Employer Update

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Employment Law Trends Assessment: Looking Back at 2020, and Ahead to 2021

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With a global pandemic, economic tumult, widespread social unrest, and a U.S. presidential election, 2020 was a year like no other. These factors, among others, contributed to meaningful shifts in the landscape of employment law – and a promise of further changes in this ever-evolving field in 2021 under President Biden's administration and a Democratic-controlled Congress. In this month's Employer Update, we review many of the noteworthy developments in employment law in 2020, and discuss further changes we expect to see in 2021. Topics addressed below include governmental responses to the COVID-19 pandemic and developments in several areas of employment law, including independent contractor classification, restrictive covenants, mandatory pre-dispute arbitration, equal pay legislation, the joint employer standard, discrimination on the basis of sexual orientation and gender identity, religious accommodation, and traditional labor law.

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Navigating Governmental Responses to the COVID-19 Pandemic

By Quinn Christie

In 2020, employers navigated a dense and ever-changing thicket of legislative and regulatory measures responding to the COVID-19 pandemic. Employers may face more of the same in 2021, as federal, state, and local governments respond to a changing economic landscape, ongoing COVID-19 outbreaks, and the availability of a vaccine. Among other areas of focus, employers will need to remain cognizant of evolving workplace safety guidance from the Centers for Disease Control ("CDC") and the Occupational Health and Safety Administration ("OSHA"), revised sick or family medical leave requirements, unemployment reporting obligations, and other programs designed to support businesses and workers affected by the COVID-19 pandemic, as well as any additional federal response measures that may be initiated by the new Biden administration.

The most recent federal legislation responding to the COVID-19 pandemic is the Consolidated Appropriations Act, 2021, which was signed into law on December 27, 2020. This Act encompasses several smaller acts that renew or revise programs initially implemented under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") or the Families First Coronavirus Response Act ("FFCRA"), the federal government's initial responses at the outset of the COVID-19 pandemic (which included, among various other measures, increased unemployment benefits, and paid leave for pandemic-related reasons). Among the various acts encompassed by this latest legislation, those of key concern to employers include:

- The Continued Assistance for Unemployed Workers Act of 2020, which provides federal funds to support states' payments of $300 per week on top of the normal unemployment benefit and to allow workers who exhausted their unemployment eligibility in the past year to claim an extra 11 weeks of benefits between December 26, 2020 and March 14, 2021. To address individuals who refuse to return to work or decline an offer of suitable employment because they prefer to collect unemployment benefits, each state receiving federal funds to support the broadened unemployment benefits must institute a hotline or online portal for employers to report individuals who refuse an offer of suitable work without good cause.
- The COVID-related Tax Relief Act of 2020, which extends until the end of March 2021 the availability of refundable tax credits for payments made to employees under the FFCRA for emergency paid sick or family and medical leave.
- The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, which replenishes funding for the Paycheck Protection Program ("PPP"), permits second draw loans, and expands permissible uses of PPP proceeds to include certain operating expenditures, property damage costs, supplier expenses, and group insurance costs.
- The Taxpayer Certainty and Disaster Tax Relief Act of 2020, which extends and expands the employee retention tax credit originally made available to employers under the CARES Act.
- The Coronavirus Economic Relief for Transportation Services Act and the Airline Worker Support Extension, which provide monetary support to airlines and other transportation services entities in order to maintain employment and continue operations, with various strings attached.

In addition to these legislative measures, the federal government's recent COVID-related activity of particular note to employers includes updated guidance issued on December 16, 2020 by the U.S. Equal Employment Opportunity Commission ("EEOC") regarding employment issues arising out of the availability of COVID-19 vaccinations.[1] The guidance explains that under federal law, employers may institute mandatory vaccination policies and may lawfully ask employees for proof they have been vaccinated, but "subsequent employer questions, such as asking why the individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business

necessity.'" The EEOC's guidance does not address whether or in what circumstances an employer inquiry regarding why an employee did not receive a vaccination might be job-related and consistent with business necessity. To avoid having to satisfy the ADA standard for disability-related inquiries, employers would need to refrain from asking why an employee has not received a vaccination.

Instead, employers may wish to advise employees of the appropriate contact person to whom any requests for a reasonable accommodation regarding the mandatory vaccination policy should be directed.[2] Once an employee requests an accommodation based on a disability or a sincerely held religious belief, practice, or observance, employers must engage in an interactive process to determine whether a reasonable accommodation could excuse the protected individual from the vaccination requirement. The EEOC guidance states that an employer may prohibit an unvaccinated employee from entering the worksite only if the employee would pose a "direct threat" at the worksite – meaning that based on "reasonable medical judgment" and the "best available objective evidence," the individual's unvaccinated status would pose a significant risk of substantial harm to the health or safety of the individual or others – that cannot be eliminated or reduced by reasonable accommodation.[3] However, as the EEOC guidance explains, even in such circumstances, "[t]his does not mean the employer may automatically terminate the worker." Instead, according to the EEOC, "[e]mployers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities," such as an accommodation allowing the employee to "perform[ ] the current position remotely," or a right to take a leave of absence (such as leave under the FFCRA, the FMLA, or the employer's policies).

