

2021 LABOR AND EMPLOYMENT UNDER THE NEW ADMINISTRATION

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Agenda

- Federal Agency Updates
 - ▣ Department of Homeland Security
 - ▣ Department of Labor
 - ▣ OSHA
 - ▣ NLRB
 - ▣ EEOC
- Executive Orders
- Federal Legislation
- U.S. Supreme Court

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FEDERAL AGENCY UPDATES

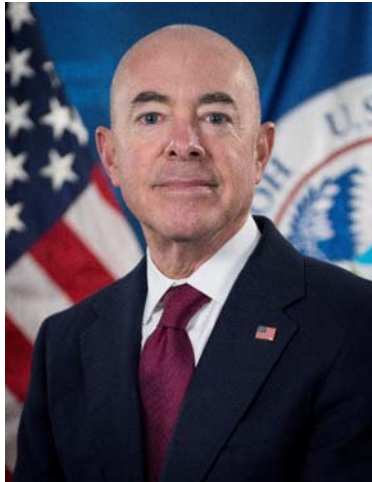
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Department of Homeland Security



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Secretary of Homeland Security



- On February 2, 2021, Alejandro Mayorkas was confirmed by the Senate.
 - ▣ He is the first immigrant and first Latino to hold this position.
- His previous experience includes being the Deputy Secretary of the Department (2nd in Command), Director of the U.S. Citizenship and Immigration Services, and U.S. Attorney for the Central District of California.

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Worker Audits



- Potential for decrease in Department of Homeland Security's Immigration and Customs Enforcement (ICE) audits through I-9 audits.
 - ▣ President Biden has indicated his intent to end workplace raids.
 - ▣ On February 18, 2021, ICE announced enforcement and removal efforts would be focused on threats to national security, border security and public safety.

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Extension of Form I-9 Requirement Flexibility



- On January 28, 2021, DHS and ICE announced that they would be extending the flexibility in complying with Form I-9 requirements due to COVID-19 through May 31, 2021.
 - ▣ This extension only applies to employers and workplaces that are operating remotely.

- Standard Form I-9 rules require the employer to review the employee's identity and employment authorization documents in person with the employee. This flexibility allows remote employers to inspect these documents remotely.
 - ▣ This policy does not change the fact that these documents must be inspected within three (3) days of an employee's first day.

 - ▣ Within three (3) business days after physical and in-person operations resume, all employees on-boarded using remote verification must go through an in-person verification of those documents. Employer should note COVID-19 as the reason for the physical inspection delay.

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The Department of Labor (DOL)



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Secretary of Labor



- Marty Walsh to lead the Dept., the first union member to do so in nearly 50 years.
 - Longtime member and previous president of the Laborers' Union Local 233.
 - Elected secretary-treasurer and general agent of the Boston Metropolitan District Building Trades Council, a union umbrella group (2011–2013).
 - Elected to Massachusetts House of Representatives in 1997 until 2014.
 - Walsh has served as the mayor of Boston since 2014.
- Stated at confirmation hearing he supports \$15/hour minimum wage, wants to achieve pay equity for women and minorities, and will move to hire additional OSHA inspectors.



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Items That May Be Revisited



- Employee v. Independent Contractor Determinations
 - In January, DOL announced final rule adopting the “economic reality” test effective March 8, 2021.
 - Two core factors: 1) the nature and degree of the worker’s control over the work; and 2) the worker’s opportunity for profit or loss based on initiative and/or investment.
 - Three lower impact factors: 1) the amount of skill required for the work; 2) the degree of permanence of the working relationship between the worker and the potential employer; and 3) whether the work is part of an integrated unit of production.
 - The Biden Administration froze the implementation of rules not yet effective, including the “economic reality” test, which was set to go into effect in May 2021.
 - Biden has advocated for a three-prong “ABC test” which defaults workers as employees.
 - The presumption can be changed by showing the worker: 1) is free from control and direction of employer in performing work; 2) performs work outside usual course of employer’s business; and 3) is customarily engaged in an independently established business or trade of the same nature as the work being performed.

