

The Employment Trends That Will Shape 2022



YOUR WORKPLACE IS OUR WORK.®

Presented by

**Richard I. Lehr, Albert L. Vreeland, II, Michael L. Thompson,
Whitney R. Brown and Lance W. Parmer**

Lehr Middlebrooks Vreeland & Thompson, P.C.

March 1, 2022

Your Workplace is our Work®



Copyright 2022 Lehr Middlebrooks Vreeland & Thompson, P.C. All rights reserved.
Reproduction or use of these materials, including for in-house training, without authorization of
the authors is prohibited.

1



Agenda

- Announcement: New Investigations Practice
- U.S. Supreme Court and Major Case Update
- The Workforce of the Future
- Unions: Best of Times, Worst of Times
- Wellness and Lifestyle Incentives and Surcharges
- Business Immigration Update
- Agency Updates

2

2



Firm Recognition

- Best in Bar – Whitney Brown
- NextGen BHM Law – Lance Parmer
- SuperLawyers Top 50:
 - Richard Lehr
 - David Middlebrooks
 - Al Vreeland
 - Mike Thompson
- *Chambers Guide to USA's Leading Lawyers for Business*
- *US News & World Report*
- Corporate International Global Alabama Labor Law Firm of the Year

3

3



4

WHO WE ARE



- ✓ ATTORNEYS
- ✓ FORENSIC ACCOUNTANTS
- ✓ CERTIFIED FRAUD EXAMINERS
- ✓ INSTITUTIONAL LEADERSHIP
- ✓ TRAINED EEOC INVESTIGATOR
- ✓ DIVERSE BENCH
 - Law Enforcement/Security
 - Information Security

EXPERT INVESTIGATION SOLUTIONS

5

INVESTIGATIVE SERVICES



- ◆ MALFEASANCE
 - ◆ Asset Misappropriation and Embezzlement
 - ◆ Corruption and Conflict of Interest
 - ◆ Breaches of Fiduciary Duty or Confidentiality
- ◆ EMPLOYMENT
 - ◆ Discrimination, Harassment
 - ◆ Retaliation, Whistleblowing
 - ◆ Compensation Audits, W&H
- ◆ CUSTOMER, STUDENT, CONSUMER COMPLAINTS
 - ◆ Discrimination, Harassment
 - ◆ Product Damage
 - ◆ Sexual Misconduct, Title IX

EXPERT INVESTIGATION SOLUTIONS

6



U.S. SUPREME COURT: A NEW JUSTICE AND CASES AHEAD

Albert L. Vreeland, II,
and Whitney R. Brown

7

7



New Supreme Court Nominee

Judge Ketanji Brown Jackson:

- Served as a judge on both federal trial (8 years) and appellate courts (2 years).
- Practiced with multiple large corporate firms.
- Also worked as a federal public defender.



8

8



Judge Ketanji Brown Jackson

Notable labor cases as a judge:

- Invalidated a Trump-era rule relaxing the timeframes for union elections
- Invalidated another Trump-era rule which loosened the mandatory subjects of bargaining for federal employees
- Criticized, however, by civil rights attorneys for her handling of a race discrimination class action against Lockheed Martin.

9

9



The Conservative Supermajority

- Skepticism of agency issued regulations
- Protection of individual religious views over group rights
- Narrow view of role of courts in enforcing rights

10

10



The U.S. Supreme Court Employment Case Decided This Term (Other Than Vaccine Mandate Decisions)

11

11



Computer Fraud & Abuse Act

Van Buren v. U.S.–

- Among other things, CFAA creates civil and criminal liability for those who wrongly access a computer or exceed their authorized access.
- Police officer used a database he had access to for an improper purpose.
- U.S. Supreme Court resolved a circuit split in deciding that the employee didn't violate the CFAA when he used a database he had access to with improper purpose. To have violated the CFAA, he'd have needed to have entered an area of the computer he didn't have access to.

12

12



Major Employment Cases Ahead: Employer and Employee Religious Expression

13

13



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- District Court (N.D. Tex.) decision that seems destined for Supreme Court review.
- Plaintiffs, including a church and for-profit “religious employer” sought a declaration that they and others like them could be exempt from and/or found not to violate anti-discrimination provisions of Title VII.

14

14



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- Suit included three claims related to an employer's religious exercise:
 - Religious Freedom Restoration Act (RFRA) compels exemptions to *Bostock*;
 - Free Exercise clause compels exemptions to *Bostock*;
 - Right of Association clause compels exemptions to *Bostock*;

15

15



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- With respect to the Church, the Court found that the Title VII religious exemption applied to potential non-religious (i.e., sex discrimination) claims. This deepens an existing circuit split. Court found the for-profit business was not entitled to assert the Title VII exemption.