Notwithstanding the rollout of vaccination in the United States, employers must remain mindful of CDC and OSHA guidance and regulations regarding maintenance of a safe worksite, especially because of proposed legislation in some states that, if enacted, would prohibit employers from enforcing mandatory vaccination policies.[4] OSHA's COVID-19 webpage[5] collects the agency's requirements including enforcement memoranda, regulations, and other guidance for maintaining a safe worksite during the pandemic. The CDC's website also provides an array of resources for employers, such as guidance for treatment of workers who are at high risk, guidance tailored to specific industries and types of jobsites, and other suggestions regarding COVID-19 risks in the workplace.[6]

Employers must remain nimble during 2021 as governmental authorities continue to update and expand upon existing measures intended to keep workplaces safe and to support the economy, the labor force, and businesses suffering from the ongoing impact of the COVID-19 pandemic.

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[1] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[2] *See Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) ("Generally, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed.").

[3] *See also* 29 C.F.R. 1630.2(r).

[4] Karla Grossenbacher, Some States Put Brakes on EEOC's Stance on Mandating Covid-19 Vaccine (Jan. 13, 2021), Bloomberg Law.

[5] OHSA, Coronavirus Disease (COVID-19), www.osha.gov/coronavirus.

[6] CDC, COVID-19: Workplaces and Businesses, https://www.cdc.gov/coronavirus/2019-ncov/community/workplaces-businesses.

Developments in State and Federal Efforts to Regulate Independent Contractor Classification

By Nicole Jibrine

Over the past year, there have been significant developments at the state and federal levels with respect to independent contractor classification standards. As discussed in the January 2020 and December 2019 issues of Weil's Employer Update, California's Assembly Bill 5 ("AB5") went into effect on January 1, 2020, and codified a classification test pursuant to which a worker is generally presumed to be an employee unless the hiring entity can prove:

(A) the worker is free from control and direction in the performance of the work, both under the terms of the contract and in fact,

(B) the worker performs work that is outside the usual course of the hiring entity's business, and

(C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In September 2020, California's Assembly Bill 2257 amended AB5 by creating additional exemptions for certain occupations and industries, most notably in the media, music, entertainment, and insurance industries. On November 3, 2020, California also voted to pass the ballot initiative Proposition 22, which further exempts app-based rideshare and delivery drivers from AB5. Proposition 22 permits drivers to be classified as independent contractors with certain benefits and protections, including: (i) a guarantee of 120% of the applicable minimum wage for "engaged time" spent on rides or deliveries, (ii) healthcare subsidies for workers driving fifteen hours per week or more, (iii) certain vehicle expense reimbursements, and (iv) occupational accident insurance for on-the-job injuries.[1] Under Proposition 22, companies that engage such app-based drivers must also adopt anti-discrimination and anti-harassment policies and rest break policies, perform background checks and safety training, and enter written agreements with their drivers with certain protections from termination.[2] Proposition 22 does not indicate whether it is intended to apply retroactively.[3]

On January 12, 2021, drivers of certain app-based services (including Uber, Lyft and DoorDash), the Service Employees International Union California State Council, and Service Employees International Union filed an Emergency Petition for Writ of Mandate and Request for Expedited Review in the California Supreme Court to invalidate Proposition 22.[4] The *Castellanos* petitioners assert, among other challenges, that Proposition 22 is unconstitutional because it improperly usurps the authority of the California legislature under the state Constitution, as well as the inherent authority of the judiciary to interpret initiative amendments.[5]

At the federal level, on January 7, 2021, the Department of Labor ("DOL") published a final rule which adopts a revised version of the "economic reality" test under the Fair Labor Standards Act ("FLSA") that would modify the federal requirements for classifying workers as independent contractors and prescribes the relative weights of the five "economic reality" factors.[6] According to the DOL, to determine whether an individual should be classified as an independent contractor – i.e., someone in business for him/herself – or an employee – i.e., someone economically dependent on an employer – the two "core" factors entitled to greater weight are:

1) the nature and degree of the worker's control over the work; and

2) the worker's potential for profit or loss.[7]

The three other factors would supplement the "core" factors as "guideposts":

1) the amount of skill required for the work;

2) the degree of permanence of the working relationship between the worker and the potential employer; and

3) whether the work is part of an integrated unit of production.[8]

The DOL's final rule also provides that businesses may offer independent contractors certain benefits, such as "health, retirement, and other benefits," without altering the company-contractor relationship.[9] The final rule was slated to take effect on March 8, 2021.