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Items That May Be Revisited



□ Joint Employer Test



- A rule put in effect last year to roll back a rule from the Obama Administration, the Joint Employer Test was intended to narrow the standard by which a company can be considered a “joint employer” for liability purposes.
- Revising or eliminating this rule will likely make more businesses liable for failures by franchisees or contractors to pay OT or minimum wage.
- Revisit your contracts with staffing agencies for possible issues on this topic.

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OSHA



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OSHA Expectations



- Jim Fredrick (USW Union) – Acting Ass't Secretary of Labor for OSHA
- More aggressive stance on worker safety.
- Increase the number of OSHA inspectors.
- Linking COVID-19 illness/death to workplace more likely.
- More emphasis on PPE.
- More whistleblower protection.

Executive Order 13999



- Issued on January 21, 2021, this Order directed the Secretary of Labor to:
 - ▣ Issue revised guidance to employers on workplace safety during the pandemic within 2 weeks of the date of the order (which has since been done)
 - ▣ Consider whether emergency temporary standards on COVID-19 are necessary (if so, standards were to be issued by March 15, 2021, but still under consideration).
 - ▣ Review enforcement efforts of OSHA related to COVID-19 and identify changes to better protect workers and ensure equity in enforcement.
 - ▣ Launch national program to focus OSHA enforcement efforts for COVID-19 on those that put the largest numbers of workers at serious risk or are contrary to anti-retaliation principles.
 - ▣ Conduct a multilingual outreach campaign to inform workers of their rights.

Guidance on Masks and Employer Duties



- On January 29, 2021, OSHA posted new guidance on mask wearing and other employer duties related to COVID-19.

- OSHA suggests that a workplace COVID prevention program is the most effective way to mitigate the spread, some elements of which include:
 - ▣ Assigning workplace coordinator for all COVID issues.
 - ▣ Identifying combination of measures to limit the spread.
 - ▣ Considering protections for high risk workers.
 - ▣ Educating and training workers on COVID policies.
 - ▣ Sending infected or potentially infected workers home.
 - ▣ Performing enhanced cleaning and disinfection after learning worker(s) suspected/confirmed to have COVID.
 - ▣ Providing guidance on testing.
 - ▣ Implementing protections from retaliation and setup up anonymous process for workers to voice concerns on COVID hazards.

Guidance on Masks and Employer Duties



- Additional Details on Key Measures for Limiting Spread include:
 - ▣ Workers who have or likely have COVID-19 should be isolated until they meet CDC guidelines for exiting isolation (10 days since symptoms first appears, 24 hours with no fever, other symptoms improving).

 - ▣ Workers exposed to COVID-19 should quarantine.

 - ▣ Limit the number of people in one place at any given time (flexible worksites, flexible work hours, communicate remotely (e.g., phone, video), flexible meeting and travel options).

 - ▣ Alter workspaces to help workers and customers maintain distance.

 - ▣ Provide all workers with face coverings unless their work task requires a respirator.

 - ▣ Improve ventilation.

 - ▣ Provide supplies necessary for good hygiene practices.

 - ▣ Perform routine cleaning and disinfection.

Items That May Be Revisited



- “Regulation by Shaming”
 - On January 29, 2021, OSHA announced that the Obama-era policy that publicized the names of OSHA violators would make a return.
 - OSHA would issue press releases about why it specifically cited an employer for a violation.
 - Enforcement of this policy had been significantly reduced since 2017.
- OSHA Fine Increases
 - President Obama increased OSHA fines by 78% and introduced annual increases to account for inflation.
 - President Trump did not change this policy, so employers should expect these amounts to keep rising.

Items That May Be Revisited



- OSHA Recordkeeping/Electronic Submission/Anti-Retaliation Rules
 - The Obama Administration introduced rules requiring certain employers to submit injury and illness data electronically.
 - Also required employers to inform employees of right to report workplace injury without retaliation.
 - In 2019, OSHA issued a final rule that revoked the requirement for employers with 250 or more employees to electronically submit information from OSHA Forms 300 and 301 (although companies still have to submit information from form 300A).

