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E-UPDATE

November 30, 2021

RECENT DEVELOPMENTS

Where Do OSHA's Vax-or-Test ETS and CMS' Vaccination Mandate Stand Now?

As employers likely know, the Biden administration has issued a number of vaccination mandates in various forms – all of which are subject to challenge by States and other interested parties. These include: (1) the Occupational Safety and Health Administration's Emergency Temporary Standard requiring employers with 100+ employees to require either vaccination or weekly testing (discussed in our November 4 E-lert); (2) the Executive Order requiring government contractors and subcontractors to mandate vaccination (discussed elsewhere in this E-Update); and (3) the Centers for Medicare and Medicaid Services' Final Rule requiring certain federally-funded healthcare entities to impose a vaccination mandate (discussed in our November 8 E-lert). At this time, the OSHA ETS has been put on hold nationwide, while the CMS rule has been stayed in ten states.

OSHA Suspends Implementation and Enforcement of Vax-or-Test ETS – For Now. Following the U.S. Court of Appeals for the Fifth Circuit's stay of the Occupational Safety and Health Administration's Emergency Temporary Standard (ETS) requiring employers with 100+ employees to require employees to be vaccinated or undergo weekly testing, OSHA has now stated on its ETS webpage that it "has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation." While this gives some breathing room as to the initial compliance deadlines of January 4, 2022 for the testing requirement, and December 6, 2021 for everything else, employers should not be too quick to assume that the ETS will never take effect.

As we discussed in our November 13, 2021 E-lert on the Fifth Circuit's stay, the various petitions challenging the ETS have been consolidated into a single matter that will be heard by the Sixth Circuit. On November 23, OSHA requested the Sixth Circuit to lift the Fifth Circuit's stay. Other parties asked the Sixth Circuit to transfer the matter back to the Fifth Circuit (which is not too likely). We expect the Sixth Circuit to move expeditiously on these requests and then on the merits. And regardless of how the Sixth Circuit rules, we expect the losing side to request Supreme Court review. There is plenty of speculation on how a (conservative) Sixth Circuit and (conservative) Supreme Court will rule, but there are no guarantees. Accordingly, larger employers should continue to monitor the situation as it develops.

The CMS Rule Is Stayed in Certain States. On November 29, 2021, a federal judge in Missouri stayed the CMS Rule – but only in the following states: Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. The judge found the rule to

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exceed CMS' authority. CMS may appeal the ruling to the (conservative) Eighth Circuit. At this time, the Rule will not take effect in the listed States for now, but it is in effect everywhere else. Thus, covered healthcare employers in States other than those listed must continue to plan for compliance with the vaccination deadline of January 4, 2022.

EEOC Expands Its COVID-19 Guidance to Address Retaliation

Throughout the pandemic, the Equal Employment Opportunity Commission has continuously updated its COVID-19 Guidance to provide employers with assistance on issues arising under the antidiscrimination laws that it enforces. This month the EEOC added a new section, simply reminding employers of the existing prohibition on retaliation against employees for exercising rights under these laws. This further supports the interagency initiative against retaliation, discussed elsewhere in this E-Update. As the EEOC notes, the key points are as follows:

- Job applicants and current and former employees are protected from retaliation by employers for asserting their rights under any of the EEOC-enforced anti-discrimination laws.
- Protected activity can take many forms, including filing a charge of discrimination; complaining to a supervisor about coworker harassment; or requesting accommodation of a disability or a religious belief, practice, or observance, regardless of whether the request is granted or denied.
- Additionally, the ADA prohibits not only retaliation for protected EEO activity, but also "interference" with an individual's exercise of ADA rights**.**

What is retaliation? The Guidance additionally explains that retaliation includes any employer action in response to EEO activity that could deter a reasonable person from engaging in such activity. Whether the action is retaliatory depends on the circumstances. Examples might include actions such as denial of promotion or job benefits, non-hire, suspension, discharge, work-related threats, warnings, negative or lowered evaluations, or transfers to less desirable work or work locations. It can also include actions that have no tangible effect on employment (e.g. reduced communication, exclusion from meetings, unreasonable deadlines, etc.), or even an action that takes place only outside of work. It does not typically include, however, "a petty slight, minor annoyance, or a trivial punishment."

