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Current Issues in Labor & Employment Law

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Wage and Hour Compliance in a Pandemic Era

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Tracking Telework Hours

- Work that an employer did not request but nonetheless "suffered or permitted" is compensable. 29 C.F.R. § 785.11; *see also* 29 U.S.C. § 203(g)
- "Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work." *Allen v. City of Chicago,* 865 F.3d 936, 938 (7th Cir. 2017)
- The FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." *Kellar v. Summit Seating Inc.,* 664 F.3d 169, 177 (7th Cir. 2011)

Tracking Telework Hours

- An employer's obligation to compensate employees for hours worked can therefore be based on *actual knowledge or constructive knowledge* of that work. For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications
- The FLSA's standard for constructive knowledge in the overtime context is whether an employer has *reason to believe work* is being performed
- If an employer is otherwise notified of work performed through a reasonable method, or if employees are not properly instructed on using a reporting system, then an employer may be liable for those hours worked *Allen,* 865 F.3d. at 946

Tracking Telework Hours

- Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported
- "When the employee fails to follow reasonable time reporting procedures [he or] she prevents the employer from knowing its obligation to compensate the employee." *White v. Baptist Memorial Health Care Corp.,* 699 F.3d 869, 876 (6th Cir. 2012)
- Moreover, where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system. *Id.* at 877

Suggestions for Telework Tracking

- Review remote work timekeeping technology to ensure employees have access to enter time before and after their scheduled shifts
- Where technology does not allow an employee to easily access his or her timekeeping system to enter time worked outside of normal working hours, employers should consider an alternate timekeeping system to capture those hours
- Provide additional training to managers responsible for non-exempt employees
- Provide clear guidance for employees who run into technical difficulties logging their time

Suggestions for Telework Tracking

- Ensure that the company has a policy requiring non-exempt employees to notify management if they believe that there is an error in their paycheck, and that the company has a mechanism for correcting it
- Have employees sign an acknowledgment of remote timekeeping requirements, separate and part from a more general handbook acknowledgment to show that the employee knew specifically about remote timekeeping requirements
- Employers should also ensure that they are uniformly enforcing these policies for all non-exempt employees
- Employees who do not comply with timekeeping requirements should be disciplined in accordance with employer policy

Avoiding Misclassification of Employees

- As businesses reopen and workers gradually return to work following COVID-19 shutdowns, employers should be mindful of how much non-exempt work is being performed by employees classified as exempt
- Especially in retail and hospitality workplaces, supervisors may be called on to perform work that was previously performed by non-exempt workers
- While the FLSA provides no precise percentage of exempt job duties that must be performed by an exempt employee, a store manager whose primary duties become stocking shelves and running a cash register would likely be non-exempt and eligible to receive overtime pay
- One of the biggest challenges employers face in misclassification cases is that they often have no record of the employee's hours actually worked
- Burden of proof is on the employer in such situations, so the overtime calculation is often based only on the employee's recollection of overtime hours worked unless the employer can produce contrary proof

Non-Exempt Employees Working Unapproved Overtime

Must the employee be paid for those hours?

- YES. Employers must pay their non-exempt employees for all hours worked, including hours worked that the employer knows about, even if worked without the employer's permission
- For example, if an employer knows or has reason to believe that an employee is responding to work emails after hours, the employer must pay the employee for the time so spent

Suggested Solutions to Unapproved Overtime Concerns

- Employers should ensure that supervisors do not set an expectation for non-exempt employees to respond to work emails or phone calls after hours. Supervisors should be discouraged from contacting non-exempt employees after work hours
- Further, if a non-exempt employee receives an email from his or her supervisor after hours, the employee may feel pressure to respond, so supervisors may want to take steps such as putting "Do Not Respond Until Work Hours" in the subject line of an email sent after hours
- Likewise, employers may want to consider whether non-exempt employees should have access to work email accounts on their personal devices because time spent checking work email, even if an employee does not respond to any such emails, could be considered compensable time

Off-the-Clock Work Resulting from COVID-19 Safety Precautions

- Preliminary and postliminary activities that are an integral part of the employee's job and/or undertaken to benefit the employer, such as filling out reports, removing trash and picking up plans or requisition orders, are typically considered compensable working time
- There is no specific precedent for issues that arise from the time spent by employers and employees taking recommended safety measures due to the COVID-19 pandemic
- Examples:
  - Regularly taking employees' temperatures
  - Asking questions about employees' exposure to the virus
  - Additional cleaning/sanitizing responsibilities

Off-the-Clock Work Resulting from COVID-19 Safety Precautions

- Employees who regularly had to wear PPE and other health and safety equipment are now wearing new and additional types of equipment. Similarly, employees who never wore any safety equipment are now wearing such equipment
- Consider new pandemic-related "donning" and "doffing" activities (wearing gloves, masks, and other PPE)
  - "Doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' that is covered by the FLSA." *IBP, Inc. v. Alvarez*, 126 S.Ct. 514, 527, 546 U.S. 21, 40 (U.S. 2005)
  - Courts have considered the nature and unique quality of the clothing or equipment, whether the clothing or equipment is integral to the job and the time required to put it on and take it off

Recent Litigation Example – Donning & Doffing

- Last month, a proposed class action was filed against Cytec Engineered Materials, Inc., a chemical manufacturer, in Orange County Superior Court alleging wage and hour violations of the California Labor Code
  - Case No. 30-2020-01164932-CU-OE-CXC
- The plaintiff alleges non-exempt employees were required to: (1) don personal protective equipment, including safety goggles, masks, face shields, and gloves; and, (2) wait in line to be screened for COVID-19 through mandatory temperature checks

Suggested Solutions to “Donning & Doffing” Issues

- Review donning and doffing policies, and make sure they require employees to don and doff extra equipment on the clock
- If employees must obtain the new equipment at work, then make sure they retrieve it after clocking in and return it before clocking out
- Control when employees are donning, doffing, and retrieving the new equipment so they are not “on the clock” before they are supposed to be
- If paying employees a flat amount of time or money to cover donning and doffing activities, make sure the flat amount is sufficient (and have objective data to rely on where possible)
- If employees have to clean or sanitize their own equipment, then ensure that is done on the clock as well

Failure to Cover Offsite or Jobsite Expenses

- There is no specific federal requirement to reimburse employees for business-related expenses. Several states (including California, the District of Columbia, Illinois, Iowa, Massachusetts, Montana and New York) have specific state law requirements applicable to employee expense reimbursements
- However, the U.S. Department of Labor has taken the position that under FLSA, employers are barred from making employees incur expenses that cut into minimum wage or overtime that employees are legally due

