EMPLOYMENT LAWSCENE ALERT: FIFTH CIRCUIT ISSUES STRONG REBUKE OF OSHA'S AUTHORITY TO MANDATE VACCINATIONS IN THE WORKPLACE–OSHA SUSPENDS EFFORTS

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. In a strong rebuke of the Biden's Administration's desire to vaccinate as many Americans as possible through use of OSHA's emergency temporary standard provision (29 U.S.C. § 655(c)) found in the Occupational Safety and Health Act, the Fifth Circuit found that OSHA exceeded its statutory and constitutional authorities when it issued its emergency temporary standard by finding that "[t]here is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one…[n]or can the Article II executive breathe new power into OSHA's authority–no matter how thin patience wears." The Fifth Circuit further found that continuing the stay was in the public interest because it "is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions–even, or perhaps *particularly*, when those decisions frustrate government officials." (Emphasis original).

The Fifth Circuit concluded that the Constitution vests Congress with limited legislative powers; and these powers cannot be usurped by federal regulatory action. The Fifth Circuit stated:

> *The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases–a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory–this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. Cf. Ala. Ass'n of Realtors, 141 S. Ct. 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.*

The Fifth Circuit ordered that OSHA take no steps to implement or enforce its emergency temporary standard mandating COVID-19 vaccinations in the workplace until further order of the court. In response, OSHA issued the following statement on its website:

> *On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*

Despite the Fifth Circuit's decision, the issue is far from being resolved as challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace is now pending in multiple federal circuits. On Tuesday, November 16, 2021, pursuant to the federal rules for multi-circuit litigation, a lottery will be held by the Judicial Panel on Multidistrict Litigation randomly selecting the federal circuit that will host and decide the ultimate fate of OSHA's emergency temporary standard–albeit the U.S. Supreme Court will most likely have the final word in this important debate on the reach of federal regulatory authority. As always, we will keep you updated on this important issue as matters develop.

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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
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- 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: BIDEN ADMINISTRATION'S DEPARTMENT OF LABOR WILL UPEND MANY EMPLOYER-FRIENDLY REGULATIONS

In this, the final installment in our series discussing the Biden Administration's workplace initiatives, we will now discuss some of the potential changes forthcoming from the U.S. Department of Labor that employers should note, including changes to the independent contractor test under the Fair Labor Standards Act, a narrowing of the "joint employer" test under the National Labor Relations Act, an expansion of the Family and Medical Leave Act to provide paid leave through passage of the Family and Medical Insurance Leave Act, and a determined Congressional effort to raise the federal minimum wage to $15 per hour.

Independent Contractor Test Under FLSA

Back in September 2020, the Trump Administration proposed a new rule broadening the independent contractor test to make it easier for companies to classify workers as independent contractors, rather than employees, under the Fair Labor Standards Act (FLSA). Under the FLSA, only employees are entitled to minimum wage and overtime compensation. The new rule proposed by the Trump Administration was set to take effect on March 8, 2021. Now, however, the U.S. Department of Labor has delayed the effective date to May 7, 2021.

The Trump Administration's proposed rule was intended to provide more clarity to the multifactor economic reality test that is presently used in determining independent contractor status under the FLSA. The Trump Administration believed that the economic reality test would benefit from additional clarity because of the way courts have evolved from the text and Supreme Court precedent. The existing economic realities test assesses workers' economic dependence on a potential employer, and many supporters of the proposed independent contractor test argued that the new test was necessary to address concerns that: (1) the core concept of economic dependence remains vague and under-developed; (2) the test lacks guidance about how to balance the multiple factors; and (3) the lines between many of the factors are blurred. The shortcomings of the economic realities test have become more apparent in the new modern and gig economy.

On March 5, 2021, however, the Biden Administration's Department of Labor sent to the White House of Office Information and Regulatory Affairs a new proposal entitled "Independent Contractor Status Under the Fair Labor Standards Act". It is expected that the Biden Administration will adopt new regulations upending the Trump Administration's employer-friendly independent contractor test and will provide a more employee-friendly interpretation relative to whether an individual is an employee or an independent contractor under the FLSA. The U.S. Department of Labor is nearing completion of a regulatory update to the Trump Administration's proposed independent contractor rules and is simply waiting for White House of Information and Regulatory Affairs' pending regulatory review before releasing the new proposal. Stay tuned for updates as they develop.

Joint Employer Test Under NLRA

In March 2020, the Trump Administration's Department of Labor adopted a final rule narrowing the definition of "joint employer" under the National Labor Relations Act (NLRA) limiting the circumstances under which multiple entities could be deemed the employer of a single worker. The Trump-Era regulation provided that an entity may be considered a joint employer of a separate employer's employees when it has direct control over the employees' essential terms and conditions of employment.

