

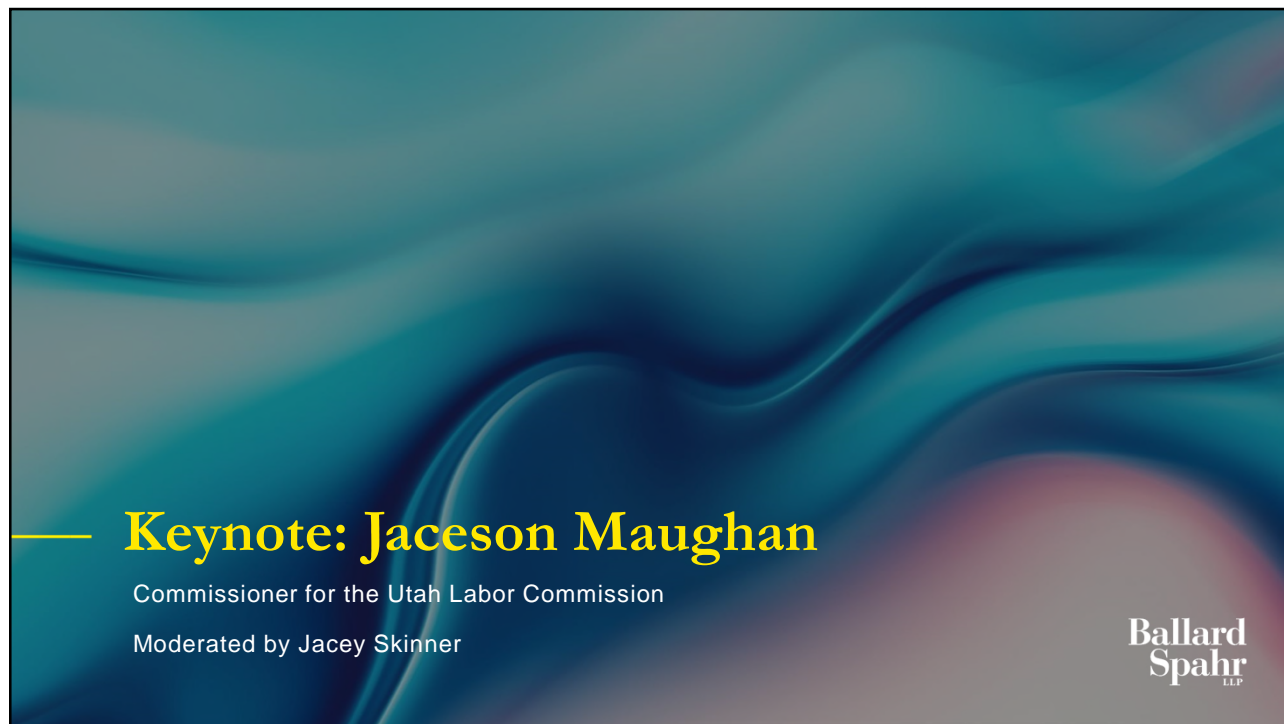
# — 10<sup>th</sup> Annual Utah Fall Employment Seminar

November 11, 2021

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— **Keynote: Jaceson Maughan**  
Commissioner for the Utah Labor Commission  
Moderated by Jacey Skinner

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— **Employment Law Year in Review**  
Jason D Boren  
November 11, 2021

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## — Agenda

1. U.S. Supreme Court
2. 10<sup>th</sup> Circuit
3. Utah Supreme Court
4. Utah Legislature



## — U.S. Supreme Court

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## Supreme Court

### Six "R" Appointments



### Three "D" appointments

## Union Access vs. Property Rights

- *Cedar Point Nursery v. Hassid*, Case No. 20-107 (US 6/23/21)
  - Supreme Court struck down as unconstitutional a California law that permitted union organizers access to agricultural company land to speak with workers.
  - Two California growers filed suit in federal court, seeking to enjoin the law allowing union organizers on to their property for up to 3 hours per day, 120 days per year.
  - Employers successfully argued that the law constituted an unconstitutional taking of their property in violation of the 5<sup>th</sup> and 14<sup>th</sup> Amendments.
  - Court rejected the union's argument that the law was a critical tool for informing vulnerable farm laborers of their organizing rights under the NLRA.

## — Transgender Rights

- *Grimm v. Gloucester County School Board*: Supreme Court refused to review a federal appellate court ruling involving use of bathrooms by a transgender student.
- The student, assigned as a female at birth, sought to use the boys' bathroom in his Virginia high school. The school's policy barred students from using a gender-specific bathroom if contrary to their gender assigned at birth, and required the student to use a single-occupancy bathroom.
- The student sued under Title IX, prohibiting gender discrimination in education, which under the Supreme Court's *Bostock* ruling covers gender identity as well.
- Supreme Court left stand the 4<sup>th</sup> Circuit ruling that schools must allow transgender students to use the bathrooms that align with their gender identities.

## — 10<sup>th</sup> Circuit

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## Retaliation

- *Roberts v. Winder*, Case No. 20-04082 (10/26/21): The 10<sup>th</sup> Circuit rejected employee's argument that he was fired in violation of his 1<sup>st</sup> amendment rights
  - *The plaintiff, a public employee, was hired in 1996 by then-Sheriff Kennard. In 2006, the plaintiff supported Kennard in his re-election campaign against Winder. Winder won and became the plaintiff's boss. In 2017, at Winder's request, the plaintiff's job position was eliminated.*
  - *The Court held that because the plaintiff would have been terminated even absent any desire to punish him in retaliation for his allegedly protected speech, there was no 1<sup>st</sup> amendment violation. The fact that 11 years had passed between the allegedly protected speech and the adverse action provided additional support for this finding.*
  - *The Court also held that the plaintiff failed to establish that he had a fundamental property interest in his position because it was not a permanent position. The plaintiff failed to establish an ADEA claim because his replacement was only 4 years younger than him.*

## Retaliation

- *Payan v. UPS*, Case No. 19-4017 (11/25/19): The 10<sup>th</sup> Circuit found that an employee failed to establish a retaliation claim when the employer investigated and disciplined him after the employee had brought a discrimination claim.
  - *An employee brought a racial discrimination claim against his employer in 2014. The case was dismissed.*
  - *In 2015, the employer conducted an investigation into allegations that the employee had altered employee timecards. The employer found that the employee violated its company integrity policy and disciplined the employee by denying his yearly raise and annual stock distribution.*
  - *The Court found that the employer's disciplinary actions were not retaliation because the employee failed to establish that the investigation was pretextual. The Court found that the employer's stated justifications for the investigation were consistent, there were no procedural irregularities, and there was no evidence that the employee was treated differently than similarly-situated co-workers.*

## — Title VII

- *Battino v. Redi-Carpet Sales of Utah*, Case No. 20-4081 (9/13/21): The 10<sup>th</sup> Circuit found that the employee failed to state a claim of pregnancy or sex discrimination when the employer revoked her work-from-home arrangement, leaving her without childcare.
- *An employee left for six weeks of maternity leave and her employer agreed that she could work remotely for an additional month. Shortly into that time period, the employer revoked the remote arrangement, citing operational challenges. The employee failed to come into the office, citing lack of childcare, and the employer fired her.*
- *The Court found that the revocation of the employee's work-from-home arrangement and unwillingness to allow her the opportunity to seek childcare did not constitute discrimination on the basis of sex or pregnancy.*

## — Title VII Sex + Age Claims

- *Frappied v. Affinity Gaming Black Hawk*, Case No. 19-1063 (7/21/20): The 10<sup>th</sup> Circuit found that sex-plus-age claims are cognizable under Title VII.
- *The Court explained that so long as a plaintiff can show that the outcome would have been different but for a protected characteristic, she has a cognizable claim under Title VII.*
- *The Court stated that “the class of sex-plus claims cognizable under Title VII is broader than [prior precedent]” and that “we no longer require sex-plus plaintiffs to show discrimination against an entire subclass.”*