On Inauguration Day, the Biden administration issued a memorandum to freeze the DOL's modified "economic reality" test from taking effect, as well as other "midnight" regulations from the Trump administration. With respect to the DOL's final worker classification rule, which has been published in the Federal Register but has not taken effect, the memorandum advises the DOL to consider postponing the effective date for sixty days from Inauguration Day.[10] The memorandum also advises agencies to consider opening a thirty-day public comment period during the sixty-day delay period.[11] After the Biden administration issued this regulatory freeze memorandum, the DOL's Wage and Hour Division withdrew two opinion letters addressing independent contractor status that were published on January 19, 2021.[12] The DOL stated that the letters had been published prematurely because they were based on rules that had not taken effect.[13] In these revoked opinion letters, the DOL had applied its modified "economic reality" test to conclude that certain owner-operators and certain distributors of manufacturer's food products are likely independent contractors under the FLSA.[14]

In contrast to the DOL's modified "economic realities" test, the Biden administration has signaled that it may seek to mirror California's AB5 legislation on the federal level by "working with Congress to establish the 'ABC' test as the federal standard for all labor, employment, and tax laws."[15]

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[1] CAL. BUS. & PROF. CODE § 7449(f).

[2] *Id.*

[3] The California Supreme Court recently held that the application of the "ABC" test from *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* applies retroactively to "all nonfinal worker classification cases that predate the effective date of the Dynamex decision." *Vazquez v. Jan-Pro Franchising International*, No. S258191 at *18 (Cal. Jan. 14, 2021).

[4] Petition for Writ of Mandate, *Castellanos v. California*, (Cal. 2021) (No. S266551).

[5] *Id.* at *10.

[6] Since 1954, the DOL has issued and revised guidance using variations of the "economic reality" test, but this is the first time the DOL has promulgated a generally applicable rule addressing who is an independent contractor versus an employee under the FLSA. *See* Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1172 (Jan. 7, 2021).

[7] Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1175-76 (Jan. 7, 2021) (to be codified at 29 C.F.R pt. 795.105(b)-(d)).

[8] *Id.*

[9] *Id.* at 1185.

[10] Chief of Staff, Exec. Office of the President, Memorandum For the Heads of Executive Departments and Agencies: Regulatory Freeze Pending Review (2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/.

[11] *Id.*

[12] *See* Fair Labor Standard Act 2021 Opinion Letter Search, U.S. Dep't of Labor, https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA.

[13] *Id.*

[14] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-8 (Jan. 19, 2021); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA2021-9 (Jan. 19, 2021).

[15] The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/empowerworkers/.

Developments and Expected Shifts in Restrictive Covenant Legislation

By Dan Richards

Currently, there is no federal legislative or regulatory scheme governing the use of restrictive covenants, such as non-competition and non-solicitation agreements, in the employment context. But two bills that have been proposed in Congress in recent years could become the subject of further legislative activity in 2021 under the Biden administration. First, the Federal Freedom to Compete Act, introduced in the Senate in 2019 (S. 124), seeks to ban the use of non-competes with any workers who are not exempt from the requirements of the Fair Labor Standards Act. Second, the Workforce Mobility Act, introduced with bipartisan cosponsors in the Senate in 2019 (S. 2614) and the House in 2020 (H.R. 5710), seeks to ban all non-competes except those associated with a sale of business or the dissolution of or disassociation from a partnership, and to limit the scope of permissible non-competes even in those scenarios. The bill also would have enabled the Federal Trade Commission ("FTC") and Department of Labor to issue civil penalties for violations, and to pursue action in court. It was silent on other restrictive covenants, such as customer and employee non-solicitation covenants and confidentiality agreements.

Joe Biden's election as President may bring new life to these stalled bills. The Biden campaign's website signals his support of legislation in this area, stating that, "[a]s president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements."[1] In light of this campaign promise, either the Federal Freedom to Compete Act or the Workforce Mobility Act—or, perhaps, a variant of those bills—might regain traction on Capitol Hill.

Beyond legislative proposals, there also was movement this past year toward the possibility of a regulatory scheme at the federal level for restrictive covenants. In January 2020, the FTC held a public workshop with legal scholars, economists, and policy experts to evaluate the merits and legality of rulemaking "that would restrict the use of non-compete clauses in employer-employee employment contracts."[2] In March, nineteen state attorneys general sent a letter to the FTC urging the agency to create new rules limiting non-competes in the employment context. Similarly, in July, Senators Elizabeth Warren (D-Mass.) and Chris Murphy (D-Conn.) sent a letter to the FTC requesting immediate rulemaking that would curb employers' use of non-competes. Despite these efforts, the FTC has yet to propose rulemaking with respect to non-competes.

While the federal government has yet to enact any restrictive covenant legislation or regulations, over the past year, several state and local governments continued the recent trend of filling the federal void with a patchwork of legislation in this area. For example, on December 15, 2020, Washington, D.C.'s City Council unanimously passed the Ban on Non-Compete Agreements Amendment Act of 2020 (B23-0494). If it becomes law, this bill would ban virtually all non-compete agreements between employers and employees entered into after the bill's effective date, except in the sale of business context. Mayor Muriel Bowser has signed the bill, which will take effect upon the expiration of a thirty-day window for congressional review. Also, in April 2020, Virginia followed a number of other states (including Illinois, Maine, Massachusetts, Maryland, New Hampshire, Rhode Island, and Washington) by enacting a law that prohibits employers from entering into non-competition or non-solicitation agreements with low-wage workers—specifically, those earning less than the state's average weekly wage. These laws have a similar purpose and effect as the Federal Freedom to Compete Act in that they limit the use of non-competes to higher-earning employees. Virginia's new law, Va. Code § 40.1-28.7:8, also goes a step further than many of its counterparts in other states by banning restrictive covenants that prohibit employees from providing services to former clients who initiate contact with the employee.

