

Biden's First 100 Days See An About-Face On Workers' Rights

By **Vin Gurrieri**

Law360 (April 30, 2021, 6:07 PM EDT) -- During the first 100 days of his presidency, President Joe Biden acted fast to chart a drastically different course from his predecessor on discrimination and diversity issues, expanding legal protections for LGBTQ people through executive action and freeing federal contractors to train staff on racial sensitivity.

Thursday marked Biden's symbolic 100th day in office, with the new president in that time taking major steps to fulfill pro-worker promises after years in which the Trump administration moved the legal needle sharply in employers' direction.

Those steps included unwinding Trump-era policies that Democrats viewed as making it easier for workplace bias to occur and harder to hold perpetrators of such behavior accountable — priorities that attorneys say were advanced by Biden in short order.

"I think that the administration has done a lot in the first 100 days to get things moving in the direction they said that they were going to take it, which is pro-worker," said Lindsey Hogan, a partner at Faegre Drinker Biddle & Reath LLP. "So, in terms of what can be achieved in 100 days, I think they are right on track with saying how they wanted this administration to approach workers' rights."

Raquel Alvarenga, a management-side lawyer at Haynes and Boone LLP, offered a similar sentiment, saying the new administration has made combating bias and inequality a core component of its platform.

"Given the developments that we're seeing so far, I think that the Biden-Harris administration clearly has a very robust anti-discrimination, anti-harassment and an equity-focused agenda that ... is really just a reversal of course from the Trump-era policies," Alvarenga said.

Here, Law360 looks at Biden's notable moves so far and what may lie ahead.

Racial Sensitivity Training Back on for Contractors

Perhaps the Biden administration's swiftest employment policy rollbacks occurred on the new president's first day in office when he signed Executive Order 13985 — the first executive action of his presidency — titled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. One component of that order revoked a controversial initiative from President

Donald Trump that barred government contractors from holding certain types of diversity and inclusion employee training seminars that included topics Trump had deemed "offensive and anti-American."

Under the Trump administration's measure — which was widely opposed both by civil rights advocates as well as the business community and drew multiple legal challenges — subjects such as white privilege and certain types of implicit bias training would be off-limits in seminars that federal contractors conducted for their employees.

The DOL's Office of Federal Contract Compliance Programs, which was tasked with enforcing the mandate laid out by Trump in his September executive directive, asked contractors in October for information about diversity training programs that might run afoul of Trump's directive and set up a hotline for tips on potentially unlawful seminars. Those phone and email tip lines were officially shut down a week after Biden's executive order, with the OFCCP also canceling investigations it had opened and wiping out an FAQ webpage about the controversial directive.

Susan Harthill, a partner at Morgan Lewis & Bockius LLP and former DOL deputy solicitor for national operations, noted that a federal judge had issued a preliminary injunction directing the OFCCP not to act with respect to the Trump executive order prior to Biden taking office, so the agency had already taken down its hotline and paused its pursuit of complaints ahead of Biden's executive order.

"Basically, the entire [Trump] executive order and agency actions, whether that be enforcement or investigations or any proposed rulemaking [have] all just been completely abandoned at this point," Harthill said.

Faegre Drinker's Hogan noted that the Trump executive order had forced federal contractors to hold off on doing implicit bias training and that Biden's order effectively gave contractors "the ability to make their own decisions as to how they would structure their training" seminars.

"Every federal contractor wants to abide [by] the regulations and be in compliance, and I think the prior executive order from the prior administration was somewhat unsettling for a variety of reasons, one of which was [that] you haven't really seen an administration try to set standards on training in such a way," Hogan said. "So, I think federal contractors are now feeling more confident that they can structure their own training in a way that meets their other requirements under the regulations to provide their employees with training on issues like discrimination and harassment on a periodic basis."

Slate of Pro-LGBTQ Executive Orders

Within hours of taking office, Biden also issued Executive Order 13988, directing federal agencies to interpret all federal anti-discrimination laws that mention sex discrimination to prohibit bias based on sexual orientation and gender identity.

The order resulted in some agencies that enforce bias laws adopting interpretations that track the U.S. Supreme Court's reading of sex discrimination under Title VII of the Civil Rights Act in last year's *Bostock* decision as covering LGBTQ people. Such agencies include the Consumer Financial Protection Bureau and the U.S. Department of Housing and Urban Development.

The executive order was preceded by Executive Order 13985, which besides unwinding the Trump administration's restrictions on certain racial sensitivity trainings also directed federal agencies to identify programs and policies that "perpetuate systemic barriers to opportunities" for people of color,

LGBTQ people and other marginalized groups, and work to redress inequities in those policies.

Sharon McGowan, Lambda Legal's chief strategy officer and legal director, said the Biden administration's executive orders were important in that they set the tone that LGBTQ rights would be central to governing policy going forward and that the high court's analysis in *Bostock* would be respected by the administration and fully implemented.

"We were obviously very pleased and relieved to see the Biden administration come out on Day 1 with a number of really clear and definitive actions that addressed some of the lawlessness of the prior administration around some of these issues, but that also set the tone that civil rights — particularly LGBTQ civil rights — would be a priority for the administration and not something that they would get around to fixing," McGowan said.

"Having that clear statement that the administration understood the decision and planned to implement it in its robust form was incredibly important, not only to see from Day 1 but then it also gave all of the other administrative agencies throughout the executive branch their clear marching orders about what they needed to do," McGowan added.