The rule primarily impacts businesses that rely on franchisees or leased workers. The Trump Administration's rule essentially reversed the Obama-Era standard set forth in the National Labor Relations Board's (NLRB) 2015 decision in *Browning-Ferris*. The NLRB's 2015 decision in *Browning-Ferris* lowered the bar for proving an entity was a joint employer by holding that it was no longer necessary that an entity actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately for a entity to be a joint employer. Fortunately, the NLRB had an opportunity to revisit its *Browning-Ferris* decision in 2020 on remand from the U.S. Court of Appeals for the District of Columbia Circuit. In its 2020 decision, the NLRB reversed course from its 2015 decision, holding that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees in order to be held a joint employer under the NLRA.

Employers should expect the Biden Administration to attempt to override the new Trump-Era "joint employer" regulation and the NLRB's 2020 decision in *Browning-Ferris* through passage of the controversial Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), which codifies an expansive "joint employer" standard, which would result in businesses having liability for workplaces that they don't control and workers they don't employ. On March 9, 2021, the U.S. House of Representatives passed 225-206 the PRO Act, again, along party lines. The 2021 version of the PRO Act, among other things, revises the definition of "joint employer" under the NLRA by requiring the NLRB and courts to consider not only an entity's direct control, but to also consider an entity's indirect control, over an individual's terms and

conditions of employment including any reserved authority to control such terms and conditions, which standing alone, can be sufficient to make a finding of a "joint employer" relationship.

The U.S House of Representatives previously passed the PRO Act in 2020, but it stalled out in the U.S. Senate. The recently passed Pro Act will continue to have a challenging time in the U.S. Senate unless the Democrats can get around the filibuster rules which will most likely again stall the bill in the U.S. Senate. Nonetheless, employers should pay close attention to the PRO Act and the Biden Administration's attempt to return to the Obama-Era "joint employer" test where an entity's indirect or unexercised contractually reserved right to control could, alone, warrant finding of a joint-employer relationship.

Family and Medical Insurance Leave Act

The Biden Administration will attempt to expand the Family and Medical Leave Act (FMLA) by supporting job-protected paid leave benefits. Currently, FMLA leave is unpaid unless the employee chooses, or the employer requires, substitution of paid leave (e.g., vacation or PTO).

The Biden Administration will attempt to obtain paid FMLA leave for employees working for private employers through the Family and Medical Insurance Leave (FAMILY) Act (S. 248) which has been recently introduced in the U.S. Senate by Sen. Kristen Gillibrand (D-NY). The FAMILY Act would allow employees to receive up to 12 weeks (60 days) of paid leave in a year for caring for a newborn or newly adopted fostered child, for employee's or employee's family member's serious health condition, or dealing with qualifying exigencies arising from the deployment of a family member in the Armed Services.

However, unlike the FMLA, the FAMILY Act would apply to all employers across the country regardless of their size. That is, eligibility for FAMILY Act benefits would not be tied to FMLA employer coverage and would be available to every individual who has the earnings and work history necessary to qualify for Social Security Disability Insurance. The benefits under the FAMILY Act would be paid through a national family and medical leave insurance fund which would be funded through a payroll tax contribution of 0.20%.

Increase in Federal Minimum Wage to $15

In this series, we previously addressed the Democrats' efforts to increase the federal minimum wage to $15 per hour through a provision in the American Rescue Plan Act of 2021 (i.e., the $1.9 Trillion coronavirus-relief package). Since the posting of our article, the U.S. Senate parliamentarian dealt a deadly blow to the Democrats' efforts to increase the federal minimum wage when she ruled that the bill's proposal did not meet the U.S. Senate's guidelines for reconciliation, and, therefore, the proposal could not be included in the

coronavirus-relief package which was passed by both chambers of Congress this week and signed into law by President Biden on March 11, 2021.

Congressional Democrats, however, did not give up without a fight when they attempted to circumvent the U.S. Senate's reconciliation guidelines and the U.S. Senate's parliamentarian ruling by proposing tax penalties for employers with $2.5 billion or more in gross revenue who do not pay their employees at least $15 an hour instead of having a provision in the bill that directly raised the federal minimum wage. Supporters of addressing a federal minimum wage increase through amendment of the tax code finally relented when the complexity of such a maneuver would delay quick passage of the relief bill which the Democrats wanted completed by March 14, 2021.