Failure to Cover Offsite or Jobsite Expenses

- California law provides an instructive example: California Labor Code Section 2802(a) requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer…." Failing to reimburse employees can lead to class or collective actions and quickly become incredibly burdensome for employers (including attorneys' fees)
- In California, when employees must use their personal cell phones for work-related calls, employers must pay some reasonable percentage of those phone bills even if employees incurred no extra expenses using their cell phone for work. *See Cochran v. Schwan's Home Serv., Inc.*
- It follows that if employers allow their employees to opt to use their personal cell phone, instead of a company-issued cell phone, that they should be reimbursed a reasonable percentage of their phone bill for work-related calls or other data usage for using texts or the internet for work purposes

Failure to Cover Offsite or Jobsite Expenses

- California courts have not defined what “reasonable percentage” means, but the main options are:
  - (1) Reimburse for the actual voice and/or data fees incurred for business purposes, which requires employees to submit expense reports itemizing the costs of calls made for work purposes and the costs of data used for work supported with cell phone bills or other evidence of the costs (this is a time intensive process for employees);
  - (2) Reimburse for a percentage of voice and/or data fees that accurately reflects the amount of mandatory business usage, and if a percentage or flat monthly amount is used, then allow employees to seek reimbursement for any additional costs incurred over the percentage or flat amount if the actual costs of business use exceed those amounts (this can be hard to determine given the number of different plans available); or
  - (3) Provide employees with a cell phone or another communication alternative for business use

Recent Litigation Examples – Employee Expenses

- A class action filed in Orange County California Superior Court this year alleges that Anyone Home, Inc. failed to provide reimbursement for her and other similarly situated employees' home internet, home telephone, personal cell phone, personal computer, utility costs, office furniture, and insurance from July 2019
  - Interestingly, the lawsuit alleges that, in December 2020, Anyone Home sent the employee $225 as reimbursement for past business expenses and provided that they would begin paying her a recurring stipend of $25 per month

Recent Litigation Examples – Employee Expenses

- An action filed in January in the Merced County California Superior Court alleges that Foster Farms failed to provide and reimburse employees for the cost of personal protective equipment (PPE) used at a job site
  - Specifically, the employees allege that they were forced to purchase PPE such as masks, gloves, and hand sanitizer without reimbursement
  - Employees argue that California case law requires employers to provide their employees with PPE, at the employer's expense, and employees must be reimbursed for any such materials that the employees purchase if the employer fails to do so

Suggested Solutions to Work Expense Issues

- **Implement a clear written expense reimbursement policy**
  - Consider what supplies and equipment are necessary for employees to carry out their job duties
  - Adopt and implement a clear, written policy that clearly outlines what are considered reasonable necessary business expenses and how employees should submit their reimbursement requests

Suggested Solutions to Work Expense Issues

- **Implement Automatic Stipends**
  - Of course, for some reimbursements, you will be unable to determine the precise portion of an employee's work-related expense. In these instances, you may want to consider deciding on a flat-rate amount that you believe reasonably covers the work-related expense associated with that expense. For fixed recurring expenses, you may also consider implementing the stipend automatically
  - The common practice that is evolving is to provide a flat monthly stipend and inform employees in writing that employees may submit expense reimbursement requests to the extent that the stipend does not otherwise cover their business internet and cell phone usage
  - Under this approach, the onus is on the employee to prove that the stipend didn't cover the cell phone and internet expense; further if they were to bring a claim, it would be off-set by the stipend

Suggested Solutions to Work Expense Issues

- **Allow Employees To Temporarily Bring Company Equipment Home**
  - You can limit or avoid the need for employee expense reimbursements by providing employer-owned supplies and equipment for use at a remote location. You should consider whether allowing employees to take office supplies and equipment home on a temporary basis is a better option for your business
  - For instance, computers, phones, monitors, keyboards, computer mice, printers, printer paper, notepads, printer ink, pens, mobile hot spots can all likely be brought to the employee's residence from the workplace. Of course, you should ensure that you implement a check-out protocol and policy to safeguard the return of these items
- **Allow Employees To Submit Requests For Specific Items That They Need**
  - Another option is to have employees submit requests for specific items that they need. This prevents situations where employees are required to buy items they do not need and there is no need for an expense reimbursement. It also allows an employer the opportunity to prospectively assess whether this is a reimbursable necessary expense. Additionally, it gives an employer control over what item is actually purchased, allowing the employer to control the price point

Paid and Unpaid Breaks

- An employee must be paid for a meal break unless all three of the following conditions are met:
  - (1) the break is at least 30 minutes in length;
  - (2) the employee is free to leave his duty post; and
  - (3) the employee is completely relieved of all duties during the break
- Problems often arise with the last requirement when employees eat lunch at their desks and continue to work through the meal period

Paid and Unpaid Breaks

- With many employees working from home due to COVID-19, employers may be tempted to assume an eight-hour workday and/or to institute automatic lunch break deductions from employees' work hours
  - An automatic daily deduction for meal breaks that does not take into account employees skipping their usual lunchtime or working while on the job is not advised
- As always, employers should be extra mindful of keeping accurate and complete records of all employees' time worked, whether in the workplace or at their homes

Legal Risk from COVID-19 Related Statutes

- Since March 12, 2020, there have been over 1,900 lawsuits (including 152 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus
  - States with the most filings include: California (450+); New Jersey (225+); Florida (160+); New York (150+); and Ohio (100+)
- Industries with the most filings are: healthcare (460+ cases); manufacturing (200+ cases); retail (165+); public administration (160+ cases); and hospitality (140+ cases)
- Many cases were filed as a result of the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act (EFMLEA) contained in the Families First Coronavirus Response Act (FFCRA)

Legal Risk from COVID-19 Related Statutes

- The FFCRA expired as of 12/31/20. However, because violations of the act are tied to FLSA, *employers may still be liable for incidents which occurred while the emergency provisions were in effect*
- DOL is urging employers to voluntarily comply with the FFCRA/EPSLA/EFMLEA provisions until April 2021. It is unclear whether voluntary compliance will continue to accrue liability after the expiration of the FFCRA

EPSLA Liability

- EPSLA prohibited employers from searching for a replacement employee to cover the hours during which the employee was receiving paid sick time
- Additionally, employers were prohibited from requiring the employee to use other paid leave before using the paid sick leave
- It was unlawful for any employer to discharge, discipline, or otherwise discriminate against an employee who took paid sick leave under the act, or who files a complaint, institutes a proceeding including one for enforcement, or who testifies in a proceeding
- The EPSLA also relates to the anti-retaliation provisions of FLSA, providing that:
  - It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—
  - (1) takes leave in accordance with this Act; and
  - (2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding. *PL 116-127*
- DOL has stated that it will enforce the FFCRA (and related provisions) for leave taken or requested during the effective period of April 1, 2020, through December 31, 2020, for complaints made within the statute of limitations

