



December 8, 2020

Biden-Harris Department of Labor Review Team
Chris Lu, Team Lead

Submitted electronically to Patricia Smith

Re: National Employment Lawyers Association (NELA)'s Proposals for First 100 Days

Dear DOL Agency Review Team:

The National Employment Lawyers Association (NELA) welcomes the opportunity to share our recommendations for concrete steps that can be taken in the first 100 days under new leadership at the White House and Department of Labor (DOL). If implemented, these changes would advance the work of building an economy in which all workers are treated with dignity and respect; workplaces are equitable, diverse, and inclusive; and the well-being of workers is a priority in business practices.

NELA is the largest professional membership organization in the country comprised solely of lawyers who represent workers asserting employment, wage and hour, labor, and civil rights protections. NELA advocates for workers' rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to helping those who have suffered unlawful treatment in the workplace to use private law enforcement to vindicate their rights.

NELA members and staff have identified the following six areas, set forth below in which there is an immediate need for course correction as a result of the failures and anti-worker policy decisions of the outgoing administration. These are presented in no particular order and should not be read as a ranked list.

Forced Arbitration. Through the passage of numerous workers and civil rights laws, Congress has bestowed upon the people important substantive rights, buttressed by private rights of action and fee-shifting provisions. Each of these many laws was passed because Congress recognized that the only way to maintain labor standards is to deputize workers as private attorneys general to supplement governmental enforcement. Arbitration disempowers these private attorneys general, conceals wrongdoing from public view, and severely damages public faith in the justice system. NELA strongly supports passage of the Forced Arbitration Injustice Repeal Act (FAIR Act) in the 117th Congress. In conjunction with efforts to gain passage of the FAIR Act, DOL should respond by:

- Working with the White House to issue an executive order like the Fair Pay and Safe Workplaces order prohibiting the federal government from contracting with companies that impose arbitration on their workers;
- Announce, in the first 100 days, the convening of a group of stakeholders from nonprofits, academia, unions and the private sector who will provide DOL with data about barriers to enforcement of

employment and labor laws, including any role the proliferation of forced arbitration provisions play in this under-enforcement, and from which data DOL will make specific policy recommendations.

COVID-19 Response. The pandemic has highlighted the extremely harsh consequences of the lack of meaningful COVID-19 safety protections for large numbers of working people. Workers of color, immigrant workers, and those whose age or disability places them at higher risk have paid a disproportionate, and unacceptable, price. We cite just one statistic from [one study](#) that underscores the severity of these disparities: “among black people between the ages of 35 and 44 our research shows a nine-fold increased risk of death.” In addition to robust legislative relief, which NELA supports, immediate administrative responses should include:

- Ensure that OSHA promulgates an Emergency Temporary Standard on day one;
- EEOC should issue new guidance in the first 100 days on considerations under the ADA and ADEA for those at elevated risk from COVID-19.

Nature of Work and Right to Organize. Complex and fissured working arrangements like subcontracting and gig work, and the continued rampant misclassification of employees as independent contractors, strip workers of crucial rights while depriving the government of tax revenue. One of the implicated rights is the right to form a union and bargain collectively, a right that is separately under attack. In response:

- DOL should withdraw the pending independent contractor rule, RIN 1235-AA34, and begin a new rulemaking that ties worker classification to the clear, protective ABC test;
- NLRB should rescind its [joint employer](#) rule, and DOL should rescind all aspects of its [joint employer](#) rule that have not been invalidated by court order;
- NLRB should withdraw its pending rule prohibiting graduate students from organizing, RIN 3142-AA15;
- EEOC should suspend its pending union time rule, RIN 3046-AB00.

Fair Wages. All workers deserve a living wage, protection from wage theft, and rigorous enforcement of laws addressing pay and wage theft. Wage theft must be addressed as the serious crime that it is. DOL should:

- Institute a \$15 minimum wage for all government contractors, with annual increases indexed to inflation and no exceptions for agricultural or domestic workers, youth or people with disabilities;
- Issue a position statement opposing all subminimum wages, including for tipped workers;
- Withdraw the pending tip credit rule, (RIN 1235-AA21) and related sub-regulatory guidance including, WH Op. No. FLSA2018-27 (Nov. 9, 2018) and the DOL Field Operations Handbook, FOH §30d00(f) (Feb. 15, 2019);
- Initiate a rulemaking on the fluctuating workweek that would require employers to prove they paid contemporaneous overtime and had explicit mutual understanding with workers.

Equal Employment Opportunity. Harassment and discriminatory barriers to employment and advancement cause great harm to the economic security, growth, and well-being of workers who are people of color, women, LGBTQ people, religious minorities, immigrants, older people, and people with disabilities. In addition to harming all of those groups, such barriers deprive employers and society as a

whole of the valuable contributions of an enormous number of working people. The administration should make these issues a priority by starting with the following immediate changes:

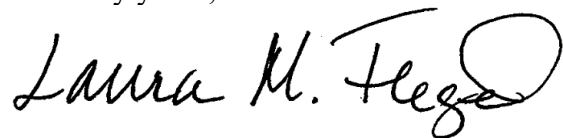
- Rescind Executive Order 13950 on race and sex stereotyping and any implementing guidance at the agency level;
- Rescind [OFCCP rule](#) permitting discrimination by religiously affiliated federal contractors;
- Suspend the pending changes to EEOC's conciliation process, RIN 3046-AB19;
- Rescind the OFCCP final rule, RIN 1250-AA10, on issuing a Predetermination Notice for preliminary findings of discrimination;
- Issue guidance to all federal agencies implementing the Supreme Court's *Bostock* decision and clarifying that sex discrimination includes discrimination based on sexual orientation and gender identity;
- Withdraw the EEOC Proposed Updated Compliance Manual on Religious Discrimination, issued Nov 17, 2020;
- Suspend pending EEOC ADA and GINA wellness program rules, RIN 3046-AB10 and RIN 3046-AB11;
- EEOC and OFCCP should resume collection of EEO-1 component 2 pay data and make it publicly available as an accountability tool, which will also help with accountability on the Fair Wages point discussed above.

Independent, Diverse, and Well-Resourced Federal Agencies. To be able to effectively carry out their charge of protecting workers and ensuring employment and labor laws are enforced, DOL and its component agencies must be adequately staffed. That staff must be a demographically diverse group of people who have deep subject matter expertise. These workers must be immunized from undue political manipulation.

- Prioritize filling vacancies at OSHA and the Wage and Hour Division in first 100 days;
- Rescind Executive Order creating Schedule F in the excepted service;
- Rescind any DOL guidance implementing Executive Order 13950 on race and sex stereotyping and any implementing guidance at the agency level and develop affirmative efforts to ensure demographically diverse staff at DOL;
- Work with the group of stakeholders discussed in the Forced Arbitration point above to develop plans for private-public partnerships to supplement agency enforcement power and multiply resources to better address workers' needs.

Thank you for your consideration. If you have questions or wish to discuss these matters, please contact Laura Flegel at lflegel@nelahq.org or (202) 674-6552.

Sincerely yours,



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