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# 2022 Labor & Employment Legal Update

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*A wider lens on workplace law*

# Today's Agenda

- COVID-19 & OSHA
- Diversity, Equity, and Inclusion Trends
- President Biden's Administration
- Agency Update
- DEI Trends
- Hot Topics in Employment Law
- Notable Cases and Litigation



# COVID-19: Where Are We Now and What Are We Still Facing?

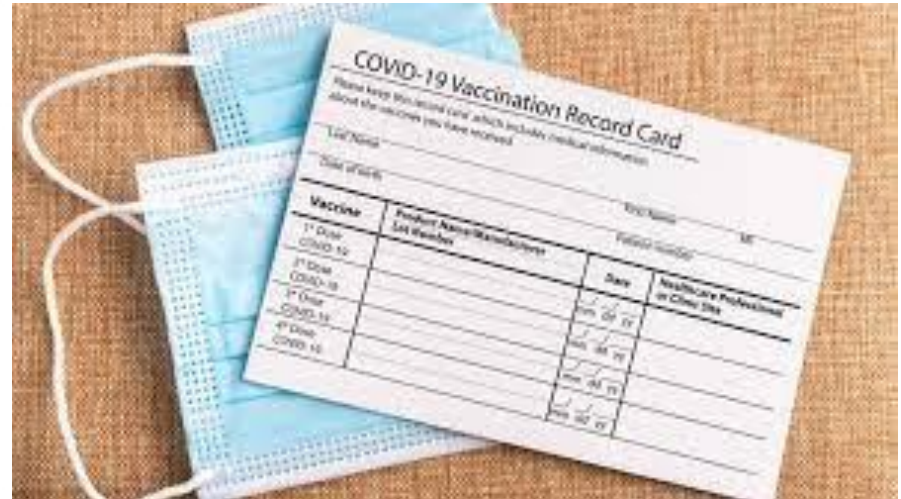
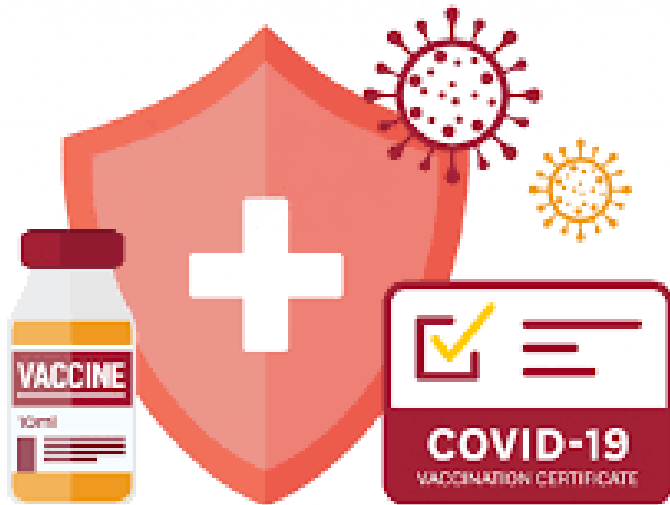


# What Are Employers Facing?

- The higher than normal rates of resignations and reshuffling will continue.
- Inability to find replacements – recruitment problems.
- Many employees are leaving their jobs due to a perceived poor work environment or better opportunity at other locations.



# COVID-19 and OSHA



# OSHA's COVID 19 Vaccination Mandate



- The U.S. Department of Labor's Occupational Safety and Health Administration withdrew the vaccination and testing emergency temporary standard issued on Nov. 5, 2021, to protect unvaccinated employees of large employers with 100 or more employees from workplace exposure to coronavirus.
- The withdrawal was effective January 26, 2022.
- The Supreme Court had sent the litigation back to the Sixth Circuit after it stayed the ETS on January 13, 2022.



# OSHA's Informal Hearings on a Final Healthcare Standard for COVID-19

- On March 22, 2022, OSHA reopened the rulemaking record partially and scheduled an informal public hearing to seek comments on specific topics that relate to the development of a final standard to protect healthcare and healthcare support service workers from workplace exposure to COVID-19.
- The hearing began on April 27, 2022 and continued through May 2, 2022.
- The agency is reopening the rulemaking record to allow for new data and comments on topics, including the following:
  - Alignment with the Centers for Disease Control and Prevention's recommendations for healthcare infection control procedures.
  - Additional flexibility for employers.
  - Removal of scope exemptions.
  - Tailoring controls to address interactions with people with suspected or confirmed COVID-19.
  - Employer support for employees who wish to be vaccinated.
  - Limited coverage of construction activities in healthcare settings.
  - COVID-19 recordkeeping and reporting provisions.
  - Triggering requirements based on community transmission levels.
  - The potential evolution of SARS-CoV-2 into a second novel strain.
  - The health effects and risk of COVID-19 since the ETS was issued.



