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E-UPDATE

July 30, 2021

RECENT DEVELOPMENTS

President Biden's Vaccine Push: Paid Leave for Family Member Vaccinations and Federal Contractor Mandates

On July 29, 2021, President Biden announced additional efforts to increase COVID-19 vaccinations in the U.S. Of interest to employers, these efforts include (1) reimbursements to small and medium-sized employers to provide paid leave for family member vaccinations; and (2) certain vaccine-related mandates applicable to on-site federal contractors, with the intention of expanding those requirements to all federal contractors.

Expansion of Paid Vaccine Leave Reimbursements. Under the American Rescue Plan Act, employers with fewer than 500 employees could choose to provide paid leave, and get a tax credit, for employees to become vaccinated. President Biden has now announced that those employers may be reimbursed if they offer paid leave for employees to get their family members vaccinated.

Federal Contractor Vaccine Requirements. Onsite contractors will be required to attest to their vaccination status. Anyone who is not fully vaccinated will be required to wear a mask on the job, regardless of their location, practice social distancing from all others, comply with a weekly or twice-weekly testing requirement, and be subject to restrictions on official travel. President Biden has also instructed his team to apply similar standards to all off-site federal contractors as well.

The technical details of these initiatives have yet to be released. We will keep you updated on any developments.

DOL Officially Rescinds Joint Employer Rule, Expanding Pay Protection for Workers

On July 29, 2021, the U.S. Department of Labor issued a final rule rescinding the joint employer rule issued under the prior administration. With the rescission of the rule, the DOL returns to its prior approach, making findings of joint employer status – with the concurrent obligations for employers under the Fair Labor Standards Act – more likely.

Under the FLSA, several entities may be the joint employers of a single employee as long as they are "not completely disassociated" with respect to the employment of the employee. These joint employers are then jointly and severally liable for the employee's wages.

In 2016, the DOL under the Obama administration issued an Administrator's Interpretation (AI) in which it adopted an expansive "economic realities" test to assess joint employer status. (Although the AI is no longer on the DOL website, you can view it here). This test heavily favored the finding

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of such status. The Trump DOL, however, withdrew the AI in June 2017, and issued a new Final Rule in January 2020, as we discussed in our January 13, 2020 E-lert. This rule made findings of joint employer status to be less likely, including in franchise situations. The rule was challenged in court, and on September 8, 2020, a federal judge vacated a significant portion of the rule, as we covered in our September 10, 2020 E-lert. Following the change in administration, the Biden DOL then proposed to rescind the rule, as discussed in our March 2021 E-Update.

In rescinding the joint employer rule, the DOL states that it was concerned that the rule was contrary to the FLSA and Congressional intent, and inconsistent with prior DOL guidance. Moreover, the rule did not encompass all possible joint employer relationships. The DOL also rejected the rule's strict right-of-control test in favor of its prior "totality-of-the-circumstances economic realities standard that has generally been used by the courts." It also expressed concern about the negative impact on workers who would not be able to collect unpaid wages from a joint employer.

With the rescission of the rule, employers can expect the DOL to adopt the approach that was set forth in the prior AI, although that has not formally been reissued as of yet. In that AI, the DOL noted that the concept of joint employment under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act is "notably broader" than under the common law.

Like the now-rescinded rule, the AI discussed two types of joint employment relationships: horizontal and vertical. But the AI's analysis encompassed other factors and favored findings of joint employment, as follows:

Horizontal Joint Employment: Horizontal joint employment exists where an employee has two (or more) technically separate but related or associated employers – the focus here is on the relationship between the two employers, covering situations where:

- The employers have an arrangement to share the employee's services;
- One employer acts in the interest of the other in relation to the employee; or
- The employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

An example of this type of horizontal joint employment relationship is where the same owner owns separately incorporated restaurants, and the managers of the two restaurants share employees and coordinate scheduling together.

The AI set forth a non-exhaustive list of factors to be considered in evaluating the relationship between employers in horizontal joint employment cases:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?

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- Do the employers share supervisory authority over the employee?
- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

According to the AI, not all, or even most, of these factors must be present for joint employment to be found.

Vertical Joint Employment: Vertical joint employment exists where one employer (the intermediary employer) provides workers to another employer (the potential joint employer), and the workers are "economically dependent" on both employers. The focus of the analysis here is on the relationship between the worker and the potential joint employer. This type of relationship is typically raised with regard to staffing agencies, temporary agencies, independent contractors, third-party management companies, and labor providers.