## — Title VII Remedies

- *Tudor v. Southeastern Oklahoma State University*, Case Nos. 18-6102 & 18-6165 (9/13/21): The 10<sup>th</sup> Circuit held that a transgender professor was entitled to reinstatement with tenure and front pay after the jury found the employer discriminated against her on the basis of her sex.
  - *The jury in the lower court found that the employer discriminated against a transgender professor on the basis of her sex when it denied her tenure.*
  - *The Circuit Court found that the professor was entitled to reinstatement with tenure to put her in the position she would have been in had the discrimination not occurred. Additionally, the Court found that the professor was entitled to front pay for the period of time she worked a temporary alternative teaching position, because that position was not substantially similar to the tenured position.*

## — Severe and Pervasive

- *Sanderson v. Wyoming Highway Patrol*, Case No. 19-08025 (9/30/20): The 10<sup>th</sup> Circuit reversed a District Court's ruling that the plaintiff failed to allege sufficiently severe or pervasive discrimination to establish a hostile work environment.
  - *A female employee joined the Wyoming Highway Patrol, which was male-dominated. Male co-workers repeatedly made sexual comments to the employee, spread rumors about her sexual activity, and made her feel ostracized.*
  - *The Circuit Court found that these cited acts of harassment were not "isolated or fleeting" and that the employee was subjected to "persistent, repeated rumors of sexual promiscuity" accompanied by harassment. Therefore, the employee raised a genuine issue of material fact as to whether the discriminatory conduct was severe and pervasive, constituting a hostile work environment.*



## — Outrageous Conduct

- *Lester v. ConocoPhillips*, Case No. 4:18-cv-00022 (1/28/21): The Utah District Court granted an employer's motion to dismiss an employee's discrimination claim, finding that the alleged misconduct did not rise to the level of outrageous conduct.
- *The Court rejected an employee's sexual harassment claim when the employee brought the claim against the company her employee contracted with and not her actual employer.*
- *The Court also found that the employee's allegations that the company intentionally inflicted emotional distress by allowing her co-workers to criticize her work performance, make unwanted sexual advances, and claim to have a sexual relationship with her were not severe enough to constitute outrageous conduct.*

## — ADA Adverse Employment Action

- *Exby-Stolley v. Board of County Commissioners*, Case No. 16-01412 (10/28/20): The 10<sup>th</sup> Circuit held that a plaintiff does not need to present evidence of a separate adverse employment action to prove a violation of the ADA's reasonable job accommodation requirements.
- *An employee brought a failure-to-accommodate claim against her employer after her employer allegedly failed to provide any accommodations for her physical limitations, compelling her to resign. The District Court jury instructions stated that the employee must prove that she "was discharged from employment or suffered another adverse employment action by [her employer]."*
- *The 10<sup>th</sup> Circuit reversed and remanded, finding that requiring an adverse employment action is contrary to circuit precedent, the text of the statute, and the broad remedial purpose of the ADA.*

### Pattern-or-Practice Claims

- *EEOC v. JBS USA*, Case No. 1:10-cv-02103 (1/25/21): The Colorado District Court found that a 10<sup>th</sup> Circuit en banc decision, *Exby-Stolley*, did not constitute an intervening change in the law controlling Title VII religious-accommodation cases.
- The EEOC requested that the Court reconsider an earlier decision that held that plaintiffs must establish an adverse employment action when bringing a Title VII claim. The EEOC claimed that the 10<sup>th</sup> Circuit en banc decision in *Exby-Stolley* was an intervening change that required the court to reconsider its earlier findings.
- The Court disagreed and explained that in *Exby-Stolley*, an ADA case, the 10<sup>th</sup> Circuit en banc found that “while ADA claims do not require that a plaintiff show an adverse employment action, in Title VII religious-accommodation cases, the prima facie case requires the employee to show, among other things, that ‘he or she was fired or not hired for failure to comply with the conflicting employment requirement.’” This 10<sup>th</sup> Circuit decision was therefore consistent with the court’s earlier findings.

### Failure to Accommodate

- *Aubrey v. Koppes*, Case No. 19-1153 (9/18/20): The 10<sup>th</sup> Circuit reversed the District Court’s finding that the plaintiff’s requested accommodations were unreasonable, and instead found that a jury could find the employer did not engage in a process to reasonably accommodate her.
- *An employee requested accommodations after the onset of a rare condition. Her suggested accommodations included retraining and reassignment to a lighter position, but her employer refused these accommodations.*
- *The Court held that a jury could reasonably find that the employer failed to engage in the necessary interactive accommodations process because the employer did not try to understand the employee’s limitations or explore accommodations that would allow her to return to work.*

### Reasonable Accommodations

- *Unrein v. PHC-Fort Morgan*, Case No. 20-1219 (4/8/21): The 10<sup>th</sup> Circuit found that employers do not have to accommodate employee's non-work related barriers.
  - *An employee became legally blind and could no longer drive herself to work. At first, the employer granted her requested accommodation of a flexible, unpredictable work schedule based on when she could secure rides to work. When the employer revoked this arrangement, stating that the employee's physical presence was an essential element of her job, the employee sued alleging failure to accommodate.*
  - *The Court held that the employee sought "an accommodation for her transportation barrier, a problem she faces outside the workplace unrelated to an essential job function or a privilege of employment."*

### FLSA de Minimis Doctrine

- *Peterson v. Nelnet Diversified Solutions*, Case Nos. 19-1348 & 20-1217 (10/8/21): The 10<sup>th</sup> Circuit found that the time that call-center representatives spent turning on their computers and launching certain software was compensable work under the FLSA and the de minimis doctrine did not apply.
  - *Call-center employees brought a class action lawsuit, alleging that the two minutes they spent prior to their shifts turning on their computers and software had to be compensated under the FLSA.*
  - *The Circuit Court found that this time was compensable because it was integral and indispensable to the employees' duties. The Court further found that because the employer could easily estimate the amount of time spent and the employees completed the task with sufficient regularity, the de minimis doctrine did not apply.*

## — Frivolous Suits

- *United States ex rel. Sorenson v. Wadsworth Brothers Construction Co.*, Case No. 16-cv-875 (2/3/21): The Utah District Court granted an employer's motion for attorneys' fees, finding that the employee's False Claims Act claims were frivolous
  - *An employee brought a False Claims Act claim against his employer, alleging false compliance with federal wage requirements while performing Utah construction projects. Additionally, the employee alleged he was not paid proper wages and that he was retaliated against.*
  - *The Court dismissed all claims and found that they were unsupported, that the employee continued to litigate the claims after the facts were indisputably clear, and that the claims were frivolous. The Court ordered the employee to pay the employer's attorneys' fees.*

## — Utah Supreme Court

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## — Duty of Care

- *Boynton v. Kennecott Utah Copper, LLC*, Case No. 20190259 (8/5/21): The Supreme Court of Utah found that premises operators owe a duty of care to workers' co-habitants with respect to take-home exposure to asbestos
  - During the 1960s and 1970s, an employee was exposed to asbestos at numerous job sites. He alleged that his wife was exposed to asbestos from the fibers and dust he carried home from these sites. The employee's wife was diagnosed with mesothelioma in 2016 and died one month later. The employee sued three premises operators of sites he worked at where he had been exposed to asbestos.
  - The Court found that the premises operators had taken affirmative acts that introduced asbestos into the workplace and created a foreseeable risk of harm to the co-habitants of workers exposed to asbestos dust.



