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# To the Victor Goes the Spoils: How the 2020 Presidential Election Could Reshape Labor and Employment Law

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*The 2020 presidential election has the potential to significantly upend labor and employment law. If there is a change in administration, employers should expect a sharp departure from rules issued over the past four years, particularly with respect to overtime, joint employment, and independent contractors. Employers may additionally expect renewed scrutiny of non-compete agreements. These changes may redefine the relationship between employers and workers in vast segments of the economy.*

If President Trump loses the 2020 presidential election to former Vice President Joe Biden, employers should expect labor and employment law to dramatically shift in favor of employees. Millions of workers may become newly eligible for overtime, gig economy workers could gain wage and hour protections and the right to unionize, franchisers may become liable for the acts of franchisees and be forced to collectively bargain with their entire workforce as joint employers, and non-compete agreements may become unenforceable.

Crucially, a Biden administration can achieve each of these changes by appointing new leadership at the Department of Labor ("DOL"), National Labor Relations Board ("NLRB"), and Federal Trade Commission ("FTC") to reinterpret existing law rather than by passing new laws[1] through Congress.[2]

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This article discusses a few of the most significant ways in which the Trump administration has changed labor and employment law, and what a Biden administration is likely to do in response if elected.

## OVERTIME

If elected, Biden will likely direct his Secretary of Labor to implement new overtime rules that apply to millions more workers at countless businesses.

Under the Fair Labor Standards Act ("FLSA"), employers must pay all employees the minimum wage, and for employees who work more than 40 hours a week, overtime premium pay of at least 1.5 times the regular rate of pay.[3] However, "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt from both the minimum wage and overtime requirements.[4] But, the FLSA does not define what these terms mean, and explicitly grants authority to the Secretary of Labor to define the scope of the exemptions.

Since 1940, the DOL has held that in order to be exempt, an employee must (1) receive a fixed salary; (2) receive at least a specified minimum amount; and (3) have job duties that primarily involve executive, administrative, or professional duties.[5]

These requirements are more politically divisive than they appear at first glance. Indeed, each of the last three administrations has sought to redefine the second requirement – the minimum salary that an employee must be paid. The Bush administration raised the threshold to $23,660 per year, which Democrats lambasted as inadequate for workers and a give-away to big business.[6] The Obama administration raised the minimum salary to $47,476 per year, indexing it to future wage growth, which Republicans argued would hurt low-wage workers by reducing opportunities for promotion and limiting flexibility in job schedules.[7] However, a district judge invalidated the Obama administration's rule, concluding that it exceeded the authority granted to the DOL.[8] The Trump administration subsequently withdrew the Obama administration rule, and implemented its own rule effective January 1, 2020, which raised the minimum salary to $35,308 per year – higher than the existing exemption threshold set by the Bush administration, but lower than the Obama administration final rule. Further, the Trump administration rule is not automatically indexed, so fewer workers will receive overtime as wages increase over time. Candidate Biden has reiterated arguments leveled against the Bush administration, citing studies which show that 8.2 million workers would lose more than $1.2 billion per year as a result of implementing the Trump administration overtime rule rather than the Obama administration overtime rule.[9]

As the political disputes continue, one thing is certain: the percentage of full-time, salaried Americans eligible for overtime has dramatically declined over recent decades. In 1975, over 60 percent of

full-time, salaried Americans were eligible for overtime, while today, less than seven percent of full-time, salaried Americans are similarly eligible.[10] As both parties have realized, this is largely due to the failure of overtime regulations to incorporate a salary basis that keeps pace with inflation.

A new overtime regulation is likely to be a central component of a Biden administration's labor policy agenda. Any overtime regulation will likely be very similar to the Obama administration's final rule: it will have a higher salary threshold, exempting fewer employees, and be indexed to some measure, so that it is not eroded by inflation.[11] Regardless of the content of the final rule, it will still be challenged in the courts, where survival is far from certain.

## INDEPENDENT CONTRACTOR VERSUS EMPLOYEE

Approximately 57 million people – more than one third of the U.S. workforce – work in the gig economy, many as independent contractors, not employees.[12] For example, Uber/Lyft drivers, Taskrabbit movers, and Doordash food deliverers are all considered independent contractors. But, states and cities under Democratic control have recently sought to redefine the relationship between employer and worker, passing laws that locally expand the definition of "employee"[13] or require minimum compensation for independent contractors.[14]

A Biden administration will likely continue down the same path, making appointments at the DOL and the NLRB who revise the existing interpretation of "employee" under the FLSA and the National Labor Relations Act ("NLRA"). If implemented, this poses both acute and permanent concerns for employers that rely heavily on independent contractors. Workforce costs will increase due to wage and hour requirements, and employees previously considered independent contractors will be newly eligible to unionize.

