

A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The background is a light, neutral color.

Work**Smarts** Half-Day Seminar

**2021 Labor and Employment Landscape:
What Happened, Where are We, and Where
We're Going**

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The Year in Review...

Overview

- New Administration
- Ongoing COVID-19 Pandemic
- OSHA's Emergency Temporary Standard (ETS)
- Independent contractors
- Joint Employers
- EEOC Guidance
- Labor Law Changes
- New State Law Legislation



What Happened?

Biden Administration

Executive Order 13985 – Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

- Revoked President Trump's EO 13950 which prohibited federal contractors from workplace training on race and sex discrimination
- Federal government to revise agency policies to account for racial inequities in implementation
- All federal agencies to promote diversity, equity and inclusion, and accessibility

Biden Administration

Executive Order 13988 – Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

- Expands discrimination protections previously offered solely on the basis of sex into the categories of gender identity and sexual orientation
- Directs all federal agencies to implement *Bostock v. Clayton County, Georgia*
- *Bostock*: Title VII of the 1964 Civil Rights Act adds sexual orientation and gender identity as protected classes

Biden Administration

Executive Order 13999 – Protecting Worker Health and Safety Addresses OSHA's role in Curbing COVID-19

- Revise employer guidance on workplace safety
- Review OSHA's enforcement efforts related to COVID-19
- Determine necessity of emergency temporary standards and, if necessary, issue ETS
- March 2020 – 4,257 lawsuits (439) class actions against employers for alleged COVID-related violations
- January 2021 over 13,000 COVID-related complaints but OSHA inspection initiated on only small fraction

Vaccine Mandates

- Vaccine Mandate for Federal Contractors (and Subcontractors)
- OSHA's Emergency Temporary Standard (ETS) for private companies with at least 100 employees
- State and local requirements
 - Prohibits all or some employers from imposing a vaccine mandate (AZ, AR, GA, IN, TN, TX, UT)
 - Treats vaccination status as protected characteristic (MT)
 - Evolving at state and local level
- Other:
 - The Centers for Medicare & Medicaid Services (CMS) vaccine mandate for most Medicare and Medicaid certified providers and suppliers

Vaccine Mandate Challenges

- Federal Contractor/Subcontractor Challenges
 - Lawsuits have been filed by 18 states in district courts over the federal employee mandate
- Health Care Worker Mandate
 - 10 states have sued over the Centers for Medicare & Medicaid Services (CMS) vaccine mandate for most Medicare and Medicaid certified providers and suppliers

More Federal Law Developments

- Independent Contractor Classification
- Joint Employers
- Non-competition Agreements
- EEOC Guidance on Transgender Discrimination
- New Democratic Majority at the NLRB
- The PRO Act

New State Laws

- Arizona
 - Pregnancy Discrimination
- California
 - Expansion of CFRA
 - Wage Theft
 - Cal/OSHA penalties
 - Silenced No More Act
- Colorado
 - Gender Identity and Expression Discrimination
 - Veterans' Preference
 - Paid Sick Leave and Paid Family Leave
 - Public Health Emergency Whistleblower Act

New State Laws

- Florida
 - E-Verify
 - COVID-19 Employer Liability
- Missouri
 - COVID-19 Employer Liability
- Minnesota
 - COVID-19 and Workers' Compensation
- Nevada
 - Kin Care Leave
- Tennessee
 - COVID-19 Employer Liability
 - Public restrooms



Where Are We Now?

Overview

- Biden's COVID-19 Action Plan
- Pending Challenges to Vaccine Mandates
- EEOC COVID-19 Technical Assistance Guidance
- Expanded Anti-Discrimination
- Issues in Working from Home, Returning to Work, and Vaccine Mandates

OSHA ETS Updates & Challenges

- *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir.)
 - November 12 decision reaffirmed a prior stay issued on November 6th and found that the ETS was both overbroad and under-inclusive.
 - Ordered the agency to “take no steps to implement or enforce” the ETS until further court order.
 - OSHA stated that it remains confident that it had the requisite authority, but that it was suspending activities related to the implementation and enforcement of the ETS pending future developments in the litigation.
- Other Circuits with Pending Litigation
 - D.C. Circuit
 - 6th Circuit (KY, MI, OH, TN)
 - 7th Circuit (IL, IN, WI)
 - 8th Circuit (AR, IA, MO, NE, ND, SD)
 - 11th Circuit (AL, FL, GA)

