

JacksonLewis

# Foresight is 2021: The Year Ahead for Employers

Baltimore Association of Corporate Counsel  
December 10, 2020

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# How 2020 Started



# How 2020 Ended



# 2021??



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# About Jackson Lewis P.C.

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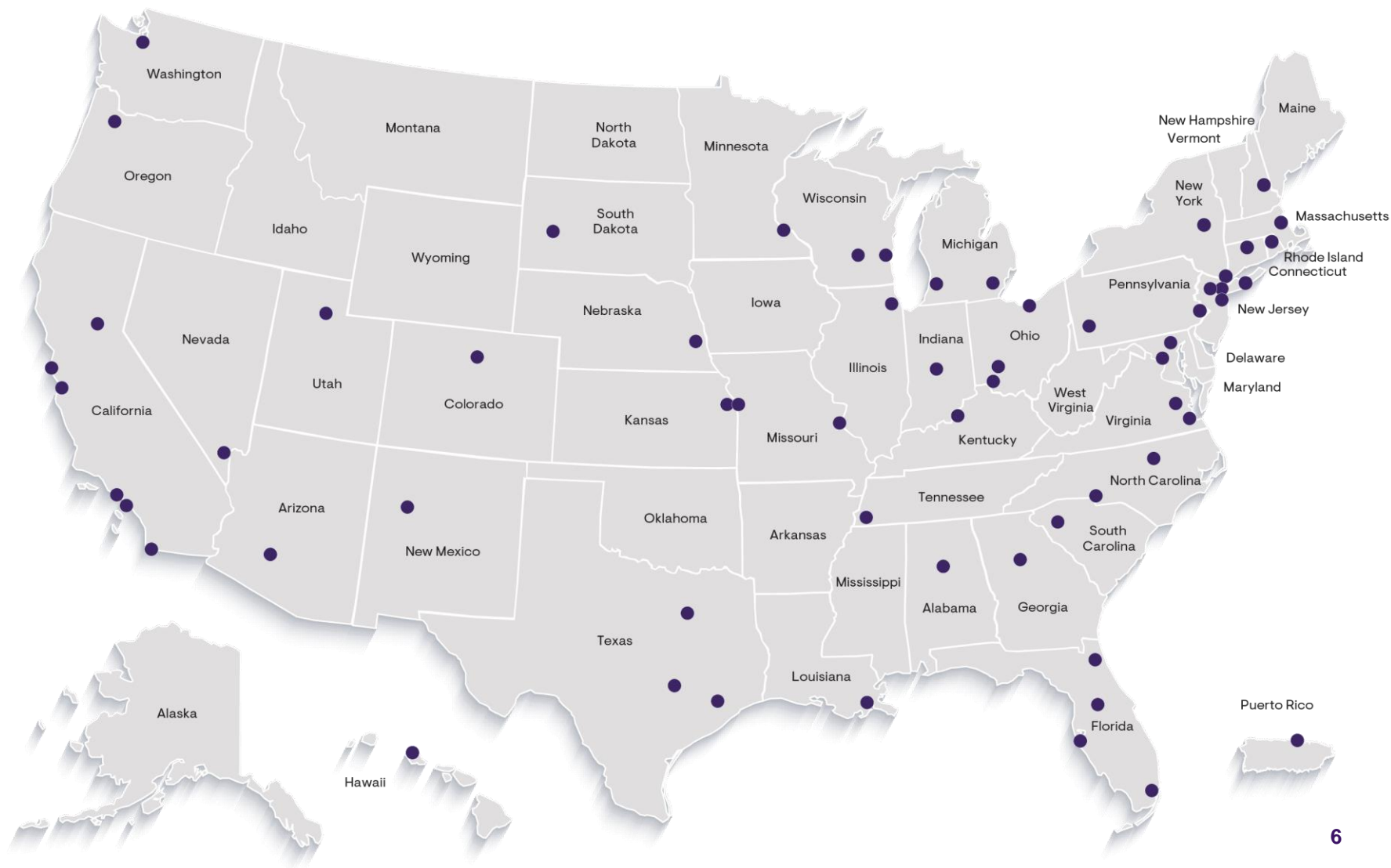
# Strategically located to serve employers' needs