### *Wage and Hour Issues Under the FLSA*

Independent contractors are not "employees" under the FLSA and therefore are not entitled to the minimum wage or overtime. Further, employers are not required to make social security contributions, or pay unemployment insurance or workers' compensation on independent contractors.[15] Overall, classifying a workforce as "employees" rather than "independent contractors" can increase an employer's labor costs by 20 percent to 30 percent,[16] which is significant given that labor typically accounts for more than 60 percent of corporate expenses.[17] Particularly for prominent gig economy companies like Uber and Lyft, which are still losing money every year,[18] revised guidance from the DOL about who is an "independent contractor" may pose a substantial long-term threat, and

is all but certain to increase litigation costs regarding misclassification in the short-term.

In April 2019, the Trump DOL issued guidance strongly suggesting that many gig economy workers are "independent contractors" and not "employees."[19] The Trump administration first rescinded guidance from the Obama administration that reached the opposite conclusion, and then issued its own letter, which was highly unusual given its significant policy implications.[20]

To determine whether a worker is an independent contractor or an employee, both courts and the DOL analyze "economic dependence." An economically dependent worker is an employee, while an economically independent worker is an independent contractor. "Economic dependence" is based on six factors derived from U.S. Supreme Court precedent:

(1) Employer control;

(2) Permanency of the worker's relationship with the potential employer;

(3) The worker's investment in facilities, equipment or helpers;

(4) The amount of skill initiative, judgment or foresight required for the worker's services;

(5) The worker's opportunities for profit or loss; and

(6) The extent of integration of the worker's services into the potential employer's business.[21]

The Trump DOL first stressed that the workers at issue – service providers for a virtual marketplace, similar to Uber/Lyft drivers – "do not work directly for your client to the consumer's benefit; they work directly for the consumer to your client's benefit."[22] For example, an Uber driver works directly for the customer who called the car, which subsequently benefits Uber, which receives a percentage of the fare. It next analyzed the same six factors for "economic dependence" as the Obama administration, yet came to the opposite conclusion, finding that there was no indication that the workers are economically dependent. In fact, the Trump DOL did not even think it was a close question – it found each factor weighs in favor of independent contractor status, and that two of the six factors "heavily" or "strongly" weigh in favor.[23]

A Biden administration is likely to rescind this letter and issue guidance concluding that many gig economy workers are employees. While the guidance is not binding on courts, it is often persuasive evidence. Accordingly, companies may face significantly greater exposure to liability for misclassification as a result of new guidance. Further, and more

importantly, these companies would have to adapt their business model to absorb significantly higher labor costs.

## *Unionization Under the NLRA*

A Biden administration is likely to eventually appoint a new majority to the NLRB, which in turn will likely return to the broader definition of "employee" established during the Obama administration. Should this happen, many current independent contractors may be eligible to unionize as employees.

Section 2(3) of the NLRA defines "employee" to exclude independent contractor, meaning that independent contractors may not unionize.[24] To determine whether a worker is an employee or an independent contractor, the Board and courts have traditionally employed a 10 factor common law test that generally analyzes the scope of the work, the worker's autonomy, and the relationship between the worker and the employer.

While the factors are clear, Democratic-appointed and Republican-appointed Board members have disagreed over how to apply them. Specifically, Republican appointees argue that "entrepreneurial opportunity for gain or loss" is an animating principle of the 10 factor test, and therefore applies to each factor, while Democratic appointees counter that entrepreneurial opportunity should merely apply to one factor of the 10 factor test. This disagreement may seem academic, but it leads to vastly different outcomes. The Republican-favored test limits the definition of "employee," consequently preventing countless workers from obtaining the ability to unionize, while the Democratic-favored test leads to the opposite outcome.