Legitimate discipline is permitted. Additionally, the EEOC makes clear that employers may still discipline employees for legitimate reasons, even if they have asserted rights under the antidiscrimination. In the context of the current pandemic, "an employer may take non-retaliatory, non-discriminatory action to enforce COVID-19 health and safety protocols, even if such actions follow EEO activity (e.g., an accommodation request)."

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NLRB GC Says OSHA's ETS Will Require Unionized Employers to Bargain Over Implementation

On November 10, 2021 National Labor Relations Board General Counsel Jennifer Abruzzo issued a memorandum expressing her office's views concerning employer bargaining obligations related to OSHA's Emergency Temporary Standard (ETS) to Protect Workers from Coronavirus. Although the ETS is currently stayed (as discussed elsewhere in this E-Update), unionized employers must keep this guidance in mind if circumstances change. More specifically, if unionized employers hoped that the government's mandate would provide a blanket exemption from bargaining over the decision to implement the mandate, GC Abruzzo's memo indicates otherwise.

Briefly, unionized employers subject to the National Labor Relations Act (NLRA) generally have two types of bargaining obligations relating to employee terms and conditions of employment. First, a "decisional bargaining" obligation requires that the employer provide the union with notice of the proposed change to employee working conditions and an opportunity to bargain prior to implementing the change. Second, where an employer may be excused from a decisional bargaining obligation – because, for example, the CBA's management rights clause gives the employer unilateral authority on the subject, or because changes in the law require the employer's compliance – the employer may be required to bargain over the effects of the decision, or an "effects bargaining" obligation.

GC Abruzzo's memo states that the implementation of the ETS will create both decisional and effects bargaining obligations. Where the ETS provides an employer with discretion concerning implementation of the ETS, the employer will have a decisional bargaining obligation. Specifically, an employer will likely have decisional bargaining obligations on the following aspects of the ETS:

- **Vaccination or Weekly Testing -** Employers have the option of requiring that employees be vaccinated or submit to weekly testing. Thus, if employers wish to mandate vaccination, GC Abruzzo posits that the employer must first notify and bargain with the union before doing so.
- **Who Pays for Masking and/or Testing?** The ETS does not require that employers cover the cost for masks or weekly testing (but review your state and local laws for any such requirements). Accordingly, it is the GC's view that which party will bear the cost of testing is subject to decisional bargaining.
- **Type of Leave Used for Recovering from Vaccine's Side Effects –** Employers have the discretion whether to require employees to use sick leave or other paid time off (PTO) while recovering from the vaccine's potential side effects. If an employer wishes to require employees to use such leave, this would also be subject to decisional bargaining with the union. In addition, the cap on what constitutes "reasonable" PTO for employees experiencing vaccine side effects would also be subject to decisional bargaining.

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- **Contact Tracing and Treatment of Close Contacts to Positive Cases –** The ETS does not provide requirements for an employer to engage in contact tracing, or how it should handle removal of employees who are close contacts to individuals who have tested positive. Rather, employers are recommended to follow CDC guidelines. Thus, whether an employer wishes to remove employees who have been in close contact with positive cases is at the employer's discretion, and therefore may be subject to a decisional bargaining obligation. (Note: Most employers have had such policies in place since 2020, in which case such an established policy may excuse the employer from now being required to bargain over this subject. But, if an employer *changes* those requirements as part of the ETS implementation, GC Abruzzo would likely take the view that the employer must bargain over that change.)
- **Weekly Testing for Unvaccinated Employees –** The ETS leaves to the employer's discretion the details of weekly testing. Specifically, who administers the test, and where and when it is administered is a decision for the employer. But, again, it is GC Abruzzo's view that the decision over these details must be bargained with the union.

Now is an important time to remind employers that the decisional bargaining obligation continues until the parties reach agreement or a good-faith impasse. Thus, an employer does not necessarily need to obtain the union's agreement prior to implementation, provided the parties reach a good-faith impasse.