NLRB



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NLRB Chair



- Chair Lauren McFerran (D)
 - Originally nominated by President Obama.
 - Confirmed on December 16, 2014.
 - Term expired December 16, 2019.
 - Re-nominated and confirmed by President Trump on July 29, 2020.
 - Term expires December 16, 2024.
 - Previously served as an attorney for the Senate Committee on Health, Education, Labor and Pensions.



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Board Members



- Four Members Currently Sitting on a Five Member Board
 - Lauren McFerran (D), Chair
 - Term expires December 16, 2024
 - John Ring (R)
 - Term expires December 16, 2022
 - Marvin Kaplan (R)
 - Term expires August 27, 2025
 - William Emanuel (R)
 - Term expires August 27, 2021

Acting General Counsel



- Peter Sung Ohr
 - Designated to serve as Acting General Counsel of the NLRB by President Biden on January 25, 2021, following President Biden's termination of Trump appointed General Counsel, Peter Robb, and his top deputy, Alice Stock.
 - Arguments that Robb's termination was unlawful have already appeared.
 - Previously Regional Director of the NLRB's Chicago Regional Office (Region 13).

Recent Notable NLRB Decisions



- *Apogee Retail LLC d/b/a/ Unique Thrift Store*
 - NLRB overruled its former approach to investigative confidentiality rules that required an employer to make a case-by-case determination of whether confidentiality can be required in a specific investigation.
 - The NLRB's test for whether a facially neutral workplace rule would interfere with employees' rights now considers: (i) the nature and extent of the potential impact on NLRA rights; *and* (ii) legitimate justifications associated with the rule.
- *Caesars Entertainment Corporation d/b/a Rio All Suites Hotel and Casino*
 - Overruled *Purple Communications, Inc.* (2014) and determined that employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for non-work purposes.
- *Valley Hospital Medical Center, Inc.*
 - Restored longstanding precedent that employers' statutory obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires.

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Recent Notable NLRB Decisions



- *Kroger Mid-Atlantic*
 - Held an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for other charitable, civic, and commercial activities unrelated to protest activities.
 - Further, employer may ban nonemployee access for union organization activities if it also bans comparable organizational activities by groups other than unions.
 - This overturned years of prior case law to the contrary.
- It is possible that each these decisions could be reviewed and ultimately overturned when the Board reverts to a Democratic majority.

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EEOC



Chair of the EEOC



- On January 21, President Biden named Charlotte Burrows Chair of the EEOC.
 - ▣ Burrows has been with the EEOC since she was nominated as a Commissioner in 2014. She was re-nominated in 2019.
 - ▣ Prior to the EEOC, she held several positions at the DOJ, most notably Associate Deputy Attorney General.
- In a press release, Burrows said, “The EEOC’s mission to advance equal opportunity for all in the workplace is particularly critical as we work to rebuild the American economy and address the challenges of systemic discrimination.”



Possible EEOC Changes



- Despite seating a chair quickly, any EEOC changes will likely be slow or more bipartisan—the 5 member commission will keep its conservative majority until at least July 2022.

- In early 2018, the EEOC approved its Strategic Plan for fiscal years 2018–2022.
 - ▣ Approved under then EEOC Acting Chair Victoria Lipnic, the plan’s mission was threefold:
 - Combat and prevent employment discrimination through the strategic application of EEOC's law enforcement authorities.
 - Prevent employment discrimination and promote inclusive workplaces through education and outreach.
 - Organizational excellence.
 - ▣ A new plan will likely be approved early next year.

Employer Mandated Vaccinations



- On December 16, 2020, the EEOC issued guidance stated that employers can require their employees to vaccinated for COVID-19, and can even prohibit them from coming to the office or the jobsite if they refuse.
 - ▣ **Exceptions:** Disabilities and Religion.
 - ▣ EEOC’s guidance based on previous guidance from OSHA allowing employers to mandate influenza vaccinations. Additionally, employers have a responsibility to provide a safe workplace under OSHA law.