For example, in *Supershuttle DFW*,[25] the Trump NLRB concluded that workers who operate shared-ride vans from the airport are independent contractors, not employees, and therefore had no statutory right to unionize. Supershuttle workers were first required to purchase or lease a van that satisfied Supershuttle's standard. Supershuttle then connected its workers with customers seeking a ride from the airport, but the workers had complete control of their schedule – they set their own hours and could choose how many hours per week to work. Supershuttle set the fares that customers would pay, and the workers would then collect a percentage of that fare. The Board concluded that the workers were independent contractors because they had "total control" over their schedules and significant opportunity to make more or less money depending on how hard they worked.[26]

The lone Democratic appointee dissented, and her reasoning likely reflects what the NLRB would do under a Biden administration. She concluded that the drivers resemble insurance agents, which are considered employees under the Act. She noted that the drivers perform functions essential to Supershuttle's business, are trained

by Supershuttle, do business in Supershuttle's name, and have what amounts to a permanent working relationship with Supershuttle. Further, in reality the workers had little opportunity for entrepreneurial gain or loss, because their income was merely a function of working harder, not smarter.

An NLRB with a Democratic-appointed majority would likely conclude that these workers, and millions more similarly situated, are employees eligible to unionize rather than independent contractors.

## JOINT EMPLOYER

The definition of "employer" under both the FLSA and the NLRA is politically contested. The definition is vital to large companies that rely heavily on subcontractors (e.g., Amazon) and corporations with numerous franchises (e.g., McDonalds). If these companies are considered employers of the subcontractor's employees or the franchisee's employees, they will be liable for wage-and-hour claims, and may have to one day collectively bargain with a significantly expanded workforce, which would fundamentally alter their business model.

### *Wage and Hour Issues Under the FLSA*

The Trump administration recently implemented a new rule limiting the definition of "employer" under the FLSA. This rule will limit liability for FLSA violations for companies that rely on staffing agencies, temporary workers, and subcontractors. These companies will no longer be exposed to liability if their subcontractor violates the law by failing to pay their employees appropriate wages. If elected, Biden will likely abandon the Trump administration rule, and return to the previous broader definition of "employer."

The FLSA defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee[.]"[27] Under this definition, it can be difficult to determine whether a company is a joint employer of employees who work for its subcontractor. Prior to the Trump administration's rule, the DOL had not updated its definition of joint employer in over 60 years, and several circuit courts used different tests to determine when a company was jointly liable for the FLSA violations of its subcontractors.[28]

The new rule, effective March 16, 2020,[29] assesses whether the joint employer:

(1) Hires or fires the employee;

(2) Supervises and controls the employee's work schedule or conditions of employment;

(3) Determines the employee's rate and method of payment; and

(4) Maintains the employee's employment records.[30]

But, the new rule expressly states that a potential joint employer's "reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control."[31] Therefore, if a company has the contractual authority to hire and fire a subcontractor's employee, but does not actually exercise this authority, the company is not considered a joint employer. In other words, "[o]nly actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability to do so under a contract, are relevant to joint employer status under the Act."[32]

This is particularly important for large companies like Amazon, which rely heavily on subcontractors who employ drivers to deliver its packages. If a driver alleges that he/she is not paid the minimum wage or overtime, who may he or she sue to recover? Certainly the driver may sue the subcontractor, but in many cases the driver would prefer to sue Amazon, which is much better capitalized than the smaller subcontractor. But the suit may go forward only if Amazon is considered a joint employer. Amazon is much more likely to be considered a joint employer if one analyzes its power to determine the driver's terms and conditions of employment, because it often exhibits significant leverage over smaller subcontractors, and can easily put them out of business by simply terminating their contract.[33] But, Amazon is unlikely to be considered a joint employer if one simply analyzes who actually hires, supervises, pays, and maintains employment records for the driver – the subcontractor is almost always responsible for these items. Therefore, whether having the power or reserved contractual authority to determine working conditions is relevant to defining "employer" has huge financial implications for large companies that rely on subcontractors or staffing agencies for their operations.

A Biden administration would argue that the more limited definition of "employer" harms small subcontractors and employees by exempting large companies from liability. Indeed, one study indicates that shifting responsibility solely to subcontractors may cost workers up to $1.0 billion annually.[34] Expect a Biden administration to jettison the Trump administration rule and issue a new rule that returns to the previous, broader definition of "employer."

## *Unionization Under the NLRA*

The Trump NLRB recently took the highly unusual step of issuing rulemaking to change the definition of joint-employment. Typically,

the Board announces new rules through adjudication (a/k/a cases between litigants), but the NLRA also permits the Board to introduce new rules through rulemaking. In a new rule effective April 27, 2020, the NLRB explained that an employer "may be considered a joint employer of a separate employer's employees only if the two share or codetermine the employees' essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction."[35] In doing so, the Board overturned *Browning-Ferris Industries of California*,[36] issued during the Obama administration, which held that a company could be a joint employer if it exercised *indirect* control over the essential working conditions of another business's employees.

