EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT HOLDS THAT LIGHT DUTY POLICY DID NOT VIOLATE THE PDA

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On August 16, 2022, the U.S. Court of Appeals for the Seventh Circuit issued a decision in *EEOC v. Wal-Mart Stores East, L.P.* (found here), holding that Wal-Mart did not discriminate against pregnant employees by reserving temporary light duty positions only for those employees injured on the job. The Equal Employment Opportunity Commission (EEOC) commenced its action against Wal-Mart in 2018 by claiming that Wal-Mart's denial of temporary light duty work to pregnant women violated Title VII of the Civil Rights Act of 1964 (Title VII) and the Pregnancy Discrimination Act (PDA). The federal district court granted Wal-Mart summary judgment dismissing the EEOC's lawsuit. The EEOC then appealed the federal district court's dismissal of its case to the Seventh Circuit. The EEOC argued that accommodating all employees injured on the job by providing these employees a temporary light duty position and not providing a similar accommodation to pregnant employees constituted a clear case of sex discrimination in violation of Title VII and the PDA. The Seventh Circuit disagreed.

If this fact scenario sounds vaguely familiar, it should, because in 2015 the U.S. Supreme Court addressed similar facts in *Young v. UPS*. In the *Young* case, the U.S. Supreme Court decided whether the PDA allows an employer to have a policy that accommodates some, but not all, workers with non-pregnancy related disabilities but does not accommodate pregnancy-related conditions. In *Young*, UPS offered temporary light duty positions to not only employees injured on the job, but also for other reasons, including those employees who had lost their Department of Transportation certification. The employee in *Young* argued that employers who provide work accommodations to non-pregnant employees must do the same for pregnant employees who are similarly restricted in their ability to work. The U.S. Supreme Court, however, rejected the employee's interpretation of the PDA since it essentially would give pregnant employees an unconditional "most-favored-nations" status because pregnant employees would have to receive the same accommodations that any other employee received *for any reason*. Congress never intended to provide pregnant employees such broad protections.

Instead, the U.S. Supreme Court in *Young* held that a pregnant employee can establish a case of pregnancy discrimination relative to an employer's application of its light duty policy by

showing, among other things, that the employer provided light duty positions to others (i.e., non-pregnant employees) similar in their ability or inability to work. If an employee can establish this critical element of her *prima facie* case of discrimination (the "first step"), then the burden shifts to the employer (the "second step") to articulate a "legitimate, nondiscriminatory" business reason for denying the accommodation. An employee can then overcome the employer's legitimate business reason by showing (the "third step") that the employer provided favorable treatment to some non-pregnant employees whose circumstances cannot be distinguished from that of pregnant employees.

In defending its temporary light duty program before the Seventh Circuit, Wal-Mart presented a legitimate business reason by arguing that its program is part of its overall worker's compensation program to bring injured employees back to work as soon as possible while limiting the company's "legal exposure" under Wisconsin's worker's compensation statute and to avoid the cost of hiring people to replace the injured employee. The Seventh Circuit found that offering temporary light duty work to employees injured on the job for these reasons was a "legitimate nondiscriminatory" and neutral justification for denying light duty accommodations to individuals not injured on the job, including pregnant women. According to the Seventh Circuit, Wal-Mart's articulation of a legitimate nondiscriminatory reason supporting the business purpose of its temporary light duty program then shifted the burden to the employee to provide sufficient evidence that Wal-Mart's policy imposed a significant burden on pregnant employees and that the employer's legitimate business reason was not sufficiently strong to support that burden.

The EEOC argued, however, that Wal-Mart did not meet its burden under the second step (making the third step unnecessary) because the PDA and the *Young* decision required employers to do more than simply establish that their light duty policy was designed to benefit a particular group of non-pregnant employees. Instead, the EEOC argued, the PDA and the *Young* decision required employers to meet a higher burden under the second step by requiring employers to explain *why* pregnant employees are excluded from the program, just not articulate a justification that the program benefited a particular group of non-pregnant employees when, according to the EEOC, Wal-Mart's light duty program could have easily accommodated pregnant employees. The Seventh Circuit rejected the EEOC's argument and called it a stretch to hold that the Congress intended such a heightened burden under the PDA.