The Democrats big push to include a federal minimum wage increase in the corona-virus relief package was an attempt to avoid the U.S. Senate's filibuster rules that a non-budgetary piece of legislation would be subject to under U.S. Senate rules. The Biden Administration, however, will now have to seek an increase in the federal minimum wage through a legislative bill and may have a difficult time getting the bill through the U.S. Senate given the U.S. Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. We will keep you posted on the Biden Administration's efforts to raise the federal minimum wage.

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 you may have regarding any of the new workplace policies or proposed legislation that will be ushered in during the Biden Administration.

ATTORNEY GUMINA'S ARTICLE ON EMPLOYER COVID-19 VACCINATION POLICIES WAS FEATURED BY ABC OF WISCONSIN

Recently, Associated Builders and Contractors of Wisconsin (ABC of Wisconsin) featured Attorney Joseph Gumina's article entitled "Encouraging Rather Than Mandating COVID-19 Vaccinations May Be An Employer's Best Option". In this article, Attorney Gumina discusses some of the challenges employers may face with a mandatory COVID-19 vaccination policy and suggests alternative options for employers to consider. Attorney Gumina plans to provide updates to this ongoing issue in the upcoming workforce focused magazine—*Wisconsin Merit Shop Contractor*.

Attorney Gumina's article is a must read for any employer contemplating whether to require its employees to become vaccinated. Read the full article here.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION WILL PROMOTE A SIGNIFICANT SHIFT IN RECENT FEDERAL LABOR LAW

In our series discussing the new workplace initiatives under the Biden Administration, we will next address the Biden Administration's desire to make significant changes in National Labor Relation Board ("NLRB"' or "Board") policy and to roll back the labor law precedent of the Trump Administration's NLRB. The Biden Administration's labor policy through the NLRB will focus on two primary goals: (1) the promotion of collective bargaining and (2) the protection of employees' rights to join and form unions. In pursuing this focused labor policy, the Biden Administration is keeping the promise it made during the Presidential campaign that it will pursue policies and the development of labor law that serves the interests of unions. All employers will need to pay attention for the next four years to the NLRB's development and application of the Biden Administration's labor policies.

Through the former NLRB's General Counsel, Peter Robb, the Trump Administration made significant pro-management policy changes and shepherded pro-management developments in labor law under the National Labor Relations Act (the "NLRA" or the "Act"). Under the Obama Administration, the Democratically–led Board took an expansive view on how the Act should be interpreted and enforced, including a very broad reading of Section 7 of the Act, which provides that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Trump-era Board then narrowed this expanded reach of Section 7.

During the Trump Administration, many of the Obama-era Board policies and decisions were overturned by the Board or by the federal courts, including: (i) overturning of the Board's *Specialty Healthcare* decision that allowed unions to define their own bargaining units, including the recognition of micro-units; (ii) allowing employers, in the Board's decision of *Johnson Controls*, to withdraw union recognition at the expiration of a collective bargaining agreement if the employer can prove that the union does not continue to have majority support amongst bargaining unit employees; (iii) the U.S. Supreme Court's decision in *Epic Systems* overturning the Board's *Murphy Oil* decision where the Supreme Court held that an employer's requirement that employees agree to class- and collective-action waivers in

mandatory arbitration agreements does not violate the NLRA; (iv) the Board's *MV Transportation* decision that applied a "contract coverage" analysis instead of a "clear and unmistakable waiver" standard in determining whether an employer with a collective bargaining agreement has the duty to bargain over, or has the right to implement, work or safety rules without bargaining that are within the scope and compass of the parties' existing collective bargaining agreement; (v) overturning, in *Caesars Entertainment*, the Board's 2014 controversial *Purple Communications* decision, which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing; and (vi) overturning, in *Apogee Retail*, the Board's decision in *Banner Estrella Medical Center* where the Board ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers despite an employer's confidentiality policy that prohibits such communications during a workplace investigation.

To follow through on his pledge made during his campaign to be "the most pro-union president," President Biden, as part of his first executive actions, took the unprecedented step to fire Mr. Robb as the NLRB's General Counsel. President Biden broke 85 years of tradition by being the first U.S. President to remove an incumbent NLRB general counsel before the end of his term. Mr. Robb's term was set to end in mid-November. President Biden's termination of Mr. Robb signals a shift in NLRB policy objectives under the Biden Administration and sets the stage for a roll back of the Trump-era NLRB policies and precedent.