# President Biden's Administration





# President Biden and the Workplace



- More protections for workers
- Expansion for the types of workers that are considered employees
- More difficult to classify workers as independent contractors
- Expand the definition of “joint employer”
- A permanent, national paid family and medical leave program that would apply to all employers
- Redefine benefits to be more inclusive
- New guidelines for workplace safety
- Increasing record keeping and reporting
- Lowered standard to establish an unfair labor practice



# AGENCY UPDATE



# EEOC Update

- Charlotte A. Burrows - Current Chair
- Focus
  - Combat harassment
  - Foster pay equity
  - Advance diversity and inclusion
- Outreach
  - Native Americans
  - Vulnerable immigrant/migrant communities
  - Other traditionally underserved populations



# EEOC Update

- Change is coming
  - Democrats regain the majority in July 2022
  - Anticipated targets
    - Sexual harassment guidance
    - Wage payment information
    - Wellness regulations
- Charges Filed
  - Total Charges FY 2021 – 61,331
    - Race – 20,908
    - Sex - 18,762
    - Disability – 22,843
    - Age – 12,965
- Lawsuits
  - 2020 – 97 lawsuits
  - 2021 - 114
- Recovery
  - \$484 Million Fiscal Year 2021



# EEOC Initiatives

- Three identified programs
  - E-Race
    - Improve efforts to address race & color discrimination
    - Improve strategies for processing and litigating these claims
  - LEAD – Leadership for the Employment of Americans with Disabilities
    - Address declining number of employees with disabilities in the federal workforce
    - Address those with severe disabilities
  - Youth@Work
    - National education & outreach program to promote equal opportunity



# Religious Claims

- EEOC has identified as a priority going forward
  - Kroger grocery store
    - EEOC filed suit over claims it required employees to wear aprons with rainbow hearts
    - Refused any accommodations
    - Asked for other apron or to cover up the heart
    - Kroger denies it references LGBTQ rights
    - Does an employer have to accommodate a sincerely held belief even if it is inaccurate?



# Covid - What is the EEOC Doing?

- ***EEOC v. ISS Facility Services, Inc.***
  - Employee with pulmonary condition denied ability to work remotely two days a week once employees returned to in-person work
- ***EEOC v. U.S. Drug Mart d/b/a Fabens Pharmacy***
  - Employee with asthma harassed for requesting to wear a mask
- ***EEOC v. 151 Coffee, LLC***
  - Employer refused to let two baristas with disabilities return to work until a vaccine was developed



# ADA & Covid-19

- Can Covid-19 result in a disability?
  - EEOC Guidance – December 2021
  - Three disability definitions
    - Physical/mental impairment
    - Employer's perception of disability
    - Worker's record of impairment
  - Case by case basis
    - Flu like symptoms – no
    - Long-haul Covid-19 – “certain circumstances”
  - Retaliation





# U.S. Department of Labor



- 2022 changes
  - Hiring 100 new investigators in the near future
    - More hiring to come later in the year
  - Pact with NLRB to share information about potential violations
  - Tougher approach to joint employer issues
  - More enforcement efforts
    - WHD recovered \$234.3 million in back wages
    - Drop of \$23.5 million from 2020



# NLRB: Who's In Charge?

- Biden Board
  - John Ring (12/16/22) (R)
  - Marvin Kaplan (8/27/25) (R)
  - David Prouty (SEIU NY GC)
  - Gwynne Wilcox (Levy Ratner Union Law Firm)
  - Laura McFerrin (CHAIR)
- Biden 2.1 million to Board Budget for outreach and education
- DOL Persuader Rules



# NLRB: Who's In Charge?

- GC Jennifer Abruzzo
  - Former CWA GC
  - Extremely Pro-Union
  - Extremely Expansive View of NLRA
  - 50/50 Vote in Senate



# Unprecedented Inter-Agency Coordination

- NLRB announced it would strengthen information sharing, investigation, enforcement, training, and outreach efforts with:
  - EEOC;
  - OSHA & MSHA;
  - OFCCP;
  - Office of Labor-Management Standards; and
  - DOL's Wage and Hour Division.



