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# What To Expect When You're Expecting 2021

A Post-Election, Pre-Certification,  
Mid-Litigation Update

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# Firm overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.



# Practices

- Affirmative Action Compliance and OFCCP Defense
- Class Actions and Complex Litigation
- Collegiate and Professional Sports
- Corporate Diversity Counseling
- Corporate Governance and Internal Investigations
- Disability, Leave and Health Management
- Employee Benefits
- ERISA Complex Litigation
- General Employment Litigation
- Health Law and Transactions
- Immigration
- International Employment Issues
- Labor and Preventive Practices
- Non-Competes and Protection Against Unfair Competition
- Privacy, Data and Cybersecurity
- Wage and Hour
- White Collar and Government Enforcement
- Workplace Safety and Health
- Workplace Training

# **In 2021....**

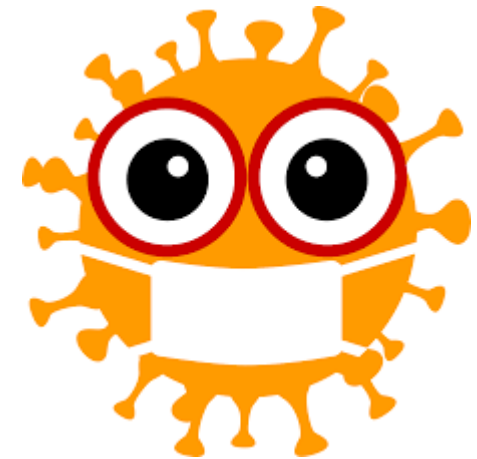
- **We will (very likely) have a new president**
- **We may or may not have a change in senate control**

**In 2021....**

- **COVID-19 will continue to affect the workplace**

# COVID-19 Considerations

- The constant considerations:
  - Employee leave,
    - Federal leave requirements, newer state leave laws
  - General workplace safety,
  - Work from home,
  - Layoff/furlough and recall
  - Hiring and retention
- Watch for changes in employer obligations related to leave, workplace safety and other benefits
- Extension of current COVID-related federal leave laws (EFMLA, Sick Leave)
- Potential increased leave benefits



# COVID-19 Considerations

- When an employee tests positive or is suspected of having COVID-19
  - Employee is excluded from the workforce pursuant to CDC standards
    - Differs depending on industry
    - Employers must check state and local orders
    - Generally: 10 days since symptom onset, 24 hours since resolution of fever, and other symptoms improved OR if employee has no symptoms – 10 days from positive test.
- When an employee tests positive
  - Engage in contact tracing
  - Identify anyone with “close contact”
  - Notify those with close contact (subject to confidentiality requirements)

# COVID-19 Considerations

- When an employee has “close contact” with someone who has COVID-19
  - “Close contact” – Within 6 feet or less for 15 minutes or more cumulative over 24 hours, *with or without masks or other source control measures*
  - Employee is excluded from the workforce pursuant to CDC standards
  - Generally: 14 days from last known date of exposure
  - Not required to honor doctor’s release or negative test result during the 14-day quarantine after exposure



# COVID-19 and OSHA

- Many OSHA standards related to protection of employees in the workplace
- COVID-19 is an OSHA recordable workplace illness if:
  1. COVID-19 positive test,
  2. Illness is “work-related,” AND
  3. The illness is otherwise recordable because it falls into *one* of the following categories:
    - (1) death,
    - (2) days away from work,
    - (3) restricted work or transfer to another job,
    - (4) medical treatment beyond first aid, or
    - (5) loss of consciousness
- “Work related” = If, after a good faith inquiry into the cause of the illness, “the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.”

# COVID-19 and Workers Compensation

- This is a state law issue
- Generally, workers' compensation does not cover community-spread illness like a cold or the flu
- If COVID-19 exposure is caused by the nature of employment, more likely to be workers' compensation coverage (healthcare, first responders, residential care)
- Some states enacted legislation extending workers' compensation coverage to specific types of workers who contract COVID-19
- Other states, including California, have a rebuttable presumption that COVID-19 is a workplace injury requiring compensation
- Nebraska has no such law at this time

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# Vaccinations

- Several outlets report vaccine readiness for some populations as soon as December
- Can employers require employees to be vaccinated?
- Some states already prohibit employer-mandated vaccination
- In states that do not prohibit, remember:
  - ADA Reasonable Accommodations
  - Religious Accommodations
  - Collective Bargaining Agreements



# Should Employers Require Vaccination?

- Do you need to require if employees can get vaccinated to protect themselves?
- Workers comp/liability issues if employee has adverse reaction to vaccine
- Division/employee morale issue
- Litigation risk
- Both the EEOC and OSHA recommend encouraging, *not requiring*, flu vaccines