With regard to vertical joint employment, the AI stated that the first inquiry is whether the intermediary employer is an employee of the potential joint employer. If so, then its employees are also deemed employees of the potential joint employer. If not, then the analysis turns to an evaluation of the employee's economic dependence on the potential joint employer. The AI set forth a non-exhaustive list of factors to be considered in that regard:

Does the potential joint employer direct, control, or supervise (even indirectly) the work?

- Does the potential joint employer have the power (even indirectly) to hire or fire the employee, change employment conditions, or determine the rate and method of pay?
- How permanent or lengthy is the relationship between the employee and the potential joint employer?
- Does the employee perform repetitive work or work requiring little skill?
- Is the employee's work integral to the potential joint employer's business?
- Is the work performed on the potential joint employer's premises?
- Does the potential joint employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance, or, in agriculture, providing housing or transportation?

Again, not all of the factors must be present for a finding of joint employment.

We would expect the DOL to reissue a version of this AI or provide other similar guidance at some point in the near future. Until that time, this information may be helpful as a general guide of how the DOL might address joint employer issues.

The White House, HHS and DOJ Assert that "Long COVID" May Be A Protected Disability

As part of its statement commemorating the anniversary of the Americans with Disabilities Act, the Biden-Harris administration released a package of guidance and resources to support individuals experiencing long-term symptoms of COVID-19 (i.e. "Long COVID"). Among this is joint guidance

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from the Health and Human Service's Office of Civil Rights and the Department of Justice, as well as a new webpage from the Department of Labor's Office of Disability Employment Policy, which offers resources on accommodations for long COVID.

DOJ and HHS Guidance. According to the guidance, the physical or mental impairments caused by long COVID may be disabilities under the ADA and other federal disability laws, if they substantially limit one or more major life activities. These activities not only include bodily functions, such as respiratory or circulatory systems, but also broadly encompass routine activities such as caring for oneself, sleeping, eating, working, thinking, and much, much more.

The guidance reiterates the general principle that the term "substantially limits" should be interpreted broadly and not require extensive analysis. The impairment need not prevent or significantly restrict an individual from performing a major life activity, nor does it need to be severe, permanent or long-term. It may also be intermittent.

If a COVID "long hauler" has a disability, then they are protected by the ADA. This would entitle them to reasonable accommodations from their employers, as long as such accommodations do not pose an undue hardship. The guidance lists a number of federal agencies that have provided resources to assist businesses and other entities address the needs of COVID long haulers. Of relevance to employers, this includes the EEOC.

ODEP Webpage. This new webpage collects resources that the DOL has previously provided on COVID, including on accommodations for COVID long haulers, notably including a blog post on long-haulers and the ADA, which we previously discussed in our May 2021 E-Update.

Employers May Not Disparately Enforce E-mail Policies to Prohibit Union Activity

In a case applicable to unionized and non-unionized employers alike, the U.S. Court of Appeals for the D.C. Circuit found that an employer unlawfully discriminated against an employee under the National Labor Relations Act (NLRA) by reprimanding her for sending facility-wide e-mails seeking employee support for a union, supposedly in violation of the company's e-mail policy prohibiting the mass distribution of non-business e-mails.

Facts: In *Communications Workers of America, AFL-CIO v. NLRB*, in the context of union organizing activity, a customer service representative used the employer's e-mail system during her non-working time to send several mass e-mails soliciting her coworkers' support for the Union. In response, the employer first sent a center-wide e-mail directing employees not to send mass e-mails on the employer's work e-mail system for non-business purposes. The employer then disciplined the employee for violation of the prohibition on mass e-mails. The union filed an unfair labor practice charge with the National Labor Relations Board.

ALJ and Board Decisions: At the initial stage, an Administrative Law Judge found that the employer violated the NLRA by disparately applying company policies to union activity. Although the employer stated that it prohibits any non-business mass e-mails as disruptive and distracting, and that many employees found the e-mail disruptive, there was also evidence that other non-business mass e-mails, such as food in the break room or employee service milestones, had been permitted.

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The Board reversed the ALJ's determination regarding the use of the e-mail system for mass e-mails. The Board held that the relevant e-mails in this case are not the type of e-mails the employer permitted employees to send on its e-mail system – i.e., e-mails restricted to those with a "business purpose" – and were not in any way connected to union activity. Specifically, the Board noted that the employer never permitted e-mails either in favor or against a specific union or union activity. Moreover, non-business e-mails related to food in the break room and celebrating employee service milestones, "were not similar in character" to the employee's mass e-mails in this case.