61

Locations Nationwide

950+

Attorneys







# 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



# Industries

- Automotive
- Chemicals
- Construction
- Energy and Utilities
- Financial Services
- Government Contractors
- Healthcare
- Higher Education
- Hospitality
- Insurance
- Life Sciences
- Manufacturing
- Media
- Professional Services
- Real Estate
- Retail and Consumer Goods
- Staffing and Independent Workforce
- Technology
- Transportation





# Today's Agenda

- Crystal Ball 2021: What Does a Biden Administration Mean for Employers?
- Maryland Law Update: The ABC's of Mini-Warn and More
- COVID-19 Litigation Trends: Is Your Company a Potential Target?
- Diversity Concerns, Social Media, and Political Speech: Interactive Discussion on Best Practices and Risk Mitigation

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# **Crystal Ball 2021: What Does a Biden Administration Mean for Employers?**

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# OFFICE OF THE PRESIDENT ELECT

JOSEPH R. BIDEN, JR.





# Agency Expansion

- Increased funding for the EEOC, OSHA, OFCCP, and the U.S. Justice Department's civil rights division to increase the number of anti-discrimination investigators, litigators, and enforcement actions.
- Dramatic increase in the number of investigators in labor and employment enforcement agencies to facilitate an anti-misclassification effort.
- Direct the DOL to engage in collaborative enforcement partnerships with the NLRB, the EEOC, the IRS, the justice department, and state tax, unemployment insurance, and labor agencies.

# Federal Contractors

- Reinstate Obama Administration's Fair Pay and Safe Workplaces executive order, which Trump revoked.
  - Employers' compliance with labor and employment laws considered in determining whether they are sufficiently responsible to be entrusted with federal contracts.
  - Employers must sign neutrality agreements that they will not run anti-union campaigns before being granted federal contracts.
  - Employers must pay a \$15 per hour minimum wage and family sustaining benefits.
- Will likely revoke President Trump's "Executive Order on Combating Race and Sex Stereotyping" that restricts the federal government, federal contractors, and certain federal grant recipients from conducting specific types of diversity and unconscious bias training.



# NLRA Issues (*Important for ALL Employers*)

- Disciplining employees who have engaged in protected concerted activity.
- Confidentiality of Workplace Investigations.
- Joint Employer Status.
- Independent Contractor Definition.
- Protecting the Right to Organize Act.

# Immigration

- Expand ability of employers to utilize H1-B and similar procedures to bring in workers from outside the U.S.
- Revoke existing Trump Administration executive orders restricting immigration.
- Undo proposed Trump Administration rulemaking.
- Mandatory E-Verify for employers?



# Other Employment Issues

- Outlaw non-compete agreements except ones that are necessary to protect a narrowly defined category of trade secrets.
- Outright ban on no-poaching agreements.
- Extension of FFCRA leave benefits.
- Gig economy fight (administration priorities vs. CA vote).
- Expand ACA.
- Support for anti-arbitration agreement legislation.

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# **Maryland Law Update: The ABC's of Mini-Warn and More**

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# Maryland's Economic Stabilization Act: New Details

- Previously voluntary and ignored.
- Now applies to any relocation of a worksite or reduction of certain size for employers with 50+ employees in Maryland.
- Open questions surrounding update to law include:
  - Which third-parties to give notice to?
  - What benefits must be provided to separated staff?
  - Are mass layoffs that do not result in a shutdown of all or a portion of the business a qualifying event?