16

16



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- With respect to Braidwood’s RFRA claim, the Court found that Braidwood showed that the EEOC required it to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions. The violation of convictions was punishable by EEOC enforcement, which could subject Braidwood to liability for backpay, compensatory damages, and punitive damages.
 - The Court found that the EEOC’s generalized interest in eradicating discrimination didn’t meet its burden to show a compelling interest.

17

17



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- With respect to Braidwood’s Free Exercise claim, the Court found that Title VII wasn’t facially neutral and generally applicable, making it subject to strict scrutiny, which the EEOC failed to meet by only generally citing to an interest in eradicating discrimination.
- Consistent with *Fulton v. Phila.*, a unanimous 2021 U.S. Sup. Ct. decision that the City of Philadelphia did not act neutrally when it failed to contract with Catholic Social Services for foster parent referral, because CSS wouldn’t certify same-sex couples.

18

18



Religious Expression & Work

Bear Creek Bible Church et al. v. EEOC –

- With respect to Braidwood's Free Association claim, the court found that as in the *Boy Scouts* case, there was no compelling interest in making Religious Business-Type employers hire and retain individuals engaging in conduct contrary to their expressive interests.
- Decided in N.D. Tex. (Amended Final Judgment issued 1/12/22)
- Appeal window closes 3/13/22.

19

19



Religious Expression & Work

Kennedy v. Bremerton Sch. Dist. -

- Kennedy, a high school football coach, prayed with players before and after games.
- His School District asked him to stop to avoid an Establishment Clause suit. He refused, and went to the media to support his cause.
- He was suspended.
- The district court and Ninth Circuit Court of Appeals sided with the School District.
- Cert. granted by U.S. Sup. Ct. on 1/14/22.

20

20



Major Employment Cases Ahead: More Issues About Sex and Gender

21

21




Bear Creek v. EEOC

Bear Creek Bible Church et al. v. EEOC –

- Suit included two claims related to whether certain rules about private sexual conduct and dress violated Title VII prohibition against sex (as defined post-*Bostock*).
- The Court held:
 - *Bostock's* interpretation of Title VII does not prohibit discrimination against bisexual employees;
 - *Bostock's* interpretation of Title VII does not prohibit employers from establishing sex-neutral rules of conduct that are adverse to “practicing homosexuals” and transgender people.

22

22




THE WORKFORCE OF THE FUTURE

Richard I. Lehr

23

23



Today's Workforce

- 42.4% of American adults are obese
- 18.6% difficulty walking and climbing steps
- 20.5% suffer from chronic pain
- 20.1% have high cholesterol
- 11.7% take drugs for nervousness and anxiety
- 9.1% take drugs for depression
- 44.6% of teens have unhealthy weights
- 21.2% of teens (ages 12 to 19) are obese. In 1994, it was 10.9%.
- Implications for employers: ADA, FMLA, Workers' Comp

Sources: Centers for Disease Control and Prevention; National Center for Health Statistics, 2021.

24

24



Tomorrow's Workforce

- Age 65 and older: workforce participation will increase to 9.6% by 2029.
- By 2029, 1 of 4 age 65 or older will work.
- Workplace injury frequency for those 65 and older increased each year for the past four years.
- 48% of the age 65 and older injuries are due to falls, slips and trips, the highest of any age group.
- Employees age 65 and older are sick/absent a median of 16 days/year; all age groups combined: 8 days.
- Implications for employers: ADA, ADEA, FMLA, workers comp.

25

25



UNIONS: BEST OF TIMES, WORST OF TIMES

Richard I. Lehr

26

26



Unions: Best of Times, Worst of Times

Best of times: According to Gallup, union approval rate among those surveyed is 68%, the highest since 1965. Why:

1. Unions are viewed on the “right side” of social justice and environmental issues.
2. Unions are viewed as a balance to “big business.”
3. COVID-essential worker pay disparity compared to executives.
4. The Biden administration.

27

27



Unions: Best of Times, Worst of Times

Worst of times: Union membership continues to decline.

1. Almost 94% of non-government employees do not belong to unions, according to the Bureau of Labor Statistics in a January 20, 2022 report.
2. Private sector membership dropped from 6.3% in 2020 to 6.1% in 2021. 33.9% of government employees are union members.
3. 14 million union members in total, split equally between government and non-government workforces.
4. Thirty percent of the 14 million union members nationally live in two states—California and New York.
5. Union membership in Alabama declined from 8% in 2020 to 5.9% in 2021.