D.C. Circuit Reverses the Board: A unanimous D.C. Circuit reversed the Board. First, the D.C. Circuit held that the employer never previously enforced any policy to prohibit employee mass e-mail communication regarding non-business subjects. Indeed, the evidence indicated that the employer permitted mass e-mail use for non-business purposes, even if those non-business purposes were unrelated to union activity. Thus, the employer failed to demonstrate a neutral application of its policy and therefore had discriminated against the employee's union activity. Further, because the employer announced a new rule – i.e., prohibition of mass e-mails for non-business purposes – in response to the employee's union activity, the e-mail and the subsequent reprimand of the employee constitute violations of the NLRA.

Takeaway: Notably, the Board under the Obama administration had taken the position that employers may not prohibit e-mail use for union activity, as set forth in the *Purple Communications* case. In *Caesar's Entertainment*, however, the Trump Board reversed *Purple Communications* and held "facially neutral restrictions on the use of employer IT resources are generally lawful to maintain, *provided that they are not applied discriminatorily*." This case provides a stark reminder to employers that the consistency of its responses to union-related and non-union employee conduct is measured not by whether it or the Board can identify some legitimate, union-neutral distinction *after the fact*, but by reference to policies the employer had in place and the reasons on which it in fact relied for the action challenged as discriminatory.

DOL Issues Proposed Rule Increasing Minimum Wage Rate for Federal Contractors

As we discussed in our April 2021 E-Update, President Biden signed an Executive Order (EO) increasing the minimum wage rate applicable to government contractors and subcontractors to $15 an hour – a significant increase from the current rate of $10.95. The U.S. Department of Labor has now issued a proposed rule to implement the EO, which, according to the DOL, will:

- "Increase the minimum wage for workers performing work on or in connection with covered federal contracts to $15 per hour beginning Jan. 30, 2022." This is an increase from the current, already escalated rate of $10.95 per hour that went into effect on January 1, 2021.

- "Continue to index the federal contract minimum wage in future years to an inflation measure." This measure is the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted) (CPI-W).

- "Eliminate the tipped minimum wage for federal contract workers by 2024." Currently, the applicable tipped rate is $7.65. Under the proposed rule, it would increase to $10.50 per hour

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beginning on January 30, 2022, further increased to 85% of the applicable minimum wage the following year, and phased out altogether by 2024.

- "Ensure a $15 minimum wage for workers with disabilities performing work on or in connection with covered contracts." Currently, employers who are certified by the DOL are permitted to pay a subminimum wage rate to workers with disabilities whose productivity is impacted by their disability.

- "Restore minimum wage protections to outfitters and guides operating on federal lands."

With limited exceptions, the EO will apply to: new contracts; new contract-like instruments; new solicitations, extensions, or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments entered into or renewed after January 30, 2022. The following arrangements are covered: procurement contracts for services or construction; services contracts covered by the Service Contract Act; concessions contracts; and contracts 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. In addition, the wages of the workers must be governed by the Fair Labor Standards Act, the SCA, or the Davis Bacon Act. Contractors will need to ensure that their subcontractors also abide by the requirements of the EO and the implementing rule.

The DOL is accepting comments from the public on the rule here, through August 23, 2021. The DOL will then consider the comments and may make changes to the proposed rule before issuing a final rule.

More on the Minimum Wage in the Mid-Atlantic

Although the federal minimum wage remains $7.25, most states in the mid-Atlantic region have implemented higher minimum wage rates. In addition to the proposed rule increasing the minimum wage for federal contractors, discussed elsewhere in this E-Update, there were several other relevant developments in July.

Delaware enacted a law that increases the minimum wage in steps from the current $9.25 to $15.00 per hour by January 1, 2025. The first increase comes on January 1, 2022, to $10.50 per hour. Employers are also required to display a mandatory poster, which is available here.

On July 1, 2021 the minimum wage in **Montgomery County, Maryland** increased to $15.00 per hour for employers with more than 50 employees, $14.00 for mid-sized and certain other employers, and $13.50 for small employers Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.

