



Employment Law Update

2022 Federal and State Legal Update

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Shareholder

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Agenda

New Federal Priorities & Actions

Federal Agency Actions

Federal Legislation

Federal Case Law Update

State Law Updates

Biden Administration Priorities and Actions

Biden Administration Actions

Agency Priorities

Worker Protections and Benefits

- Push for federal paid leave law
- Push for increase in minimum wage to \$15/hour
- Support for Paycheck Fairness Act
- Expand diversity & inclusion protections
- Directed all agencies to ensure that other federal laws that ban “sex” bias also cover the LGBTQ+ individuals

Pro Labor

- Fired Peter Robb on Inauguration day
- Formed the White House Taskforce on Worker Organizing and Empowerment
- Incorporated PRO Act into infrastructure proposal

Agency Enforcement > Compliance Assistance

- Watch out for 2022—ramped up enforcement expected
- Encouraging agencies to use sub-regulatory guidance (does not have same rulemaking requirements)
- OIRA now led by Sharon Block, Obama-era DOL leader

Cybersecurity

- May 12, 2021, the Biden Administration issued an Executive Order on “Improving the Nation’s Cybersecurity” (EO 14028)
- October 2021, DOJ launched Civil Cyber-Fraud Initiative: DOJ will pursue enforcement vs. federal contractor companies that fail to follow cybersecurity protocols

Biden Administration Actions

Executive Orders for Federal Contractors

\$15 Minimum Wage

- April 2021, Biden signed [Executive Order 14026](#)
- EO requires federal contractors with covered new, renewed, and extended contracts to pay at least \$15 an hour by Jan. 30, 2022

Nondisplacement of Service Contract Workers

- November 18, 2021, Biden signed [Executive Order 13495](#)
- Provides a right of first refusal for continued employment to qualified service workers when a government contract is replaced with a new contract and a successor contractor at the same location

Banning Non-Compete Agreements

- July 9, 2021, Biden signed the [Executive Order on Promoting Competition in the American Economy](#)
- The Order encourages the Federal Trade Commission (FTC) to employ its statutory rulemaking authority “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility”

Agency Actions

EEOC

Leadership

- Chair & Vice Chair

Veteran EEOC dynamic duo from Obama Administration

- Chair & Vice Chair

- Charlotte Burrows (D) – Chair (2023)

- Jocelyn Samuels (D) – Vice Chair (2026) – Term confirmed on July 14, 2021

- Keith Sonderling (R) – Commissioner (2024)

- Janet Dhillon (R) – Commissioner (2022)

- Andrea Lucas (R) – Commissioner (2025)

- Acting General Counsel

- Gwendolyn Young Reams



Charlotte Burrows



Jocelyn Samuels

EEOC

Priorities and Actions

- Focus on rebuilding and strengthening the agency
 - Filled 450 frontline staff positions
 - Ended year with 2,100 employees
- April 28, 2021: EEOC held first-ever public hearing by video conference
 - Civil rights impacts of COVID-19 in the workplace
 - Issuance of new and updated technical assistance regarding COVID-19, vaccinations, and reasonable accommodations
- Renewed focus on “tackling systemic discrimination in the workplace, including promoting racial justice and equity, preventing and remedying discrimination in pay, and addressing the civil rights impact of the COVID-19 pandemic in the public and private sectors”

EEOC

Priorities and Actions

- More aggressive enforcement focused on:
 - Addressing workplace harassment and bias upon reopening, with particular attention to LGBT+ discrimination and harassment
 - Pushing for federal pay equity law
 - Reinstating EEO-1 Component 2 Data Reporting
 - July 19, 2021, deadline for 2019 and 2020 data submission
 - April 12, 2022, deadline for 2021 submissions
- Litigation Trends: Moving back up - EEOC increases lawsuits
 - 2021: 138
 - 2020: 93
 - 2019: 144
 - 2018: 199
- EEOC filed 59 lawsuits in September 2021 alone
- Comprehensive FY 2021 [enforcement and litigation statistics](#) to be released in 2022
- Anticipated uptick in litigation for 2022

EEOC

2021 Fiscal Year End

- November 15 [Fiscal Year 2021 Agency Financial Report:](#)
 - \$484 million in recovery for workers
 - 26 systemic lawsuits
 - Over 340 systemic investigations on the merits