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[1] The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/empowerworkers/.

[2] Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues, FTC (Jan. 9, 2020), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

Developments in Mandatory Arbitration and Class Action Waivers

By Justin M. DiGennaro

While Congress has not amended the Federal Arbitration Act ("FAA") in decades, the United States Supreme Court has, in recent years, strengthened the enforceability of arbitration and class action waiver provisions in employment agreements.[1] However, President Biden has expressed support for significant amendments to the FAA that could limit the ability of employers to require confidential arbitration provisions or class action waivers in connection with employment-related disputes. In fact, President Biden has expressly promised to "enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits. . ."[2] In an effort to effectuate this campaign promise, President Biden may push to enact a number of different pieces of proposed legislation regarding mandatory arbitration and class action waivers.

For instance, President Biden has expressed support for enacting the Forced Arbitration Injustice Repeal Act ("FAIR Act"), which the House passed in late 2019.[3] The FAIR Act, if enacted, would prohibit employers from requiring employees to sign predispute arbitration agreements or class action waivers as a condition of employment, and specifically states that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute." Further, it would define an "employment dispute" to include any disputes "arising out of or related to the work relationship or prospective work relationship . . ." The FAIR Act would apply to employees at all levels, and to all predispute arbitration provisions, regardless of whether the provision allows for class arbitration. If Congress enacts the FAIR Act, employers would have to re-evaluate their employment arbitration and class action waiver policies and practices.

President Biden has also expressed support for enacting the Protecting the Right to Organize Act ("PRO Act"), which the House passed in early 2020.[4] The PRO Act would classify as an unfair labor practice an employer entering into or attempting to enforce a predispute class action waiver with an employee, coercing an employee into agreeing to a predispute class action waiver, or retaliating or threatening to retaliate against an employee for refusing to agree to a predispute class action waiver. However, these provisions would apply only to workers protected by the National Labor Relations Act—which excludes, among others, supervisors and independent contractors—and prohibit only arbitration provisions that require individualized proceedings. Therefore, if the PRO Act is enacted, while employers may still be able to compel confidential arbitration of many employment claims, the use of predispute class action waivers may be more limited with respect to many employees.

President Biden also may support enacting the Ending Forced Arbitration of Sexual Harassment Act, which was introduced in the Senate in 2017.[5] This proposed legislation states that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute." It defines "sex discrimination dispute" as "a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under title VII of the Civil Rights Act of 1964 . . . regardless of whether a violation of such title VII is alleged." Like the FAIR Act, this proposed legislation would apply to all employees at any level. However, in contrast to the FAIR Act, it would not apply to *all* employment disputes, but rather, *only* to sex discrimination disputes as defined in the act. In addition, in contrast to both the PRO Act and the FAIR Act, this legislation would prohibit only predispute arbitration provisions, but would not address the enforceability of standalone class action waivers. Thus, if the Ending Forced Arbitration of Sexual Harassment Act is enacted, employers may wish to consider carving out "sex discrimination disputes" from any existing arbitration policies and practices. Employers also would need to assess the

practicalities of determining which claims fall within the definition of “sex discrimination disputes,” and enforcing arbitration provisions when non-“sex discrimination disputes” and “sex discrimination disputes” are intertwined in a single case. Employers may also wish to enhance their use of standalone class action waivers, subject to and consistent with other applicable legislation, as a remaining tool towards reducing the risk of material litigation by employees.

In the past few years, several states have already begun enacting legislation which purports to restrict employers’ abilities to direct employment disputes to confidential mandatory arbitration on an individualized basis.[6] Employers may have taken some comfort from criticism from commentators of these laws as likely being preempted by the FAA. However, with the Biden administration and a Democratic-controlled Congress, the prospect of meaningful restrictions on arbitration through federal legislation may be a realistic prospect for the first time in many years. Employers certainly should monitor federal legislative efforts in this area.

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[1] *See*, *e.g.*, *Epiq Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[2] The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/empowerworkers/.

[3] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1423/text.

[4] Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2474.

[5] Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/2203/text?format=txt.

[6] N.Y. C.P.L.R. § 7515 (New York); Cal. Labor Code § 432.6 (California); 820 ILCS § 96/1-25(b) (Illinois); N.J. Stat. 10:5-12.7 (New Jersey); MD Code Labor & Empl. § 3-715; V.S.A. 21 § 495h (Vermont); RCW § 49.44.210 (Washington).

Developments in Pay Equity and at the EEOC

By Elizabeth Casey

The issue of pay equity remained front and center in 2020, including in the courthouses and in state legislatures, and with the election of a new President who has signaled his support for federal legislation in this area.

