EMPLOYMENT LAWSCENE ALERT: FTC BANS EMPLOYEE NON-COMPETES, BUT LEGAL CHALLENGES EXPECTED

The administrative agencies are having a busy week! In addition to the DOL issuing an updated rule on the salary basis to be overtime exempt, on Tuesday, April 23, 2024, the Federal Trade Commission voted 3-2 on its long-awaited non-compete ban, which was initially issued as a proposed rule in January 2023. The FTC estimates that this rule will affect 2,301,874 employees in Wisconsin and increase wages of each of those employees by $524 annually.

Under the FTC's rule, which is scheduled to go into effect 120 days from publication in the federal register, "non-compete clauses" are banned in almost all cases involving employees, which is broadly defined as including employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provide services to a person. Non-compete clauses are defined as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition." These limits do not apply to restrictions *during* employment, only post-employment restrictions.

Non-competes are still allowed in certain, very specific circumstances. For example, the rule states that it does not apply to non-competes entered into pursuant to a bona fide sale of a business. Additionally, *existing* non-competes with "senior executives" who made at least $151,164 in the preceding year and have policy-making authority at the business are not banned. Otherwise, *new* non-competes cannot be entered into with employees (whether or not they are senior executives), and employers will need to notify non-senior executives with existing non-competes that such agreements will not be enforced. The FTC has provided model language for such notice. The rule also does not cover not-for-profit organizations, such as non-profit hospitals, or non-competes in franchise agreements, although non-competes between franchisors or franchisees and their employees would still be subject to the rule.

The FTC non-compete ban does not necessarily ban non-solicitation or non-disclosure agreements. However, such agreements *could* be banned under the FTC rule if they "function to prevent a worker from seeking or accepting other work or starting a business after their employment ends." Non-solicitation and non-disclosure agreements are also subject to the FTC's section 5 prohibition against unfair methods of competition, irrespective of whether they are covered by the final rule.

The FTC's rule will soon be (or already is depending on when you're reading this) challenged in court by groups such as the U.S. Chamber of Commerce, asserting that the rule oversteps the FTC's authority. Regardless of the ultimate implementation of the FTC's rule, employers will remain bound by Wisconsin's restrictive covenant statute, Wis. Stat. § 103.465, for all restrictive covenants with their employees and independent contractors that are not banned by the FTC. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices, including discussion and review of your existing or future restrictive covenants.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES FINAL OVERTIME RULE WITH SIGNIFICANT SALARY THRESHOLD INCREASE

Under the Fair Labor Standards Act, non-exempt employees are entitled to overtime pay at 1.5 times their regular rate for all hours worked in a workweek in excess of 40. In order to be considered exempt, an employee must be paid a salary in excess of a certain amount and must perform certain job duties, generally of a bona fide executive, administrative, or professional. Currently, the salary basis is $35,568 per year ($684 per week), which was most recently updated in 2019.

On Tuesday, April 23, 2024, the Department of Labor announced its final rule, entitled *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Executives*, which significantly increases the salary thresholds below which employees are entitled to overtime compensation. This final rule is based on the proposed rule that was issued in September 2023 and the more than 33,000 comments the DOL received about that proposed rule.

Under the final rule, set to be effective July 1, 2024, the salary necessary to qualify as exempt from overtime compensation will increase to $43,888 annually ($844 weekly) on July 1, 2024, with an additional increase to $58,656 annually ($1,129 weekly) on January 1, 2025. Then, beginning July 1, 2027, the salary threshold will automatically update every three years. In addition, the salary threshold for highly compensated employees will be raised from its current level of $107,432 annually to $132,964 on July 1, 2024 and to $151,164 on January 1, 2025. The final rule does not change the job duties test, which will still need to be met in addition to the salary basis test in order for an employee to be considered exempt.

If this final rule goes into effect, it is estimated that more than 3 million workers will be affected. However, it is likely that the final rule will be challenged in court, just as other updates to the salary basis test have been challenged (and sometimes struck down) in the past. Given the short timeline before the initial increase, employers should begin preparing now to evaluate what they will need to do if the final rule does go into effect on July 1, 2024. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices.

EMPLOYMENT LAWSCENE ALERT: BIDEN PROPOSED BUDGET HAS LABOR AND EMPLOYMENT SIGNALS

On March 11, 2024, President Biden released the Budget of the U.S. Government for Fiscal Year 2025. Although this proposed budget is only a proposal and unlikely to pass either the House or the Senate as currently drafted, it does provide insight into the Biden Administration's priorities and contains a number of important labor and employment components.

