

The Florida Public Human Resources Association Annual Conference

Recent Developments in Labor & Employment Law



Presented by:

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WARNING

- The Content of the following presentation could cause mood swings, depression, and/or loss of temper.
- When necessary, TAKE A DEEP BREATH!!



Executive Branch Actions



Trump's Executive Orders Affecting the Workplace Are or Will be Gone!!!

- In 2020 President Trump did issue several EOs, but they have or will all be overturned by Biden EOs, so I am going to skip discussing those



Biden's Campaign Promises and Commitments

- Pledged to pass legislation to strengthen worker organizing: “We’re going to shift the balance of power back to workers in this country”
- He supported and still supports the PRO Act—discussed later



More Biden promises and expected reforms in labor and employment law

- Workplace Safety
- Wage and Hour Law
- Future of Work
- Pay Equity
- Labor Relations (Unions)
- Employee Benefits
- Employee Leave
- Employee Privacy and Data Security
- Outlaw Restrictive Covenants (noncompetes)
- Global Immigration
- Affirmative Action
- Racial Equality



President Biden's Executive Orders Impacting the Workplace

- He has signed over 50 executive orders or executive memos proclamations, continuing the aggressive activity on the day of his inauguration, on which he signed **17 EOs**, with several impacting employers, including the following:
 - EO on Organizing and Mobilizing the US Government to Provide a Unified and Effective Response to Combat COVID-19: includes employers and employees
 - EO on Preventing and Combating Discrimination on the basis of Gender Identity or Sexual Orientation: includes a revocation of Executive Order 13950, relating to diversity and inclusion training programs offered by federal contractors
 - EOs terminating Emergency with respect to the Southern Border of the U.S., and reversing several Trump EOs on immigration
 - EO shutting down Keystone Pipeline, impacting 11,000 employees



Biden Appointments to White House That Will Impact Labor and Employment Issues

- Sharon Block, former Obama labor official appointed as interim political leader of the White House regulatory review office (OIRA)
- According to Block, that agency needs a *worker-oriented overhaul*



Appointments to White House Labor Team

- Pronita Gupta, former Obama-era official at the US Department of Labor
- Senior White House Adviser on Labor Policy



Biden Appointments to White House Labor Team

- Seth Harris, former Obama Labor Department acting and deputy secretary of labor, will be Deputy Assistant to the President for labor and the economy
- His work will touch on worker organizing, collective bargaining and labor standards enforcement
- Praised by Richard Trumka, AFL-CIO President



Trump's Appointment of Federal Judges

- During his 4 years in office, Trump appointed 226 judges to the federal bench
- 3 Supreme Court justices, 54 Circuit Court judges, and 169 District Court Judges
- 1 out of every 4 active judges on U.S. Court of Appeals has been appointed by Trump
- Impact: This will ultimately benefit employers from a labor and employment law standpoint