**In Case You Missed It...**  
**Changes in Marijuana and  
CBD Laws**

# CBD and Medical Marijuana



- Marijuana – Still a Schedule I Substance under the CSA
  - Minimal enforcement efforts on a federal level
- “Hemp” - No longer Schedule I Substance under the CSA
  - Cannot have more than 0.3% THC by dry weight
  - “CBD” products with 0.3% THC or less are “legal” BUT
    - FDA has not approved CBD products for medical purposes except a few prescription drugs
    - FDA has not approved CBD as a dietary supplement
    - FDA has not approved CBD to be added to food
  - Some evidence that CBD use could cause a positive marijuana test
  - Opens the door for possible ADA claims related to CBD

# CBD and Medical Marijuana

- South Dakota – Voters approved ballot measures addressing both recreational and medical marijuana. Effective July 1, 2021 – likely several months before the law is implemented
  - Medical marijuana users have the same rights under state law as they would have if they were prescribed a pharmaceutical medication as it pertains to: (1) interactions with a person’s employer; (2) drug testing by a person’s employer; or (3) drug testing required by state law
  - Employers are not required to allow employees to ingest or work under the influence of marijuana, but may not consider a medical marijuana patient to be under the influence solely because of a positive drug test that appears “in insufficient concentration to cause impairment”
- Voters in Montana, Arizona, and New Jersey also approved recreational marijuana. Mississippi will also have medical marijuana.



# CBD and Medical Marijuana

- Nebraska – Did not appear on Nov. 2020 ballot due to Nebraska Supreme Court ruling
- Iowa – Passed a medical cannabidiol law in 2020
  - Legalized “medical cannabidiol” for qualifying patients and removed THC cap of 3%.
  - Does not require an employer to permit or accommodate the use of marijuana in the workplace
  - Does not prohibit an employer from implementing policies restricting the use of marijuana by employees or establishing and enforcing a zero tolerance drug policy in accordance with the Iowa drug testing law or federal law

# Takeaways

- Don't assume a CBD user who tests positive for marijuana has no rights under the ADA or state law
- In Iowa/Nebraska - no legal obligations related to marijuana BUT there are some practical concerns with legal status in neighboring states (e.g., Colorado, South Dakota, Illinois)
- In South Dakota - review drug testing policies and procedures
  - Adverse action against medical marijuana patient will be a challenge (no established level of impairment for THC concentration)
  - Shift focus to fitness for duty - safety and performance are still valid areas of concern
- In all states, make the company's position on CBD and marijuana clear
- Drug testing required by federal law is not impacted (DOT, ATF)
- Expect ongoing state efforts to legalize medical and recreational marijuana. Biden Administration anticipated to support decriminalizing marijuana, possible rescheduling.

**Depending on Georgia...  
Anticipated Legislative and  
Regulatory Changes**



## Affordable Care Act - Texas v. California

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- The U.S. Supreme Court held oral arguments on 11/10/20
- Case challenges the constitutionality and ongoing viability of the ACA following the elimination of the penalty under the individual mandate
- The Court focused on 3 main issues: Standing, Severability and the Merits
- Based on the oral argument, it appears a majority of the Justices are inclined to allow the ACA to stand
- Decision to be released in the Spring
- It was not lost on the Court that a finding of unconstitutionality would result in tens of millions of Americans becoming uninsured in the middle of a pandemic and introducing chaos into the health insurance market.

# Healthcare - Biden/Harris Agenda

- Medicare – Lower Eligibility Age to 60 and broaden benefits to include dental and vision
- “Public Option” – like Medicare for all to compete with private plans.
  - In theory would leverage buying power of federal government and lead to lower costs
  - Would provide an alternative to employer-provided coverage and private plans
  - Very much a nonstarter unless GA runoffs for Senate both go Democratic
- Build on ACA –
  - Expand subsidies and affordability
  - Restore funding to ACA – including marketing for Marketplaces
  - Restore federal control over Marketplaces
  - Bipartisan support for ending surprise billing and lowering drug costs.

# Diversity & Inclusion

- Rescission of “Executive Order on Combating Race and Sex Stereotyping”
  - Restricted diversity and inclusion training, unconscious bias training for federal contractors
- Reimplementation of EEO-1 pay data reporting
- Equality Act
  - Prohibits discrimination on the basis of sexual orientation or gender identity
- Paycheck Fairness Protection Act
  - Places a higher burden on employers to explain gender-based pay disparities



# Proactive Steps

- Federal contractors – watch for rescission of the Executive Order and ability to reinstitute any D&I training place on hold
- Employers with EEO-1 reporting requirements, have a plan for reporting pay data
- Review any EEO/Anti-Discrimination and Anti-Harassment policies, consider adding prohibition of discrimination on the basis for sexual orientation and gender identity
- Consider an internal or counsel-driven wage assessment to locate and address any disparities along protected-class lines

# Biden Immigration Plan:



Undo Trump Executive Orders and Policies (does not require legislation)

- ❖ Reinstiate DACA
- ❖ Rescind Travel Bans
- ❖ Protect Temporary Protected Status and provide path to permanent residency
- ❖ Defund Mexico/U.S. border wall