## — Utah Legislature

Special Legislative Session

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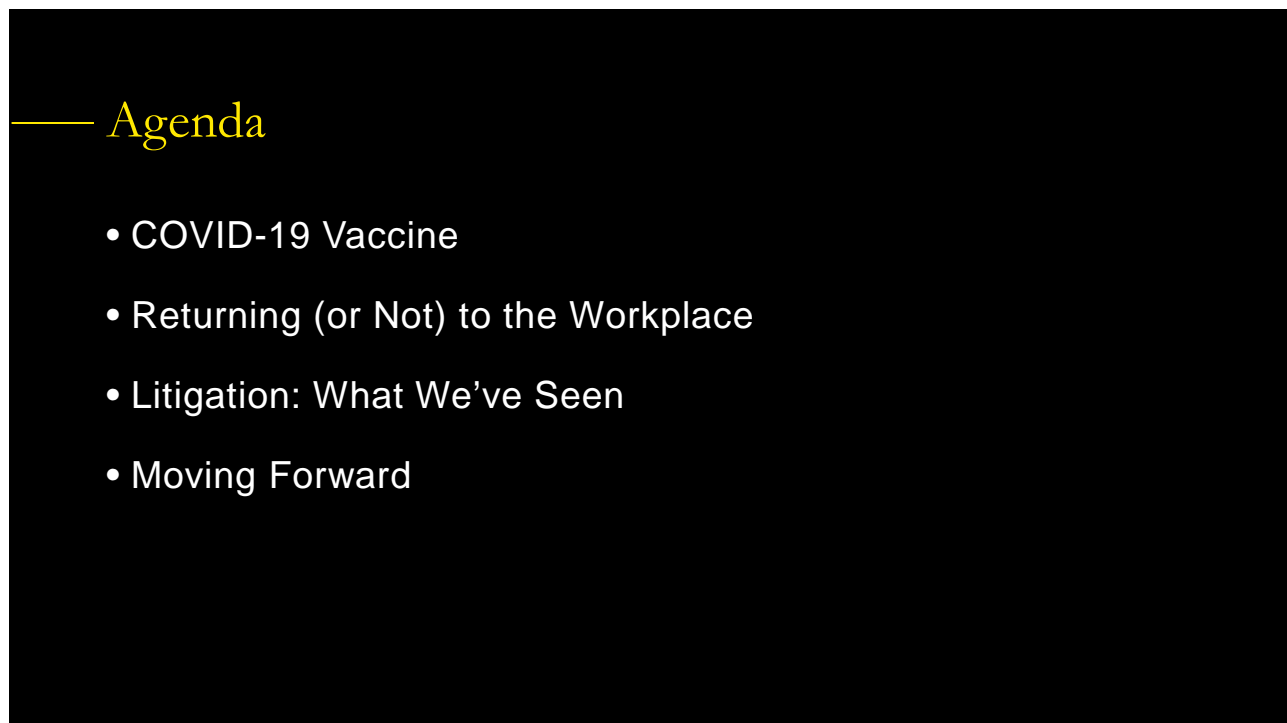
## — Special Session

- Will Address Biden workplace vaccine requirements.
- SB2004 Workplace COVID-10 Amendments.
  - expands exemptions to workplace vaccine mandates.
  - Will cover natural immunity for those who previously had immunity
  - Covers sincerely held personal belief in addition to religious belief.

— We will return in  
15 minutes

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## — Learning Objectives

- Review updates on the law with regard to vaccines, health and safety, accommodations, and other workplace issues
- Consider alternative workplace arrangements, including remote work pros and cons
- Address best practices to minimize potential employer liability when returning to the workplace



## — The COVID-19 Vaccine

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## — Poll #1

- Are you mandating vaccines (or do you plan to), or are you incentivizing vaccines (or do you plan to)?

Mandating

Incentivizing

Neither



## — Vaccines in the Workplace

- What are the options?
  - Mandates
  - Incentives
  - Silence
- What are the requirements?



## — Must you Mandate?

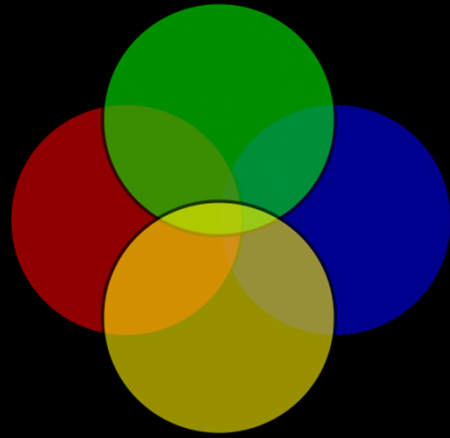
- OSHA Emergency Temporary Standard
  - Private sector employers with 100 or more employees
  - Government employers not covered unless in a “Plan State”
- President Biden Executive Order 14042 and related guidance
  - Federal contractors
  - covered contractor employee” is “any full time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.”
- CMS Interim Final Rule
  - All staff employed by covered Medicare- and Medicaid-certified providers

## — ETS Coverage

- All employees in USA, regardless of location
- Includes part-time, seasonal, minors and temporary workers
- Includes employees who are already vaccinated
- Does NOT include independent contractors
- In staffing agency context, workers are counted as employees of the agency
- Determination as of 11/5/2021
- Excluded workers:
  1. Those who do not report to a workplace where other individuals are present;
  2. Employees working from home;
  3. Those who work exclusively outdoors

---

If covered by  
numerous rules, ETS  
excludes workplaces  
subject to EO or CMS  
requirements



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### Preemption

ETS preempts inconsistent state and local  
requirements related to COVID-19 vaccines,  
testing, masks

Does NOT preempt any requirements that are  
more protective of employees and complement,  
rather than conflict with, ETS

## — ETS Requirements

- Mandatory Vaccine policy
  - The vaccine is medically contraindicated
  - Medical necessity requires a delay in vaccination
  - A legal entitlement to a reasonable accommodation due to a disability or sincerely held religious belief



## — ETS Requirements Cont'd

- Testing and Masking Policy
  - Once every 7 days
  - Cost?
  - Removal from workplace
  - Masks:
    - Requirements of face coverings
    - Limited exceptions





## — ETS: Additional Considerations



- Paid Time Off
  - Vaccination
  - Recovery
- Acceptable proof of vaccination
- Record-keeping
- Reporting obligations
- Informational obligations

## — ETS Future?

- Lawsuits filed by Texas, Louisiana, Mississippi, South Carolina, and Utah in the 5th Circuit
- Florida, Alabama, and Georgia in the 11th Circuit
- Kentucky, Idaho, Kansas, Ohio, Oklahoma, Tennessee, and West Virginia filed in the 6th Circuit
- Missouri, Arizona, Nebraska, Montana, Arkansas, Iowa, North Dakota, South Dakota, Alaska, New Hampshire, Wyoming, and five additional private entities (the “Coalition”) filed suit in the 8th Circuit
- So far, stayed in 5th Circuit (MS, LA, TX)

## — Federal Contractor Coverage

- Covered contract: Includes contract or “contract-like instrument”:
  1. For services, construction or a leasehold interest in real property;
  2. For services covered by the Service Contract Act;
  3. For concessions; or
  4. Entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public
- Covered contractor employee: any full-time or part-time employee of a covered contractor working on **OR** in connection with a covered contract **OR** working at a covered contractor working place

## — Federal Contractor Requirements

- For covered contracts awarded prior to 10/15/2021 where performance is ongoing, the requirements must be incorporated when an option is exercised or an extension is made.
- For new contracts, the requirements must be incorporated into contracts awarded on or after 11/14/2021
- Vaccination of covered contractor employees by 1/4/2022
- Compliance with masking and physical distancing while in covered contractor workplaces
- Designation of a person to coordinate COVID-19 workplace safety efforts



## — CMS Requirements

- All employees, licensed practitioners, students, trainees, volunteers, and any individual who provides care, treatment, or other services for a covered provider and/or its patients, regardless of clinical responsibility or patient contact.
- Exemptions
  - Those providing services performed exclusively offsite
  - Those who do not have any contact with any patients or other staff
- Fully vaccinated by 1/4/2022
- Delay only allowed for clinical precautions



## — Can you Mandate Vaccines?

Yes, but...

