

HOT TOPICS IN LABOR AND EMPLOYMENT LAW

Thomas R. Revnew
Phone: (952) 921-4622
Email: trevnew@prkalaw.com

PRK&A | Peters
Revnew
Kappenman
Anderson
The Lawyers for Employers

Agenda

- Federal Agency Updates
 - ▣ Department of Homeland Security
 - ▣ Department of Labor
 - ▣ COVID-19 Updates
 - ▣ NLRB
- Federal Legislation

FEDERAL AGENCY UPDATES

Department of Homeland Security





Worker Audits

- Potential for decrease in Department of Homeland Security's Immigration and Customs Enforcement (ICE) audits through I-9 audits.
 - President Biden has indicated his intent to end workplace raids.
 - On February 18, 2021, ICE announced enforcement and removal efforts would be focused on threats to national security, border security and public safety.

Extension of Form I-9 Requirement Flexibility



- DHS and ICE have announced that they are extending the flexibility in complying with Form I-9 requirements due to COVID-19 through December 31, 2021.
 - This extension only applies to employers and workplaces that are operating remotely.

- Standard Form I-9 rules require the employer to review the employee's identity and employment authorization documents in person with the employee. This flexibility allows remote employers to inspect these documents remotely.
 - This policy does not change the fact that these documents must be inspected within three (3) days of an employee's first day.

 - Within three (3) business days after physical and in-person operations resume, all employees on-boarded using remote verification must go through an in-person verification of those documents. Employer should note COVID-19 as the reason for the physical inspection delay.

The Department of Labor (DOL)



Independent Contractor Status



- Employee v. Independent Contractor Determinations
 - In January, DOL announced final rule adopting the “economic reality” test effective March 8, 2021.
 - Two core factors: 1) the nature and degree of the worker’s control over the work; and 2) the worker’s opportunity for profit or loss based on initiative and/or investment.
 - Three lower impact factors: 1) the amount of skill required for the work; 2) the degree of permanence of the working relationship between the worker and the potential employer; and 3) whether the work is part of an integrated unit of production.
 - The Biden Administration froze the implementation of rules not yet effective, including the “economic reality” test, which was set to go into effect in May 2021.
 - Biden has advocated for a three-prong “ABC test” which defaults workers as employees.
 - The presumption can be changed by showing the worker: 1) is free from control and direction of employer in performing work; 2) performs work outside usual course of employer’s business; and 3) is customarily engaged in an independently established business or trade of the same nature as the work being performed.



Items That May Be Revisited



□ Joint Employer Test

- A rule put in effect last year to roll back a rule from the Obama Administration, the Joint Employer Test was intended to narrow the standard by which a company can be considered a “joint employer” for liability purposes.
- Revising or eliminating this rule will likely make more businesses liable for failures by franchisees or contractors to pay OT or minimum wage.
- Revisit your contracts with clients for possible issues on this topic.

COVID UPDATES

OSHA



Biden's COVID-19 Action Plan (Sept. 9, 2021)

- Vaccinating the unvaccinated:
 - Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly.
 - Requiring Vaccinations for all Federal Workers and for Millions of Contractors that Do Business with the Federal Government.
 - Requiring COVID-19 Vaccinations for Over 17 Million Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings.
 - Calling on Large Entertainment Venues to Require Proof of Vaccination or Testing for Entry.
 - Requiring Employers to Provide Paid Time Off to Get Vaccinated.

OSHA REQUIREMENTS

OSHA Requirements

- Biden directed the DOL's Occupational Safety and Health Administration ("OSHA") to develop a rule:
 - ▣ requiring all employers with 100 or more employees to ensure their workforce is either fully vaccinated or provides a negative test at least weekly.
 - ▣ It is estimated that this rule could impact 80 million workers.

Many Unanswered Questions:

- How will employers determine if they meet the 100 employee threshold?
- Who pays for weekly tests? Is that paid working time?
- What if tests are unavailable? Is a certain test required?
- Can employees opt-out of testing?

Challenges to ETS Process

- OSHA has only used ETS process nine times
 - ▣ Six of the standard were challenged with only one standard withstanding the judicial scrutiny.

- 24 State Attorney General Have expressed they will challenge the mandate.
 - ▣ The standard of “grave danger” is not met;
 - ▣ COVID-19 is not a substance, agent or hazard under the Act;
 - ▣ Grouping employers on basis of 100 or more employees does not meet the requirement that the standard be necessary to alleviate the damage

Preparing for the ETS

- Consider policies for determining employees' vaccination status.
- Consider policies for tracking weekly test results
- Consider what the response will be for employees who refuse to comply with the ETS
 - ▣ ADA/Religious accommodation?

