

# EMPLOYMENT LAWSCENE ALERT: OSHA ISSUES DETAILS OF VACCINE MANDATE

Today, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released the [Emergency Temporary Standard](#) regarding COVID-19 Vaccination and Testing, which has commonly been referred to as the Vaccine Mandate. It will officially be published on November 5, 2021. Announced by President Biden in September, the Vaccine Mandate requires all employers with more than 100 employees to either require that employees be fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 tests, both of which are subject to reasonable accommodations for disabilities and sincerely held religious beliefs. The Vaccine Mandate does not apply to individual employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. Although the majority of the Vaccine Mandate officially goes into effect on January 4, 2022, employers need to start preparing immediately in order to be in full compliance by that date, including establishing and implementing the required written policies. Certain provisions, including the fact that employers must offer paid time-off for employees to receive the COVID-19 vaccinations and recover from any side-effects and must require unvaccinated employees to wear masks, go into effect on December 5, 2021.

For employees who opt to utilize the testing requirement, employers must keep records of each test unvaccinated employees take. If an employee is not vaccinated and does not receive a weekly test or if the employee tests positive for COVID-19, the employer must remove that employee from the workplace. A covered employer may require employees to pay for their own COVID-19 testing.

In order to assess whether or not an employer has 100 employees, employers are required to count all full-time and part-time employees at all of their locations, whether or not they work at the company's facility or remotely. Employers are not required to count independent contractors or leased employees, such as those from staffing agencies. Additionally, franchisees may count their employees separately from the franchisor and from other franchisees. Here are some examples provided in the ETS:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.

- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

The Centers for Medicare and Medicaid Services issued its own [emergency rule](#) requiring healthcare workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4, 2022, but its rule does not allow for a weekly testing option. In the event of an overlap between the CMS rule and the OSHA rule, the CMS rule will govern. Additionally, in any overlap between the OSHA rule and the requirement that federal contractors be vaccinated, the federal requirement will govern.

The Vaccine Mandate, which has already received significant pushback from certain lawmakers, attorneys general, and business groups, is likely to be challenged in court, and it could be enjoined prior to its effective date. However, employers should not rely on that possibility and should begin preparing now. As always, O’Neil Cannon is here for you and will keep you updated on developments on the Vaccine Mandate as they happen. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

---

## **19 OCHDL LAWYERS SELECTED AS 2022 BEST LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH**

We are pleased to announce 19 of our lawyers have been included in the 2022 Edition of *The Best Lawyers in America*, and an additional five have been selected as 2022 *Best Lawyers: Ones to Watch*.

The following are the O’Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2022 lists:

### *Best Lawyers in America*

- 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
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina – Employment Law – Management and Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law and Trusts and Estates
- Grant C. Killoran – Commercial Litigation and Litigation – Health Care
- JB Koenings – Corporate Law
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, and Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation and Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Joseph D. Newbold – Commercial Litigation
- Chad J. Richter – Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

*Best Lawyers: Ones to Watch*

- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Kelly M. Spott – Trusts and Estates
- Christa D. Wittenberg – Commercial Litigation

**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: WHAT DOES PRESIDENT BIDEN'S EXECUTIVE ORDER ON NON-COMPETES MEAN FOR WISCONSIN EMPLOYERS?**

On Friday, July 9, 2021, President Biden signed an [Executive Order](#) that, among other things, instructed the Federal Trade Commission ("FTC") to ban or limit non-compete agreements and other clauses or agreements that "unfairly limit worker mobility." This is not a federal ban on non-compete agreements and does not change any current law. It is important to note, however, that the FTC and the U.S. Department of Justice Antitrust Division, through civil and criminal enforcement actions, have already been looking at no-poach agreements between employers and other competitive restrictions through the lens of antitrust and consumer protection laws and have begun to indict those employers who have entered into anti-competitive agreements that adversely affect America's labor market. To comply with President Biden's Executive Order, the FTC will likely go through a notice and comment period and eventually issue regulations governing the enforceability of restrictive covenants. Although a full federal ban on restrictive covenants is unlikely and any FTC rule would be subject to legal challenges, there may be limitations for certain workers (e.g., those in lower wage positions) or those in certain industries (e.g., retail, hospitality). Therefore, employers will need to stay informed on the progress of these regulations.

