

What a Difference a Year Makes: the Impact of COVID-19 and the Biden Administration on Key Employment Issues

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Overview

- COVID-19 Issues
- Expected Biden Administration Changes
- Employment Litigation Trends
- 2020-2021 United States Supreme Court Preview
- Questions & Answers



COVID-19 Issues

COVID-19 Issues

American Rescue Plan - Paid Sick & Paid Family Leave under FFCRA

- Extends payroll tax credit for employers through September 30, 2021
- Paid sick or paid family leave is now discretionary
- Increases wages for which employers may claim credit from \$10,000 to \$12,000
- Additional qualifying reasons for paid leave:
 - Receiving the COVID-19 vaccination;
 - Recovering from effects of getting the COVID-19 vaccination; or
 - Seeking or awaiting the results of a COVID-19 test because:
 - The employee was exposed to COVID-19; or
 - The employer requested the COVID-19 test or diagnosis

COVID-19 Issues

American Rescue Plan - Paid Sick & Paid Family Leave under FFCRA

- **Paid Sick Leave**
 - An additional 10 days through September 30, 2021
 - Employees still eligible for additional 10 days even if they have previously exhausted the 10 allotted paid sick days
- **Expanded Paid Family and Medical Leave**
 - Emergency family and medical leave now includes all of the qualifying reasons that would support emergency paid sick leave
 - Still paid at 2/3 of employee's regular rate of pay
- **Non-Discrimination Provisions**
 - Increased enforcement provisions to ensure no discrimination of employees opting to take the leave

COVID-19 Issues

American Rescue Plan

- **Extension of Pandemic Unemployment Assistance (PUA)**
 - Extension runs through September 6, 2021
 - Most individuals who qualify will continue to receive \$300 per week in benefits + the state unemployment benefit amount in which they qualify
 - Extends the number of weeks which individuals can receive benefits from 24 to 53
 - Provides some safe harbors for accidental overpayments that have previously occurred

COVID-19 Issues

American Rescue Plan

- **COBRA Provisions**

- Requires employers to subsidize 100% of the cost of COBRA and comparable state continuation coverage for “assistance eligible individuals” from April 1, 2021 to September 30, 2021
- Cost of COBRA subsidy to employer will be offset by a payroll tax credit
- Refundable if the credit exceeds the amount of employer’s payroll tax
- KEY TAKEAWAY: Requires employers to look back to November 1, 2019 and identify who:
 - Is currently on their COBRA coverage because of an involuntary termination or reduction in hours; and
 - Did not elect COBRA coverage or had coverage discontinued
- Employers must then determine the remaining length of the individual’s maximum coverage and send required notices to employee by May 31

COVID-19 Issues

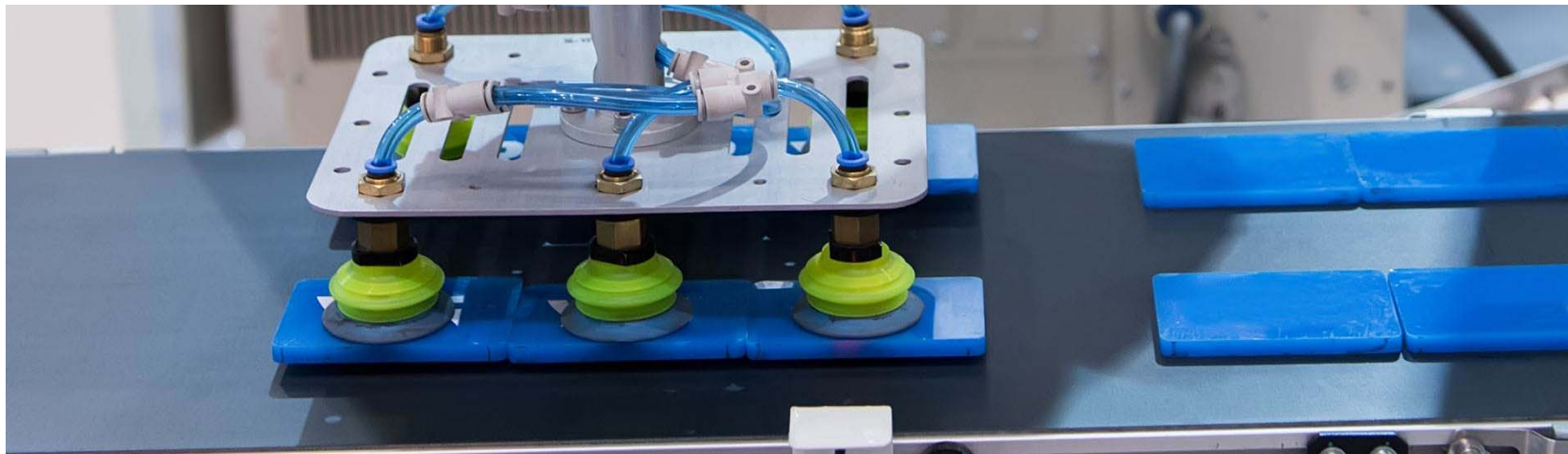
COVID-19 Vaccination

- **Can an employer make COVID-19 vaccination a condition of employment?**
YES! But...
 - Can an employer fire an employee for refusing to get vaccinated?
 - Short answer: **Yes**.
 - Can an employer require certain segments to get vaccinated?
 - Short answer: **Yes**.
- **Employer liability concerns**
 - No broad employer liability shields included in any COVID-19 relief legislation at the federal level
 - Existing FDA law may shield employers from statutory and tort causes of actions due to vaccine

