



COLLISION INDUSTRY
CONFERENCE

Human Resources Task Force

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Employment Law Update

What's Hot?

- COVID (sorry....)
 - Vaccination Issues
 - American Rescue Plan Act & FFCRA
- Biden Administration
 - Key Appointments Affecting Employers
 - Key Policy Adjustments Affecting Employers

COVID - Vaccinations

- **Employers CAN mandate employees be vaccinated...BUT the legal realities complicate things...**
 - **Beware the vaccination pre-screening questions!** Cannot take adverse action against employee if they refuse to answer the questions...and the questions are required to get the vaccine.
 - If mandated, “job related and consistent with business necessity.”
 - If voluntary, the decision to answer the questions must also be voluntary.
 - Does not apply if third-party administers vaccine, BUT if the employee does not get vaccinated asking them “why?” may run afoul of ADA disability-related inquiry rules, and thus may trigger the “interactive process.”

COVID - Vaccinations

- **Employers CAN mandate employees be vaccinated...BUT the legal realities complicate things...**
- **Beware the religious accommodations requirements!** Cannot take adverse action against employee if they refuse to get vaccinated for religious reasons.
 - Title VII – VERY BROAD definition of “Religious or Sincerely Held Belief”.
 - Employer must provide “reasonable accommodation” unless it would pose an “Undue Hardship,” i.e., more than a *de minimis* cost or burden on employer.

COVID - Vaccinations

- **Employers CAN mandate employees be vaccinated...BUT the legal realities complicate things...**
- **What about other reasons that Employees refuse vaccination?**
 - They are waiting on more long-term data about side effects
 - They think the vaccine is a government science experiment.
 - They don't need a vaccine because they're taking a cow dewormer which will protect them from getting sick from COVID.

COVID - Vaccinations

- **Employers CAN mandate employees be vaccinated...BUT the legal realities complicate things...**
 - **Other Issues**
 - OSHA – New Regulations Coming Soon!
 - ***Wage and hour Issues***
 - Liability for Adverse Reactions to Vaccine
 - Unionized? Partner with your Union.
 - **Data Privacy/Security – including State Law**
 - Disparate Impact?
 - State law
 - **Post-Vaccination protocol adjustments – face coverings, social distancing, quarantining, etc.**

COVID – FFCRA & The American Rescue Plan Act

- Payroll tax credits extended to September 30, 2021 (see your tax advisor)
- Expanded Eligibility for Paid Leave
- Changes to EFMLA pay
- Anti-discrimination provisions for tax credit
- EPSL banks reset April 1, 2021

COVID – FFCRA & The American Rescue Plan Act

• Expanded Eligibility for Paid Leave

- When an employee is obtaining a COVID-19 vaccine
- When an employee is suffering or recovering from side effects of vaccine; and
- When an employee is seeking or waiting the results of a COVID-19 test if employee has either been exposed or employer has requested the test.

COVID – FFCRA & The American Rescue Plan Act

• Changes to EFMLA pay

- All 12 weeks of EFMLA can be paid
- EFMLA benefits expanded to include all of the reasons an employee can take EFMLA (not just school and childcare issues)
- Remainder 2/3 regular rate; capped at \$200
- Total cap increased from \$10K to \$12K

COVID – FFCRA & The American Rescue Plan Act

- Anti-discrimination provisions for tax credit
 - Employers may not choose to limit the categories of employees eligible for paid leave (highly compensated, full-time, based on tenure)
 - Applies separately to EPSL and EFMLA

- EPSL banks reset April 1, 2021
 - Employees get more EPSL, employers can get tax credits (see your tax advisor)

COVID – FFCRA & The American Rescue Plan Act

Other Parts of the Act

- Extensions related to Disaster relief, public health emergencies
- COBRA and ACA extensions and subsidies
- CARES Act Employee Retention Tax Credit Extensions

Biden Administration – Key Appointments Affecting Employers

- **Sec’y of Labor – Matt Walsh.** Confirmed. Union member since age 21, union president and head of multi-union coalition until becoming Mayor of Boston.
- **Deputy Sec’y of Labor (#2 in DOL) Julie Su.** Nominee. Former California Labor Commissioner – set policy and directed enforcement. Current head of California LWDA.
- **DOL Solicitor (Chief Legal Officer/Prosecutor) Seema Nanda.** Nominee. Various roles in US DOL Solicitor’s office during Obama Administration. DNC CEO. Noted civil rights advocate and prosecutor.
- **New EEOC Chair Charlotte Burrows.** Obama appointee to the five person committee (three Republican appointees, two Democrat appointees). Chair and Vice Chair are the two Democrat appointees.
- **New NLRB Chair Lauren McFerran (D).** Five person Board (three Republican appointees, one Democrat appointee, one open seat).
- **Where is this all going for employers?**

Biden Administration – Key Policy Adjustments Affecting Employers

DOL Enforcement Will Aggressively Pursue “Double Damages” in Wage Cases

- The FLSA includes provision giving DOL investigators and prosecutors discretion to seek “liquidated damages” when an employer fails to properly pay an employee.
- The amount of “liquidated damages” is equal to TWO TIMES the amount of back pay owed to the employee. Example: EE is owed \$10k in back pay, the liquidated damages would be an additional \$20k, for a total of \$30k.
- Often utilized inconsistently, especially during the Obama administration.

Biden Administration – Key Policy Adjustments Affecting Employers

DOL Enforcement Will Aggressively Pursue “Double Damages” in Wage Cases

- In June 2020 the WHD Director directed enforcers to curtail use of the liquidated damages provision, and to ***not assess them*** unless there was clear evidence of bad faith and willfulness on the employer’s, or if the employer had no prior history of violations.
- And, if an investigator decided double damages were warranted, they needed to first get approval from WHD Director and the DOL Solicitor (top level administration).

Biden Administration – Key Policy Adjustments Affecting Employers

DOL Enforcement Will Aggressively Pursue “Double Damages” in Wage Cases

- **April 9, 2021** -- USDOL revoked the Trump administration policy curtailing use of liquidated damages provision, ***now encourages its use*** except in cases “where employer has set forth credible evidence of a good faith defense,” or the where the regional solicitor “deems the matter inappropriate for litigation.”
- ***Decision-making authority*** on use of liquidated damages ***now vested in hands of regional solicitors or other designee.***

Biden Administration – Key Policy Adjustments Affecting Employers

Expansion of Federal Discrimination Protections

- Reinforcing recent SCOTUS decisions, Biden Executive Order directs federal agencies to interpret all federal anti-discrimination statutes prohibiting sex discrimination, such as Titles VII and IX, to protect against discrimination based on sexual orientation, gender identity, and gender expression.
- Stay tuned for more...!

Questions?

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