



Recent Developments in Labor & Employment Law

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APCA Mid-Year Meeting
Trump International Hotel
Washington, D.C.
October 8, 2021



Our Mission Today



- Update APCA members on the many significant developments that have impacted or will impact the workplace since my presentation in March at the APCA convention
- We will cover President Biden's executive actions, Congressional actions, significant court decisions, significant developments in the federal labor agencies, and other developments of interest



Trump Quote

- "You can't be scared. You do your thing, you hold your ground, you stand up tall, and whatever happens, happens."



Executive Branch Actions



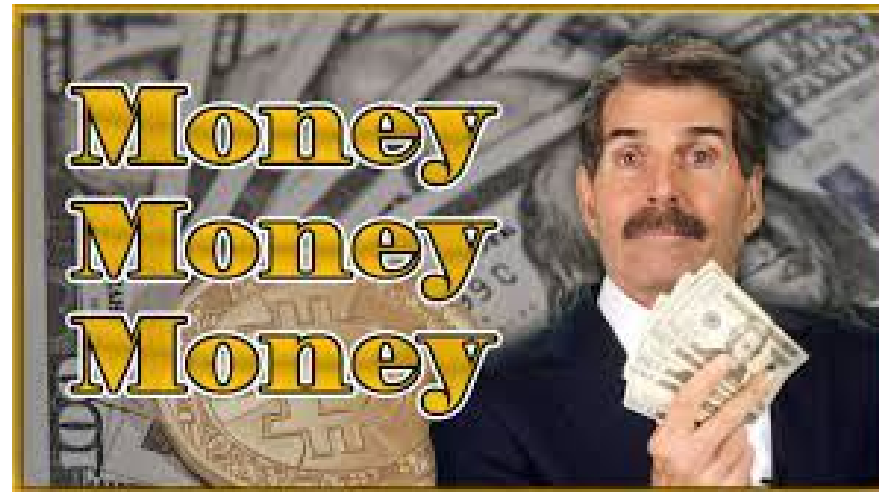
Department of Defense Implements Biden EO Allowing Transgender Persons to Join and Openly Serve in the Military (3/31/21)

- Reverses President Trump's March 2018 EO effectively banning transgender people from openly serving in the military
- Defense Secretary Lloyd Austin "strongly believes that the force thrives when it is composed of diverse Americans who can meet our high standards and that an inclusive force strengthens our military posture."
- Military servants will also have a path to getting DOD-funded medical treatment, including *gender transition procedures*

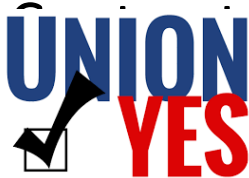



Biden Proposes to Spend \$14.2 Billion on the Department of Labor in 2022 (4/9/21)

- This would be a 14% increase over current annual budget!!!
- Includes OSHA and Wage and Hour Division
- All part of Biden's focus on enforcement against employers



Biden Signs Executive Order Establishing the White House Task Force on Worker Organizing and Empowerment (4/26/21)

- Task Force will be dedicated to mobilizing the federal government's policies, programs, and practices to empower workers to **organize and successfully bargain with their employers**
- Composed of more than 20 cabinet members and the heads of other federal agencies who will take a **"whole-of-government approach to empower workers"**
- VP Kamala Harris is the Chair, and Marty Walsh (DOL Secretary) is the Vice Chair
- Four Goals stated: 1. **Lead by Example**; 2. **Facilitate worker organizing across the country**; 3. **Increase worker power in underserved communities**; 4. **Increase union membership**
- See my article in Pipeline  ers Join  | Quarter for more details

White House Pro-Union Task Force Update

- Goals are to avoid labor friendly changes that require Congressional Action, and to focus on those that can be imposed by presidential or agency actions (E.g., see NLRB developments later in this program)
- Goal is to initiate executive actions by October 23, and to set long term goals too
- Listening session with unions is the main method of communication
- Electronic voting is a topic of discussion
- Amazon election is the subject of discussion by Task Force members



Biden Signs Executive Order Requiring Federal Contractors to Increase Minimum Wage To \$15 (4/27/21)

- By January 30, 2022, all federal agencies must incorporate the \$15 minimum wage into new contract solicitations
- By March 30, 2022, all federal agencies must implement the \$15 minimum wage into (1) new contracts and (2) existing contracts which are extended or renewed after the effective date
- Applies to federal procurements contracts of at least \$10,000 for
 - Procurement contracts for services or construction
 - Contracts for services covered by the Services Contract Act
 - Contracts for concessions
 - Other miscellaneous federal contracts



Biden Calls for Paid Family, Medical Leave (4/28/21)

- In an address to Congress, President Biden touted his American Families Plan, which would provide paid family and medical leave for employees for up to 12 weeks a year
- It would be funded by tax increases, and provide up to \$4000 a month, with a minimum of two-thirds of average weekly wages replaced, rising to 80% for the lowest wage earners
- It would be phased in over 10 years—and cost \$225 Billion



Biden Administration Reverses Trump Ban on LGBT Health Care for LGBT Employees (May 10, 2021)

- Health and Human Services Department announced that it would begin enforcing protections for LGBT Americans in health care again
- It cites the Supreme Court decision in Bostock case, holding that LGBT people are protected from discrimination under Title VII



Biden Moves to Ax Trump Rule On Financial Oversight of Unions (5/26/21)

- DOL's Office of Labor-Management proposed to rescind the Trump-era rule that subjected union funds to stricter transparency requirements
- It claimed that the proposal would not affected its ability to deter corruption in organized labor
- Hah Hah Hah Hah!!!!!!!!!!!!!!!!!!!!