EPSLA Liability - Violations

- Violations of the act are considered to be violations of enumerated sections of the Fair Labor Standards Act and are subject to FLSA penalties
- Because the violations are tied to FLSA, it is possible for employees with claims that they were not provided paid sick time for Covid-related issues while the EPSLA was in effect to still bring claims for violation of the minimum wage and be subject to the traditional penalties under FLSA. *See 29 U.S.C. 206; 29 U.S.C. 216; 217*
- A two-year statute of limitations applies to ordinary violations of the FLSA, but a three-year statute of limitations applies to willful violations. *See Hantz v. Prospect Mortg.*, LLC, 11 F.Supp.3d 612, 616 (E.D.Va.,2014)
- So far, published decisions in cases involving the EPSLA have involved a relatively straightforward application of existing FLSA jurisprudence. Most cases involving Covid-specific statutes remain undisposed, so it is unclear whether employers are placed at a disadvantage because of the additional restrictions imposed by FFCRA and EPSLA

Recent Litigation Examples - EPSLA

Higgins v. Petticoat-Schmitt Civil Contractors, Inc. (Middle District of Florida), December 30, 2020

- The plaintiff, a project manager, filed suit against his former employer, a construction company, for alleged violation of the FFCRA and EPSLA. The plaintiff alleges that in early December 2020, he tested positive for COVID-19 and his healthcare provider advised him to self-quarantine for 10 days. The plaintiff alleges that he provided a note to the defendant from his healthcare provider and thus requested and took 10 days of paid sick leave. Upon the conclusion of his 10-day quarantine, the plaintiff tested negative for COVID-19 but alleges that he was still symptomatic. The plaintiff claims he provided the defendant with another note from his healthcare provider, stating that he should remain away from work until his symptoms subsided. Several days later, the plaintiff alleges that the defendant terminated him. The plaintiff believes that he was terminated because he had taken too much time off while suffering from COVID-19. Based upon these allegations, the plaintiff claims that the defendants retaliated against him in violation of the FFCRA and EPSLA

Recent Litigation Examples - EPSLA

***Harris v. Prine Systems, Inc.* (Middle District of Florida), November 15, 2020**

- The plaintiff works for the defendant as a full-time, hourly employee. The plaintiff claims that she informed the defendant of her intent to self-quarantine pursuant to state, federal, or local government orders relating to COVID-19. The plaintiff alleges that she completed an "Unpaid Leave of Absence Request Form" at the defendant's request, and that the defendant approved the plaintiff's request for leave to complete a 14-day self-quarantine. The plaintiff claims that the defendant failed to pay her for 80 hours of paid sick time to which she was entitled under the FFCRA. The plaintiff asserts that the defendant refused to pay her, and instead counted her 14 days of sick leave against her annual quota for unpaid time off. The plaintiff also alleges that the defendant's failure to provide the paid sick time constitutes a violation of the FLSA for failure to pay minimum wages

Recent Litigation Examples - FLSA

***Marinos, et al. v. The District of Columbia, et al.* (District Court for the District of Columbia), October 5, 2020**

- The plaintiffs, current and former police officers, detective, and sergeants of the Metropolitan Police Department (MPD), allege that the MPD violated the FLSA by failing to include hazard pay in calculating regular rates of pay for purposes of calculating overtime pay. The plaintiffs allege that on April 14, as a result of the COVID-19 pandemic, the mayor of the District of Columbia authorized "a $14 per diem premium payment for employees who are physically required to report to work to fulfill their official job duties for the duration of the COVID-19 Public Health Emergency." The plaintiffs allege that the MPD provided, and continue to provide, the $14 per diem hazard pay. The plaintiffs allege that they are entitled to overtime compensation equal to one and a half times their regular rate of pay, which should include the hazard pay

Recent Litigation Examples – EFMLEA & EPSLA

***Beatty v. Hamilton Operator LLC, et al.* (Mercer County, New Jersey), July 17, 2020**

- The plaintiff, a dietary aide/cook for a nursing home, brings claims under the New Jersey Law Against Discrimination, the New Jersey Earned Sick Leave Law, the Emergency Paid Sick Leave Act (EPSLA), and the Emergency Family and Medical Leave Expansion Act (EFMLEA). The plaintiff alleges that he began experiencing a fever in excess of 102 degrees. The defendants advised him to stay home and contact his primary care doctor. A day after the plaintiff was notified regarding his negative COVID-19 test result, the plaintiff shared the result with the defendants. The defendants informed the plaintiff that they were terminating the plaintiff's employment because it "took too long" to obtain the COVID-19 test result. The plaintiff alleges that his taking leave constituted "protected conduct" under the ESLL, EFMLEA, and the EPSLA, and the plaintiff further alleges that the defendants were liable to the plaintiff for discriminating against him "for the perception of disability" under New Jersey law

Recent Administrative Developments Due to Post-Election Changes

DOL Withdraws Trump Administration Wage & Hour Opinion Letters

- On February 19, 2021, WHD announced the withdrawal of two Trump-era opinion letters—FLSA2019-6, addressing independent contractor status under the Fair Labor Standards Act, and FLSA2019-10, addressing the compensability of sleeping time for truck drivers
- Going forward, employers may not rely on these withdrawn opinion letters as a defense to liability
- The WHD is likely to withdraw more opinion letters in the coming weeks and months as it continues to review guidance issued during the prior administration. It remains unclear whether the WHD will continue the practice of issuing opinion letters in response to specific inquiries, and/or whether it will revert to the Obama-era practice of issuing Administrator's Interpretations on general subjects such as independent contractor and joint employment

Recent Administrative Developments Due to Post-Election Changes

DOL Rescinds 11th Hour Wage & Hour Regulations Issued by Trump Administration

- On March 11, 2021, the U.S. Department of Labor's Wage and Hour Division (WHD)—as expected—announced its proposals to rescind the Trump-era rules on independent contractor classification and joint employment. WHD has filed a Notice of Proposed Rulemaking (NPRM) to withdraw the Trump administration's independent contractor rule

