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.

AN EDUCATIONAL BUSINESS SERIES FOR SUCCESS: DEFINING HOW OWNERSHIP INTEREST(S) CAN BE TRANSFERRED IF ONE OR MORE OF THE OWNERS CAN NO LONGER OR DO NOT WANT TO CONTINUE IN THE BUSINESS

In our last article, we explained why setting in place an exit strategy when the time comes and minimizing the potential for conflict is important. In this post, we will be discussing how ownership interest(s) can be transferred if one or more of the owners can no longer or do not want to continue in the business.

PART 3 – DEFINING HOW OWNERSHIP INTEREST(S) CAN BE TRANSFERRED IF ONE OR MORE OF THE OWNERS CAN NO LONGER OR DO NOT WANT TO CONTINUE IN THE BUSINESS

Your business is soaring along, meeting or exceeding all projections and expectations, and then suddenly one of the owners wants to pull out of the company. Or something disastrous

happens and an owner simply cannot continue.

There is a myriad of reasons an owner may leave the business, including simply not having the passion to remain in it, but no matter what, you can and should be prepared. Whether your business continues to function at a high level or crumbles during this transitional period depends on how well you have anticipated situations that involve transfers of ownership interests. A well-drafted buy-sell agreement can help keep your business on track by defining how and when ownership interests can be transferred, and for how much.

Typical Buy-Sell Provisions

In many cases, the owner's interest must be sold back to the company, the remaining shareholders, or a combination thereof. A solid buy-sell agreement may be structured in several different ways and account for differing triggering events. In all cases, however, the buy-sell agreement should specify the value of the interest after the owners agree on the method of valuation.

In the most common scenario involving the death or disability of an owner, co-owners are required to buy the departing owner's share. Under what is commonly called a "cross-purchase plan," each owner would buy a life insurance policy on every other owner and pay the premiums, either personally or using business funds. The remaining owner or owners could then purchase the departing owner's interest from their heirs using the life insurance proceeds.

When the business itself will buy the departing owner's share upon the death of an owner, the buy-sell is funded with a life insurance policy bought by the business and on which it pays the premiums. The business would then use the proceeds of the policy to purchase the owner's share from their heirs.

In a situation in which a sole proprietor has handpicked someone to take over the business, a one-way buy-sell agreement may be the best choice. In this case, the chosen person—whether it is an employee, child, sibling, spouse, etc.—would buy an insurance policy on the owner and name themselves as the beneficiary. Premiums may be paid by the business or by the future owner.

Buy-sell agreements may also give the business the option to buy a departing owner's interest first. If the business declines, the option then moves to the remaining owners, but if they do not buy all the remaining interest, the business must buy it. This type of arrangement is called a "wait and see" plan because it allows the business to decide whether it makes good financial and tax sense to purchase the departing owner's shares at the time of the triggering event.

A buy-sell agreement may also provide remaining owners with a "right of first refusal," giving

them the option to buy the departing owner's interest before it is offered to anyone else for purchase. This provision can help ensure that the remaining owners maintain a say in who their future partner will be, though it is not foolproof if the remaining owners do not have the funds available to buy the interest.

Remember, too, that owners do not always have equal shares in the business, and that means that separate buy-sell agreements may be in order. For example, a buy-sell for a minority owner may require them to sell their interest to the majority owner while one for the majority owner may prefer that a particular person, such as a child, take over their shares.

Overall, a comprehensive buy-sell agreement can cover many triggering events and scenarios while also keeping all current owners happy both during the course of business and in the case that the contract must kick in. The best buy-sell for your business will minimize potential conflict while also considering exactly what your specific business needs as well as potential tax consequences.

Check out our next article in our business series covering what types of protection needs to be considered in a transition.

If you have questions about your company's succession, please contact a member of our Estate and Business Succession Planning team.

OTHER ARTICLES IN THIS SERIES:

- An Educational Business Series for Success: Setting in Place an Exit Strategy When the Time Comes and Minimizing the Potential for Conflict
- An Educational Business Series for Success: Why Buy-Sell Agreements are Necessary Even if You Don't Plan to Sell Your Company Soon

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TAX AND WEALTH ADVISOR ALERT: ESTATE AND TAX PLANNING DURING MARKET TUMULT

The worldwide equity market tumult is creating some unique and unprecedented challenges. However, plunging asset values are presenting some rare opportunities in wealth planning that are often only seen once in a generation. Below are some strategies you may wish to incorporate into your estate and tax planning during this time.