Biden Makes Juneteenth (June 19) a Federal Holiday (6/17/21)

- New Federal Holiday created
- Federal employees get a paid day off with time and one half their regular rate of pay
- Up to private employers on whether to include it as a holiday



Biden Directs the FDC to Curtail the Use of Noncompete Agreements (7/9/21)

- Biden signed a sweeping EO aimed at promoting competition in the economy
- It is simply a recommendation, not law
- He focuses on noncompetes with lower level wage earners—some states already outlaw those



Biden's Federal Judicial Appointments Are Not Likely to Be Employer Friendly

- Appointments are generally diverse, prosecutors, civil rights lawyers or plaintiff's lawyers
- This is no surprise



Biden's Recent Covid Vaccination Related Actions

- On July 29 Biden directed federal employees and onsite contractors to get vaccinated or wear a mask and comply with regular testing
- On August 3, DOJ issued memo opining that private and public employers are not prohibited from mandating COVID-19 Vaccinations that have only received approval for use under an Emergency Use Authorization (EUA)
- On August 18, Biden announced that he will require nursing homes to vaccinate their staff or risk losing Medicaid and Medicare funding, and also announce his intent to recommend booster shots
- August 23, FDA issues full approval to Pfizer Vaccine
- On September 9, Biden issues comprehensive, six pronged national strategy mandating vaccination to several groups



Biden's Recent Covid Vaccination Related Action



- Biden's Plan:
 - Requiring All Employers with 100+ employees to ensure their workers are vaccinated or tested weekly. OSHA ordered to develop a new Emergency Temporary Standard (ETS) to implement this requirement. Predicted to impact 80 million workers in private sector (Still waiting for ETS)
 - Requiring Vaccinations for all Federal Workers and for Millions of Contractors that do business with the federal government (Guidance issued September 24)
 - Requiring Vaccinations for over 17 million health care workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings
 - Calling on Large Entertainment Venues to Require Proof of Vaccination or Testing for Entry
 - Requiring Employers to Provide Paid Time Off to Get Vaccinated (Still waiting for details)
- Is it legal? Some provisions are highly likely to be challenged.

Federal Congressional and Legislative Action



House Passes Pregnant Workers Fairness Act (5/14/21)

- Law would require employers to consider whether they could provide reasonable accommodations to pregnant workers to keep them employed
- It basically adopts the ADA reasonable accommodation requirement
- The bill is supported by many business groups and might have a chance of passage in the Senate too



House Passes Bill to Protect Older Workers (6/23/21)

- The law “Protecting Older Workers Against Discrimination Act (POWADA)” would ease the burden of proof to prove a case of age discrimination
- Current law requires employees to prove age discrimination was the sole factor that led to termination or other adverse actions



Congress Uses Congressional Review act to Undo Trump EEOC Conciliation Rule (6/24/21)

- The rule would have required the EEOC to provide employers with specific information supporting an adverse determination by the EEOC during the conciliation, in order to facilitate settlement
- The Republican members of the EEOC were outraged by this development, since they spent months putting together a rule that was designed to facilitate settlements
- Biden eventually signed it, of course



Senate Blocks Paycheck Fairness Act (6/8/21)

- Law would have imposed tougher standards and bigger penalties on employers over claims of pay discrimination based on sex
- Would have made it much more difficult for employers to defend themselves



The \$3.5 Trillion “Infrastructure” Bill Includes Union/Worker Friendly Provisions

- Among the PRO Act (stalled in the Senate because of filibuster rule) provisions moved into the infrastructure bill currently in the House (through the reconciliation process) are the following:
 - Prohibition of mandatory employee meetings that discuss union organizing
 - Severe fines of executives for committing unfair labor practices—up to \$50K
 - Tax breaks for funding union political campaigns
 - Tax credits for vehicles made with union labor
 - Attacks on independent contractor classification
 - Prohibition of lockouts and permanent replacement of strikers
 - Ban on class action waivers in arbitration agreements
 - \$5M for implementation of systems to conduct electronic voting in union elections
 - Creates taxpayer funded, 12 week paid family and medical leave benefit
 - Drastic increase in amounts of civil money penalties and fines under FLSA and OSHA
 - Mandatory retirement plans or individual retirement accounts or similar plans



Supreme Court Developments



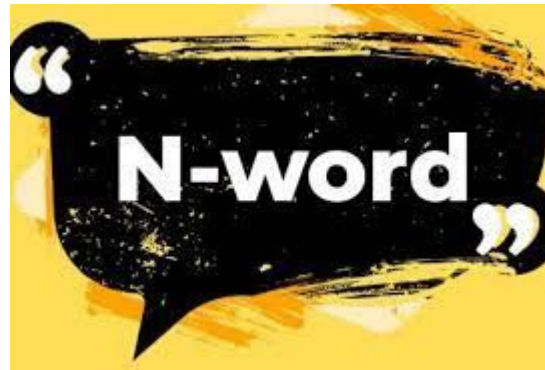
SCOTUS Refuses to Review Religious Accommodation Standard for Undue Hardship (4/5/21)

- Court refused to review a 1977 ruling that defines the term “undue hardship” to mean **anything that has more than a de minimis, or trivial, burden on the employer** when dealing with requests for reasonable accommodation of a religious belief under Title VII
- Important decision, since requests for religious exemptions from mandatory vaccinations are rampant throughout the United States



SCOTUS Refuses to Review 5th Circuit Holding On “N” Word (5/18/21)

- 5th Circuit (Texas, Louisiana, Mississippi) held that use of racial epithets, including “N” word, not sufficient to create a hostile workplace
- Split in Circuits on this issue
- Despite this development, you should NOT allow employees to use racial slurs in your workplace



SCOTUS Leaves Affordable Care Act (Obama Care) In Place (6/17/21)

- Texas sued to have the individual mandate unconstitutional
- 5th Circuit had agreed with Texas
- SCOTUS holds only that Texas and other plaintiffs did not have **STANDING** to bring the suit