Federal Congressional and Legislative Action

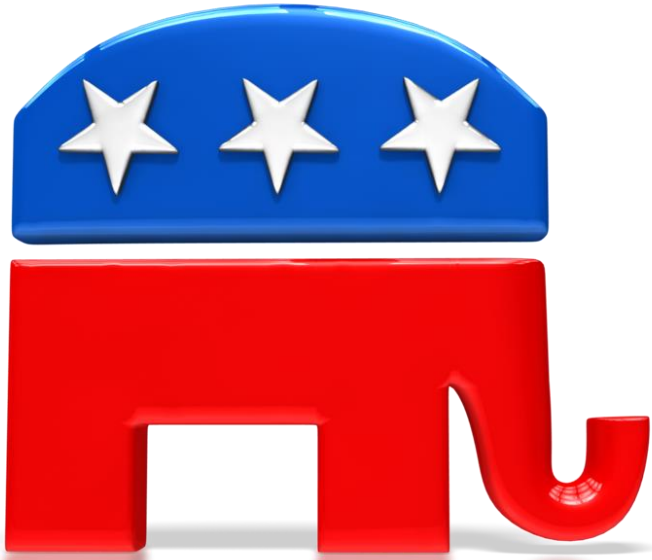


House Composition, 2021

211



221

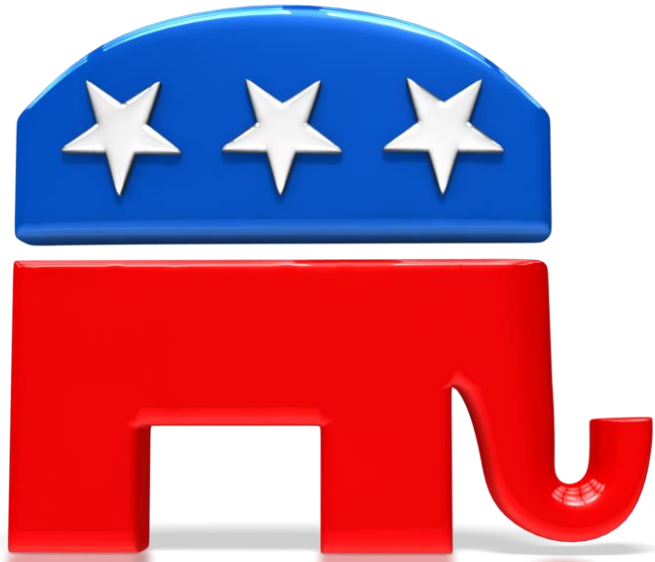


Senate Composition, 2021

50



50



Dems Introduce Raise the Wage Act (1/26/21)

- Would move the minimum wage from its current \$7.25 per hour to \$15 per hour by 2025
- Will it pass?
- Non-Partisan Congressional Budget Office on February 8, 2021, reported that increasing the minimum wage would boost jobless rolls by 1.4 million workers by 2025, while 900,000 workers would get lifted out of poverty. It would also increase budget deficits by \$54 Billion over 10 years



Dems Reintroduce Paycheck Fairness Act (1/28/21); House Labor Committee Advances it on 3/24/21

- The bill would beef up the Equal Pay Act, and increase burden on employers to justify pay gaps between men and women employees
- Would narrow the defense of “any other factor other than sex” and it would apply only if the employer can show that the disparity isn’t “based on or derived from” existing gender-based pay gaps, is related to the job in question and necessary for the business, and if employers can fully account for any difference in pay between workers of different genders.



Dems Introduce National Paid Leave Bill (2/5/21)

- Family and Medical Insurance Leave Act (Family Act)
- Employees could receive up to 66% of their monthly wages while taking time off for health conditions, pregnancies, childbirth, the care of a family member and other reasons.



Supreme Court Developments



Supreme Court Holds that Title VII Protects Workers from Discrimination Based on Sexual Orientation and Gender Identity (6/15/20)

- *Bostock v Clayton County, Georgia*
- 6-3 decision, with Justice Neil Gorsuch joining the court's liberal members and penning the Court's decision
- Decision closes a deep divide among the circuit courts, even though the EEOC long took this position
- To do: add "sexual orientation" and "gender identity" to your EEO policy



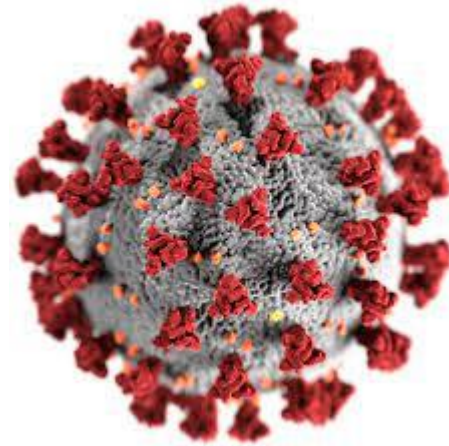
State Actions Regarding Labor & Employment Law



