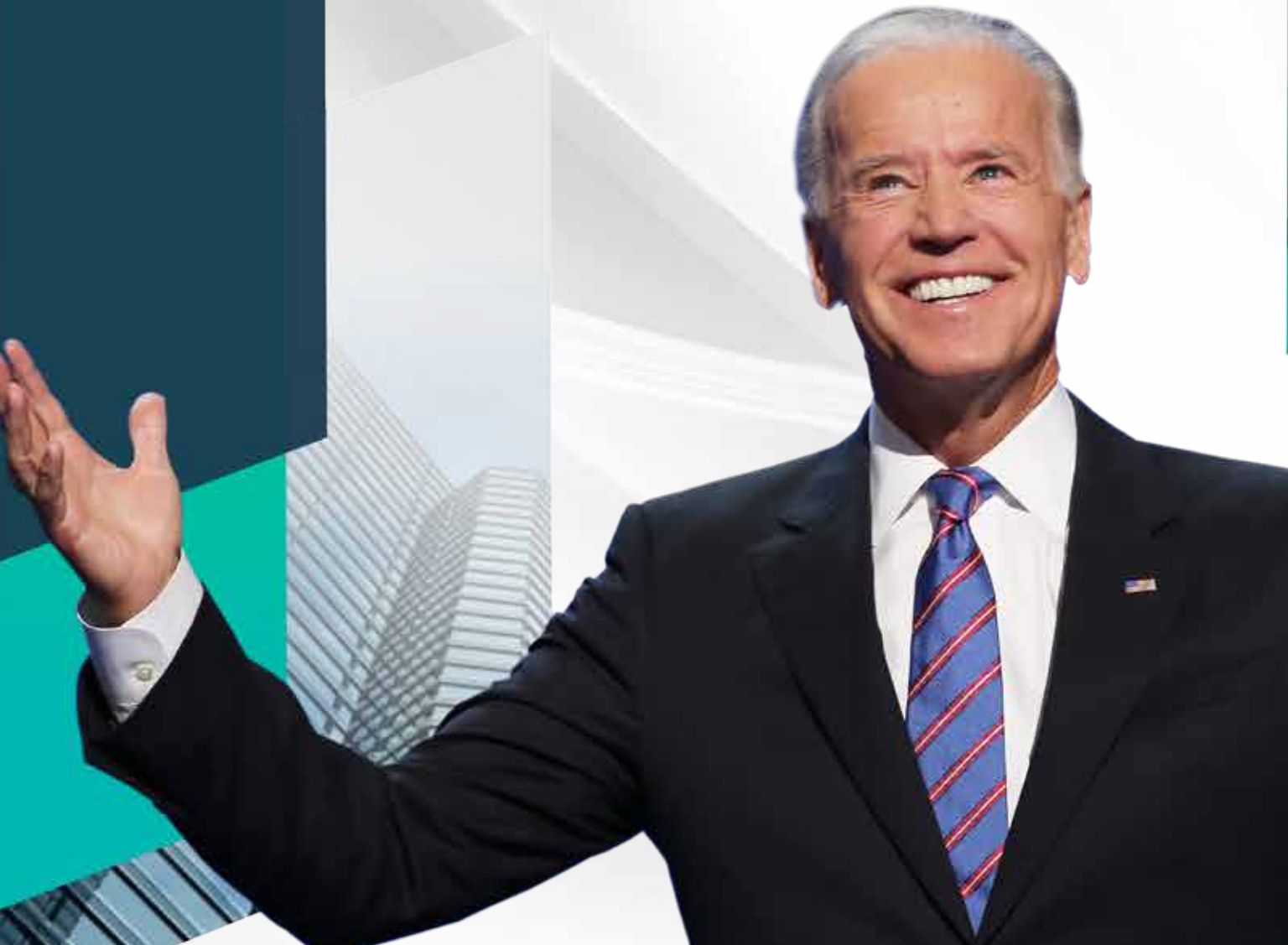
IS LIKELY TO MAKE ONCE HE TAKES OFFICE

**Recognition of
Hong Kong
Insolvency
Proceedings
in Mainland
China
A Test Case in
the Making?**

A BIDEN

ADMINISTRATION'S

NEW VISION FOR THE AMERICAN WORKPLACE



A LOOK AT THE KEY CHANGES
PRESIDENT-ELECT

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While legal challenges are still working their way through the courts, in all likelihood, President-elect Joe Biden will assume Presidency in January 2021. On the campaign trail, Biden touted an aggressive pro-employee vision for the American workplace. This stands in stark contrast to the pro-employer approach the Trump Administration has taken.

On the legislative front, Biden has advocated for many employee-friendly laws. However, in order to make the sweeping changes promised during his campaign, the Democrats will have to take control of the Senate – an outcome that is dependent on them winning two races set for January 5, 2021 in typically Republican Georgia.

Given the uncertainty of the control of the Senate, Biden's Administration is more likely to pursue his agenda through executive action. When he takes office, Biden will have the opportunity to appoint a number of administrative positions and issue new executive orders. However, Biden's ability to work

through the executive branch could again be limited if the Democrats fail to take control of the Senate, as many of the most impactful positions require approval of the Senate prior to appointment.

Some of the key changes President-elect Biden will attempt to make when he takes office are described below.

Equity at the Workplace

Biden campaigned on the promise of increased equity in the workplace for members of historically disadvantaged communities. To that end, Biden has endorsed a number of statutes providing employees with new avenues to seek redress from employers.