SCOTUS Says California Violated the U.S. Constitution By Its Regulation Allowing Union Organizers Access to Agricultural Company Land for Part of the Year to Organize Workers 6/23/21)

- Court holds that this regulation amounts to taking agricultural employers' property without compensation
- Unfortunately, this ruling doesn't directly impact union or employee rights under the National Labor Relations Act
 - For example, if you allow members of the public on your pipeline right of way, union organizers may have a right to access that property



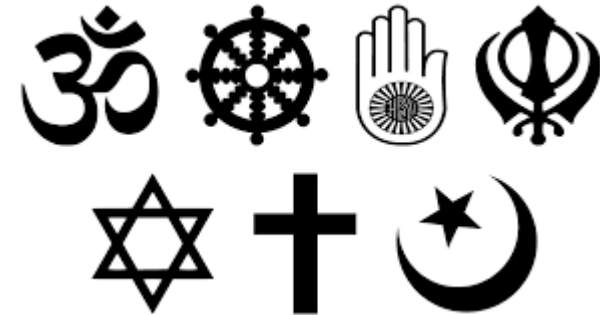
SCOTUS Denies Review of Indiana University's Vaccination Mandate 8/17/21

- Students filed suit, said they were adults who were “entitled to make their own medical treatment decisions and have a constitutional right to bodily integrity, autonomy and of medical treatment choice in the context of a vaccination mandate.”
- Lower courts denied the claim, noting the mandates limited scope and numerous exemptions
- Important signal by the court that mandatory vaccinations are lawful
 - 1905 SCOTUS decision that a state can require all members of the public to be vaccinated against smallpox
- Note: Most lawsuits attacking mandates have failed so far



SCOTUS Docket to Be Interesting—Even Though No Major Employment Law Cases on Agenda

- Roe v. Wade--abortion
- Guns
- Religion



Trump Quote Re Terminating Employees

- “In real life, if I were firing you, I’d tell you what a great job you did, how fantastic you are, and how you can do better someplace else. If somebody steals, that’s different, but generally speaking, you want to let them down as lightly as possible. It’s not a very pleasant thing. I don’t like firing people.” –



State Labor & Employment Laws



State Laws Dealing with Pandemic Issues

- Most states have enacted various laws related to Covid-19 pandemic
- In addition to all of the federal laws in effect, it is essential that you check local laws to ensure compliance
 - Liability immunity laws for Covid related injuries/deaths
 - Bans on mandatory vaccination
 - Unemployment laws
 - Workers Compensation
 - Paid leave
 - Safety requirements that exceed OSHA guidance
 - Bans on imposing fines (surcharges) on unvaccinated employees
 - Pay for time spent on employer mandated requirements
- For resources to assist you in determining relevant state laws, go to www.ogletree.com, and press **COVID-19**

Labor & Employment Law Lawsuits, and Court Decisions/Actions/Settlements Of Interest



Department of Justice Prosecutes First Wage-Fixing Case

- DOJ and executives of a staffing company agree to set criminal trial for December 2021
- The executives are accused of entering into an agreement with a competing staffing company to lower the rates paid to physical therapists for in home care visits in the Dallas/Forth Worth area
- Such agreements violate antitrust laws



California Employee Sues Employer in Federal Court for \$10 Million For Being Terminated Because of Her Participation in the January 6 Capitol Protests

- Employee claims that her participation in the protest was limited to peacefully marching up to the Capitol and taking selfies with police officers
- She had worked for her employer for two decades
- She claims a violation of the good cause provision of her employment agreement and California civil rights law that bans people using threats to interfere with someone's constitutional rights
- Company claims she has no claim, and that her action in being present at the “insurrection” was unacceptable conduct



Walmart Hit With \$125 Million Jury Verdict for Firing Disabled Employee (7/16/21)

- EEOC sued Walmart for alleged ADA violation
- According to EEOC, Walmart changed the schedule of a sales associate with Down syndrome, exacerbating attendance problems for which she was later fired
- Company allegedly did not offer her a reasonable accommodation—this is a big issue for the EEOC
- Verdict will be lowered to \$300,000 in damages, which is the cap under the ADA
- Juries can be sympathetic to disabled employees



Tesla Hit With \$137 Million Verdict in Race Harassment Jury Trial (10/4/21)

- Black former Tesla subcontractor (hired through a staffing company) claims he was subjected to a racially hostile environment at the electric vehicle maker's Northern California
- Testimony by plaintiff and other subcontractors said that the N-word was used daily at the factory and that company failed to take corrective action in response to complaints
- \$6.9 M for compensatory damages. \$130 M for punitive damages, based on jury finding the company's conduct was malicious, oppressive or reckless
- Allegedly-No training of supervisors and no written procedure for coordinating investigations into racial harassment

Black Prostitutes Lawsuit Allowed to Proceed Against the Chicken Ranch Brothel

- 2 black prostitutes filed class action against Chicken Ranch, claiming they were harassed, retaliated against, and otherwise denied equal job rights while working
- Chicken Ranch filed an appeal with the 9th Circuit Court of Appeals, disputing its “employer” status under Title VII, claiming that isn’t an employer under Title VII because it’s a “uniquely Nevada enterprise”
- Ninth Circuit refused to accept the appeal and the case is moving forward



Transgender Walmart Worker Allegedly Called “It” Loses Her Bias Suit

- Federal court dismisses Title VII lawsuit, finding that the conduct described did not create a hostile work environment that justified her resignation as a constructive discharge
- Plaintiff claimed that instead of using her preferred pronouns, her supervisor called her “it”, rolled his eyes at her, and was overly critical of her job performance
- These actions did not rise to the level to state a “constructive discharge” claim



Pennsylvania Attorney General Launches \$20 Million Wage Theft Against Construction Company

