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EMPLOYMENT LAW UPDATE

November 3, 2022

12:00	**Registration and Lunch**
12:25	**Welcome**
12:30	**Federal and State Updates**
1:10	**Bringing Your Handbook into Compliance**
1:50	**Accommodating Skyrocketing Mental Health Issues in the Workplace**
2:20	**Break**
2:30	**Promoting Employee Engagement in the Era of Quiet Quitting and Remote Work** • Breakout Session
3:20	**Labor Law Basics and Updates for Non-Union Employers**
4:00	**Wrap-Up / Q&A**
4:30	**Cocktail Hour**

Federal and State Updates

Suzanne King

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Federal Update

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Posting and Notice Requirements

- DOL published updated EEO poster
  - Published posters (federal and state) are routinely updated, be sure to use correct versions.
- Be aware of and comply with state specific onboarding/termination notice requirements:
  - Upon hiring, e.g., notice of pay, family/medical leave policy, sexual harassment policy
  - Upon termination, e.g., termination notice, unemployment insurance information

Independent Contractor Status

October 13, 2022, DOL published a proposed rule to revise guidance on IC status. DOL's proposed rule looks at the "economic realities of the working relationship":

(1) the "opportunity for profit or loss depending on managerial skill";
(2) "investments by the worker and the employer";
(3) "degree of permanence of the work relationship";
(4) "nature and degree of control," including "whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose";
(5) the "extent to which the work performed is an integral part of the employer's business"; and
(6) the "skill and initiative" of workers (i.e., whether a worker uses specialized skills brought to the job or is "dependent on training from the employer to perform the work")

However, the proposed rule also states that "additional factors may be relevant" in the analysis.

State Update: MA, ME, NH

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Maine Vacation Payout

"All unused paid vacation accrued pursuant to the employer's vacation policy on and after January 1, 2023 must be paid to the employee on cessation of employment unless the employee is employed by an employer with 10 or fewer employees or by a public employer." (26 M.R.S.A. §626)

- Vacation accrued prior to 1/1/2023 is not covered by this new requirement
- If "PTO" accrues, likely should treat it as vacation under this policy, but check with employment counsel
- Check your policies!

Maine Equal Pay Law

- *Mundell v. Acadia Hosp. Corp.* (D. Me. Feb. 8, 2022)
  - Pay difference alone is sufficient to establish liability under MEPL -- employer intent is irrelevant
  - Treble damages and attorney's fees and costs are available for violation of MEPL

Maine Ban the Box

Reminder -- effective October 18, 2021, employers cannot include request for criminal history record information on initial employee application forms and cannot state that a person with a criminal history may not apply or will not be considered for a position.

- An employer may inquire about an applicant's criminal history record information during an interview or once the prospective employee has been determined otherwise qualified for the position, provided the applicant is given the opportunity to explain circumstances.
- Exception for federal or state law or regulation or rule requiring criminal history information or creating a mandatory or presumptive disqualification.
- Check your applications!

Maine: Settlement, Separation, and Severance Agreements

- May include a provision that prevents the subsequent disclosure of factual information relating to a claim of unlawful employment discrimination only if:
  - The agreement expressly provides for separate monetary consideration in addition to anything of value to which the employee, intern or applicant is already entitled
- A settlement, separation, or severance agreement cannot include a provision that:
  - Limits an individual's right to report, testify or provide evidence to an employment discrimination enforcement agency
  - Prevents an individual from testifying or providing evidence in court proceedings in response to legal process
  - Prohibits an individual from reporting conduct to a law enforcement agency
- No impact of employers' ability to impose confidentiality of proprietary information, trade secrets, or information that is otherwise confidential by law, rule, or regulation

(26 M.R.S.A. §599-C)

Massachusetts Wage Act: Good News For Employers

- *Devaney v. Zucchini Gold, LLC* (Mass. 2022)
  - › FLSA preempts the MA Wage Act where employees' claims for unpaid overtime wages arose exclusively under FLSA.
  - › Remedies are limited to those available under the FLSA (e.g., liquidated damages).
  - › Mandatory treble damages under the MA Wage Act are not available.

