

Labor & Employment Law Developments 2021

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Today

- **The New Labor/Employment Law Climate**
 - Legislative Initiatives
 - Regulatory Revisions
 - Redefining “Equality”
 - Enhanced COVID Safety Requirements
- **Post Pandemic Workplace**
 - Vaccination Programs
 - Home Work
 - ADA/EEO Considerations
 - Wage-Hour Compliance/Claims
 - Future Employment Claims
 - Unemployment Claims Management
- **Ohio’s Employment Law Uniformity Act – Great News!**



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The Labor and Employment Law Climate

- Pro-Employee/Pro-Labor Initiative!
- Executive Orders/Legislative Proposals Abound
 - American Jobs (Infrastructure) Plan – 3/31
- Numerous Pro-Union/Pro-Employee Appointees to Key Labor Positions

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The Labor and Employment Law Climate

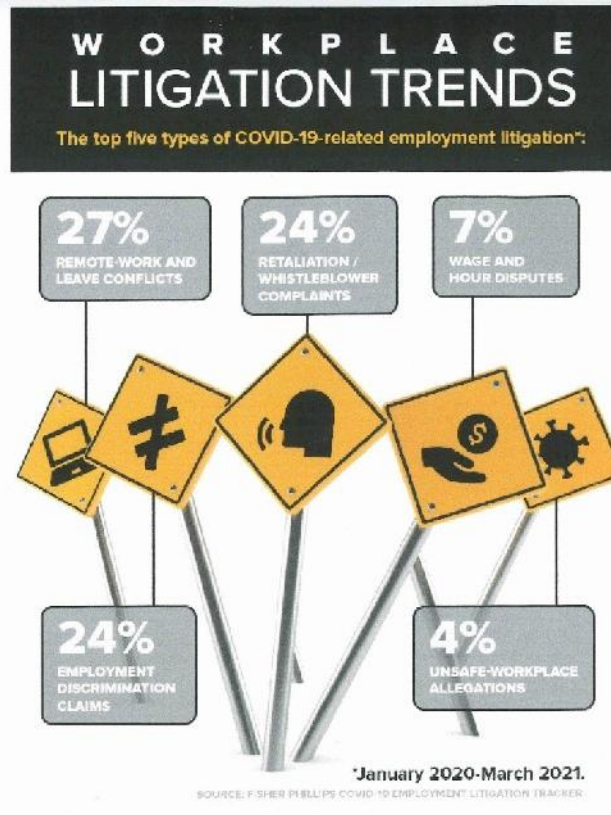
- Regulations Frozen

- Withdrawal of Rules Not Published/Postponing Effective Dates of Pending Rules 60 Days/30 Day Public Comment
- Freeze on Revised Immigration + Visa Regulations, EEOC, NLRB
- Payroll Audit Independent Determination Program – Self-Reporting Abolished



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The Labor and Employment Law Climate



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The Labor and Employment Law Climate

- Increased Employment Litigation
- Transitioning from COVID-19
 - Job Hopping
 - Home Work
 - Workplace Safety

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The Protecting the Right to Organize Act The “PRO” Act

- Organized Labor’s Wish List
- Undoes 85 Years of Labor Laws
- Redefines Definition of Employee
- Drastically Changes Collective Bargaining



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PRO Act

- Strictly limit who can be categorized as independent contractors;
- Expand “joint employer liability” making employers liable for the unlawful actions of others with whom they do business;
- Eliminate all union unfair labor practices related to picketing – making lawful secondary boycott picketing, jurisdictional picketing, and recognitional picketing thereby causing numerous work stoppages;
- Create personal monetary liability for employers’ directors and officers for violations of the Labor Act;
- Authorize civil lawsuits for employees allegedly aggrieved by an employer’s violation of the Labor Act without damage caps;
- Ban employer lockouts and permanent replacement of strikers while allowing intermittent strikes and slowdowns;
- Preempt state right-to-work laws including those now in 27 states;
- Eliminate NLRB procedures for resolving work jurisdiction disputes including injunctive relief for picketing;
- Forbid mandatory “captive audience” group meetings of employees;
- Authorize, for the first time, up to \$100,000 in NLRB penalties for violation of labor laws pertaining to discrimination, retaliation and discharge;
- And, the PRO Act does much more ...

