

# Comparing The Presidential Candidates' Labor Policies: Part 1

By **Colton Long, William Dugan and Douglas Darch**

The 2020 presidential race is well underway in the U.S. Labor policy has been and will continue to be a key talking point for Democratic candidates and President Donald Trump moving into the general election.

In part one of this two-part article, we examine the key labor policy proposals advanced by the leading Democratic contenders of the 2020 race — Sen. Bernie Sanders, I-Vt., and former Vice President Joe Biden.

In part two, we will examine the policy proposals of any remaining Democratic nominees, after Super Tuesday, as well as President Donald Trump.

## **Bernie Sanders**

Sanders has made increasing union membership a key battle cry of his campaign. Indeed, Sanders has promised that he will double union membership through his policy reforms in his first four years. The key proposed reforms include the following:

### ***Implementing a Majority Sign-Up Process***

To accomplish his goal of expanding union membership, Sanders proposes providing unions the ability to organize through a majority sign-up process, whereby the National Labor Relations Board would be required to certify a union if it receives the consent of the majority of eligible workers.

Another term for this plan is "card-check system." This would require only that employees execute valid union cards. The NLRB would then confirm the validity of those union cards, and if a majority of bargaining unit employees have executed union authorization cards, certify the union as the employees' bargaining representative.

There is no secret ballot election process under this system. Sanders' proposal would eliminate the election process and ultimately reduce an employer's ability to campaign against unions.

### ***Imposing First Union Contract Provisions***

Sanders proposes that employers be required to start negotiating with unions within 10 days after a union has been certified. If no agreement is reached within 90 days of negotiations, the parties must participate in compulsory mediation.

If no contract is reached after 30 or more days of mediation, the remaining issues in dispute are resolved through binding arbitration. This proposal would make it harder for an employer to force that issues be resolved in its favor (such as management rights clauses) or to swap issues.



Colton Long



William Dugan



Douglas Darch

### ***Eliminating At-Will Employment***

Sanders proposes to eliminate employment at will — one of the most well-known aspects of U.S. labor and employment law under which an employee may quit working at any time and an employer may terminate an employee's employment for any reason, so long as it is not an unlawful reason. Sanders proposes restricting an employer's ability to terminate employees unless the employer has just cause for the termination.

As proposed by Sanders, the just-cause standard would apply to all employment terminations, irrespective of the existence of a union. Typically, collective bargaining agreements already require that various actions be taken only with just cause. This proposal would fundamentally reshape the employment relationship and likely create additional liability for employers, positioning employees to challenge a termination they deem unfair or unwarranted.

### ***Codifying Browning-Ferris***

Sanders also proposes codifying the NLRB's Browning-Ferris Industries of California Inc. decision defining the joint employer standard. Under Browning-Ferris a company is a joint employer of an employee if it sufficiently exercises indirect control and/or the reserved right to control (i.e., potential control not necessarily exercised) over the terms and conditions of employment.

Proof that two or more companies actually exercise direct and immediate control over an employee would not be required to establish joint employment. This proposal would have significant implications for companies who use workers through a third-party company, and for franchisors who do not directly employ the workers of their franchisees.

### ***Increasing Gig Economy Protections***

Sanders also proposes policies establishing that gig economy workers (i.e., workers who perform services on behalf of a company — usually app-based service companies such as ride-sharing or meal delivery services) are employees of the companies for whom they render services, and not nonemployee independent contractors.

This change would have the practical effect of extending legal protections reserved for employees of companies (such as state and federal anti-discrimination statutes and wage and hour laws) to gig economy workers. Further, Sanders proposes amending the National Labor Relations Act to give gig economy workers the right to unionize and collectively bargain.

In addition to the above, and in summary, Sanders proposes:

- Giving federal employees the right to strike (currently, federal employees may unionize but not go on strike);
- Prohibiting the replacement of unionized workers who strike;
- Eliminating right-to-work laws: Currently Section 14(b) of the Taft-Hartley Act, allows states to adopt right-to-work legislation. This would give unions the ability to collect dues from any employee whose employment is governed by a collective bargaining agreement;

- Increasing the federal minimum hourly wage from \$7.25 to \$15; and
- Implementing a paid family leave system, providing employees paid leave for their own or a family member's serious medical condition, or for the birth, adoption or foster placement of a child.

