2021 FEDERAL UPDATE

FEDERAL LEGISLATION

The American Rescue Plan Act was signed into law by President Biden on March 11, 2021. While there were a wide range of impacts from this massive and intricate piece of legislation, the key impacts for employers, were:

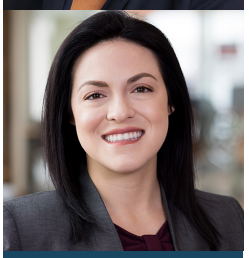
- Voluntary extension of Families First Coronavirus Response Act (FFCRA) leave;
- Extended unemployment insurance (UI) benefits;
- 100% COBRA premium subsidy, additional notice requirements, and a new election period;
- Increased caps for Dependent Care Assistance Plan (DCAP) benefits; and
- Extension of the Employee Retention Credit (ERC) until the end of 2021

For more information see our full Client Alert.

EXECUTIVE ACTIONS

President Biden took office on January 20, 2021 and has already taken a number of executive actions that impact government and private employers:

- As an initial "batch" of immediate actions following his swearing-in on January 20 2021, President Biden issued Executive Order 1399: Protecting the Federal Workforce and Requiring Mask-Wearing. It, in essence, required federal agencies to comply with CDC guidance on mitigation measures and enact social distancing and mask wearing among federal government employees and agency visitors.
- On April 27, 2021, the President signed Executive Order 14026: Increasing the Minimum Wage for Federal Contractors, announcing that the minimum wage for federal workers would increase to $15 per hour effective January 1, 2022. The U.S. Department of Labor's Wage and Hour Division is drafting regulations that will increase the hourly minimum wage rate to $15 for those employees working on or in connection with a covered federal government contract.
- On September 9, 2021, President Biden announced his "Path Out of the Pandemic: COVID-19 Action Plan." That Plan included executive orders imposing vaccine mandates for both federal employees and federal contractors (see below), and a charge to the federal Occupational Safety and Health Administration (OSHA) to adopt rules related to vaccination that would be applicable to most U.S. workplaces. It also established a Safer Federal Workforce Task Force (the "Task Force") that was charged with issuing guidance to implement his Executive Orders.



WRITTEN BY:
Amy Robinson
Rebecca Schach

- Executive Order 14043: Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. The Order requires that federal government employees be vaccinated as quickly as possible, and required the Task Force to issue the necessary guidance for agencies to implement such a mandate within seven days. The Task Force published its guidance on September 13, 2021, making it clear that the deadline for federal employees to be vaccinated was November 22, 2021.
- Executive Order 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors. The Order requires federal contracts to include requirements related to vaccination and safety protocols for federal government contractors and subcontractors. The Task Force's corresponding guidance then clarified that this mandate was to be broadly interpreted and extends to contractor and subcontractor's employees who work on a covered contract in support of a covered contract (for example, administration, IT, and HR for a contractor doing federal projects), or those who work at a contractor location where federal work is performed. Originally to be effective in December 2021, the vaccination requirements were later delayed to January 18, 2022.

FEDERAL AGENCY ACTIONS

As many may have anticipated, the change in administration has thus far mostly resulted in a rolling-back of some of the late-breaking rule changes that we mentioned last year.

- Back to the prior independent contractor rule. On January 7, 2021, the U.S. Department of Labor (DOL) on instructions by the Trump Administration issued a new independent contractor rule. That rule would have resulted in a much simpler, less burdensome test for recognition as an independent contractor and exception to coverage as an "employee" under the federal Fair Labor Standards Act (FLSA), which governs minimum wage, overtime, and child labor laws. Once on the scene, however, President Biden instructed the DOL to revisit the issue, resulting in the DOL's initially delaying and ultimately withdrawing the rule altogether. As it stands today, the previous rule remains in effect, which requires a fact-specific analysis of the "economic realities" of the work to determine whether the individual or business is truly an independent contractor and exempt from the protections of the FLSA. See, https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor. The significant factors weighing on the "economic realities" of the individual's work are:
  1. The extent to which the services rendered are an integral part of the principal's business.
  2. The permanency of the relationship.
  3. The amount of the alleged contractor's investment in facilities and equipment.
  4. The nature and degree of control by the principal.
  5. The alleged contractor's opportunities for profit and loss.
  6. The amount of initiative, judgment, or foresight in open- market competition with others required for the success of the claimed independent contractor.
  7. The degree of independent business organization and operation.
- Same for the joint employer rule. Much like the "almost" new rule on independent contractors under the FLSA, on October 5, 2021, the DOL rescinded a new rule enacted under