In addition, an employer may have an effects bargaining obligation over aspects of its implementation of the ETS. For example, if an employer requires vaccination, how the employer will treat unvaccinated employees – e.g., unpaid administrative leave until a date certain after which termination occurs – is one such subject that could be dealt with during effects bargaining.

For employers, there are important takeaways from GC Abruzzo's memo. Most notably, it is the NLRB GC's position that any element of ETS that permits employer discretion is subject to decisional bargaining with the union representing its employees prior to implementation. Given the broad array of subjects that provide employer discretion, employers should begin formulating and presenting proposals to the union prior to implementing the ETS. The NLRB requires that unions be provided with "reasonable" notice in advance of implementation, so employers should provide notice of its proposed implementation as soon as practicable.

Federal Contractor Update – the Minimum Wage Final Rule, Updates to the Vaccination Mandate and More

There have been several significant developments for federal contractors this month, including the issuance of the final rule implementing a higher minimum wage for certain federal contractors, further revisions to the vaccination mandate, an executive order requiring successor service contractors to offer employment to their predecessor's employees, and a proposal to rescind the Trump administration's religious exemption final rule.

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Minimum Wage Final Rule. As we discussed in our April 2021 E-Update, President Biden signed Executive Order 14026 (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 Department of Labor issued a proposed rule in July 2021 to implement the EO, and following an opportunity for public comment, has now issued a final rule. According to the DOL, the final rule:

- Increases the hourly minimum wage to $15 an hour for workers performing work on or in connection with covered contracts, beginning Jan. 30, 2022.
- Continues to index the federal contract minimum wage in future years to inflation.
- Eliminates the tipped minimum wage for federal contract employees by 2024.
- Ensures a $15 minimum wage for workers with disabilities performing work on or in connection with covered contracts.
- Restores minimum wage protections to outfitters and guides operating on federal lands.

With limited exceptions, the Final Rule will apply to new contracts, and renewals and extensions of existing contracts beginning on January 30, 2022. (Existing contracts will be subject to a $11.25 rate effective January 1, 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.

Updates to Vaccine Mandate. As federal contractors know, President Biden issued an Executive Order requiring the insertion of a clause into certain new, renewed and extended contracts that mandates compliance with Guidance issued by Safer Federal Workforce Task Force. The Guidance requires the vaccination of almost all of a contractor's employees – originally by December 8, 2021. However, the contractor deadline was recently extended to January 18, 2022.

In addition, there have been additions and changes to the accompanying FAQs for government contractors. Some of the more significant ones are as follows:

- For employees onsite at a federal location, prior to January 18, 2022, they must complete and carry a Certification of Vaccination form (unless the agency maintains this information). Employees who are not vaccinated must be able to provide proof of a negative COVID-19 test within the 3 days prior to entering the federal location (unless they are tested through the agency's testing program).
- After January 18, 2022, those onsite vaccinated employees will need to show only their government-issued personal identity verification (PIV) card.
- If a contractor can legally access an employee's vaccination records, the employee does not need to then provide separate proof of vaccination.
- Requests for accommodation do not need to be fully resolved before the employee begins at a covered workplace location.

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- If companies are considered corporate affiliates because one controls or has the power to control the other, or another company controls both, then employees of the affiliate will be considered covered employees if they perform work at a covered contractor workplace. In addition, the affiliate's workplace will be considered a covered contractor workplace if a contractor employee performs work there. In other words, affiliate employees in a shared workplace will be covered by the Guidance's requirements.
- Agencies will work with contractors who are addressing compliance challenges in good faith. But if the contractor is not taking steps to comply, significant actions, like termination of the contract, should be taken.

Service Contract Successors' Hiring Requirements. On November 18, 2021, President Biden signed an Executive Order on Nondisplacement of Qualified Workers Under Service Contracts, which the accompanying Fact Sheet states is intended to ensure a reliable supply of experienced and skilled workers on federal contracts. The EO requires that when a service contract expires, and a follow-on contract is awarded for the same or similar services, the successor contractor "will be required to offer jobs to qualified employees who worked for the previous contractor and performed their jobs well." Regulations to implement this EO will be forthcoming.