EEOC

Technical Assistance Bulletins

- EEOC issues various updates to COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (including November 17, 2021 update to cover retaliation)
- No opinion letters issued

DOL

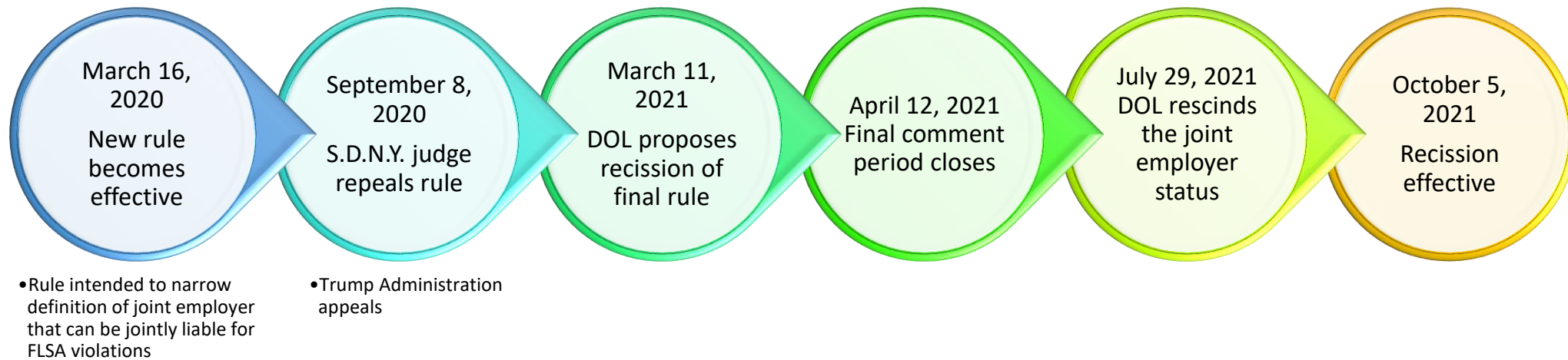
Leadership

- Secretary of Labor - Marty Walsh
- Deputy Secretary of Labor - Julie A. Su
- OSHA Acting Assistant Secretary - James Frederick
- Solicitor of Labor - Seema Nanda
- Wage and Hour Division Acting Administrator - Jessica Looman



DOL

FLSA Joint Employer Standard



- DOL is not proposing regulatory guidance to replace the March 2020 rule
- DOL will consider legal and policy issues relating to joint employment under the FLSA before determining whether alternative regulatory guidance is appropriate
- Likely DOL will apply “economic realities” test (focused on whether an employee is economically dependent on multiple employers)

DOL

FLSA Independent Contractor Rule

- Final rule was scheduled to take effect March 8, 2021
 - “Economic reality” standard aimed at making it easier to classify worker as independent contractor
 - Two main factors: (1) nature and degree of control over work; and (2) worker’s opportunity for profit/loss
- Biden Administration: froze and then withdrew rule on May 6, 2021
- Revert to “totality of the circumstances” standard
- *See Walsh v. Wellfleet Communications, et. al.*, No. 20-16385 (9th Cir. Nov. 2021) (*finding telecom company misclassified more than 1,300 call center employees as independent contractors and ordering \$1.4 million in back wages and damages*)

DOL

Tipped Employee Rules



Effective December 28, 2021
Tipped Employee Final Rule

October 29, 2021 – DOL publishes final
Modified 80/20 rule prevails
Additional guidance and requirements imposed



Effective November 28, 2021

Tip pooling clarifications
Expansion of DOL ability to assess civil penalties

DOL Office of Federal Contract Compliance Programs (OFCCP)

Affirmative Action Plan Contractor Portal

- December 2, 2021, the OFCCP [finalized](#) its Affirmative Action Program Verification Interface (“Contractor Portal”)
- Contractors must register and complete online portal submission to certify, on an annual basis, if they have developed and maintained an affirmative action program for each establishment and/or functional unit, as applicable

Key Dates

- February 1, 2022: Portal registration opens
- March 31, 2022: Employers may begin submitting certifications of AAPs
- June 30, 2022: Certification deadline