the Trump Administration that would have simplified the analysis of "joint employer" status under the FLSA. It justified this about-face on the basis that the new rule would have "improperly narrowed the test for vertical joint employment and conflicted with decades of Department interpretation, the text of the Fair Labor Standards Act, and Congressional intent." The final rule is published at 29 C.F.R. 791 and available here.

Now, under the new (prior) standard, the DOL looks at the "degree of association" between potential joint employers to assess whether:

1. there is an arrangement between the employers to share the employee's services;
2. one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
3. the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

- (New) final rule on tip pools. Effective November 23, 2021, the DOL issued a final rule on tip pools under the FLSA. "Tip pools" are arrangements that potentially allow restaurant staff to share tips, and the rules address who may participate, when tips can be credited toward the minimum wage (i.e., "tip credits"), and what penalties apply if the employer gets it wrong. The rule also addresses the conditions under which supervisors and managers can receive or share tips, as well as the circumstances under which penalties can be assessed. The new rule states:
  - Provided that tipped employees receive the full minimum wage (without tip credit), tip pooling is allowed and may include dishwashers, cooks, or other employees who do not customarily receive tips.
  - Owners, managers, and supervisors cannot participate in a tip pool or otherwise keep tips that employees receive, but are permitted to accept tips they receive from customers for services they "directly" and "solely" provide—and keep all or contribute a portion to other employees and/or or a tip pool.
  - The DOL can assess a $1,100 penalty for each tip-rule violation, regardless of whether the violation is repeated or willful.
- The vaccine or test mandate. In response to President Biden's "Path Out of the Pandemic: COVID-19 Action Plan," the Occupational Safety and Health Administration (OSHA) issued its Emergency Temporary Standard (ETS) that will require *all employers with 100 or more employees* to adopt either a vaccination policy or a vaccine or test policy, as well as masking and additional safety measures Issued on November 5, 2021. For more details see our Client Alert. That rule is currently on hold, as challenges in 12 of the 13 federal circuits are resolved. Additional details can be found in our recent Alert on this topic.

NOTABLE FEDERAL ACTIONS

***Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017), *petition for cert. filed*, 2018 WL 3239694 (U.S. June 25, 2018) (No. 18 12). Public High School Football Coach had no right to conduct post-game prayer because doing so, within the scope of his duties as a public employee, would violate the Establishment Clause.**

Bremerton School District high school football coach Kennedy had a practice of praying at the conclusion of football games, in the center of the field, often

surrounded by Bremerton students and members of the community. Following at least one parent complain that their son felt compelled to join in for fear of not being given playing time if he didn't, the School District. Administration reminded Kennedy of the School District's policy that staff could neither "encourage or discourage" a student from engaging in silent prayer or devotional activity, and counseled him that his motivational speeches to his players needed to remain purely secular in nature. He nonetheless continued to do so, placed on administrative leave and ultimately not rehired for the following season.

He then sued the School District alleging that alleged that his rights were violated under the First Amendment and Title VII of the Civil Rights Act of 1964. The District court disagreed and dismissed his case, and on appeal the 9th Circuit Court of Appeals agreed, finding that the School District would have violated the Establishment Clause by allowing Kennedy to engage in the religious activity he sought. In particular, because Kennedy was engaging in public speech of an overtly religious nature while performing his job duties, not merely private prayer. It also affirmed dismissal of his Title VII claims for the District's failure to accommodate his religious beliefs because it agreed that doing so would pose and undue hardship to the School District.

KEY TAKEAWAY

In addition to illustrating the limits of first amendment protections in public employment, the decision highlighted that the School District's investigation into the matter revealed that coaching staff had received little training regarding District policies—a fact that could have prevented the situation from developing into the public relations nightmare it became in the first place. A good reminder about the importance of both adequate training and proper recordkeeping on training.