Perhaps the highest-profile recent litigation in the pay equity space has been the United States Senior Women's National Soccer Team's ("USWNT") lawsuit against the United States Soccer Federation, Inc. ("USSF"), alleging, among other claims, that the USSF discriminates against female players by paying them less than male players. But in May 2020, a federal judge in California rejected these claims and granted partial summary judgment to the USSF, finding that the evidence submitted by the parties showed that the plaintiffs were actually paid at a rate that was *more* – not less – than the rate paid to their male counterparts.[1] The court based its decision on consideration of *all* forms of compensation received by the male and female players, rejecting the USWNT's argument that their lower per-game bonuses under the terms of their collective bargaining agreement amounted to an Equal Pay Act violation.[2]

Beyond the courtroom, several state legislatures have taken up the issue of pay equity. For example, Colorado's New Equal Pay for Equal Work Act ("NEPEWA"), which went into effect on January 1, 2021, forbids employers from asking about or relying on an applicant's salary history (following the lead of numerous other states and municipalities that have enacted similar restrictions) and mandates that employers pay employees of different sexes the same wage rate for substantially similar work.[3] The NEPEWA's associated regulations, the Equal Pay Transparency rules, go further than other states' initiatives in this area by requiring employers to announce internal job openings and disclose all compensation and benefits for a job on both internal and external postings.[4] California also passed pay equity legislation in 2020, becoming the first state to enact an employee data reporting law. California's law, which is modeled after the Equal Employment Opportunity Commission's ("EEOC") reporting requirements implemented during the Obama administration,[5] requires private employers with 100 or more employees to annually report employee pay data, including an indication of each employee's race, ethnicity, sex, and job category.[6]

With Joe Biden's election as President, the possibility of pay equity legislation at the federal level will be a hot button topic in 2021. The Obama-Biden administration prioritized various equal pay initiatives, such as by enacting the Lilly Ledbetter Fair Pay Act as its first piece of legislation and implementing the EEOC's collection of gender pay data. President Biden may attempt to build off some of these Obama-era pay-equity policies. For example, one of his campaign platforms was support of the Paycheck Fairness Act ("PFA"), which passed the House of Representatives in 2019 but did not come up for a vote in the Senate in 2020.[7] The PFA would amend the Equal Pay Act of 1963 by replacing the catch-all "any factor other than sex" defense to a pay disparity claim with the revised defense of "a *bona fide* factor other than sex" (emphasis added), "such as education, training, or experience," which factor may not be derived from a sex-based pay differential, must be job-related and consistent with business necessity, and must account for the entire pay disparity at issue.[8] The PFA also would require employers to provide the EEOC with compensation, hiring, termination, and promotion data, disaggregated by sex, race, and national origin, and would prohibit employers from relying on wage history in the determination of wages (much like many existing state and local laws).[9]

However, the Biden administration's policy goals related to pay equity and other employment issues may face a roadblock in the form of the Trump administration's lingering impact at the EEOC. Although Republican Janet Dhillon stepped down as chair of the EEOC after President Biden's inauguration and was replaced by Democratic EEOC-veteran Charlotte Burrows, Democrats are still a minority on the Commission. Because President Trump appointed three commissioners to the EEOC,

each for a five-year term, Republicans will retain control of the Commission until at least July 2022.

Another remnant of the Trump administration that may continue to impact the EEOC going forward is the Commission's recent, final approval of a new rule requiring the Commission to provide employers with additional information during the conciliation process, including information it relied on when making a reasonable cause determination.[10] This information includes a summary of the facts and other non-privileged information the Commission based its findings on, an explanation of the legal basis for the EEOC's decision, underlying calculations and explanations relating to damages, and the Commission's designation of the case (*e.g.*, systemic, class, or pattern or practice).[11] While the rule has already been published in the Federal Register and is scheduled to become effective on February 16, 2021, its implementation is uncertain, as President Biden's chief of staff issued a memo hours after the President's inauguration that directed agencies to immediately withdraw newly finalized but unpublished rules and to consider 60-day postponements for newly published rules that have not yet taken effect.[12]

In another notable change from past practices, in 2020, the EEOC issued its first opinion letters in over 30 years.[13] Members of the public may request opinion letters on the application of EEOC-enforced laws to any specific question or factual scenario, and reliance on such letters may provide a defense to liability for claims under Title VII and the Age Discrimination in Employment Act.[14] While the EEOC has discretion whether to respond to requests for opinion letters, responding to such requests may be another way in which the Republican commissioners seek to flex their muscles in opposition to the Biden administration's agenda while they remain in control of the Commission.

[1] *Morgan v. United States Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020).

[2] *Id.* at 652-57.

[3] Colo. Rev. Stat. § 8-5-102.

[4] Colo. Dep't of Labor, 7 C.C.R. § 1103-13 (2020).

[5] The EEOC halted the collection of employer gender and race pay data in 2020, deciding to collect only workforce diversity information. Agency Information Collection Activities: Existing Collection, 85 Fed. Reg. 16340 (Mar. 23, 2020).

[6] S.B. 973, 2020 Leg. (Cal. 2020) (effective Mar. 31, 2021).