Recent Administrative Developments Due to Post-Election Changes

- **Independent Contractor Rule:** The Trump-era rule would have relaxed the standards for classifying workers as independent contractors, elevating two factors (control and opportunity for profit or loss) above other factors and giving them greater probative value in the classification analysis
  - Per the NPRM, this approach would mark a departure from WHD's longstanding approach and be inconsistent with Supreme Court precedent
  - President Biden has signaled an intention to bring the federal classification rules in line with the "ABC" test adopted by certain states, which can make it considerably more difficult for certain businesses to classify workers as independent contractors
- **Joint Employment Rule:** The Biden administration also filed a NPRM to rescind the joint employment rule—which took effect on March 16, 2020. Per WHD, the rule—which set forth separate considerations for "horizontal" and "vertical" joint employment—departs from and has been limited by judicial precedent and otherwise is not sufficiently grounded in the statutory text

Recent Administrative Developments Due to Post-Election Changes

- **Ending the PAID Program**
  - On January 29, 2021, the DOL abruptly ended the Payroll Audit Independent Determination (PAID) program
  - The PAID program began in March 2018 as a pilot program to allow employers an alternative method to rectify overtime and minimum wage violations of the Fair Labor Standards Act (FLSA)
  - Under the PAID program, employers were able to self-report a wage violation, submit a calculation of back wages to the DOL, and enter into an agreement to pay 100% of back wages owed over a two-year period.In turn, the DOL would supervise and approve the payment and provide a release as to the reported issue

Recent Administrative Developments Due to Post-Election Changes

- **Ending the PAID Program**
  - Without the self-reporting PAID program, the only two options available to release FLSA claims are through a court-approved settlement or as a result of a DOL-initiated investigation
  - While the PAID program did not release any state law claims, it did reduce the threat of additional litigation and negative publicity
  - It is not clear whether employers currently working with the DOL through the PAID program will be allowed the benefits of the program
  - Even without the added benefits of the PAID program, employers should continue to be proactive to audit pay records and correct potential wage issues if identified

Don’t Forget: State and Local Laws and Regulations

New York

- The New York state legislature passed Bill S2588A/A3354B, which would amend the New York Labor Law to grant employees paid leave time for the COVID-19 vaccination. Under the proposed bill, employers would be required to provide employees with “a sufficient period of time, not to exceed four hours” per vaccine dose, to be vaccinated for COVID-19. The bill would also prohibit employers from discriminating or retaliating against employees who request or take a leave of absence to be vaccinated for COVID-19, or who otherwise exercise their rights under this law

Don’t Forget: State and Local Laws and Regulations

California

- Many cities in California, including Oakland, Long Beach, and West Hollywood have enacted ordinances requiring large grocery and/or drug stores to pay specified workers premium pay for the heightened risk of exposure to and infection by the novel coronavirus
- **Businesses Required to Pay Hazard Pay**
  - The ordinances generally apply to large grocery and/or drug stores. Oakland’s ordinance applies to grocery stores over 15,000 square feet in size operated by companies that employ 500 or more employees nationwide. The Long Beach and West Hollywood ordinances apply to grocery chains that employ over 300 workers nationwide and more than 15 employees per grocery store in their respective cities
- **Employees Entitled to Hazard Pay**
  - The ordinances exclude managers, supervisors and confidential employees from the entitlement to premium pay

Don’t Forget: State and Local Laws and Regulations

California

- **Premium Pay Requirements**
  - Oakland requires a *minimum* premium of $5/hour until “risk level” based upon state metrics is “minimal”
  - Long Beach requires $4/hour and lasts for 120 days (unless extended)
  - West Hollywood requires $5/hour and lasts 120 days
- **Prohibitions on Limiting a Worker’s “Earning Capacity”**
  - In addition to prohibiting employers from taking adverse action against employees for exercising their rights under the ordinances, some of the ordinances make it unlawful for an employer to “limit a worker’s earning capacity.” The Long Beach and West Hollywood ordinances, for example, state that a covered grocery store shall not, as a result of the ordinance, reduce a grocery worker’s compensation or “limit a grocery worker’s earning capacity” unless the covered employer can prove that its decision to take such action would have happened in the absence of the ordinance

Thank You!

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Social Distancing from Departing Employees:

Trade Secrets & Non-Competes in the Era of Remote Working

March 25, 2021

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- Whether motivated by fear after notice of layoffs, greed, a desire to take shortcuts, or anything in between, most employees take or retain information when they leave a job
- The motivation does not matter much, they do it because company information is valuable and useful
- Preventing, detecting, and stopping the exfiltration of company information is challenging; don't guard your Ft. Knox with the equivalent of outsourced part-time security guards
- The loss of company information is just one of the many threats; the loss of a customer's confidential information or exposure to data breach laws can be just as damaging
- Employees working remotely pose new risks and different spins on old ones

Claims Menu

Antipasti

- Cease-and-desist letter
- Preliminary injunctive relief
- Seizure order

Main Course

- Breach of Contract
  - NDA, non-compete, non-solicitations, return of property agreement
- Trade Secret Violations
  - Primarily statutory
  - Federal law (DTSA)
  - State versions of the UTSA
- Breach of Fiduciary Duty
  - Varies by jurisdiction and employee position
  - All employees owe at least some fiduciary duties
- Common Law Claims
  - Unfair competition and other tort claims
  - Many common law claims based upon use/disclosure of information are preempted by state UTSAlaws
- Computer/Access Claims
  - Primarily statutory
  - Exceeding scope of authorized access
- Criminal Considerations
  - Theft
  - Hacking and computer crimes

Dessert

- Money Damages
- Permanent injunctive relief
- Attorneys' fees

Choosing Your Claims

- What claims are available and what injunctive relief can withstand appellate review
- Mileage varies by jurisdiction, especially non-compete requirements and enforceability
- Choice-of-law and forum-selection provisions in non-compete agreements are far from absolute for remote workers in other states
- Not all state versions of UTSA are equal
- Difficult to enforce in-state injunctions against out-of-state parties
- What "must" be done – an employee may not be "worth" pursuing, but doing nothing may result in future selective enforcement defenses

The Focus is *Always* on Protectable Information

- Common thread to every potential departing employee claim
  - Protectable interest supporting restrictive covenants
  - Crux of trade secret and other information-based claims
  - Want to show that employee took more than just what was in her head
- Retention or theft of information tips the injunction scales, even on claims not based on use/disclosure of information
- Information-based injunction restrictions can be more effective than injunctions on competition and solicitation (*i.e.*, the "backdoor non-compete")

Information Protection Program

- Formal information protection program is ideal
- Even basic exit procedures help when a key employee leaves without notice and you have to make decisions quickly, under stress, and with limited information