The debate over whether indirect control can make a company a joint employer has enormous ramifications. Consider McDonalds, which has about 14,000 restaurants in the United States, more than 90 percent of which are operated by franchisees.[37] Some argue that McDonalds certainly exercises indirect control over its franchisees by setting uniform rules and expectations at its restaurants over matters such as how to staff restaurants, when to clean bathrooms, and where partially completed orders should be placed on counters.[38] Consequently, if indirect control is relevant to analysis, McDonalds is much more likely to be considered a joint employer of the workers at each of its 14,000 restaurants, which could allow one union to represent all McDonalds workers at the bargaining table – as opposed to one union representing all workers at a particular McDonalds franchise, which would be independent of McDonalds the parent company. This prospect would almost certainly reshape McDonalds' business model because a parent-level union would likely lead to higher wages, more generous benefits, and far less scheduling flexibility. Further, this change would impact millions of other similarly situated fast-food franchise workers, and millions more employed by staffing agencies.

Under the Obama NLRB, McDonalds was subject to the charge that it was a joint employer of employees at its franchises, but the Trump NLRB quickly changed course, resulting in a settlement that avoided finding that McDonalds was a joint employer. The NLRB's recent rule will make it far more unlikely that McDonalds and other similar parent companies can be considered joint employers of the employees that operate under their name.

A Biden administration is likely to nominate NLRB members who support returning to the *Browning-Ferris* interpretation of "employer" permitting indirect control. Ultimately, this change threatens both the franchise and staffing agency business models pervasive in many low-wage sectors of the economy. Given its significance, a Democratic-appointee majority at the NLRB is likely to prioritize departing from the recently issued Trump rule.

## NON-COMPETE CLAUSES AT THE FTC

Ordinarily, one might not look to the FTC as a significant source of labor and employment policy change. However, labor groups have petitioned the FTC to declare through its rulemaking authority that non-compete agreements are per se illegal. Similarly, leading Democrats have repeatedly argued that non-competes are harmful to employees, and have taken steps to outlaw them.[39] A Biden administration could nominate a majority of FTC commissioners receptive to this argument, and the commissioners could announce through rulemaking that non-compete agreements are unlawful due to their perceived anticompetitive effects.

Non-compete agreements now apply to vast segments of the economy. Nearly 30 million employees are covered by non-compete agreements, and nearly 60 million employees have been covered by a non-compete agreement at some point in their career.[40] Some may reflexively assume that non-compete agreements apply almost exclusively to highly-trained, highly-compensated employees, such as corporate leaders, engineers, and architects. However, while these workers are particularly likely to work under a non-compete, they are by no means alone. Indeed, 12 percent of workers without a bachelor's degree who earn less than $40,000 per year are covered by a non-compete, including fast food workers, teachers, and temporary warehouse workers.[41]

Candidate Biden has taken notice of this change and wants to eliminate most non-compete agreements. His labor and employment platform cites empirical research showing that non-compete agreements can negatively impact employees by reducing labor mobility and depressing wages.[42]

The FTC Act, which was enacted over 100 years ago, permits the FTC to prohibit "unfair methods of competition."[43] Should a majority of the FTC commissioners conclude through rulemaking that non-competes are "unfair methods of competition" as a result of the empirical evidence, employers nationwide would no longer be permitted to enforce these standard clauses in employment contracts.

## POSSIBLE, BUT FAR FROM GUARANTEED

Each of the above-mentioned changes to labor and employment law is initially dependent on President Trump losing the 2020 election. Even if that happens, it will take time for a new administration to issue new regulations and shift the ideological composition at the NLRB and FTC (further, due to political polarization, a Republican-controlled Senate may refuse to confirm any nominees that a Biden administration submits). And, any changes may ultimately have to pass muster in the federal courts, which have quickly grown increasingly conservative under the Trump administration. Additionally, some changes are only means to

an end, not an end in themselves – for example, just because Uber/Lyft drivers may be able to unionize as "employees" does not mean that they will actually vote to do so.

But, these regulatory/administrative revisions are also not impossible. Further, the mere presence of a Biden administration may also change how employers approach issues in subtle yet meaningful ways. For example, just as unions have increasingly shelved complaints rather than taking them to the NLRB under the Trump administration,[44] employers may become increasingly willing to settle certain claims under a Biden administration. Similarly, increasing funding for various agencies that conduct workplace investigations – which seems likely under a Biden administration – may spur employers to more rigorously analyze their compliance with existing law, even if they are never targeted by a specific complaint. Ultimately, both employers and workers should pay close attention to the upcoming presidential election, as it has the potential to redefine their relationship.