[7] The Biden Agenda for Women, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/womens-agenda/.

[8] Paycheck Fairness Act, H.R. 7, 116th Cong. § 3 (2019).

[9] *Id.* §§ 8, 10.

[10] Update of Commission's Conciliation Procedures, 29 C.F.R. § 1601 (2021).

[11] *Id.*

[12] Jon Hill, *Biden Freezes Late Trump Regs For White House Review*, Law360 (Jan. 20, 2020), https://www.law360.com/articles/1346974/biden-freezes-late-trump-regs-for-white-house-review.

[13] Paige Smith, *EEOC to Issue First Opinion Letter on Job Bias in Over 30 Years,* Bloomberg Law (Apr. 29, 2020), https://news.bloomberglaw.com/daily-labor-report/eeoc-to-issue-first-opinion-letter-in-over-thirty-years.

[14] Formal Opinion Letters, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/formal-opinion-letters.

Developments in the Joint Employer Standard

By Lauren E. Richards

Over the past year, key administrative agencies issued new guidance and regulations that arguably narrowed the "joint employer" standard, effectively seeking to limit the circumstances under which an entity may be deemed a joint employer. More specifically, in 2020, the Department of Labor ("DOL") and the National Labor Relations Board ("NLRB") both issued new rules to focus the joint employer inquiry more on an entity's direct control over an employee, and less on an entity's indirect control or the economic realities of the relationship.[1]

The DOL's final rule, which took effect on March 16, 2020, made significant changes to the joint employer standard applicable to "vertical relationships," such as the relationship between a franchisor and franchisee or between a general contractor and subcontractor, which also include an entity's use of temporary staffing agencies or outsourced services through a third party. The new rule focused on the extent to which an entity controls (1) hiring and firing, (2) supervision and control of the work schedule and conditions of employment, (3) setting the pay rate, and (4) maintaining employment records. The new rule, therefore, deviated from the previously enforced "economic realities" test. The "economic realities" test, by contrast, had focused on the type of work performed at the company and the potential joint employer's influence over the workplace environment and explicitly rejected a focus on control. In September 2020, however, Judge Gregory Woods of the Southern District of New York invalidated the substantive changes to the DOL's new rule,[2] finding that they constituted an "arbitrary and capricious" departure from past practice, including the DOL's previous interpretations as well as established case law.[3] The court also found the new test to be inconsistent with the statutory definitions of "employer," "employee," and "employ" in the Fair Labor Standards Act ("FLSA").[4] In November 2020, the DOL appealed the ruling.

In February 2020, the NLRB issued a new rule stating that, to qualify as a joint employer, the entity must exercise "substantial *direct* and immediate control" over "essential terms and conditions of employment," such as hiring, firing, wages and benefits, hours of work, direction and supervision of work, and discipline.[5] This new rule restores the controlling joint employer test from before *Browning Ferris Indus. of California, Inc. d/b/a BFI Newby Island Recyclery*,[6] in which the NLRB majority had ruled that joint employer status could be found upon merely a showing of *indirect* control over such terms and conditions, or even the reservation of the right to control such terms and conditions. In the fall of 2020, the House Education and Labor Committee subpoenaed the NLRB regarding (1) its late 2019 approval of a settlement involving McDonald's in which McDonald's avoided joint employer liability, and (2) the NLRB's February 2020 joint employer rule. The requests target a potential conflict of interest that lawmakers suggest may have swayed the NLRB's recent decision-making with respect to the joint employer standard.[7] Because the NLRB will maintain a Republican majority until the end of August 2021, any changes from the NLRB as a result of the Biden administration might not occur until the end of 2021 or later.[8]

Franchisors, businesses who use temporary staffing agencies, or those who otherwise subcontract work or staff employees using a third party should all remain mindful of any additional joint employer guidance that may come under the Biden administration. To the extent more liberal tests for establishing joint employer status are enacted, they could increase the likelihood of findings of joint liability for wage and hour violations, unfair labor practices, and discrimination or harassment claims.

Finally, businesses also should remain cognizant of potentially conflicting or inconsistent joint employer standards across different agencies (which could be exacerbated by varying judicial interpretations of those standards across jurisdictions). While some agencies, such as the DOL, may shift their approach more quickly and expand the joint employer standard under the new administration, others such as the

NLRB or the EEOC may take more time to adjust their policies given the current composition of these agencies. Thus, the DOL could consider an entity to be a joint employer under the FLSA and, therefore, jointly and severally liable for the payment of minimum wage and overtime to employees, while the NLRB and the EEOC may not reach the same conclusion. Businesses should, therefore, carefully monitor each agency's approach to understand their obligations and potential liabilities.

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[1] In late 2019, the Equal Employment Opportunity Commission ("EEOC") indicated that one item on its 2020 agenda was to clarify the approach to joint employer liability in discrimination claims. However, the EEOC did not release any new guidance on the issue in 2020.