We also remind employers that many other states and local jurisdictions have minimum wage rates above the federal rate, including the following throughout the Mid-Atlantic region:

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- **Maryland**: $11.75 per hour. The required poster is available here.
- **District of Columbia**: $15.00 per hour, with a tipped wage of $5.00 per hour. The required poster is available here.
- **New Jersey**: $12.00 per hour for most employers, with seasonal and small (fewer than 6 employees) at $11.10 per hour, and agricultural employers at $10.44 per hour. The tipped wage rate is $4.13 (The tipped wage rate for tipped employees, together with any tip credit, must meet the minimum wage. Employers are responsible for making up any shortfall.) The required poster is available here.
- **Virginia**: $9.50 per hour. Virginia does not require a state minimum wage posting.
- **West Virginia**: $8.75 per hour. The required poster is available here.

TAKE NOTE

Warning - Attempts to Diversify Can Result in Liability for Race Discrimination. An employer's attempt to diversify its day shift by reassigning a Black employee to a less-desirable night shift resulted in a violation of Title VII, according to the U.S. Court of Appeals for the Sixth Circuit.

In *Threat v. City of Cleveland*, fire captains bid on shift assignments based on seniority, but the applicable collective bargaining agreement gives the City the right to transfer up to four captains to a different shift regardless of their preference. Following the bidding process, a day shift ended up being staffed only by Black captains. The City transferred one to the night shift and replaced him with a White captain in order to "diversify the shift." Following complaints of race discrimination and a rebidding process, the same employee again ended up on a day shift of all Black captains and was transferred to a night shift because of "diversity." The Black captains then sued for race discrimination under Title VII and state law.

In order to sustain a claim of race discrimination under Title VII, a plaintiff must establish that they were subjected to a "materially adverse employment action" because of their race. In this case, there was no question that the shift change was based on race, but the City argued that a shift change is not a material action. The Sixth Circuit, however, disagreed, finding that the shift change controlled when and with whom the employee worked, prohibited him from exercising his seniority rights, and diminished his supervisory responsibilities. Of particular interest, the Sixth Circuit acknowledged that it had previously and repeatedly held that shift changes were not adverse employment actions under Title VII. But it stated that those decisions did not create a categorical rule; rather context matters. It also clarified that an employment action does not require economic harm in order to be adverse for purposes of Title VII.

There are several lessons here for employers. The recent heightened attention to diversity in the workplace has caused some employers to engage in actions in pursuit of diversity that can, in fact, create liability for the employer under Title VII. Making employment decisions based on race is extremely risky and should be carefully considered and vetted with counsel. Moreover, in some jurisdictions, including the Sixth Circuit, an employment action does not necessarily require an economic impact in order to be considered "materially adverse."

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Rats! NLRB says Unions May Use Scabby the Rat to Target Neutral Employers. The National Labor Relations Board held that a union's use of a large inflatable rat – infamously known as "Scabby" and standing 12-feet tall with red eyes and claws – and banners targeting a "neutral" employer does not, without more, violate the National Labor Relations Act.

Scabby and other inflatables have been used by unions for decades. Typically, Scabby is raised on public property, and used to protest employers with which unions are having a dispute or even a "neutral" employer that merely does business with the employer that the union finds repugnant. For many years, the debate has raged between Board Republicans and Democrats over whether the use of Scabby is analogous to lawful handbilling or unlawful picketing. Republican General Counsels have taken the position that using inflatables was a symbol of a labor dispute and its display amounted to "signal picketing" (i.e. non-traditional forms of picketing) or other coercive conduct in violation of the NLRA.

In *Lippert Components*, the Union displayed Scabby and two banners near the public entrance of an Indiana trade show for four days. One of the banners criticized a manufacturer for alleged safety violations, while the other banner criticized a neutral supply company for doing business with the manufacturer. The neutral supply company filed an unfair labor practice charge with the NLRB alleging in relevant part that the Union's display violated the NLRA's prohibition on unions from threatening, coercing, or restraining a neutral employer where the objective is for the neutral employer to stop doing business with another entity.

In a 3-1 decision, the Board held that the Union's conduct did not violate the NLRA, in accordance with the Board's established precedent holding that displaying banners or an inflatable rat near the entrance of a neutral employer, without something more, does not unlawfully threaten, coerce, or restrain a neutral employer. The majority also agreed that the display did not constitute "signal picketing."

Many observers expected a majority-Republican Board to utilize this case to overrule the existing precedent, so the decision will come as a surprise to some. However, many also believed that such a decision would encounter turbulence before a circuit court when organized labor raised First Amendment issues. One thing is likely certain, though: unions will be emboldened by this decision, and Scabby (and other inflatables) will continue to be used to target neutral employers.