The Seventh Circuit held that its decision was consistent with the requirements of the PDA that provides that pregnant women must be "treated the same" as others "similar in their ability or inability to work." The Seventh Circuit also found that its decision was aligned with the U.S. Supreme Court's holding in *Young* because unlike Wal-Mart's policy, UPS's light duty policy seemed to accommodate almost every other group of employees with lifting restrictions, not just those inured on the job (like Wal-Mart's), who were similar to pregnant employees in their ability or inability to work. Wal-Mart, on the other hand, limited application

of its light duty policy exclusively to those employees who were injured on the job. The Seventh Circuit stated that the EEOC fell short in establishing disparate treatment discrimination because the EEOC could not offer evidence of comparators who were similar to pregnant women in their ability or inability to work and who benefited from the light duty program, other than employees injured on the job.

In designing a temporary light duty policy for employees injured on the job, employers should be mindful that it is important to develop a strong "legitimate and nondiscriminatory" basis that properly articulates the business reason why the policy is designed to protect a limited class of employees (*e.g.*, employees injured on the job) to the exclusion of others in order to avoid claims of sex discrimination under Title VII and the PDA when pregnant employees are denied accommodations under the policy. It is also important for employers to consistently apply their temporary light duty policies in a non-discriminatory manner by allowing only employees for which the policy was legitimately designed to seek accommodations under the policy— specifically, those employees suffering on-the-job injuries. Also, making exceptions to a temporary light duty policy designed to benefit employees injured on the job or designing a light duty policy that applies to broad categories of other employees can make such a policy susceptible to a claim of sex discrimination under Title VII and the PDA if it does not treat pregnant women the same as other employees not so affected but similar in their ability or inability to work.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues related to temporary light duty policies in the workplace.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT ISSUES STAY OF OSHA'S VACCINATION-OR-TEST RULE

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On January 13, 2022, the Supreme Court of the United States issued a split decision (found here) staying the Occupational Safety and Health Administration's (OSHA) Vaccination-or-Test Emergency Temporary Standard (ETS) that would require employers with 100 or more employees to either impose a mandatory vaccination policy or, alternatively, mandate that

unvaccinated workers wear a face covering while at work and be subject to a COVID-19 test every seven days. The decision was issued *per curiam* by the Court with conservative Justices Neil Gorsuch, Clarence Thomas, and Samuel Alito issuing a separate concurring opinion and the Court's three liberal Justices, Stephen Breyer, Elena Kagan, and Sonia Sotomayor, all dissenting.

The Court found in its decision that OSHA's vaccination-or-test rule operated "as a blunt instrument" across businesses of all different kinds without "distinction based on industry or risk of exposure to COVID-19." In exercising its authority under § 655(c)(1) of the Occupational and Safety Health Act (OSH Act) to issue an emergency temporary standard, the Court found that OSHA can only exercise the authority that Congress had provided to it. OSHA's ETS would have required 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. The Court found that OSHA's exercise of such authority under § 655(c)(1) "is no 'everyday exercise of federal power,'" but, rather, "a significant encroachment into the lives—and health—of a vast number of employees." The Court held that OSHA had overstepped its authority in issuing its vaccination-or-test mandate because the OSH Act empowers OSHA to set *occupational* safety standards in the workplace, but not broad public health measures. Because COVID-19 can and does spread at home, in schools, during sporting events and everywhere else that people gather, the Court ruled that, while COVID-19 is a hazard, it is not an *occupational* hazard in most workplaces. The Court stated that by "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." The Court concluded that, while "Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly."

The Department of Labor quickly issued a statement (found here) from the U.S. Secretary of Labor, Marty Walsh, appearing on OSHA's website addressing the Department of Labor's disappointment in the Court's decision. Secretary Walsh rejected the Court's premise of its ruling that OSHA did not have the authority established by Congress to enact the ETS. Secretary Walsh stated:

> OSHA promulgated the ETS under clear authority established by Congress to protect workers facing grave danger in the workplace, and COVID is without doubt such a danger…We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive COVID-19 guidance to help them uphold their obligation.