First, the proposed budget contains a 2.3% increase to the Department of Labor's discretionary budget and a 7% increase to the National Labor Relations Board's budget. These increases are intended to support, among other things, DOL's worker protection agencies, which focus on workers' wages and benefits, child labor, misclassification of workers as independent contractors, and workplace health and safety, and the NLRB's "capacity to enforce workers' rights to organize and collectively bargain for better wages and working conditions."

Additionally, the proposed budget seeks to establish a national comprehensive paid family and medical leave program, administered by the Social Security Administration, that would significantly expand upon the current federal Family Medical Leave Act. The new proposed plan would (1) entitle eligible workers to up to 12 weeks of partially paid leave to bond with a new child; care for a seriously ill loved one; heal from their own serious illness; address circumstances arising from a loved one's military deployment; or find safety from domestic violence, dating violence, sexual assault, or stalking; and (2) entitle workers to three days to grieve the death of a loved one. Furthermore, President Biden called on Congress to require employers to provide seven days of job-protected sick leave each year to all workers and to ensure that employers cannot penalize workers for taking time off to address their health

needs, the health needs of family members, or to find safety from domestic violence, dating violence, sexual assault, or stalking. The proposed budget also notes the Administration's proposed rule that would extend overtime pay to an estimated additional 3.6 million workers by raising the salary basis from the current level of $35,568 per year ($684 per week) to $55,068 per year ($1,059 per week). This proposed rule was issued in September 2023 and is expected to be finalized in April 2024. If not challenged, this means that the required increase could go into effect as early as June 2024.

The proposed budget also significantly increases penalties for employers who violate laws overseen by the DOL, the Equal Employment Opportunity Commission, and the National Labor Relations Board. This would include penalties for laws related to workplace safety and health, wages and hours, child labor, equal opportunity, and labor organizing. The proposed budget also specifically provides the EEOC with resources to implement and enforce the Pregnant Workers Fairness Act; continue to monitor pay equity through collection and analysis of pay data; and combat discrimination that may arise out of automated employment systems, including AI.

Even if this proposed budget is not enacted as written, it is a strong signal of what the current Administration believes is important and what its agencies will focus on from an enforcement standpoint. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices.

EMPLOYMENT LAWSCENE ALERT: DUST OFF THOSE HANDBOOKS–THE NLRB HAS CHANGED ITS RULES (AGAIN)

Because the incumbent President appoints members of the National Labor Relations Board (NLRB), the NLRB's decisions often reflect the policy choices of that President's political party. Generally, when a Democrat holds office, the NLRB's decisions are more employee and union-friendly, and when a Republican holds office, the NLRB's decisions are more management-friendly. An issue that the NLRB has consistently gone back and forth on, depending on the incumbent President, is the standard for evaluating employee handbooks and establishing what rules and policies are acceptable under Section 7 of the National Labor Relations Act (NLRA). Under Section 7 of the NLRA, employees have rights of organization and collective bargaining, including the right to discuss wages, hours, and other terms and conditions of employment.

From 2004 to 2017, under the *Lutheran Heritage* standard, the NLRB took the position that, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, that the rule or policy violated Section 7. This guidance emphasized that employer's rules and policies needed to be narrowly tailored to avoid violating Section 7. Then, in 2017, the NLRB decided *Boeing*, which held that a facially neutral work policy was lawful when the potential adverse impact on an employee's exercise of protected rights was outweighed by justifications associated with the policy.

Now, the NLRB has changed the standard back to something that "builds on and revises" the *Lutheran Heritage* standard. On August 2, the NLRB set an employee and union-friendly standard for rules and policies in its *Stericycle Inc.* ruling. Under the new standard, a workplace rule or policy is presumptively unlawful if an employee would reasonably interpret the rule "to chill employees from exercising their Section 7 rights." These rights include discussing wages and terms of employment with coworkers, appealing to the public about working conditions, organizing to improve working conditions, and supporting or forming a union. That presumption of unlawfulness may be rebutted by the employer "by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." However, this is likely to be a high burden for employers to meet.

Rules and policies most at risk of being interpreted as chilling an employee's ability to exercise his or her Section 7 rights include those regarding the following issues: social media, audio and video recording, cell phone use, personal conduct, conflicts of interest, and confidentiality of harassment complaints and investigations. It is important to note that facially neutral rules may be found unlawful and that the employer's intent in creating the rule is immaterial; all rules are viewed through the employees' lens and what they could reasonably interpret.