COVID-19 Issues

COVID-19 Vaccination

- **Employer Legal Risks**
 - Workplace Safety Concerns - OSHA
 - Sincerely Held Religious Beliefs - Title VII
 - Disability Considerations - Americans with Disabilities Act (ADA)



COVID-19 Issues

COVID-19 Vaccination

- **Best Practices**
 - **Prepare Vaccination Policy**
 - No policy
 - Strongly encourage vaccination
 - Require vaccination
 - **Consider De Minimis Incentives for Vaccination**
 - **Determine what, if any, documentation will be required to evidence vaccination**
 - Concerns with “confidential medical records”
 - **Distribute communications to employees about vaccination and confidentiality**
 - **Encourage vaccination at the very least**

COVID-19 Issues

Return to Work

- Workplace Safety
 - Comply with local capacity restrictions, if any
 - Employee screening procedures
 - Employee exposure notifications and procedures
 - Determine required levels of PPE
 - Employee vaccination policy
- In-person vs. remote vs. hybrid work models
- If returning to in-person workplace, consider the following:
 - How will the employer handle objections to returning?
 - Employees in high risk categories
- Review, update, and implement new policies
- Produce clear and confident communications to employees

CHECK-IN POLL

This is required for Kansas and Nebraska CLE credit.

Expected Biden Administration Changes

Expected Biden Administration Changes

Diversity & Inclusion

- **The Equality Act**
 - Prohibits discrimination on the basis of sexual orientation and gender identity with respect to employment, housing, education, and public accommodation
- **Revocation of Executive Order 13950**
 - EO 13950 prohibited contractors and recipients from including certain “divisive concepts” in their diversity and inclusion, harassment, and related equal employment opportunity training



Expected Biden Administration Changes

Paid Family and Medical Leave + Equal Pay

- **Federal Paid Family and Medical Leave**

- Many states and cities have enacted their own paid family leave and/or paid medical leave during 2020 and 2021.
- American Families Plan
 - 12 weeks of paid parental, family and sick leave

- **Federal Equal Pay Laws**

- Paycheck Fairness Act
 - Limit disparities in pay to bona fide objective factors, such as education, training or experience
 - Prohibit employers from restricting employees from discussing wage information
 - Require companies to report compensation data correlated to employees' race, sex, and national origin

Expected Biden Administration Changes

Wage and Hour Issues

- **Increase of Federal Minimum Wage to \$15.00 per hour**
- **Enforcement of Wage Theft Provisions of FLSA**
 - Enforce existing provisions and add to FLSA provisions
 - Increase pay transparency
 - Increase penalties for wage theft, retaliation
- **Independent Contractor Classifications**
 - Cancelling President Trump's Independent Contractor Rule
 - Return to the fact-intensive "economic realities test"
- **Many FLSA Opinion Letters Rescinded**

Expected Biden Administration Changes

Pro-Union Policies

- **Protecting the Right to Organize (PRO) Act**
 - Significant changes to the National Labor Relations Act (NLRA)
- **Collegiate Level Unions**
 - NLRB withdrew pending rule blocking graduate school student unions
 - *NCAA v. Alston*
 - United States Supreme Court will decide whether the NCAA's prohibition on competition for college athletes violates federal antitrust laws
- **Reversing Trump era NLRB regulations and decisions**
 - Return to *Browning-Ferris* rule for joint employers — indirect control

Expected Biden Administration Changes

Elimination of Employee Waivers

- **Forced Arbitration Injustice Repeal Act**
 - Legislation to eliminate use of pre-dispute arbitration agreements in the employment, civil rights, consumer and anti-trust contexts
- **Elimination of class-action waivers**
 - President Biden has stated he would sign legislation prohibiting employers from seeking class and collective action waivers in the employment context
- **Limit enforceability of non-compete agreements**
 - Prohibit non-compete agreements with the exception of those “that are absolutely necessary to protect a narrowly defined category of trade secrets”
 - Eliminate no-poaching agreements