[2] The new rule also made minor changes to the portion of the joint employer rule addressing "horizontal relationships," which are relationships in which two employers share employees during the same workweek. The Southern District of New York found the changes to be "non-substantive," and they were not affected by the court's order.

[3] 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

[4] *Id.*

[5] 29 C.F.R. 103.40 (emphasis added).

[6] *Browning Ferris Indus. of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599, 1600 (2015), *aff'd. in part, reversed in part and remanded,* 911 F.3d 1195 (D.C. Cir. 2018).

[7] *See* Press Release, House of Representatives Education & Labor Committee, Chairman Scott Subpoenas NLRB Chairman for Documents Regarding Potential Conflicts of Interest (Sept. 15, 2020), https://edlabor.house.gov/media/press-releases/chairman-scott-subpoenas-nlrb-chairman-for-documents-regarding-potential-conflicts-of-interest.

[8] However, after assuming office President Biden immediately terminated the Trump-appointed General Counsel of the NLRB, Peter Robb, after Robb declined to resign before the end of his term in November 2021. The General Counsel of the NLRB is charged with prosecuting NLRB cases and determining which cases have merit.

Development in LGBTQ Rights and Religious Liberties in the Workplace

By Omar Abdel-Hamid

In a landmark decision for LGBTQ rights in the workplace, the United States Supreme Court held last year in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) that in addition to the expressly enumerated protected classes, Title VII of the Civil Rights Act of 1964 should be read to also prohibit discrimination on the basis of sexual orientation and gender identity. The Biden administration may further these efforts to protect LGBTQ rights in the workplace. For example, prior to his election, President Biden expressed interest in enacting the Equality Act within his first 100 days in office.[1] The Equality Act, which the House passed in 2019 but the Senate never voted on, would amend the Civil Rights Act of 1964 to expressly prohibit discrimination on the basis of sexual orientation or gender identity in employment, housing, jury selection, and public accommodations. Thus, if the Equality Act is enacted, sexual orientation and gender identity would be statutorily protected classes (similar to sex and race) in the workplace, and employers would be prohibited under federal law from discriminating against individuals based on these characteristics, including with respect to hiring, termination, compensation, and other terms and conditions of employment.

In terms of developments with respect to religious belief protections, in November 2020 the Equal Employment Opportunity Commission ("EEOC") proposed an update to its Compliance Manual on Religious Discrimination and issued new guidance with respect to religious discrimination claims. Under the EEOC's new guidance, some employers would be afforded additional defenses against workplace bias claims including through the expansion of the "ministerial exception," a doctrine that protects religious employers from certain federal employment discrimination claims. The new guidance would also provide employees with additional protections from religious discrimination in terms of the "reasonable accommodations" that employers must provide to accommodate an employee's religious beliefs in accordance with several recent judicial decisions, including the Supreme Court's decision in *EEOC v. Abercrombie*, 135 S. Ct. 2028 (2015), which held that an employer violated Title VII by considering anticipated religious accommodations when making hiring decisions. The public comment period on the EEOC's revised guidance closed on December 17, 2020.

The Supreme Court is also considering petitions for writs of certiorari in two cases that may require the high court to re-assess the extent of an employer's obligation to provide "reasonable accommodations" to employees on the basis of an employee's religious beliefs.[2] Under current Supreme Court precedent, employers must provide "reasonable accommodations" to employees whose religious beliefs conflict with their job duties so long as those accommodations do not impose an "undue hardship," which the high court, in *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63 (1977), held is "more than a de minimis" burden on the employer. In both *Memphis Light* and *Dalberiste*, the petitioners are encouraging the Supreme Court to reconsider whether *Hardison*'s "de minimis" standard is the correct standard under which to assess whether accommodations impose an "undue hardship" on an employer. Both petitioners argue that such a standard effectively nullifies the statutory protections for religious employees and ignores Title VII's statutory text and legislative history. The Supreme Court's decision whether to hear *Memphis Light* or *Dalberiste* will be significant, as the high court has not clarified or addressed the "reasonable accommodation" standard in over 40 years.

Finally, on December 16, 2020, in the context of guidance regarding employers mandating COVID-19 vaccinations in the workplace, the EEOC also included guidance to address the issue of an employee refusing vaccination due to sincerely held religious beliefs. The EEOC guidance provides that although employers may mandate COVID-19 vaccinations generally, employers must provide a "reasonable accommodation" to individuals who refuse the vaccine because of a sincerely held religious belief, practice, or observance (or exempt them from the vaccination requirement), as long as doing so would not create an "undue hardship"

for the employer. As set forth in the guidance, only if such a reasonable accommodation is not possible may the employer exclude the employee from the workplace (which the EEOC expressly clarified, does not mean the employer may automatically terminate the employee).

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[1] The Biden Plan to Advance LGBTQ+ Equality in America and Around the World, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/lgbtq-policy/.

[2] *Small v. Memphis Light, Gas & Water*, 952 F.3d 821 (6th Cir. 2020), *petition for cert filed* (June 15, 2020) (No. 19-1388) and *Dalberiste v. GLE Associates Inc.*, No. 20-11101 (11th Cir. May. 19, 2020), *petition for cert. filed*, (June 24, 2020) (No. 19-1461).

