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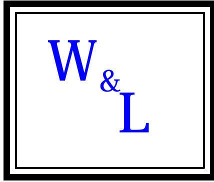
EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues



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BIDEN ISSUES EXECUTIVE ORDER ATTEMPTING TO REQUIRE COVID VACCINATION/TESTING

In what many consider President Biden's most bold move regarding COVID-19, he issued an Executive Order on September 9, 2021, in an effort to require that federal employees, federal contractors, and large employers of 100 or more employees require their employees to be vaccinated. The Executive Order is unprecedented as never before has the government issued a mandate requiring employees to submit to a vaccination or weekly medical testing or risk severe disciplinary action, including termination. The Executive Order also contemplates requiring covered employers to provide paid time off for employees to get vaccinated and recover from the vaccination.

The contractor portion includes those that provide services to the federal government. The Executive Order does not apply to businesses with contracts valued below the "simplified acquisition threshold" which is generally set at $250,000.00; grant holders; and subcontractors that provide only products.

The Executive Order must be implemented by a relatively unusual procedure, an Emergency Temporary Standard (ETS). Such standards are only valid for a period up to six months, then either would expire or be extended by a permanent standard. The concept of such a standard is that the Occupational Safety and Health Administration (OSHA) has determined that COVID-19 presents a grave danger to all covered workplaces, and that the ETS is necessary. While the Administration states that such a standard will be promulgated in the "coming weeks," the last related standard related to healthcare workers took 12 weeks. There will likely thereafter be a break-in period, perhaps six weeks, for which covered employers must comply, on penalty of fines just like every other OSHA standard, up to $14,000.00 per violation for serious offenses.

There are numerous unanswered questions concerning what the ETS will provide. For example, it is not certain whether the standard applies to 100 employees of a given location or 100 employees company-wide. It is uncertain whether employers will be required to pay for the testing for those employees refusing vaccination. It is not certain what type of test will be required or how employers are required to verify vaccination status. There will be some exceptions to the ETS, and it assumes that exceptions must be allowed for medical and religious reasons. It may be that employers will become overwhelmed with exemption requests, but it is likely that an employee's opposition to vaccines will be deemed a personal belief and will not be considered a religion. It would seem likely that there must be a sincerely held religious belief in order to be exempt from a mandatory vaccination policy.

It is certainly possible that the ETS will go beyond the requirements set forth therein, and it is highly likely that there will be a serious legal challenge to the validity of the ETS. Never before has OSHA required employees to be vaccinated. Until the ETS has been drafted, circulated, and adopted, there is no enforceable mandate requiring any employer to take any action under the September 9, 2021 Executive Order.

The Executive Order represents a tougher position on the part of the Administration, as President Biden in the past only encouraged employers to mandate vaccination against COVID-19. Some believe the recent actions are to provide "cover" or encouragement for employers to mandate such vaccination.

The President's Executive Order for federal workers goes further than requirements previously announced on July 29, 2021, which included an option for on-site federal contractors to choose testing instead of vaccination. Now the Executive Order mandates vaccines for contractors. It will call for the new requirement to be in place for contracts entered into on or after October 15, 2021, and will apply to any workplace location "in which an individual is working on or in connection with a federal government contract or contract-like instrument." There are some exceptions to the government contractor requirement including for those who only sell products to the federal government.

In terms of enforcement, the ETS could cover more than 80 million workers, suggesting that policing employer compliance will be a problem. It is likely that OSHA will rely on whistle-blowers and target specific industries.

While employers can begin making plans for meeting the requirements, so many details remain to be covered by the ETS, it is difficult to make plans too definitive. Questions are welcome as to "guesstimates" what the ETS will look like.

ISSUES RELATED TO SAFETY AND WORK-RELATED ISSUES, PERTAINING TO WALK-OUTS, SIT-INS, PROTESTS, ETC.