NLRB

Leadership

- Peter Robb (R) fired 1/20/21 after refusing to resign
- Deputy General Counsel Alice Stock (R) fired 24 hours later
- July 21, 2021, General Counsel Jennifer Abruzzo confirmed (tie vote, VP Harris tie breaker)
- Board & Terms
 - Lauren McFerran (D) – Chair (2024)
 - John Ring (R) (2022)
 - Gwynne A. Wilcox (D) (2023) (filling vacant seat)
 - Marvin Kaplan (R) (2025)
 - David M. Prouty (D) (2026)



NLRB

Priorities and Activities

- GC renews emphasis on work rules and personnel policies (handbooks)
- GC asks for most cases that can evaluate or overturn Trump precedent to be sent for review
- Pro-labor appointments = Eventual rollback of Trump-era decisions, such as:
 - **NLRB restores employer's right to restrict employee email use** (*Caesars Entertainment d/b/a/ Rio-AllSuite Hotel and Casino*)
 - **NLRB confirms confidentiality permissible during workplace investigations** (*Apogee Retail, LLC d/b/a Unique Thrift Store*)
- Pro-labor rulings on election disputes (e.g., Nov. 29, 2021, ordering a new election at Alabama Amazon plant)
- FY 2021 recovered \$56,801,407; 6,307 individuals were offered reinstatement
 - Compare: FY 2020, in which \$39,389,405 total was recovered in back pay, fees, dues, and fines and 978 workers were offered reinstatement
- Sep. 8, 2021: General Counsel issued a [memorandum](#) to all regions, advising them to seek a variety of remedies to “ensure that victims of unlawful conduct under the National Labor Relations Act are truly made whole for losses they have suffered.”
- Aggressive prosecution policies to continue in 2022

EEOC, DOL, & NLRB

Cross Agency Collaboration

- Significant new development announcement
- November 17, 2021, EEOC, DOL, and NLRB announced joint initiative to raise awareness about retaliation issues
- Prior to this initiative, Memoranda of Understanding (MOU) existed between the DOL and EEOC and between the NLRB and EEOC, but no MOU connected all three agencies
- Emphasis on education, with possibility of increased enforcement

Federal Legislation

COVID-19 Updates

- SCOTUS speaks on ETS (more on that later) & Medicare/Medicaid Directive
- Executive Order re: vaccinations (no testing/masking alternative) challenged in multiple states and jurisdictions
- Calls for restoring a national policy on COVID-19 paid sick leave are growing, as omicron variant cases surge and major U.S. employers, including Amazon.com and Walmart, reduce the paid sick days employees can take for quarantine
- 4,268 = # of COVID-19 employment litigation cases (1/30/2020 - 1/02/22)
 - Most common claim = employment discrimination
 - Most common industry = health care

Federal Legislation

Infrastructure Investment and Jobs Act (IIJA)

- November 15, 2021, President Joe Biden signed the \$1.2 trillion IIJA into law
 - Wage rate requirements for federal contractors or subcontractors in construction, alteration, or repair work
 - Creates 4 new advisory boards (Women of Trucking, National Academy of Sciences, 21st Century Energy Workforce, and EPA)
 - Ended employee retention tax early
 - Creates & expands workforce development grants for certain industries

Federal Legislation

Build Back Better Act (BBBA)

- November 19, 2021, U.S. House of Representatives passed the BBBA, bill moves on to the Senate
- As currently proposed, 5 key provisions for employers:
 1. Paid leave: 4 weeks of guaranteed government-paid family and medical leave (\$800 cap per week) with broader definition of family member
 2. NLRA civil penalties: adds civil penalties against an employer who engages in unfair labor practices (ULPs), with key pro-labor prohibitions
 3. FLSA civil penalties: increases civil penalties for violations of the FLSA
 4. Workplace safety: increases penalties under OSHA (penalties for “willful” violations from \$70,000 to \$700,000 [current inflation-corrected penalty is \$136,653])
 5. Immigration reform: allows undocumented individuals to obtain work permits under a parole infrastructure
- Also includes Affordable Care Act, retirement account, and child care credit provisions

Marijuana Opportunity, Reinvestment, and Expungement Act of 2020 (MORE ACT)