***Fried v. Wynn Las Vegas*, 2021 WL 5366989 (9th Cir. Nov. 18, 2021). An employer can create a hostile work environment, where it didn't already exist, just by failing to take immediate and corrective action in response to a coworker's or third party's sexual harassment or racial discrimination that the employer knew or should have known about.**

Fried was a male manicurist at the Wynn Hotel in Las Vegas from 2005 to 2017 who alleged she salon was a hostile work environment. He was frustrated that customers would often favor female manicurists and be favored in scheduling, and alleged that when he occasionally expressed this to his manager, her response was that if he didn't like it he should consider a "less female dominated profession." He also claimed colleagues told him that he should "wear a wig" to look female.

Toward the end of his employment, he was propositioned by a customer who wanted him to engage in sexual activity, and after going immediately to his manager to report the issue he was instructed to return to his station and finish the services. He did so and said that for the remaining twenty minutes the customer continued to make sexual comments, and that he felt "absolutely horrible" and "uncomfortable" the whole time. When Fried tried to follow up after the customer had left, he alleged that his manager was dismissive and, later that his coworkers told him that he should take it as a compliment and suggested that he must have liked being propositioned to keep bringing it up.

The District Court dismissed his claims, finding that any of the conduct alleged was sufficiently "severe or pervasive" to prove hostile work environment. However, the 9th Circuit Court of Appeals found that while the comments from managers and coworkers alone were not enough, the manager's refusal to deal with the client who was propositioning him was, in itself,

sufficient to support a claim for hostile work environment and therefore dismissal was improper. The court also found that the issue of the coworkers' comments about Fried taking the customer's proposition as a compliment and welcoming the behavior should be reviewed again in light of the manager's inaction to determine whether those allegations could also be reasonably considered as to their cumulative effect.

To determine whether an environment is sufficiently hostile or abusive to violate Title VII, a court must consider all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

KEY TAKEAWAY

While perhaps illuminated in a new context here, employers should already appreciate that manager inaction to harassment complaints can lead to serious legal exposure, regardless of whether the underlying conduct itself is sufficient to meet the legal standard of harassment. Now more than ever, employers should be integrating regular training, specifically focused on managers, in addition to their regular staff training on these policies and practices.

***Martinez-Gonzalez v. Elkhorn Packing Co.*, ___ F.4th ___, 2021 WL 5099986 (Nov. 3, 2021). The conditions under which an arbitration agreement are signed could be the difference in enforcing the agreement.**

This case proves that arbitration agreements aren't dead just yet. Here, the Ninth Circuit found an arbitration agreement enforceable for a farm laborer in California. The farm laborer from Mexico, Martinez-Gonzalez, harvested lettuce under the H 2A guest worker program. After quitting his job, Martinez-Gonzalez sued his employer, Elkhorn Packing, alleging violations of federal and state labor and wage laws. Elkhorn moved to compel arbitration under an agreement signed by Martinez-Gonzalez during the orientation for incoming H-2A workers. Martinez-Gonzalez asserted that he did so under duress because it was presented to him *after* he made the journey from Mexico to California, and by then he had already commenced work and was dependent on Elkhorn for housing.

In determining whether to the arbitration agreement was valid under California law, the Court considered all the circumstances surrounding the execution of the agreement—when the agreement was signed, the language and education level of the employee, the length of time the agreement was reviewed by the employee before signing, and the option to revoke the agreement even after signature. The Court found no evidence that anyone at Elkhorn gave Martinez-Gonzalez any impression that he would be fired if he did not sign the agreement, no threat of termination or suggestion that the agreement was mandatory, and no attempt by Elkhorn to interfere with Martinez-Gonzalez' ability to consult counsel before signing. Given that, the Court found no economic duress or undue influence to invalidate the agreement.

KEY TAKEAWAY

To best position an arbitration agreement for enforceability in the employment context, the agreement must be provided under circumstances that explain the impact of the agreement and allow the employee to ask questions and review the agreement without excessive pressure by management.