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 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 inabilities 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 inabilities 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 over come 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: BREAKING NEWS: DOL SETS OVERTIME SALARY EXEMPTION THRESHOLD AT $35,568

On September 24, 2019, the U.S. Department of Labor announced a final rule to increase the salary threshold necessary to exempt executive, administrative and professional employees from the Fair Labor Standard Act's (FLSA) minimum wage and overtime pay requirements. The final rule raises the annual salary threshold from $23,660 (or $455 per week) to $35,568 (or $684 per week). The FLSA requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the regular rate of pay. Section 13(a)(1) of the FLSA, commonly referred to as the "white collar" or "EAP" exemption, exempts from these minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity." Now for an employee to qualify for one of the EAP exemptions, generally, that employee has to be paid on a salary basis and earn at least $35,568 per year or $684 per week. The final rule becomes effective January 1, 2020.

The final rule also allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to ten percent of the standard salary level as long as such payments are paid annually or on a more frequent basis. In addition, if an employee does not earn enough in nondiscretionary bonus or incentive payments in a given year (52-week period) to retain his or her exempt status, the employer may make a "catch-up" payment up to ten percent of the total salary level for the preceding 52-week period. This "catch-up" payment must be paid within one pay period following the end of the 52-week period. In plain terms, each pay period an employer must pay the EAP employee on a salary basis at least 90 percent of the standard salary level and, if at the end of the 52-week period the sum of the salary paid plus the nondiscretionary bonuses and incentive payments (including commissions) paid does not equal the standard salary level for the 52-week period, the employer has one pay period to make up for the shortfall (up to 10 percent of the required salary level). Any such catch-up payment will count only toward the previous 52-week period's salary amount and not toward the salary amount in the 52-week period in which it was paid.

Today's final rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that had established the salary threshold at $47,476 per year or $913 per week. The Obama administration's controversial final rule was struck down on November 22, 2016 by a federal district court in Texas because it "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an

employee's job duties." An appeal of that decision is still pending before the United States Court of Appeals for the Fifth Circuit. However, given the release of today's final rule, the DOL will rescind the Obama administration's 2016 final rule making the pending appeal moot.

The final rule also raises the total annual compensation requirement for "highly compensated employees" (HCE) from the currently enforced level of $100,000 per year to $107,432 per year. The HCE salary level of $107,432 is set at the 80th percentile of full-time salaried workers nationally using updated 2018/2019 salary data. However, Wisconsin employers should note that Wisconsin law does not recognize the HCE exemption, and, as a result, Wisconsin employers should not rely or utilize this exemption when classifying employees for wage and hour purposes.

Finally, the DOL's proposed rule published on March 7, 2019 rejected the Obama administration's 2016 rule that provided for automatic adjusting every three years of the salary threshold for the EAP exemptions. Instead, the DOL's March, 2019 proposed rule rejected automatic adjusting and favored that the Secretary of Labor review the salary threshold every four years preceded by a period of public comment. The DOL's final rule, however, reaffirmed the DOL's intent to update the standard salary level and HCE total annual compensation threshold more regularly in the future using notice and comment rulemaking, but declined to make a commitment to do so every four years believing that prevailing economic conditions, rather than fixed timelines, should drive future updates.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS SHOULD CONFIRM THAT THEIR I-9S ARE IN ORDER

Recently, President Trump announced that a new round of workplace immigration raids would be postponed until after July 4. Regardless of when or if these raids happen, all employers should take this time to ensure that they are in compliance with federal law by having proper work authorizations for all of their employees. Workplace authorization is governed by the Immigration and Reform Control Act, which allows U.S. companies to hire and employ only U.S. citizens, non-citizen nationals, lawful permanent residents, and aliens authorized to work in the U.S. Employers must have a Form I-9 on file for every current employee hired on or after November 6, 1986. I-9 forms for former employees must be kept until the later of three years from the employee's hire date or one year after their final date of employment. Such forms can be retained on paper or electronically.

To determine compliance with federal immigration laws for lawful work authorization, employers should conduct an audit of their I-9s to confirm, among other things, that each individual who should have an I-9 on file in fact has one on file; that any and all employment authorization documents are current; that all sections of the I-9 form have been fully filled out; and that any changes, such as a name change, have been properly documented. Corrections to I-9 forms must be handled carefully and in compliance with federal law. We have attorneys experienced in assisting employers with I-9 audits. Failure to properly follow the law regarding the maintenance of I-9 forms, including making corrections, can subject an employer to civil and criminal penalties.

EMPLOYMENT LAWSCENE ALERT: CREATION OF NEW TASK FORCE SIGNALS INCREASED STATE SCRUTINY OF WISCONSIN WORKER CLASSIFICATION

April 15, 2019 marked not only the end of the 2018 personal income tax season, but also the beginning of a new era of enforcement of Wisconsin employment practices. On that date, Governor Tony Evers issued an Executive Order creating a Joint Task Force on Payroll Fraud and Worker Misclassification (the "Task Force"). This Task Force will focus on workers who should be classified as employees but are misclassified as independent contractors.