EXECUTIVE ORDERS

Executive Orders

- On September 9, 2021, President Biden announced two executive orders in connection with his COVID-19 Action Plan:
 - ▣ Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (EO 14043).
 - ▣ Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042).

FEDERAL CONTRACTOR REQUIREMENTS

Federal Contractor Requirements

- On September 24, 2021, the White House’s “Safer Federal Workforce Task Force” issued new guidance regarding vaccination requirements for federal contractors.
 - Requires COVID-19 vaccination for all covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation.
 - Applies to federal contractors of all sizes (no exemption for small employers).
 - No testing requirements or options.
 - Contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors.

Covered Contracts

- Applies to a contract that:
 - is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 - is a contract or contract-like instrument for services covered by the Service Contract Act;
 - is a contract or contract-like instrument for concessions; or
 - is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

- Agencies are strongly encouraged to incorporate a clause requiring compliance with the vaccine mandate into contracts that are not covered or directly addressed by the current guidance.

Definitions

- **Covered contractor employee** – means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract **or** working at a covered contractor workplace.
 - This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.
 - Unless a covered contractor has a separate building for non-covered employees and can affirmatively determine that an employee will never come into contact with a covered contractor employee during the period of performance of a covered contract, all employees need to be vaccinated.
 - This would include interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Definitions

- **Covered contractor workplace** – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.
 - ▣ A covered contractor workplace does not include a covered contractor employee's residence.

Definitions

- **Fully vaccinated** – People are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine.
 - Current guidance does not require a booster.
 - Guidance could be updated to include additional information about the expiration of fully-vaccinated status (requiring some individual to be vaccinated again or receive a booster).

Requirements

- Requires vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation by December 8, 2021.

- The covered contractor must review its covered employees' documentation to prove vaccination status such as:
 - a copy of the record of immunization from a health care provider or pharmacy,
 - a copy of the COVID-19 Vaccination Record Card,
 - a copy of medical records documenting the vaccination
 - or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.
 - A digital copy of such records, for example, a digital photograph, scanned image, or PDF of such a record is acceptable proof.

Requirements

- Require masking while in covered contractor workspaces as outlined in the guidance.
 - In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions.
 - Exceptions for situations where a mask may get wet, high intensity activities where it may make breathing difficult, activities where a mask may create a risk to workplace health, safety or job duty.
 - In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask.
 - Check: <https://covid.cdc.gov/covid-data-tracker/#county-view> for information about community transmission **weekly**.
 - When the level of community transmission is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes those protocols recommended for areas of moderate or low community transmission.
- Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area

Requirements

- Designate a COVID point-person.
 - This person is responsible for communicating the required workplace safety protocols.
 - This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors.
 - This person is also responsible for ensuring that covered contractor employees comply with the requirements related to the verifying proper vaccination documentation.



COVID-19 Vaccinations Statistics (MN)

- 71.0% of 16+ years of age completed vaccine series
- 71.6% of 18+ years of age completed vaccine series
- 92.1% of 65+ completed vaccine series
- 3,282,820 with completed vaccine series

NLRB





Board Members

- Four Members Currently Sitting on a Five Member Board
 - Lauren McFerran (D), Chair
 - Term expires December 2024
 - John Ring (R)
 - Term expires December 2022
 - Marvin Kaplan (R)
 - Term expires August 2025
 - David Prouty (D)
 - Term expires August 2026
 - Gwynn Wilcox (D)
 - Term expires August 2023

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Recent Notable NLRB Decisions

- *Apogee Retail LLC d/b/a/ Unique Thrift Store*
 - NLRB overruled its former approach to investigative confidentiality rules that required an employer to make a case-by-case determination of whether confidentiality can be required in a specific investigation.
 - The NLRB's test for whether a facially neutral workplace rule would interfere with employees' rights now considers: (i) the nature and extent of the potential impact on NLRA rights; *and* (ii) legitimate justifications associated with the rule.

- *Caesars Entertainment Corporation d/b/a Rio All Suites Hotel and Casino*
 - Overruled *Purple Communications, Inc.* (2014) and determined that employers generally have the right to impose nondiscriminatory restrictions (including outright bans) on the use of employer-owned IT systems for non-work purposes.