- Must reasonably accommodate employees who cannot take the vaccine because of a medical condition or religious belief
- Adverse reactions from employees may be covered by workers' compensation (also mandatory leave law in some jurisdictions)
- Beware of disparate treatment and disparate impact claims

## — Accommodations

### Must accommodate:

- Disability
- Sincerely held religious belief
- UNLESS it would cause an “undue hardship”
- Also, “direct threat” exception

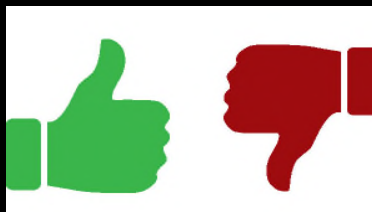
## — Mandating Vaccines

### Pros

- Allow a safer return
- Rules can help diminish conflicts
- Instills employee, client/customer, third party confidence

### Cons

- Danger/fear factor of vaccines
- Administrative burden
- Conflict
- Discrimination/retaliation claims



## — Can you Offer Incentives?

- Yes, so long as you are not involved in administering vaccines
- If you are administering vaccines, the incentive must be non-coercive
- Types of incentives



## — Asking the “V” Question

- Vaccine itself is not a medical examination
  - Screening questions asked before administration are subject to ADA standards for disability-related medical inquiries
- Can you ask employees if they have been vaccinated?
  - Yes**
    - EEOC has said this is not a “disability inquiry”
    - But this information, once provided, is confidential medical information
- What will you do with the information?
- If you want to let vaccinated people unmask, how to you enforce the distinction?

## — Vaccine Passports



- Digital apps, like IBM's Excelsior, verify one's vaccinated status
- Biden Administration will not issue mandated vaccine credential
- Some states now have banned "Vaccine Passports"
  - FL, TX, UT, ID, MT and AZ have enacted Executive Orders or laws, but they don't cover employment
- Other states, like California and New York, are embracing the concept

## — Policy Considerations

- What is the policy? Mandate? Incentive?
- Define exceptions to requiring vaccination
- Consider how to confirm vaccination and avoid fraudulent claims
- What is the timetable for coming into compliance?
- What is the penalty for noncompliance?
- Develop an internal PR campaign to gain buy-in
- Review for disparate treatment and disparate impact
- What other safety precautions are required?





## — Returning (or not) to the Workplace

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### — Poll #2

- Do you plan to have employees work remotely some or all of the time?

Yes – All of the Time

Yes – Part Time

No





## — Continued Remote Work Arrangements

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## — Today's Remote Workforce

- According to a recent Pew Research study, prior to the pandemic 20% of U.S. employees worked from home.
- As of December 2020, approximately 71% of employees worked from home.
- The study found 54% of employees would want to work from home after the coronavirus outbreak ends.

## — Remote Work Policy Considerations

- Logistics
- Work Expectations
- Wage and Hour Compliance
- Expenses
- Security
- Safety



## — Logistics – Eligibility

- Which employees will be eligible for remote work?
  - Keep in mind
    - Operational needs
    - Strategic considerations
    - The employee's role
    - Requested work location
    - Job performance
    - Other factors that may result in the denial of a particular request
  - In addition, changes in circumstances may result in a change to previously approved requests



## — Logistics – Eligibility Cont'd

- What may disqualify employees from working remotely?
  - Physical presence needed
  - Sufficient experience
  - Performance concerns
  - Training needs
  - Ability to measure work output or outcome
  - Work is highly confidential
  - Compliance concerns

## — Remote Work Agreements

- What will the arrangement entail?
  - Formal or informal? Short or long term? Fixed schedule or flexible arrangement?
- Will there be a probationary period?
- Performance expectations?
  - Statement that employees are expected to meet all the responsibilities, perform all the duties and comply with all the policies that apply to any workers in similar roles, regardless of the location, or be subject to disciplinary action
  - Tell employees how performance will be measured, if applicable

## — Remote Work Agreements Cont'd

- Scheduling
  - Will employees be required to work certain “core hours” and be accessible during those hours or will employee be allowed to set their own works hours?
  - Will employees be on-call beyond regular hours?
- In Office Work
  - Is it required? If so, on fixed schedule or as needed?
- Support
  - What type of equipment and support is being offered?

## — Remote Work Agreements Cont'd

- Other Items
  - Reiterate employment at will
  - Ensure process for accurate tracking of time by non-exempt employees and require employees to agree to abide by it
  - Require employees to ensure a safe work environment
  - Require employees to commit to following confidentiality and data security protocols
  - Reserve right to revoke remote work privileges at any time
  - Warn employees that breach of remote work policy is cause for disciplinary action, including termination



## — Wage and Hour Compliance

- Employers must pay for all time that it ***knows or should have known*** an employee is working, regardless of the location
- Companies must have clear timekeeping policies and practices in place and train employees on those policies to minimize their risk of liability for wage and hour claims
- At the federal level, you can reach a written agreement with a teleworking employee in advance over what hours will be considered working time and how they will report any hours worked outside of their normal working time
  - It should reflect reasonable expectation of hours and not be a device to avoid paying for hours worked
  - Ideal is to have non-exempt employees record all actual hours, if practical

## — Wage and Hour Compliance



- Ensure that employees are not working through unpaid meal and rest breaks
- Travel time may have to be paid in some situations, such as where an employee has to travel to a meeting during the work day
- State laws may impose additional requirements



## — Expenses

- Setting up a home office is likely to create expenses including office supplies, internet service/other utilities, technology (e.g., computer, printer)
- Who has to pay for these expenses?



## — Safety Considerations

- Employer's obligation to provide a workplace that is "free from serious recognized hazards" and other relevant safety standards apply to remote work
  - OSHA guidance on home offices
  - Some states have more rigorous requirements
- Workers' compensation laws apply if the employee can show that the injury is in the course of employment
  - Can include injuries that occur during incidental breaks

## — Security Considerations



- Privacy
- Data Security

## — Cross-Border Issues

- What happens if you have employees working remotely in states, or even countries, where you do not otherwise operate?
  - What state law applies?
  - What if employees are working outside the country?



## — Returning to the Workplace

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## — OSHA Duty and Standard of Care

- General duty to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm”
- Protection for employees who refuse to engage in dangerous work when subjectively and objectively dangerous, employer refuses to eliminate danger, and there is no time to correct through enforcement channels



## — To Mask or Not to Mask?

- Do you have to?
- Do you want to?
- CDC Guidance
  - Many states have adopted, but not all
  - Who provides?
  - What kind?
  - Who will be required to wear?
  - Under what circumstances?
  - What to do if people refuse?
- Handling requests for religious and medical exemptions

## — Testing and Screening Protocols

- Are you screening? What screening questions to ask?
- Testing considerations:
  - What to test?
  - Who to test?
  - How to test?
  - How often to test?
- Maintaining records; confidentially
  - HIPAA
  - ADA
- Accommodations

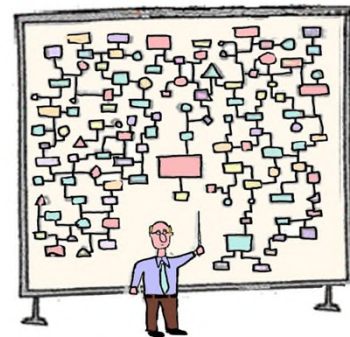


## — Employees Who Do Not Want to Return

- Do you have to accommodate? For how long?
- What about employees with childcare issues?
- Are you prepared to require employees to be there full-time?
- Will you provide additional leave?
  - ARPA/FFCRA (expired 9/30/2021)
  - State and local leave laws
- How strictly will you enforce attendance policies?