# Unprecedented Inter-Agency Coordination

- Abruzzo also announced partnerships with:
  - Internal Revenue Service;
  - Dept. of Justice's Antitrust Division; and
  - Federal Trade Commission
  - Dept. of Homeland Security
  - Employee Immigration Rights Section at DOJ



# General Counsel Memo - August 12, 2021

- 40 Trump Era and Older Decisions Identified For Review and Replace
- Most Radical Change in Law in 60 Years

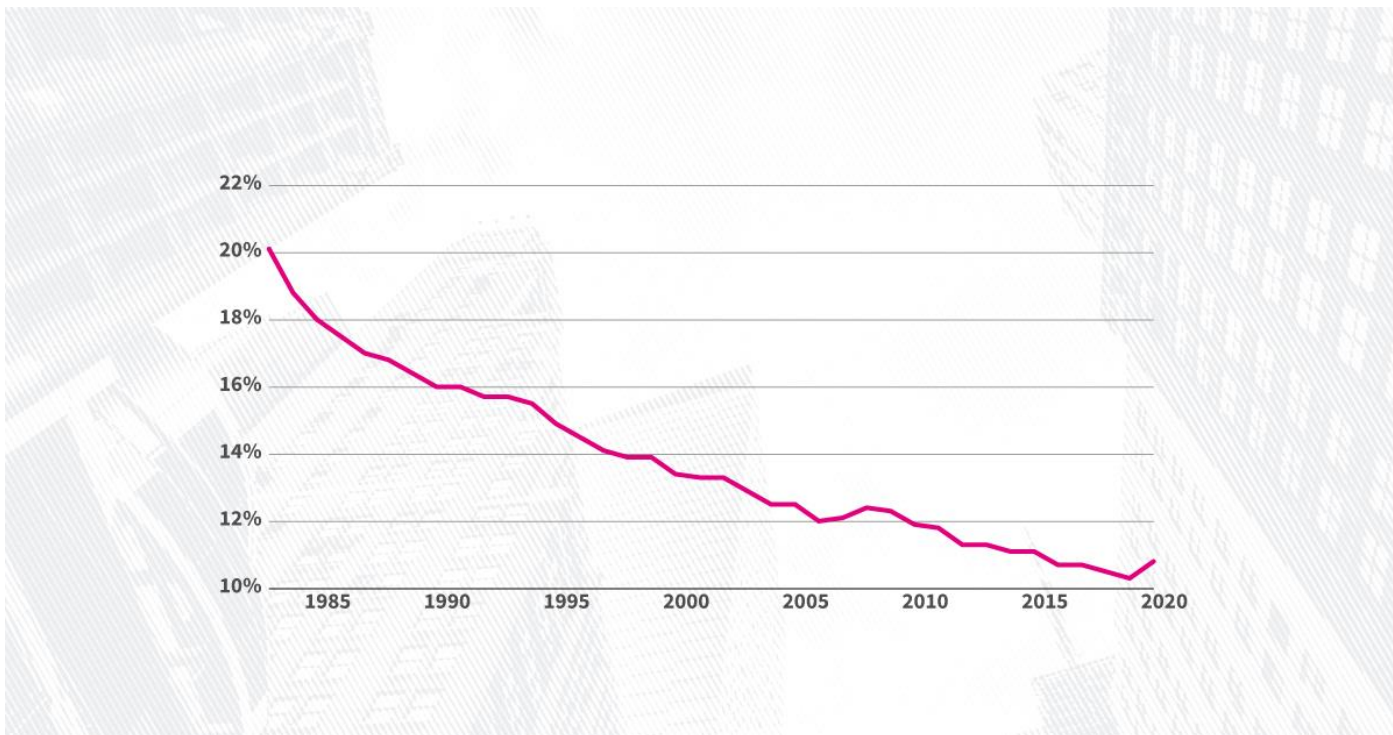


# NLRB/Union Agenda



# National Labor Relations Board – Union Membership

- Union Membership
  - Despite rising popularity - decreasing numbers





# NLRB/Union Agenda

- Organizing Assistance
  - Bargaining Orders
  - Micro-Units (Carve Out Easier Units)
  - ULP Penalties (Limit and Chill Employer Actions)
  - Bargaining (Eliminate Employer Bargaining Leverage)
- Strengthen Bargaining
  - First Contract Interest Arbitration
  - Injunctions for Violations
- Strengthen PCA
  - Review your handbook!