Secretary Walsh, in his statement, reminded all employers that OSHA will do everything within its authority to hold employers accountable for protecting workers under its arsenal of

enforcement tools, including under OSH Act's General Duty Clause.

For now, the case heads back to the U.S. Court of Appeals for the Sixth Circuit where that court will determine the final disposition of the applicants' petitions for review of OSHA's ETS. Depending on the action of the Sixth Circuit, the case could head back to the Supreme Court of the United States for final disposition. We will keep you updated as matters develop in this ongoing case.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues related to workplace safety issues arising from or related to COVID-19.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT HALTS OSHA'S VACCINATION-OR-TEST EMERGENCY TEMPORARY STANDARD

O'NEILCANNON
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The U.S. Supreme Court just issued a decision blocking the Occupational Safety and Health Administration's Emergency Temporary Standard that would require employers with 100 or more employees to impose either a mandatory vaccination policy or, alternatively, mandate that unvaccinated workers be required to wear a face covering while at work and be subject to a COVID-19 test every seven days. The Court's three liberal Justices, Stephen Breyer, Elena Kagan, and Sonia Sotomayor all dissented. This is a breaking story and we will provide updates as soon as possible.

EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT TO HOLD SPECIAL SESSION

ON JANUARY 7, 2022 TO REVIEW FEDERAL VACCINE MANDATES

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On Wednesday, the U.S. Supreme Court issued an order (found here) that it would hold a special session to hear arguments on OSHA's vaccine-or-test rule that mandates employers with 100 or more employees require its employees to be fully vaccinated against the COVID-19 virus or be subject to weekly tests. The Court issued its order in response to emergency applications for an administrative stay in response to the U.S. Court of Appeals for the Sixth Circuit's 2-1 decision lifting the stay on OSHA's emergency temporary standard issued by the U.S. Court of Appeals for the Fifth Circuit back on November 6th.

The U.S. Supreme Court's one-page order simply reads:

> Consideration of the applications (21A244 and 21A247) for stay presented to Justice Kavanaugh and by him referred to the Court is deferred pending oral argument. The applications are consolidated, and a total of one hour is allotted for oral argument. The applications are set for oral argument on Friday, January 7, 2022.

It is extremely unusual for the Court to hear arguments on an application for a stay, as it is the Court's customary practice to issue such a ruling based solely on the submission of written briefs.

For now, the U.S. Supreme Court has decided to defer its decision on whether to grant a stay until after the January 7th oral arguments. Although the Court is moving on an expedited basis to hear arguments on whether to grant a stay, with OSHA having previously announced that it would begin enforcement on January 10, but would not issue citations for noncompliance with the standard's testing requirements before February 9 so long as an employer is exercising reasonable good faith efforts to comply, employers hoping for a stay before the holidays will have to diligently continue their efforts to take the necessary steps to implement by January 4th either a mandatory vaccination policy or adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT LIFTS STAY OF OSHA'S VACCINATION MANDATE–OSHA FOLLOWS BY ANNOUNCING ENFORCEMENT POLICY

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On Friday, December 17, 2021, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit lifted the stay of OSHA's emergency temporary standard (ETS) mandating COVID-19 vaccinations in the workplace or, alternatively, requiring unvaccinated employees to submit to weekly COVID-19 tests. The stay was originally issued by the U.S. Court of Appeals for the Fifth Circuit on November 5, 2021, when the Fifth Circuit held that OSHA had exceeded its statutory and constitutional authorities when it issued its ETS.