# Maryland's Economic Stabilization Act: Notice

- Who gets notice and what does it say?
  - Who?
    - All employees at the affected work site.
    - The employee representative, if unionized.
    - Maryland Workforce Development's Dislocated Worker Unit.
    - All elected officials in the jurisdiction.
  - What to say?
    - The name and address of the affected workplace.
    - A supervisor's name, telephone number, and email address to contact for further information.
    - A statement explaining whether the reduction in operations is expected to be permanent or temporary, and whether the workplace is expected to shut down.
    - The expected date when the reduction in operations will begin.

“During the 2020 legislative session, Senate Bill 780 passed into law and amended the Maryland Economic Stabilization Act under Article II, Section 17(c) of the Maryland Constitution - Chapter 407. The Department of Labor is actively working to develop regulations that facilitate the implementation of this new Act and expects that the regulations will be out for public comment in November 2020, with full implementation occurring by April 1, 2021. Until such time that regulations are available, the Department will not enforce full implementation of the Act. Should you have an interest in this topic, we encourage you to check the Maryland Register Online or contact our Department’s Dislocation Services Unit at [sheila.bouloubassis@maryland.gov](mailto:sheila.bouloubassis@maryland.gov).”

-<https://www.dllr.state.md.us/employment/warn.shtml>

# New Maryland Laws Now in Effect

- Prohibition on workplace discrimination based on hairstyles and textures commonly associated with race, as part of FEPA.
- Prohibition on use of facial recognition technology to analyze an interviewee's facial movements through artificial intelligence without a waiver.
- Expansion of the state's "equal pay for equal work" law to prohibit retaliation against an employee who inquires about their wages.
- Prohibition on asking job candidates for their pay history.

# Laws Effective In The New Year

- Maryland's minimum wage will increase to \$11.75/hour or \$11.60/hour, depending on employer size, effective January 1, 2021.
- Montgomery County has amended its Ban-the-Box law to expand protections for employees, effective February 19, 2021:
  - Now applies to all employers in the County.
  - Prohibits inquiries until after a conditional offer of employment.
  - Prohibits certain inquiries all together.

# Looking Ahead: Continued COVID-19 Consequences

- Maryland's General Assembly 2021 Session:
  - COVID-19: unemployment, business relief for certain industries, and liability protection, hazard pay, workplace safety standards.
  - Other issues: WARN, paid family leave.
- Continued rolling restrictions by state and counties based on surge.
- Return to work, but currently telework continues to be strongly encouraged throughout the state for all businesses.



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# **COVID-19 Litigation Update**

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# Litigation Statistics by Industry\*

TOP INDUSTRIES	TOTAL COMPLAINTS
Healthcare	285
Manufacturing	99
Retail and Consumer Goods	82
Transportation	72
Government	61
Hospitality: Restaurant	57
Professional Services	53
Construction	53

\*Source: Jackson Lewis P.C.'s COVID-19 Employment LitWatch. This material is provided for informational purposes only and is intended solely to inform the recipient about general litigation trends. It does not purport to contain an exhaustive list of COVID-19 related employment complaints. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

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# Litigation Statistics by Claim\*

TOP CLAIMS	TOTAL COMPLAINTS
Disability, Leave & Accommodation	431
Retaliation/Whistleblower	258
Discrimination/Harassment	160
Workplace Safety & Conditions	104
Wage and Hour	72
Contract	44
Traditional Labor	21
Other	11

\*Source: Jackson Lewis P.C.'s COVID-19 Employment LitWatch. This material is provided for informational purposes only and is intended solely to inform the recipient about general litigation trends. It does not purport to contain an exhaustive list of COVID-19 related employment complaints. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

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# **Diversity & Inclusion: Legal Considerations**

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# Diversity & Inclusion Best Practices

1. Create a Diversity & Inclusion Strategic Plan
2. Establish diversity goals for underrepresented groups
3. Designate Executive responsible for monitoring, tracking, and reporting progress against goals to CEO/Executive Leadership.



