

Thursday, December 9, 2021

# 2021 in Review: Where We Are and Where We're Going

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# OSHA ETS Policy

Presented by Suzanne King

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# ETS Policy Options

<b>Option 1</b> <b>Mandatory vaccination for all</b>	<b>Option 2</b> <b>Employee choice: vaccine or test + mask</b>
<ul style="list-style-type: none"><li>• Subject to specified exceptions (working exclusively outside or at home) and exemptions (religious or medical)</li><li>• Unvaccinated with approved exemption must test + mask</li></ul>	<ul style="list-style-type: none"><li>• COVID test at least every 7 days</li><li>• Masking in the workplace subject to narrow exception</li><li>• Removal from workplace if test positive</li></ul>

# Federal Courts on ETS

- November 5: OSHA issued ETS
- November 6: U.S. Court of Appeals for the 5<sup>th</sup> Circuit issued an emergency stay, referencing “grave statutory and constitutional issues” with the vaccine mandate
- November 12: 5<sup>th</sup> Circuit reaffirmed its stay, ordering OSHA to “take no steps to implement or enforce” the ETS “until further court order”
  - In response to the stay, OSHA suspended “activities related to the implementation and enforcement of the ETS pending future developments in the litigation”

## Federal Courts on ETS (*cont.*)

- November 16: US Court of Appeals for the 6<sup>th</sup> Circuit “won” the “multi-circuit lottery” and will decide the merits of the challenges to the ETS
- November 23: OSHA filed a motion requesting that the stay be lifted
- December 7: Briefs due from all parties opposed to OSHA’s motion
- December 10: Reply briefs due in support of the motion to lift the stay

# What should employers do now?

- No current obligation to comply with ETS, but consider:
  - Determining vaccination status of employees
  - Deciding whether to implement a mandatory vaccination policy or implement a vaccine or test + mask policy (but don't issue policy yet)
- Pay attention to developments

# Determining Vaccination Status and Proof of Vaccination

- Retain either a physical or digital copy of the documentation confirming vaccination
  - Treat as confidential medical information
- Maintain a roster of all employees that clearly indicates whether they are:
  - Fully vaccinated
  - Partially vaccinated
  - Not vaccinated because of a medical or religious accommodation
  - Have not provided proof of vaccination and, therefore, must be treated as not vaccinated

# CMS Mandate

Presented by Katy Rand

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# CMS Mandate Details

- Applies to many Medicare-Medicaid-certified providers and suppliers.
- Covered staff = all (regardless of patient care resp.), plus students, trainees, volunteers, and contractors, unless fully remote.
- Full vaccination by January 4 unless exempt (medical / religious).

## CMS Mandate Details (*cont.*)

- Religious exemptions recognized.
- Medical exemption:
  - Reasonable accommodation for disability or
  - Certain recognized medical conditions for which vaccines are contradicted
- Required process for documenting and tracking vaccine status, retaining records as confidential.

# CMS Vaccine Mandate Status

- Louisiana and Texas district courts enjoined the rule. Appeals to 5<sup>th</sup> and 8<sup>th</sup> Circuits pending.
- Florida district court declined to do so. 11<sup>th</sup> Circuit declined to stay pending appeal.
- CMS announced it will not enforce the mandate and has directed surveyors not to survey for compliance.

# Federal Contractor Mandate

Presented by Katy Rand

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# Federal Contractor Vaccine Mandate

- Mandate acts upon government agencies, not directly on contractors / employers.
- Requires agencies to add vaccine requirements to contracts for new contracts, those up for renewal, extension, etc.
- Encourages agencies to require vaccination in contracts, even if not covered.

# Federal Contractor Mandate Details

- Vaccination required for all “covered contractor employees”
  - Anyone working “in connection” with a covered contract (including in supportive roles, such as HR, accounting, etc.)
  - Anyone working at a “covered contractor workplace”

# Federal Contractor Details (*cont.*)

- “Covered contractor workplace” means
  - Any physical location where someone might cross paths (even quickly) with an employee working on or in connection with a covered contract.
    - Lobbies, restrooms, hallways.
    - Given breadth of “in connection with,” this could be all workplaces.

# Federal Contractor Details (*cont.*)

- Applies even to contractor workplace locations that are fully outdoors.
- Must flow down to lower-tier subcontractors.
- No testing option.
- Exemptions recognized where reasonable accommodation is required by law (Title VII or ADA).