- December 4, 2020, the U.S. House of Representatives passed a bill to remove cannabis (marijuana) from the Controlled Substances Act of 1970.
- The "Marijuana Opportunity, Reinvestment, and Expungement Act of 2020," H.R. 3884 (the MORE Act), was approved by a vote of 228 to 164.
 - The House vote marked the first time in 50 years that a chamber of Congress has revisited the classification of cannabis as a federally controlled and prohibited substance.
 - A new version of the MORE Act was reintroduced this session and passed the House Judiciary Committee in **September 2021**.
 - Senate Majority Leader Chuck Schumer (D-NY) says he and colleagues are working to advance a federal marijuana legalization bill in the U.S. Senate.
- The MORE Act leaves in place the patchwork of state laws governing cannabis.

State by State Marijuana Laws

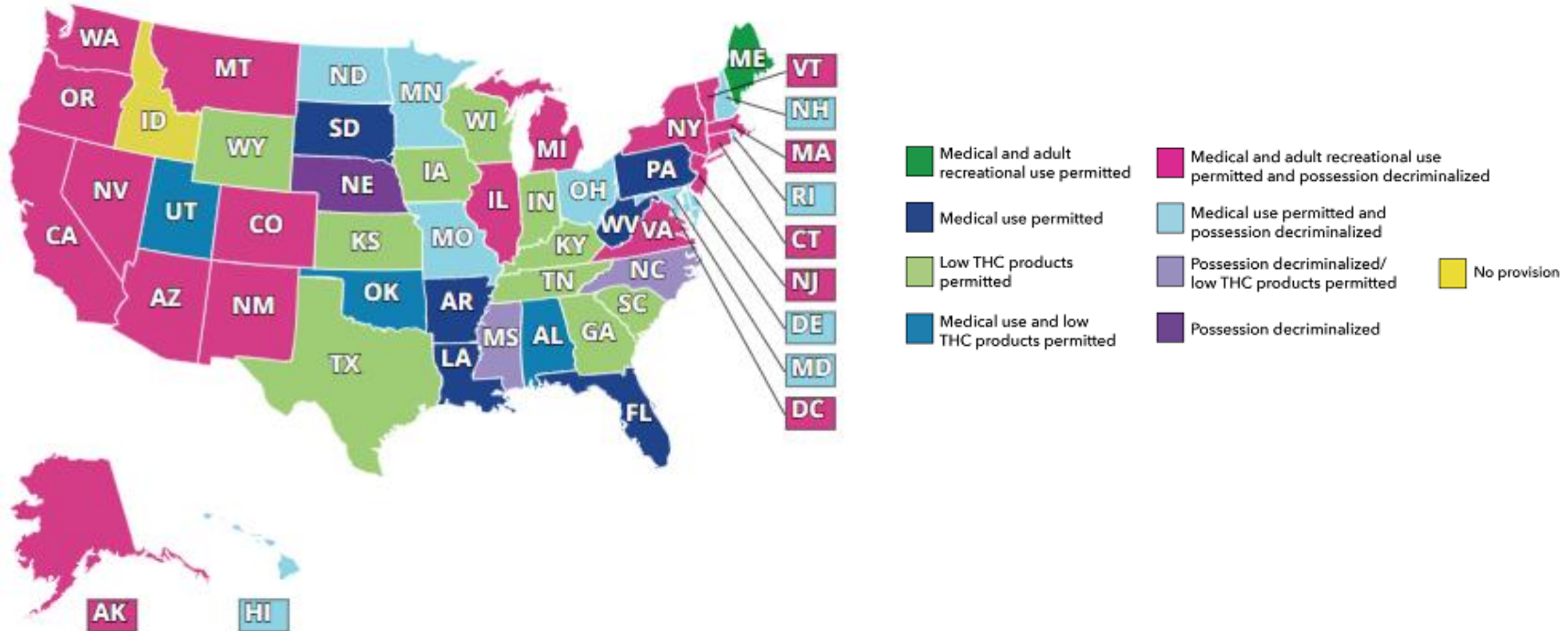


Image Source: Bloomberg Law: https://www.bloomberglaw.com/product/health/page/infocus_medical_marijuana