- It saves time
  - You may have a slam-dunk injunction, but if you do not act quickly enough, then you cannot show imminent harm (don't get left holding the money damages bag)
  - Must gather evidence, evaluate evidence, draft the series of pleadings that accompany a request for injunctive relief, and basically have a mini trial in a matter of a few weeks (often with expedited discovery beforehand)
  - Involve the attorneys as early as possible; keep it privileged
- And it saves treasure
  - Save your litigation war chest by doing as much of the evidence hunt as possible yourself (but don't alter evidence)
  - Pay your attorneys to evaluate evidence and advise, not to help brainstorm about what digital paper trails could exist and where to find them
  - Forensic and other expert/consultant fees
  - Responding to expedited discovery

The Challenges of a Remote Working Environment

- More variables means more opportunities
- Additional data exit points
- More difficult to monitor and police, even with the best security solutions
- Increased reliance on third-party providers for key security measures

Know Generally What You Need To Prove in Court

- Injunctive relief requires a higher burden of proof – don't ask a court for an extraordinary remedy without the proof

- Although expedited discovery is common, don't assume it will be granted; must bring the evidence yourself

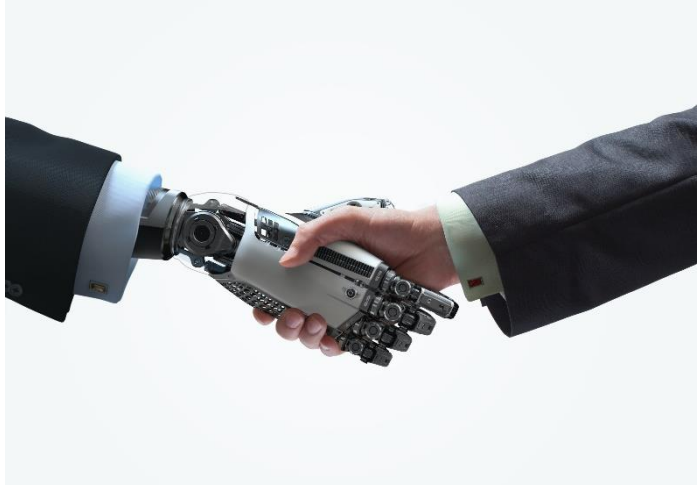
- Always fact and context specific, but you generally want to show:
  - Restrictive covenants are supported by protectable interests, restrictions are reasonable
  - Effort was made to keep valuable information secret
  - Employee retained or deleted information when she knew or should have known better
  - Employee misrepresentations, half-truths, breach of trust and other black hat evidence
  - How remaining employees left behind will be harmed or adversely affected

So, what can you do to put your company in the best place to investigate, evaluate, and act quickly?

Plan Ahead – Implement an Information Protection Program

- Don't wait to "figure things out" when a key employee leaves
  - Missed evidence
  - Increased costs
  - Increased attorneys' fees
  - Loss of trade secret status for class of information
  - A "busted" standard employee non-compete
- Data protection laws, customer and vendor agreements, and insurance requirements likely mean you already have some sort of starting point

Partner with IT



- They know your networks, databases, and resources best
- Map data flow and identify potential avenues of data leakage
- Implement individual credentialing, access restrictions, auditing, and activity logging
- Provide all equipment to employees and install security and remote monitoring software where permitted
- Set up automated alerts for suspicious activity
- Ensure there is a reliable method for proving up electronic signatures
- Devote adequate resources to employee training

Get input from employees who access and use the information

- A lot information is confidential, but know what information employees are most likely to take

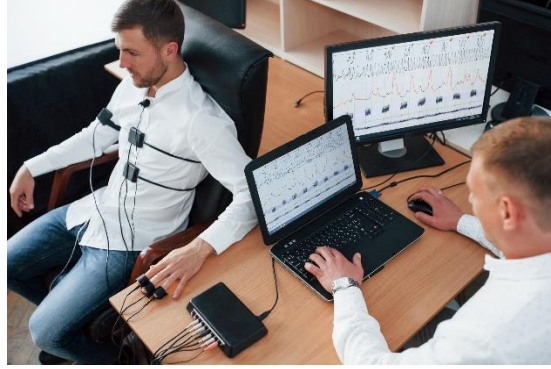
- Do not rely solely on IT, as employees who access the data the most often know the loopholes and back doors and what information is most important

- Incentivize cooperation and ask trusted employees:
  - what information is most valuable for the next job
  - how they access and use company information
  - how they would take information if they wanted to stay under the radar

Cover the Employee Basics

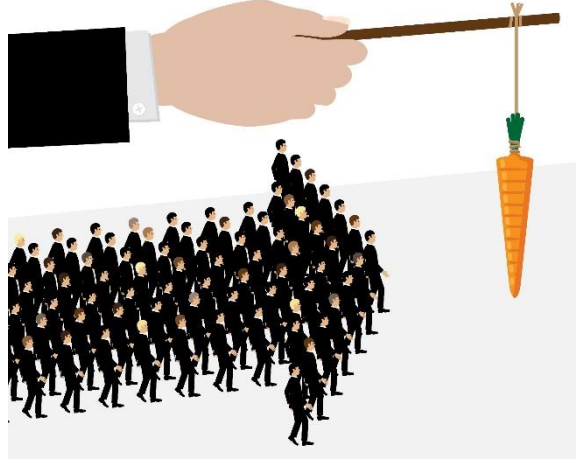
- Policies
- Agreements
- Training
- Be clear, give fair warning of expectations, and don't use off-the-shelf language that could apply to any company in any industry
- Specifically address remote working environments

Don’t Skip the Exit Interview



- Likely your first real opportunity to assess any threat
- Set eyes on them, if possible; a videoconference is better than a phone call or email
- Specifically remind employee of policies, agreements, and continuing obligations
- Confirm employee has returned all company information and property and did not retain any copies
- Document and require employee written acknowledgment; can be done on a one-page form
- Deactivate employee access to company resources and revoke all credentials
  - If you have advance notice of an employee’s departure, consider access restrictions *before* the employee leaves

Choose Carrot Over Stick Where Possible



- Incentivize the behavior you want
- Make severance, final commissions, bonus compensation, and other benefits conditioned on compliance with employee agreements; delay benefits until 60 days after separation
- Directly tie stock options and ownership incentives to compliance with employee NDAs and restrictive covenants
- The forfeiture of benefits can sometimes be better leverage than an injunction – and it is easier to prove

Develop Procedures and Checklists & Rely on Them

- Employee onboarding
- Employee exiting
- Review following suspicious behavior alerts and activities
- Make them easy to follow – for both your employees and for a future judge/jury
- Hold HR accountable for ensuring that checklists are fully completed

Trust But Verify, Especially with Key Employees

- Review computer, other electronic equipment used, and email
- Review access and activity logs, especially of key databases
- Look for evidence of suspicious activity
  - Data deletion
  - Data copying
  - Failed attempts to access information outside of authorization
  - Irregular patterns of access or use, especially of key databases
  - Emails to personal email (check bcc's, too)
  - Access to non-company cloud storage (or attempted but blocked access)
- Employees are getting savvy, so look back 90 days
- Automated alerts can save a lot of time
- Compare employee emails on server vs. emails in user-facing account

Preserve Evidence

- Make sure equipment and electronic evidence are secure before reviewing; get help from IT or an outside specialist
- Image equipment, especially computers
  - Image, don't backup
  - You can still search backups, though
  - Storage is cheap
- Have a procedure for preserving electronic evidence at this stage
  - Do not wait for a formal litigation hold, it may be too late then
  - Auditing capabilities and log retention often have very quick shelf lives
- Document chain of custody

What if a key employee leaves before your program is in place?