Basic Estate Planning: Now, more so than ever, it is important to make sure your family is provided for in your estate plan. This means reviewing your current estate planning

documents to ensure the principal documents are in order. Wills, revocable trusts, powers of attorney, beneficiary designations and health care directives should all be reviewed to ensure that these documents reflect your current wishes.

Make an Annual Gift Exclusion: You can make an annual tax-free gift of $16,000 per person (for married couples, a combined $32,000) that does not count against your lifetime gift tax exclusion (currently $12.06 million per person). Using marketable securities as the gifted asset when volatility is so high, and valuations are down, can offer you some extra stretch on gifts made now before valuations rise in the future.

Place Assets into Existing Irrevocable Trusts or Fund a New Irrevocable Trust: Like making an annual gift, funding an irrevocable trust with securities while valuations are low allows for more assets to be placed in the trust (when measured against the lifetime exclusion) and allows you to transfer more of your wealth tax-free.

Make Roth IRA Rollovers: The "cost" of converting a traditional IRA into a Roth IRA is paying taxes now on the current value of the IRA, therefore, it is best to make these conversions when the market is down.

Tax-Loss Harvesting: Some may consider lowering their tax liability by selling a security now at a loss to offset gains from earlier this year or in the future. However, you should be aware of the wash-sale rules. The wash-sale rule states that when you harvest losses, you cannot repurchase substantially identical investments for 30 days. Even though you may have separate accounts with different advisors, the rule considers all accounts to be the same. Therefore, it is important to make sure that all your advisors are aware of the securities you are buying and selling.

Intra-Family Transactions: When asset values are low, wealth transfer planning techniques involving intra-family transactions, such as selling assets to your children or grandchildren, are very effective if the sold assets appreciate at a rate greater than the interest rate charged. When asset values recover, all the asset appreciation will be outside of your taxable estate and will be held by or for the benefit of your children or grandchildren transfer tax free.

GRATs: A grantor retained annuity trust (GRAT) is an estate planning vehicle that allows you to freeze the value of your estate while transferring any future appreciation to the next generation free of tax. With a GRAT, you transfer certain assets to a trust and retain the right to receive annuity payments for a term of years. The transfer of property to a GRAT constitutes a gift for gift tax purposes, but the value of that gift is only the value of the trust assets on the date of the transfer plus an assumed rate of return. Any appreciation of the assets more than the hurdle rate passes to the beneficiaries free of gift tax. GRATS are most effective when interest rates and market values are low. While the economy isn't currently

experiencing low interest rates, it is experiencing low market values, which still makes it beneficial to set up a GRAT. For clients who have existing GRAT terms that are ending, it is probably beneficial to keep them going. Those without GRATs should strongly consider funding them in this current market climate.

CLATs: Those with charitable inclinations should consider a charitable lead annuity trust (CLAT). A CLAT works like a GRAT, however, a CLAT is designed for a charity to receive the annuity payments for a term of years, rather than an individual. At the end of the term, the balance of the assets remaining in the trust passes to the beneficiaries you indicate in the trust agreement. As with all the strategies discussed above, low equity values result in more assets passing to your intended beneficiaries free of transfer tax.

If you are interested in learning more about estate and tax planning during these unprecedented times, please contact Attorney Britany E. Morrison at O'Neil Cannon

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ERICA REIB REELECTED TO THE BOARD OF THE STATE BAR'S LABOR AND EMPLOYMENT SECTION

Attorney Erica N. Reib was recently reelected to the Board of the Labor and Employment Section of the State Bar for a three-year term beginning July 1, 2022, making this her third term in a row. The State Bar of Wisconsin provides opportunities for lawyers to work on issues that matter to them and the public they serve. The Labor and Employment Section includes new and experienced attorneys who practice labor and employment law. The section keeps members up-to-date on recent developments in the law. The section also allows members to exchange information and opinions on various labor topics and legal issues in the workplace.

Erica is a member of O'Neil Cannon's Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, OSHA matters, wage and hour issues, NLRB and unfair labor practice matters, employment policy and agreement drafting and review, unemployment compensation, investigations and proper employment practices to avoid litigation. She volunteers her time at the Marquette Volunteer Legal Clinic and Milwaukee Justice Center, and is a board member and legal committee chair at the Audio and Braille Literacy Enhancement, Inc.

Erica is pleased to be elected again and looks forward to continuing her involvement on the Board. If you would like to contact Erica, she can be reached at 414-276-5000 or

erica.reib@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: WHAT IS AN ESTATE PLAN?

We are often asked, “What is an estate plan?” An estate plan can mean different things depending on your unique personal and financial situation. We structure your estate plan based on many things, such as whether you are single, married, or divorced; whom you want your estate to pass to upon your death; and the complexity and makeup of your assets. Some individuals may need more estate planning, some may need less.