The Task Force will be chaired by the Secretary of the Department of Workforce Development ("DWD") and will be staffed by representatives from the DWD, including its Worker's Compensation and Unemployment Insurance divisions, the Department of Revenue, and the offices of the Attorney General and the Commissioner of Insurance.

Background
Similar task forces have been implemented in recent years in Connecticut and Massachusetts (2008), New York (2016), Colorado, New Jersey, Tennessee, and Virginia (2018), and Michigan (2019).

One of the catalysts for the Wisconsin Task Force creation was the finding, under DWD audits from January 2016 through April 2019, of 5,841 misclassified employees and the related under-reporting of nearly $70 million in gross wages and $1.8 million in unemployment insurance taxes. Misclassification of employees also results in the underpayment of Social Security and Medicare-related employment law taxes.

Another impetus for the new interagency coordination is the concern that employers who misclassify workers as independent contractors gain an unlawful competitive advantage that allows them to under-bid or out-compete law-abiding employers.

Prior reviews of employer practices reported by the National Employment Law Project posit that audits of Wisconsin employers have typically revealed worker misclassification in 44% of investigated cases.

Task Force Mandates

The new Task Force is required to report annually to the Governor by March to describe its accomplishments and recommendation for the prior year. Specifically, the Task Force report must include the amount of wages, premiums, taxes, and other payments or penalties collected as a result of coordinated agency activities, as well as the number of employers cited for misclassification and the approximate number of affected workers. The Task Force must also identify administrative or legal barriers impeding more effective agency coordination. After consultation with representatives of business, organized labor, members of the legislature, and other agencies, the Task Force will also propose changes to administrative practices, laws, or regulations appropriate to:

- reduce agency coordination barriers;
- prevent worker misclassification from occurring;
- investigate potential violations of laws governing worker classifications;
- improve enforcement where such violations are found to have occurred; and
- identify successful mechanisms for preventing worker misclassification.

Key Take-Away

The Wisconsin Task Force is being implemented at a time when recent federal decisions by the National Labor Relations Board and the United States Supreme Court appear to be permitting some gig economy companies to more easily classify workers as independent contractors, rather than as employees.

As a result of the creation of the Task Force, however, Wisconsin employers should expect increased scrutiny from the DWD and Department of Revenue regarding independent contractor relationships.

The Employment Law team of O'Neil, Cannon, Hollman, DeJong and Laing recently presented client seminars in Pewaukee and Green Bay on the many aspects of worker classification and are well-positioned to assist Wisconsin employers in reviewing current arrangements or discussing how the law applies under various circumstances.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST REVIEW THEIR BACKGROUND CHECK PROCESSES TO ENSURE COMPLIANCE WITH NEW RULES

The Fair Credit Reporting Act ("FCRA") requires that employers who request "consumer reports," which include background checks, criminal histories, driving records, and credit reports, from a third-party service about employees and applicants follow certain rules. These rules contain specific requirements for notice, disclosure, and consent both in conjunction with obtaining a report and taking adverse employment action because of information in the report.

One requirement is that an employer must make certain disclosures **before** the employer takes an adverse action based on information discovered in the consumer report. This includes providing the employee or applicant with a written summary of consumer rights under the FCRA. Recently, the Bureau of Consumer Financial Protection updated its model disclosure to reflect recent legislative changes to the FCRA, such as the consumer's right to place a security freeze or fraud alert on their credit report. The new model form can be found here.

Employers must ensure that their authorizations and disclosures meet all FCRA requirements and that they are providing the correct notifications, including the updated summary of rights.

#METOO: SEXUAL HARASSMENT CLAIMS AND MISCONDUCT

Wisconsin attorneys Sara Geenen and Erica Reib discuss the duties and risks for both employers and employees seeking to protect themselves.

EMPLOYMENT LAWSCENE ALERT: NLRB'S GENERAL COUNSEL ISSUES GUIDANCE ON HANDBOOK RULES POST-BOEING

On June 6, 2018, the NLRB's General Counsel issued a memorandum (GC 18-04) to all NLRB Regional Directors providing regional offices general guidance on the new standard regarding the lawfulness of handbook rules under Section 7 as established by the NLRB in *The Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the NLRB overturned the onerous "reasonably construe" standard that was previously established by the NLRB in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Lutheran Heritage*, the NLRB held that employers can't maintain workplace policies that workers could "reasonably construe" as barring them from exercising their Section 7 rights. Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities…"

The *Lutheran Heritage* standard was criticized as rendering unlawful every policy, rule and handbook provision—such as rules governing workplace civility, open door policies, fraternization, use of recording devices, use of cameras, confidentiality, use of social media, interactions with media, and use of logos and trademarks—that an employee might "reasonably construe" to prohibit any type of Section 7 activity. Simply, the *Lutheran Heritage* standard was unworkable for employers in drafting legitimate and effective workplace policies.

