



WORKING TOGETHER TOWARDS EQUALITY

IN THE WORKPLACE

Compliance in the New Administration

Presented By:

John C. Fox

Fox, Wang, & Morgan, P.C.

315 University Ave.

Los Gatos, CA 95030

(408) 844-2360



John Fox
Partner
Fox, Wang & Morgan P.C.

John C. Fox, Esq. is the President of Fox, Wang & Morgan P.C. He represents companies and tries cases in state and federal courts throughout the United States. His advice, counseling and litigation work involve primarily wage-hour and employment discrimination class actions, properly structuring compensation analyses, properly structuring AAPs and statistical Disparity Analyses and Adverse Impact Analyses, defending and prosecuting trade secret claims, employment contract disputes, wrongful termination, corporate investigations, the use of statistics in employment matters and defending OFCCP audits/lawsuits. Mr. Fox also provides strategic advice to companies nationwide regarding their employment practices and helps build HR recruitment, selection and promotion systems to minimize legal risk. Mr. Fox was also previously Executive Assistant to the Director of OFCCP, where he was responsible for all enforcement and policy matters and OFCCP's contacts with the Congress, other federal agencies and The White House.

AGENDA

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 - OFCCP Will Be At The Center Of Biden's Civil Rights Agenda
 - This Will Be The Era Of The Lawyer As Head Knocking OFCCP Audits Return
- III. WHAT'S COMING? The 2020 DEMOCRATIC PARTY PLATFORM AS TO CIVIL RIGHTS.....p. 31



KEY TO ABBREVIATIONS

AAP=Affirmative Action Plan

CO=Compliance Officer

D&I= Diversity & Inclusion

EE= Employee

Kor=Contractor

I. HOW THE TRANSITION WILL WORK

Every Presidential Candidate has a Transition Team

Ted Kaufman, a long-term Biden aide and former US Senator from Delaware, is heading up former Vice-President Biden's Transition Team

There is a separate Team for each major federal agency, or collection of related agencies

Main job is to pick the approximately 4,000 political appointees who will run the Biden Administration

- over 1200 appointees will require the "Advice and Consent" of the Senate
- Usually about 20% of the Transition Team ends up in a high level job in the agency they help to transition



I. HOW THE TRANSITION WILL WORK (con't)

Article II, Section 2, Clause 2 of the Constitution:

“The President] shall have Power, by and with the Advice and Consent of the Senate, to * * * **and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint** Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, **and all other Officers of the United States**, whose Appointments are not herein otherwise provided for, and which shall be established by Law: **but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”** [emphases added]



I. HOW THE TRANSITION WILL WORK (con't)

- Secondary job of the Transition Team is to meet with outgoing Administration officials to get up to speed about issues on the table to insure a clean “baton handoff” to the incoming Administration
- This will NOT be/is NOT unfolding as a cooperative and congenial transition from Team Trump to Team Biden
- Other than the security agencies (Department of Homeland Security; DoD; CIA; National Security Agency; etc), the Biden transition teams will likely NOT gain physical access into the federal government and will likely be starting fresh on January 20, 2021 (Inauguration Day)



I. HOW THE TRANSITION WILL WORK (con't)

U.S. DEPARTMENT OF LABOR BIDEN-HARRIS TRANSITION TEAM

The Department of Labor team will also review the Equal Employment Opportunity Commission, the Federal Mine Safety and Health Review Commission, the Pension Benefit Guaranty Corporation, the Federal Labor Relations Authority, the National Mediation Board, the Federal Mediation and Conciliation Services, the Railroad Retirement Board, and the National Labor Relations Board.

IT'S A TEAM OBAMA REUNION!