Here is a list of the typical documents we include in an “estate plan.”

Revocable Trust

People often come to us asking for a “simple” Will. However, a Will-based estate plan is not always the best choice. A “simple” Will now may cause beneficiaries significant cost and delay, later, when the Will gets probated. This is why we often recommend that our clients establish a “Revocable Trust.”

A Revocable Trust is a trust that you create during your lifetime and acts as the “centerpiece” of your estate plan. The Trust is designed to help you manage your assets during your lifetime and to designate who will receive your property upon your death. You are the “grantor” or creator of the Trust and serve as Trustee during your lifetime, so you still retain control over the assets in your Trust. The Trust is both completely amendable and revocable during your lifetime.

Upon your death, your trust property is divided and distributed to your named beneficiaries, often your children. A share for a beneficiary can either be distributed outright and free of trust, or it can be held in trust for that beneficiary’s benefit. A share held in trust can be useful for a beneficiary to protect from creditors and divorce, or if a beneficiary is a spendthrift.

Married couples often create a “joint” Revocable Trust together. A joint Revocable Trust is a useful tool to minimize taxes and effectively manage a married couple’s assets, before and after death.

A Revocable Trust is particularly useful if you have minor children, you own your own business, or you own real property in multiple states. The Trust also makes the

administration of your assets more efficient if you become incapacitated.

Last Will and Testament

Even if you have a Revocable Trust in place, it is still necessary to have a Will. This is what we refer to as a "Pour-Over Will." The Pour-Over Will serves a few important purposes. First, in the event that you fail to re-title an asset into your revocable trust, the Pour-Over Will is designed to receive those assets upon your death and "pour" them into your Revocable Trust. Second, the Pour-Over Will is the only place you can nominate a guardian for your minor children if you were to unexpectedly pass away. Finally, the Pour-Over Will distributes your personal property, such as your furniture, household items, clothing, etc. to your intended beneficiaries.

Martial Property Agreement

For married couples, we often draft a Marital Property Agreement. This agreement allows married couples to "opt in" to Wisconsin's marital property system by classifying most of your assets as marital property upon yours and your spouse's deaths. The Marital Property Agreement also contains a "Washington Will Provision," which means the surviving spouse can fund the trust upon the death of the first spouse and thus avoid probate. This agreement, however, does not address divorce and is used solely for estate planning purposes.

Durable Power of Attorney

In the event that you become incapacitated as a result of an accident or illness, you can appoint an "agent" in your Durable Power of Attorney to oversee your financial affairs. We are often asked what the difference is between an "agent" and a "trustee." An "agent" manages the assets outside of your Revocable Trust, while a "trustee" manages the assets held by your Trust. A Durable Power of Attorney offers great flexibility in administering your financial affairs and also allows you to avoid a costly guardianship proceeding.

Health Care Power of Attorney

A Health Care Power of Attorney allows you to appoint an individual to make health care decisions on your behalf in the event that you are unable to do so yourself. The document also allows you to express your wishes regarding entering a nursing home or community-based residential facility when the need arises, as well as other important end-of-life decisions.

HIPAA Release and Authorization

The Health Insurance Portability and Accountability Act was passed into law in 1996. This Act prevents medical professionals from divulging your personal medical records to family

members or other individuals. Because of this, it is often difficult for family members to gain access to your medical information in the event of an emergency. Our HIPAA Release and Authorization allows medical professionals to release your personal medical records to persons of your choosing (often family members) to help manage your care.

Deed

If you establish a Revocable Trust, an important step is re-titling your real property into the name of your Revocable Trust. Thus, upon your death, you avoid having the real estate pass through probate, and your Trustee will have the ability to maintain, manage, and/or sell your real property upon your death. This step is especially important for property owned outside of Wisconsin. If you fail to transfer your real property into your Revocable Trust, you risk needing an "ancillary" probate in the state in which your real property is located. This can be a costly and tedious step we try to avoid.

ATTORNEY JESSICA HASKELL ELECTED TO THE BOARD OF DIRECTORS OF THE STATE BAR'S BANKRUPTCY, INSOLVENCY AND CREDITORS' RIGHTS SECTION

Attorney Jessica K. Haskell has been elected to the Board of Directors of the Bankruptcy, Insolvency and Creditors' Rights Section of the State Bar of Wisconsin for a three-year term beginning July 1, 2022. The Bankruptcy, Insolvency and Creditors' Rights Section seeks to inform its members about developments in bankruptcy and collection law and to serve the judiciary and the public. Specifically, members work on developing the law, increasing communication between practitioners, and improving the standards of the profession.