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DOL Independent Contractor Rule ABC Test vs. Economic Realities Test

- Trump Regulation Frozen – Effective March 8
- Allows for I.C. Benefits
- Core Factors
 - Emphasizing Workers' Control over Work/Opportunity for Profit/Loss
- ABC Test – Presumption Not Independent
 - Work outside employer's usual course of business + customarily engaged in independent business

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Joint Employer Liability

- Responsible for Acts of Others!
 - Franchisees, subcontractors, staffing firms, affiliated companies
- Trump Standard 2020 Struck Down by Democratic AG's Action
- Trump Appeal Will Be Abandoned
- “Actual” vs. “Possible” Control – Merely reserve right to control directly or indirectly
 - i.e., subcontract agreement gives right of prime to expel employee
- Biden to Propose Replacement Regulation

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Right-to-Work

- 27 States Not Requiring Union Membership + Dues
- Abolishes Dues Obligations
- Attacks Financial Support for Unions
- 10.8% Unionized
 - Private sector – 6.3%
 - Public sector – 34.8%

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\$15 Minimum Wage

- Executive Order for Government Contractors
- \$7.25 since 2009
- 29 States/53 Cities Enhanced Minimum Wage
- Phased in through 2026
- November 2020 – Florida \$15
- In 2019, only 1.9% of 82.3 million hourly workers earned \$7.25 or less

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Wage-Hour

- Executive, Administrative Professional Exemption
- White Collar Salary Test – \$35,568 to \$47,476

\$455 vs. \$684 vs. \$913 per week

- Increased Operational Costs



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National Labor Relations Act

- Enhanced Remedies for Discrimination and Retaliation
 - Consequential and Liquidated Damages
- Civil Penalties – \$50,000 to \$100,000
 - \$10,000 per violation
- Personal Liability – Corporate Officers
- Individual Employee ULP Suits – No Caps
- Captive Audience Group Meetings Forbidden
- Employee Communications via Workplace Systems Permitted



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NLRB

- Picketing Permitted
 - Secondary/Jurisdictional/Recognitional
- Strikes Permitted
 - Intermittent/Slow Down/No Permanent Replacements
- Lockouts Forbidden
- Last Offer Not Installed Upon Impasse
- Compulsory First Contract Interest Arbitration for 2-Year Term

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NLRB

- Quickie Elections
 - Union chooses method and place
- Micro-bargaining Units
- Mail-in Ballots
- Supervisor Definition Tightened
- Persuader Rule Broadened
- Contested ULP Election Decided by Cards

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Equal Opportunity “Equity” Expansion Equity vs. Equality!?

- All Agencies Review Barriers Within 200 Days
- Expansive Definition of Equity – “Consistent and systemic fair, just and impartial treatment of all individuals including persons in rural areas and persons otherwise affected by persistent poverty or inequality”

(Additional Protected Classes!)



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Equal Opportunity “Equity” Expansion Equity vs. Equality!?

- Paycheck Fairness Act
 - More Transparency in Wages (7 states)
 - Higher Standard than Equal Pay Act – Justification by Any Factor Other Than Sex vs. New Employer’s Burden for Bona Fide Job-Related Factors Other Than Sex
- LGBT Civil Rights Act Amendments for Sex-Based Discrimination



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Employment Agreements

- Banning Mandatory Arbitration of Employment Disputes
- Forbidding Class Action Waivers
- Banning Non-Compete/Non-Solicitation Agreements

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Paid Family Leave

- Extension of FMLA and EPSL
- 66% of Monthly Wages/12 Weeks for Health Conditions, Pregnancy, Childbirth, Adoption, Family Member's Injury or Sickness, Military Deployment