Massachusetts Wage Act – Not So Good News for Employers

- *Reuter v. City of Methuen* (Mass. 2022)
  - › Holding that because the employer paid the employee's final wages late, it was strictly liable and therefore owed treble damages on the delayed wages.
    - Rejecting the holding in *Dobin v. CIOview Corp.*, (Super. Ct. Oct. 29, 2003) *(*when wages are paid late but before a complaint is filed, the only damages are interest on the delayed payment, trebled).
  - › "[A]llowing a defense for late payments made before litigation is commenced would essentially authorize, and even encourage, late payments right up to the filing of a complaint… [E]mployers rather than employees should bear the cost of such delay and mistakes, honest or not."

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
- 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.

New Hampshire Medical Marijuana

- *Paine v. Ride-Away, Inc.* (Supreme Court, 2022)
  - The NH medical marijuana law does not contain any language categorically excluding the use of therapeutic cannabis as an accommodation.
  - The disability and accommodation statute excludes disability due to "current illegal use of or addition to" a federally controlled substance, but in this case, the employee's disability was due to PTSD, not illegal drug use.
  - In other words, whether off-duty use of medical cannabis is considered a reasonable accommodation must go through the usual case by case determination

Multi-state Employers: Important Trends To Watch

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Pay *Disclosure* Requirements

- Currently, 7 states and NYC; and a NYS law awaiting Gov. Hochul's action
- State laws vary, but generally:
  - › Covers employers with 1 or more employees working in the state
    - CT: all employers located within CT (regardless of where employees work)
  - › Required to disclose: "wage range," "wage rate," or "pay scale"
  - › To whom: applicants, or applicants and employees
  - › When: when advertising a job, promotion or transfer opportunity, or upon request

Pay Disclosure

	CT	RI	NYC	NYS
Covered employers	Employers within CT employing 1 or more employees (regardless of where the employees work) Out-of-state employers not located in CT are not covered	Employers with one or more employees	Employers with 15 or more employees (at least one of whom must work in NYC)	Employers with four or more employees
What to disclose	Wage range, including reference to any applicable pay scale, any previously determined range of wages for the position, actual range of wages for current employees holding comparable positions, or the amount budgeted for the position	Wage range, including reference to any applicable pay scale, previously determined rage of wages for the position, or the range of wages for those currently holding equivalent positions, or budgeted amount for the position	The minimum and maximum hourly or salary compensation for the position	The compensation or range of compensation for the job, meaning the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity
To whom or when to disclose	Applicants upon request, or prior to or at the time of an offer of compensation Employees upon hire, a change of position, or upon request	Applicants upon request Employees at the time of hire, a change of position, or upon request	When advertising a job, promotion, or transfer opportunity	When advertising a job, promotion, or transfer opportunity that can or will be performed, at least in part, in NYS

Non-Compete Restrictions

- Trend toward states passing legislation to address restrictive covenants
- Structural similarities, but significant differences in detail
  - › Wage threshold (e.g., IL currently $75,000, increasing every five year until 2037 at $90,000)
  - › Consideration (e.g., offer of employment plus something else, such as financial benefits)
  - › Statutorily unenforceable (e.g., if terminated without cause, terminated within 6 months of employment)
  - › Expanding restrictions to non-solicitation (e.g., Illinois)

Multistate Employers: Addressing Different Restrictive Covenant Laws

- What level of protection is needed? (e.g., executive v. non-executive; customer-facing v. non-customer facing; sales v. non-sales)
- Where are your employees?
  - › MA law triggered if the employee is and has been a resident of or employed in MA at least 30 days immediately before separation
- Different approaches depending on your workforce, risk tolerance, culture, etc.
  - › Uniform non-compete agreement vs.
  - › State specific agreements