Jessica is a member of O'Neil Cannon's Banking, Receivership, and Creditors' Rights Practice Group. She represents court-appointed receivers, secured and unsecured creditors, financial institutions, and corporations in state and federal court. Jessica is pleased to be elected and looks forward to being involved with the Board in her new role.

TAX AND WEALTH ADVISOR ALERT: IRREVOCABLE INCOME-ONLY TRUSTS, HOW THEY CAN HELP YOU APPLY FOR MEDICAID AND WHEN THEY SHOULD BE AVOIDED.

An irrevocable income-only trust can be an indispensable tool when planning for retirement and long-term care expenses. It's important to know how these trusts work, how they help you qualify for Medicaid, and how to set one up.

What Are Irrevocable Income-Only Trusts?

Irrevocable income-only trusts are used for Medicaid planning. They are a type of living trust that protects assets from being sold to cover long-term care expenses such as nursing homes. These assets are placed in a trust so that they can be passed down to beneficiaries. The beneficiary of the trust is only entitled to receive the trust income; the trust principal is not accessible.

You can use an irrevocable income-only trust to qualify for Medicaid. You make your assets the trust principal, which becomes inaccessible to you. By doing so, you can only access the trust income, which is subsidized to pay for your nursing home care, and then Medicaid pays the rest. However, the amount Medicaid pays must be under $2,000 by the end of each month, and if not, it may increase the amount you pay out of pocket.

Qualifying for Medicaid

Although you can use this type of trust to help qualify for Medicaid, keep in mind, it creates a waiting period of ineligibility. Each state has laws about when you can start receiving Medicaid benefits after transferring funds to an irrevocable income-only trust.

The Benefits and Downsides of Irrevocable Income-Only Trusts

An irrevocable income-only trust has several advantages, including:

- You retain the ability to qualify for Medicaid benefits and still preserve some assets for your loved ones.
- In the interim, between setting up an irrevocable income-only trust and entering a nursing home, you may establish an income stream for yourself.

There are some downsides to keep in mind when considering creating an irrevocable income-only trust, such as:

- You lose control over your assets in the trust. This is because the trust is irrevocable, which means you cannot change or terminate the trust.
- Medicaid's look-back period is 60 months, so if you become ill before this period ends, you are left without funds to pay for nursing home bills. Medicaid will not cover these costs. You should not put *all* of your assets in the trust for this reason.
- If you are young and healthy, a **revocable trust** is a much better structure for your estate plan because it allows you to change your estate plan and, more importantly, it keeps you in control of your assets.

How to Set Up an Irrevocable Income-Only Trust

To start an irrevocable income-only trust, you'll need to gather some important information. Make a list of your assets and income from all sources, including all assets transferred within the last five years. Then, determine whether your resources are exempt, non-exempt, or inaccessible for Medicaid purposes. Finally, consult with an experienced Medicaid law attorney to help you finalize and set up the fund.

Working with an experienced attorney can help you better ascertain your cash flow needs. You will have to ensure your present income needs are met and that you have sufficient funds to pay your nursing home bills if you unexpectedly become ill.

If you'd like further information about this topic, please contact a member of our Estate and Business Succession Planning team.

OCHDL IS PLEASED TO ANNOUNCE THAT RYAN J. RIEBE HAS JOINED THE FIRM

Attorney Ryan J. Riebe, a graduate of the University of Minnesota Law School, has joined the Litigation Practice Group of O'Neil Cannon Ryan has experience counseling individuals and businesses in a wide variety of litigation matters in state and federal courts and in mediation and arbitration. He is licensed to practice law in both Wisconsin and California. We are very pleased to have Ryan join OCHDL.

OCHDL, founded in Milwaukee in 1973, is a full-service law firm that focuses on meeting the many needs of businesses and their owners. Our experienced attorneys work with businesses and their owners at all stages of the business life cycle, helping them start, grow, and transition their businesses. We also assist business owners with their personal legal needs, including tax and estate planning, and family law. For more information about the types of services we provide, please visit our **website** or contact your OCHDL attorney.

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- The Great Wealth Transfer and Its Implications on Estate, Trust, and Probate Litigation
- Setting in Place an Exit Strategy When the Time Comes and Minimizing the Potential for Conflict
- Union Organization Is on the Rise

Firm News:

- Trevor Lippman Leads Effort to Secure $5.4 Million Settlement in Will Fraud Case
- Jim DeJong Featured on WISN AM 1130
- Joseph Gumina Recently Quoted in The Daily Reporter

Click the image below to read more.

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.