## NOTES

1. Legislation can ultimately achieve far more fundamental changes, but is extremely unlikely. Biden has voiced support for the PRO-Act, which would be the most significant revision of the nation's labor laws since the Great Depression. But, there is virtually no chance that the PRO-Act could receive a filibuster-proof majority in the U.S. Senate, even assuming Democrats win both the Presidency and the House of Representatives in the 2020 elections.

2. The Senate, which is currently controlled by Republicans, can still block these appointments. However, even if the Senate blocked every single nomination, a Biden administration could still appoint interim leadership at the Department of Labor to execute a regulatory overhaul of wage and hour issues.

3. 29 U.S.C. § 201 *et. seq.*

4. 29 U.S.C. § 213(a)(1). There are commonly referred to as the EAP exemption. But, they are not the only exemptions – outside salesmen, computer professionals, highly compensated employees, blue-collar workers, police, firefighters, paramedics, and first responders are also exempt. *See Fact Sheet # 17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA), U.S. Department of Labor – Wage and Hour Division, available at https://www.dol.gov/whd/overtime/fs17a_overview.pdf.*

5. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019).

6. *See* Steven Greenhouse, *Controversial Overtime Rules Take Effect*, N.Y. Times, Aug. 23, 2004, *available at https://www.nytimes.com/2004/08/23/us/controversial-overtime-rules-take-effect.html*.

7. *See* Tim Devaney, *GOP bill seeks to roll back Obama overtime rule*, The Hill, Mar. 17, 2016, *available at https://thehill.com/regulation/legislation/273437-gop-legislation-seeks-to-roll-back-overtime-rule*.

8. *See Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

9. *See The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions*, Joe Biden For President, *available at https://joebiden.com/empowerworkers/* (citing Heidi Schierholz, *More than eight million workers will be left behind by the Trump overtime proposal*, Economic Policy Institute, Apr. 8, 2019, *available at https://www.epi.org/publication/trump-overtime-proposal-april-update/*. These figures are projected to grow over time because they are not indexed to future growth).

10. *See Fact Sheet: The Trump Administration's Overtime Rule Leaves Millions of Workers Behind*, House Committee On Education and Labor, *available at https://edlabor.house.gov/imo/media/doc/2019-06-12%20Trump%20Administration%20Overtime%20Rule%20Fact%20Sheet.pdf*.

11. In *Nevada v. United States Dep't of Labor*, the Eastern District of Texas also concluded that the automatic updating mechanism was unlawful. However, it is unclear whether that district court's analysis would ultimately prevent implementation of a new overtime rule if challenged in the courts.

12. Barbara Booth, *92% of US freelancers can't take a nonworking vacation, a new survey reveals. Here's why*, CNBC, July 25, 2019, *available at https://www.cnbc.com/2019/07/25/why-92percent-of-freelancers-say-they-can-never-take-a-vacation.html*.

13. For example, California recently enacted AB 5, which codifies the "ABC" test. *See Independent contractor versus employee*, California Department of Industrial Relations, *available at https://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm*.

14. New York City requires minimum compensation for certain independent contractors, such as Uber/Lyft drivers. *See* Sara Ashley O'Brien, *Uber, Lyft prices go up in NYC as new driver minimum wage law takes effect*, CNN, Feb. 1, 2019, *available at https://www.cnn.com/2019/02/01/tech/uber-nyc-rates/index.html*.

15. *See* Robert W. Wood, *When 'Independent Contractors' Get Unemployment Benefits, What It Means For Employers*, Forbes, Oct. 20, 2017, *available at https://www.forbes.com/sites/robertwood/2017/10/20/when-independent-contractors-get-unemployment-benefits-what-it-means-for-employers/#4340730a4eff*.

16. *See* Noam Scheiber, Labor Dep't Says Workers at a Gig Company *Are Contractors*, N.Y. Times, Apr. 29, 2019, *available at https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html?login=email&auth=login-email*.

17. *See* Sam Ro, *Labor accounts for 60% of corporate expenses, and it's only getting more expensive*, Business Insider, Dec. 15, 2015, *available at https://www.businessinsider.com/citi-levkovich-rising-labor-costs-pressure-profit-margins-sp600-2016-2015-12*.