CROWN Act

- Creating a Respectful and Open World for Natural Hair (CROWN) Act
  - › Extends protection under discrimination statute to natural or protective hairstyles, including hair textures, hair types, and hairstyles, among others
- Currently, at least 18 states and numerous municipalities have enacted a CROWN Act (e.g., Connecticut, Maine, Massachusetts, New York, etc.)
- Review and update as needed:
  - › EEO policy; harassment policy; dress and appearance policy
    - Maine: "traits associated with race, including hair texture, Afro hairstyles and protective hairstyles" (effective August 7, 2022)
    - Massachusetts: "traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles" (effective July 26, 2022)
- Provide education and training on CROWN Act for recruiters, managers, and supervisors

Sexual Harassment

- Be aware of greater state protection for employees than under federal law
  - › Lowering the bar for harassment claim, e.g., NYS – employees only need to plead and prove that they received "inferior terms, conditions or privileges of employment because of the individual's membership" in a protected class, "regardless of whether such harassment would be considered severe or pervasive..."
  - › Training requirements – at least 6 states and a number of localities (e.g., CA, CT, DE, DC, IL, ME, NYS, etc.).

"Unlimited" PTO: Legal and Practical Consideration

- Is it really "unlimited"?
  - Is there actually an expectation of how much/little time off is taken?
  - Oversight – communication, approval process, evaluation mechanism for effectiveness, abuse, etc.
- No payout upon termination
  - Spell this out in policy
- Recommend against including sick time in policy (i.e., unlimited "vacation" instead of unlimited "PTO")
- Exclude family/medical leave situations or cap usage

Leave Laws

- High-level similarities, but many practical differences across state family/medical leave laws
- One uniform policy approach is nearly impossible
- Remote workers – know where they are primarily working
- Carefully address in policies the interaction between/among federal and state family/medical leaves as well as employer-provided leave or time off
- Train supervisors and managers

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Bringing Your Handbook into Compliance

Katy Rand and Katie Porter

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Handbooks: Layered Leave Policies

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FMLA - Maine

- Don’t forget about state law.
- Employers with 15 or more employees at one location are entitled to up to 10 weeks of unpaid FML leave in a two-year period.
- Broader relational coverage, including certain siblings and now, **grandparents**.

Earned Paid Leave

- Applies to employers with more than 10 employees in Maine;
- Employees must earn one hour of EPL for every 40 worked, up to 40 per year;
  - › Hours worked include OT hours
- Accrual begins at start of employment, but can prohibit use until 120 days of employment.

PTO Policy May Not Be Compliant

EPL paid at "regular rate"

EPL available for any reason under the sun

EPL is protected time off

Up to 40 hours of unused EPL roll over

If not paid out, EPL balance remains for 1 year

How To Make PTO Policy Compliant

- Option 1:
  - Establish a separate EPL policy and reduce the PTO accordingly.
- Option 2:
  - First 40 hours of PTO earned and used in a given year is treated as EPL and therefore paid out differently, protected, etc.
- Option 3:
  - Permit employees to designate their PTO as EPL upon use.

Maine's New Vacation Payout Law

- Unclear:
  - Does PTO or some portion of PTO constitute "vacation" for purposes of this law?
- Somewhat clear (according to MDOL):
  - EPL does *not* constitute vacation for purposes of this law, at least as long as you have a separate EPL policy.

Possible Solutions

- Treat all PTO like vacation and pay it out upon termination.
- Hope courts read the term "vacation" literally and don't require pay out of PTO.
- Scrap PTO concept and create separate "vacation" and "EPL" banks.
  - › Achieves clarity / certainty
  - › Avoids paying out entire bank of available paid time off.
  - › Employees would be encouraged (but not required) to use EPL to cover sickness / sudden necessity.

Don't Forget ME Family Sick Leave

- 26 M.R.S. §636: Employer must allow an employee to use at least 40 hours a year of paid leave to care for an immediate family member who is ill.
- Time used for this purpose is protected (even though, absent EPL, time wouldn't have been protected if employee used the time for their own illness).
- According to MDOL, the EPL statute does not render this law moot.