Recent Notable NLRB Decisions

- *Other Areas of Possible Review:*
 - ▣ Employee status as independent contractors
 - ▣ Employee handbooks and rules
 - ▣ Arbitration agreements and class waivers
 - ▣ Weingarten rights for non-union employees
 - ▣ Expansion of “concerted protected activity”



FEDERAL LEGISLATION

Family and Medical Insurance Leave Act (FAMILY Act)

- The FAMILY Act aims to:
 - Provide paid leave benefits for public and private sector employees.
 - Including part-time employees.
 - Would apply to all size companies.
 - Provide workers up to 66% of their wages, capped at \$4,000 per month, for up to twenty (20) caregiving days per month, and up to sixty (60) caregiving days per benefit period.
 - Paid leave available under most conditions currently covered by the Family and Medical Leave Act (“FMLA”). Generally, where a worker is needed to care for a child, spouse, parents, or themselves.
 - Paid leave under the FAMILY Act is contingent upon several factors, and requires the worker to: (1) apply for benefits; (2) earn income during the previous twelve (12) months; (3) be covered by disability insurance benefits (as determined under section 223(c) of the Social Security Act); and, (4) complete mandatory waiting period.
 - Funded through payroll tax:
 - employees pay 0.2%, and,
 - employers pay 0.2%.

Family and Medical Insurance Leave Act (FAMILY Act)

- Impact on STD policies.
 - FAMILY Act benefits will be “coordinated, in a manner determined by regulations issued by the Commissioner”, with benefits received from temporary disability insurance or family leave insurance programs under any law or plan of a State.
- Impact on PTO policies.
 - “Nothing in this Act shall be construed to diminish the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan that provides greater paid leave or other leave rights to employees than the rights established under this Act.”
 - Otherwise, the text of the Act is silent on the impact it will have on PTO policies.
 - May require policies requiring PTO to be used when taking time off under the FMLA to be revised.
- Will not alleviate the requirement to follow FMLA and provide FMLA notices and paperwork.

Protecting the Right to Organize (PRO) Act



- Specific changes to the NLRA under the PRO Act include:
 - Codification of the “quickie” or “ambush” election rules that limit employees’ access and opportunity to consider information about the union seeking to represent them.
 - Elimination of the secret ballot election by imposing a “backdoor card check” and allowing for a majority of employees to “agree” to designate the union as their representative by signing an authorization card.
 - Expansion of the definition of “employee” and contraction of the definition of “independent contractor,” likely giving some independent contractors protections under the NLRA.
 - Prohibition of permanently replacing striking workers.
 - Requiring employer to allow workers to use the employer’s communication devices (e.g., computer, email, phones) to engage in collective bargaining or other organizing activities.
 - Expanding joint employer liability that could alter well-settled subcontracting practices in the construction industry.

Protecting the Right to Organize (PRO) Act



- Other specific changes to anticipate:
 - Eliminating “secondary boycott” protections that would allow unions to launch disruptive protests and pickets against any employer, even those having nothing to do with a labor dispute.
 - Permitting intermittent strikes and slowdowns that could devastate jobsite progress and production.
 - Requiring mandatory mediation in the event the employer and union are unable to agree to a collective bargaining agreement within the first 90 days of negotiations.
 - Prohibiting the use class action waivers by employers.
 - Allowing NLRB fines of employers who have engaged in unfair labor practices up to \$100,000 if found to have violated NLRA within preceding five years.
 - Hindering an employers ability to secure legal advice on complex labor matters.

OTHER NOTABLE TRENDS

Non-Compete/Non-Solicitation Agreements

Non-Compete/Non-Solicitation Agreements

- Protect the employer in the event the employee leaves the company and unfairly competes with the company by:
 - ▣ Soliciting the company's clients, customers, or vendors;
 - ▣ Soliciting the company's employees; and
 - ▣ Divulging or using the company's confidential information.

Non-Compete/Non-Solicitation Agreements

- Agreements must protect a legitimate business interest of the employer:
 - ▣ Customer relationships.
 - A non-solicitation agreement pertaining to social media should explicitly identify:
 - The form of social media sought to be restricted,
 - The colleagues or clients involved, and
 - The purpose behind the restriction.
 - ▣ Good will.
 - ▣ Confidential Information.
 - ▣ Trade Secrets.
 - The Minnesota Uniform Trade Secrets Act, and
 - The Defend Trade Secrets Act.
 - Ensure confidentiality agreements contain the necessary whistleblower disclaimer/immunity notice where appropriate.

Non-Compete/Non-Solicitation Agreements

- The agreement must be supported by consideration.
 - If possible, employee should be asked to sign the non-compete agreement before he/she joins the company.
 - A non-compete rolled out to an existing workforce must be accompanied with additional consideration to be valid.
 - Additional consideration may be:
 - Year-end bonus,
 - Salary increase,
 - Equity grant, or
 - Some other discretionary benefit.
 - Include a section in the agreement outlining the consideration.

QUESTIONS?

TOM REVNEW

952-921-4622

trevnew@prkalaw.com

THANK YOU!