- Focus first on the low-hanging digital fruit
- Talk closely with the employee's team members, even remote employees "talk"
- Leave no reasonable stone left unturned in the hunt for black hat evidence
- Phone a friend – get forensics assistance
- Engage counsel early, a lot can be "fixed" with a good cease-and-desist letter

A Little Lagniappe

- Prohibit the use of another company's confidential information and enforce it
  - Avoid a goose/gander defense
- Provide key employees company-supplied smartphones and pay all services fees directly to the provider
  - Easier to obtain information quickly if you pay directly (don't reimburse the employee)
  - Make sure your policies and agreements confirm that the company owns the account
- Remember to evaluate whether an employee's theft of information is subject to data breach laws and comply with notification requirements if triggered

Thank You!

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COVID-19 Workplace Issues: Counseling Tips Relating to COVID-19 and Beyond

Brian McGinnis, Sahara Pynes, Gray Mateo-Harris

March 25, 2021

Counseling Tips Relating to COVID-19

- Discrimination, Harassment Issues
- Vaccine Issues
- Paid Time Off
- Off-Duty Conduct

COVID-19 and Discrimination Laws

- Does a global COVID-19 pandemic mean that employers can take shortcuts on or ignore otherwise applicable anti-discrimination/ harassment laws?
  - No
  - It's worth repeating: No
- It remains an employer's obligation to provide a discrimination and harassment free workplace
  - That means training, policies, addressing complaints, etc.

COVID-19 and Discrimination Laws

- How might these issues manifest in the workplace?
  - Race/National Origin
  - Age
  - Disability
- Actual vs. perceived protected characteristics
- “Jokes”
- Interaction with reopening/vaccinations

Let's Talk About Vaccinations

- We now have multiple vaccination options (Moderna, Pfizer, Johnson & Johnson, etc.), and vaccine administration is ramping up throughout the country and the region

- The $1,000,000 question:
  - Can an employer require employees to get vaccinated either generally or in connection with a return to work?

Can Employers Require Employees To Get Vaccinated?

- It depends
- EEOC guidance
- Vaccine administration by employer vs. requirement to show proof of vaccination
- Reasonable accommodations
  - Disability
  - Religious Belief
- State and local laws
- Risk assessment

How Can Employers Encourage Vaccination Short of Mandates?

- Communications from leadership
- Open and honest, good-faith dialogue
- Making resources available to employees
- Incentives
  - Discrimination and wellness considerations

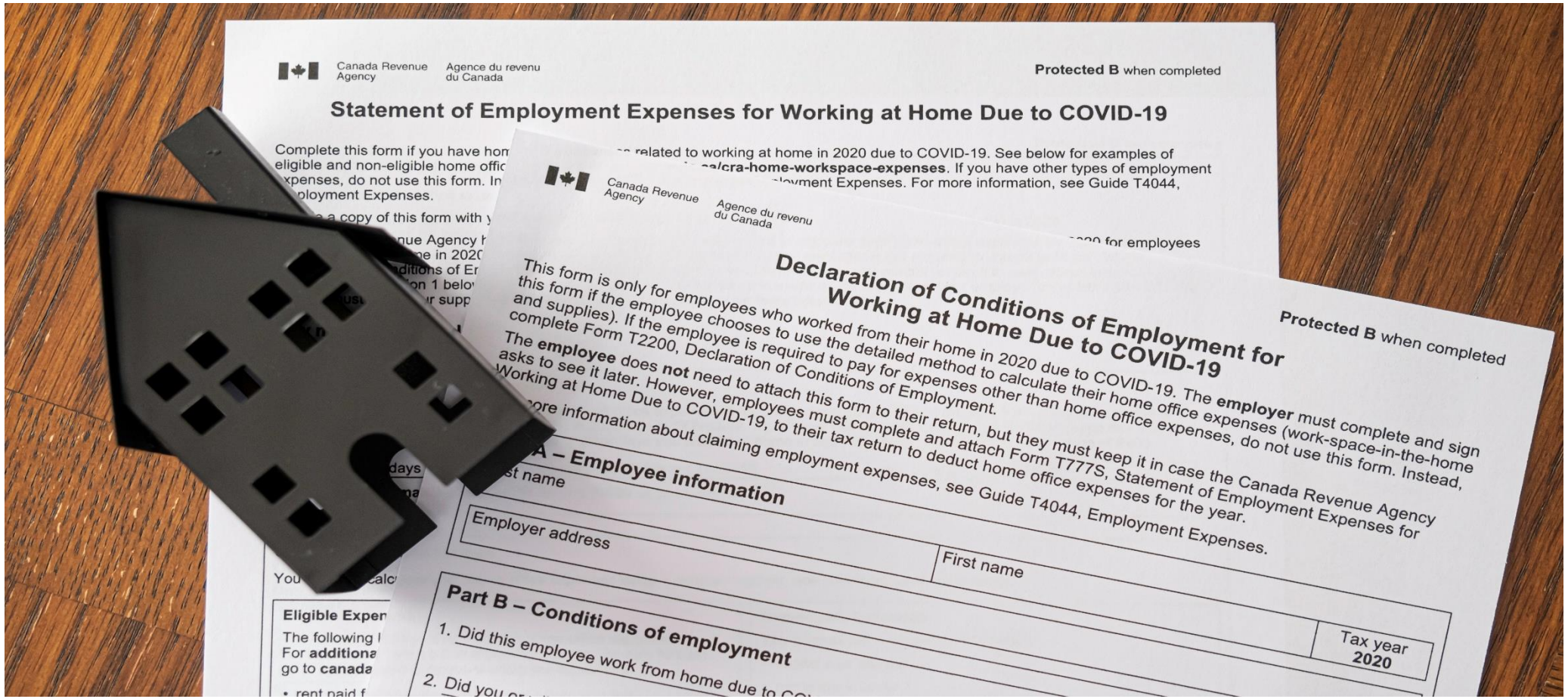
COVID-19 and Paid Time Off

- Employer policy
  - Consistent application re: COVID-19 related requests for time off
- FFCRA
  - Expiration?
  - FMLA interaction
- State and local laws

Off-Duty Conduct

- State/local off-duty conduct laws
- What to do about employee social media posts?
- What to do about employees who “go viral”?