More Protected Time Off

According to MDOL:

"If an employee uses all 40 hours of EPL for vacation or personal reasons not related to illness of an immediate family member and has other paid time off, the employer must allow the employee to use up to 40 hours of the remaining paid time off to care for an immediate family member who is ill and the absences are protected."

Family Sick Leave Policy

- Separate policy still required.
- Policy should state that employees may use up to 40 hours of their PTO per year to care for an ill immediate family member.
- Policy should state that employee must designate the time as family sick leave.
- Policy should state that time so designated is protected time.

Handbooks: Confidentiality / Non-Solicitation Policies

Katy Rand and Katie Porter

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Confidentiality Policies

- Protect non-public information that has value in employer's business.
- Prohibit employees from disclosing or using such information other than in connection with job and for benefit of employer.
- Beware of prohibiting protected concerted activity.
- New statute, 26 M.R.S. §599-C, prohibits employer from waiving or limiting any right to report or discuss unlawful employment discrimination "occurring in the workplace or at work-related events" (?)

Non-Solicitation Policies

- Prohibit employees from soliciting clients / customers / employees in connection with another venture.
- May prohibit employees from soliciting employment from clients / customers.

Benefits / Limits of Policies

- Policies operate as rules / expectations during course of employment.
- But, Handbook undoubtedly disclaims status as a contract.
  - *"This handbook is not a contract"*
  - *"Employer can change policies at any time, with or without notice"*
- Policies therefore have limited utility post-separation.

Agreements Endure

- Employees with access to sensitive or commercially valuable and non-public information should be required to sign confidentiality agreements.
- Employees who are paid to develop good will and who are positioned to convert that good will for their own benefit should be required to sign non-solicitation agreements.
- For a discussion of when / whether / how employees should be required to sign non-competition agreements, stay tuned…

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Handbooks: Revisiting Your Policies

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Review Handbooks to Confirm:

- Policies make sense
- Track the company's actual policies/practices
- Reflect any updates in the law
- Reflect policies required in jurisdictions where the employees work

Handbooks Should Specify:

- Employees are employed at-will (unless contractual agreement otherwise)
- Not a contract between employer and employee
- Can be modified at any time
- All employees must read and acknowledge the Handbook (and whenever policies are updated)

Handbooks: Key Policies (other than leaves) to Review

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Anti-Discrimination/Harassment

- Protected characteristics are expanding
- Coverage of laws also expanding
- Policy must be robust, clear and detailed
- Complaint procedure
-
- Make sure to have training each year
- No retaliation
- Reasonable accommodations

Teleworking

- Specify who is eligible
- Hybrid or fully remote schedule
- Expectations (availability, presentation on calls, timekeeping, caretaking duties, etc.)
- Expense reimbursement
- Retain discretion to revise policy and call people back in

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Accommodating Skyrocketing Mental Health Issues in the Workplace

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EEOC Statistics on Charges Alleging Discrimination Based on Mental Health

- In fiscal year 2021, the EEOC received about 8,400 charges from individuals alleging employment discrimination due to a mental health condition or substance abuse disorder.
- Mental health discrimination charges accounted for about 30% of all ADA claims, up nearly 50% from 10 years ago.
- Most common mental health conditions in EEOC charges are anxiety, depression, post traumatic stress disorder, bipolar, and schizophrenia.
- Anxiety and depression saw the biggest gains in number of charges filed during pandemic (2020-2021), accounting for nearly 60% of all mental health charges.

Reasons for Recent EEOC Charge Statistics for Mental Health Bias

- Employees have been struggling with stress, burnout and fatigue due to:
  - fear of contracting or spreading COVID-19
  - stress of increased caregiving responsibilities due to day care and school closings
  - stress of caring for self or family members with COVID-19 related illness;
  - anxiety about getting the vaccine or being fired for not getting the vaccine;
  - apprehension about returning to the workplace; and
  - extended social isolation while working from home and/or limiting social events.
- Mental health services have expanded due in part to:
  - Increase in prevalence of mental health issues
  - Increase in pandemic funding of mental health services;
  - Decrease in stigma attached to seeking help for mental illness