# Diversity, Equity, and Inclusion Trends



# What Do these DEI Trends Address?

## A Multigenerational Workforce

- The workforce is aging and changing considerably.
- There are now five, or more, generations in the workplace ranging from:
  - The Silent Generation (those born between 1928 and 1945 with some still holding down full or part-time jobs)
  - Baby Boomers (born between 1946 and 1964)
  - Generation X (born between 1965 and 1980)
  - Millennials or Generation Y (born between 1981 and 1996)
  - Generation Z (born since 1997).
- With so many different generations comes distinct employee expectations around topics such as:
  - Reskilling/upskilling in the age of automation
  - Holistic employee wellness programs (with a fine point on mental wellness)
  - Connecting work to social impact and purpose
  - Flexible work arrangements
  - Social media within and outside the workplace



# Biden Administration Gender Initiatives and Legislation

- **Transgender Protections**
- Beginning on **April 11, 2022**, The Department of State all U.S. citizens will be able select an “X” as their gender marker on their U.S. passport application.
- As of **March 31, 2022**, Delta and United already offer a third gender marker option in their travel-reservation systems, with a third air carrier planning to offer this option in the Fall of 2022.
- The First White House Proclamation for Transgender Day of Visibility was issued on **March 31, 2021**.



# The Department of Labor and Gender Identity

- The Department of Labor is enforcing discrimination prohibitions in workforce development programs funded by the **Workforce Innovation and Opportunity Act**, protecting workers from discrimination based on their gender identity or transgender status.
  - The Workforce Innovation and Opportunity Act (WIOA) is designed to help job seekers **access employment, education, training, and support services to succeed in the labor market**



# The U.S. Equal Employment Opportunity Commission and Gender Identity

- The U.S. Equal Employment Opportunity Commission (EEOC) will **promote greater equity and inclusion for members of the transgender community** by giving individuals the option to select an **“X” gender marker** during the voluntary **self-identification questions** that are part of the intake process for filing a charge of discrimination.
- New actions to expand the **collection and use of sexual orientation and gender identity (SOGI) data.**



# Hot Topics in Employment for 2022



# COVID 19 Issues in the Workplace

- COVID-19-related litigation regarding vaccine mandates, disability-related and religious accommodations, remote-work rules, unemployment, and wage.





# Privacy

- Privacy & productivity concerns with remote working, considerations for how employers monitor productivity without breaching privacy and confidentiality issues will become a bigger issue.



# Paid Family Leave



- The expectation among many state and federal legislators is that attention to paid family leave will only increase.
- Paid family leave laws and coverage have increased over the past few years in addition to a push for a federal mandate for paid family leave.
- Paid family leave provides eligible employees job-protected, paid time off to bond with children (newborn, fostered, or adopted), care for ill family members, and assist loved ones for care during military deployments.



# Mental Health Days

- Many companies in 2021 started offering mental health days for employees. This was in large part due to the stressful effects of the pandemic and a continued trend of remote working.
- Questions are arising about how these days will be counted.
  - Are employers compensating workers for these days?
  - How many days should employees be given and for how long?



# New and Amended Statutes

## •Kansas

- **HB 2001.** This law permits employees to submit a written waiver request to their employer if that employer requires the COVID-19 vaccine.
- The employer is instructed to grant that request if (1) the vaccine is injurious to the employee's health or the health of an individual who lives with the employee, or (2) if receiving the vaccine would violate the employee's sincerely held religious belief.
- Employers are not permitted under the law to inquire as to the sincerity of the individual's religious belief.

## •Missouri

- **Minimum Wage.** As of January 1, 2022, minimum wage is set as \$11.15 per hour. In 2023, it will increase to \$12 per hour.
- **Domestic Violence Leave Law.** Effective August 28, 2021, an employer with between 20 and 49 employees must provide at least one week of unpaid leave per year to employees for domestic violence or sexual violence reasons.
- Employers with 50 or more employees must provide at least two weeks of unpaid leave per year for the same reasons. See Mo. Rev. Stat. 285.630.



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# New and Noteworthy Court Decisions



# New U.S. Supreme Court Justice

- Justice Ketanji Brown Jackson
- On February 25, 2022, President Joe Biden nominated Judge Ketanji Brown Jackson to become the 116th Associate Justice of the United States Supreme Court.
- On April 7, 2022, a bipartisan group of Senators confirmed Judge Jackson's nomination.