President Biden quickly replaced Mr. Robb with Peter Ohr as NLRB's acting General Counsel. Mr. Ohr comes from the NLRB's Chicago Regional Office where he was its Regional Director. Mr. Ohr did not waste any time as the NLRB's acting General Counsel when, in a two-day span, he rescinded 10 Trump-era NLRB General Counsel Memoranda and two NLRB Operations-Management Memoranda issued by his predecessor. Mr. Ohr cited that the rescinded memoranda guidances were either not necessary or in conflict with the NLRB's policy objective of encouraging collective bargaining. Those guidances rescinded by Mr. Ohr, among others, included: (i) holding that employers may violate the Act when they enter "neutrality agreements" with unions to assist unions in their organizing efforts; (ii) on handbook rules developed following the Board's decision in *Boeing*; (iii) on a union's duty to properly notify employees subject to a union security clause of their *Beck* rights not to pay dues unrelated to collective bargaining and to provide further notice of the reduced amount of dues and fees for dues objectors in the initial *Beck* notice; (iv) on deferral of NLRB Charges under *Dubo Manufacturing Company* that instructed NLRB Regions to defer under *Dubo* or consider deferral of all Section 8(a)(1), (3), (5) and 8(b)(1)(A), and (3) cases in which a grievance was filed; and (v) on instructing NLRB Regions and Board agents on how to proceed during investigations in connections with securing the testimony of former supervisors and former agents and how audio recordings should be dealt with during investigations.

In the meantime, President Biden has nominated Jennifer Abruzzo to become the next NLRB General Counsel. Ms. Abruzzo was the second-ranking NLRB official under the Obama Administration as the agency's Deputy General Counsel. Most recently, Ms. Abruzzo was special counsel for the Communications Workers of America. The White House referred to Ms. Abruzzo as "[a] tested and experienced leader, [who] will work to enforce U.S. labor laws that safeguard the rights of workers to join together to improve their wages and working conditions and protect against unfair labor practices." Richard Trumpka, president of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported Ms. Abruzzo's nomination by stating that "the days of the NLRB actively blocking workers from organizing a union are over." Ms. Abruzzo's nomination will have to be confirmed by consent of the Senate, which is currently evenly divided between Democrats and Republicans. Ms. Abruzzo's road to confirmation could be bumpy given the strong criticism by some Republican Senators of President Biden's unprecedented decision to fire Ms. Abruzzo's predecessor, Mr. Robb, before the end of his term.

Biden Administration Will Push Pro-Union Legislation, Including the PRO Act

Besides the change in the NLRB's General Counsel and the effects that change will have on the development of federal labor policy, the Biden Administration, together with the Democratically controlled Congress, is also planning sweeping legislative changes to the Act with the objective to make union organizing easier for employees. The proposed legislation that employers should pay most attention to is the Protecting the Right to Organize (PRO) Act (H.R.2474 and S.1306).

Specifically, pro-union allies of the Biden Administration are pushing the administration to pass the PRO Act, which would be an overhaul of federal labor law under the NLRA. The PRO Act, which the U.S. House of Representatives passed in February 2020, includes in its current form several controversial and seismic shifts in established federal labor law, including:

- Permitting the NLRB to assess civil penalties against employers, ranging from $50,000 to $100,000, for each unfair labor practice violation, which also includes personal liability for managers of alleged violations;
- Providing employees with a private cause of action against an employer for unfair labor practice violations;
- Permitting secondary strikes by a labor organization to encourage participation of union members in strikes initiated by employees represented by a different labor organization;
- Terminating the right of employers to bring claims against unions that conduct such secondary strikes;
- Superseding state's right-to-work laws, by requiring employees represented by a union to contribute fees to the labor organization for the cost of such representation;
- Expanding unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes;
- Making it an unfair labor practice to require or coerce employees to attend employer

meetings designed to discourage union membership;
- Prohibiting employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation;
- Requiring the NLRB to promulgate rules requiring employers to post notices of employees' labor rights and protections and establishing penalties for failing to comply with such requirement;
- Prohibiting employers from participating in any NLRB representation proceedings;
- Requiring employers to provide a list of voters to the labor organization seeking to represent the bargaining unit in an NLRB-directed election;
- In initial contract negotiations for a first contract, compelling employers and unions to mediation with the Federal Mediation and Conciliation Service in the event the parties do not reach an agreement within 90 days after commencing negotiations;
- Compelling employers to bargain with a labor organization that has received a majority of valid votes for representation in an NLRB-directed election; and
- Providing statutory authority for the requirement that the NLRB must set preelection hearings to begin not later than 8 days after notifying the labor organization of such a petition and set postelection hearings to begin not later than 14 days after an objection to a decision has been filed.

President Biden promised during his campaign to sign the PRO Act. This legislation, however, is currently stalled in the U.S. Senate and may face an uphill battle given the Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. Consequently, to the extent that the PRO Act is subject to a filibuster in the Senate, it is unlikely that the PRO Act will become law in its current form. Nonetheless, all employers should pay careful attention to the PRO Act and its movement through the U.S. Congress.