The case was later reassigned to the Sixth Circuit pursuant to a lottery-style drawing in accordance with the federal rules for multi-circuit litigation. Given that 11 of the 16 active judges on the Sixth Circuit are Republican political appointees, it was surmised that the Sixth Circuit would most likely follow the Fifth Circuit's decision in halting OSHA's ETS in its tracks. However, once the case was reassigned, the first battle fought between the parties began with whether the case should be decided by a traditional three-judge panel or whether the case would be heard en banc where the entire panel of 16 active judges would hear the case. In a decision (found here) that appeared to strongly divide the court, the Sixth Circuit denied the petition for an initial hearing en banc reasoning that a three-judge panel of the court had already devoted a significant amount of time to the case and that an initial hearing en banc would only serve to strain the limited resources of the court to have all 16 active judges devote their attention to the case. The Sixth Circuit's decision, however, included a strongly worded 27-page dissenting opinion from the Sixth Circuit's chief judge arguing that Congress had not "clearly" granted the Secretary of Labor authority to impose OSHA's vaccinate-or-test mandate, especially when the authority to regulate public health and safety has traditionally been regulated by the states. The chief judge also argued in his dissenting opinion that the Secretary of Labor had not met the "grave danger" standard for issuance of OSHA's ETS when (1) the key population group at risk from COVID-19–the elderly–no longer works, (2) members of the work-age population at risk–the unvaccinated–have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) the remaining group–the vaccinated–does not face a grave risk by the Secretary's own

admission, even if they work with unvaccinated individuals. Many legal experts interpreted the chief judge's dissenting opinion not only as a signal that the three-judge panel assigned to the case was ready to issue a decision to lift the Fifth Circuit's stay, but also could serve as a road map for the U.S. Supreme Court to stop OSHA from implementing its vaccinate-or-test rule.

In a 2-1 decision (found here) dissolving the Fifth Circuit's stay, the Sixth Circuit recognized that Congress had granted the Secretary of Labor "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace, even ones to address a pandemic that contemplates the use of medical exams and vaccinations as tools in its arsenal. The Sixth Circuit hinged its decision on two primary findings. First, the court found that Congress had granted OSHA broad authority under the Commerce Clause to regulate infectious diseases and viruses to protect the interests of interstate commerce (see 29 U.S.C. § 651(a)), and with that authority can issue an emergency standard to protect workers from a "grave danger" presented by "exposure to substances or agents determined to be toxic or physically harmful" in the workplace–which includes infectious agents such as COVID-19 even though the virus is not unique to the workplace. Second, the Sixth Court found that the ETS does not require anyone to be vaccinated, but, rather, allows employers, themselves, to determine the best way to minimize the risk of COVID-19 in the workplace–whether by mandatory vaccinations or requiring unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. Based on these findings, the Sixth Circuit held that OSHA had met its burden in issuing the ETS by adequately establishing that: (1) an "emergency" exists relative to the pandemic; (2) the health effects of COVID-19 present a "grave danger" in the workplace; and (3) the ETS is "necessary to protect employees from" the grave danger.

Appeal Filed with U.S. Supreme Court

Those opposing OSHA's ETS immediately appealed the Sixth Circuit's decision to the U.S. Supreme Court by filing an emergency application (found here) for an administrative stay, or alternatively, writ of certiorari before judgment. It would be anticipated that the U.S. Supreme Court, with its conservative majority, will act relatively quickly on whether to issue the petitioned-for stay or to allow the Sixth Circuit's decision to stand and allow OSHA to move forward to implement its vaccinate-or-test rule.

OSHA Moves Forward

With the Fifth Circuit's stay dissolved by the Sixth Circuit's decision, OSHA did not delay in notifying employers that it intends to proceed with implementation and enforcement of its vaccinate-or-test rule. However, OSHA recognizes that many employers have been waiting for some clear direction from the federal courts as to whether OSHA will be permitted to proceed with implementation of its ETS. As a result, OSHA will delay issuance of any citations for noncompliance with any requirements of the emergency standard before January 10 and

will not issue citations for noncompliance with the ETS's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

What Employers Need to Know

We would expect that the U.S. Supreme Court, at some point, will be directly involved with the ultimate fate of OSHA's vaccinate-or-test rule. If and until the U.S. Supreme Court becomes involved, employers should start, now, the process of drafting the required policies to comply with OSHA's ETS should it survive the legal challenges confronting it. Employers, by making efforts now to comply by at least having policies in place, should the ETS become effective January 5, 2022, absent further court action, should be able to demonstrate to OSHA that it has taken the reasonable and good-faith efforts to comply with the rule. This will be true even if some employees remain unvaccinated, or the weekly COVID-19 testing protocol for unvaccinated employees is not yet fully operational by January 5. However, all employers with 100 or more employees will have to require and enforce by January 5 that all unvaccinated employees wear face coverings as required by the ETS unless such employees are fully vaccinated.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT SELECTED TO HEAR CHALLENGES TO OSHA'S COVID-19 VACCINATION MANDATE

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On Tuesday, November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation held a lottery-style drawing to select which of the 12 federal circuit court of appeals where petitions for review are currently pending as to which circuit will hear the challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Through that lottery process, the U.S. Court of Appeals for the Sixth Circuit was selected. As a result, the U.S. Judicial Panel on Multidistrict Litigation issued a consolidation order consolidating before the Sixth Circuit all of the petitions for review now pending in the various federal circuit court of appeals.