CROWN Act of 2021

- Movement to support passage of “Creating a Respectful and Open World for Natural Hair” or CROWN legislation
 - Prohibits discrimination based on a person's hair texture or hairstyle, if that style or texture is commonly associated with a particular race or national origin. Specifically, the bill prohibits this type of discrimination against those participating in federally assisted programs, housing programs, public accommodations, and employment
- Federal legislation introduced in U.S. Senate on March 22, 2021
- State bills passed in California, Colorado, Connecticut, Delaware, Maryland, Nebraska, New Jersey, New Mexico, New York, Nevada, Illinois, Oregon, Virginia, and Washington



The CROWN Act

State Law Developments

Wisconsin Law Developments

Independent Contractors

- Wisconsin created a worker misclassification task force
- Task Force issued [report](#) in 2021
- Task Force met in January, February, March, June, and September 2021
- While Task Force is exploring Wisconsin tests, no proposal or legislation has been introduced

Wisconsin Law Developments

Unemployment

- Legislation
 - 2021 Senate Bill 547 proposed to allow workers who fail to comply with vaccine mandate to collect unemployment
- UI Decisions
 - COVID-19 defenses asserted by employees who resigned due to employers failing to follow safety precautions
 - *Nelson*, Case No. 20013693MD
 - *Walker*, Case No. 206099593MD

Wisconsin Law Developments

Marijuana Legislation

- Current Law:
 - Medical Use Prohibited: Certain low THC products (in a form without a psychoactive effect) permitted for medical treatment with certification
 - Recreational Use Prohibited
 - Drug Testing Unrestricted
- 2021 – Gov. Tony Evers (D-WI) budget proposal included a legalization provision for medical and recreational marijuana
 - Provision was removed by the legislature before the budget was passed
- Early November 2021 – a bipartisan group of Wisconsin lawmakers introduced a partial decriminalization bill
 - Would make possession of up to 14 grams of marijuana punishable by a \$100 civil fine without the threat of jail time under state law for a first offense

Illinois Law Developments

Lots Going On!

Illinois HB 117 – Eff. 01/01/2022

Amends the Illinois Secure Choice Savings Program Act to apply to employers with at least five employees, rather than 25 or more employees. Includes automatic increases to contributions.

Illinois HB 1207 – Eff. 01/01/2022

Employers remain prohibited from seeking an applicant's salary history but may provide information about compensation for the position applied to. Employers may also discuss an applicant's salary and benefits expectations for the position during the application process.

Illinois HB 1838 – Eff. 01/01/2022

Provides that discrimination based on disability includes discrimination against an individual because of the individual's association with a person with a disability.

Illinois HB 3582 – Eff. 01/01/2022

Provides victims and family members of victims of violent crimes with unpaid leave and provides that victims of violent crimes will not be barred from collecting voluntary leave benefits.

Illinois HB 53 – Eff. 01/01/2022

Provides that an employer that relies solely upon artificial intelligence to determine whether an applicant will qualify for an in-person interview must gather and report data about the race and ethnicity of applicants who are and are not extended an opportunity for an in-person interview and race and ethnicity data for applicants who are hired.

Illinois Law Developments

Lots Going On!

Illinois HB 1600 – Eff. 01/01/2022

Amends Illinois' Lodging Services Human Trafficking Recognition Training Act to require restaurants and truck stops to provide employees with training in the recognition of human trafficking and protocols for reporting observed human trafficking to the appropriate authority.

Illinois SB 1730 – Eff. 01/01/2022

Requires public corporations to report the self-identified sexual orientation and self-identified gender identity of their directors.

Illinois SB 2486 – Eff. 01/01/2022

Provides that an individual aggrieved by a disclosure of a disciplinary report may file a complaint with the state Director of Labor or file an action in court within 3 years after the violation.

Illinois SB 258 – Eff. 01/01/2022

Provides that an employer may eliminate a child from the insurance obligor's health insurance coverage, if the employer no longer provides a group health insurance plan to any employees or the child is no longer eligible for coverage due to federal or state restrictions.

Illinois SB 672 – Eff. 01/01/2022

Amends the Illinois Freedom to Work Act, setting forth standards for the enforceability of noncompete agreements against employees. Employers shall not enter into noncompete agreements with employees who earn or are projected to earn \$75,000 or less on an annualized basis.