## **Joe Biden**

Biden also intends to strengthen unions and add additional legal protections for gig economy workers. Biden's proposals include the following:

### ***Restricting Employer Use of Arbitration Agreements***

Biden supports passage of the Protecting the Right to Organize Act which, among other things, broadly restricts an employer's use of arbitration agreements or class action waivers.

This would largely undo the U.S. Supreme Court's 2018 ruling in *Epic Systems Corp. v. Lewis*, which held that an employer's use of agreements requiring individual arbitration (thereby precluding claims from proceeding on a class or collective basis) are enforceable. Such a proposal could significantly increase the number of class and collective actions against employers in the U.S., up from the notable decline in such actions after the Supreme Court's ruling in *Epic Systems*.

### ***Prohibiting Noncompete and No-Poaching Agreements***

Biden proposes banning an employer's use of noncompete agreements "except for the very few that are absolutely necessary to protect a narrowly defined category of trade secrets."

Biden would further eliminate no-poaching agreements — agreements between two or more employers promising that no party to the agreement will hire away the workers of another party to the agreement. Opponents of no-poaching agreements argue that they harm competitiveness in the market and negatively impact an employee's freedom of movement by foreclosing employment opportunities.

### ***Increasing Gig Economy Protections***

Biden proposes codifying the ABC test when determining whether a gig economy worker is or is not an employee of a company. The test was recently codified in California as A.B. 5.

Under the ABC test an employer must demonstrate that the worker (A) is free from the employer's control; (B) is performing work that is outside the employer's usual course of business; and (C) customarily works as an independent business in that industry. Biden also proposes that gig economy workers be able to collectively bargain.

### ***Implementing Enforcement Priorities for Employee Misclassification***

Part of Biden's plan includes "aggressively pursu[ing] employers who violate labor laws, participate in wage theft, or cheat on their taxes by intentionally misclassifying employees as independent contractors." Biden's proposals also calls for an "aggressive, all-hands-on-deck enforcement effort" to reduce U.S. employee misclassification issues.

Key to Biden's approach would be implementing specific enforcement priorities for the NLRB, the U.S. Equal Employment Opportunity Commission, the IRS, and the U.S. Department of Justice to work collaboratively to investigate and enforce misclassification issues. Biden also calls for increased funding for the retention of investigators in these same agencies to "facilitate a large anti-misclassification effort."

### ***Implementing a Majority Sign-Up Process***

Biden supported (and co-sponsored) the original version of the proposed Employee Free Choice Act, which supports a majority sign-up process (or card-check system) as an initial option for union elections. Biden emphasizes his continued support for such a system through his 2020 labor proposals. Again, this will streamline the union election process and make it more difficult for employers to campaign against unions.

### ***Codifying Browning-Ferris***

Biden also proposes enacting legislation restoring the broad definition of "joint employer" articulated in Browning-Ferris.

Further, Biden proposes:

- Clarifying that employers may not retaliate against unauthorized workers who report labor violations, and expanding the U visa program. Currently, the U visa program gives unauthorized immigrants legal status in the U.S. who have suffered serious mental or physical abuse while in the U.S. and are willing to assist U.S. law enforcement officials. Under Biden's plan, the U visa program would extend to cover unauthorized workers whose employers commit unlawful workplace violations against them under federal, state or local labor law;
- Increasing the federal minimum hourly wage from \$7.25 to \$15; and
- Eliminating right-to-work laws in the U.S., in an effort to strengthen unions and increase union membership.

### **Key Takeaways**

All of these proposals have the potential to change the way employers do business in the U.S. Indeed, some proposals, such as Sanders' just-cause proposal or the proposals for a broader joint employer standard, may transform the U.S. workplace in several ways, by strengthening employee bargaining rights, reshaping the use of contractors in the workplace, and expanding numerous workplace protections.

Further, even if the Democratic nominee does not win the White House, their policy proposals may seep into the consciousness of the voting public and, consequently, their respective representatives in Washington, D.C. This could lead to the adoption of some or all of these laws after the 2020 election, regardless of who takes the oval office this go-around. Employers should keep tabs on these policy proposals and the level of support they garner.

*William Dugan is a partner, chair of the U.S. disputes employment group, and co-chair of the North American employment disputes group at the firm.*

*Douglas Darch is a partner at the firm.*

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