Legal Framework for Mental Health Related Employment Claims

ADA

FMLA

OSHA

WC

EEOC v. Ranew's Management Co.,

(D. Ga. 2021)

- Plaintiff was CFO of manufacturing plant
- Plaintiff asked for three weeks off work, per his doctor's recommendation, to address symptoms of severe depression.
- CEO told CFO to take as much time as he needed to get well.
- Returned after 6 weeks with a doctor's release
- CEO told CFO he could not trust the CFO to perform his job and fired him.
- Case settled for $250,000 in 2022
- "The ADA makes it clear that employment decisions must be made based on employee qualifications rather than on stereotypes about an employee's disability." EEOC Regional Attorney

Jessup v. Barnes Group, Inc.

23 F.4th 360 (2022)

- Plaintiff Jessup was a 17-year employee hired as regional sales manager and promoted to business development manager
- Suffered a panic attack in October 2016
- Requested and was granted series of leaves through June 2017 but returned to work in April 2017
- Two weeks later, Jessup was told his job had been eliminated and he would be "regional sales manager" with same salary but different incentives.
- "Mid-year" Jessup's sales quota increased by $2 million
- July 2017 Jessup suffered another panic attack
- Dispute over when he was fired (Nov.2017 or Jan. 2018)
- Jessup's lawsuit alleged wrongful termination, failure-to-accommodate and hostile work environment.
- Jessup admitted in his deposition in Dec. 2019 that he still was unable to work due to mental health condition.

Best Defense: A Well Documented Interactive Dialogue Process

ADA Interactive Dialogue Process
Employee/Supervisor Meeting Summary

Employee Name: _____ Supervisor/HR Rep Name: _____

Employee's Limitation or Restriction	Employee's Job Function(s) that the Limitation or Restriction Impacts	Medical Documentation Needed? (If yes, set deadline)	Possible Accommodation(s) (If limitation cannot be accommodated, write "none")	Employer Approved Accommodation(s)

Describe expectations and timeframes related to any productivity, quality and attendance standards:

Date: _____ Employee Signature: _____

Date: _____ Supervisor/HR Signature: _____

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Promoting Employee Engagement in the Era of Quiet Quitting and Remote Work

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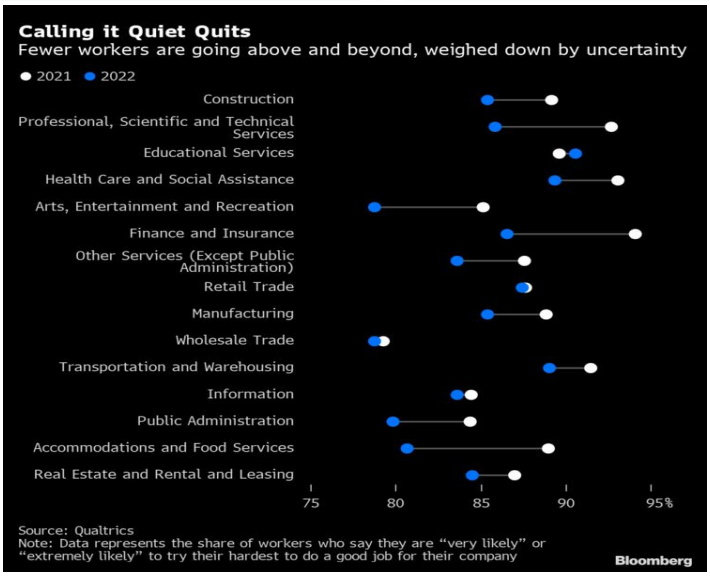
What's Working, What's Not?

Is "Quiet Quitting" Real?

- The answer is YES
- Survey data confirm that people are uneasy, distracted, demoralized
- Recent Gallup survey reported full 50% of U.S. workforce could be described as "people who do the minimum required and are psychologically detached from their job." (*Source: Bloomberg)*
- Recent Qualtrics International survey of 9,000 US full and part-time employees shows a less dramatic percent of employees who are not "very likely" or "extremely likely" to do a good job for their company.
- But trends are very concerning.



