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.

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19 O'NEIL CANNON LAWYERS SELECTED AS 2024 BEST LAWYERS; ANOTHER 4 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 19 of our lawyers have been included in the 2024 Edition of *The Best Lawyers in America*, and an additional four have been selected as 2024 *Best Lawyers: Ones to Watch*.

The following are the O'Neil Cannon lawyers named to the 2024 lists:

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- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Peter J. Faust – Corporate Law and Mergers and Acquisitions Law
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About Best Lawyers

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.

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.

O'NEIL CANNON SERVES AS LEGAL ADVISOR TO I3 PRODUCT DEVELOPMENT IN ITS SALE TO HELIOS TECHNOLOGIES

O'Neil Cannon advised i3 Product Development (i3) in its recent sale to Helios Technologies (NYSE: HLIO). i3, a custom engineering services firm with over 55 engineers, specializes in electronics, mechanical, industrial, embedded, and software engineering. Its solutions are used across many sectors, including medical, off-highway, recreational and commercial marine, power sports, health and wellness, agriculture, consumer goods, industrial, sports, and fitness. i3 has business locations in both Sun Prairie and Middleton, Wisconsin.

Helios Technologies is a global leader in highly engineered motion control and electronic controls technology for diverse end markets, including construction, material handling,

agriculture, energy, recreational vehicles, marine, and health and wellness.

Josef Matosevic, Helios' President and Chief Executive Officer, stated, "The acquisition of i3 Product Development will turbocharge our efforts to be the most innovative company focused on the intersection of the hydraulics and electronics markets. This flywheel acquisition fits into our technology roadmap strategy like a glove and will continue to make us incredibly tough for our competition to follow."

The O'Neil Cannon deal team was led by Attorney Chad Richter with assistance provided by O'Neil Cannon attorneys Britany Morrison, Nick Chmurski, Erica Reib, Sam Nelson, and Michael Kennedy.

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.

SUPER LAWYERS RECOGNIZES 25 O'NEIL CANNON ATTORNEYS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. Recently, *Super Lawyers* published its lists for 2022, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-five of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Nicholas G. Chmurski:
    - Rising Stars
- Douglas P. Dehler:
    - Super Lawyer
- James G. DeJong:
    - Super Lawyer
- Seth E. Dizard:
    - Top 50 Attorneys in Wisconsin
    - Top 25 Attorneys in Milwaukee
    - Super Lawyer
- Peter J. Faust:
    - Super Lawyer
- John G. Gehringer:
    - Super Lawyer
- Joseph E. Gumina:
    - Super Lawyer
- Jessica K. Haskell:
    - Rising Stars
- Grant C. Killoran:
    - Super Lawyer
- Dean P. Laing:
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    - Super Lawyer
- Trevor C. Lippman:
    - Rising Stars
- Gregory W. Lyons:
    - Super Lawyer
- Patrick G. McBride:
    - Super Lawyer
- Britany E. Morrison:
    - Rising Stars
- Joseph D. Newbold:
    - Super Lawyer
- Erica N. Reib:
    - Rising Stars

- Chad J. Richter:
    - Super Lawyer
- John R. Schreiber:
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- Jason R. Scoby:
    - Super Lawyer
- Steven J. Slawinski:
    - Super Lawyer
- Kelly M. Spott:
    - Rising Stars
- Christa D. Wittenberg:
    - Rising Stars

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

> "[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex. It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one's way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists."

We are proud to be one of the few firms in Wisconsin that had more than 50% of its attorneys receive recognition by *Super Lawyers.*

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.

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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.

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.