OFCCP 'Religious Contractor' Rule Primed for Reversal

But not every move by the Biden administration to unwind Trump-era policies and broaden worker protections went as smoothly as the new president enacting executive orders with the stroke of a pen.

Case in point is the administration's prospective rollback of a rule finalized by the OFCCP in early December that gave faith-based federal contractors wide latitude to claim they are exempt from anti-discrimination mandates, regulations that critics argued would effectively open the door for bias against LGBTQ people based on their sexual orientation and gender identity.

The rule stipulated that religious federal contractors be afforded the same carveout from anti-discrimination mandates that churches, religious schools and other nonsecular employers are given under federal civil rights laws, which cleared those contractors to make hiring and other employment decisions based on their faith. It also accounted for recent decisions by the Supreme Court aimed at protecting religious freedoms.

A group of state attorneys general challenged the rule in court, which led to the federal government's lawyers in the early days of Biden's administration telling the New York federal judge hearing the suit that the rule would soon be rescinded through a fresh round of notice-and-comment rulemaking.

A replacement rule has yet to be unveiled, but McGowan said there is a "strong federal interest" in ensuring that the most talented people can be called upon to advance federal objectives.

"I think it's incredibly important to recognize how important it is that taxpayer dollars are not being funneled in ways that subsidize discrimination," McGowan said. "We do not want to see federal contracting dollars going to employers who refuse to actually make employment opportunities available to all qualified people."

EEOC Conciliation Rule on Chopping Block

On the U.S. Equal Employment Opportunity Commission front, Democrats in Congress wasted little time

charting a new course on one of the agency's key processes — presuit conciliation.

That informal and confidential process is when the EEOC tries to secure voluntary compliance from employers credibly accused of workplace discrimination before suing them. The agency must offer conciliation as an option to employers before it can sue them under Title VII and other laws the agency enforces.

The rule set baseline requirements for the type of information the EEOC must provide employers during conciliation, including certain information about the agency's legal rationale. The agency must also provide a basis for any monetary remedies it seeks and disclose if it has designated a case as one in which it is pursuing "systemic, class, or pattern or practice" allegations if such a designation has been made at the time of conciliation, among other procedural changes.

The agency's Republican majority approved the rule by a party-line vote in January, but the agency's newly appointed Democratic chair has voiced opposition to the rule, which took effect in mid-February.

In March, Democrats in Congress unveiled resolutions to rescind the EEOC's rule under the Congressional Review Act, which gives lawmakers the ability to upend executive branch regulations within 60 legislative days of when they are issued. If a rule is wiped out, the CRA also contains a provision that blocks future administrations from enacting similar regulations without congressional authorization.

Those resolutions are still pending, but business groups have urged Congress to reconsider, arguing that the rule makes presuit settlements more likely.

Alvarenga noted that many of her clients find the conciliation process "frustrating," and were supportive of the added transparency the Trump-era rule promised to bring to the process.

"One complaint I typically hear from employers is that [before] this rule the conciliation process really lacked a lot of transparency," Alvarenga said, while noting that the conciliation process prior to the rule being finalized "wasn't as fruitful as employers would typically like it to be because the EEOC essentially treated it as a 'black box,'" and employers "wouldn't get the factual [or] legal underpinnings for their reasonable cause findings."

However, Morgan Lewis' Harthill — noting that the rule isn't likely to be reviewed by the EEOC itself since the Republican majority that voted to finalize it will remain in place at least until mid-2022 — said it remains to be seen what will happen to it in Congress. She said Democrats "would have to take into account what [they] might want to do in this space later" given that a substantially similar rule can't be issued in the future.

"We're watching and waiting; there is probably a strategy there in terms of whether to CRA this," Harthill said.

Sweeping Proposals Lie Ahead

The Biden administration's executive orders and regulatory actions so far may have turned the dial further toward protecting workers. Legislative overhauls with broader reach that are working their way through Congress have also received the administration's blessing.

Among the legislative proposals that Biden implored lawmakers to pass during his Wednesday night speech to a joint session of Congress were the Equality Act and the Paycheck Fairness Act — signaling the administration's intent in pursuing broader workplace reforms than just through executive branch actions.

The Equality Act is a sweeping LGBTQ rights proposal that would codify and expand Bostock by prohibiting discrimination based on sexual orientation or gender identity in employment, public accommodations and other areas. The Paycheck Fairness Act would significantly amend the Equal Pay Act, including by narrowing the defenses an employer can use for paying workers at divergent rates. They are among numerous pro-worker, pro-labor bills being pursued by Democratic lawmakers.

Haynes and Boone's Alvarenga for one said she believes Biden's various executive orders in the early days of his term occurred both because he "wanted to take quick, decisive action on his first day in office," and to serve as strategic stopgap while employment-related bills like those move through Congress.

"I think Biden's plan all along was strategically to have these executive orders serve as a stopgap anticipating that there could be some pushback from Republicans in the Senate in ultimately getting something like the Equality Act passed," Alvarenga said.

In terms of the interplay between the Biden administration's executive and regulatory actions and pending legislation, Lambda Legal's McGowan stressed the importance that both tools "be recognized as each necessary but neither sufficient."

"It's absolutely essential that we see the Equality Act passed because there are ways in which it can reach discrimination in areas of life that the executive order can't necessarily reach," McGowan said.

"But having the federal government come forth with these really strong pronouncements, I think, helps to socialize the idea that these are values that promote the well-being and economic security of the country as a whole and will hopefully contribute to the momentum, even [with] a still fairly deadlocked Senate, to get some of these things over the finish line."

--Editing by Tim Ruel and Abbie Sarfo.