Another important aspect of the new standard is that the NLRB decided that it is to be applied retroactively, meaning it not only applies to workplace policies going forward but also workplace policies already in existence. Therefore, it is crucial that employers reevaluate their current employee handbooks and other workplace rules and policies to ensure that they do not violate the standard set forth in *Stericycle*. Because the NLRA applies to non-union companies, all employers should be aware of the new standard and ensure that their handbooks and policies comply with the *Stericycle* decision. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: PREGNANT AND NURSING EMPLOYEES HAVE NEWLY EXPANDED RIGHTS

On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) and the Pregnant Workers Fairness Act (PWFA) into law. Both expand the protections for pregnant, postpartum, and nursing employees, who may also have protections under the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the FMLA.

The PUMP Act expands the 2010 amendment to the FLSA that required employers to provide a nursing mother reasonable break time to express breast milk for up to one year after childbirth and to provide a place other than a bathroom for the employee to express breast milk, shielded from view and free from intrusion from coworkers and the public.

Although significant, the 2010 amendment only entitled non-exempt workers to protection because it only covered those workers who were entitled to overtime pay under the FLSA. The PUMP Act expands the protections of break time to nurse and a private place to pump to all exempt and non-exempt employees, which is estimated to cover an additional nearly nine million workers. In addition to expanded coverage, under the PUMP Act, employees have a private right of action to bring suit against employers that do not comply with the Act.

The PUMP Act applies to all employers covered under the FLSA; however, if an employer with fewer than fifty employees can demonstrate that compliance with the break time requirement would impose an undue hardship, the employer may be exempt. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer's business.

The required break time for pumping under the PUMP Act does not have to be paid unless either (1) the employer provides compensated breaks for other employees during similar break times, (2) the employee is not completely relieved from duty during the break, or (3) the break is otherwise required by law to be paid. However, exempt employees may not have their salaries reduced due to breaks covered by the PUMP Act. The PUMP Act requires the pumping space to not necessarily be permanent but does require that the space be available "each time such employee has a need to express the milk." If an employer does not currently have any eligible employees, the employer does not have an obligation to provide a space, but employers should consider where they will make space if an employee becomes eligible. It is crucial that the space to express breast milk not be a bathroom.

The PWFA requires employers with fifteen or more employees to engage in an interactive process with pregnant and postpartum applicants and employees and to make reasonable accommodations for any limitations related to pregnancy, childbirth, or related medications, unless such accommodation would pose an undue hardship to the employer. Additionally, employers may not deny employment to, take adverse action against, or retaliate against applicants or employees who request a reasonable accommodation or engage in other protected activity under the PWFA. Much like the ADA, employers and employees must engage in an interactive process to determine what accommodations are necessary for the individual employee; employers cannot unilaterally decide what accommodations are appropriate.

Prior to the end of 2023, the EEOC will issue final regulations related to PWFA. The EEOC has already provided examples of potential accommodations that may be appropriate under the PWFA, including longer and more flexible breaks to eat, drink, and use the restroom; schedule flexibility, including to deal with morning sickness; exemption from strenuous activities; leave for medical appointments and to recover from childbirth; and closer parking. On June 27, 2023, the EEOC began accepting complaints under the PWFA, which also has a private right of action.

In addition to becoming familiar with the new requirements under the PUMP Act and PWFA, employers should review their policies in order to make sure that they comply with the expanded requirements of the laws. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATION IN EMPLOYMENT WILL HAVE ITS DAY AT THE HIGH COURT

In recent years, the U.S. Supreme Court has made major employment law headlines with its *Bostock* decision (holding sexual orientation and gender identity are protected classes under Title VII) and *Epic Systems* decision (holding class-action waivers are enforceable against employees), among others. It looks like 2023 will be no different. In addition to taking up the rights of employers to sue unions for damages incurred during strikes and asking the Solicitor General to weigh in on what actions can be the basis for a discrimination suit under Title VII, the Supreme Court is also poised to reshape the landscape of religious accommodations.

Under Title VII, employers are prohibited from discriminating against individuals because of

their religion in hiring, firing, and other terms and conditions of employment. In addition, employers must reasonably accommodate the religious practices of an employee or a potential employee, unless doing so would pose an "undue hardship" to the employer. Such accommodations may include flexible scheduling, voluntary substitutes or swaps, job reassignments, lateral transfers, changes to dress and grooming codes, and protection of workplace religious expression. Currently, under the 1977 Supreme Court decision *Trans World Airlines, Inv. v. Hardison*, an "undue burden" is defined as "more than *de minimis* cost" or a minor burden. This definition stands in fairly stark contrast to the Americans with Disability Act definition of "undue burden," which is "significant difficulty or expense."

