

2021 EMPLOYMENT LAW AND LITIGATION FORECAST

December 8, 2020



YOUR WORKPLACE IS OUR WORK.®

Presented by

Lehr Middlebrooks Vreeland & Thompson, P.C.

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WELCOME TO OUR 2021 EMPLOYMENT LAW AND LITIGATION FORECAST WEBINAR

Please use the Q & A box to submit any questions and the chat box for general comments. We will do our best to answer any questions submitted through the Q & A box at the end of the webinar. If we do not get to your question, please contact the speaker separately.

HRCI and SHRM certificates will be sent in an email one day after the webinar to all participants.

AGENDA

- 1. FIRM OVERVIEW**
- 2. ELECTION SUMMARY**
- 3. LITIGATION AND LEGISLATION FORECAST**
- 4. DIVERSITY DEMANDS**
- 5. AGENCY UPDATE**
- 6. LABOR TRENDS**
- 7. MANAGING LAYOFFS AND RECALLS**
- 8. IMMIGRATION**
- 9. QUESTIONS AND ANSWERS**

INTRODUCTION AND FIRM OVERVIEW

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Lehr Middlebrooks Vreeland & Thompson, P.C.

Your Workplace is our Work®



- Founded in 1993
- Highest ratings from *U.S. News & World Report* and Chambers Guide to USA's Leading Lawyers for Business
- Four of our attorneys are in the Top 50 according to SuperLawyers
- The LMVT Team includes:
 - JW Furman, former EEOC Investigator and Mediator
 - Lyndel Erwin, former U.S. Department of Labor District Director
 - Jerome Rose, former EEOC Regional Attorney



Support We Provide

- Internal investigations
- Leadership/supervisory training
- Diversity and inclusion training/guidance
- Immigration
- Administrative investigations
- Litigation defense
- Benefits analysis
- Leave issues
- Policy development, handbook review
- Labor relations, union avoidance training

ELECTION SUMMARY

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Post-Election Analysis

- No “coattails” from President-elect Biden
- Republicans narrowed Democrats’ House majority – Democrats lost 8 seats, Republicans picked up 9 (222-206; 7 undecided)
- Republicans lost 1 Senate seat – now 50-48 (Jan. 5 – GA election)
- Trifectas – 15 Democratic, 23 Republican
 - D: CA, IL, NY
 - R: TX, FL



What Did Voters Say Regarding Workplace Issues?

- California: President-elect Biden won by 5.1 million; voters rejected repeal of state law prohibiting discrimination or preferences based on race, ethnicity, national origin or sex.
- Florida: President Trump won by 370,000; Republican trifecta; voters passed minimum wage increase to \$15/hour by 2026.

LITIGATION AND LEGISLATION FORECAST

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Litigation and Legislation

- FFCRA – Emergency FMLA and Emergency Paid Sick Leave
 - Sunsets 12/31/20
 - Possible Extension?
- Extended Unemployment Benefits
 - Sunsets 12/26/20
 - Likely extension



Litigation and Legislation

- Federal independent contractor law
- Federal non-compete preemption



Litigation and Legislation

- The Trump Judicial Legacy
 - Over 220 federal judges appointed
 - 3 Supreme Court Justices
 - 53 Court of Appeals judges – 30%
- COVID-19 Impact on the Courts
 - Federal civil cases down 10%
 - Employment cases down 12.9%



Litigation and Legislation

- FFCRA Retaliation Lawsuits
 - New protected status
- COVID-19 Safety Related Lawsuits
 - Duty to provide safe workplace
 - Disparate impact on minorities
- WARN Lawsuits



Litigation and Legislation

- Work from Home Issues
 - Fewer behavior related cases (harassment)
 - More wage and hour and pay issues
 - Implications for reasonable accommodation
- EEOC Backlog

DIVERSITY DEMANDS

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Employer Speech:

Training and Policies: How can employers talk about diversity?



Diversity & Inclusion Training

Generally Accepted Best Training Practices

- Regular training and regular discussion.
- Endorsement, attendance, participation by key executives (not just HR).
- Discussion of systemic and implicit bias.
 - Test yourself (implicit bias):
<https://implicit.harvard.edu/implicit/selectatest.html>
- Discussion of the burden of microaggressions.



Diversity & Inclusion Training

Even Better Practices

- Voluntary training and experiences: meetings, book discussions, engagement, continuing education, town halls.
- Involving managers in recruitment at diverse events.
- Formal mentorship models.
- Cross training and long-term cross-management; special project teams.
- Accountability for raise, promotion decisions.
- Reviews and targets for diversity of applicant pools.
- Diversity task forces.



Diversity & Inclusion Training

But wait (literally, just wait)!

- On September 22, President Trump signed an Executive Order forbidding federal contractors from conducting certain types of diversity training.
- Director Craig Leen has specifically said that teaching white fragility or white privilege would run afoul of this mandate.
 - Leen did okay recognition of the history of slavery and implicit bias training as long as it is not directed at any particular group.
- Effective Date: November 21, 2020.
- Likely Un-Effective Date: January 21, 2021.



Diversity & Inclusion Training

But wait (literally, just wait)!

“Does Executive Order 13950 prohibit unconscious bias or implicit bias training?”

“Unconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.

“Training is not prohibited if it is designed to inform workers, or foster discussion, about pre-conceptions, opinions, or stereotypes that people—regardless of their race or sex—may have regarding people who are different, which could influence a worker’s conduct or speech and be perceived by others as offensive.”

Source: OFCCP’s FAQ: <https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950>



Employee Speech:

How can private employers police employee speech?