OSHA ETS Requirements: Vaccination Status Collection

- Deadline – previously December 5
- Employer must collect vaccination status for all covered employees
- Employer must obtain satisfactory proof of vaccination for all fully vaccinated employees
- Employer must create and maintain roster with vaccination status

OSHA ETS Requirements: Time Off Requirements

- Time off to get vaccinated
 - Reasonable time off to get vaccinated during the work day – includes four hours of paid time off for each dose
 - Cannot be deducted from PTO/existing leave benefits
 - If need more than four hours, must be given the option to use accrued paid leave benefits. If none, leave can be unpaid.
 - If outside of work hours, no paid time off required.
- Side effects
 - Reasonable time and paid sick leave to be given
 - Can require employees use accrued PTO/existing leave benefits
 - If no available sick leave, leave must be provided for this purpose. Probably should be paid leave.
- Check state and local laws as well

Information Required to Be Provided to Employees under ETS (1910.501(j))

- (1) The ETS requirements and workplace policies and procedures established to implement ETS;
- (2) The CDC document “Key Things to Know About COVID-19 Vaccines”;
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
- (3) Information regarding retaliation and discrimination protections; and
- (4) Information regarding laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Vaccination Records & Disclosure of Status

- Treat as confidential medical information
- Have to maintain vaccination and testing records for duration of ETS
- ADA Restrictions
 - Can only disclose vaccination status and records to supervisor/manager if need to know of a specific accommodation
 - In an emergency event, can inform safety and health personnel
 - ADA government investigator
- HIPAA
 - Does not typically apply to employee-employer relationships
- Applicable State Privacy Laws
- Employee could sign a voluntary consent to disclose this information

Records Available to Employees & OSHA

To Employees

- Copy of their COVID test results
- Aggregate number of fully vaccinated employees and the total number of employees at the workplace

To OSHA

- Mandatory COVID vaccination policy
- Aggregate number of fully vaccinated employees and the total number of employees at the workplace
- Other records required under ETS
- EST also requires reporting of work-related hospitalizations and fatalities

COVID-19 Sick Leave

- Families First Coronavirus Response Act (FFCRA)
 - Expired December 2020
 - Tax credit extended through March 31, 2021 to qualifying employers that voluntarily chose to continue to provide Emergency Paid Sick Leave (EPSL) or Emergency Paid Family Leave (EPFL)
- American Rescue Plan Act (ARPA)
 - Signed into law on March 11, 2021
 - Extended and expanded tax credit provisions of the FFCRA through September 30, 2021
- Some states enacted related legislation for sick leave

Pregnant Workers Fairness Act (PWFA)

- This is a proposed bill that passed the House of Representatives in May 2021
- Senate has not passed the legislation
- Bill prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.
- Bill sets forth enforcement procedures and remedies.

EEOC COVID-19 Technical Assistance

- March 2020: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”
- Updated October 25, 2021
 - Addresses questions on vaccination requirements from Title VII and religious accommodation perspective
 - Accommodations for sincerely-held religious belief
 - Limited factual inquiry permissible

Evolving LGBTQ+ Anti-Discrimination Laws

- *Bostock v. Clayton County* (June 2020) – U.S. Supreme Court decision expanded protections for LGBTQ+ workers
- Title VII prohibits employers from discriminating on basis of sexual orientation and gender identity
- Ban on discrimination “because of sex” includes sexual orientation and gender identity
- Springboard for state anti-discrimination laws

Expanded State Anti-Discrimination Laws

Sexual Harassment

- Texas SB 45 (September 1, 2021)
 - Texas employers of any size may be sued for sexual harassment
 - Adds individual liability
 - Now greater protection than federal law
- Texas HB 21 (September 1, 2021)
 - Increased timeframe to file sexual harassment charge from 180 days to 300 days from date alleged conduct occurred
 - Anticipated increase in number of sexual harassment state law claims
 - Employers of every size should ensure best practices to prevent sexual harassment and handle complaints promptly and thoroughly when they arise

Work from Home, Return to Work and Vaccine Mandates

- Working from home
 - Wage and hour issues
 - Time tracking
- Return to Work and Vaccine Mandates
 - More wage and hour issues
 - Health screenings
 - Accommodation Requests
 - Disability
 - Religion



Where are We Going?