# Diversity & Inclusion Best Practices

## 4. Expand outreach:

- Use proven diversity-specialist recruiters;
- Ensure in-house recruiting team is diverse;
- Expand recruitment “reach” to minority-rich colleges/universities;
- Leverage internal referral sources such as Employee Resource Groups;
- Sponsor/participate in job fairs in minority/female-rich communities/events;
- Develop relationships with/leverage sources of external candidates (e.g., Urban League, National Black MBA Association).

# Diversity & Inclusion Best Practices

5. Review/revise job descriptions to eliminate irrelevant, unnecessary barriers.
6. Encourage diverse candidate slates (applicants), interviewers, hiring/promotions panels (and/or decision-makers).
7. Train/educate workforce on imperative of D&I.
8. Provide mandatory live unconscious bias training to all recruiters, hiring managers, and executives—or all workforce.
9. Ensure that all talent development processes—career/leadership development, succession planning, coaching, mentoring, sponsorship—expressly incorporate qualified minorities/females.

# D&I Initiatives Requiring Legal Review

1. Incentive compensation-dependent representation targets in executive/hiring manager performance objectives (but expressly maintain “best qualified” requirement).
2. “Rooney [or Mansfield] Rule”: Requiring minorities/females in candidate pools (but maintain “best qualified” requirement, and consider EEOC Uniform Selection Requirements).
3. Executive oversight and review of all hirings/promotions where no minorities/females were considered.

# Problematic D&I Initiatives

1. Using race/gender-exclusive selection processes, for example, minority-only candidate pools for select under-represented jobs; RIFs of white males only.
2. Establishing exclusive, minority/female-only succession planning, career development, mentoring, and sponsorship initiatives.
3. Expressly taking into account race/gender in individual decision-making for hiring, promotions, transfers, terminations, *etc.*

# Red Light/Green Light

1. Establish a Diversity Council to advance meaningful diversity actions.
2. Hold listening sessions for our minorities to tell us how to improve.
3. Require that all new candidate pools include at least one minority.
4. Hires for the next year **must include** 25% African Americans.
5. Improve our minority representation to 35% by 2022, and 40% by 2025.
6. Establish \$20,000 scholarships **for minority employees** to continue their educations.”