Too Short? Too Bad - Just Being Short Is Not a Disability. Unless the individual's lack of height – or other physical characteristic – is tied to a physiological disorder, the Americans with Disabilities Act does not apply, as the U.S. Court of Appeals for the Eleventh Circuit recently explained.

In *Colton v. FEHRER Automotive, North America, LLC*, the 4'6" employee was assigned to work at a table that was too tall for her. Her request for a shorter table or a step stool was refused. Her complaint to Human Resources was brushed off, and she was then terminated as "not a good fit" (perhaps literally?) for the company. She then sued, but the trial court dismissed her lawsuit for failure to state a discrimination claim.

The Eleventh Circuit affirmed the dismissal of her lawsuit, finding that she did not have a disability within the meaning of the ADA. Under the ADA, an individual has a disability if they: (1) have a

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mental or physical impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) are regarded as having such impairment.

In its regulations, the EEOC has defined "impairment" to mean "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems …" The EEOC has also issued further guidance that such impairments do "not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." And the Eleventh Circuit noted that even the U.S. Supreme Court has stated that employers are "free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment—such as one's height, build, or singing voice—are preferable to others."

In this case, the employee did not assert that her short stature was the result of any kind of physiological disorder. This deficiency was fatal to her claim under the ADA. And although she tried to invoke the "regarded as" prong of the disability definition, the Eleventh Circuit noted that the employer would have to regard her as having a physiological disorder, even if she did not actually have one. That was not the situation here.

Although the employee was not protected by the ADA, we want to remind employers that many state and local jurisdictions have discrimination protections for personal appearance, which would include physical characteristics such as height.

An Employee's Dissatisfaction Does Not Make The Employer's Response to Harassment Unreasonable. In response to a complaint of co-worker harassment under Title VII, an employer is required to take action that is "reasonably calculated to end the harassment." Whether the response is reasonable will depend on the circumstances and, as the U.S. Court of Appeals for the Sixth Circuit held, an employee's dissatisfaction with the employer's actions alone does not mean the response was unreasonable.

In *Doe v. City of Detroit*, upon returning from transgender surgery, an employee complained that her nameplate had been defaced. It was immediately cleaned and replaced. Two days later, a gift bag containing a phallic toy and harassing note were left for her. The employer collected handwriting samples, interviewed other employees, and reminded them that violations of the City's zero-tolerance harassment policy could result in termination, but was unable to ascertain the identity of the harasser. The employee requested a lock for her office door and to have a camera installed, but these were not immediately provided. Five months later, the employee reported receiving a threatening note. At that time, the police were notified and the requested lock was ordered. Two weeks later, however, she received another threatening note. She provided HR with the name of an employee she suspected of being the harasser, but there was no evidence to connect him to the events. At her request, she was moved to another office while the lock and security camera were installed. Several, but not all employees, were interviewed by HR, not including the alleged harasser. The employee was then informed by other employees that the suspected harasser had viewed her Facebook page and made disparaging remarks to his subordinates. HR found his conduct to be inappropriate, and he was suspended for three days and then moved to a different floor, at which point there was no further harassment. Following additional employment-related actions that the employee viewed to be retaliatory, however, the employee sued, alleging, among other things, that the City's response to her harassment complaints was "completely inadequate."

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The Sixth Circuit disagreed with the employee. The City had responded promptly and effectively to the nameplate incident by cleaning and replacing it, and to the gift bag incident by conducting an immediate investigation. The Sixth Circuit specifically noted that the fact the investigation did not identify the harasser did not make it unreasonable, nor did the employee's dissatisfaction with the "thoroughness" of the investigation. And while acknowledging that providing a lock and camera might have been reasonable steps, the Sixth Circuit asserted that "a harassment victim may not dictate an employer's action against a co-worker," and the employer's failure to take those steps (at least immediately) did not mean the employer was "indifferent" to the complaint, given the other measures it did take.

As for the threatening notes, the Sixth Circuit found the City's initial response of contacting the police and providing the lock to be reasonable. And although the City's limited investigation after the second note may have been inadequate, which would not have been reasonable, the City also took other actions that stopped any further harassment – and therefore its response, contrary to the employee's claims, was legally sufficient.

What this case emphasizes is that an employer need not comply with an employee's demands regarding its response to harassment. But the response should be reasonable, under the circumstances. This includes a prompt and thorough investigation, as well as other measures calculated to end any harassment.