What Employers Should and Can Do

Given the Biden Administration's priority of encouraging employees to unionize, and with the pro-labor individuals that President Biden has placed in top leadership positions in the U.S. Department of Labor, including the nomination of Marty Walsh, the former two-term mayor of Boston and former union leader, to become the next Secretary of Labor, union organizing activity is likely to increase. To lawfully counter those activities, employers can help ensure that employees are accurately informed about 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 about unionization.

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

EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration's efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration's concerted focus on workplace safety, it behooves all employers to take notice of OSHA's new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration's charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston's Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19, and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing

COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on mitigating and eliminating COVID-19 in the workplace — a directive that President Biden's Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and

target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention ("CDC") data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program's criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity based on having received the vaccination. As a result, assuming that an emergency temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

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 OSHA's new policies and directives under the Biden Administration.

ATTORNEY JOSEPH GUMINA FEATURED IN MERIT SHOP CONTRACTOR

Recently, the *Merit Shop Contractor* magazine featured Attorney Joseph Gumina's article entitled "COVID-19 and Liability." In the article, Attorney Gumina emphasizes methods for construction employers to prevent and control worksite hazards relating to COVID-19. The article also discusses general safety and health mandates a construction employer should follow in order to help protect themselves from possible COVID-19 litigation. This article is a must read for all construction employers.

Read the full article here.

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- 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
- Thomas A. Merkle – Family Law
- 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

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

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current practice and in good standing.

ATTORNEY JOSEPH GUMINA RECENTLY FEATURED IN SUPER LAWYERS

Attorney Joseph Gumina, chair of O'Neil Cannon's labor and employment law group, was recently featured in the *Super Lawyers* article "Can I Lay Off My Furloughed Employees?". In the article, Gumina shares advice regarding legal considerations employers need to be aware of when considering laying off furloughed employees during these unprecedented times. Read full article here.

O'Neil Cannon remains open for its clients and we are here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

EMPLOYMENT LAWSCENE ALERT: DOL UPDATES GUIDANCE ON FFCRA COMPLIANCE

On Monday, March 30, 2020, the U.S. Department of Labor (DOL) issued further guidance for employers on the Families First Coronavirus Recovery Act (FFCRA). You can find the updated DOL guidance here.

For private sector employers, the updated DOL guidance does the following:

1. Updates Q #8 clarifying the regular rate calculation when it includes commissions, tips, or piece rates;
2. Updates Q #15 regarding what records employers need to keep when an employee takes paid leave;
3. Updates Q #16 regarding what information an employee must provide his or her employer when taking paid leave;
4. Adds Q #38 describing which employees are eligible for paid sick leave and expanded family and medical leave;
5. Adds Q #39 clarifying who is a "covered employer" that must provide paid leave;
6. Adds Q #40 clarifying who is a son or daughter;
7. Adds Q #41 and #42 explaining what employees should do if their employer denies them paid leave;

8. Adds Q #43 describing an employee's right to restoration to their job position after taking paid leave;
9. Adds Q #44 describing the amount of leave an eligible employee is entitled to within a 12-month period under the Family and Medical Leave Expansion Act (FMLEA);
10. Adds Q #45 explaining how much leave an employee can take under the FMLA over the next 12 months after taking leave under the FMLEA;
11. Adds Q #46 answering whether paid sick leave counts against other types of paid sick leave;
12. Adds Q #47 answering whether an employee can use paid sick leave and expanded family and medical leave together for any COVID-19 related reasons;
13. Adds Q#48 defining who is a full-time employee under the Emergency Paid Sick Leave Act;
14. Adds Q#49 defining who is a part-time employee under the Emergency Paid Sick Leave Act;
15. Adds Q #50 answering whether the definition of a covered employed under the FMLA applies to defining a covered employer under the FMLEA;
16. Adds Q #51 answering whether employees in a waiting period for health insurance coverage will have effective coverage if the waiting period expires while the employee is on paid leave;
17. Adds Q #52-54 providing additional guidance to public sector employers;
18. Adds Q #55 defining who is a "health care provider" for purposes of providing advice for an individual to self-quarantine;
19. Adds Q #56 defining who is a "health care provider" as to who may be excluded by their employer from paid sick leave or expanded family and medical leave;
20. Adds Q #57 defining who is an emergency responder;
21. Adds Q #58 answering when the small business exemption applies to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and FMLEA; and
22. Adds Q #59 answering when a small employer is exempt from the requirements to provide paid sick leave or expanded family and medical leave.

We will continue to provide you with updates from the U.S. Department of Labor regarding FFCRA compliance as they are released.