# POLITICAL SPEECH IN THE WORKPLACE

# What Kinds of Tough Conversations Might Come Up in the Workplace?

**Trump  
Said...**

**Football Players Kneel During  
the National Anthem**

**Black  
Lives Matter**

**Day Without  
Immigrants  
Protests**

**Tightened  
Border  
Control**

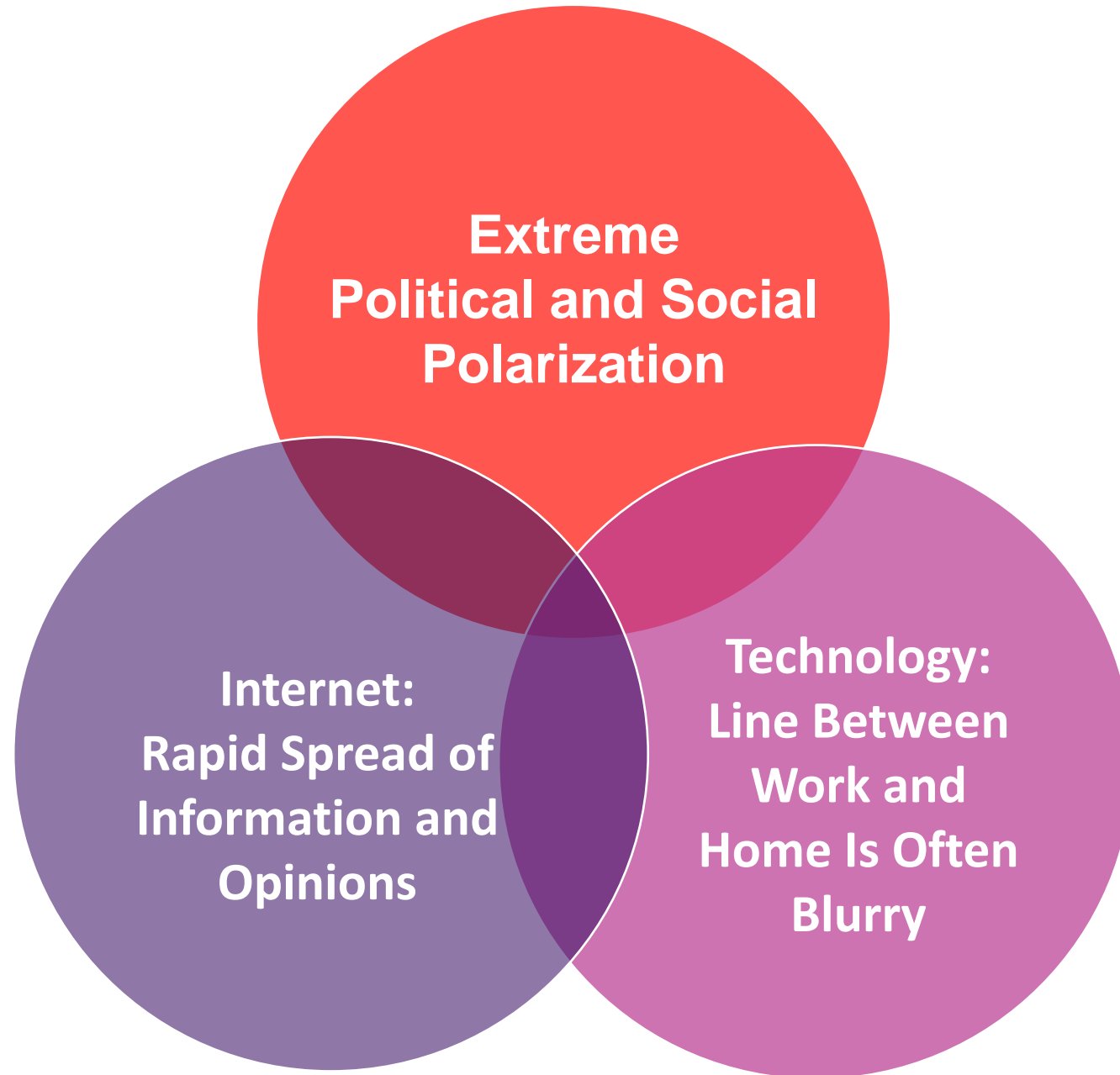
**Workplace  
Disputes Over  
COVID Spike**

**Biden Said...**

# How 2020 Started ... Continued In 2021

- COVID-19 crisis in the workplace.
- Remote working.
- Disability management/perceived disability.
- Return to office procedures.
- Racial tensions.
- Political tensions.
- Freedom of speech and expression.
- Home schooling/childcare issues.





# Why is This Important?

- Heightened sensitivity to political issues.
- Preserving harmony, inclusiveness, and efficiency.
- Possible public and customer relations issues.
- Potential harassment/discrimination implications.
- Applicability of federal and state laws that may protect certain types of employee speech or activities.



# The “Simple” Approach

- An employee’s focus at work should be job-related.
- If you are engaging in political dialogue or activities at work (or other non-work activities) that are keeping you or your co-workers from performing your job duties or distracting you from your job duties, you will be subject to disciplinary action.

# Pop Quiz

For which one of these actions could an employer lawfully discharge or discipline an employee?

- A. Placing a “Biden-Harris” bumper sticker on his car.
- B. Sending emails to her co-workers soliciting support for Joe Biden.
- C. Hanging political cartoons on his office door.
- D. Writing a blog at home stating her opinions about Donald Trump.
- E. All of the above.