Proposed Rescission of the Trump Religious Exemption Final Rule. In the waning weeks of the Trump administration, the Office of Federal Contract Compliance Programs issued a final rule on religious exemptions for government contractors, which we discussed in our December 2020 E-Update. The rule was controversial in that it vastly expanded contractor religious defenses to discrimination claims – viewed as specifically targeting LGBTQ+ interests. The OFCCP is now proposing to rescind that final rule, and return to a case-by-case analysis under existing law. Interested parties may submit comments here through December 9, 2021. The OFCCP will then issue a final rule, which will undoubtedly carry through with a full rescission.

TAKE NOTE

The DOL's Relaunched EARN Website Provides Employers with Disability Resources. This month, the Department of Labor announced its redesigned Employer Assistance and Resource Network on Disability Inclusion website. According to the DOL, "The redesigned web site highlights four essential components of the employment lifecycle – recruitment, hiring, retention and advancement – and explores how including people with disabilities in each of these areas helps employers meet their workplace diversity, equity, inclusion and accessibility goals."

The website provides a number of resources related to disability inclusion, including online training courses, checklists, policy guides, videos and recorded webinars. It addresses topics such as workplace mental health, COVID-19-related employment issues, telework, federal contractor requirements and the benefits of neurodiversity in the workplace.

The DOL, NLRB and EEOC Join Together to Fight Retaliation. The three major federal agencies governing the workplace – the Department of Labor, the National Labor Relations Board, and the Equal Employment Opportunity Commission – announced a joint initiative to raise awareness about worker protections from retaliation for exercising their rights under federal labor and employment laws. According to the announcement, through Memoranda of Understanding, the

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agencies will collaborate to protect workers, educate the public, and engage with employers and other groups.

As the announcement notes, many workplace issues cut across multiple agencies. In the past, however, an investigation by one agency typically would not trigger involvement by other agencies. The new agreements, however, mean that an agency may inform another if it sees retaliation issues that fall within the other's jurisdiction. Employers may therefore face greatly expanded potential liability from governmental investigations.

NLRB GC Memo Addresses Protections for Immigrant Workers. The General Counsel of the National Labor Relations Board, Jennifer Abruzzo, issued a memo on November 8, 2021, emphasizing that undocumented workers are still entitled to the protections of the National Labor Relations Act. The memo sets forth actions to ensure the rights and remedies for immigrant workers under the NLRA. Among these include the following:

- The Board will seek immigration relief for witnesses and victims of unfair labor practices. This includes deferred action, parole, continued presence, U or T status (special visas/status for certain crime or trafficking victims), a stay of removal, or other relief as available and appropriate.
- It will certify applications for U or T visas/status for individuals who have been helpful to a NLRB investigation or litigation, and have suffered harm as a victim of a qualifying crime.
- Immigration-related threats and retaliatory actions in unfair labor practice cases involving immigration status or work authorization will be taken seriously.
- Board Agents will be flexible and empathetic in working with hesitant immigrant witnesses. This includes assuring them an individual's immigration or work authorization status is not relevant to the investigation and they will not be asked about it. It will also be flexible with meeting at neutral locations, providing bilingual materials and translators, and allowing for alternative contact information, among other things.
- Board Regions will tailor appropriate remedies. For example, if an employee cannot be reinstated due to lack of work authorization, a conditional reinstatement order that allows for time to obtain work authorization may be an option. The GC reiterates that other available remedies include consequential damages; the publication of the Notice to Employees; a Notice reading in the presence of management; payment into a remedial monetary fund in lieu of backpay; and even sponsorship of work authorization. It may also include supervisory training on worker rights under the NLRA, non-discriminatory immigration practices, and the appropriate use of E-Verify.
- Regions should also generally oppose a respondent's intention to introduce evidence or question witnesses about their immigration status or work authorization during the liability phase of a ULP proceeding.
- The GC will consider Section 10(j) injunctive relief in all cases where illegal intimidation regarding immigration status threatens the exercise of Section 7 rights and the Board's remedial authority.