Minnesota Law Developments

- Minnesota SB 9 – Eff. 1/1/2022 – Clarifies that an employer cannot reduce an employee's pay during lactation breaks; requires an employer to provide reasonable accommodation to an employee for health conditions related to pregnancy or childbirth. Employers shall not require employees to take leaves or accept accommodations
- MN-OSHA – Eff. 1/13/2022 – Intends to adopt the OSHA ETS Rule with the same enforcement dates (**January 10** and **February 9**) as federal OSHA. It does not appear that MN-OSHA will alter the federal standard or adopt any additional restrictions on covered employers (i.e., those with 100+ employees). *Pending: whether MN-OSHA will push ahead with enforcement if the U.S. Supreme Court issues a decision enjoining enforcement of the federal rule. According to MN-OSHA's announcement: it "will react accordingly to further judicial determination as the current litigation makes its way through the process."*
- Minimum Wage – Eff. 1/1/2022 – State minimum wage rate increases - amount determined by employer size: <https://www.dli.mn.gov/news/new-year-new-minimum-wage-rates-jan-1-2022> - Minnesota Department of Labor and Industry provides nice guidance.

Iowa Law Developments

- [SB 2296 – Eff. 7/1/2021](#) – Contingent Workforce and Independent Contractors – Establishes the circumstances under which certain independent contractors are not considered employees for purposes of various laws.
- House File 902 – 10/29/2021 signed into law – Requires Iowa employers with mandatory COVID-19 vaccine policies to waive their requirements for employees who seek vaccination exemptions for medical or religious reasons. The law also permits individuals to qualify for unemployment insurance benefits, even when they have been discharged from employment for refusing to receive COVID-19 vaccines.
- Pending legislative bills to keep an eye on:
 - Private sector employee drug testing
 - Requirements and prohibitions relating to vaccines/immunizations and providing civil remedies
 - Occupational safety and health standards, employment matters, reporting requirements, and civil liability concerning COVID-19, providing penalties and remedies, and including effective date provisions

Multi-state Law Developments

Potpourri

- Minimum wage increases
- Expense Reimbursements
 - COVID test costs
- Hiring
 - Salary/wage disclosures
 - Conviction/arrest record inquiries
- Paid sick and family leaves
- Restrictive covenant law restrictions
- #MeToo settlement agreement laws continue