This is also a good reminder for Wisconsin employers to review their employee restrictive covenants, including non-disclosure, non-solicitation, and non-compete agreements. Regardless of any potential updates to federal law, Wisconsin has its own state statute regulating restrictive covenants – Wis. Stat. § 103.465. Wisconsin's statute imposes certain requirements for a restrictive covenant to be valid, including reasonable time and geographic limitations. Given the new focus on non-competes by the federal government, it is worthwhile

for employers to have their restrictive covenants reviewed to evaluate enforceability and ensure that they're being appropriately used to protect those legitimate business interests recognized by law. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding restrictive covenants and related issues.

---

## **EMPLOYMENT LAWSCENE ALERT: WHAT DOES THE CDC'S NEW MASK GUIDANCE MEAN FOR EMPLOYERS?**

On May 13, 2021, the CDC announced that it had updated its [guidance](#) for individuals who have been fully vaccinated against the COVID-19 virus (i.e., individuals who received their final shot more than two weeks ago). The updated guidance states that individuals who have been fully vaccinated against COVID-19 are not required to wear masks or follow social distancing guidelines in most settings. Masks are still required for those who have not reached full vaccination. Masks are also still required for all individuals in certain places, including on public transportation, in transportation hubs, and at high-risk workplaces, such as healthcare, correctional facilities, and homeless shelters. Although this guidance was issued for individuals, the CDC has promised updated guidance for businesses and employers shortly, and some companies have already lifted their mask mandates for customers.

So, while this means that employers may soon be able to relax their mask rules for employees, there are a number of important considerations for employers.

### **Can an employer ask its employees if they have been vaccinated?**

Yes. According to the EEOC, requesting proof of COVID-19 vaccination is not likely to elicit information about a disability, and therefore is not a disability-related inquiry under the ADA, which would otherwise need to be job-related and consistent with business necessity, and does not elicit genetic information protected by the Genetic Information Nondiscrimination Act. Additionally, HIPAA does not apply to employee health information collected or maintained by an employer in its role as an employee's employer. However, medical information regarding employees should be kept confidential and separate from an employee's general personnel file.

### **Does my company still have to comply with local mask ordinances?**

Yes. The CDC guidance specifically says that individuals are still required to wear masks

when required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. Therefore, companies located in areas where there are currently mask ordinances in place must continue to follow such local or state laws.

### **What about OSHA and other safety concerns?**

On January 29, 2021, OSHA published guidance that required all individuals to wear masks when in public and around other people and provided that employers should not distinguish between workers who are vaccinated and those who are not. However, OSHA has now stated that it is reviewing the CDC guidance, will update its guidance in the near future, and to “refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.” Therefore, employers should be able to rely on the CDC guidance related to mask mandates and social distancing for fully vaccinated employees. However, employers must remember that, consistent with the obligations under the OSH Act’s general duty clause, they will need to continue to provide a safe workplace. Therefore, an employer that abandons all COVID-related safety protocols or permits all employees, regardless of vaccination status, to stop wearing masks may still be at risk of an OSHA complaint.

In summary, employers must continue to comply with local mask ordinances and should monitor OSHA and other guidelines to make sure that they are ensuring the safety of their employees. If an employer decides to allow fully vaccinated individuals to stop wearing masks, it should clearly communicate its policy, including how it will verify vaccination status, to its employees. As always, O’Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

---

## **EMPLOYMENT LAWSCENE ALERT: AMERICAN RESCUE PLAN EXTENDS TAX CREDITS FOR COVID-RELATED LEAVE**

On March 11, 2021, President Biden signed the American Rescue Plan into law. Among a wide variety of other aims, the \$1.9 trillion bill extended tax incentives for certain employers that chose to provide their employees with qualifying paid leave related to the COVID-19 pandemic.

In March 2020, the Families First Coronavirus Response Act (“FFCRA”) was signed into law. The FFCRA contained two leave components: the Emergency Paid Sick Leave Act (“EPSLA”)

and the Emergency and Family and Medical Leave Act (“EFMLA”). Under the EPSLA, employers with fewer than 500 employees were required to provide employees with up to two weeks of leave sick leave for six COVID-related reasons; and under the EFMLA, employers with fewer than 500 employees were required to provide employees with up to 12 weeks of leave if their children’s school or child care facilities were closed due to COVID. Those employers could then offset the expense of such paid leave through tax credits. Mandated leave under the FFCRA ended on December 31, 2020, but in December 2020, the tax credits were extended through March 31, 2021 for employers with fewer than 500 employees that opted to continue to provide qualifying EPSLA and EFMLA leave.

