March 1, 2023

California DOL Becoming US DOL?
Migrant Child Labor/NLRB and Severance Agreements

Julie Su Nominated to become Secretary of Labor

As US Secretary of Labor Marty Walsh ends his tenure to become Executive Director of the National Hockey League Players Association, President Biden nominated Deputy Labor Secretary Julie Su to succeed him. Her confirmation is sure to be contentious, based on her record as California's Secretary of the California Labor and Workforce Development Agency. According to Tom Manzo, president of the California Business and Industry Alliance, "It appears failing upward is the new American dream. Julie Su was a disaster in California, presiding over a hostile approach to business owners and wide-scale unemployment insurance fraud." Estimates are that $20 billion was lost in California due to unemployment claims fraud during Ms. Su's tenure as Secretary. In 2021, the Senate by a 50-47 vote confirmed her for her current job as Deputy Labor Secretary.

What may employers expect under Ms. Su's leadership? Based on her California record, an increased focus on misclassification of employees as contractors, increasing the duties tests and salary levels for wage and hour exemptions, and extending workplace rights to those in the gig economy.

DOL/HHS Announce Joint Enforcement Effort to stop Child Labor

The Department of Labor stated that there has been a 69% increase in the illegal employment of children since 2018. During FY 2022, DOL investigated 385 companies that employed over 3,800 underage children. Added to this trend has been the migrant children from Latin America who arrive in the US without a parent. To combat the expansion of child labor/migrant child labor violations, DOL and HHS created a joint task force to share information and initiate enforcement proceedings. Investigations will be initiated in industries/locations where child labor violations are most likely to occur. Particular attention will be paid to staffing agencies, as employers claim they did not know the employees referred by the staffing agencies were underage. HHS will also establish a call center for unaccompanied migrant children to report safety concerns. DOL and HHS will ask Congress to increase penalties for child labor violations, which currently are $15,138 per child. Employers that use staffing agencies need contractually to specify expectations that the staffing agency referrals are an appropriate age for the work to be performed, and consider inserting clauses for indemnification, costs of defense, and other penalties if the staffing agency doesn't comply. In some jurisdictions and industries, 14-year-old children may be legal employees, in other locations and industries the employees need to be at least age 19. Know the standards for your state and local jurisdiction and type of business, and be sure the staffing company follows that as well.

NLRB Nixes "Keep Quiet" Severance Agreement Language
Disclaimer: What we're about to review does <u>not</u> cover severance agreements with managers and supervisors—those employees are excluded from coverage under the National Labor Relations Act. However, for most other private sector employees, the NLRB ruled that confidentiality requirements violated the NLRA, as it prohibited employees from speaking to other employees about terms and conditions of employment. The non-disparagement language the Board found fault with covered statements "to Employer's employees or the general public, which could disparage or harm the image of the Employer." The NLRB ruled that such language violated the NLRA, as it precluded employees from speaking to co-workers about the company. However, prohibiting disparaging comments to the public does not violate the NLRA. We can assist in the review of confidentiality/non-disparagement language in light of the NLRB decision, so that employers protect their interests in a manner consistent with NLRB expectations.

If you have any questions regarding DOL, NLRB, or migrant child labor, please contact Richard Lehr at 205-323-9260 or rlehr@lehrmiddlebrooks.com.