

Labor & Employment Law Developments 2021

Bob Dunlevey

*Board Certified Specialist
Labor and Employment Law*

rdunlevey@taftlaw.com

(937) 641-1743

Taft /

The Labor and Employment Law Climate

- Pro-Employee/Pro-Labor Initiative
- 32 Executive Orders/Legislative Proposals Abound
- Numerous Appointees to Labor Positions

The Labor and Employment Law Climate

- Regulations Frozen
 - Withdrawal of Rules Not Published/Postponing Effective Dates of Pending Rules 60 Days/30 Day Public Comment
 - Freeze on Revised Immigration + Visa Regulations, EEOC, NLRB
 - Payroll Audit Independent Determination Program – Self-Reporting Abolished
- Increased Employment Litigation
- Remote Work – Transition from COVID-19

The Protecting the Right to Organize Act

The “PRO” Act

- Organized Labor’s Wish List
- Undoes 85 Years of Labor Laws
- Redefines Definition of Employee
- Drastically Changes Collective Bargaining

DOL Independent Contractor Rule ABC Test vs. Economic Realities Test

- Trump Regulation Frozen – Effective March 8
- Allows for I.C. Benefits
- Core Factors
 - Emphasizing Workers' Control over Work/ Opportunity for Profit/Loss
- ABC Test – Presumption Not Independent
 - Work outside employer's usual course of business + customarily engaged in independent business

Joint Employer Liability

- Responsible for Acts of Others!
 - Franchisees, subcontractors, staffing firms, affiliated companies
- Trump Standard 2020 Struck Down by Democratic AG's Action
- Trump Appeal Will Be Abandoned
- Actual vs. Possible Control – Merely reserve right to control directly or indirectly
 - i.e., subcontract agreement gives right of prime to expel employee
- Biden to Propose Replacement Regulation

Right-to-Work

- 27 States Not Requiring Union Membership + Dues
- Abolishes Dues Obligations
- Attacks Financial Support for Unions
- 10.8% Unionized
 - Private sector – 6.3%
 - Public sector – 34.8%

\$15 Minimum Wage

- Executive Order for Government Contractors
- \$7.25 since 2009
- 29 States/53 Cities Enhanced Minimum Wage
- Phased in through 2026
- November 2020 – Florida \$15
- In 2019, only 1.9% of 82.3 million hourly workers earned \$7.25 or less

Wage-Hour

- Executive, Administrative Professional Exemption
- White Collar Salary Test – \$35,568 to \$47,476

\$684 vs. \$913 per week

National Labor Relations Act

- Enhanced Remedies for Discrimination and Retaliation
 - Consequential and Liquidated Damages
- Civil Penalties – \$50,000 to \$100,000
 - \$10,000 per violation
- Personal Liability – Corporate Officers
- Individual Employee ULP Suits – No Caps
- Captive Audience Group Meetings Forbidden
- Employee Communications via Workplace Systems Permitted

NLRB

- Picketing Permitted
 - Secondary/Jurisdictional/Recognitional
- Strikes Permitted
 - Intermittent/Slow Down/No Permanent Replacements
- Lockouts Forbidden
- Last Offer Not Installed Upon Impasse
- Compulsory First Contract Interest Arbitration for 2-Year Term

NLRB

- Quickie Elections
 - Union chooses method and place
- Micro-bargaining Units
- Mail-in Ballots
- Supervisor Definition Tightened
- Persuader Rule Broadened
- Contested ULP Election Decided by Cards

Workplace Safety – OSHA

- OSHA COVID Emergency Standard
 - 1/21/21 Executive Order Urges Guidance
- OSHA’s “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID in the Workplace”
 - “Should” vs. “Consider”
 - Employee + union involvement emphasized

Workplace Safety – OSHA

- Anticipated Standard 3/15/21
 - Hazard Assessment
 - Identify Measures to Limit Spread
 - Adopt Measures to Control Infected/Potentially Infected – Vaccine
 - Educate + Train
 - Publish Non-Retaliation Protections
 - Enhanced Face Mask Provisions

Equal Opportunity “Equity” Expansion

Equity vs. Equality!?

- All Agencies Review Barriers Within 200 Days
- Expansive Definition of Equity – “Consistent and systemic fair, just and impartial treatment of all individuals including persons in rural areas and persons otherwise affected by persistent poverty or inequality” (additional classes!)

Equal Opportunity “Equity” Expansion

Equity vs. Equality!?

- Paycheck Fairness Act
 - More Transparency in Wages (7 states)
 - Higher Standard than Equal Pay Act – Justification by Any Factor Other Than Sex vs. New Employer’s Burden for Bona Fide Job-Related Factors Other Than Sex
- LGBT Civil Rights Act Amendments for Sex-Based Discrimination

Employment Agreements

- Banning Mandatory Arbitration of Employment Disputes
- Forbidding Class Action Waivers
- Banning Non-Compete/Non-Solicitation Agreements

Paid Family Leave

- Extension of FMLA and EPSL
- 66% of Monthly Wages/12 Weeks for Health Conditions, Pregnancy, Childbirth, Adoption, Family Member's Injury or Sickness, Military Deployment

Immigration

- Expedited Green Card Eligibility for “Dreamers”
- Increased Penalties for Employers of Seasonal Workers Violating Laws
- Clearing Visa Backlog by Eliminating Per County Visa Caps
- Increase Total Annual Ceiling of Employment-Based Immigrants with Doctoral Degrees and STEM Exempted from Total

Construction

- Reserved Gate
- NLRB Jurisdictional Dispute Procedures – Injunctive Relief
- Hot Cargo Union Only Clauses
- Persuader Reporting for Multi-Employer Associations
- Apprenticeship
 - More flexibility than registered apprenticeships for training duration, ratio,s and approval process
 - One-half of all apprenticeship programs are already unregistered

Construction

- Multi-Employer Pension Plan Reform
 - Alternative plans – defined benefit plus annuity
- The American Rescue Plan
 - No Loan

Post-Pandemic Considerations

- Mandatory Vaccines Unless ADA Medical Conditions/Religious Beliefs
- OSHA Section 13 Right to Refuse to Work + Travel
 - Imminent Danger
 - Collect Unemployment if Employer “Not in Compliance,” i.e., Distancing
- Increased ADA “Work at Home”
 - Reasonable Accommodation
- Wage/Hour Claims for Homework

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Please keep in mind that new guidance is being issued by state and federal authorities on a daily basis, and the scope of every employer's legal obligations is changing constantly. As a result, statements in these slides may be qualified by subsequent developments.