## — Leadership and Planning

- Establish a team or task force to oversee planning, execution and monitoring
- Conduct COVID-19 risk/hazard assessment
- Create the Reopening Plan
- Communicate the plan and the right to modify the plan
- Undertake regular monitoring and updates
- Document the process



*"Of course, there are a few implementation issues to deal with"*



## — Litigation: What We've Seen

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## — Workplace Litigation



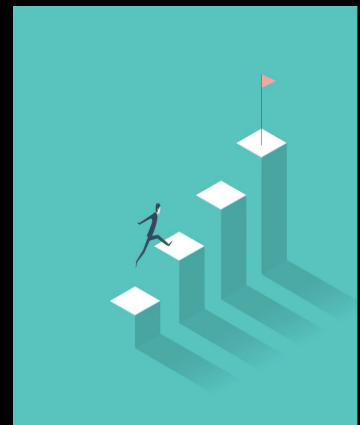
- Trends
- What you can do

## — Remote Work and Leave Claims

- Families First Coronavirus Relief Act (through 9/30/2020)
- Family and Medical Leave Act
- Disability Leave
- New and existing state and local leave statutes
- Remote work issues

## — Steps You Can Take

- Consider flexible telework, leave, and attendance policies
- Administer benefits, including leave benefits, equitably and consistently
- Conduct training on handling requests for leave under the ADA and FMLA and state and local laws





## — Whistleblower and Retaliation Claims

- Several federal and state statutes prohibit retaliation
  - OSHA
  - Section 1983
- Termination in violation of public policy

## — Discrimination Claims

- Disability, Age and Pregnancy Discrimination Claims
  - Fear of returning to the workplace based on underlying conditions/risk factors
  - Requests to continue working remotely based on underlying conditions/risk factors
  - Policies preventing employees who have (or are perceived to have) underlying conditions/risk factors from returning to the office

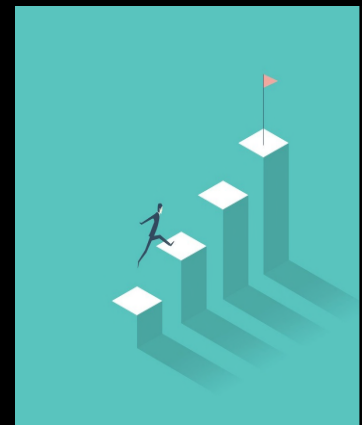
## — Discrimination Claims

- Race/National Origin Discrimination
  - Harassment of or discrimination against employees from regions that become COVID-19 hotspots
  - Harassment/discrimination against Asian and Asian American employees



## — Steps You Can Take

- Ensure consistent application of policies
- Ensure that harassment and discrimination policies apply in the remote environment the same as they do under normal circumstances
- Revise the complaint procedure if necessary
- Be prepared to conduct remote investigations
- Ensure that reasons for terminations are documented and clearly communicated to the employee

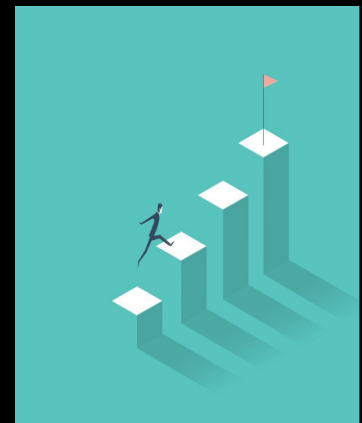


## — Unsafe Workplace Claims

- Failure to comply with federal, state, and local guidance
- Public nuisance: “an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B(1).
- Wrongful death
- Workers’ compensation

## — Steps You Can Take

- Reopen cautiously
- Follow OSHA, CDC, and state and local guidance
- Keep open lines of communications with employees
- Document current guidance, policy effective dates, and communications with employees
- Take employee concerns and complaints seriously



## — Other Litigation

- Wage and Hour Claims
- Vaccine Litigation
- Trade Secret Misappropriation
- Cybersecurity and Data Privacy

## — What's to Come

- Ramped up Federal Agency Enforcement
  - DOL, EEOC, OSHA
- New laws to prepare for future pandemics
  - E.g. New York HERO Act
- Filing of additional discrimination, retaliation, wage and hour claims
- Unemployment compensation claims
- Unemployment Fraud





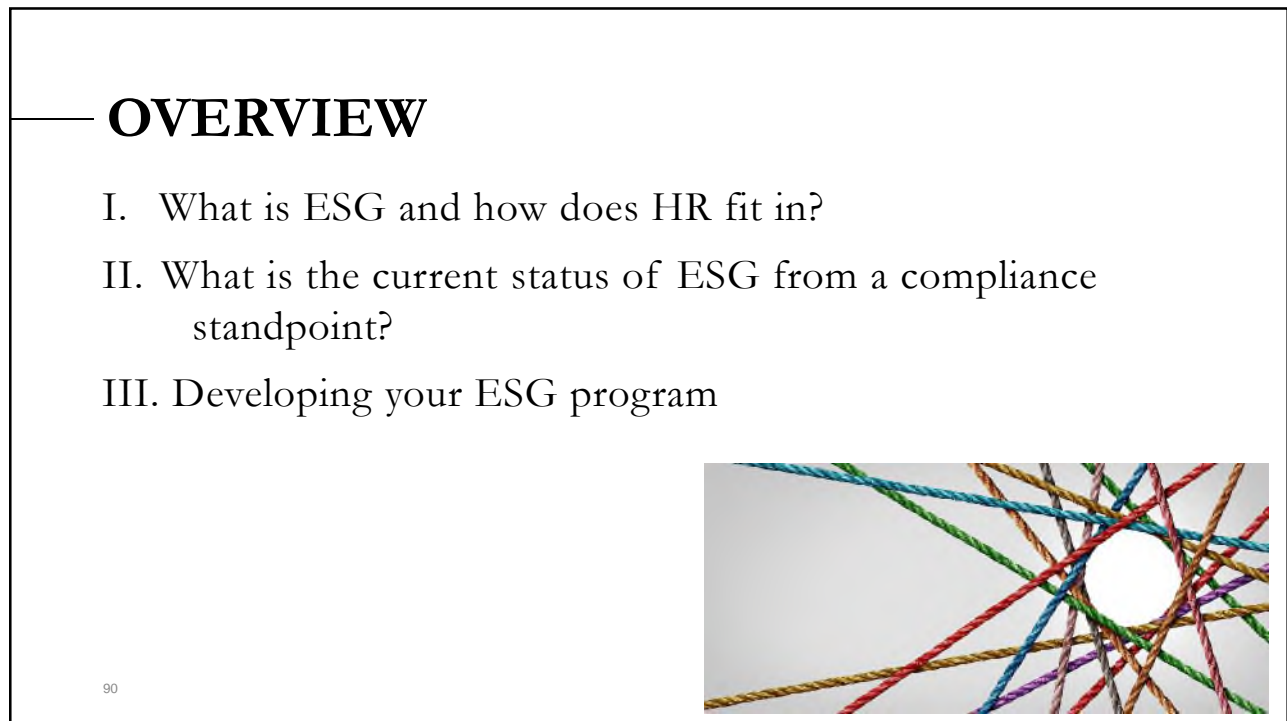
## — Q&A

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THANK YOU FOR  
JOINING US!

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## \_\_\_\_ Poll #1

- Are you familiar with ESG principles?



91

## \_\_\_\_ Poll #2

- Has your company been discussing ESG?