# Uniformed Services Employment and Reemployment Rights Act Cases

## *Quiles v. Union Pacific Railroad*

- Court granted judgment as a matter of law to Employer because Plaintiff failed to show that Union Pacific failed to place him in the position that he would have been had he not been deployed
- Company underwent a reduction in force and reorganization and Plaintiff's position was eliminated
- New position that Plaintiff said he should have been placed in required at least 5 years of field experience, which he did not have



# Age Discrimination

- *Seastrand v. US Bank* (10<sup>th</sup> Cir.)
  - Employee with good performance reviews
  - “Profitable Employee” that helped close \$1 billion loan
  - Terminated for showing “poor judgment”
  - Reaffirms position that the court will not second-guess a company’s “business judgment”





# Age – Mixed Motive

- *Lowe v. Walbro LLC* (6<sup>th</sup> Cir.)
  - Terminated for performance and eliminated his managerial position
  - Termination for “a culmination of a series of things”
  - No negative job reviews/no actual feedback for 2 years
  - Termination meeting allegedly told -
    - You’re kind of getting up there in years
    - You’re at retirement age
    - You go one way and the company’s going the other
  - Fired for both legitimate and illegal reasons



# FMLA

- *Evans v. Cooperative Response Center, Inc.* (8<sup>th</sup> Cir.)
  - Does a company have to tolerate frequent and unplanned medical leave under the FMLA?
  - Job required consistent attendance
  - More lenient schedule would not have allowed her to fulfill her obligations
  - Argued that the office ran “swimmingly” in her absence
  - Attendance was not a necessary duty
  - SCOTUS declined to hear the case



# Retaliation - Sellars v. CRST Expedited, Inc. (Eighth Circuit)



- Holding: although many employees actually did receive less pay during investigations after reporting harassment, the standard pay policy did not amount to retaliation *per se*. The policy applied no matter the gender of the complainant, and even applied in situations such as a safety investigation for unsafe driving.
- Impact: the Eighth Circuit still has yet to find an employer's policy retaliatory on its face.



# Arbitration - Morgan v. Ferrellgas, Inc. (Eighth Circuit)



- Holding: because the arbitration agreement broadly covered any dispute arising out of the employment relationship of the parties, and because the former employee alleged that the non-signatory officers acted on behalf of the employer, it could be enforced by non-signatory officers.
- Impact: broad, all-encompassing arbitration agreements related to employment can be enforced by both the employer and by individual employees or officers who acted on behalf of the employer.



# ADA - Brown v. Austin (Tenth Circuit)



- Holding: regular, in-person attendance during core work hours was an essential job function for this employee, and allowing him to work flexible hours or work remotely more often would have meant eliminating essential job functions. These were not reasonable accommodations.
- Impact: even as remote work has drastically increased, there may still be times when office workers can be expected to regularly attend work in person. The Court here notes that at the time employee requested these accommodations (in 2012), the files the employee needed for his job were physical, hard-copy files. It is possible the outcome would be different in today's climate, where most office work can be done remotely.



# Retaliation - Reznik v. inContact, Inc. (Tenth Circuit)

- Holding: an employee alleging retaliation for opposing what the employee believed was discrimination does not need to have opposed legal discrimination. The employee just needs to have a subjective belief that it is discrimination, and that belief must have been objectively reasonable.
- Impact: this case serves as a good reminder for employers that even if reported discrimination does not meet the legal requirements for discrimination, the reporting employee still could make a claim for retaliation.



# Whistleblowers - Yount v. Keller Motors, Inc. (Missouri)



- Holding: This case under the Missouri Whistleblower Protection Act deals with several matters of first impression.
- First, the WPA distinguishes between a wrongful discharge claim against employees and a wrongful discharge claim against the employer because of the acts of those employees.
- Second, a plaintiff who pleads that he reported unlawful acts of coworkers to his supervisors adequately pleads serious misconduct of employer for a WPA claim.
- Third, the trial court erred when it concluded that a plaintiff who reports unlawful activities of coworkers to his supervisors was not a “protected person” under the WPA.
- Impact: the WPA has a broader impact now, covering more sweeping conduct by a whistleblower.



# Arbitration - Johnson v. Menard, Inc. (Missouri)



- Holding: where an employer retained unilateral, unfettered ability to modify or revoke promise to arbitrate, the promise to arbitrate was illusory and the agreement was unenforceable.
- Impact: employers must be careful not to retain entirely unfettered discretion to amend their arbitration agreements, because then they are at risk of having those agreements invalidated because the promises are illusory.





# Retaliation - Martley v. City of Basehor, KS (Kansas)

**CRIMINAL  
INVESTIGATION**

- Holding: the initiation of a criminal investigation can sometimes be an adverse action to state a claim for retaliation, but there must be concrete harm to reputation or future employment prospects.
- Impact: if you as an employer initiate a criminal proceeding or investigation against an employee or a former employee, prepare for the possibility that they may claim retaliation.



# Questions



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