Because employers have had fairly significant leeway when it comes to religious accommodation, this area of law has not seen significant litigation, as religious discrimination claims account for only 3.4% of all EEOC charges in fiscal year 2021. However, the tides may be turning, particularly if *Hardison* is overruled. In January, the Supreme Court agreed to hear oral arguments in a case that could be poised to change the "undue burden standard" for religious accommodation. In *Groff v. DeJoy*, a Christian letter carrier objected to delivering packages for Amazon on Sundays and asked for an accommodation that he never be required to work on Sundays due to his religious beliefs. The U.S. Postal Service rejected this request, stating that granting it would be an undue burden because it would cause tension among other employees who would be required to work on Sundays. The U.S. Postal Service did offer to let the employee switch shifts with other employees, if any of them were willing to do so. The District Court and the Court of Appeals for the Third Circuit ruled in favor of the U.S. Postal Service, citing *Hardison* and the minimal burden the employer needed to show to reject the request for accommodation. Although conventional wisdom would typically indicate that the conservative super-majority on the high court is likely to rule in favor of the corporation, given this Supreme Court's openness to arguments of religious discrimination in other contexts and both Justice Alito's and Justice Gorsuch's prior criticism of *Hardison*, the current definition of what is a "de minimis" burden in religious accommodation cases is likely to change in favor of the employee. Whether that change brings the religious accommodation definition of "undue burden" closer to the ADA's definition or creates some newly defined test remains to be seen.

Employers should stay tuned for the outcome of *Groff* and should, in the meantime, carefully consider any requests for religious accommodation with an eye toward a potentially increased burden on the employer to show that the requested accommodation creates an undue burden. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: VOTE! AND REMEMBER THAT YOUR EMPLOYEES ARE ENTITLED TO TIME OFF TO VOTE!

Tuesday, November 8, 2022, is Election Day. Although early voting is underway, many people will want to vote in-person on Election Day. All Wisconsin employers, regardless of size, are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 a.m. until 8 p.m.). Employees must request the time off prior to Election Day. Employers cannot deny voting leave on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee may utilize (e.g., the beginning or end of the workday). Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are required to grant 24 hours of unpaid leave to an employee who is appointed to serve as an election official. This election official leave is for the Election Day on which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with notice of their need for this leave at least seven days prior to Election Day.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or to reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong and Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

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

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 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: UNION ORGANIZATION IS ON THE RISE

Recently, it seems like the stars have aligned in favor of unions. When President Biden was elected in 2020, a part of his workplace initiatives included the promotion of collective bargaining and the protection of employees' rights to join and form unions. Then, a global pandemic struck, which made many employees reconsider and question their relationships with their workplaces and employers. In February 2022, the White House Task Force on Worker Organization and Empowerment released a report promoting the Biden Administration's support for worker organization and collective bargaining by recommending, among other things, that the federal government use its "authority to support worker empowerment by providing information, improving transparency, and making sure existing pro-worker services are delivered in a timely and helpful manner." Earlier this month, the National Labor Relations Board (NLRB) announced that union representation petitions filed with the Board between October 1, 2021 and March 31, 2022, had increased 57% over the prior six-month period. Additionally, unions have made major headlines recently with successful union elections at an Amazon fulfillment center on Long Island and multiple Starbucks locations.

And more changes are likely on the horizon. For example, on April 7, the NLRB General Counsel issued a memo challenging employers' well-established free speech rights, which are protected pursuant to Section 8(c) of the National Labor Relations Act (NLRA). The General Counsel's memo announced that she will ask the Board to find that mandatory employee meetings, held by employers to express their opinions on union organizing, violate employees' Section 7 rights under the NLRA. If the Board takes this position, it would be a huge blow to employers' ability to effectively and freely communicate with their employees

and would also be contrary to U.S. Supreme Court precedent recognizing employers' free speech rights in the workplace.

So, what's an employer to do? Employers cannot threaten employees, cannot interrogate them about their support of a union, cannot promise things to influence the union vote, and cannot surveil employees. However, to lawfully counter a union's organizational activities, employers can help ensure that employees are accurately informed about the effects of 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 and concerns about unionization.

As always, the labor and employment law team at O'Neil Cannon is here for employers to answer questions and address labor and employment law concerns. We encourage you to reach out with any questions, concerns, or legal issues you may have.

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

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 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.