92



## Poll #3

- Does your company have an ESG program?



93

## ESG: What is it?

- Use of Environmental, Social, Governance factors to evaluate a business
  - Nonfinancial factors
  - Used by investors and others
  - Assess future financial performance
  - Risk management
  - Controversy



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(cont.)

## — ESG: How is it Used?

- Measure:
  - Sustainability
  - Ethical Impact
  - Accountability

**ESG OFFERS...**



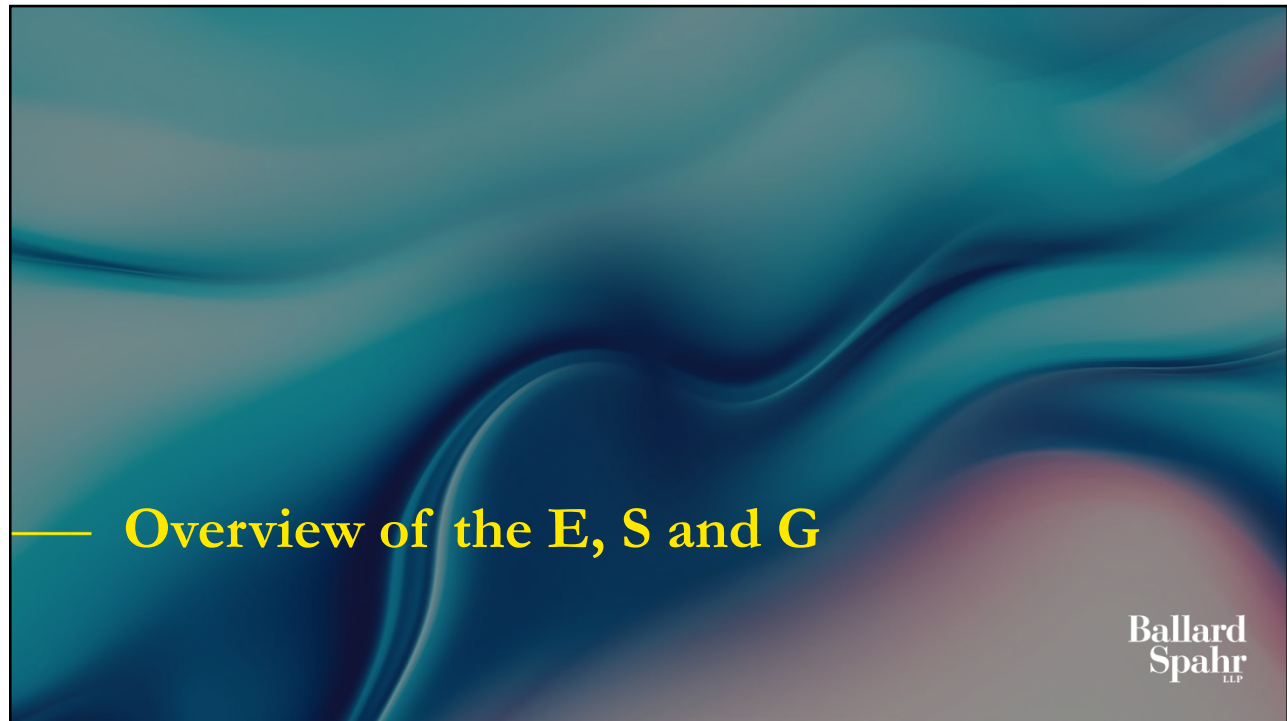
95

## — ESG = OPPORTUNITY

### STRATEGIC PLANNING


- What are we doing?
- How can we improve?
- Where do we want to be: leading or following?

96



— Environmental Aspect of ESG

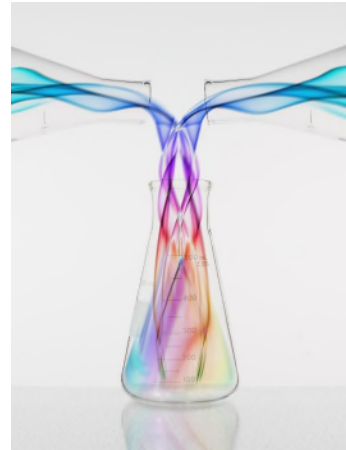
- Impact on the Earth, Water, Air: Climate
- Handling of Waste, Chemicals
- Energy Efficiencies



98

## HR and the “E”

- Environmental Aspect of ESG
  - Health and Safety
    - Onboarding
    - Training
    - Work Comp
    - Safety Committee
  - Recycling



99

## Social Impact of ESG

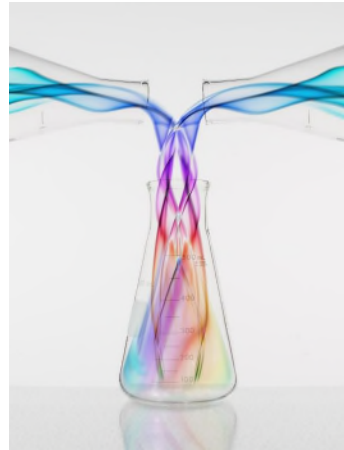
- Treatment of Employees; Hu. Rts.
- Work Environment
- Relationship with Community



10  
0

## Social Aspect of ESG: HR Leads the Way

- Treatment of EEs; Human Rts.
  - Equal Oppt., Anti-discrimination Policies
  - Internal, Global (supply chain)
- Work Environment
  - Health, Safety
  - Benefits
- Community Presence
  - EEs
  - Company Support



10  
1

## Governance Issues

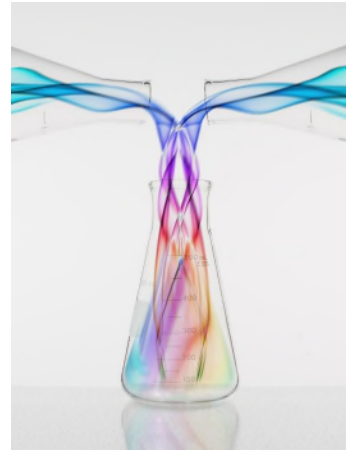
- Accountability/Transparency: reporting, disclosing
- Board Diversity
- Consistency btwn. Shareholder, Management Interests



10  
2

## HR and the “G”

- Board Diversity
  - Recruiting
- Ethics
  - Code of Conduct
  - Conflict of Interest Policy
- Community Support, Philanthropy



10  
3

## ESG: Then and Now

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## Who's Behind the ESG Movement?

- 2006 UN Principles for Responsible Investment
  - 63 investment companies; 4,000 signatories as of 9/21 per PRI
- Federal Government
- State Governments
- Stakeholders: Investors, Employees, Applicants
- Customers, Vendors
- Service Providers

10  
5

## The Federal Gov't. and ESG

- SEC
  - March 4, 2021: Implementation of a Climate and ESG Task Force
  - April 9, 2021: Risk Alert on ESG
- Proposed Rules
  - Spring 2021 Rule List
- Disclosure Requirements
  - 2010 Guidance Regarding Disclosure Related to Climate Change
  - March 15, 2021: Request for Public Input on Climate Change Disclosures



10  
6



## THE STATES AND ESG

### States Driving Board Diversity Efforts

- California
  - SB 826: California-Based Public Companies Must Include Minimum Numbers of Women on Their Board of Directors
  - AB 979: California-Based Public Companies Must Have a Minimum of 1 Director From an Underrepresented Community.
- Washington
  - SB 6037 –Washington-Based Public Companies Must Have 25% Gender Diversity on Board of Directors by January 1, 2022.
- Illinois
  - H.B. 3394 – Illinois-Based Public Companies Must Disclose Diversity of Board of Directors in Annual Report

## THIRD PARTIES AND ESG

- Investors
- Employees, Applicants
- Customers/RFP's
- Insurance Companies
- Banks



## HR: WHAT IS YOUR ROLE IN ESG?

CRITICAL



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### Where do we go from Here?