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- The Board will work with other agencies. Under a deconfliction MOU between ICE and the Board (which prevents conflicting enforcement actions between immigration agencies and labor enforcement agencies), ICE will typically refrain from enforcement activities at a worksite that is the subject of an existing investigation of a labor dispute and any related proceeding. In addition, the Board will work with the Department of Justice to address labor-related violations of immigration law.

Ill-Considered Questions About Retirement May Support Age Discrimination Claim. A supervisor's repeated questions about when the employee was going to retire was "one of the most powerful pieces of evidence" of age discrimination in the case, the U.S. Court of Appeals for the Sixth Circuit found.

In *Sloat v. Hewlett-Packard Enterprise Co.*, a high performing, older employee was transferred to a new manager. The manager was not welcoming, made derogatory age-based comments, gave him a low rating and minimal salary increase, reassigned his responsibilities, only communicated with him a few times over a period of months, and attempted to have him terminated in a one-person layoff, before the employee was finally let go as part of a larger reduction in force. In addition to all of this, the manager also asked – at least 10 times – when the employee was going to retire. The employee filed suit for age discrimination and retaliation.

In finding the repeated questions about retirement to be evidence of animus towards age (along with certain other problematic comments and conduct), the Sixth Circuit observed that, "Retirement is obviously a concept closely associated with being older; the term 'retirement age' is not used to describe persons in the bloom of youth."

Does this mean that an employer can never ask about retirement plans? Of course not. Employers must engage in succession planning, and the timing of an employee's retirement may be a significant factor in that process. But context matters. Such questions should be thoughtful, appropriate, and carefully handled.

It's Not Retaliation Just Because the Employee Doesn't Like It. Not every action that an employee dislikes constitutes illegal retaliation, as the U.S. Court of Appeals for the First Circuit recently confirmed in a case involving reassignment to an unwanted position.

In *Lima v. City of East Providence*, a school principal sued the School Department, claiming retaliation for her advocacy for better affirmative action practices. The case was eventually settled. Following a change in leadership at the School Department, the principal complained about various workplace issues (e.g. lack of a rug, substitute teacher, timing of performance reviews). She was then asked if she would become the principal of a newly-created pre-K program, for which the Department had received a state grant. Believing it to be a demotion, she refused. She was nonetheless placed into the position. She then sued, alleging discriminatory retaliation under state law.

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The First Circuit found that the employer had set forth a legitimate, non-discriminatory reason for the transfer – that she was the only elementary school principal in the Department with both pre-K qualification credentials and experience as a principal. In fact, her credentials were cited in the Department's application for the grant and, as the First Circuit noted, "may well have been an influential factor in the grant award." Her own suspicions of retaliatory motive were simply not enough to cast this reason into doubt.

This case reminds employers that employees who engage in protected conduct – such as complaining of discrimination – must be handled with care, but such conduct does not insulate the employee from legitimate employment actions, even if they are actions that the employee does not like.

What's the "Mailbox Rule" for Email? In the context of an emailed arbitration agreement, the U.S. Court of Appeals for the Fifth Circuit recently explained how an employer can demonstrate that an employee has received an electronic communication.

In *Gezu v. Charter Communications*, the company sent an email to all non-union employees to announce a new employment dispute resolution program involving an arbitration agreement. The email stated that unless the employee opted out of the program within the next 30 days, they would be enrolled in the program. The email contained a link to the full agreement, as well as further information about the program and instructions on how to opt out, on the company's intranet. An employee filed a discrimination lawsuit, and the company moved to compel arbitration.

The Fifth Circuit granted the motion to compel arbitration, despite the employee's argument that he had never read the email. Under applicable state (Texas) law, the employer can show that an arbitration agreement is an enforceable modification of the terms of the employee's employment if it can demonstrate that the employee received notice of the change and accepted the change. The mailbox rule comes into play where there is a dispute about receipt of notice. Under the mailbox rule, "'[a] sworn statement is credible evidence of mailing' and creates a presumption of receipt." In the present case, both the VP of HR Technology and the Senior Director of Records submitted declarations that the company had sent and the employee had received and opened the email. The Fifth Circuit found such declarations to create the presumption of receipt.