The current situation is an appropriate time to remind employers of their obligations under federal laws dealing with not only safety protests, but any protests remotely relating to wages, hours, and terms and conditions of employment. The National Labor Relations Act protects employees from adverse action from employers for "union or other concerted activity." Such activities go way beyond union matters, and the new Administration has announced that it will take the broadest possible interpretation to protect employees engaging in "protected concerted activity" for their mutual aid or protection. Such activity may be two or more employees banding together regarding issues relating to the terms and conditions of employment, or one employee speaking on behalf of others, or even seeking to induce actions by others. During the pandemic, for example, this writer has experienced numerous incidents of employees not only complaining, but on occasion engaging in sit-ins or walking off the job.

Most know that union employees who strike, in the absence of a no-strike clause in a collective bargaining agreement, are protected from discharge or discipline. Many don't know that the same rules are applicable to walk-outs by non-union employees unrelated to unions. The main exception is that the walk-outs must somehow be causally related to wages, hours, or other terms and conditions of employment. For example, it is unlikely that there can be a protected walk-out over whom the employer selects as customers. Walk-outs over political issues are particularly controversial.

There are some other limitations as to how a walk-out is carried out. Under current National Labor Relations Board (NLRB) rules (which may be changed by the current Administration), while a short-term walk-out or strike is lawful, there is a doctrine that prohibits union and non-union workers from taking part in intermittent strikes, which are generally defined as a series or pattern of short-term strikes for a common goal. Similarly, persons walking off the job cannot engage in a "sit-in" strike, which is a refusal to leave the employer's premises while refusing to work for a considerable period of time after given every opportunity to comply. Wal-Mart has particularly been victimized by intermittent strikes, resulting in a 2019 NLRB ruling in favor of Wal-Mart finding walk-outs were intermittent strikes because they were part of a "plan to strike, return to work, and strike again repeatedly."

A union may try to disguise the use of intermittent strikes by calling separate walk-outs having distinct origins and distinct demands, or claiming that the cause of the walk-out is the employer's unfair labor practices.

Persons walking out cannot legally be disciplined for failing to give advance notice or failing to call in early the day of the walk-out. Nor can the employer count the days as absences under an attendance-control program. Further, once the walk-out is over, if the union or an individual offers to return "without condition," the employer must allow the worker to return to his or her original position. The exception is that the law allows employers to hire permanent replacements for workers engaged in an "economic" strike, meaning one not caused by unfair labor practices.

Editor's Note: Walk-outs create situations where experienced labor counsel is a necessity to guide employers in their reaction. The specific words used by management towards those walking out may determine the outcome. For example, if the employer tells those walking out that they are fired if they don't return to work, it will be an unfair labor practice subject to reinstatement and back pay later on. If the employer simply informs the employees that they are subject to being permanently placed, it is probably lawful. Similarly, management may inform those walking out that they must return to work or leave the premises, and after a period of time, if they refuse to leave the premises or return to work, authorities may be called, and there is the potential for disciplinary action including discharge. The exact words used by management are quite important, and witnesses should be present to verify what was said. This writer has experienced numerous walk-outs over the last six months over issues related to the pandemic such as "hazard" pay.

TDPP EXTENDED FOR SIX COUNTRIES

More than 400,000 citizens of six foreign countries who live and work in the U.S. under Temporary Protected Status (TPS) are able to stay for at least another year. The countries under the temporary deportation protection program include El Salvador, Haiti, Nicaragua, Sudan, Honduras and Nepal. There will be an automatic extension until December 31, 2022 according to a Department of Homeland Security Notice published September 10, 2021.

TRUMP REGULATION REQUIRING EEOC TO CONCILIATE RESCINDED

The current administration has moved rapidly to eliminate the Trump administrators, even during the terms of their employment, and to eliminate administrative rules and guidance issued by the prior administration. The

most recent example is an EEOC regulation issued during the Trump Administration that required the EEOC to give employers far more information about its findings of alleged discrimination during the process of conciliation. Conciliation is mandated by Title VII where the EEOC files a lawsuit against an employer.

Bills passed both the House and Senate during May and June under the Congressional Review Act rescinding this EEOC regulation. The White House supported the legislation saying it would remove "unnecessary and burdensome standards" established by the rule - which would have encouraged employers to focus in litigation on whether the regulation's terms were met, rather than on the allegations of bias.

Editor's Note: One could argue that the government too often evaluates the success of a law by how many lawsuits are filed, rather than how often voluntary compliance and voluntary settlements are reached.

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