Laws That We Should Look Out For In Florida

- Ban the Box Laws—no questions re criminal record on applications
- Bans on asking about salary history for applicants for employment
- Paid Sick Leave—including for COVID-19 and/or for vaccination related time
- Laws Prohibiting Mandatory Vaccination for COVID-19
- Liability Immunity Laws for protection against COVID-19 lawsuits
- Marijuana legalization
- Mandatory Sexual Harassment Training
- Wage and Hour Laws more stringent than Fair Labor Standards Act
- Drug Testing Laws
- Guns in the Trunk Laws
- Hairstyle Discrimination Laws
- Background Check Requirements that exceed federal FCRA requirements
- Independent Contractor laws
- Noncompetition agreement laws
- Voting Leave Laws

Covid 19 – An Ever-Changing Paradigm



CDC Public Health Recommendations for Fully Vaccinated People

- Fully vaccinated people can:
 - Resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance
 - Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel
 - Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States
 - Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings
 - Refrain from quarantine following a known exposure if asymptomatic
 - Refrain from routine screening testing if feasible

EEOC Updates COVID-19 Guidance

- **Mandatory COVID-19 Vaccine Policies**
 - Section K.1 - Employers may mandate that employees be vaccinated for COVID-19, subject to:
 - Reasonable accommodations for employees with disabilities; or
 - Sincerely held religious belief that precludes vaccination.
 - Consider the disparate impact that mandatory vaccination policies may have on other protected classes.
 - Assess the extent to which the policy is disproportionately screening out employees in protected categories.

EEOC Guidance cont'd

- Reasonable Accommodations to Mandatory Vaccines
- Use the ADA's interactive accommodation process
- Section K.2 - Suggested accommodations:
 - Wearing face masks;
 - Socially distancing;
 - Working modified shifts;
 - Testing periodically for COVID-19;
 - Working remotely and/or reassignment;
 - Other accommodations may be considered;
 - Accommodations for non-vaccinated pregnant employees.

EEOC Guidance cont'd

- Direct threat of Unvaccinated Individuals
 - Section K.5 – employers cannot force compliance on individuals with disabilities precluding vaccination.
 - UNLESS the employer can demonstrate the employee poses a direct threat to the health and safety of others.
 - Can a reasonable accommodation reduce or eliminate the threat?

EEOC Guidelines cont'd

Assess based on “reasonable medical judgment that relies on the most current medical knowledge about COVID-19”:

- “the level of community spread at the time of the assessment”;
- U.S. Centers for Disease Control and Prevention (CDC) statements;
- employee’s health care provider information with employee’s consent;
- “the type of work environment”, such as:
 - Does the employee work alone?
 - Does the employee inside or outside?
 - Is there available ventilation?
 - How often does the employee interact with others?
 - How many other employees are already vaccinated?
 - Are employees wearing masks?
 - Can employees social distance?

EEOC Guidance cont'd

- Reasonable accommodations for fully-vaccinated employees?
- Section K.11 – reasonable accommodations may still be needed.
 - Example -- heightened risk of severe illness from COVID-19.
- Follow the same interactive accommodation process.

EEOC Guidance cont'd

- Religious objections
- Section K.12 - “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.”
- *However*, if an employer is aware of facts that would create an objective basis on which to question “the religious nature or the sincerity” of a belief, practice, or observance, “the employer would be justified in requesting additional supporting information.”

EEOC Guidance con't

- Vaccine Incentives for Employees
 - Employers may offer vaccination incentives to employees so long as the incentives are “not so substantial as to be coercive.”
 - Employers also “may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer’s behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated” without violating the Genetic Information Nondiscrimination Act (GINA).
 - Employers may not offer vaccination incentives to *family members* to become vaccinated when the employer or its agents are providing the vaccination.
 - Employers are not precluded from offering incentives to a family member if a third party administers the vaccine to the family member.

EEOC Guidance cont'd

- Confidentiality of Vaccination Information
 - Section K.4 - vaccination status is confidential medical information.
 - Employers must maintain the information's confidentiality and store it separately from the employee's personnel file.
 - Will the EEOC would take the position that having employees wear visual indicators of their vaccination status, such as a wristband or sticker, would violate the Americans with Disabilities Act (ADA)?

Employee Concerns Regarding Return to Work

- As reopening begins and reemployment offers are made, employers may face scenarios regarding employees concerns with returning to the workplace.
- Its important employers know to respond to such concerns. Employers should conduct an interactive process discussion with the employee to learn the specific concerns.
- Employers should take detailed notes of all conversations.