Under the new *Boeing* standard, however, the NLRB will apply a balancing test (balancing employees' Section 7 rights with employer's legitimate business interests) in evaluating whether an employer's facially neutral policy interferes with employees' Section 7 rights by considering two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In applying this new balancing test, the NLRB will delineate three categories of facially neutral employment policies, rules and handbook provisions:

- Category 1 includes rules that the NLRB will designate as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
- Category 2 includes rules that warrant individualized scrutiny in each case as to

whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- Category 3 includes rules that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

The above three categories will represent a classification of results from application of the new *Boeing* balancing test. The categories are not part of the test itself.

The NLRB's June 6th memorandum will assist NLRB regional offices in assessing on how to handle or process unfair labor charges alleging that a particular employer's policy or handbook rule violates employees' Section 7 rights. In addition, the NLRB's General Counsel's memorandum will guide regional offices regarding the placement of various types of rules into the three categories set out in *Boeing* providing the regional offices a balanced common sense approach in evaluating and processing such unfair labor practice charges against the new standard set forth in *Boeing*.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES CLASS-ACTION WAIVERS ARE ENFORCEABLE FOR EMPLOYEES

For the last several years, employers have been operating under a cloud of confusion regarding whether provisions in employment agreements that require employees to engage in individual arbitration proceedings, as opposed to class proceedings, are enforceable. Finally, the Supreme Court, in a 5-4 decision, has given us an answer, and the answer is yes, such provisions are enforceable!

In 2012, the National Labor Relations Board (NLRB) took the stance that class waivers violated workers' rights to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA). Although the Fifth Circuit rejected that stance in *D.R. Horton and Murphy Oil* and held that such provisions were valid and enforceable, the NLRB continued to litigate the issue, claiming that such provisions were not legal. In the intervening years, the Second and Eighth Circuits have agreed with the Fifth Circuit, while the Sixth, Seventh, and Ninth Circuits have agreed with the NLRB.

On Monday, in *Epic Systems Corp. v. Lewis*, the Supreme Court finally settled the dispute. In examining the issue, the Court considered two issues: (1) whether the "savings clause" of the Federal Arbitration Act (FAA) required enforcement of the arbitration agreements as written if

the agreement violated another federal law, and (2) whether the arbitration agreements that waived collective rights violated the NLRA.

In looking at the first issue, the majority found that the FAA required courts to enforce arbitration agreements and, therefore, favored arbitration agreements. Although it acknowledged the general FAA "savings clause," such clause only applies when certain *contract* defenses apply. In examining the case at hand, the majority found that no such contract defenses were applicable and that it could not override the established policy of enforcing arbitration agreements.

The Court also considered whether the NLRA's protection of employees' collective rights displaced the FAA's favored enforcement of arbitration agreement. The majority held that, although the NLRA guarantees employees the right to *bargain* collectively, it neither guarantees the right to *collective action* nor manifests intent to displace the FAA. Because the NLRA was enacted after the FAA, if Congress had intended the NLRA to override the FAA's protections for arbitration agreements, such intent would have needed to be clear. Because it was not clear, the Court found that there was no such intent and that the NLRA's protection of collective rights could not override the FAA's policy of enforcing arbitration agreements as written.

Based on the Supreme Court's ruling in *Epic*, employers are now free to include arbitration agreements that include a waiver of class and collective actions in their employment contracts. Although Congress could amend the law to clearly state that the NLRA, or some other federal law, does not allow for waiver of class or collective actions by employees, such legislative action is unlikely at this point in time. Employers may find arbitration agreements useful as arbitration may be less expensive, faster, and more flexible than traditional litigation.

EMPLOYMENT LAWSCENE ALERT: COURT INVALIDATES EXPANDED OVERTIME RULE

On Thursday, a federal court in Texas issued summary judgment invalidating the Obama administration's updated overtime regulations, which raised the minimum salary level for exempt employees from $455 to $913 per week. The Court determined that the "significant increase" was outside of the scope of Department of Labor's (DOL) authority, as was the provision that the minimum salary threshold would automatically update every three years.

The Court looked to Congress's intent under the Fair Labor Standards Act and found that the

determining factor for whether an employee should be considered exempt is the duties the employee performs and whether those duties are executive, administrative, or professional in nature. By more than doubling the minimum salary level and excluding an estimated 4.2 million employees who were previously classified as exempt from exempt status, the Court found that the DOL had gone too far and essentially rendered the duties test meaningless. Because the emphasis should be on duties, not salary, the Court invalidated the updated overtime rules.

However, the Court did not go as far as to rule that the DOL has no authority to establish a minimum salary level. The Court found that the current minimum salary level is a permissible "floor" to screen out "obviously nonexempt" employees. Although the Fifth Circuit Court of Appeals is currently considering an appeal of the preliminary injunction the Texas federal court issued last November, the DOL under the Trump administration only continued the appeal for the purpose of establishing that it had the authority to establish a minimum salary level, which has now been done by the Texas court. The DOL is currently seeking public feedback on revisions to the overtime rule and may issue its own revised rule in the future. We will keep you updated on any further changes.