18. *See* Brett Arends, *Lyft and Uber lure people with low fares, but how long will cheap ride-sharing last?*, Marketwatch, Apr. 25, 2019, *available at https://www.marketwatch.com/story/what-the-lyft-ipo-reveals-about-the-rapidly-changing-driving-habits-of-americans-2019-03-05*.

19. FLSA 2019-6, U.S. Department of Labor – Wage and Hour Division, Apr. 29, 2019, *available at https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf*.

20. Noam Scheiber, *Labor Dep't Says Workers at a Gig Company Are Contractors*, N.Y. Times, Apr. 29, 2019, *available at https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html?login=email&auth=login-email*.

21. *Rutherford Food. Corp. v. McComb*, 331 U.S. 722, 730 (1947). Other factors may also be relevant. *See United States v. Silk*, 331 U.S. 704, 716 (1947).

22. FLSA 2019-6, U.S. Department of Labor – Wage and Hour Division, Apr. 29, 2019, *available at https://www.dol.gov/whd/opinion/FLSA/2019/2019_04_29_06_FLSA.pdf*.

23. *Id*.

24. 29 U.S.C. § 152(3).

25. 367 NLRB No. 75 (Jan. 25, 2019).

26. *Id*.

27. 29 U.S.C. § 203(d).

28. Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820-2823 (Jan. 16, 2020).

29. *Joint Employer Final Rule Frequently Asked Questions*, U.S. Department of Labor – Wage and Hour Division, *available at https://www.dol.gov/agencies/whd/flsa/2020-joint-employment/faq#3*.

30. 29 C.F.R. § 791.2(a)(1).

31. 29 C.F.R. § 791.2(a)(3)(i).

32. Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14044 (Apr. 9, 2019).

33. *See* Patricia Callahan and Caroline O'Donovan, *Amazon Cuts Contracts With Delivery Company Linked To Deaths*, ProPublica, Oct. 11, 2019, *available at https://www.propublica.org/article/amazon-cuts-contracts-with-delivery-companies-linked-to-deaths*.

34. *See* Celine McNicholas and Heidi Shierholz, *EPI comments regarding the Department of Labor's proposed joint-employer standard*, Economic Policy Institute, June 25, 2019, *available at https://www.epi.org/publication/epi-comments-regarding-the-department-of-labors-proposed-joint-employer-standard/*.

35. 29 C.F.R. § 103.

36. 362 NLRB 1599 (2015).

37. Alina *Selyukh, McDonald's Not Responsible For How Franchisees Treat Workers, U.S. Agency Rules*, NPR, Dec. 12, 2019, *available at https://www.npr.org/2019/12/12/787126119/mcdonalds-not-responsible-for-how-franchisees-treat-workers-u-s-agency-rules*.

38. Alexia Alejalde Ruiz, *Why should McDonald's be a joint employer? NLRB starts to provide answers*, Chicago Tribune, Mar. 10, 2016, *available at https://www.chicagotribune.com/business/ct-mcdonalds-labor-case-0311-biz-20160310-story.html*.

39. *See The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions*, Joe Biden For President, *available at https://joebiden.com/empowerworkers/*; further, other leading lawmakers from both the moderate and progressive wings of the Democratic party have called for similar changes. *See* Tal Axelrod, *Warren, Klobuchar call on FTC to curtail use of non-compete clauses*, The Hill, Mar. 30, 2019, *available at https://thehill.com/homenews/senate/434992-warren-klobuchar-call-on-ftc-to-curtail-use-of-non-compete-clauses*.

40. *Petition for Rulemaking to Prohibit Worker Non-Compete Clauses*, Open Markets Institute et. al., *available at https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf*.

41. *Id*.

42. *See The Biden Plan For Strengthening Worker Organizing, Collective Bargaining, And Unions*, Joe Biden For President, *available at https://joebiden.com/empowerworkers/* (citing Starr, Evan and Prescott, J.J. and Bishara, Norman D, *Noncompetes in the U.S. Labor Force* (Mar. 25, 2020). U of Michigan Law & Econ Research Paper No. 18-013, *available at* SSRN: *https://ssrn.com/abstract=2625714*, and *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Department of the Treasury – Office of Economic Policy (Mar. 2016), *available at https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf)*.

43. 15 U.S.C. § 45.

44. *Trump's Labor Board Has Unions Shelving Complaints*, Bloomberg Law, May 10, 2019, *available at https://news.bloomberglaw.com/daily-labor-report/do-not-publish-trumps-labor-board-scaring-away-union-complaints-9-10*.

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