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Subsequently, OSHA issued a statement in response to the Fifth Circuit's decision that it would suspend the implementation and enforcement of its emergency temporary standard pending the outcome of the litigation. Relative to the Fifth Circuit's decision, the Sixth Circuit has three options as it can either adopt, modify, or vacate the Fifth Circuit's decision.

The Sixth Circuit, located in Cincinnati, Ohio, oversees the federal district courts covering the states of Kentucky, Michigan, Ohio, and Tennessee. There are 16 total judges on the Sixth Circuit: 11 Republican appointees and 5 Democratic appointees. Six of the Republican appointees were appointed by President Trump and five were appointed by President George W. Bush, while the five Democratic appointments were made by Presidents Clinton and Obama. Although the consolidated petitions for review will be heard by a randomly selected three judge panel, based on the overall makeup of the Sixth Circuit, the chances are relatively high that the mandate will continue to be blocked.

Despite the possible variations of the makeup of the randomly selected judicial panel from the Sixth Circuit, the case could be heard by the Sixth Circuit *en banc* (meaning that the full judicial panel consisting of all judges in regular active service could decide the case). The Sixth Circuit disfavors *en banc* proceedings unless the proceeding involves a question of exceptional importance. To hear a case *en banc*, a majority of the circuit judges who are in regular active service and who are not disqualified may order that the case be heard or reheard by the court *en banc*. It will be interesting to see if the Sixth Circuit decides to permit the consolidated petitions for review to proceed before a randomly selected three-judge panel or if it will decide to initially hear the case *en banc*. For now, the Fifth Circuit's stay remains in place.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: FIFTH CIRCUIT ISSUES STRONG REBUKE OF OSHA'S AUTHORITY TO MANDATE VACCINATIONS IN THE WORKPLACE–OSHA SUSPENDS EFFORTS

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On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. In a strong rebuke of the Biden's Administration's desire to vaccinate as many Americans as possible through use of OSHA's emergency temporary standard provision (29 U.S.C. § 655(c)) found in the Occupational Safety and Health Act, the Fifth Circuit found that OSHA exceeded its statutory and constitutional authorities when it issued its emergency temporary standard by finding that "[t]here is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one…[n]or can the Article II executive breathe new power into OSHA's authority–no matter how thin patience wears." The Fifth Circuit further found that continuing the stay was in the public interest because it "is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions–even, or perhaps *particularly*, when those decisions frustrate government officials." (Emphasis original).

The Fifth Circuit concluded that the Constitution vests Congress with limited legislative powers; and these powers cannot be usurped by federal regulatory action. The Fifth Circuit stated:

> *The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases–a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory–this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. Cf. Ala. Ass'n of Realtors, 141 S. Ct. 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.*

The Fifth Circuit ordered that OSHA take no steps to implement or enforce its emergency temporary standard mandating COVID-19 vaccinations in the workplace until further order of the court. In response, OSHA issued the following statement on its website:

> *On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard,*

published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.

Despite the Fifth Circuit's decision, the issue is far from being resolved as challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace is now pending in multiple federal circuits. On Tuesday, November 16, 2021, pursuant to the federal rules for multi-circuit litigation, a lottery will be held by the Judicial Panel on Multidistrict Litigation randomly selecting the federal circuit that will host and decide the ultimate fate of OSHA's emergency temporary standard–albeit the U.S. Supreme Court will most likely have the final word in this important debate on the reach of federal regulatory authority. As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION'S DEPARTMENT OF LABOR WILL UPEND MANY EMPLOYER-FRIENDLY REGULATIONS

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In this, the final installment in our series discussing the Biden Administration's workplace initiatives, we will now discuss some of the potential changes forthcoming from the U.S. Department of Labor that employers should note, including changes to the independent contractor test under the Fair Labor Standards Act, a narrowing of the "joint employer" test under the National Labor Relations Act, an expansion of the Family and Medical Leave Act to provide paid leave through passage of the Family and Medical Insurance Leave Act, and a determined Congressional effort to raise the federal minimum wage to $15 per hour.