I. HOW THE TRANSITION WILL WORK (con't)

U.S. DEPARTMENT OF LABOR BIDEN-HARRIS TRANSITION TEAM

Name:	Most Recent Employment:	Source of Funding
Chris Lu, Team Lead	FiscalNote	Volunteer
Jennifer Abruzzo	Communications Workers of America	Volunteer
Mary Beech	Northeastern University	Volunteer
Jessica Chu	Amalgamated Transit Union International	Volunteer
Michele Evermore	National Employment Law Project	Volunteer
Jocelyn Frye	Center for American Progress	Volunteer
Tanya Goldman	Center for Law and Social Policy	Volunteer
Viv Graubard	New America	Volunteer



I. HOW THE TRANSITION WILL WORK (con't)

U.S. DEPARTMENT OF LABOR BIDEN-HARRIS TRANSITION TEAM

Name:	Most Recent Employment:	Source of Funding
Deborah Greenfield	Self-employed	Volunteer
Seth Harris	Self-employed	Volunteer
Micheal Hazard	United Association	Volunteer
Nadia Marin-Molina	National Day Laborer Organizing Network (NDLON)	Volunteer
Patricia Moscoso	State of California	Volunteer
Seema Nanda	Self-employed	Volunteer
Raj Nayak	Self-employed	Volunteer

I. HOW THE TRANSITION WILL WORK (con't)

U.S. DEPARTMENT OF LABOR BIDEN-HARRIS TRANSITION TEAM

Name:	Most Recent Employment:	Source of Funding
Shaun O'Brien	American Federation of State, County and Municipal Employees	Volunteer
Josh Orton	United States Senate, Office of Senator Bernie Sanders	Transition — PT Fund, Inc.
Doug Parker	State of California, Department of Industrial Relations	Volunteer
Lynn Rhinehart	Self-employed	Volunteer

I. HOW THE TRANSITION WILL WORK (con't)

U.S. DEPARTMENT OF LABOR BIDEN-HARRIS TRANSITION TEAM

Name:	Most Recent Employment:	Source of Funding
Ann Rosenthal	Self-employed	Volunteer
Robin Runge	The Solidarity Center	Volunteer
Patricia Smith	National Employment Law Project	Volunteer
Jenny Yang	Urban Institute	Volunteer

I. HOW THE TRANSITION WILL WORK (con't)

- The current political appointees will start leaving in droves between now and January 20, 2021 as they find new jobs (little reason to stay and “go down with the ship”)
- Any political employees still remaining on-roll lose their jobs at the moment the new President is sworn in
- When the last political appointee in a sub-component federal agency (like OFCCP) leaves, a senior career employee runs the agency in an “Acting” capacity and reports to the remaining political appointees until the last political employee leaves the building. Then, the career employees report to the Transition Team until the Cabinet-level appointee (The Secretary of Labor in the case of USDOL) is sworn in and takes his/her seat and brings along his/her political appointee managerial team in coming weeks/ months



I. HOW THE TRANSITION WILL WORK (con't)

- Patty Davidson, OFCCP's career Deputy, will likely become the Acting Director of OFCCP until TEAM Biden arrives at OFCCP
- The OFCCP Director has never sat for "Advice and Consent"
- S/he should, unless the Senate exempts the position from A&C
- This becomes important if Republicans win 51 or more Senate seats following the two January 5, 2021 Senate race run-offs in Georgia



I. HOW THE TRANSITION WILL WORK (con't)

- CURRENT SENATE TALLY: 50 Republicans vs 46 Democrats + 2 Independents (who typically caucus with the Democrats) = 48
- Two open Senate seats in Georgia: going to a January 5, 2021 run-off
 - Very unusual to have both Senate seats from same state open at the same time. (Senate 6-year terms are staggered to avoid this)
 - Republican incumbent Kelly Loeffler filled a Senate vacancy last year, so she is running as an incumbent, but has not previously won an election: very tough race for her
- Republicans have two advantages: they are incumbents, and no Libertarians are running against them to siphon off votes which will now likely go to Republicans

II. THE BIDEN POLICY AGENDA REQUIRES DEMOCRATS TO CONTROL THE SENATE

A 50-50 tie gives the Senate to Biden (since the VP, Kamala Harris) would cast any tie-breaker votes in her capacity as the VP

- However, there are some wrinkles:
 - The two (left of center) Independents, Bernie Sanders (I-Vermont) and Angus King (I-ME), typically caucus with the Democrats (but are not always reliable Democrat votes, but usually so: ~86% (Sanders) and only ~ 62% (King))
 - But, Sen Collins (R-Maine) will vote with Democrats from time-to-time
 - So, if the Democrats picked up one of the Georgia Senate seats, then the addition of the two Independents and occasionally Collins would get the Democrats to 50 votes [46 (Democrats) + 2 (Independents) +1 (GA) +1 (Collins)]