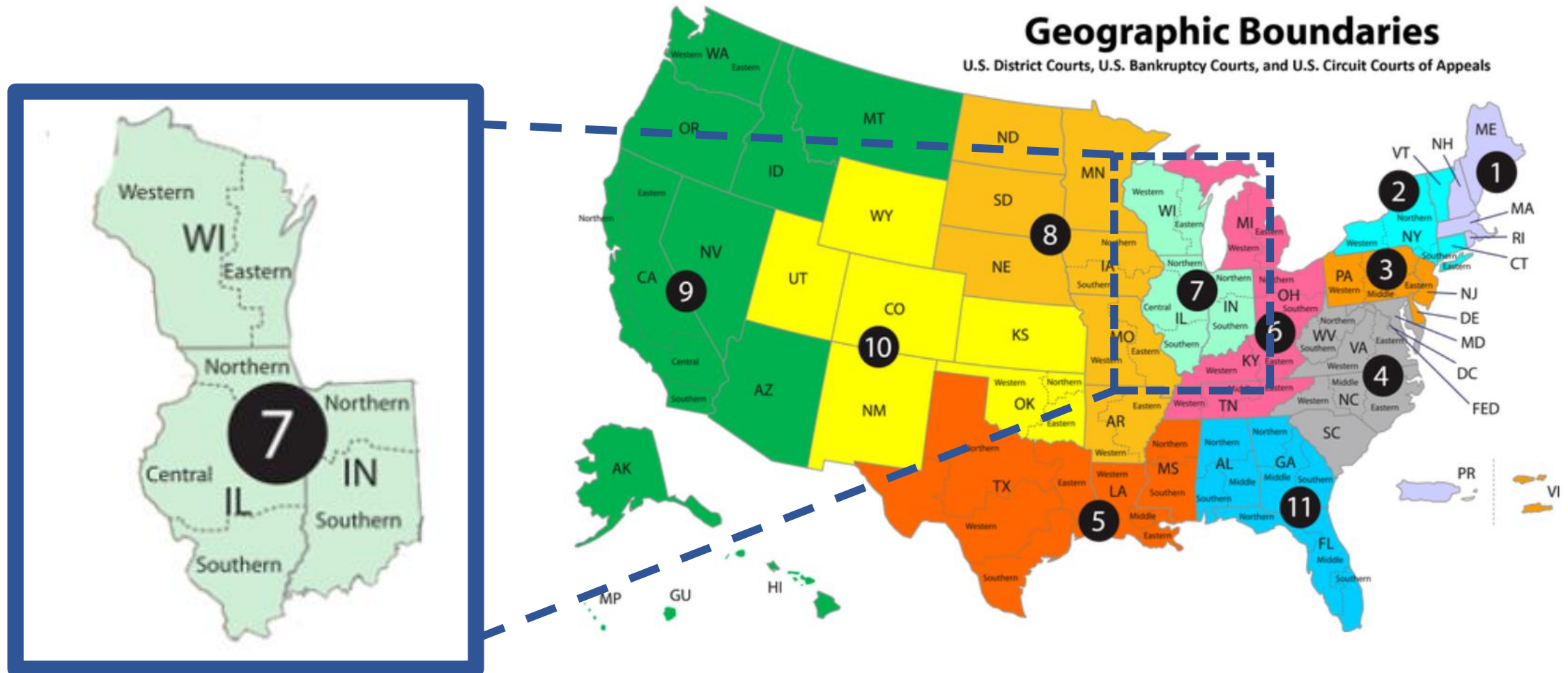
Litigation Update

SCOTUS

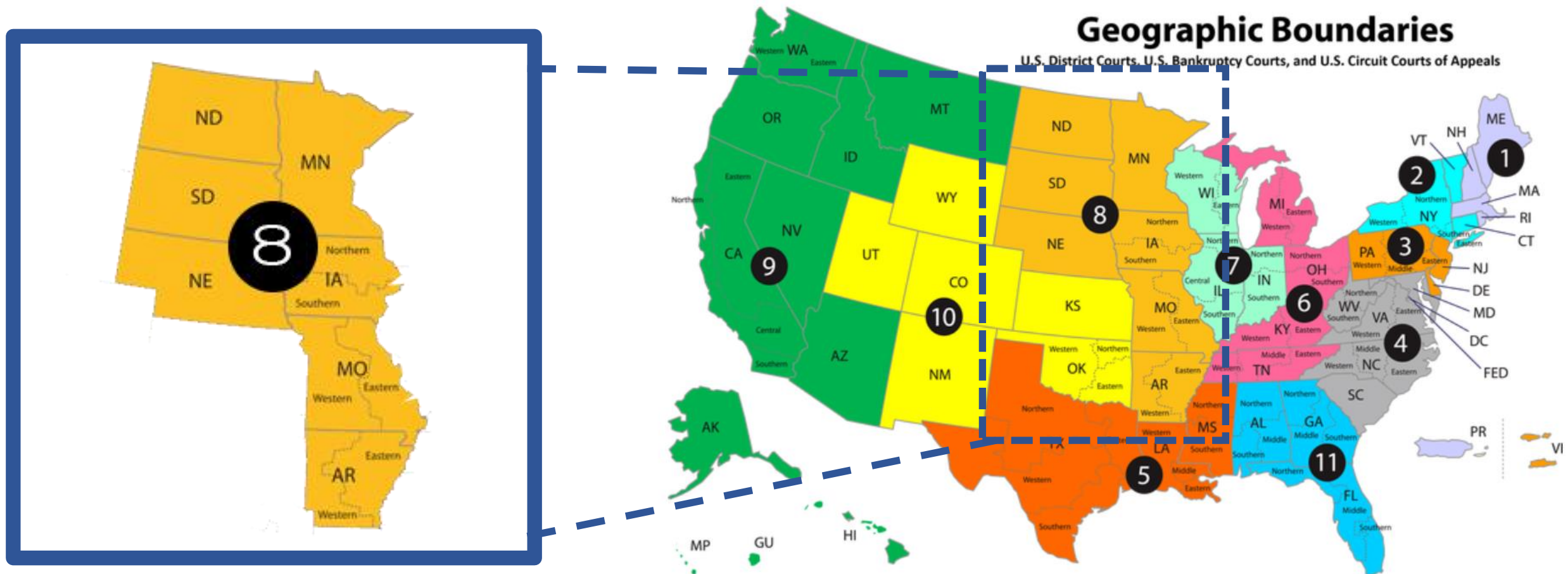
COVID-19 Decisions

- 01/13/22 - The U.S. Supreme Court slammed the brakes on a Biden administration vaccine-or-testing rule for private businesses with at least 100 employees but let a stricter, yet narrower rule aimed at the health care industry take effect nationwide.
 - Order #1 - Issued by six-justice majority, stopped a controversial [emergency rule](#) from the [Occupational Safety and Health Administration](#) requiring businesses that clear the 100-worker threshold to either adopt a COVID-19 vaccination mandate or have workers submit to weekly tests, holding that it exceeded the agency's authority. *"Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly," the high court majority said in its order. "Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."*
 - Order #2 - Issued by a 5-4 vote, gave the federal government the go-ahead to enforce a separate workplace vaccination rule by the [Centers for Medicare & Medicaid Services](#) while the Biden administration appeals two injunctions that had blocked the rule [in parts of the country](#).

Seventh Circuit Decisions



Eighth Circuit Decisions



Federal Case Law Developments

Potpourri Take Two

- **Joint Employment/Joint Liability**
 - *Diaz v. Tesla, Inc.*, No. 17-cv-06748 (N.D. Cal. Oct. 1, 2021)
- **Bostock Clarified**
 - *Jimenez v. Laborer's Welfare Fund*, 2020 WL 5979653
 - *Doe v. Triangle Doughnuts*, 2020 WL 4013409
 - *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)
- **Accommodations**
 - *LaBarbera v. NYU Winthrop Hosp.*, 2021 WL 980873 (E.D.N.Y. Mar. 21, 2021) (pregnancy)
 - *EEOC v. Walmart Stores East, L.P.*, 992 F.3d 656 (7th Cir. 2021) (religious)
- **Age Discrimination**
 - *Zampierollo-Rheinfeldt v. Ingersoll-Rand de Puerto Rico, Inc.*, 999 F.3d 37 (1st Cir. 2021) (circumstantial evidence – “rejuvenating”)