Scenario 1 - Employee refuses to return to work over safety concerns.

- Assure employee that Company is complying with latest guidance from CDC, OSHA and state and local governments.
- Explain to employee the specific safety procedures the Company has implemented.
- Employee still refuses to return?
 - Options: Allow sick leave, seek volunteers to return to work, or accept resignation.

Scenario 2 - Employee has a underlying condition and refuses to return to work over fear of infection.

- Follow the normal interactive process under the ADA and determine if a reasonable accommodation would allow the employee to perform the essential functions of the job, including considering whether temporary leave without pay is a reasonable accommodation.
- Inform employee of the Company's safety measures.

Scenario 3 – Employee refuses to return to work because unemployment benefits provide comparable pay.

- The federal supplement provided with unemployment compensation is scheduled to expire, if it hasn't already in your specific state.
- The Company cannot guarantee that a position will be available to the employee in the future.
- Declining the offer to return to work may negatively affect eligibility for unemployment benefits.

Scenario 4 – Employer refuses to return to work because lack of childcare.

- The Company should consider temporary measures.
- Alternatively, the Company may consider seeking volunteers to return to work if ramping up gradually.

COVID-19 Litigation Trends

- 1,500 COVID-19 Related Cases filed in 2020.
- Healthcare industry most impacted.
- Hospitality, manufacturing, and retail industries have also been heavily impacted.
- Disability discrimination; failure to accommodate; interference with leave under the Family and Medical Leave Act, Families First Coronavirus Response Act (FFCRA), and state leave laws; and retaliation claims.
- Future lawsuits relating to COVID-19 Vaccinations.

Court Actions Involving Discrimination and Harassment Issues



Jury Awards Black Worker \$8.5 Million



- April 14, 2020: Missouri State court of appeals upholds \$8.5M jury verdict, finding that there was plenty of evidence to support the jury's conclusions approving her claims of discrimination, harassment, and retaliation
- \$1.3M in actual damages, and \$7.2M in punitive damages
- White employee tells her that "blacks don't take pride in their work, where they live, or anything."
- Others made racist comments, including some about President Obama
- Another worker left Paula Deen magazines on display after she was publicly accused of racist behavior, and another mockingly sang "negro spirituals" around the office
- **TIP: train your employees that racial slurs, jokes, etc. are inappropriate in any context!**

Fifth Circuit Agrees With Dismissal of Suit Despite “Boorish” Behavior



- June 10, 2020, appellate court upholds summary judgment in favor of City of Houston dismissing Black Female’s suit for discrimination and hostile environment, claiming her co-workers at a Houston firehouse engaged in offensive behavior
- Court: she failed to show that the alleged harassment was severe or pervasive enough to have interfered with her work
- Behavior challenged: passing gas at the dinner table; infrequently slept in their underwear at station; told occasional racially insensitive jokes; brought adult magazines to the station; derogatory photos of President Obama
- Court: The conduct “is not severe or humiliating under the governing standards”.
- **TIP: don’t allow even boorish behavior in your workplace. Chances are the Missouri jury awarding \$8.5M would have found this conduct to be a hostile environment**



Most Interesting Claim: Trans Man Sues Amazon for Pregnancy Discrimination

- October 7, 2020: a transgender New Jersey man is suing Amazon after he claimed that he was discriminated against him when he became pregnant
- Claims that after he disclosed his pregnancy, he was mistreated by his supervisors and co-workers
- One co-worker rudely asked him in the men's bathroom: "Aren't you pregnant?"
- TIP: gender identity is now protected under Title VII
- **DON'T WORRY-- I AM CONFUSED TOO!!!**



Another Interesting Claim: Jeremy Roenick Says NBC Fired Him Because He's Straight