II. BIDEN NEEDS SENATE CONTROL (con't)

- But, if Bernie Sanders resigns his Senate seat to become the Secretary of Labor, the **Republican** Governor of Vermont would appoint a (presumably Republican) replacement until the 2022 mid-term elections
- Republicans **could** thus end up with 53 Senate seats thru at least 2022:
 - 50 currently ready to be seated on January 4, 2021
 - + 2 Georgia seats (heavy maybes)
 - + 1=Bernie Sander's seat (if he goes into the Biden cabinet w/Republican replacement)

II. BIDEN NEEDS SENATE CONTROL (con't)

Two bad things happen to Biden if the Senate is Republican controlled:

1) Biden cannot force legislation through: must bargain with Republicans who can stop legislation Biden proposes: Biden would either have to come to the middle or try to force a limited number of objectives through his (soon to be) hobbled Executive Branch of Government: the return of Presidential Executive Orders

2) Biden could not get his 1200+ Advice and Consent political appointees approved timely, and many will not be approved at all



II. BIDEN NEEDS SENATE CONTROL (con't)

Note the delays the Democrats were able to force on President Trump (even though the Republicans have controlled the Senate for the last 6 years):

- Almost 700 federal government Advice & Consent positions remain vacant (= over 1/2 of Trump's A & C political appointments)
- EEOC Commissioners took 18 months to confirm and seat
- USDOJ Assistant Attorney General for Civil Rights took over a year

II. BIDEN NEEDS SENATE CONTROL (con't)

PUNCHLINE for OFCCP:

If the Senate is 51, or 51+, Republicans next year, Biden will either have to scale back his political agenda by moving to the middle, or will have to drive any aggressive agenda through Executive Branch action as President Obama was forced to do for the last 2 years of his Presidency

In either event, OFCCP will be “THE TIP OF THE SPEAR” in TEAM BIDEN’S civil rights agenda because Biden can control it and drive it forward without the Senate



II. BIDEN NEEDS SENATE CONTROL (con't)

- BUT, Biden needs Advice and Consent to seat:
 - the Assistant Secretary of Labor for OSHA
 - the Wage Hour Division Administrator
 - the Assistant Attorney General for the Civil Rights Division
 - EEOC Commissioners
 - NLRB Members



II. BIDEN NEEDS SENATE CONTROL (con't)

- NOT SO EEOC (but The President may identify The Chair)

The Commission:	Term Ends:	Political Party
Jocelyn Samuels, Commissioner	July 1, 2021	D
Janet Dhillon, Chair	July 1, 2022	R
Charlotte A. Burrows, Commissioner	July 1, 2023	D
Keith E. Sonderling, Vice Chair	July 1, 2024	R
Andrea R. Lucas, Commissioner	July 1, 2025	R

II. BIDEN NEEDS SENATE CONTROL (con't)

- NOT SO NLRB (but The President may identify The Chair)

Members:	Term:	Political Party
William J. Emanuel	August 27, 2021	R
John F. Ring, Chairman	December 16, 2022	R
Lauren M. McFerran	December 16, 2024	D
Marvin E. Kaplan	August 27, 2025	R

II. BIDEN NEEDS SENATE CONTROL (con't)

The Senate's control of legislation and of high-level Presidential appointments to the Executive Branch of Government is a central part of the "balancing of power" our Founding Fathers consciously and very purposely wrote into the Constitution given their fear of centralized tyrannical control by Kings.

It is this "balancing of power," dispersing power across not only the three branches of the federal government (Executive; Legislative and Judicial) but also further balancing legislative power between the House of Representatives and the Senate, which has caused political scientists to constantly marvel for over 200 years



II. BIDEN NEEDS SENATE CONTROL (con't)

Controversy and head-knocking is likely to follow the Biden Administration like it did the Trump Administration...with federal Government Kers squarely in the middle of the fight

The mistake of President Trump, and the seeming coming mistake of President-Elect Biden, is the failure to answer this question: **“Where is the mandate?”**

With razor-thin victory margins in 2016 and 2020, neither Trump nor Biden may claim a strong victory. A small margin of victory does not mandate far-reaching changes

So, the instruction of the American people in 2016, and even more so in 2020, was to steer to the middle...not to the far right or the far left



II. BIDEN NEEDS SENATE CONTROL (con't)

Return of Obama EEO and Affirmative Action policies?