Independent Contractor Test Under FLSA

Back in September 2020, the Trump Administration proposed a new rule broadening the independent contractor test to make it easier for companies to classify workers as

independent contractors, rather than employees, under the Fair Labor Standards Act (FLSA). Under the FLSA, only employees are entitled to minimum wage and overtime compensation. The new rule proposed by the Trump Administration was set to take effect on March 8, 2021. Now, however, the U.S. Department of Labor has delayed the effective date to May 7, 2021.

The Trump Administration's proposed rule was intended to provide more clarity to the multifactor economic reality test that is presently used in determining independent contractor status under the FLSA. The Trump Administration believed that the economic reality test would benefit from additional clarity because of the way courts have evolved from the text and Supreme Court precedent. The existing economic realities test assesses workers' economic dependence on a potential employer, and many supporters of the proposed independent contractor test argued that the new test was necessary to address concerns that: (1) the core concept of economic dependence remains vague and under-developed; (2) the test lacks guidance about how to balance the multiple factors; and (3) the lines between many of the factors are blurred. The shortcomings of the economic realities test have become more apparent in the new modern and gig economy.

On March 5, 2021, however, the Biden Administration's Department of Labor sent to the White House of Office Information and Regulatory Affairs a new proposal entitled "Independent Contractor Status Under the Fair Labor Standards Act". It is expected that the Biden Administration will adopt new regulations upending the Trump Administration's employer-friendly independent contractor test and will provide a more employee-friendly interpretation relative to whether an individual is an employee or an independent contractor under the FLSA. The U.S. Department of Labor is nearing completion of a regulatory update to the Trump Administration's proposed independent contractor rules and is simply waiting for White House of Information and Regulatory Affairs' pending regulatory review before releasing the new proposal. Stay tuned for updates as they develop.

Joint Employer Test Under NLRA

In March 2020, the Trump Administration's Department of Labor adopted a final rule narrowing the definition of "joint employer" under the National Labor Relations Act (NLRA) limiting the circumstances under which multiple entities could be deemed the employer of a single worker. The Trump-Era regulation provided that an entity may be considered a joint employer of a separate employer's employees when it has direct control over the employees' essential terms and conditions of employment.

The rule primarily impacts businesses that rely on franchisees or leased workers. The Trump Administration's rule essentially reversed the Obama-Era standard set forth in the National Labor Relations Board's (NLRB) 2015 decision in *Browning-Ferris*. The NLRB's 2015 decision in *Browning-Ferris* lowered the bar for proving an entity was a joint employer by holding that it was no longer necessary that an entity actually exercise authority and control over the

terms and conditions of employment or that the control be exercised directly and immediately for a entity to be a joint employer. Fortunately, the NLRB had an opportunity to revisit its *Browning-Ferris* decision in 2020 on remand from the U.S. Court of Appeals for the District of Columbia Circuit. In its 2020 decision, the NLRB reversed course from its 2015 decision, holding that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees in order to be held a joint employer under the NLRA.

Employers should expect the Biden Administration to attempt to override the new Trump-Era "joint employer" regulation and the NLRB's 2020 decision in *Browning-Ferris* through passage of the controversial Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), which codifies an expansive "joint employer" standard, which would result in businesses having liability for workplaces that they don't control and workers they don't employ. On March 9, 2021, the U.S. House of Representatives passed 225-206 the PRO Act, again, along party lines. The 2021 version of the PRO Act, among other things, revises the definition of "joint employer" under the NLRA by requiring the NLRB and courts to consider not only an entity's direct control, but to also consider an entity's indirect control, over an individual's terms and conditions of employment including any reserved authority to control such terms and conditions, which standing alone, can be sufficient to make a finding of a "joint employer" relationship.