"Piggybacking" on Another Employee's Charge of Discrimination? Before an employee can file suit for discrimination under federal law, they must first file a charge of discrimination with the Equal Employment Opportunity Commission (the "administrative filing requirement"). But there are times when an employee may "piggyback" on another employee's charge, as the U.S. Court of Appeals for the First Circuit recently explained.

In *Perez-Abreu v. Metropol Hato Rey LLC*, an employee filed an age discrimination lawsuit without complying with the administrative filing requirement. He attempted to invoke the so-called "single-filing" rule, which allows an employee to "piggyback" on a timely-filed charge made by a similarly-situated co-worker. Although the First Circuit declined to adopt the rule in the case before it, it noted that the Second Circuit had identified three versions of the rule: (1) the broadest test, which requires only that the claims of the non-filing employee and the filing employee arise out of the same circumstances and occur within the same general timeframe; (2) a narrower version, requiring that the charge gives notice of "class-wide" discrimination impacting a group of workers including the non-filing employee; and (3) the narrowest test, which requires that the charge not only gives notice of class-wide discrimination but also that the filing employee asserts that they are representing the class or others similarly situated. Different federal Circuits have applied different versions of this rule.

Additionally, the traditional single-filing rule only allows the non-filing employee to participate in a class action or join in a lawsuit brought by the filing employee. The Second Circuit, however, has recognized one situation in which such employee could file their own, separate lawsuit. While both Title VII and the Age Discrimination in Employment Act have a charge-filing prerequisite, only Title VII also requires the employee to receive a Notice of Right to Sue from the EEOC before being able to file suit. Since the ADEA does not have the requirement, an employee could piggyback on

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the co-worker's charge to file their own suit. Whether the Second Circuit's position would be adopted by its sister Circuits is unknown, however.

OSHA Revises Its National Emphasis Program. Through this program, originally issued in March 2021, OSHA focuses its enforcement efforts on companies placing the largest number of workers at serious risk of COVID-19 infection, and prioritizes employers who retaliate against whistleblowing employees. The program was revised in July 2021 to adjust the targeted industries, but continues to include healthcare as well as meat and poultry processing.

Healthcare inspections will be conducted in accordance with the new OSHA Emergency Temporary Standard, under a new directive, DIR 2021-02 (CPL 02), Inspection Procedures for the COVID-19 Emergency Temporary Standard. Non-healthcare inspection procedures will follow the Updated Interim Enforcement Response Plan (IERP). Changes to the IERP include the following:

- Enforce protections for workers who are not fully vaccinated.
- Stop exercising enforcement discretion for temporary shortage-based noncompliance with the Respiratory Protection standard.
- Stop exercising enforcement discretion for temporary pandemic-related noncompliance with other health standards.

Pennsylvania Employers Alert - Security (And Other?) Screening Time Is Compensable. The Pennsylvania Supreme Court recently held that workers must be paid for the time spent waiting in line and undergoing a security screening process. Of note, the principles in this holding have broader application and, in the context of the pandemic, would likely require Pennsylvania employers to pay for COVID-19 screening time.

In *In re Amazon.com, Inc.*, the Pennsylvania Supreme Court was asked to decide whether the time spent waiting for and undergoing a security screening is compensable time under the Pennsylvania Minimum Wage Act. In that case, hourly warehouse workers were required to undergo an anti-theft security screening process at the end of their shift, consisting of metal detectors, bag/personal item searches, and a secondary screening process if the metal detector was triggered.

This time was not compensable under federal law. Under the federal Fair Labor Standards Act, as amended by the Portal-to-Portal Act, activities that are preliminary or postliminary to the employee's principal activity, even if required by the employer, are not compensable. Rather, as the U.S. Supreme Court has stated, only those activities that are an "integral and indispensable part of the principal activities" – meaning the duties for which the employee was hired to perform – are compensable. Separately, pursuant to the *de minimis* exception to the FLSA, an employer is not required to compensate employees for insignificant and infrequent periods of time worked beyond the regularly scheduled hours.

The Pennsylvania Supreme Court, however, found that these federal rules do not apply to the Pennsylvania Minimum Wage Act – that the federal rules establish a "floor" and that the state law was intended to offer greater protections. First, the definition of "hours worked" under the state law includes all time that the employee is required to be on the employer's premises, which would include the mandatory screening time. Second, Pennsylvania law does not recognize the *de minimis* exception.

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Although this case dealt specifically with security screening, the principle that, under Pennsylvania law, employees must be paid for all time required to be spent on the employer's premises means that Pennsylvania employers likely must also pay employees for the time spent in COVID-19 screening when first arriving at work. Many employers implemented protocols that required employees to answer certain questions and/or undergo a temperature check before starting work. This time, according to the Pennsylvania Supreme Court's analysis, is likely compensable.