Return of Obama Employment Law policies?

Return of Presidential Executive Orders to attempt to end-around
Senate blockades of Congressional Legislation?

Return of the “Blacklisting” Executive Order?

Rescission of Trump Executive Order 13950 (D&I training)?

Rescission of Trump Executive Orders Advancing Religious Freedoms?
(EO 13926: 20-6-2; EO 13831: 18-5-3)



II. BIDEN NEEDS SENATE CONTROL (con't)

2022 Senate Elections

Things could be different following the mid-term 2022 elections

34 Senators will be up for re-election in 2022

21 Republicans and 13 Democrats

State	Pre-Election Incumbent	Political Affiliation	Last Election Margin of Victory
Alabama	Richard Shelby	R	28.1%
Alaska	Lisa Murkowski	R	15.2%
Arizona	Mark Kelly	D	2.4%
Arkansas	John Boozman	R	23.6%
California	TBD	D	N/A
Colorado	Michael Bennet	D	5.7%
Connecticut	Richard Blumenthal	D	28.6%
Florida	Marco Rubio	R	7.7%

II. BIDEN NEEDS SENATE CONTROL (con't)

2022 Senate Elections (con't)

State	Pre-Election Incumbent	Political Affiliation	Last Election Margin of Victory
Georgia	Kelly Loeffler/TBD	R	N/A
Hawaii	Brian Schatz	D	51.4%
Idaho	Mike Crapo	R	38.4%
Illinois	Tammy Duckworth	D	15.1%
Indiana	Todd Young	R	9.7%
Iowa	Chuck Grassley	R	24.4%
Kansas	Jerry Moran	R	30.0%
Kentucky	Rand Paul	R	14.6%
Louisiana	John Neely Kennedy	R	21.4%

II. BIDEN NEEDS SENATE CONTROL (con't)

2022 Senate Elections (con't)

State	Pre-Election Incumbent	Political Affiliation	Last Election Margin of Victory
Maryland	Chris Van Hollen	D	25.2%
Missouri	Roy Blunt	R	2.8%
Nevada	Catherine Cortez Masto	D	2.4%
New Hampshire	Maggie Hassan	D	0.1%
New York	Charles Schumer	D	43.6%
North Carolina	Richard Burr	R	5.7%
North Dakota	John Hoeven	R	61.5%
Ohio	Rob Portman	R	20.8%
Oklahoma	James Lankford	R	43.1%

II. BIDEN NEEDS SENATE CONTROL (con't)

2022 Senate Elections (con't)

State	Pre-Election Incumbent	Political Affiliation	Last Election Margin of Victory
Oregon	Ron Wyden	D	23.3%
Pennsylvania	Pat Toomey	R	1.5%
South Carolina	Tim Scott	R	23.7%
South Dakota	John Thune	R	43.6%
Utah	Mike Lee	R	41.0%
Vermont	Patrick Leahy	D	28.3%
Washington	Patty Murray	D	18.0%
Wisconsin	Ron Johnson	R	3.4%

III. WHAT'S COMING? 2020 DEMOCRATIC PARTY PLATFORM AS TO CIVIL RIGHTS

BUILDING A STRONGER, FAIRER ECONOMY

<https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf>

- ☐ Raising Wages and Promoting Workers' Rights
- ☐ Enacting Robust Work-Family Policies
- ☐ "A new economic contract that raises wages" p. 14
- ☐ "One that at last supports working families and the middle class by securing equal pay for women and paid family leave for all" p. 14

III. 2020 DEMOCRATIC PARTY PLATFORM (con't)

ACHIEVING UNIVERSAL, AFFORDABLE, QUALITY HEALTH CARE

❑ Protecting LGBTQ+ Health

- ❑ “We condemn the Trump Administration’s discriminatory actions against the LGBTQ+ community, including the dangerous and unethical regulations allowing doctors, hospitals, and insurance companies to discriminate against patients based on their sexual orientation or gender identity. Democrats will reverse this rulemaking and restore nondiscrimination protections for LGBTQ+ people and people living with HIV/AIDS in health insurance, including coverage of all medically necessary care for gender transition. We will also take action to guarantee that LGBTQ+ people and those living with HIV/AIDS have full access to needed health care and resources, including **by requiring that federal health plans provide coverage for** HIV/AIDS testing and treatment and HIV prevention medications like PrEP and PEP, **gender confirmation surgery, and hormone therapy.”** [emphases added] p. 33