- AG describes the case as the largest criminal wage theft case in the nation's history
- Contractor had done \$1.7 Billion in State Contracts, but failed to pay full prevailing wages
- AG: "They fleeced workers to put more money in their pockets"
- Criminal prosecutions for "wage theft" are increasing all around the country



En Banc Fifth Circuit Rules that Day Rate Compensation Does Not Satisfy Requirement of Payment on a Salaried Basis for Exempt Status (9/6/21)—*Hewitt v. Helix Energy Solutions Group, Inc*

- Toolpusher on oil rig who supervised 12 to 14 employees, was paid a day rate of \$963 and earned more than \$200,000 annually
- In a 12-6 opinion by the full Fifth Circuit, it ruled that payment of a day rate does not qualify as payment on a salary basis
- Despite the argument that the oil and gas industry will be adversely impacted, the court said it must follow the law as written regardless of the unjust result
- Lesson: when dealing with the FLSA, you must follow the rules, and if you don't, being generous will come cost you more in back pay
- Note: there are some other rulings contrary to this one



Pipeline Contractor Required to Pay Over \$1 Million in Back Pay and Liquidated Damages

- Department of Labor sued Henkels & McCoy alleging that it
 - Failed to pay non-exempt workers overtime when they worked more than 40 hours in a workweek
 - Failed to include daily “per diems” in the regular rate for overtime when the payments had no relationship to any actual travel or work-related expenses (apparently all or most of workers lived within 50 miles of the job site)
 - Paid operators a daily lump sum characterized as “truck rental pay”, but again failed to include these payments when calculating their overtime pay. The employer allegedly paid this daily lump sum for each day they worked, regardless of whether the operators used their personally owned vehicles for any work-related purposes.



Engineering Company Settles With Pipeline Inspectors In OT Suit

- An Illinois-based engineering firm reached a \$400,000 settlement in a collective action filed by gas pipeline inspectors
- Claim was that the inspectors were misclassified as exempt and were not paid overtime when working over 40 hours
- Salary is required for exempt status
- Wage and Hour states that most inspectors are generally not exempt under the administrative exemption, though some court decisions have allowed the exemption in certain cases



NLRB
Developments
www.nlrb.gov



Acting NLRB General Counsel Peter Ohr Signals Sweeping View of NLRA Legal Protections for Workers (3/31/21)

- Peter Robb, former General Counsel of NLRB, was fired by Biden on the day of his inauguration
- Was immediately replaced by Peter Ohr
- Ohr issued a memo making it clear that the Biden board will apply the NLR protections “vigorously and robustly” in its enforcement actions
 - Health and Safety Issues Related to Pandemic
 - Political and social justice activity
 - Racial discrimination in the workplace
- His rants were affirmed by the new Democrat Chair of the NLRB, Lauren McFerran on May 6, 2021
- See my article in 2d quarter issue of Pipeline Contractors Journal



NLRB Rules that It Cannot Determine Whether Peter Robb's Termination By Biden Was Lawful (4/30/21)

- Board says this issue must be resolved by federal courts, not the Board
- Unanimous decision (3 Republicans; 1 Democrat—Chair)
- Many employers are challenging any actions taken by the new General Counsel as unlawful because of the termination of Robb
- The issue may make it to the US Supreme Court
- As a scary aside, numerous NLRB staffers cheered Peter Ohr appointment as “refreshing” and “good for the country”



NLRB Defends Its Decision That There is No Twitter Exception for Threatening Comments

- Publisher of conservative magazine, The Federalist, posted the following post on Twitter:
 - “FYI@fdrlst first one of you tries to unionize I swear I’ll send you back to the salt mine
- NLRB ruled that it was unlawful threat
- Company is appealing it to a federal appellate court, claiming it was posted as a “joke”
- What you cannot do in communications re unionization: **TIPS**
- You cannot:
 - Threaten
 - Interrogate
 - Promise
 - Spy



Biden Board Plots Worker-Focused Outreach To Educate Your Employees About Unionization

- President's budget for 2022 calls for \$2.1 million to have the NLRB launch programs to inform workers about their rights under the NLRA, including forming unions and requesting that an employer address workplace grievances
- All part of the President's plan to have the most pro-union White House in history



NLRB Rules that Scabby the Rat Can Join Union Protestors (7/21/21)

- 3-1 Ruling, with 2 Republicans agreeing it is not unlawful for unions to use Scabby the Rat and similar balloons in demonstrations at businesses that don't employ those unions' members.
- This decision is contrary to Peter Robb's goal to ban use of Scabby
- Several federal courts have ruled that the use of Scabby was protected by the First Amendment to the Constitution (Free Speech)



Senate Confirms Jennifer Abruzzo as NLRB General Counsel (7/21/21)

- Abruzzo was former staffer at NLRB for 23 years
- Most recently: Special Counsel for Strategic Initiatives for Communications Workers of America (CWA)
- Rest assured, the new GC will be no friend to employers (see discussions to come)



Senate Confirms Biden's Two Nominees to the NLRB (7/29/21)

- Gwynn Wilcox—Union Attorney



- David Prouty—General Counsel For Union Local (SEIU)



NLRB GC Abruzzo Sends Memo to NLRB Regional Directors Targeting Employer Favorable Rulings By Trump NLRB (8/12/21)

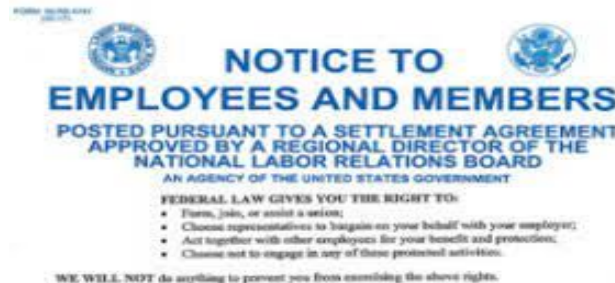
- Employer handbook rules
- Confidentiality Provisions in separation agreements
- Greatly expanding what constitute protected concerted activity
 - Health and safety issues
 - Employee's right to use your email system to organize
 - Increasing restrictions on what employers can say during a union campaign
- Easing the burden of proof in cases against employers
- Greatly expanding remedies for employer unfair labor practices
 - Consequential Damages for Terminations
- Expanding union access to employer private property
- Overturning prior cases by Trump Board finding independent contractor status for workers
- Increasing the bargaining obligations of employers with unions
- Making it easier for unions to lawfully picket and strike