Reasonable Accommodations



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The Bermuda Triangle

- Employees out on workers' compensation can still be covered by the FMLA (and/or state law) and need to be accommodated under the ADA (and/or state law)
- Yes you can cut off benefits after FMLA (except for PDL in some states, e.g. CA) (but be consistent)
- Add in the patchwork of paid sick leave ordinances

When to Accommodate

- For qualified individuals with disabilities who are employees or applicants for employment
- Unless to do so would cause undue hardship to employer
- Must be able to perform the “essential functions” of job
- No explicit request needed e.g.. An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing"

What Is Reasonable

- Making existing facilities accessible;
- Job restructuring (of non-essential functions);
- Part-time or modified work schedules;
- Acquiring or modifying equipment;
- Changing tests, training materials, or policies;
- Providing qualified readers or interpreters; and
- Reassignment to a vacant position-even a lower position (at lower pay)

What Is Not Reasonable? (cont.)

- Altering essential functions (and you should not do so, even temporarily)
- Unlimited leave, but beware of regular updates on RTW status
- The employee's preferred choice only; reasonable can be an accommodation employee doesn't want
- Excusing misconduct that happened before accommodation request (i.e., bipolar manic episode with associated impulse control problems)

Undue Hardships

- Requires a multi-faceted, fact-sensitive inquiry requiring consideration of: (1) financial cost; (2) additional administrative burdens; (3) complexity of implementation; and (4) any negative impact that the accommodation may have on the operation of the business, including the effect of the accommodation on the employer's workforce
- Reality, most accommodations are not an undue burden (especially cost)

Tips for Interactive Process

- Document offers for reasonable accommodations
- Centralize accommodation requests
- Train supervisors to tell HR about accommodations and not just grant them
- Keep an accommodation log to support determinations of “reasonable” vs. “undue hardship” and to ensure consistency
- Consider a designated physician (both for WC and for accommodation requests)

Trends in Accommodation

- Stress/anxiety
- COVID
- Work from home-EEOC says not automatic
- Pets at work (emotional support animals)

When Employees March

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Freedom of Speech

- The First Amendment protects against a *federal government* actor interfering with *freedom of speech rights* or *rights to peaceably assemble*
- Applies to *public employers & federal contractors*
- Speech of a public employee, *even on matters of public concern*, is <u>not</u> protected if uttered *as part of that employee's official job duties*
- Speech of a public employee is protected if issued on *matters of public concern* <u>and</u> *made outside of the employee's official job duties*

Freedom of Speech *cont'd*

- Private employees do NOT enjoy First Amendment protections against private employers
- Private employers have significant discretion to discharge employees, particularly if such conduct is:
  - Done by an *at-will employee*
  - *Unlawful* (*i.e.*, violent or criminal)
  - Violates established *workplace policies*
  - Reflects poorly on the *Company's image or "good will"*

Freedom of Speech *cont'd*

- Private employers may NOT discharge employees for such conduct if doing so:
  - Is discriminatory (*i.e.*, only enforced because of the *type of speech* or the *protected category* at issue)
  - Violates the NLRA (*i.e.*, political activity shielded if it relates to *protected concerted activity* regarding employee concerns over wages, hours or working conditions)
  - Violates *employee contracts* including, *e.g.,* employment agreements and CBAs (*i.e.*, "just cause" standard)

Politics and the Workplace: What Employers Should Know

- Federal anti-discrimination laws do not provide protections to private sector employees from workplace discrimination *based on political affiliations, activities, or views*

- BUT certain *state and local laws* do protect employees of covered private employers

Politics and the Workplace: What Employers Should Know *cont'd*

- Examples of state and local laws:
  - Anti-discriminations laws that *include political affiliation* as a protected class or protections for certain political activity
  - Standalone political rights laws that *specifically protect employees engaged in political activity*
  - *Lawful off-duty conduct laws* that prohibit discrimination against individuals for engaging in certain activities during non-working hours
    - 29 States + D.C. protect off duty conduct
    - CA, CO, LA, NY, SC & ND expressly protect *off-duty, lawful, political activities, e.g., protesting or free speech*
  - *Ban-the-box laws* with post-hiring restrictions on use of arrest records in employment decisions (*e.g.,* FCRA, NY City Fair Chance Act, etc.)

Real Life Examples – Can She Be Fired?

- Who is her employer?
- Is she an at-will employee? Contract?
- What was she protesting? NLRA? Union?
- Is she from a state that protects peaceful protests outside of work?
- What message did she share? Was it hate speech? Did it incite violence?
- Was she arrested during the protest? If yes, was it for violating curfew, blocking a highway, or throwing water bottles at cops?
- What are her state's laws on the use of arrests and convictions in employment decisions?
- What if she tweets about her participation in the protest? Makes comments on Facebook posts?
- What is she discusses it at work with colleagues?

Real Life Examples - Can They Be Fired?

- Same exact analysis applies
- No shortcuts
- No emotional response
- Consistency is key – type of protest is generally irrelevant (except if incendiary, hate speech, criminal, etc.):
  - Women's Marches
  - Black Lives Matter
  - Trump rally
  - Biden rally

Real Life Examples - Can He Be Fired?

- Company statement: “Navistar Direct Marketing was made aware that **a man wearing a Navistar company badge** was seen **inside the US Capitol during the security breach**. After review of the photographic evidence the employee in question has been terminated **for cause**”
- “While we support all employee’s right to peaceful, lawful exercise of free speech, any employee demonstrating d**angerous conduct that endangers the health and safety of others** will no longer have an employment opportunity with Navistar Direct Marketing”

Key Takeaways

Ensure all applicable policies and procedures are:

- *Up-to-date* and relevant to the workplace
- *Tailored* to specific business needs and circumstances (focus on legitimate business reasons)
- Simple and *easy to understand*
- Accessible, disseminated and *subject of training*
- Respectful of *protected activity and lawful* (*e.g.,* off-duty conduct)
- *Consistently enforced* (avoid discrimination claims)
- Balance between *fair implementation* and *zero tolerance* (avoid disgruntled employee claims)

Thank You!