## Modernize Immigration System (would require legislation)

- ❖ Path to legalization for 11M undocumented
- ❖ Reform work visas
  - Increase H1Bs but prioritize by wages
  - Increase seasonal workers and provide more flexibility
  - Increase ag workers and provide a path to permanent residency
  - Exempt STEM visas from quotas
  - Eliminate per-country caps on green cards and increase quotas for family/employment
- ❖ Encourage Entrepreneurs through special visas
- ❖ Allow cities/counties to petition for immigration visas to stimulate economic development





Reprioritize Compliance and Enforcement (does not require legislation)

- ❖ De-emphasize deportation of non-criminals
- ❖ Stop workplace raids
- ❖ Expand protections for undocumented workers who report labor violations

# Immigration – Between now and January 20, 2021 ...

- The Trump administration is pushing further restriction of the H1B program, which allows for immigration of highly-skilled foreign workers
- Limitations on eligible occupations, modification of wage requirements, stricter enforcement
- Scheduled to go into effect in December.
- If this occurs, it cannot be immediately rescinded without formal rulemaking

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# Independent Contractors

- The Protecting the Right to Organize (PRO) Act
  - Federal bill that includes the new California state standard for assessing independent contractors
  - Presumption that every worker is an employee unless they meet the “ABC test”
    - A – free from control and direction in the performance of work
    - B – **performs work that is outside a company’s usual course of business**
    - C - customarily engaged in an independently established trade, occupation, or business of the same nature as work performed
- Similar changes to DOL’s interpretation of independent contractor status.

# Joint Employer



- Potential return to Browning Ferris standard
  - Under current administration – FLSA implemented 4 part test the focuses on actual control:
    - Hires or fires the employee;
    - Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
    - Determines the employee’s rate and method of payment; and
    - Maintains the employee’s employment records.
  - Biden may return to Browning Ferris standard:
    - Focus on “reserved rights” and “indirect control”

# Proactive Steps

## Understand your independent contractor relationships

- Copies of contracts
- Nature of the work
- Supervision of the work
- Contractor's normal course of business

## Review third party outsourcing and vendor relationships

- Copies of contracts for temporary workers, outsourced services
- Understand the level of control exercised *and reserved*
- New contracts or contracts up for renewal – consider reviewing or revisiting language surrounding control

# Wage & Hour

- Federal minimum wage of \$15
- Elimination of reduced minimum wage for tipped employees
- Increase in the minimum salary to qualify as an exempt employee under the FLSA





# Paid Leave



- Extension of the Families First Coronavirus Response Act (expires 12/31)
  - EFMLA leave
  - COVID-related paid sick leave
- Twelve weeks of paid Family and Medical Leave
- Domestic Workers Bill of Rights Act
  - Provide domestic workers with right to overtime pay, paid sick leave, and meal and rest breaks
- Healthy Families Act
  - Employers with 15 or more: one hour of paid sick leave for every 30 hours worked
  - Employers with less than 15: above rate or at least 56 hours of unpaid sick leave

# Arbitration Agreements and Non- Competes

- Forced Arbitration Injustice Repeal (FAIR) Act
  - Would prohibit requiring pre-dispute arbitration agreements as a condition of employment
- Potential for further restriction of non-competition and non-solicitation agreements
- Requires Senate approval

# National Labor Relations Board

- President-elect Biden ran on a platform of strengthening worker organizing, collective bargaining, and unions.
- The PRO Act would significantly strengthen unions by: banning employer mandatory “captive audience” group meetings; requiring mandatory immediate collective bargaining days after a union becomes employees’ representative for 90 days and, if no agreement is reached, binding interest arbitration of contract terms; preempting states’ “right to work” laws; allowing “unfair labor practice” claims to be brought as civil actions in court; adding fines and liquidated damages (possibly six figures) as remedies for unfair labor practices; and adding personal liability for unfair labor practices for corporate directors and officers.
- PRO Act passed the house in February 2020.

# National Labor Relations Board

- Major changes from the NLRB will take some time
- NLRB – 5 Board members
  - 5-year terms; appointed by President, subject to Senate approval
  - Current Members
    - John Ring – Term ends Dec. 16, 2022
    - Marvin Kaplan – Term ends August 27, 2025
    - William Emanuel – Term ends August 27, 2021
    - Lauren McFerran – Term ends December 16, 2024



# Issues to Watch

- Under current NLRB, modification to work rules standards implemented by Obama Board
- Greater ability for employers to control non-employee access to property
- Attempt to rescind some of the election rules that provided for “quickie elections”
- NLRB issued joint employer regulations in February 2020. Partially struck down by New York court in September 2020.
- NLRB solicited input on contract bar doctrine (prevents decertification election except in limited windows before a union contract expires)

# Takeaways

- Potential for expansion of union rights through legislation
- Likely some NLRB decisions under Trump Board will be overturned if Biden secures Democratic majority of NLRB (i.e., late 2021 at the earliest)
- Now is a good time to take proactive measures
  - Union avoidance training
  - Climate surveys
  - Self-audit for areas of vulnerability (wages, benefits, safety/COVID)
  - Avoid broad employee conduct policies, especially with regard to confidentiality

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Thank **you.**