NLRB Achieves 3-2 Democrat Majority on August 30

- William Emanuel's term ended, Prouty joined the Board
- This will not be pleasant for employers
- You need to train your supervisors on the do's and don'ts relating to the National Labor Relations Act
- Remember, you don't have to have a union to violate the NLRA
- Untrained supervisors are your biggest risk in creating liability under this law—We don't want you to be the test case for changing the law!!!
- **GOOD LUCK**

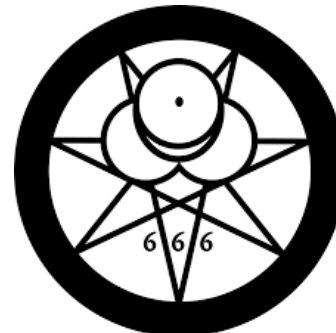
GC Abruzzo Tells Regional Directors to Seek More Money in NLRB Settlements

- In her memo, Abruzzo says that be aggressive in seeking remedies in settlement agreements that are not available under current law
 - If workers suffer other economic consequences, other than lost wages, she wants to include those in settlement agreements
 - E.g. lost insurance, medical expenses, moving expenses, damages to credit ratings, training required to get a new job, liquidation of investment accounts to cover living expenses
- What a way to encourage settlements—please pay all of these extra monetary awards NOW, that you won't have to pay if you lose your case later!!!



Two Recent COVID-19 Related NLRB GC Opinions (9/16/21)

- 1. Employer violated NLRA by barring a worker from raising concerns about pandemic safety on a smartphone messaging app. Trump Board rulings that gave employers broad authority to restrict employee communications on company email system didn't apply to free third-party apps on employees personal smartphone
- 2. Employer could lawfully discipline a worker for emailing coworkers that contained apocalyptic prophecies, Bible verses, and a warning about a “Mark of the Beast” Covid-19 vaccine that would doom a recipients soul



NLRB GC Abruzzo Says College Athletes Are Employees (9/29/21)

- Only private universities are affected
- Misclassifying athletes as students instead of employees should be an unfair labor practice in and of itself
- Yet another signal on the NLRB's general counsel efforts to expand union organizing



Abruzzo says Black Lives Matter Protests and Protests Against Crackdowns on Undocumented Workers Are Protected Activity (10/6/21)

- “Political and social justice advocacy qualifies as a protected activity when it directly connects with workers’ interests as employees. Black Lives Matter and those supporting undocumented workers have the objective goal of mutual aid and protection and concern issues that employers control.”



Trump Quote

- “When you are wronged repeatedly, the worst thing you can do is continue taking it-- fight back! ”



EEOC Developments

www.eeoc.gov



EEOC Chair Says EEOC Will Hire 450 More Staff Members to “Rebuild” Its Workforce

- Part of a push to address systemic discrimination in the workplace
- This might result in less delays in getting the EEOC to make determinations of pending EEOC charges
- One of our clients just received an adverse action letter from the EEOC 5 years after the Charge was filed



EEOC Issues Update Guidance on COVID-19 on May 28, 2021

- Key updates are the following:
 - Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated, so long as employers comply with reasonable accommodation under the ADA (medical exemption) and Title VII (religious exemption)
 - Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily get vaccinated from a third party, so long as the incentives are not coercive
 - If employers choose to get vaccination information from their employees, they must keep the vaccination information confidential pursuant to ADA



EEOC Chair Issues LGBT Restroom and Other Policies (6/15/21)

- Guidance states that employers cannot ban workers from bathrooms or locker rooms that correspond to their gender identity
 - “In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men’s facilities and all women (including transgender women) should be allowed to use the women’s facilities”
- It also addresses **dress codes** and the **use of pronouns**
- It was issued unilaterally by the Chair without a full Commission vote —Commission’s 5 members are 3 Republicans, and 2 Democrats (Chair and Vice Chair); heavily criticized by Republican members
- Texas sued the EEOC on September 20 to block the guidance



EEOC Extends Filing Deadlines for EEO-1 Reports to October 25, 2021

- One of many extensions due to the pandemic—this one is said to be the FINAL DEADLINE
- EEO-1 reports are due for 2019 and 2020
- All employers with 100 or more employees and federal contractors with 50 or more employees must file EEO-1 reports

EEO-1 Report

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EEOC, DOL, OSHA, Wage & Hour Division, Office of General Counsel of NLRB Sign Pact with Mexico to Protect Mexican Workers' Rights While Working in the U.S. (9/3/21)

- It renews a previously existing Memorandum of Understanding
- Protects Mexican workers regardless of their immigration status
- In a virtual event on October 4, Secretary of Labor Walsh noted that DOL investigators are not interested in workers' immigration status when seeking their cooperation to provide evidence of wage violations or dangerous working conditions

"Every worker has the right to raise concerns without retaliation in the U.S., either directly to the Department of Labor or through the Mexican Consulates, to promote the protection of all workers. If you are working in this country, you are guaranteed rights."

—U.S. Secretary of Labor Marty Walsh

dol.gov

Wage and Hour Division Developments

www.whd.gov



Wage and Hour Division Scraps Trump Era Limits on Double Damages In Pre-Litigation Settlements (4/9/21)

- New policy is to return to WHD's policy of pursuing liquidated damages found due upon approval of the Regional Solicitor
- Liquidated damages will not be assessed by WHD where the employer has set forth credible evidence of a good faith defense or where the Regional Solicitor deems the matter inappropriate for litigation.