# Federal Contractor Mandate Status

- Nationwide injunction entered December 7, 2020.
- But, unlike regulations, contracts are a matter of agreement.
- Will federal agencies still insist on vaccination policies (despite not being required to do so)?
  - Their employees are all subject to a mandate.
  - Contractual leverage?

# Reasonable Accommodation Issues

- Undue burden threshold is different under ADA and Title VII
  - “Significant difficulty and expense” v. “more than de minimis cost.”
- Can differential treatment give rise to a claim?
  - No First Amendment rights vis-à-vis private employers
  - Potentially significant employee relations issues

# Requests for Religious Exemption

- Is employee expressing religious belief or personal / philosophical belief?
- If former, generally assume sincerity.
- If objective reason to question, may conduct limited inquiry.
  - May ask employee whether they adhere consistently
  - Tread lightly and seek counsel

# Requests on Basis of Disability

- Like any other request for accommodation, may seek information from medical provider concerning disability and why vaccine isn't medically advisable.
- Requests may relate to contraindication or other issues.
- Beware of hack doctors, offering notes for a fee.

# Accommodations to Consider

Remote work

Masking /  
distancing

Reassignment

Leave

Relocation

# Whole Foods Case

Presented by Meg LePage

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# Frith v. Whole Foods Market

- Whole Foods had a “neutral” dress code policy: No clothes with visible slogans, messages, logos and/or advertising unless Whole Foods-related.
- Until Plaintiffs began wearing BLM masks and other attire in June 2020, policy rarely enforced. (ex. employees wore LGBTQ+ messaging, NRA messages, the anarchist symbol, “Lock Him Up” and SpongeBob SquarePants mask.)
- Plaintiffs contended that wearing BLM attire was a demand for better treatment of Black employees.
- As employees continued to be disciplined, Plaintiffs said they were wearing BLM masks for the added purpose of challenging what they perceived to be racism for not allowing them to wear BLM masks.



# Frith v. Whole Foods Market

- Class action filed July 31, 2020.
- Count One- Selective enforcement of the policy constitutes unlawful racial discrimination in violation of Title VII because the policy adversely affected black employees and singled out for disfavored treatment advocacy and expression of support for Black employees by both Black employees and their supporters
- Count Two- Discipline of employees for opposing their discriminatory policy in not allowing BLM masks is unlawful retaliation in violation of Title VII.



# Motion to Dismiss-District Ct.

“Putting aside the wisdom or fairness of Defendants’ decision to aggressively discipline employees for wearing BLM attire, particularly when Defendants purportedly allowed employees to wear clothing with other messaging, inconsistent enforcement of a dress code does not constitute a Title VII violation because it is not race-based discrimination and because Title VII does not protect free speech in a private workplace.”

# Associational Discrimination

- Typically, plaintiffs assert associational discrimination when they are subjected to discrimination for maintaining a relationship with a member of another race.
- “Title VII prohibits discrimination based on race. It cannot be read expansively enough to extend its protections to employees who have been disciplined for wearing clothes that violate a company dress code, even if that clothing is associated with individuals of a particular race.”

## Frith v. Whole Foods

“Title VII prohibits discrimination against a person because of race. It does not protect one’s right to associate with a given social cause, even a race-related one, in the workplace.”

# Appeal to First Circuit

- Justice Lipez: lack of information about the racial identities of individual plaintiffs would make it difficult to state race bias claims under Title VII.
- Judge Thompson to Plaintiffs' counsel: "Suppose they were tolerating all these political statements, but an employee one day showed up with a Ku Klux Klan mask on," Judge Thompson said. "Are you saying that in order to eradicate that problem the company could not have said, 'OK, we are going to enforce our dress policy.?' I'm trying to figure out when an employer has the right to draw the line."

# New Hampshire FLSA Case

Presented by Suzanne King

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# *U.S. DOL v. Unitil Service Corp.*

## **(D.N.H. Nov. 17, 2021)**

- Are electric distribution dispatchers and senior gas controllers administrative employees exempt from FLSA's overtime pay provision?
  - Court said yes!
- To qualify for administrative employee exemption:
  - Paid on a salary basis at a rate of at least \$684 per week;
  - Primarily perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
  - Exercise discretion and independent judgment with respect to matters of significance
- **Fact intensive!**
  - Job titles do not determine exempt status
  - The devil is in the details

# Takeaway

In reaching its decision that both dispatchers and controllers are exempt, the court noted:

“The longstanding dictate from the Supreme Court that FLSA exemptions are to be ‘narrowly construed’ no longer applies.”

*Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018)

# The NLRB: A Look Ahead

Presented by Daniel Strader

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# Changes at the NLRB

- February 1, 2021 Memo by Acting General Counsel Peter Sung Ohr
  - Rescinded 10 memoranda by prior GC Peter Robb
  - GC 18-04 provided guidance on employee handbook rules – deemed “no longer necessary” in light of Board decisions interpreting *Boeing* case
- July 22, 2021 – Jennifer Abruzzo became GC
- August 12, 2021 – GC 21-04 – “Mandatory Submissions to Advice”
  - Identifies types of cases that are top priorities for the agency
  - Notes recent “doctrinal shifts” by the Board
  - Identifies other initiatives she wants to “carefully examine”
  - Non-exhaustive – expect more in the future

# General Counsel Priorities

- Employer Handbook Rules
- Prior to 2017, Board policy was that facially neutral rules were unlawful if employee could “reasonably construe” language to prohibit protected rights
  - E.g. no recording rules, civility rules
  - Led to the Board striking down many common employer rules
- *Boeing Co.* (2017): if a facially neutral rule could potentially interfere with rights under the Act, the Board will evaluate: (i) the nature and extent of the potential impact on employee rights; and (ii) legitimate justifications associated with the rule. If the justifications outweigh the potential impact, then the rule would be deemed lawful.
  - This rule led to Trump-era guidance detailing handbook policies that were presumptively lawful, unlawful, and in-between.
- GC Abruzzo wants to revisit *Boeing* rule as applied to handbook rules on confidentiality, non-disparagement, social media, media communications, civility, respectful and professional manner, offensive language, and no cameras.

# General Counsel Priorities (cont.)

- Expanding Definition of Concerted Protected Activity
- **Email communications** –
  - *Purple Communications* (2014) – reversed existing precedent and adopted new rule that if employer granted email access to employees, it could not prohibit union-related discussions during non-work time.
  - *Caesars Entertainment* (2019) – reversed *Purple Communications* – email is employer’s property, and employees have no right to use email for union-related communications unless there is no other reasonable means of communication.
  - GC is asking for cases to revisit *Caesars* and also apply to other digital communications, e.g. Slack – could raise new concerns with remote workforce
- **Solicitation** –
  - *Wynn Las Vegas* (2020) – held that solicitation includes encouraging employees to vote for or against union – prior rule was that only asking employee to sign union authorization card was solicitation
- GC seeking cases to expand “inherently concerted” doctrine to subjects other than wages, hours, and job security; e.g. health and safety, race discrimination – “vital elements of employment”

# General Counsel Priorities (cont.)

- **Expanded Remedies** – GC Memo 21-06 (Sep. 8, 2021)
  - GC plans to expand “make whole” relief for ULP charges
  - Historically limited to back pay, reinstatement, and remedial orders
  - Under GC’s approach, monetary relief could include consequential damages, front pay, liquidated damages; union organizing costs in organizing cases; negotiation expenses in failure to bargain cases
    - Consequential damages may include health care costs, credit card interest, 401k penalties, career training, loss of home or car
- **End of Right to Election?**
  - Since late 1960s, an employer can always insist that union be certified through secret ballot election, unless it commits ULPs that impede a free and fair election
  - GC seeks cases where employer refused to recognize and bargain with union based on showing of card majority, and employer “is unable to explain its reason for doubting majority status” – requires employer to show good faith doubt of card majority

# Other Labor Developments

- PRO Act (Protecting the Right to Organize)
- Would have eliminated right-to-work laws, outlawed mandatory company meetings, allowed new unions to seek arbitration without contract, and imposed civil penalties against employers and corporate officers for ULP violations
- Passed House in March 2021 but stalled in Senate – little chance of passage
- On November 19<sup>th</sup>, House passed BBB Act and included some portions of Pro Act: civil penalties, tax deduction of dues, \$350 million in additional NLRB funding – fate in Senate is unclear
- OSHA Vaccine Mandate
- Operations Management Memo 22-03 – reminds employers of obligation to bargain over discretionary aspects of OSHA rule and over the effects of non-discretionary aspects
  - E.g. Whether to allow testing alternative; how much paid leave to offer