- July 17, 2020: Former NHL star sues NBC, saying he was fired after joking about having a threesome with his wife and a colleague on a Barstool Sports podcast, even though gay and female employees who made similar comments haven't faced any repercussions
- Roenick claims that he is a straight white man, and claims protected status under the New York human rights law, which covers gender and sexual orientation discrimination.
- On the podcast, Roenick joked with other vacationers about having a threesome with his wife and a female friend, and commented about their bathing suits. (The comments were explicit).
- He claims gay broadcaster made vulgar comments about a woman's groin, and when Roenick asked about it, he was told that the broadcaster "is gay and can say whatever"



EEOC Developments

www.eeoc.gov



EEOC Pauses Right to Sue Notices Amid COVID-19 Pandemic

- If you had an EEOC Charge pending during 2020, it is likely that you got no determination from the EEOC, due to its decision to largely pause issuing a right to sue within 90 days of the charging party's receipt of the notice, since courts were essentially shut down



EEOC Issues New Guidance on Opioid Users' Workplace Rights

- August 5, 2020
- Employees who use opioids lawfully or have recovered from addiction are protected from workplace bias under the ADA, even though illegal use of those drugs still falls outside the law's bounds



EEOC Publishes Proposed Wellness Rules For Review

- January 7, 2021
- The proposed rules address what level of incentives employers may lawfully offer to encourage employee participation in wellness programs that require disclosure of medical information, without violating the ADA or GINA
- 60 days for public comment



President Biden Appoints Charlotte Burrows As EEOC Chair

- January 21, 2021
- She has served as a Commissioner since 2015
- Was previously in the Department of Justice where she worked on various civil and criminal matters



EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data (2/26/21)

- 67,448 Charges filed
- \$439.2 Million secured through settlements and litigation
- EEOC filed 93 lawsuits, and resolved 165 pending lawsuits
- Breakdown on Bases for Charges:
 - Retaliation 55.8%
 - Disability 36.1%
 - Race 32.7%
 - Sex 31.7%
 - Age 21%
 - National Origin 9.5%
 - Color 5.3%
 - Religion 3.6%
 - Equal Pay Act 1.5%
 - Genetic Information .7%

EEOC

U.S. Equal Employment Opportunity Commission



You're Fired!! Biden fires EEOC General Counsel After She Refuses to Quit

- On March 5, 2021, President Biden fired EEOC General Counsel Sharon Fast Gustafson, after she declined to resign
- Her appointment term was through 2023
- Gustafson was a solo practitioner for two decades before being appointed by Trump in 2018
- March 12, 2021, Biden designated EEOC veteran lawyer, Gwen Reams as acting GC



Wage and Hour Division Developments

www.whd.gov



Warning: Any Actions Taken by the Wage and Hour Division in 2020 That are Employer Friendly are Destined to be “Fired” by the New DOL

- 7/20: WHD issued final rule on fluctuating workweek pay system, approving payment of bonuses, commissions, and other compensation in addition to salary—this one might survive
- Numerous Employer Friendly Opinion Letters Issued in 2020—too many to discuss today—will opinion letters cease, like they did during the Obama administration?
- WHD issued a field assistance bulletin to provide guidance on tracking time for nonexempt employees working remotely during the pandemic, and other jobs that always require remote work—very helpful guidance
- 9/8/20: Employer friendly Joint Employer Rule adopted by DOL and WHD for FLSA purposes, was invalidated in part by a NY federal judge. March 11, DOL issued new rule which would rescind the current joint employer rule
- 1/19/21: WHD says truckers who own their own trucks and haul freight for a logistics provider are likely independent contractors—this was scrapped by Biden’s DOL on 1/26/21, along with two other opinion letters

So What Can Employers Expect in 2021??

- More aggressive enforcement activity from federal labor agencies
 - NLRB after the fall of 2021
 - EEOC
 - OFCCP
 - Wage and Hour Division
 - OSHA
- More COVID-19 and basic employment law court litigation. Over 1500 COVID related suits filed so far!!
- More union organizing activity, even if PRO Act doesn't pass
 - Safety
 - Loss of income and jobs by many employees
 - The “perfect storm” for unions
- GOOD LUCK, get vaccinated, and stay safe!!!



THANK YOU!

Coleridge
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Coleridge
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