WHD Launches Essential Workers, Essential Protections Initiative (4/26/21)

- Intended to ensure that employees know about the wage and hour laws that protect them and how to contact WHD to get help
 - FAQs addressing pandemic-related scenarios (discusses compensability of Covid-19 screening activities)
 - National Webinar Schedule
 - WHD Workers' Rights Webpage
- Be prepared for a more employee focused enforcement attitude from WHD during the Biden administration



David Weil Nominated As WHD Administrator (6/3/21)

- Weil was WHD Administrator during Obama administration
- He was a big opponent of gig workers classification as independent contractors, and will be attacking misclassification again
- He wrote a book on the “fissured workplace”, criticizing corporate America’s reliance on staffing companies and independent contractors
- Bottom line: it will be difficult to convince WHD that a worker is an independent contractor under the Fair Labor Standards Act
- He will not be friendly on other issues either



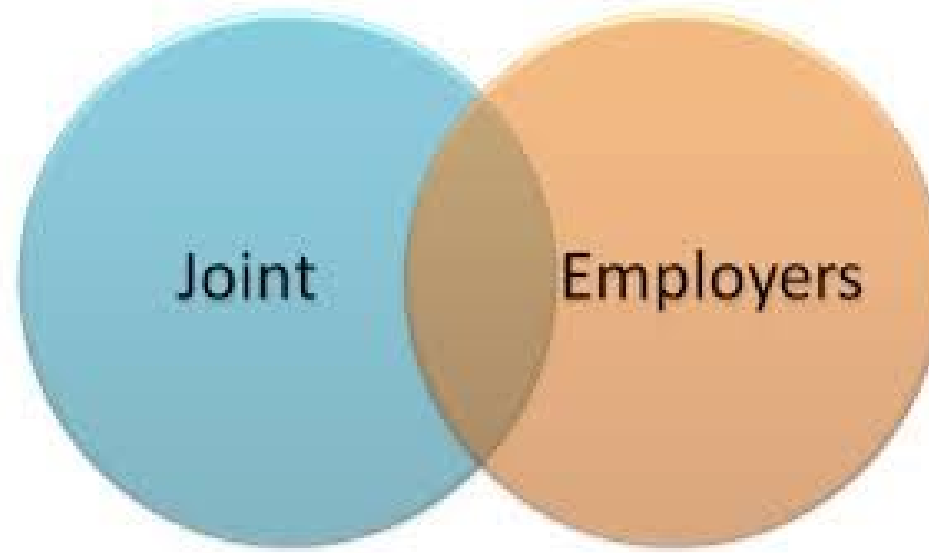
WHD Issues Notice of Proposed Rulemaking To Implement Biden's EO on Minimum Wage for Federal Contractors (7/21/21)

- Among other things, the proposed regs will:
 - Increase the minimum wage for workers performing work on or in connection with covered federal contracts to \$15 per hour beginning on 1/30/22
 - Continue to index the federal contract minimum wage in future years to an inflation measure
 - Ensure a \$15 minimum wage for workers with disabilities performing work on or in connection with covered contracts



WHD Announced an Extension of the Effective Date of the “Joint Employer” Final Rule to October 5, 2021

- The new rule will scrap the Trump Era rule that made it more difficult for agencies and employees to claim that companies were “joint employers” under the Fair Labor Standards Act



OSHA and Safety Developments

www.osha.gov



**Occupational Safety
and Health Administration**

U.S. Department of Labor

OSHA Issues Guidance on Recordability of COVID-19 Vaccine Reactions (4/20/21)

- OSHA says that if employer mandates vaccination as a condition of employment then any adverse reaction to the vaccine is work-related and thus recordable, assuming it is a new case and meets other general recording criteria
- If, however, the employer only recommends the vaccination, OSHA is exercising its enforcement discretion to not consider adverse reactions recordable. However, the vaccination must be truly voluntary, with refusal not having any impact on the employee's job.



President Biden Nominates Doug Parker As Head of OSHA (4/9/21)

- Parker is head of Cal/OSHA, one of the most enforcement focused entities in the U.S.
- Nomination still pending—not on calendar for a vote as of yet.



OSHA's ETS Limited to Health Care (6/10/21)

- After all of the delays, OSHA wound up limiting its first ETS of the year to health care employers



OSHA Issues New COVID-19 Guidance for All Industries Not Covered by ETS (6/10/21)

- OSHA adopts CDC 5/13/21 guidance relating to fully vaccinated employees
- Guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces
- OSHA **recommended** that employers encourage employees to get vaccinated with paid time off to do so, and to also recover from potential side effects from the vaccine.
- Also **recommended**:
 - Instructing unvaccinated and at risk workers who have had close contact with an infected person, and workers showing signs or symptoms, to stay home from work
 - Requiring social distancing and masking for unvaccinated and at risk workers
 - Providing training in a appropriate language that employees can understand
 - Maintaining ventilation symptoms
 - Following CDC guidelines on cleaning and disinfection, and
 - Protecting employees from retaliation and establishing an anonymous system for employees to voice concerns about COVID-19 related hazards
- Other recommendations for special situations