# Can an Employer Intervene?

- Actions employers can take may depend on:
  - Whether you are a public or private employer
  - Where the employee works
  - Whether the workplace is union or nonunion
- Other considerations:
  - Applicable laws
  - Company policies and practices



# Four Critical Laws – #1: First Amendment

- “It’s a free country, I can say what I want.” Right?
  - First Amendment limits only the *government’s* ability to suppress speech.
- Private-sector employees generally do not have First Amendment protections in the workplace.
- No federal protection for private-sector employees’ political speech.
  - BUT, some states have laws protecting employees from discipline, termination, or other penalties based upon certain political or recreational activities.

## Four Critical Laws – #2: State Laws

Some state's laws make it unlawful for an employer to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual because of certain “political activities.”

# Four Critical Laws – #3: NLRA

## NLRA: Protected concerted activity

- Section 7 grants employees the right to engage in “concerted” activities for the purpose of “mutual aid or protection.”
- Non-supervisory employees' statements and actions concerning political issues and events may be protected by the NLRA if there is a sufficient connection to the workplace or to employees' terms and conditions of employment.
- Employers lawfully may restrict workplace communications and activities that are *purely political* in nature.
  - For example, communications generally touting a political party or candidate; displaying or distributing a "Vote for Candidate X" poster or campaign button.
- The line between unprotected "purely political" communications and NLRA-protected communications becomes blurred when the subject matter touches on wages, hours or other terms or conditions of employment.
  - For example, “A Vote for Candidate X Is a Vote for An Increase to the Minimum Wage!”



# Four Critical Laws – #4: EEO

Anti-discrimination laws protect against discrimination based on such factors as race, national origin, age, sex, etc.

- Immigration = National Origin
- Terrorism = Religion, National Origin
- Police Shootings = Race
- First female VP-Elect = Race, Gender, National Origin
- Pro-Life vs. Pro-Choice = Religion, Gender
- Black Lives Matter = Race
- Masks = Disability

# Setting the Stage: What Would You Do?

To: General Counsel  
From: SVP National Operations  
Re: Black vs. Blue Lives Matter  
Date: December 10, 2020

We have a brewing issue in our Maryland location. We've had two groups of employees exchanging microaggressions since we came back from COVID. One group supports Blue Lives Matter and the other group supports Blacks Lives Matter. Tonight, however, they got into a loud verbal altercation in the parking lot (***in front of customers***). What happened tonight can't happen again, it is going to hurt business. What can we do?

**SOCIAL MEDIA: Our  
Employee POSTED *WHAT* on  
Social Media !?**

# Social Media: the New Watercooler?



- Instantaneous communication.
- Comments made on social media are more permanent than a comment made at a meeting.
- Comments can be re-broadcast and spread, creating widespread embarrassment.
- Easier to misconstrue a Tweet, Snapchat or Facebook comment.
- Easier to post videos, photos, etc.
- Blurs the line between inside and outside of the workplace.

# Potential Business and Legal Implications of Social Media Posts

## Employer Concerns

- “Cancel” culture.
- Harassment and discrimination.
- Damage to reputations.
- Interference with job functions and workplace.
- Negligent hiring/retention.

# So What Should You do When Faced with a Viral Post by an Employee?

- Basic Principles:
  - Is the employee at-will or subject to an employment contract?
  - How did this post come to the attention of the company?
    - An employee complaint?
    - News media?
    - By accident?
    - Intentionally?

# So What Should You do When Faced with a Viral Post by an Employee?

- Step 1: Investigate
  - The information publicized may be one-sided or false.
    - Vet the source of the post and confirm the information posted.
  - Speak with the employee.
- Step 2: Consider how the employee's actions affect work.
  - Come to your own conclusion as an organization about the employee's actions and whether it violates company policy and/or expectations.
  - Are there outside or internal pressures to act?
- Step 3: Consider legal implications about this decision and actions.
  - Were the employee's actions protected?
  - Is this employee being treated consistently?



# Questions?



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Thank **you.**