# Portland Minimum Wage Ordinance

- Ordinance passed in November 2020
  - Contained new minimum wage for the City **and** a 1.5x premium minimum wage during any period of time in which the state or local gov't declared a state of emergency
- July 6, 2021 – Law Court upheld the constitutionality of the ordinance but delayed effective date until January 1, 2022.
- As of January 1, minimum wage in City is **\$13.00** (state min. wage is \$12.75).
- Currently, City is under state of emergency (10/4/21) – may be under consideration at City Council meeting on 12/20/21
- Absent action by City Council, emergency wage of **\$19.50**
  - For tipped employees, may take tip credit up to \$6.37 and pay cash wage covering remaining \$13.13.

# COVID Holiday Parties

Presented by Meg LePage

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# COVID Holiday Parties

## Choices:

- Virtual party/event
- Intimate gatherings
- Larger in-person with vaccine mandate and/or testing and/or masks
  - Proof of vaccine/tests?
  - Honor system?
- Outdoor setting (maybe not in New England)
- Additional time off to spend with family
- Group project for charity





# New State Leave Provisions

Presented by Suzanne King

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# Connecticut Paid Family and Medical Leave

- Up to 12 weeks in a 12-month period for the following reasons:
  - To bond with your new-born child, newly-adopted child, or newly-placed foster child, or to process the adoption of a child or the placement of a foster child;
  - To receive treatment or recover from your own serious health condition, including pregnancy and serving as an organ or bone marrow donor;
  - To care for a “family member” who has a serious health condition;
  - To care for a parent, spouse, child, or next of kin who was injured in the line of duty on active duty in the military;
  - To address specific exigent circumstances associated with the deployment of a parent, spouse, or child to overseas military duty; and
  - To address specific situations associated with the fact that you are experiencing family violence (up to 12 days in a 12 month period).

# Connecticut Paid Family and Medical Leave

- Additional 2 weeks of leave/benefits for a pregnancy-related health condition resulting in incapacitation.
- Starting in July 2022, employers must provide employees with written notice of CT paid family and medical leave
  - No current requirement to provide any notices or post posters, but employers are encouraged to share the CT Paid Leave employee factsheet available from CT Paid Leave website ([https://ctpaidleave.org/s/employee-landing-page?language=en\\_US](https://ctpaidleave.org/s/employee-landing-page?language=en_US))

# Connecticut Paid Family and Medical Leave

- Covers all employers with one or more employee(s) working in CT
- Employees are eligible for leave/benefits if meet income threshold and are currently employed or have been employed within the last 12 weeks
- State program or private plan option
- Benefits are funded entirely through employee payroll deductions (0.5%); No employer contribution required.
- Leave/benefit payments begin on January 1, 2022
  - Employees can begin to submit applications on December 1, 2021 for leave/benefits starting January 1, 2022 and beyond

# New Hampshire Paid Family Leave Plan

- Voluntary plan
  - Private employers with 50 or more employees may choose (but are not required) to participate in the Plan
  - Participating employers will be subject to certain requirements (e.g., payroll deductions, maintenance of health insurance during leave, job protection, no discrimination or retaliation)
  - For employees whose employers do not participate in the Plan, the Plan will allow such employees to participate individually and employers will be responsible for payroll deductions
- Tax credit
  - Employers that choose to participate in the Plan will receive a tax credit, allowed against family medical leave insurance premiums due, of 50% of the premium that the employer paid for the insurance coverage for the taxable period at issue

# New Hampshire Paid Family Leave Plan

- Benefits begin on January 1, 2023
- Up to 6 weeks of paid leave per year for the following reasons:
  - The birth of a child or caring for a newborn child for the first year.
  - For newly adopted or fostered children within the first year.
  - Care for an employee's spouse, child, or parent with a serious health condition.
  - Care for a spouse, child, or parent who is in the military.
  - A personal serious health condition that is independent of employment, if the employer does not offer short-term disability insurance.
- The details of the Plan are yet to be finalized by the NH Department of Administrative Services

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