28

28



Unions: Best of Times, Worst of Times

Worst of times: Union election win rates continue to decline. In 2021:

1. Unions won 61% of elections they requested, down from 65% in 2020, 69% in 2015 and 71% in 2011.
2. Why? Employees (1) don't think they need a union and/or (2) don't want to pay union dues.

29

29



WELLNESS AND LIFESTYLE INCENTIVES AND SURCHARGES: VACCINES, WEIGHT, TOBACCO USE AND BEYOND

Lance W. Parmer

30

30



Common Incentives

- Cash awards
- Gifts
- Raffle
- Paid time off
- Mandates
- Premium discounts & surcharges



31

31



Considerations

- Applicability
- Health Insurance Portability and Accountability Act (HIPAA)
- Affordable Care Act (ACA)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)
- Title VII
- Other state and local laws
- Compliance with one \neq compliance with the others!

32

32



Wellness Programs

- Wellness Programs vs. other incentive programs
 - Different Purpose
 - Different rules and regulations
- Wellness program - A program instituted in connection with a group health plan intended to improve and promote health and fitness and help control healthcare costs through the use of incentives.
- Alternative to Vaccine Mandates
 - Mandates – prohibited by some states, can hurt moral and lead to terminations/resignations, medical and religious exemptions
 - Wellness Programs – promote vaccination and focus on addressing increased costs
 - Delta's vaccine related premium surcharge

33

33



ACA/HIPAA Wellness Program Categories

“Participatory”

- Participate and receive a reward
- Comply with HIPAA so long as the program is made available to all similarly situated individuals.
- No reasonable alternative must be offered
- Examples:
 - Fitness membership
 - Diagnostic testing program
 - Smoking cessation program

34

34



ACA/HIPAA Program Categories

“Health Contingent”

- Satisfy a standard related to a health factor to obtain a reward.
- Two types:
 - “Activity-based”
 - Earn a reward for performing or completing an activity related to a health factor
 - Examples: vaccination, walking program, diet or exercise program
 - “Outcome-Based”
 - Earn a reward for achieving a specific health outcome
 - Examples: Tobacco-free, BMI ≤ 30

35

35



Requirements for “Health-contingent” Programs

1. Annual Qualifying Period
2. 30 percent cap (or 50 percent for tobacco programs)
3. Must be designed to promote health and prevent disease
4. Must be made available to all
5. Disclosure and Reasonable Alternative Standard

36

36



Incentives under EEO Laws

- EEOC's 2016 Regulations on Wellness Programs
- 2021 EEOC Guidance on Vaccine Incentives:
 - “[U]nder certain circumstances employers may offer incentives to employees who receive COVID-19 vaccinations.”
 - Limit on value?
 - Administered by health care provider *not affiliated with the employer* – No limit
 - Administered by employer or agent – incentive may not be so substantial as to be coercive

37

37



Vaccine Incentives under ADA & GINA

- 2021 EEOC Guidance (cont.):
 - Information about an employee's COVID-19 vaccination is confidential medical information under the ADA
 - A request for documentation or other confirmation that employee or a family member has been vaccinated, is not an unlawful request for genetic information under GINA.
 - Mandates are permissible subject to reasonable accommodation
- Reasonable Accommodations
- Expect more to come...

38

38



BUSINESS IMMIGRATION UPDATE

Michael L. Thompson

39

39



Business Immigration Update

Pandemic Impact on Business Immigration

1. Offices closed
2. Travel restrictions
3. Relaxed Employment Authorization Standards
 - a. Some expired documents are acceptable
 - b. Virtual review of supporting materials for remote workers (temporary)

40

40



Business Immigration Update

FY 2023 H-1B Lottery

- Registration Open March 1st – March 18th (noon)
- \$10 fee / Minimal Information
- Selection Notifications – around March 23rd
- Selected Participants – file H-1B petitions within 90-day window
- FY 2022 – 308,613 Registrations (87,500 initial selections)
- 2nd chance (July) / 3rd chance (November) lotteries

41

41




Business Immigration Update

H-1B Action to Take Now: Identify Candidates

1. Recent Hires in OPT
2. Other visa status without dual intent or with limited extensions
3. Consider Alternatives for Non-Selected Employees

42


42



AGENCY UPDATES

43

43



NLRB Update: Biden NLRB Reverting To Obama-Era Workplace Rules

Lance W. Parmer

44

44



Political Pendulum

- **Obama Board:**
 - Employee friendly
 - Expanded employee protections, expanded coverage of NLRA
 - New rules on election procedures
- **Trump Board:**
 - Labor policy favoring employers
 - Overturned union friendly Obama-era rules
- **Biden Board:**
 - “I intend to be the most pro-union president leading the most pro-union administration in American history.”