- Considerations for Employers Considering Mandating Vaccinations
 - ▣ Legal disputes.
 - ▣ Employee pushback.
 - ▣ May consider encouragement over mandating.
 - ▣ Larger employers may make vaccine available on site or offer approved time off to get vaccinated.

EEO-1 Employment Data Deadline Extended



- In light of the pandemic, the Equal Employment Opportunity Commission (“EEOC”) delayed its annual collection of employment data and began collecting data from private employers for 2019 and 2020 on April 26 2021.
 - ▣ Its reasoning was that it would ensure the information obtained was more accurate and reliable than last year during record unemployment and layoffs.
- Generally, this data includes the race, gender, and job categories of employees and is submitted via form EEO-1 by private sector employers.
 - ▣ Pay data is no longer required to be collected as of 2020.

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EXECUTIVE ORDERS

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Biden's Early Executive Orders



- President Biden issued a large amount of general executive orders in his first two weeks in office, including:
 - ▣ Executive Order 13988: Requires agencies to extend protections of Civil Rights Act, Title IX, and other pertinent laws to include the categories of sexual orientation and gender identity in line with recent U.S. Supreme Court cases.
 - ▣ Executive Order 13991: Requires mask wearing on all federal lands and in all federal buildings.
 - ▣ Executive Order 14002: Orders all executive departments and agencies to identify actions they can take within current authority to address current economic crisis.

Biden's Early Executive Orders



- Other early executive orders:
 - ▣ Executive Order 14003: Promotes collective bargaining for federal employees and asks Director of OPM to provide a report with recommendations to promote a \$15/hour minimum wage for federal employees.
 - ▣ Executive Order 14009: Directs various executive departments and agencies to review regulations, etc. in order to remove any policies or practices that may undermine the Affordable Care Act.

Less Regulatory Reform



- Executive Order 13992 of January 20, 2021
 - Revokes President Trump's Executive Orders 13771 that required executive agencies to evaluate all federal regulations and identify any that were unnecessary.
 - Within 60 days each agency was required to develop a Regulatory Reform Task Force.
 - Each Regulatory Reform Task Force was tasked with, among other things, attempting to identify regulations that eliminated jobs, inhibited job creation, were outdated, unnecessary or ineffective, or imposed costs that exceed benefits,
 - Biden's Executive Order 13992 calls for agency heads to promptly rescind any orders, rules, regulations, guidelines, or policies, implementing or enforcing Trump's EO 13771 and to abolish any task forces described above.

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FEDERAL LEGISLATION

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Protecting the Right to Organize (PRO) Act



- Originally introduced by House and Senate Democrats in 2019 with the purported intent to strengthen workers' organizing rights, expand National Labor Relations Act ("NLRA") coverage, and further deter employers seeking to interfere with workers' rights.
 - ▣ The U.S. House of Representatives passed the Act in February 2021 by a vote of 225-206.
 - ▣ With the recent transition of the U.S. Senate to a slim Democratic majority, there is a possibility the bill will be passed during this administration.

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Protecting the Right to Organize (PRO) Act



- Specific changes to the NLRA under the PRO Act include:
 - ▣ Codification of the "quickie" or "ambush" election rules that limit employees' access and opportunity to consider information about the union seeking to represent them.
 - ▣ Elimination of the secret ballot election by imposing a "backdoor card check" and allowing for a majority of employees to "agree" to designate the union as their representative by signing an authorization card.
 - ▣ Expansion of the definition of "employee" and contraction of the definition of "independent contractor," likely giving some independent contractors protections under the NLRA.
 - ▣ Prohibition of permanently replacing striking workers.
 - ▣ Requiring employer to allow workers to use the employer's communication devices (e.g., computer, email, phones) to engage in collective bargaining or other organizing activities.
 - ▣ Expanding joint employer liability that could alter well-settled subcontracting practices in the construction industry.