What to Expect from the NLRB Under the Biden Administration

By Thomas McCarthy

With the Democrats taking control of Congress and the White House, and Joe Biden tapping Marty Walsh, a former top union leader and current Mayor of Boston, as the nominee for Secretary of Labor, employers are anticipating stark changes in the National Labor Relations Board's ("NLRB") approach to enforcement in the coming years.

Under the Trump administration, the NLRB rolled back many rules and enforcement directives from the Obama era, and issued a number of employer-friendly decisions. These include *Caesars Entertainment*, a 2019 decision allowing employers to prohibit employees from using company email for union activities; *The Boeing Company*, a 2017 decision that overturned a prohibition on workplace rules that could be "reasonably construed" as impeding employees' rights under the National Labor Relations Act ("NLRA"), and replaced it with a more employer-friendly test; *PCC Structurals, Inc.*, a 2017 decision that reinstated the traditional "community of interest" standard when determining the appropriateness of a petitioned-for bargaining unit, and allowed employers to more easily challenge the formation of difficult-to-manage "micro-units;" and *MV Transportation*, a 2019 decision that replaced the longstanding "clear and unmistakable waiver" standard (used to determine whether there is a continuing duty to bargaining as to any particular issue during the term of a collective bargaining agreement) with a more employer-friendly "contract coverage" standard that analyzes whether the issue is within the "scope" of the existing agreement language.

While these decisions may eventually be overturned or superseded by new decisions, rules, or guidance during the coming years, any such changes may be less likely to occur in the immediate future than later on in President Biden's term in office because Democrats will not hold a majority of seats on the Board until August 2021, when the term of Republican William Emanuel expires. That being said, President Biden wasted no time in terminating the Trump-appointed General Counsel of the NLRB, Peter Robb, after Robb declined to resign. The General Counsel of the NLRB is charged with prosecuting NLRB cases and determining which cases have merit, and there was pressure from some progressive circles for Biden to terminate Robb prior to the end of his term in November 2021, something that no president had ever done before.[1] A day after terminating Robb, President Biden also fired Alice Stock, who had assumed the role of acting general counsel after Robb's termination, and eventually named career NLRB employee Peter Sung Ohr as acting general counsel until a permanent nominee is confirmed by the Senate.[2] President Biden's exercise of power in this regard during the very early days of his presidency may set a tone for what will come in the future. For example, once the Republican-held seats become vacant, the Democratic control of both houses of Congress could empower President Biden to nominate candidates who are more staunchly pro-labor than he otherwise might have nominated with a split Congress.

Biden may also look to take advantage of a Democratic-led Congress to pass labor reform statutes that could not as easily be overturned or undone by a future Republican administration. In particular, Biden has championed the Protecting the Right to Organize Act ("PRO Act"), which would rewrite many aspects of the NLRA. Indeed, Biden's campaign website states that he "strongly supports the PRO Act's provisions instituting financial penalties on companies that interfere with workers' organizing efforts… [and will] go beyond the PRO Act by enacting legislation to impose even stiffer penalties on corporations and to hold company executives personally liable when they interfere with organizing efforts, including criminally liable when their interference is intentional."[3] The PRO Act, which was passed by the House in February 2020, would, among other changes:

- Ban so-called "right to work" laws, which prevent a person from being compelled to join a union or to pay union dues as a condition of employment;

- Codify rules that shorten the amount of time an employer has to campaign against unionization after an election petition has been filed;
- Prohibit employers from requiring employee attendance at meetings where the employer can present their views on union-organizing efforts;
- Eliminate the longstanding prohibition on secondary boycotts, where a union boycotts a company on the grounds that it does business with another company engaged in a labor dispute;
- Expand the definition of employees covered by the NLRA;
- Prevent employers from permanently replacing workers engaged in economic strikes; and
- Expand the definition of joint employers under the NLRA.

The PRO Act as currently drafted would also create monetary penalties (including personal liability for corporate officers and directors, similar to the Fair Labor Standards Act) that could be doubled for repeat violations, and would create a private right of action for employees and unions, with the opportunity for successful plaintiffs to recover attorneys' fees. The Democrats' razor-thin majority in the Senate could mean that modifications would have to be made to the bill in order to gain the support of centrists. However, given the Biden campaign's focus on empowering American workers and rebuilding the middle class, it would not be surprising if some version of the PRO Act makes its way onto the legislative agenda in the near term.

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[1] Braden Campbell, *Biden Fires NLRB GC Robb After He Declined To Resign*, Law360 (Jan. 20, 2021), https://www.law360.com/articles/1347003/biden-fires-nlrb-gc-robb-after-he-declined-to-resign.

[2] Robert Iafolla, *Biden Names Acting Top NLRB Lawyer After a Pair of Firings*, Bloomberg Law (Jan. 25, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-taps-new-nlrb-top-lawyer-after-back-to-back-firings.

[3] The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, Joe Biden for President: Official Campaign Website (2020), https://joebiden.com/empowerworkers/.

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