- Evaluate ESG Areas; Develop a Plan
  - Establish a Framework
  - Consider: What are we doing to support ESG?
  - Brainstorm: What can be done to improve?



11  
0

## Phase I: Develop a Framework and Plan

- Treatment of Employees
  - Policies Prohibiting Discrimination, Training
  - Reporting Procedure, No Retaliation
  - Accommodation, Accessibility
  - Diversity Efforts: AA, Recruiting, Inclusion, Goals
- Work Environment
  - Wages, Incentives, Labor Laws
  - Benefits: PTO, Leave Policies, Insurance, Retirement Plan
  - Safety, PPE, Training, Hazardous Chemicals, Waste
  - Suggestion Box, Open Door Policy, EE Committees
  - Scholarships: ESL, GED, AA, BA



11  
1

(cont.)

## Develop a Framework and Plan

- Community Presence
  - Volunteer PTO
  - Volunteer Programs
  - Community Financial Support
  - Charitable Matching
  - Internship Program
  - Blood Drive
  - Recruiting: All Abilities, Veterans, Diversity Groups



11  
2

## Phase II: What do you want to Invest?

- Will there be Specific goals
- Who will be Involved/Committee
- How Often will they Meet
- Process for Implementing Action Items



11  
3

## Phase III: Where do we go from Here?

- Evaluating, updating your ESG plan
- How can you improve?
- Maintaining your plan



11  
4



## — Q&A

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## — ESG: HR's Critical Role in the “S”

Mary M O'Brien  
Jacqueline Maba:ah  
November 11, 2021

Ballard  
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## Executive Order on Non-Compete Agreements

- On July 9, 2021, President Biden issued an Executive Order instructing the Federal Trade Commission to “curtail the unfair use of non-compete clauses.”
- The Order does not prohibit non-competes, but it does demonstrate the Administration’s antipathy toward them.
- President Biden made the following remarks while signing the EO:

[W]e’re going to improve competition for workers. I’ve talked a lot about non-compete agreements — contracts that say you can’t take another job in your field, even if you get a better deal. I made a speech — I was just reminiscing with my staff — back in 2018, at the Brookings Institution, where I talked about the non-compete clauses that were just — I found — to be absolutely ridiculous, but how prevalent they were throughout industries.
- The FTC’s authority is unclear and likely to be challenged.
- States and localities are already taking initiative
  - Washington D.C. passed the Ban on Non-Compete Agreements Amendment Act of 2020, placing a near-total ban on non-compete agreements

## DOJ Crackdown on No-Poaching Agreement

- The DOJ finally fulfilled its long time promise to criminally prosecute “no-poach” agreements.
  - A no-poach agreement is an arrangement between two or more employers not to hire employees away from each other.
- The DOJ’s first criminal prosecution of led to a recent indictment of Surgical Care Affiliates LLC (SCA), a unit of UnitedHealth Group, by a federal grand jury in Texas for allegedly entering into agreements with two other healthcare companies to not poach each other’s senior-level employees



### — OFCCP: Compensation Data

- 9/1/21: OFCCP announced that it plans to reverse course and now may consider compensation data submitted in 2018 and 2019 under EEO-1 Component 2.
- OFCCP rescinded the Trump-era policy decision not to use such data, saying it was “premature and counter to the agency’s interests in ensuring pay equity.”
- OFCCP said it will use prior data to assess its utility for providing insight into pay disparities across industries and occupations, with the stated purpose of “strengthening Federal efforts to combat pay discrimination.”

### — OSHA (Non-Covid Guidance)

- President Joe Biden issued an executive order on Jan. 21, 2021, that directed OSHA to examine the need for new workplace safety guidelines, including considering COVID-19 specific OSHA standards.
- The Biden administration is pushing for **new worker protections after record-setting temperatures** across the country left dozens of workers injured and dead this summer.
  - OSHA will **prioritize inspections on hot days**, target high-risk industries nationally, and as reported this summer, begin developing a federal rule to protect workers from heat-related illnesses, a move long sought by worker advocates.
- President Biden released a joint statement with OSHA, calling the initiative an "all-of-government effort to protect workers, children, seniors, and at-risk communities from extreme heat."

## — OSHA Investigating Retaliation

- On February 19, 2021, DOL announced OSHA would oversee whistleblower claims under two laws.
- Anti-Money Laundering Act
  - Claims of retaliation for reporting money laundering-related violations to their superiors, the federal government, or for assisting an investigation related to a violation of anti-money laundering laws.
- Criminal Antitrust Anti-Retaliation Act
  - Claims of retaliation for reporting criminal antitrust violations to their superiors or the federal government; or for assisting an investigation or proceeding related to antitrust law violations.

## — Worker Misclassification

- 5/6/21: Biden DOL withdrew a Trump-era rule entitled *Independent Contractor status under the Fair Labor Standards Act*.
  - Practical effect is to restore the “totality of the circumstances” economic realities test the DOL has traditionally used in determining independent contractor status under FLSA.
- DOL Secretary Marty Walsh, in discussing the restoration of the more employee-friendly rule, said it will “preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect.”
- Jessica Looman, DOL’s principal deputy administrator for the Wage and Hour Division: “Misclassification of employees as independent contractors presents one of the most serious problems facing workers today.”

### Worker Misclassification (continued)

- The EEOC plans to tackle discrimination and harassment faced by workers who say they've been misclassified as independent contractors, an issue that's drawn more attention with the proliferation of the gig economy.
- Across industries, lawsuits alleging that contractors are employees have focused on minimum wage, overtime, and other labor violations, more so than discrimination against women, minorities, and other protected workers.
- President Biden's American Jobs Plan calls for up to \$1.5 billion in EEOC funding over the next 10 years to target historical racial disparities
- For Title VII, courts and the EEOC apply a strict test that focuses on how much control an employer has over a worker.
- By contrast, worker classification under the Fair Labor Standards Act is analyzed under what's generally viewed as a more lenient test that analyzes a worker's economic dependence on an employer.
- The NLRB's GC has advocated for holding the act of misclassification to be an unfair labor practice under the NLRA.

### \$15/hour for Federal Contractors

- 4/27/21: EO 14026 -- Increasing the Minimum Wage for Federal Contractors
- Covered federal contractors must pay \$15/hour to employees working "on or in connection with" a covered contract.
- According to DOL regulations proposed on 7/22/21:
  - A worker performs "on" a contract if the worker directly performs the specific services called for by the contract.
  - A worker performs "in connection with" a contract if the worker's work activities are necessary to the performance of a contract, but are not the specific services called for by the contract.
- The minimum wage will index with inflation.

## — Advancing Racial Equity

- 1/21/21: EO 13950: “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”
- Repealed two Executive Orders issued by President Trump on “Combating Race and Sex Stereotyping (diversity training)” and “Establishing the President’s Advisory 1776 Commission (teaching race in schools).”
- Biden’s move signals the administration’s policy shift to focus on racial equity in management, training and education.

## — Who Is Marty Walsh?

- Marty Walsh, the two-term mayor of Boston, is the confirmed Labor Secretary and the first union leader to run the Department in over four decades.
- In an interview with Reuters, Walsh said “in a lot of cases, gig workers should be classified as employees.”
- We can expect more employee-friendly guidance coming from the DOL.



## DOL Guidance

Trump-DOL: New Tip Pooling Rule. Effective 2/22/21, hospitality employers may create tip pools that include non-tipped employees, so long as everyone receives the minimum wage.

Biden-DOL: Wage and Hour Division of the DOL published a Final Rule on Friday that will formally withdraw regulations on tip credits that were issued in the final days of the Trump Administration. The Biden Administration regulations will take effect December 28.