 - *Reinebold v. Bruce*, Case No. No. 21-1092 (7th Cir. Nov. 18, 2021) (good notes taken during hiring)

Seventh Circuit U.S. Court of Appeals

Other Notables

- Military Leave – Employers must offer paid military leave consistent with other types of leave. *White v. United Airlines, Inc.*, February 3, 2021 (D. Wood)
- “Cellar Lives Matter” – Winery violated NLRA by banning employee’s “Cellar Lives Matter” vest. *Constellation Brands U.S. Operations, Inc. dba Woodbridge Winery v. NLRB*, March 30, 2021 (M. Scudder)
- Biometric Information – Seventh Circuit certifies contested Biometric Information Privacy Act (BIPA) accrual issue to Illinois Supreme Court – *Cothron v. White Castle System, Inc.*, Case No. 20-3202, 2021 WL 5998537 (7th Cir. Dec. 20, 2021)
- Wage and Hour – Auto technicians’ pay structure may have been convoluted, but it was still a bona fide commission plan, Seventh Circuit concludes. Although the employer’s pay system for its auto repair technicians was complicated and at times redundant, it nevertheless constituted a bona fide commissions compensation method subject to exemption from the overtime pay provisions of the FLSA. *Reed v. Brex, Inc.*, 8 F.4th 569 (7th Cir. Aug. 9, 2021)

Eighth Circuit U.S. Court of Appeals

Other Notables

- On consecutive dates in mid-August 2021, the Sixth and Eighth Circuits ruled that federal courts lack jurisdiction over Fair Labor Standards Act claims arising from out-of-state conduct where the defendant is not subject to the court's general personal jurisdiction. Potential opt-ins are limited to those who worked in the state where collective is pending. *Vallone v. CJS Solutions Group d/b/a The HCI Group*, 9 F.4th 861 (8th Cir. 2021); *Canaday v. the Anthem Companies Inc.*, 9 F.4th 392 (6th Cir. 2021).

Thank You



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