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Immigration

- Expedited Green Card Eligibility for “Dreamers”
- Clearing Visa Backlog by Eliminating Per County Visa Caps
- Increase Total Annual Ceiling of Employment-Based Immigrants with Doctoral Degrees and STEM Exempted from Total
- Discontinued H-1B Temporary Foreign Workers Ban

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The American Jobs (Infrastructure) Plan

- 3/31/21 - \$2.25 Trillion
- Transportation Infrastructure - \$621 Billion
- Workforce Training - \$100 Billion
- Quality of Life at Home - \$650 Billion
 - (Retrofit homes and schools including lead pipes and broadband)
- Improve Electrical Grid - \$100 Billion



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The American Jobs (Infrastructure) Plan

- Caregivers for Elderly and Disabled - \$400 Billion
 - Care Workers' minimum wage - \$12
- Research + Development + Manufacturing - \$300 Billion
 - Clean energy – climate change
- Incorporates PRO Act – Prevailing Wage + Neutrality
- Funded by American Tax Plan!



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Pensions

- Multi-Employer Pension Plan Reform
 - Alternative plans – defined benefit plus annuity
- The American Rescue Plan
 - No Loan



The Post Pandemic Workplace(s)

The future of work after COVID-19

Trends accelerated by COVID-19

Remote work

20-25% of workers in advanced economies could work remotely 3-4 days a week on a long term basis

Digitization

2-5x growth in e-commerce, as a surge in digital platforms is underway

Automation

Uptick in use of robotics, robotic process automation and AI

Work arenas with high physical proximity were most disrupted short term during COVID-19, and some will see enduring effects.