NEWS AND EVENTS

Honor – Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for U.S. – Employment, most recently for Q2 2021. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" in 2018 to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. This is the ninth consecutive quarter and tenth time overall that Fiona has received this honor.

Webinar – "The "New Normal" of Remote Work? What Employers Need to Know." On July 21, 2021, Fiona W. Ong and Parker E. Thoeni presented this webinar on behalf of hrsimple.com, the publisher of the Maryland Human Resources Manual and similar publications in other states. The webinar may be viewed here.

Article – Parker E. Thoeni and Lindsey A. White authored "Employer Mandatory Vaccination Policies in the Time of COVID-19: Practical Considerations for Employers, Particularly Those in Healthcare," which was published in the latest edition of the Maryland Bar Journal (subscription required).

TOP TIP: Masks Redux? What Employers Need to Know About the Latest Guidance for Fully Vaccinated Individuals from the CDC

As we discussed in our May 14, 2021 blog post, "Back to Normal for the Fully Vaccinated? What the CDC's Latest Guidance Means for Employers," the CDC had previously stated that fully-vaccinated individuals could essentially resume their pre-pandemic, maskless lifestyles, subject to applicable state or local mandates. But the CDC also stated that those individuals were still required to comply with workplace requirements. Given the rapid spread of COVID-19's Delta variant and the increase in cases, particularly in areas of low vaccination rates, the CDC has now revised its guidance. So what does this mean for employers?

As a general matter, the CDC's guidance is not mandatory; it consists of recommendations. However, compliance with the recommendations means that employers are also meeting their obligation under the General Duty clause of the Occupational Safety and Health Act to provide a safe workplace. We also note that OSHA has recently updated its non-mandatory COVID-19 guidance for the workplace, as discussed in our June 10 E-lert.

What are the rules now? Just as under the prior guidance, the revised guidance states that fully vaccinated individuals (meaning at least two weeks after the second/only required shot for the vaccine in question) may:

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- Participate in many of the activities that they did before the pandemic; for some of these activities, they may choose to wear a mask.
- Resume domestic travel and refrain from testing before or after travel and from self-quarantine after travel
- Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States
- Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings
- Refrain from quarantine following a known exposure if asymptomatic
- Refrain from routine screening testing if feasible

In addition, fully-vaccinated individuals should continue to:

- Get tested if experiencing COVID-19 symptoms.
- Isolate if they have tested positive for COVID-19 in the prior 10 days or are experiencing COVID-19 symptoms.
- Follow any applicable federal, state, local, tribal, or territorial laws, rules, and regulations

But what is new is that fully-vaccinated individuals:

- Should wear a mask in public indoor settings if they are in an area of substantial or high transmission (such areas are indicated on a CDC map). This includes much of the country, and most major metropolitan areas. Masking was not previously recommended in the previous iteration of the guidance. We note that the CDC does not define "public indoor settings." One reasonable interpretation is anywhere where the public (i.e. non-employees) has access, such as retail space but also reception areas and multi-employer building lobbies, for example. Another, more expansive but still reasonable interpretation may include internal common areas, such as conference rooms, bathrooms and hallways.
- May choose to mask regardless of the level of transmission, particularly if they or someone in their household is immunocompromised or at increased risk for severe disease (including older adults or those with certain medical conditions, like diabetes, obesity or heart conditions), or if someone in their household is unvaccinated.
- Should get tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until a negative test result. Testing and masking was not recommended in the previous iteration of the guidance.

What Employers Can Do. Oddly, the CDC's latest iteration of the guidance makes no reference to workplace mandates. Nonetheless, employers can still impose requirements in the workplace. With regard to those workplace requirements, please remember that state and local jurisdictions may still impose restrictions beyond what the CDC is allowing. Thus, it is critically important to check whether and what those state/local mandates may be before taking any of the recommended actions, consistent with the latest CDC guidance, set forth below.

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- **Workspace generally**: Most workplaces will have a mix of vaccinated and unvaccinated individuals. In areas of high or substantial transmission, where the workplace is also accessible to the public, the CDC recommends that all employees as well as vendors, clients or other visitors be masked regardless of vaccination status.