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Protecting the Right to Organize (PRO) Act



- Other specific changes to anticipate:
 - ▣ Eliminating “secondary boycott” protections that would allow unions to launch disruptive protests and pickets against any employer, even those having nothing to do with a labor dispute.
 - ▣ Permitting intermittent strikes and slowdowns that could devastate jobsite progress and production.
 - ▣ Requiring mandatory mediation in the event the employer and union are unable to agree to a collective bargaining agreement within the first 90 days of negotiations.
 - ▣ Prohibiting the use class action waivers by employers.
 - ▣ Allowing NLRB fines of employers who have engaged in unfair labor practices up to \$100,000 if found to have violated NLRA within preceding five years.
 - ▣ Hindering an employers ability to secure legal advice on complex labor matters.

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American Rescue Plan Act of 2021 (“ARPA”)



- Signed into law by President Biden on March 11, 2021.
- ARPA aims to:
 - ▣ Provide \$1,400 in stimulus payments per person; stimulus payments phase out at \$75,000 per person and \$150,000 per couple.
 - ▣ Extend federal unemployment benefits through September 6, 2021.
 - ▣ Expand certain tax credits, including child tax credit and earned income tax credit.
 - ▣ Require coverage of COVID-19 vaccines and treatment.
 - ▣ Provide premium assistance for individuals who purchase ACA-compliant health coverage, capping premiums at a maximum of 8.5% of household income.

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American Rescue Plan Act of 2021 (“ARPA”)



- Voluntary Extension of Families First Coronavirus Relief Act (FFCRA):
 - ARPA “reset” the eighty (80) hours of leave provided under the FFCRA.
 - Employees may now access an additional eighty (80) hours for paid leave taken between April 1, 2021 and September 30, 2021, if their employer has voluntarily chosen to offer this leave.
 - ARPA adds additional qualifying reasons for emergency paid sick leave, including getting or recovering from a COVID-19 vaccine, waiting for COVID test results, or coming into close contact with someone who has tested positive for COVID-19.

American Rescue Plan Act of 2021 (“ARPA”)



- COBRA Premium Assistance:
 - Individuals may be eligible for COBRA premium assistance if they are eligible for and elect COBRA (or state) continuation coverage because of a reduction in hours or an involuntary termination from employment.
 - The reason for the involuntary termination or reduction in hours does not need to be related to COVID.
 - The qualifying event (involuntary termination or reduction in hours) does not need to occur between April 1, 2021 and September 30, 2021.
 - Employees involuntarily terminated, or with a reduction in hours, anytime after October 1, 2019 may still be eligible for the subsidy as their 18-month eligibility for COBRA has not expired.

American Rescue Plan Act of 2021 (“ARPA”)



□ COBRA Premium Assistance:

- Eligible individuals who qualify for and elect COBRA and the premium assistance will not be reimbursed for coverage, but will be treated as having paid their COBRA premium in full each month.
 - Employers will be reimbursed for the premium costs by the federal government through a dollar-for-dollar credit against the employer’s payroll taxes.
- Employers are required to notify certain eligible individuals about the premium assistance and other information about their rights under ARPA.
 - <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>

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Raise the Wage Act (“RWA”)



- Introduced in the 117th Congress as S. 53 and H.R. 603
- RWA aims to:
 - Increase the federal minimum wage from \$7.25 per hour to \$15.00 per hour by 2025 (if RWA passed in 2021).
 - Increase to \$15.00 is gradual:
 - \$9.50 per hour on the date of enactment
 - \$11.00 per hour 1 year after enactment
 - \$12.50 per hour 2 years after enactment
 - \$14.00 per hour 3 years after enactment
 - \$15.00 per hour 4 years after enactment



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Paycheck Fairness Act (PFA)



- Introduced in the 117th Congress as S. 205 and H.R. 7
- Passed the House in a 217-210 vote.
- PFA aims to update the Equal Pay Act of 1963 to:
 - ▣ Allow sex-based wage differentials only where based on “a bona fide factor other than sex, such as education, training, or experience.”
 - ▣ Place burden of proof on employers to prove that bona fide factor is necessary and related to sex-based wage differential.
 - ▣ Prohibit employers from preventing employees from disclosing wages.
 - ▣ Prohibit employers from seeking or relying on applicant’s past wage history in setting wages