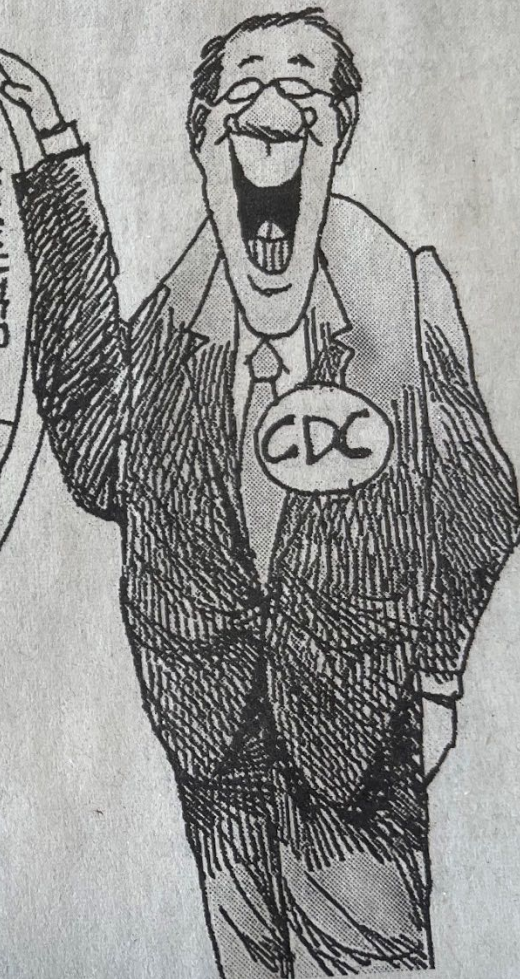
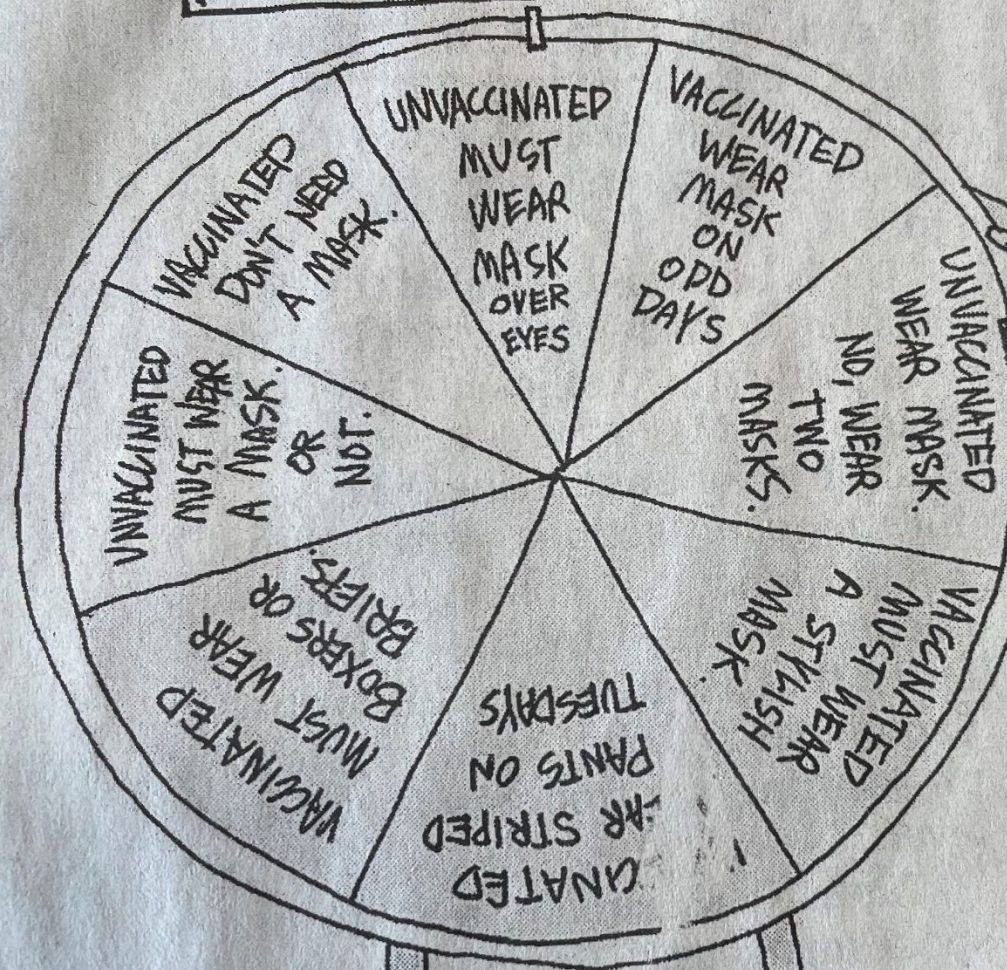
OSHA Updates COVID Guidance Again (8/13/21)

- Bottom line: Follow the updated CDC guidance and keep doing some of the things we told you to do in our last guidance
- Even vaccinated workers should wear masks
- Stay home
- Social distancing
- Provide workers no cost face masks
- Educate workers
- Suggest or require unvaccinated customers, visitors, or guest to wear face coverings in public facing workplaces
- Maintain workplace ventilation systems
- Perform routine cleaning and disinfection
- Record and report workplace Covid-19 infections and deaths
- Implement systems to prevent retaliation



CDC GUIDELINES

AND TODAY'S
SPIN SAYS...



OSHA Now Working on Biden Ordered ETS for All Employers with 100+ Employees

- Mandatory Vaccinations or weekly testing-impacting 80 million workers
- Word is it will be late October before OSHA issues guidelines
- OSHA has refused input from business entities
- GOP Lawmakers are demanding that OSHA suspend its work writing an ETS—calling it a scheme
- Companies violating the ETS could be subject to \$70K fines, and willful or repeat violations could be subject to \$700,000 fines if Infrastructure bill is passed by then



OSHA Announces Enhanced, Expanded Measures to Protect Workers From Extreme Heat (9/20/21)

- Initiative to provide resources to combat heat illness
- Pointing to climate change as one of the causes of increased deaths and illnesses from excessive heat
- It plans on developing a standard, to have something more specific than the general duty clause
- On September 30, OSHA announced that is moving towards rule making, and sent it to White House for review



OSHA Seeks to Revive Obama-Era Injury and Illness Electronic Reporting Mandate (10/1/21)

- On October 1, 2021, OSHA submitted its proposal to the White House to mandate electronic reporting of OSHA injury and illness forms by employers with at least 250 employees
- This reverses Trump-Era negating the electronic reporting requirement
- Unions and worker advocacy groups supported the Obama rule enacted in 2016, but business groups largely objected to having their safety and health records made public



Trump Quote

- “As long as you are going to be thinking anyway, think big.”