Overview

- Evolving ETS Status
- Ongoing Challenges to Vaccine Mandates
- EEOC's Next Priority
- Expanded Family Leave
- Expanded Anti-Discrimination
- New EEOC Initiative
- Labor Law Changes

EEOC's Next Enforcement Priorities

- EEOC Chair Charlotte Burrows
- OFCCP Director Jenny Yang
- Predictions of former EEOC Commissioner Victoria Lipnic
 - Pay equity enforcement
 - Required reporting of pay data for all employers
 - ADA disability rights
 - DEI → DEIA driven by Biden's EO on diversity, equity, inclusion, and accessibility in federal workforce
- New EEOC Strategic Enforcement Plan expected in 2022

Emerging Protected Characteristics

Natural Hairstyles

- Amended anti-discrimination statutes to include natural hairstyles as a protected characteristic
 - Oregon: HB 2935
 - Expands definition of race to include natural hairstyles
 - Does not prohibit enforcement of otherwise valid dress code as long as policy does not disparately impact members of a protected class
 - North Carolina: Wake County Ordinance No. 16-3697 (Feb. 1, 2022) and Charlotte County Ordinance No. 2021-115 (Jan. 1, 2022)
 - Amends definition of protected class to include gender identity, gender expression, sexual orientation, and natural hairstyle
 - Nebraska: LB 451
 - Hairstyle Discrimination Law (Aug. 31, 2021) – prohibits discrimination based on traits typically associated with race including hair texture and hairstyle

New Age Discrimination Bill

- November 4, 2021 – U.S. House of Representatives approved H.R. 3992, the *Protect Older Job Applicants Act of 2021*
- New ADEA cause of action for disparate impact claims resulting from discriminatory hiring practices
- Criticism: “trial lawyers are sure to have a field day with this bill, which will give them cause to go after everything from job fairs on college campuses and online job boards to apprenticeship and internship programs.”

Expanded Family and Medical Leave

- Federal law proposal
 - American Families Plan
 - 12 weeks or 4 weeks?
 - Qualifying reasons for leave:
 - Welcoming a new child by birth, adoption, or foster care.
 - Recovering from a serious illness.
 - Caring for a seriously ill family member (by blood or affinity)
 - Addressing issues arising from a loved one's military deployment or serious injury.
 - Who is covered?
 - Caps on wage replacement?
- State laws

Labor Law Forecast

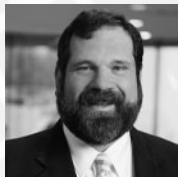
- *PPC Structurals, Inc.*, 365 NLRB No. 160 (2017)
 - Micro-bargaining units
- *MV Transportation*, 368 NLRB No. 66 (2019)
 - Management rights and collective bargaining obligations
- *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64 (2019)
 - Union access to employer property
- *Walmart Stores, Inc.*, 368 NLRB No. 24 (2019)
 - Intermittent strikes
- *800 River Road Operating Company, LLC*, 369 NLRB No. 109 (2020).
 - Post-certification bargaining over discipline
- A new Independent Contractor Test

EEOC's Next Initiative

Artificial Intelligence in the Workplace

- October 28, 2021 – EEOC Chair announced the launch initiative aimed at ensuring use of artificial intelligence (AI) and other technology-driven tools in hiring and other employment decisions comply with anti-discrimination laws.
- AI potential high-tech pathway to discrimination
- AI and algorithmic tools potential to improve lives and employment vs. potential to may mask and perpetuate bias or create new discriminatory barriers to jobs

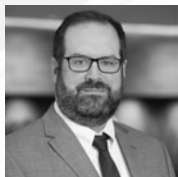
Thank You



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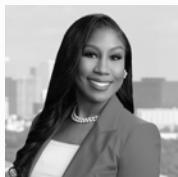
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