III. 2020 DEMOCRATIC PARTY PLATFORM (con't)

HEALING THE SOUL OF AMERICA

☐ Protecting Americans' Civil Rights

- ☐ “Democrats are committed to ending discrimination on the basis of race, ethnicity, national origin, religion, language, gender, age, sexual orientation, gender identity, or disability status. **We will appoint U.S. Supreme Court justices and federal judges who look like America (emphases added)**, are committed to the rule of law, will uphold individual civil rights and civil liberties as essential components of a free and democratic society, and will respect and enforce foundational precedents, including *Brown v. Board of Education* and *Roe v. Wade*.” p. 39

III. 2020 DEMOCRATIC PARTY PLATFORM (con't)

HEALING THE SOUL OF AMERICA (con't)

❑ Achieving Racial Justice and Equity

- ❑ “Historic wrongs and abuses perpetrated against Native Americans, two and a half centuries of slavery, a hundred years of Jim Crow segregation, and a history of exclusionary immigration policies have created profound and lasting inequities in income, wealth, education, **employment (emphases added)**, housing, environmental quality, and health care for communities of color. Democrats are committed to standing up to racism and bigotry in our laws, in our culture, in our politics, and in our society, and recognize that **race-neutral policies are not sufficient to rectify race-based disparities. (emphasis added)** We will take a comprehensive approach to embed racial justice in every element of our governing agenda, including in jobs and job creation (emphasis added), workforce and economic development, small business and entrepreneurship, eliminating poverty and closing the racial wealth gap, promoting asset building and homeownership, education, health care, criminal justice reform, environmental justice, and voting rights. Democrats will ensure federal data collection and analysis is adequately funded and designed to allow for disaggregation by race and ethnicity, among other important factors, to better design policies to address the needs of the most vulnerable communities and make informed policy choices.” p. 40

III. 2020 DEMOCRATIC PARTY PLATFORM (con't)

HEALING THE SOUL OF AMERICA (con't)

☐ Protecting Women's Rights

- ☐ "Democrats will fight to guarantee equal rights for women, including by ratifying the Equal Rights Amendment and at long last enshrining gender equality in the U.S. Constitution. **We will take aggressive action to end pay inequality, including by increasing penalties against companies that discriminate against women and passing the Paycheck Fairness Act."** (emphasis added) p. 42

☐ Protecting LGBTQ+ Rights

- ☐ **"We will ensure that all transgender and non-binary people can procure official government identification documents that accurately reflect their gender identity. We will stop employment discrimination in the federal government, and will restore full implementation of President Obama's executive order prohibiting discrimination by federal contractors on the basis of sexual orientation and gender identity."** (emphasis added) p. 42-43

III. 2020 DEMOCRATIC PARTY PLATFORM (con't)

HEALING THE SOUL OF AMERICA (con't)

☐ Protecting Disability Rights

- ☐ “Democrats will fully enforce the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Fair Housing Act, the Civil Rights of Institutionalized Persons Act, Section 504 of the Rehabilitation Act, the Mental Health Parity and Addiction Equity Act, and the Help America Vote Act, among other bedrock statutes protecting the rights of people with disabilities. We will oppose any efforts to weaken enforcement of the Americans with Disabilities Act. We will ensure non-discrimination in access to health care, building on the protections for people with disabilities enshrined in the Affordable Care Act. We will ensure every federal agency aggressively enforces the integration mandate affirmed in the Olmstead decision, and repair the damage done by the Trump Administration. **We will rigorously enforce non-discrimination protections for people with disabilities in health care, employment (emphases added), education, and housing, and ensure equal access to the ballot box.”** p. 43

THANK YOU!
QUESTIONS?



Thank You

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NILG 2021 National Conference

August 1 – August 4, 2021

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Nashville, Tennessee

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National Conference!

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2021 NATIONAL CONFERENCE

**STRIKE A CHORD
FOR EQUALITY AND COMPLIANCE**



[2021 Conference Teaser Video](#)

HRCI AND SHRM PDCs

HRCI: Activity ID: 540334

SHRM PDCs: Activity 20-4RWM9