The American Rescue Plan similarly gives employers with fewer than 500 employees the option, but not the obligation, to continue to provide EFMLA and EPSLA to employees through September 30, 2021 and provide employers with a 100% tax credit to offset the cost of such leave. The American Rescue Plan has also expanded the list of qualifying reasons for EPSLA leave to include time off to receive the COVID-19 vaccination and time off to recover from side effects of receiving the vaccination. Employers should be mindful to update their existing FFCRA leave forms to reflect these additional uses for leave. Finally, on April 1, 2021, for employers who opt to provide continued leave pursuant to EPSLA and EFMLA, employees are entitled to a renewed two-week bank of EPSLA leave, and if an employee’s bank of FMLA has not otherwise renewed pursuant to the employer’s FMLA policy, the 12-week EFMLA leave bank would also be replenished.

Therefore, while the American Rescue Plan does not add any new obligations for employers, it does continue to provide incentives in the event that employers with fewer than 500 employees choose to provide COVID-related paid time off. As always, O’Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID and related issues.

---

## **EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION**

In this, the latest installment in our series discussing the Biden Administration’s workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President

Biden has lent his support to both these initiatives, as well as other proposals that would affect employment discrimination laws.

### **Equality Act**

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

### **Pregnant Workers Fairness Act**

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar disabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar disabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not

be forced to take paid or unpaid leave if another reasonable accommodation is available. The PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to overcome the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

### **Other Potential Changes**

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.

---

## **EMPLOYMENT LAWSCENE ALERT: THE BIDEN ADMINISTRATION TACKLES WAGE AND HOUR ISSUES**

In this installment of our series discussing the new workplace initiatives under the Biden Administration, we will discuss wage and hour issues that employers should prepare for, including an increased federal minimum wage, updated enforcement priorities, and the

proposed Paycheck Fairness Act.

## **Minimum Wage**

The federal minimum wage was last increased in 2009. Since then, multiple states and municipalities have increased their minimum wages. However, the federal minimum wage, as well as the minimum wage in Wisconsin, has remained at \$7.25. Organizers and activists have supported the “Fight for \$15,” particularly in industries like fast food, and the Democratic Party has included support for a \$15 minimum wage in its party platform since 2016. President Biden made his support of a \$15 minimum wage even more clear when he signed a January 22, 2021, Executive Order directing the Office of Personnel Management to develop recommendations to pay federal employees at least \$15 per hour and directing his administration to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a \$15 minimum wage.

The Raise the Wage Act proposes a gradual increase, such that the federal minimum wage would increase in increments on a yearly basis between now and 2025 until it reaches \$15 per hour. Thereafter, the minimum wage would index to median wages. The first increase, in 2021, would be to \$9.50 per hour. Additionally, the Raise the Wage Act would, by 2027, eliminate the “tipped wage,” the “youth wage,” and the 14(c) wage, which can be paid to disabled individuals in certain positions. These changes would affect approximately 27 million workers, and the Congressional Budget Office has projected that it would increase the federal deficit and cost 1.4 million jobs as a result of employers scaling back due to increased costs.

However, increasing the federal minimum wage is no simple task. President Biden included a \$15 minimum wage in his stimulus proposal, and the House of Representatives has included a \$15 minimum wage in its most recent version of the coronavirus-relief package. However, once the bill reaches the Senate, passing an increased minimum wage will become significantly more challenging. Typically, a bill needs the votes of 60 Senators to make it to the floor, and the increase of the federal minimum wage does not currently have that support.

The coronavirus-relief package, including the increased minimum wage, could, however, be passed through a process known as budget reconciliation, which requires only a simple majority of Senators, with ties broken by the Vice President. In order to be considered part of the budget reconciliation process, the Senate Parliamentarian would have to agree that raising the minimum wage has a direct impact on the federal budget. If she does not, Vice President Harris could overrule her. If it gets past these steps, at least 50 Senators would need to vote in favor of it. At this point, it’s not clear that 50 Senators would vote “yes” to increasing the federal minimum wage to \$15 per hour, even if gradually. Additionally, President Biden has admitted that passing an increased minimum wage as part of the coronavirus-relief package is unlikely at this point.