General Department of Labor Developments



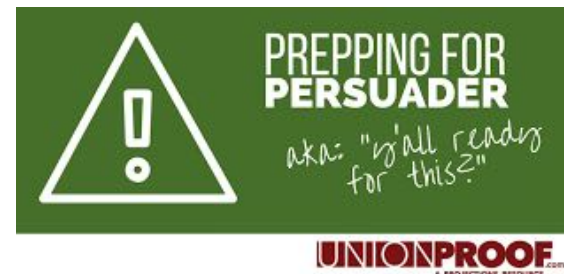
DOL Intensifies Anti-Bias Enforcement of Government Contractor Compliance



- OFCCP has stepped up its enforcement and investigations of government contractor compliance
- My partner who handles government contractor issues, says the investigators are “very deliberate” and “more intense”
- New OFCCP head, Jenny Yang, is behind this change
- On October 4, OFCCP announced that it had brokered upward of \$3.3M in settlements resolving discrimination allegations against 8 federal contractors, including pay discrimination against females and Asians, and race discrimination in hiring,

DOL Explores Redo of Obama Union-Avoidance and Persuader Reporting Rule

- This was the rule that required our labor law clients to file public reports with the federal government annually, showing how much in legal fees they had spent on getting advice to assist with union avoidance efforts
- This rule was thrown out by a Texas federal court, in a lawsuit handled by Ogletree
- It is also part of the PRO Act, passed by the House
- American Bar Association points out that the rule violates the attorney client privilege
- Nonetheless, here we go again!!!!



Secretary of Labor Marty Walsh Is Pushing to Hire More Federal Investigators at Wage and Hour Division and OSHA (7/14/21)

- Walsh asked Senate Appropriations subcommittee for funding to double the number of OSHA inspectors by the end of Biden's term and to staff up Wage and Hour Division
- He claims that DOL is down about 3000 employees from where it was 4 years ago



Organized Labor Developments



Amazon Wins Union Election At Its Bessemer, Alabama Location (4/9/21)

- Eligible Voters: 5876
- Mail Ballot Votes Cast for the Union: 738
- Mail Ballot Votes Cast Against the Union: 1798
- Number of Challenged Ballots: 505
- Objections have been filed by the Union—Still no outcome



AFL-CIO President Richard Trumka Dies at 72

- President of AFL-CIO since 2009



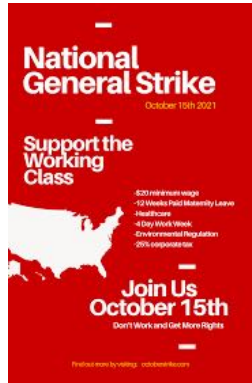
Liz Shuler Elected as New President of AFL-CIO (8/21/21)

- First Woman to Lead the AFL-CIO
- Secretary-Treasurer of AFL-CIO since 2009
- Term is until June 2022



A National “General Strike” Has Been Called for October 15, By “Labor Movement X”—Mostly Social Media

- Using Social Media to ask workers to strike
- Issues:
 - Zero federal laws providing paid time off for maternity leave
 - Unemployment rose to 14% in 2021 because companies refused to raise wages
 - Federal minimum wage has not been raised since 2009
 - Average American is in debt
- Goals:
 - 25% corporate tax rate
 - Free Healthcare for all
 - 12 weeks paid maternity and paternity leave
 - \$20 minimum wage
 - 40 day work week
 - Stricter Environmental Regulations on Corporations





Miscellaneous

Vaccination Issues—IT'S COMPLICATED!

- Political Views
- Socioeconomic Views
- Regional Views
- Misinformation
- Evolving Information
- What is “science”
- Ambivalence
- Distrust

Religious Views

Pre-COVID Vaccination resistance

Fear

“Bodily autonomy”

Frontline health workers views

“Natural immunity” view

Fake vaccination cards

Canned questionnaires

DOJ and HHS Say That COVID-19 Long Haulers May Be Entitled to ADA Job Protections

- Guidance issued on July 26
- Persons with long term COVID-19 symptoms/complications should be considered as disabled under the ADA



Biden Administration Survival Kit



- Train your supervisors on labor and employment law do's and don'ts
 - Union avoidance
 - Discrimination Issues
 - Harassment Issues
 - Retaliation Issues
 - Investigations and termination best practices
- Do a Wage and Hour Audit of your pay practices—WHD will be active
- Review and update your employee handbook and written policies
- Review the employment laws of each state you do work in to ensure that none of your employment practices are in violation of state law
- Establish a system where employees can alert management about problems
- Listen to your employees when they make suggestions
- Lead by example
- Stay tuned with the many expected pro-workers, pro-union changes in the law—If you would like to subscribe to our resources and get our updates, please send me an email

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Greg Guidry is a shareholder in Ogletree Deakins, an international law firm that represents employers on labor and employment matters. Greg handles all aspects of labor and employment law for employers throughout the United States, including union avoidance, collective bargaining, defending discrimination and wage and hour claims, providing advice to employers on workplace issues, and training managers on effective and legal practices. Greg has successfully represented pipeline industry employers, including APCA members, for many years and has presented legal updates at every APCA meeting for decades. He is a top rated labor and employment attorney, including being a member of the very selective national College of Labor and Employment Lawyers, a Super Lawyer in labor and employment law, and he has been selected as the Best Lawyers “Lawyer of the Year” in labor and employment law in the New Orleans area on several occasions, including 2021 and 2022.