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President Biden's Pro-Labor Agenda, and Its Significance for Employers

Robert Nagle, Robert Castle, Andrew MacDonald, Marvin Weinberg

March 25, 2021

The NLRB

- 5 member Board in Washington D.C.
  - 26 Regional Offices around the country
- General Counsel prosecutes alleged violations of the NLRA
- The Board decides whether employers or unions have violated the NLRB by engaging in “unfair labor practices”
- The Board oversees union elections
- Rulemaking authority is rarely used

NLRB'S Vulnerability to Political/Presidential/Labor Influence

- Although an independent federal agency, Board members are appointed by President with consent of Senate to 5 year terms and General Counsel appointed to 4 year term
- Traditionally, the White House holds a 3-2 advantage for Board members
- Although there are presently 3 Republican members, it is expected that by this Fall, the Board will be 3-2 Democrats
- The Trump appointed GC, Peter Robb, was fired by President Biden almost immediately after he was sworn in. Jennifer Abruzzo, a union lawyer who is special counsel to CWA, has been nominated to fill the post

President Biden's Declared Agenda

- Mostly set forth in the Protecting the Right to Organize (PRO) Act, to be discussed today in greater detail
- Overriding purpose is to make it easier for unions to organize nonunion workplaces
- The President backs the PRO Act and is an avowed supporter of organized labor. He has said that he will be " the strongest labor president you have ever had"

NLRB Discretion, as Reflected Through Decisions and Rule Making

- NLRB makes law through adjudicating cases and through rule-making
- Given the changes in the composition of the NLRB depending on whether there is a R or D administration, NLRB precedents are frequently overruled
- During the Trump administration, a number of key Obama era decisions were overruled and its expected that a Biden administration will overturn many of the pro- employer decisions championed by the Board over the past 4 years

Changes Coming from the NLRB

- The Board will likely overrule decisions / rules on the on the following:
  - 2020 Election Rules – return to the “ambush” election rules
  - Employer property rights
  - “Micro units”
  - Neutrality agreements
  - The “clear and unmistakable” waiver standard for workplace changes
  - The ability to keep workplace investigations confidential
  - Joint employer

The PRO Act: Impact of Potential Legislation

- Congressional change would have a longer lasting impact than any action by the “Biden Board”
- The Protecting the Right to Organize Act would drastically change the labor landscape
- Chances of passing the Senate are slim, unless:
  - Filibuster is eliminated
  - The bill is trimmed to gain sufficient Republican support (unlikely)

PRO Act: "Take Me Back . . . to 1946"

- PRO Act would undo key provisions of the Taft-Hartley Act, which became law in 1947
  - Override state "right-to-work" laws
  - Allow secondary boycotts – unions could pressure neutral businesses

PRO Act: Gifts to Unions to Facilitate Unionization of Employers

- The law would:
  - Override right to work laws, which generally allow employees to opt out of dues payments to unions
  - Strangle employers' voices in union elections and abolish employer's input in NLRB election proceedings
    - Prohibit so called "captive audience" meetings
  - Aid unions in election campaigns
    - Use of employer email systems
    - Union choice in manner of election – in person, mail, or email elections
    - Facilitate organizing in "micro-units"
  - Codify *Gissel* bargaining orders in lieu of re-run elections

PRO Act: Expanded Employee Coverage

- Independent contractors included unless they can meet the strict "ABC" test:
  - Free from employer control
  - Work outside the scope of the employer's business
  - Independent trade or occupation
- Supervisors included even if they "assign" work to others
  - Only excluded if a majority of their work involves "supervisory" duties

PRO Act: New Government Intrusion

- Interest arbitration would be mandated if the employer and union cannot agree to a first contract
  - The CBA would be *imposed* by the government
- Prohibit employers from permanently replacing economic strikers
- Civil penalties for certain ULP's by employers
  - The fines would apply individually to directors and officers
  - The fines would start at $50,000 and potentially double for repeat violations
- Abolishment of individual arbitration agreements that currently prohibit class actions
- Codification of "persuader rule" requiring employers to report payments for labor relations advice to US DOL

PRO Act: New Wave of Lawsuits

- The bill would permit court lawsuits for employees and unions where the case was dismissed by the NLRB (i.e. sufficiently weak for the NLRB to prosecute)
- New remedies include:
  - Back pay without offsetting of interim earnings
  - Liquidated damages of double the damages awarded
  - Attorneys' fees to plaintiff's lawyers
  - Punitive damages

Critical Objectives for Employers Committed to Remaining Union Free

- To avoid union organizing through employee relations efforts, programs, and values, which cause employees to have no interest in, and ideally an aversion to, union representation;
- To avoid NLRB election procedures, unfair labor practice litigation, and objections disputes, by avoiding employee or union initiated organizing drives;
- To be prepared to quickly and effectively respond to the earliest symptoms or suspicions of employee interest in union representation, or union organizing activity

Effective Employee Relations: What to Expect of Supervisors

- Sincere commitment to their employer's positive employee relations values;
- Commitment to treating subordinates with dignity, fairness, respect;
- Loyalty and dedication:
  - Supervisory support for unionization unacceptable;
  - Supervisory ambivalence unacceptable;
  - Authentic supervisory support for/commitment to direct positive, non-union relationship must be developed, maintained, and required
- Prompt identification/reporting/correction of employee relations failures and issues

Critical Effective Employee Relations Program Components

- Presenting an employer as “pro-employee”, not “anti-union”;
- Clearly explained opposition to union interference based upon employer’s commitment to employees;
- Meaningful opportunities for employee participation;
- Meaningful, effective dispute resolution;
- Fair, effective employment practices;
- Supervisors who reflect the demographics of their workforce;
- Effective communication with employees re: employer finances/operational constraints;
- Making sure that employees understand the value and hidden costs of their employee benefits;
- Ensuring that wages and benefits are competitive and that constraints are explained;
- Open, timely, effective employee communications

Critical Preventive and Response Actions:

- Preemptive education of non-supervisory employees regarding their employer's employee relations values, and opposition to union interference, and their right to reject union representation;
- Development of effectively trained supervisors and managers who are committed to lawfully but aggressively responding to union organizers;
- Early identification of union organizing warning signs;
- Prompt, effective assessment of and response to earliest symptoms of organizing;
  - Properly supported and trained campaign management team;
  - On-site in not more than 24 hours;
  - Team is ready to assess, plan, and act
- Beware of "canned" campaigns, purely "video" messaging, and ill-trained, ineffective, or unqualified "persuaders"

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