Employee Political Action and Protest

Private Employer Rights

- To restrict all non-work-related speech on-the-clock.
- To restrict political speech specifically while employees are on the clock.
- To encourage political expression.
- To favor or permit certain expressions (e.g., to permit “Black Lives Matter” face masks but not “Stars and Bars” face masks).
- To discipline or terminate for speech that violates its rules and policies, even if the speech occurs off-the-clock.



Employee Political Action and Protest

NLRA Section 7 Employee Rights

- To take or discuss protected, concerted action related to working conditions.

This includes:

- Union activity as well as activity independent of unions.
- Petitions to change scheduling policies, equipment, etc.
- Asking co-workers about wages or discipline.
- Possibly participation in movements strongly associated with organized labor (ex: Day Without a Woman, Fight for \$15).

AGENCY UPDATE

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Department of Labor

- Trump Administration
 - Secretary Eugene Scalia - Employer and industry-friendly approach
- Biden Harris Administration
 - Expect aggressive regulatory actions and enforcement proceedings.
 - “Repeal and replace” Trump initiatives
 - Prioritize interests of workers
- Who will be in Charge?
 - Boston Mayor Marty Walsh, Bernie Sanders, Andy Levin, Julie Su, and others



Occupation Safety And Health Administration (OSHA)

- Due to COVID-19, workplace safety will likely be one of the biggest priorities of the Biden-Harris Administration.
- Development of COVID-19 emergency temporary standards:
 - Flexible performance-oriented standard?
 - Rules on ventilation, face coverings, occupancy limits, social distancing, cleaning, and notification
 - Model programs and training that employers can easily adopt



Occupation Safety And Health Administration (OSHA)

- Plans to bolster OSHA enforcement as part of their overall COVID-19 strategy:
 - Goal of doubling enforcement staff
 - More inspections and citations likely



Wage and Hour Division

- Aggressive enforcement strategy with increased funding and manpower
- Ambitious Regulatory Agenda:
 - Restore broad Joint Employer standards
 - Classify independent contractors
 - Raise overtime salary threshold
 - End opinion letters



Equal Employment Opportunity Commission (EEOC)

- Continued Republican Control:
 - Majority Republican appointees through 2022
 - Republican appointed General Counsel through 2023
 - Democratic Chair will be named
- What to expect in the short term:
 - Continued shift away from litigation
 - New guidance on religious discrimination
 - New conciliations rules
 - Rules on employer-sponsored wellness programs



Equal Employment Opportunity Commission (EEOC)

- If/when the Democrats gain the majority:
 - Revisit Trump-era changes
 - Wage data collection
 - More active enforcement
 - Sexual harassment guidance

LABOR TRENDS

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President-elect Biden:

- “I’m a union guy. Unions are going to have increased power. It’s not anti-business. It’s about economic growth.”
- “I will be the strongest labor president you ever had.”



The Biden Pro-Labor Agenda

- Abolish right-to-work laws
- Federal requirement for state and local government collective bargaining
- “Card check” instead of secret ballot election
- Shift independent contractors to employees, thus making them eligible to unionize



The Biden Pro-Labor Agenda

- Expand prevailing wage for federal contractors
- Quick elections
- The Protect the Right to Organize (“PRO”) Act
 - Private right of action
 - Protects illegal strikes/boycotts
 - Mandatory first contract

MANAGING LAYOFFS AND RECALLS

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Reduction in Force/Recalls

- Develop selection criteria
 - Seniority
 - Performance
 - Critical skill set
- Don't make assumptions about health risk



Reduction in Force

- Analyze adverse impact on EEO
- Consider severance options
 - Releases
- Voluntary RIF



Recall

- Again, don't make assumptions about health risk/interest
- How to handle the reluctant recalled employee?

IMMIGRATION

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COVID-19 I-9 Flexibility Provision

- Limited exception to physically reviewing original documents
 - Employers permitted to review video, fax, email, etc. version of documents
 - Note “COVID-19” as the reason for delay in physical inspection



COVID-19 I-9 Flexibility Provision

- Delay only, employers must still physically inspect the original documents
 - Must remember to review in the future
 - Segregate these I-9's
 - Add “documents physically examined on _____” in Section 2
 - How long? Exception continues until the end of the National Emergency or the end of multiple extensions of the exception. If the employer resumes normal operations, the remotely verified employees must present their documents within 3 days



Business Immigration – The Election

- President Trump was hostile to business immigrants in the name of “protecting” American jobs
 - Significant Filing Fee Increases
 - Increased Prevailing Wage threshold
 - More Difficult to Hire or Renew H-1B Employees, particularly new graduates
 - Approximately \$40,000/year increase for some entry-level IT positions



Business Immigration – The Election

- Altered “Specialty Occupation” Definition to restrict H-1B approvals
- Ridiculous Documentation Requirements for H & L visas
 - H1B denial rates increased from 6% in 2015 to 21% in FY 2019 and 29% in FY 2020
- Accomplished changes through executive orders and regulatory means (no new law or statute, really a policy matter)



Business Immigration – The Election

- Biden Administration
 - Anticipate rolling back some of the Trump Administration restrictions to pre-Trump levels
 - BUT, the Obama administration was not always considered “friendly” to business immigration
 - L visa scrutiny ramped up under Obama administration



Business Immigration – The Election

- Focus will likely be on DACA, asylum, refugee and other measures, rather than business immigration
- Anticipate court decisions setting aside the H1B wage rate, qualification and other restrictive measures will not be fervently challenged
- Likely End Result: More favorable pathway to recruit and retain qualified foreign national workers.



QUESTIONS AND DISCUSSION

*If you haven't already, please submit any questions
in the Q & A box.*



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