- DOL guidance allows employers to reimburse business expenses by either choosing the IRS mileage rate or reasonable estimates, provided that the minimum wage is provided.

In July 2020, DOL updated overtime calculations under fluctuating work week standard – bonuses, premium payments, hazard pay, and other incentives can be included in the base regular hourly rate to compute the half-time overtime premium.

- In 2020, plaintiffs were granted conditional certifications in wage and hour class actions 84% of the time.

## DOL Updates

- The DOL ended a controversial Trump-era program that let employers potentially avoid litigation and having to pay penalties and damages by self-reporting minimum wage and overtime violations.
- In a statement, the DOL said that it was ending its “Payroll Audit Independent Determination” program, effective immediately, and that it already provided outreach and resources to help employers understand how to follow the Fair Labor Standards Act.

Those other resources were "sufficient for helping employers comply without relieving them of their legal obligations, and ensure that workers understand their rights," the DOL said in the statement.

- The DOL's Wage and Hour Division started PAID in 2018, letting employers avoid litigation, penalties and damages by self-reporting FLSA violations. When a business reported a violation, the Wage and Hour Division would oversee a resolution process and payment to employees, without imposing fines or liquidated damages, resulting in a bar to private party litigation.

### —— DOL Update (continued) Rescission of Trump-era Rule

- OFCCP has proposed to **rescind a Trump-era rule that codified religious defenses** federal contractors can use when hit with allegations of workplace bias
- That rule extended the liability shields already available to churches and “religion-exercising organizations” to “closely held” corporations, or businesses owned and operated by a small number of people. “Closely held” corporations under the rule could also avoid liability for employment decisions, such as hiring or firing, made in accordance with an owner’s religious beliefs

### —— DOL New Deputy Secretary

- Since joining the agency in July, new **DOL Deputy Secretary Julie Su** has announced her prioritization of workplace equity and making “the workplace laws of our country meaningful and real in the lives of America’s workers”
- Su offered a vision of leveraging her position to correct systemic shortcomings of federal labor and employment laws, in keeping with the administration’s push to lift up marginalized populations.

## — Joint Employment Regulations

- The Second Circuit cleared the Biden administration to set policy on joint employment (*New York v. Walsh*, 2d Cir., No. 20-03815, order 10/29/21)
- After Biden took office, the DOL changed its regulatory interpretation to expand the circumstances in which the agency can police workplaces for joint employer liability under the FLSA
- 7/29/21: DOL announced final rule rescinding Joint Employer Status under FLSA
  - DOL found that the Rule improperly narrowed the test for vertical joint employment and conflicted with decades of DOL interpretation, the text of the FLSA, and Congressional intent. In addition, the Rule's vertical joint employment standard failed to account for prior Department guidance and did not significantly impact courts' resolution of vertical joint employment cases while it was in effect.

## — Increased Damages Under FLSA

- 4/9/21: **DOL announced that investigators once again have discretion to seek liquidated damages** when enforcing wage and hour laws.
- Liquidated damages may apply as part of settlements for unpaid minimum wages or overtime.
- Marks another departure from Trump-era rules, which curtailed the use of the technique, absent evidence of bad faith or willfulness.





## Worker Organizing and Empowerment

- 4/26/21: Executive Order establishing the “White House Task Force on Worker Organizing and Empowerment”
  - Chaired by Vice President Harris
- Dedicated to mobilizing the federal government’s policies, programs, and practices to empower workers to organize and successfully bargain with their employers.
- Expect the task force to submit a set of recommendations that will further change the statutory and regulatory landscape.

## NLRB

President Biden has made support of Labor a centerpiece of his economic policy.

- As of September, Democrats make up a majority of the Board:
  - Lauren McFerran (Chair)
  - John Ring
  - Marvin Kaplan
  - David Prouty
  - Gwynne Wilcox
- This will almost certainly mean a reversal of many Trump-era rules.

## NLRB (continued)

Its two newest members have deep Labor ties:

- Prouty previously represented the SEIU and the MLB Players' Association, among other unions.
- Wilcox was instrumental in pursuing joint-employment claims against McDonalds.
  - Her involvement may lead to controversy when the issue reaches the Board again.
- The Board's new General Counsel will now pursue a Labor-friendly agenda, the goals of which have already been well publicized.

## NLRB GC Memo

- 8/12/21: **New GC Jennifer Abruzzo** announced her intention to target certain legal decisions issued in the last four years that she described as “doctrinal shifts” away from settled law, and a set of older decisions that she would like to “carefully examine.”
- Guess what ... all of the past decisions favor employers!
- The memorandum identified nearly 40 decisions ripe for “reexamination” including:
  - Employer handbook rules
  - Confidentiality provisions
  - Protected concerted activity
  - Union access
  - Employee status
  - Employees' Section 7 right to strike and/or picket
  - And much more

### — PRO Act on the Horizon?

- 2/4/21: The PRO Act was reintroduced and was passed by the House in March.
- Most sweeping, **union-friendly changes to the NLRA** in decades:
  - First contracts go to binding interest arbitration
  - Illegal to replace striking workers
  - Prohibiting employers from holding “captive audience” meetings
  - Removing the prohibition on secondary activities
  - Barring employers from requiring employees to waive their right to collective and class action litigation
  - Narrower definitions of contractor and supervisor
  - Broader joint employer liability

Recently, Ms. Abruzzo issued MEMORANDUM GC 21-06 titled “Seeking Full Remedies” that raised a lot of eyebrows. GC Abruzzo is encouraging all NLRB Regional Offices to seek remedies designed to decidedly help unions in their activities directed at employers.

- This bill makes the Obama-era Employee Free Choice Act look employer-friendly!

### — EEOC Closure Notices

- 5/10/21: EEOC announced that, effective immediately, case closure documents will be issued solely through the EEOC’s Portal and will no longer be sent to parties by U.S. Mail.
- This means that the EEOC’s Notice of Right to Sue Letter to the complainant, which starts the clock ticking on their time to file suit in court, will no longer be mailed.
- In many cases, questions arise about when the complainant received the letter via mail. Notice by Portal should reduce or eliminate those disputes.

### — EEOC Conciliation Rule

- 6/30/21: President Biden signed a joint resolution passed by Congress to repeal a Trump-era EEOC rule that would have overhauled the agency's pre-litigation settlement process.
- The rule would have required the EEOC to provide information to employers upon initiating the “conciliation” process, including
  - Summary of the facts
  - Identities of witnesses and alleged victims
  - Legal basis for a finding that discrimination has occurred.
- White House criticized the rule's “onerous and rigid new procedures,” and said it would increase the risk of retaliation against workers who file complaints or participate in discrimination investigations.

### — EEOC Covid Guidance

- 10/25/21 EEOC updated its technical guidance for employers
- Title VII requires employers to **consider requests for religious accommodations** but does **not** protect social, political, or economic views, or personal preferences of employees who seek exceptions to a COVID-19 vaccination requirement.
- Employers that demonstrate “undue hardship” are not required to accommodate an employee’s request for a religious accommodation.

## — EEOC Statistics

- Workers alleging unlawful retaliation against topped the charts of claims filed with the EEOC in fiscal year 2020, a trend that's held strong for at least three years and now through the pandemic.
- EEOC Chair Charlotte Burrows said in a statement. "COVID-19 and its economic fallout is disproportionately impacting people of color, women, older workers, individuals with disabilities, and other vulnerable workers, and that impact has serious implications in the workplace."
- Allegations of retaliation accounted for **55.8% of all charges** of workplace misconduct filed with the agency, followed by allegations of disability bias accounting for **36.1%** and race bias accounting for **32.7%** of the charges. Agency data shows that **37,632** workers reported retaliation.

Thank you for joining us  
today

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