It is important for employers who wish to create enforceable arbitration (and other employment-related) agreements with current employees to understand what are the state law requirements for such agreements. In particular, it may be possible to use email to create an enforceable agreement – but certainly employers must be able to demonstrate that the email contained sufficient notice of the agreement in question, and that the employee received and opened the email. Employers should consult with counsel when considering implementation of such agreements.

NEWS AND EVENTS

Honor – Gary L. Simpler has been named to this year's edition of the Lawdragon 500 Leading U.S. Corporate Employment Lawyers. This year's edition marks the 15th year in which Lawdragon has recognized the nation's top advisors on workforce issues and the second time in which Gary has been honored. Lawdragon's editorial team selects its 500 honorees through submissions, journalistic research, and editorial vetting from a board of legal peers.

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Victory – Parker E. Thoeni and Courtney B. Amelung won a motion to dismiss on behalf of a non-profit continuing care retirement facility in a Maryland state court. Parker and Courtney were able to show that the former employee failed to state a claim that he had been denied a reasonable accommodation, as he had been granted a 3-month leave of absence for his disability that permitted him to return to work and perform the essential functions of his job.

TOP TIP: Employers Must Protect Employees from Customer Harassment

Under Title VII, it is not enough to ensure that employees (and managers) are not harassing one another – employers must also ensure that employees are not being harassed by third parties, including customers, as the U.S. Court of Appeals for the Ninth Circuit recently reminded us.

In *Fried v. Wynn Las Vegas*, a male manicurist told a salon manager that the male customer to whom he was giving a pedicure had just sexually propositioned him. The manager allegedly told him to "just go [finish the pedicure] and get it over with." The manicurist complied, but during the 20 minutes that it took to complete the pedicure, the customer made additional inappropriate sexual comments and also grabbed the manicurist's arm or hand as he was leaving the salon. The manicurist attempted to discuss the matter with his manager several times later that day, but she responded that she was too busy. A female co-worker told him he should take the customer's proposition as a compliment, while another told him that he really wanted to have sex with the customer since he kept talking about it.

The employee eventually filed suit against the salon based on this, as well as some other incidents that the Ninth Circuit found were not a violation of Title VII. However, the Ninth Circuit did find that the employer's response to the employee's complaint about customer harassment could create a hostile work environment. The Ninth Circuit noted that other Circuits (namely, the First, Eighth and Tenth) have all found employers liable for hostile work environment harassment where their response to known harassment subjected the employee to further harassment. In this case, the manager's response "discounted and effectively condoned the customer's sexual harassment and, …went a step further by conveying that [the manicurist] was expected to tolerate the customer's harassment as part of his job."

This case is a good reminder that employers must protect employees from third party harassment. In addition, it is possible that the manager's (lack of) response was based, in part, on the fact that it was a male employee complaining of sexual harassment. Further, it is hard to imagine that the co-workers would have made those comments if the victim had been a female. It is important to remember that both men and women can be sexually harassed, and that the employer must take prompt and effective action to stop such harassment, regardless of the sex of the victim or the harasser.

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- Fifth Circuit's Stay of OSHA's Vax-or-Test ETS Remains in Place – For Now by Parker E. Thoeni, November 13, 2021

- Wait – What Is Going on With the Vax-or-Test ETS?!! by Fiona W. Ong and Parker E. Thoeni, November 9, 2021

- CMS Issues COVID-19 Rule Requiring Vaccination of Healthcare Staff by Parker E. Thoeni, November 8, 2021

- OSHA's Vax-or-Test ETS: What Employers Need to Know by Fiona W. Ong, November 4, 2021

- Hey Federal Contractors – There's Flexibility on That Vaccination Deadline (And Some More Info About Exemptions) by Fiona W. Ong, November 1, 2021

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