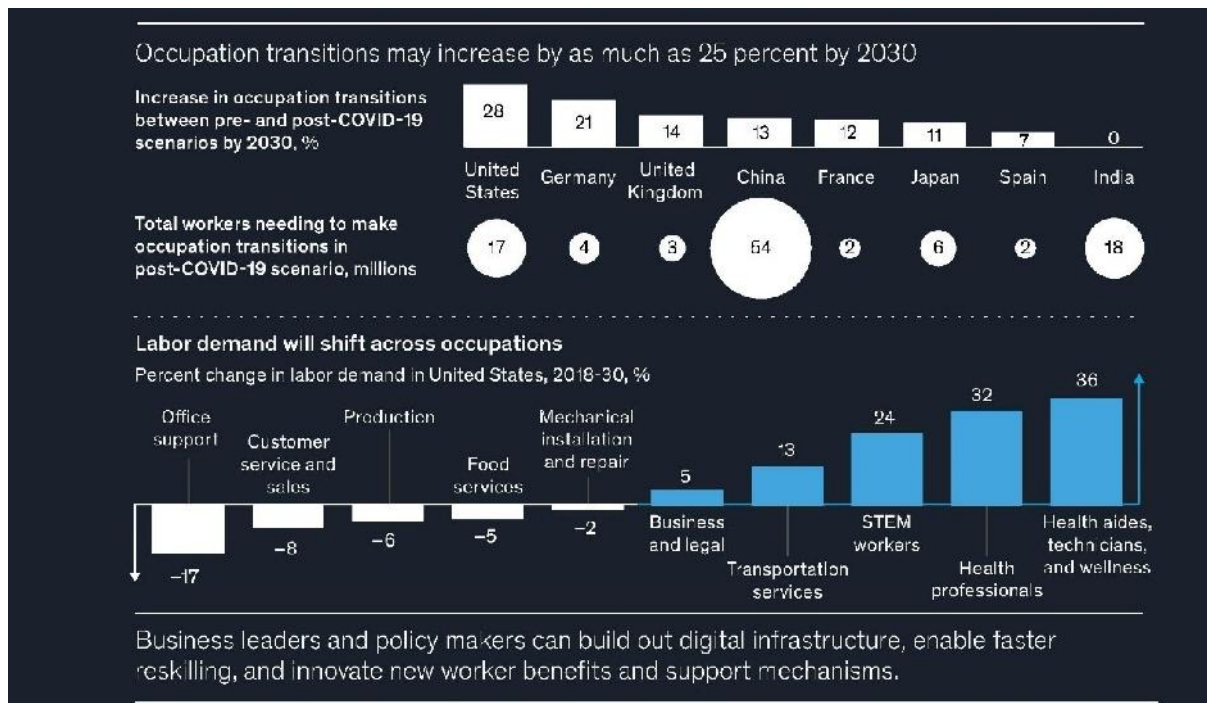


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The Post Pandemic Workplace(s)



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The Post-Pandemic Workplace(s)

- Mandatory Vaccines Unless ADA Medical Conditions/Religious Beliefs
- Taking Temperatures
- COVID Testing
- OSHA Section 13 Right to Refuse to Work + Travel
 - Imminent Danger
 - Collect Unemployment if Employer “Not in Compliance,” i.e., Distancing
- Continued “Work at Home” Privileges
 - Reasonable Accommodation vs. General Fear
- Wage/Hour Claims for Homework
 - Timekeeping Challenges
 - Compensable Time

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Restore Essential Functions

- To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request – after the workplace reopens – to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.

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Workplace Safety – OSHA

- OSHA COVID Emergency Standard
 - 1/21/21 Executive Order Urges Guidance
- OSHA’s “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID in the Workplace”
 - “Should” vs. “Consider”
 - Employee + Union involvement emphasized
- OSHA’s National Emphasis Program – March 2021



Workplace Safety – OSHA

- Anticipated Emergency Standard 3/15/21
 - Hazard Assessment
 - Identify Measures to Limit Spread
 - Adopt Measures to Control Infected/Potentially Infected – Vaccine
 - Educate + Train
 - Publish Non-Retaliation Protections
 - Enhanced Face Mask Provisions



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More on (Mandatory) Vaccinations

- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
 - Issued in 2009 by the EEOC
 - Prohibited employers from compelling all employees to take an influenza vaccine without providing exemptions based on medical conditions or sincerely-held religious beliefs
- EEOC Recommendation – consider simply encouraging employees to get the vaccine rather than making it a requirement
- Workers' compensation claims
- Bargaining with Union for consent



CDC and State Guidelines

- The guidelines are constantly changing!
 - Essential vs. non-essential businesses
 - Masking
 - Quarantine vs. isolation
- Most recent developments:
 - CDC re-defined “close contact” for purposes of contact tracing
 - Within 6 ft. of an infected person
 - Cumulative total of 15 minutes or more in 24 hours
 - CDC modifies quarantine period



FFCRA Liabilities

- Recordkeeping and job restoration obligations
- Employers are prohibited from disciplining, discharging, and discriminating or retaliating against employees who take leave or file a complaint or institute a proceeding related to the use of paid sick leave
- Subject to the same penalties and enforcement mechanisms as the FLSA/FMLA
 - FMLA: lost wages and benefits, out of pocket costs, liquidated damages, attorney's fees, reinstatement
 - FLSA: lost wages and benefits, liquidated damages, attorney's fees for failure to provide E-PSL; reinstatement, fines up to \$10,000 and criminal penalties (if prior violation) for intentional violations and unlawful termination
 - Secretary of Labor has investigative and subpoena authority



Ohio's New Employment Law Uniformity Act

April 13, 2021

- No Individual Supervisory Liability
- Two Year Statute of Limitation
- OCRC Charge First – No Dual Action with Notice First to Employer
- Affirmative Defense for Harassment Claims
- Limitations on Non-Economic and Punitive Damages - \$50,000 (14 to 101 Employees) to \$300,000 (500 employees)
- Effective Date 4/12/21



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Please keep in mind that new guidance is being issued by state and federal authorities on a daily basis, and the scope of every employer's legal obligations is changing constantly. As a result, statements in these slides may be qualified by subsequent developments.

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