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Paycheck Fairness Act (PFA)



- The PFA also aims to:
 - ▣ Authorize class actions for wage discrimination violations.
 - ▣ Allow plaintiffs to recover compensatory damages, special damages, and attorneys’ fees.
 - ▣ Allow plaintiffs to recover punitive damages where plaintiff can prove employer discriminated on the basis of sex with regard to wages “with malice or reckless indifference.”
 - ▣ Authorize the Secretary of Labor to level civil penalties and special damages ranging from \$5,000 to \$10,000 per offense.

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Family and Medical Insurance Leave Act (FAMILY Act)



- Introduced in the 117th Congress as S. 248 and H.R. 804
- The FAMILY Act aims to:
 - ▣ Provide paid leave benefits for public and private sector employees.
 - ▣ Provide workers up to 66% of their wages, capped at \$4,000 per month, for up to 20 caregiving days per month, and up to 60 caregiving days per benefit period.
 - Paid leave available under most conditions currently covered by the Family and Medical Leave Act (“FMLA”); generally, where a worker is needed to care for a child, spouse, parents, or themselves.
 - Paid leave under the FAMILY Act is contingent upon several factors, and requires the worker to first: (1) apply for benefits; (2) earn income during the previous 12 months; (3) be covered by disability insurance benefits (as determined under section 223(c) of the Social Security Act); and (4) complete mandatory waiting period.
 - ▣ Make it unlawful for an employer to discriminate against an employee for seeking or taking paid leave and authorize employees to file suits to recover compensatory and liquidated damages, attorneys’ fees, and seek equitable relief.

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THE UNITED STATES SUPREME COURT

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The U.S. Supreme Court – Today



- Former President Trump appointed three of the nine U.S. Supreme Court justices: Gorsuch, Kavanaugh, and Coney Barrett.
- With the appointment of Justice Amy Coney Barrett on October 27, 2020, the Court shifted to a 6-3 conservative majority.
 - ▣ When conservative-appointed judges held only a 5-4 majority, Chief Justice John Roberts often acted as the crucial swing vote.

Current justices on the US Supreme Court

Nominated by Republican president



John Roberts



Samuel Alito



Clarence Thomas



Neil Gorsuch



Brett Kavanaugh



Amy Coney Barrett

Nominated by Democratic president



Stephen Breyer



Elena Kagan



Sonia Sotomayor

BBC

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Future of the Supreme Court



- Justice Breyer (pictured), age 82, has served on the Court since 1994.
 - ▣ While he has not made any announcements, there have been calls for him to retire so that Biden may replace him and ensure he is succeeded by a fellow liberal.
 - ▣ President Biden has said that he would appoint the first Black woman to the Supreme Court.
 - ▣ Justice Clarence Thomas is the next eldest justice, aged 72. He holds the title as the longest-serving member of the Court.
- President Biden has announced his intent to form a commission tasked with reforming the Court in some way.
 - ▣ Some liberals are calling for Biden to expand the number of justices on the bench, although he has shied away from the idea.

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Pending Cases Before the U.S. Supreme Court

- *California v. Texas*
 - ▣ U.S. Supreme Court heard oral arguments on November 10, 2020.
 - ▣ Concerns the constitutionality of the Affordable Care Act following the Tax Cuts and Jobs Act of 2017, which eliminated the penalty for violating the ACA's individual mandate.
 - Lower courts have held that the individual mandate was a critical provision, and that without it some or all of the ACA is now unconstitutional.
- *Henry Schein, Inc. v. Archer & White*
 - ▣ U.S. Supreme Court heard oral arguments on December 8, 2020.
 - ▣ Where employer and employee agree to arbitrate some disputes – but not all – who decides whether the dispute is arbitrable, a court or an arbitrator?

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QUESTIONS?

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