The U.S House of Representatives previously passed the PRO Act in 2020, but it stalled out in the U.S. Senate. The recently passed Pro Act will continue to have a challenging time in the U.S. Senate unless the Democrats can get around the filibuster rules which will most likely again stall the bill in the U.S. Senate. Nonetheless, employers should pay close attention to the PRO Act and the Biden Administration's attempt to return to the Obama-Era "joint employer" test where an entity's indirect or unexercised contractually reserved right to control could, alone, warrant finding of a joint-employer relationship.

Family and Medical Insurance Leave Act

The Biden Administration will attempt to expand the Family and Medical Leave Act (FMLA) by supporting job-protected paid leave benefits. Currently, FMLA leave is unpaid unless the employee chooses, or the employer requires, substitution of paid leave (e.g., vacation or PTO).

The Biden Administration will attempt to obtain paid FMLA leave for employees working for private employers through the Family and Medical Insurance Leave (FAMILY) Act (S. 248) which has been recently introduced in the U.S. Senate by Sen. Kristen Gillibrand (D-NY). The FAMILY Act would allow employees to receive up to 12 weeks (60 days) of paid leave in a year for caring for a newborn or newly adopted fostered child, for employee's or employee's family member's serious health condition, or dealing with qualifying exigencies arising from

the deployment of a family member in the Armed Services.

However, unlike the FMLA, the FAMILY Act would apply to all employers across the country regardless of their size. That is, eligibility for FAMILY Act benefits would not be tied to FMLA employer coverage and would be available to every individual who has the earnings and work history necessary to qualify for Social Security Disability Insurance. The benefits under the FAMILY Act would be paid through a national family and medical leave insurance fund which would be funded through a payroll tax contribution of 0.20%.

Increase in Federal Minimum Wage to $15

In this series, we previously addressed the Democrats' efforts to increase the federal minimum wage to $15 per hour through a provision in the American Rescue Plan Act of 2021 (i.e., the $1.9 Trillion coronavirus-relief package). Since the posting of our article, the U.S. Senate parliamentarian dealt a deadly blow to the Democrats' efforts to increase the federal minimum wage when she ruled that the bill's proposal did not meet the U.S. Senate's guidelines for reconciliation, and, therefore, the proposal could not be included in the coronavirus-relief package which was passed by both chambers of Congress this week and signed into law by President Biden on March 11, 2021.

Congressional Democrats, however, did not give up without a fight when they attempted to circumvent the U.S. Senate's reconciliation guidelines and the U.S. Senate's parliamentarian ruling by proposing tax penalties for employers with $2.5 billion or more in gross revenue who do not pay their employees at least $15 an hour instead of having a provision in the bill that directly raised the federal minimum wage. Supporters of addressing a federal minimum wage increase through amendment of the tax code finally relented when the complexity of such a maneuver would delay quick passage of the relief bill which the Democrats wanted completed by March 14, 2021.

The Democrats big push to include a federal minimum wage increase in the corona-virus relief package was an attempt to avoid the U.S. Senate's filibuster rules that a non-budgetary piece of legislation would be subject to under U.S. Senate rules. The Biden Administration, however, will now have to seek an increase in the federal minimum wage through a legislative bill and may have a difficult time getting the bill through the U.S. Senate given the U.S. Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. We will keep you posted on the Biden Administration's efforts to raise the federal minimum wage.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding any of the new workplace policies or proposed legislation that will be ushered in during the Biden Administration.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an

employer's requirement that employees agree to class- and collective-action waivers in mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during

investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or

discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions about unionization.

As always, the labor and employment law team at O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for employers to answer your questions and address your concerns about the changes to federal labor policy and law under the Biden Administration. We encourage you

to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

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In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration's efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration's concerted focus on workplace safety, it behooves all employers to take notice of OSHA's new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration's charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston's Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19,

and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on mitigating and eliminating COVID-19 in the workplace — a directive that President Biden's

Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention ("CDC") data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program's criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity based on having received the vaccination. As a result, assuming that an emergency

temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

As always, O’Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding OSHA’s new policies and directives under the Biden Administration.