Biden has expressed support for the Pregnant Workers' Fairness Act ("PWFA"), the Paycheck Fairness Act ("PFA"), and the Equality Act all of which have been passed by the House of Representatives. The PWFA would require employers to reasonably accommodate pregnant workers even in absence of a disability. The Paycheck Fairness Act amends the FLSA to reduce the ability of employers to defend themselves against pay discrimination claims using the bona fide factor other than sex defense. The Equality Act would prohibit discrimination on the basis of gender identity and sexuality. While the Supreme Court's recent decisions make much of this statute redundant, it would still place increased data collecting requirements on employers. Biden has also expressed support for raising the federal minimum wage to \$15 per hour.

At the EEOC, the Republican majority will last until July 2022. Thus, the Biden Administration's impact at the EEOC level will initially be limited as the EEOC has the sole authority to initiate or intervene in systemic discrimination litigation. However, when Biden is able to make appointments to the EEOC, employers should expect increased litigation and rulemaking. A Biden EEOC is also likely to give up on legal challenges to EEO-1 data reporting/collection. Biden has also stated that reversing President Trump's executive order banning federal contractors from engaging in certain types of diversity training is a day one priority.

Workplace Health & Safety

Since the COVID-19 pandemic will continue as Biden takes office, the new Administration is likely to play a more active role in workplace health and safety. Biden has expressed support for passing legislation that would give American workers 12 weeks of paid sick leave. Further, the Biden Administration has



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stated that it will seek to double the number of OSHA investigators in order to improve enforcement of COVID-related rules. Biden's OSHA will likely seek to make injury information more publicly accessible. For instance, Chris Lu, a member of Biden's transition team, helped finalize an OSHA rule requiring employers to electronically submit injury information to the agency and prohibited employers from retaliating against workers for reporting such incidents.

The Gig Economy & Arbitration

During his campaign, Biden took aim at two matters that could result in structural changes for much of the American workplace: the gig economy and arbitration. During the previous decade, arbitration has grown as a tool for employers to resolve disputes with employees without having to resort to costly litigation. Biden has stated that he supports measures such as the Forced Arbitration Injustice Repeal ("FAIR") Act which would ban employers from requiring employees to resolve disputes in arbitration. Moreover, the Protect the Right to Organize ("PRO") Act, discussed in detail below, would ban the use of class-action waivers in arbitration agreements.

The gig-economy grew significantly under the Trump Administration. Many gig economy companies rely on classifying their workers as independent contractors. It is possible that their ability to do so will be restricted under the Biden Administration. The PRO Act would codify the ABC test enacted in California as AB5 that creates a presumption that workers are employees. Additionally, former acting Secretary of Labor Seth Harris is part of Biden's transition team and during his previous time at the Department of Labor ("DOL"), Harris focused extensively on worker misclassification issues.

Labor Unions

Biden has repeatedly expressed his support for increasing the power of unions. His primary legislative goal in this regard is passing the aforementioned PRO Act. This would allow card check to replace secret ballot elections, overturn state right to work laws, create a new private right of action for unfair labor practices, require mandatory collective bargaining for 90 days after a union becomes the representative and binding interest arbitration if no agreement is reached, and more.

Further, Biden will make changes at the NLRB. While the Board's composition will remain intact until July 2021, employers can expect some of the decisions of the Trump Board to be overturned. Moreover, Biden is able to immediately appoint a new general counsel to the NLRB. This individual oversees the agency's network of local offices and sets prosecution priorities. Even before Democrats take the majority on the Board, employers should be aware of the possibility for increased activity from the NLRB.

Immigration

The Biden Administration is expected to take action to address several executive actions that the Trump Administration took, as well as certain regulations that were proposed. These include:

Cancellation of all of the Travel Bans including: the Immigrant visa ban; H-1B, L-1, J-1, and H-2B visa stamping ban; COVID travel ban from Europe, U.K., Ireland, Canada, Mexico, China, Brazil, and Iran and replace it with temperature checks before boarding a plane, mandatory masks, and continued 14-day quarantining after arrival.

Recent restrictions on the H-1B program are likely to die in the Courts since lawsuits have been filed against the Government regarding all of these restrictions. The Biden Administration is not likely to oppose efforts to invalidate these restrictions. Restrictions that likely will go away in 2021 include:

- Limiting staffing agencies to filing H-1B petitions for only 1 year, rather than the customary 3 years.
- Limiting staffing agency H-1B petitions under the notion that they are not the end-client supervising the worker.
- Limiting the definition of H-1B specialty occupation since the statute states that specialty occupation is defined as "one requiring a degree in a specific field and the theoretical and practical application of highly specialized knowledge."
- The DOL's recent raising of the prevailing wages used for H-1B petitions.
- The re-defining of specialty occupation such that the annual H-1B lottery would give preference to applicants with the highest wages.

The USCIS has always had operational challenges and is in need of technological improvements. The Biden Administration is likely to push for the agency



to process applications in a more timely and humane fashion, expand premium processing, and in general become more customer-oriented, especially given that an individual's work authorization is frequently dependent on how long the agency takes to review the application.

The Trump Administration issued a memo in 2017 rescinding the long-standing doctrine that the agency would give deference to prior petitions when adjudicating the current one. The Biden Administration is likely to rescind that memo.

The Deferred Action for Childhood Arrival ("DACA") program provides legal status to certain individuals that came to the U.S. without documentation. The Courts forced the Trump Administration to accept current applications but the Trump Administration on its own motion still chose to deny first-time applications. The Biden Administration is likely to cancel the ban on DACA applications for first-time applicants.

The Biden Administration may start negotiations with the Congress to grant the 11 million undocumented individuals in the U.S. work permits in exchange for registration and a subsequent mandatory E-Verify for all employers in the U.S.

Last, it is also possible that the Biden Administration will ask the DOL to take a more active role in advising the Congress on labor shortages and where the use of visas could help address these shortages while properly protecting U.S. worker wages and jobs.