  Otherwise, in areas of low or moderate transmission or in non-public workspaces, vaccinated employees need not wear masks or observe social distancing protocols. However, even in these areas, the CDC still says that unvaccinated employees should continue to maintain all COVID-19 protocols generally, including masking and distancing. Additionally, in these areas, if all employees in a particular enclosed and non-public workspace are vaccinated, those employees need not wear masks or stay at least six feet apart – unless there is a state or local masking mandate that still applies to the workplace (or indoor spaces, more generally). Vaccinated vendors, clients or other visitors to the workplace also need not wear a mask, while unvaccinated ones should continue to do so.

- **Small group meetings**: As before, if all participants in a non-public, small group meeting have been vaccinated, they need not wear masks or stay at least 6 feet apart during the meeting. Although the CDC guidance permits vaccinated individuals to be within 6 feet of unmasked, unvaccinated ones, the guidance for unvaccinated individuals continues to emphasize the need for a mask and distancing, apparently even from vaccinated individuals. The best practice would be to require unvaccinated employees to continue to wear a mask when meeting with their vaccinated, mask-free colleagues.
- **Outdoor work:** The new guidance does not alter the previous recommendation that fully vaccinated employees working outdoors need not wear masks or socially distance from other employees, regardless of how many people are around or the transmission rate in their area. Again, unvaccinated employees should continue to mask, socially distance (where possible) and avoid large groups.
- **Lunchrooms**: If fully vaccinated employees wish to eat together, they can be permitted to do so. Arguably, unvaccinated colleagues could join them, although, as noted above, the CDC guidance for those individuals is to continue to observe measures such as masking and social distancing.
- **Business travel:** Employers can allow fully-vaccinated employees to resume business travel, both domestic and international. Domestic travelers need not test before or after travel, while international travelers must be tested before returning to the U.S., with testing recommended 3-5 days following return. Both domestic and international travelers need not quarantine following travel. Be aware that there may be additional testing and quarantine requirements imposed by the travel destination or local/state mandates, however. Employers should continue to try to minimize any required travel for unvaccinated employees. Moreover, employers should be thoughtful in responding to employee concerns about required travel – particularly for older employees or those with underlying health conditions, even if they have been fully vaccinated.

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- **Exposure to COVID-19**: The CDC states that if it has been more than two weeks since the employee was fully vaccinated, they need not quarantine. Exposed, vaccinated employees should still monitor for symptoms. But in addition, they now should get tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until a negative test result. Unvaccinated or partially vaccinated individuals should quarantine for at least 7 days with testing after 5 days, or for 14 days without testing.
- **Symptomatic Employees and Those Testing Positive:** Because the vaccine is not 100%, some vaccinated employees will still get COVID-19. Of course, if any employee develops symptoms of COVID-19 following exposure, they should isolate in accordance with the CDC's guidelines, seek a medical evaluation, and be tested. Those testing positive should isolate. Employees with symptoms or who have tested positive may be able to work remotely, or may need leave. If sick leave is available or mandated by state or local law – or FFCRA leave is available and allowed by the employer (through September 30, 2021) – they will be entitled to take such leave during the isolation period.
- **Reasonable accommodations**: Vaccinations do not eliminate the need to provide reasonable accommodations, if the employee has a disability. Thus, for example, employers should not be quick to assume that an employee with a condition that put them at higher risk of serious illness from COVID-19 no longer needs to telework following vaccination. Reasonable accommodations should always be considered on a case by case basis, and a disabled employee may still need to telework following vaccination, if the medical provider supports that requirement.

As we discussed in an earlier blog post, What to Do About Workplace Masking in the "Open" States, employers may implement and maintain current COVID-19 protocols that exceed what the CDC is recommending or that OSHA recommends or mandates. The CDC had previously noted that there may be higher risk – and consequently employers may wish to implement more stringent safety measures – where there are higher community transmission rates. It has now taken that responsibility out of employers' hands with its new guidance. But it had also identified other factors that may be relevant to this determination: higher community transmission rates; settings with more unvaccinated people; indoor settings with poor ventilation; inability to maintain social distancing; and activities that include shouting, physical exertion or heavy breathing, and the inability to wear a mask, among other things. (This particular observation is no longer part of the CDC guidance, but actually continues to be a useful part of the analysis for an employer assessing infection risk in the workplace).

In addition, as we previously noted, employers should realize that there may be resistance to stricter protocols from some employees, managers, and visitors, and be prepared to address that. Clear and specific communication about what the protocols are and why they are required is helpful. And an employer can usually discipline employees for failing to comply with stricter employer-mandated protocols.

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