45

45



Swift U-Turn

- The week of his inauguration, Biden forced out two Trump-era NLRB counsels and installed Democrat as chair.
- The following month, he nominated Obama alum Jennifer Abruzzo as general counsel.
- Nominated two additional Democratic members
- All of his nominees are former union lawyers
- Goal: to shift balance of power



46

46



GC Abruzzo's To-Do List

- Employer handbook rules
- Confidentiality provisions/separation agreements
- Expand scope of “Protected activity”
- Union access
- Employee status
- Duty to recognize/bargain

47

47



What Employers Can Expect

- More union charges and suits
- Expanded definition of “protected activity”
- Expanded definition of “employee”
- Additional scrutiny of employee handbooks and policies
 - employee confidentiality
 - non-disparagement
 - social media communication
 - civility rules
 - no-camera rules
- Additional scrutiny of private settlement agreements
- More requests for injunctive relief
- More to come...

48

48



OSHA Update: What's Next for the Agency's Approach to COVID-19?

Albert L. Vreeland, II

49

49



OSHA: What's Next for COVID?

- On January 13th, the U.S. Supreme Court put a “temporary” hold on the OSHA large employer ETS finding it beyond OSHA’s authority to issue emergency standards.
- On February 18th, the Sixth Circuit Court of Appeals put the final dagger in the ETS.
- Although possible that OSHA could attempt to issue a permanent rule, it is highly unlikely.

50

50



OSHA: What's Next for COVID?

- Secretary of Labor Marty Walsh announced that OSHA will use “**all available tools**” to protect workers from COVID exposure.
- Existing rules: respiratory protection, sanitation, and the general duty clause.
- OSHA frequently cross references CDC guidelines as the appropriate standard.
- Most likely to focus on precautionary procedures for employees who test positive.

51

51



OSHA: What's Next for COVID?

OSHA'S Inspection Priorities:

- Workplaces with COVID-related deaths
- Healthcare workplaces (e.g., hospitals, nursing homes)
- Prisons
- Close quarters work environments (e.g., meatpacking)
- Workplaces with high incidence of COVID-positive

52

52



OSHA: What's Next for COVID?

Healthcare: Last summer, OSHA issued a COVID ETS for healthcare employers – which expired before year end. OSHA has recently stated the expired healthcare ETS will be succeeded by a permanent rule in the next six to nine months.

ADA: Last week, a federal judge in Montgomery ruled that COVID-19 could potentially be a disability subject to the protections of the ADA (including the requirement of reasonable accommodation).

53

53



DOL Update: Enforcement Update Albert L. Vreeland, II

54

54



DOL: Interagency Cooperation

DOL's Wage and Hour Division and the National Labor Relations Board have entered into a "Memorandum of Understanding" to coordinate their enforcement activities. They will share information related to:

- unlawful denial of minimum wages or overtime pay;
- retaliation toward employees who exercise their rights;
- discriminatory failure to hire; and
- the "investigation of complex or fissured employment structures, including single or joint employer, alter ego, and business models designed to evade legal accountability."

55

55



DOL 2022 Enforcement Priorities

Number One: Worker misclassifications as independent contractors.

Next: Joint employer relationships – to give workers more options to collect back wages.

Also: Expect an attempt to raise the salary threshold for white collar exemption and/or to peg it to inflation.

56

56



EEOC Update: Charge Handling Statistics & Charge Handling Changes

Whitney R. Brown

57

57



Charge Handling Statistics

Contains	2000	2010	2018	2019	2020
All	79,896	99,922	76,418	72,675	67,448
Race	28,945	35,890	24,600	23,976	22,064
	36.2%	35.9%	32.2%	33.0%	32.7%
Race & Harassment	6,643	8,563	8,533	8,682	8,291
	8.3%	8.6%	11.2%	11.9%	12.3%
Sex	25,194	29,029	24,655	23,532	21,398
	31.5%	29.1%	32.3%	32.4%	31.7%
Sex Harassment	N/A	7,944	7,609	7,514	6,587
	N/A	8.0%	10.0%	10.3%	9.8%
Retaliation (All)	21,613	36,258	39,469	39,110	37,632
	27.1%	36.3%	51.6%	53.8%	55.8%
Disability	15,864	25,165	24,605	24,238	24,324
	19.9%	25.2%	32.2%	33.4%	36.1%