QQ by Industry Sector - 2021-22

- Finance & Insurance: 94% (highest) in 2021, now -8 percentage points
- Arts, Entertainment and Recreation: 85% in 2021, now -7 pp
- Hospitality: 89% in 2021, now -8 pp
- Overall, 14 out of 15 sectors declined from 2021 to 2022

Civilian labor force participation rate, seasonally adjusted

Click and drag within the chart to zoom in on time periods

Hover over chart to view data.
Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.
Persons whose ethnicity is identified as Hispanic or Latino may be of any race.
Source: U.S. Bureau of Labor Statistics.

QQ Reflects a Larger Trend

- Workforce participation rates over last 20 years tell big part of story
- Decline in workforce participation began *before the last recession*
- U.S. workforce has been losing its mojo for 20 years
- Maine workforce situation is acute
  - › Declining workforce size - demographics
  - › Declining workforce participation rate – 58.2% in September 2022
  - › Smaller piece of smaller pie
- For many employers, there's no relief in sight

Hypothesis

- People of working age leaving the workforce – the declining labor force participation rate - and people remaining in the workforce but losing their commitment to the job – the QQ's – result from the same economic and social forces
- As with many trends, the pandemic and related policy reactions by federal and state governments accelerated, but did not start, the workforce trends we are seeing today.
- Employer responses to decreases in both the size and the commitment of the workforce must account for these forces.

Breakout Session

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For Discussion

- What are you seeing?
- What are you measuring?
  - Employee surveys
  - Focus groups
  - Customer surveys/feedback
  - Other indicators – attendance, productivity, discipline, disputes, claims
- How are you responding?
- What are the costs, risks and benefits of leaning into the declining workforce?
- What help do you need from outside your organization?
  - Government
  - Education system
  - Other

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Labor Law Basics and Updates for Non-Union Employers

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Labor Law Compliance 101

- Federal law controls private sector employment
- Primary sources of authority:
  - › National Labor Relations Act (NLRA)
  - › Labor Management Relations Act (Taft-Hartley Act)
- NLRA enforced by:
  - › National Labor Relations Board – Political appointees; and
  - › Regional Offices – Region 1 – Boston
  - › GC plays significant role in setting Board policy
- NLRB oversees elections, and investigates and prosecutes unfair labor practice charges
  - › Cases brought by Regional Director or General Counsel

Labor Law Compliance 101 (*cont.*)

Section 7 of NLRA

- Employees have the right to:
  - › Organize, form, or join a labor union;
  - › Bargain collectively through their chosen representatives;
  - › Engage in "concerted activity for the purpose of collective bargaining or other mutual aid or protection"; and
  - › Refrain from all such activities

Section 8 of NLRA

- Employers may not:
  - › Interfere with employee's Section 7 rights; or
  - › Discriminate against employees who engage in Section 7 activity.

Section 7 – Organizing Activity

- Employees have the right to engage in organizing activity, including:
  - Discuss a union with co-workers
  - Solicit employees to sign union authorization cards during non-work time
  - Distribute union literature in non-work areas
  - Wear union buttons / shirts (absent non-discriminatory dress code rules)

Limits on Organizing Activity: Non-Solicitation and Non-Distribution Policies

- Employer may adopt and enforce a neutral policy against solicitation and distribution in the workplace
- Solicitation means asking or encouraging someone to support, join, or vote for (or against) union – more than just a discussion
- Policy cannot be discriminatory, i.e., must be applied equally
  - E.g. Cannot allow employees to solicit co-workers for membership in outside organizations but not for a union
  - Charitable solicitations are a gray area, but can be risky
- Policy must allow solicitation during non-work time, and must allow distribution during non-work time and in non-work areas (e.g. breakroom)
- Policy may not restrict all union discussion unless employer prohibits all non-work-related conversation (unlikely)