Acknowledging the challenge of getting a minimum wage hike included in the coronavirus-relief package, President Biden has said that he is prepared to engage in separate negotiations on the matter, and other politicians have discussed their potential support of a lower amount, such as \$12 per hour. So, while a \$15 minimum wage may not be right on employers' doorsteps, this is not an issue that is likely to go away. Employers should begin evaluating the effect that a minimum wage increase would have not only on the wages of their workers who fall between the current minimum wage and a potential new minimum wage, but also on their ability to retain workers who, while now comfortably over the minimum wage, may end up below, at, or only slightly above it if there is a mandated increase.

### **Wage and Hour Enforcement Priorities**

One of President Biden's campaign promises was to "ensure workers are paid fairly for the long hours they work and get the overtime they have earned." This will assuredly lead to an enforcement push at the Department of Labor ("DOL"). Moreover, the DOL is likely to strictly enforce penalties for non-payment of overtime wages. This new stance can already be seen by the fact that the Biden Administration eliminated the Payroll Audit Independent Determination ("PAID") program. The PAID program was a 2018 initiative that allowed employers to self-report FLSA wage and hour violations, including unpaid or miscalculated overtime. While the PAID program required employers to pay workers 100% of the wages owed, it did not assess the 100% liquidated damages penalty. However, on Friday, January 29, 2021, the DOL announced the immediate end of the PAID program, stating that the program "deprived workers of their rights and put employers that play by the rules at a disadvantage." The DOL added that it "will rigorously enforce the law, and . . . use all the enforcement tools we have available." Employers must make sure that their wage and hour policies and practices comply with the law and should consider performing audits to ensure there are no potential violations. Failure to take these proactive measures could land employers on the wrong side of a time-consuming and costly DOL investigation.

### **Paycheck Fairness Act**

Finally, President Biden supports the Paycheck Fairness Act, which was originally passed in the House of Representatives in 2019 and was recently reintroduced in February 2021. If passed, the Paycheck Fairness Act would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be based on "a bona fide factor other than sex, such as education, training, or experience." Currently, federal law requires that any pay disparity between employees of different sexes performing the same job be based on a "factor other than sex." The use of a **bona fide** factor would significantly narrow employers' flexibility in justifying any pay differences. The Paycheck Fairness Act also prohibits employers from restricting employees' discussions of wage information, requires additional employer reporting regarding compensation, and makes it easier for employees to

pursue individual and class and collective actions alleging wage discrimination.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding wage and hour concerns or new policies or legislation under the Biden Administration.

---

## EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA:** On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage and Hour:** This blog series will also cover potential wage and hour changes such as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."
- **Labor Law:** We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes, including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting

the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.

- **Discrimination:** Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype under Title VII.
- **DOL:** Finally, this blog series will wrap up with potential changes that could come through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil Cannon is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

---

## 21 FIRM ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. In November 2020, *Super Lawyers* published its lists for 2020, 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-one 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:

- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee

- Super Lawyer
- Douglas P. Dehler:
  - Super Lawyer
- James G. DeJong:
  - Super Lawyer
- Peter J. Faust:
  - Super Lawyer
- John G. Gehringer:
  - Super Lawyer
- Joseph E. Gumina:
  - Super Lawyer
- Gregory W. Lyons:
  - Super Lawyer
- Patrick G. McBride:
  - Super Lawyer
- Joseph D. Newbold:
  - Super Lawyer
- Chad J. Richter:
  - Super Lawyer
- John R. Schreiber:
  - Super Lawyer
- Jason R. Scoby:
  - Super Lawyer
- Steven J. Slawinski:
  - Super Lawyer
- JB Koenings:
  - Rising Stars
- Trevor C. Lippman:
  - Rising Stars
- Erica N. Reib:
  - 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 over 50% of its attorneys receive recognition by *Super Lawyers*.

---

## **EMPLOYMENT LAWSCENE ALERT: THE ELECTION IS ALMOST HERE—VOTING LEAVE IN WISCONSIN**

Tuesday, November 3, 2020 is Election Day. Although early voting is underway and many individuals have already returned their absentee ballots, many people will want to vote in-person on Election Day. All Wisconsin employers 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 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied 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 is permitted to utilize. 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 also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in 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 at least seven days’ notice of their need for this leave.

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 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.