Employment Litigation Trends

Employment Litigation Trends

EEOC Claims

- While government agencies, such as the DOL and EEOC, brought fewer actions in 2020 than in previous years, employers should expect increased enforcement and increased litigation by the Biden Administration
- **EEOC's Fiscal Year 2020 Enforcement and Litigation Data**
 - 67,448 charges filed
 - Down from 72,675 in 2019
 - Retaliation claims made up 55.8% of all charges filed (up from 53.8% in 2019)
 - Followed by disability, race, and sex
 - 70,804 charges resolved; increasing resolution rate to 17.4%
 - EEOC secured a record amount of recovery: \$535 million
 - Highest since 2004

Employment Litigation Trends

COVID-19 Considerations

- More than 1500+ COVID-19-related cases filed across the United States
 - Remote work, leave conflicts, FFCRA lawsuits
 - Age and discrimination claims
 - Disability discrimination and failure to accommodate
 - COVID-19 testing lawsuits, which will soon include COVID-19 vaccination lawsuits
 - Other workplace safety violations and concerns
 - Seeing a rise in retaliation claims as a result of workplace safety complaints; whistleblower claims

Employment Litigation Trends

Wage & Hour Issues

- Class Actions
 - Issues include:
 - Timekeeping Errors
 - Misclassification of employees
 - Non-exempt vs. Exempt
 - Employee vs. Independent Contractor
- Minimum Wage Increases
 - State and City level
- Remote Work Issues

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2020-2021 United States Supreme Court Preview

2020-2021 United States Supreme Court Term & Employment Law Impact

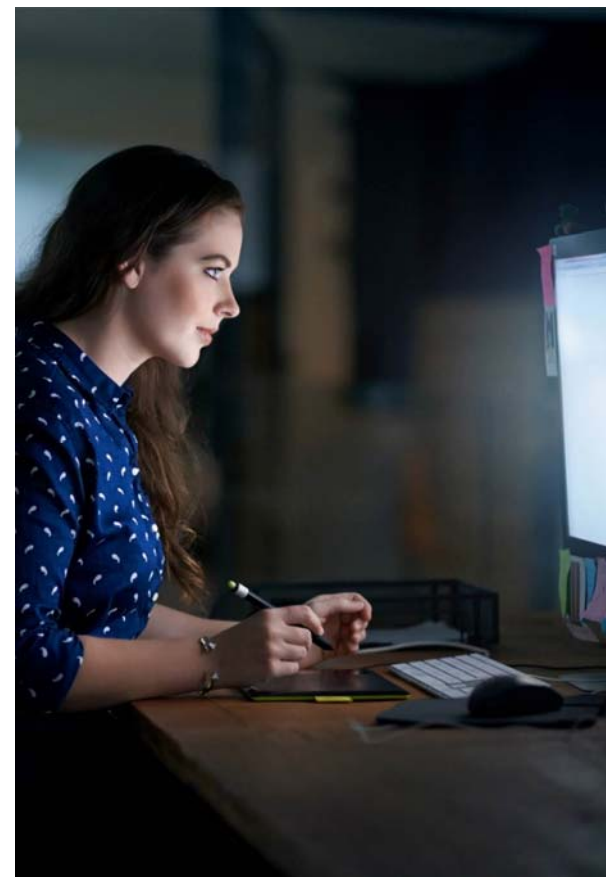
2019-2020 Term Revisited

- ***Bostock v. Clayton County, Georgia***
 - Companion cases:
 - *Altitude Express v. Zarda*
 - *R.G. & G.R. Harris Funeral Homes v. EEOC*
 - Recognized sexual orientation and gender identify as protected under Title VII
 - Warning signs for employers that harassment of both sexes is not “because of sex”

2020-2021 United States Supreme Court Term & Employment Law Impact

2020-2021 Term

- To date, the United States Supreme Court has not granted cert for any employment-related cases for its 2020-2021 term
- ***Van Buren v. United States***
 - Argued on November 30, 2020
 - Does the Computer Fraud and Abuse Act (CFAA) prohibit an employee who is authorized to access an employer's computer system from using their access in unauthorized ways?
 - Could significantly narrow the CFAA.
 - Justices' questions at oral argument suggest narrower view will prevail



2020-2021 United States Supreme Court Term & Employment Law Impact

2020-2021 Term

- ***Small v. Memphis Light, Gas & Water*** (cert denied April 5, 2021)
 - Unsuccessful religious and disability discrimination claims
 - Plaintiff requested overturning 1977's *Trans World Airlines, Inc. v. Hardison*, which defined the term "undue hardship" to mean anything that has more than a de minimis burden on the employer
 - Dissent from Justices Gorsuch and Alito

2020-2021 United States Supreme Court Term & Employment Law Impact

2020-2021 Term

- ***Collier v. Dallas Cnty. Hosp. Dist. d/b/a Parkland Health & Hosp. Sys.***
 - Petition for a writ of certiorari filed on January 15, 2021
 - Whether an employee’s exposure to the “n-word” in the workplace is severe enough to create a hostile work environment and in what circumstances racial epithets in the workplace are “extremely serious” incidents sufficient to create a hostile work environment under Title VII, rather than non-actionable “mere utterances”

Questions?

Thank you

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