Section 7 – Protected Concerted Activity

- "Protected concerted activity" refers to group action by employees to try to improve pay and working conditions
  - Taking to co-workers about wages, benefits, and work conditions
  - Circulating petition to change policies
  - Openly talking about amount of salary
  - Refusing as a group to work in unsafe conditions
  - Talking with co-workers to employer or media
- Activity is "concerted" if engaged in with or on the authority of co-workers, not solely on behalf of single employee
  - Employees speaking to each other
  - One employee authorized to speak for others
  - One employee bringing group complaint to management
  - One employee seeking to initiate or induce group action – complaints made in group setting will often meet standard

Section 7 – Protected Concerted Activity (*cont.*)

- Activity loses protection if "egregiously offensive" or maliciously false
- BUT, employees are "permitted some leeway for impulsive behavior when engaging in concerted activity"
- Board law has often protected rude or uncivil behavior in context of PCA
  - Calling VP a "stupid f-ing moron"
  - Calling supervisor "an ass," using profanity, shaking finger in supervisor's face, and shouting "I can say anything I want!"
  - Calling owner an "f-ing crook," "asshole," "stupid"; telling owner nobody liked him and talked behind his back; threatened that owner would regret firing him
- More recent standard requires GC to show that employee was disciplined because of protected activity - General Motors (2020)
  - Employer can defend by showing it would have taken same action w/o PCA
  - Greater recognition of employers' right to insist on reasonable level of civility and prohibit abusive and offensive conduct

Section 8 – Interference - TIPS

- Threats
  - › Adverse consequences for supporting union or engaging in PCA
- Interrogation
  - › Questioning employees about union support or activities
- Promises
  - › Promising benefits if employees reject union
  - › Soliciting grievances
- Surveillance / spying
  - › Checking emails for union activity; recording employees during organizing
- Prohibiting union discussion; prohibiting union insignia; prohibiting lawful solicitation / distribution

Section 8 – Discrimination / Retaliation

- Cannot discipline, discharge, or fail to hire employees due to Section 7 activity
  - › Consider Section 7 activity similarly to any other legally protected characteristic
  - › Be cautious when disciplining / terminating "whiny" employee
- Many ULP charges based on employees in non-union workplaces who are disciplined or terminated due to raising complaints
  - › Questioning employer's use of PPP funds to supplement wages
  - › Questioning employer's tipping policy during staff meeting
  - › Soliciting co-workers to sign statement against supervisor
  - › Discipline of vocal union supporter
- Beware of union "salts"

Impending Changes at the NLRB

- July 22, 2021 – Jennifer Abruzzo became GC
  - › GC plays significant role in setting Board policy
- 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

<u>Employer Handbook Rules</u>

- 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 Protected Concerted Activity

- **Definition of "concerted" –**
  - Alstate Maintenance (2019) – reversed precedent that complaints in group setting were per se concerted activity, and instead required evidence that employee was actually raising a group concern or intending to initiate group action, rather than just griping
- **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

General Counsel Priorities (*cont.*)

- **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
- **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

General Counsel Priorities (*cont.*)

- **Settlement Agreements –** GC Memo 21-07 (Sep. 15, 2021), GC Memo 22-06 (June 23, 2022)
  - › GC has directed Regional Offices to broadly consider harms caused by ULP and to ensure settlement agreements provide fullest relief possible
  - › Has made it significantly more difficult to resolve ULP cases – Region now insists on 100% backpay and benefits, plus reinstatement
  - › Require significant front pay (several months or more) in order to waive reinstatement
  - › Expanded non-monetary relief, including letters of apology, training, reading notice aloud

General Counsel Priorities (*cont.*)

- **Captive audience meetings** – GC Memo 22-04 (Apr. 7, 2022)
  - › Employers often hold mandatory meetings during union campaigns to provide information and opinions to employees about benefits of voting no
  - › Important tool for employers – unions win ~75% of elections
  - › Board has upheld employers' right to hold mandatory meetings for decades
  - › GC finds such meetings inherently coercive and wants Board to reverse precedence and hold them unlawful
  - › Filed case against Amazon on May 31, 2022

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