58

58



Charge Handling Statistics

Most Charge-Happy States Per Capita

State/Jurisdiction	Charges per 10,000 working population
Nevada	20.27
D.C.	10.67
Mississippi	9.07
Arkansas	8.25
Georgia	8.05
Tennessee	7.34
Pennsylvania	7.32
Alabama	7.15
North Carolina	6.96

59

59



Charge Handling Statistics

Administrative Resolutions - Race

Resolution	2000	2010	2018	2019	2020
All	33,188	35,890	24,600	23,976	22,064
"No Cause"	21,319	26,319	23,460	19,977	16,566
	64.2%	70.1%	76.8%	75.9%	72.9%
Cause	2,190	1,330	867	490	363
	6.6%	3.5%	2.8%	1.9%	1.6%
Merit Resolution (settlement, conciliation, withdrawal)	6,142	6,222	3,688	3,185	3,067
	18.5%	15.3%	12.1%	12.1%	13.5%
\$\$ Collected	\$61.7M	\$84.4M	\$71.3M	\$79.8M	\$74.8M

60

60



Charge Handling Statistics

Administrative Resolutions – Sexual Harassment

Resolution	2000	2010	2018	2019	2020
All	N/A	8,959	7,986	7,875	7,278
“No Cause”	N/A	4,551	4,501	4,297	3,716
	N/A	50.8%	56.4%	54.6%	51.1%
Cause	N/A	779	430	356	341
	N/A	8.7%	5.4%	4.5%	4.7%
Merit Resolution (settlement, conciliation, withdrawal)	N/A	2,322	1,819	1,792	1,908
	N/A	25.9%	22.8%	22.8%	26.2%
\$\$ Collected	N/A	\$41.2M	\$56.6M	\$68.2M	\$65.3M

61

61



Charge Handling Statistics

Administrative Resolutions – Disability

Resolution	2000	2010	2018	2019	2020
All	20,475	24,401	29,511	26,270	24,546
“No Cause”	11,431	15,182	19,902	17,383	15,689
	55.8%	62.2%	67.4%	66.2%	63.9%
Cause	2,121	1,186	1,234	980	836
	10.4%	1,186	4.2%	3.7%	3.4%
Merit Resolution (settlement, conciliation, withdrawal)	4,835	5,239	5,431	5,004	4,920
	23.6%	21.5%	18.4%	19.0%	20%
\$\$ Collected	\$54.4M	\$76.1	\$136.5M	\$116.1M	\$109.8M

62

62



EEOC Litigation Statistics

Suits filed by EEOC

Contains	2000	2010	2018	2019	2020
Merits Suits	292	250	199	144	93
Title VII	236	192	111	87	59
	80.8%	76.8%	55.8%	60.4%	63.4%
Disability	29	41	84	55	32
	10.0%	16.4%	42.2%	38.2%	34.4%

63

63



EEOC Litigation Statistics

Litigation Recovery by EEOC

Contains	2000	2010	2018	2019	2020
All	407	287	156	180	176
	\$52.2M	\$85.1M	\$53.6M	\$39.1M	\$106.1M
Title VII	315	199	82	96	99
	\$35M	\$74.0M	\$21.5M	\$25.8M	\$72.6M
Disability	53	60	55	78	58
	\$2.9M	\$2.9M	\$21.8M	\$8.5M	\$15.7M
Multiple Statutes	8	10	16	13	8
	\$0.4M	\$2.9M	\$6.3M	\$3.7M	\$1.5M

64

64



EEOC Charge Handling Changes

- Increasing dependence on electronic delivery.
- Eliminated “no cause” finding for the following weasel-wording:

The EEOC issues the following determination: The EEOC will not proceed further with its investigation and makes no determination about whether further investigation would establish violations of the statute. This does not mean the claims have no merit. This determination does not certify that the respondent is in compliance with the statutes. The EEOC makes no finding as to the merits of any other issues that might be construed as having been raised by this charge.

65

65



OFCCP Update: The Contractor Portal Whitney R. Brown

66

66



OFCCP – Contractor Portal

- OFCCP Contractor Portal will put OFCCP in possession of its own list of federal contractors and subcontractors.
- Requires registrants to certify their Plan status and that they will NOT edit their Plan during the Plan year.
- OFCCP's Carrot/Stick approach.
- Make no decisions until OFCCP's promised webinar in March on the verification step.

67

67



*Questions not covered in the
presentation may be submitted by
email to
dlajos@lehrmiddlebrooks.com*

68



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

Your Workplace is our Work®

www.lehrmiddlebrooks.com

*To subscribe to our employment law e-blasts,
e-mail dlajos@lehrmiddlebrooks.com with "subscribe" in the subject line.*