Thursday, December 30, 2021

Although the first of January is ultimately just another day in the grand scheme of things, many of us attach a special significance to it. It is a day where we symbolically leave our problems behind and press forward to see what the new year may bring. However, for better or worse, the law sees January 1, 2022, as just another day, and many of the developments employment law saw in 2021 will follow us into the new year. With that in mind, let’s take a look at some of the highlights in employment law that we have our eyes on as we begin the new year.

**The Biden Administration’s OSHA Vaccine Mandate**

On November 4, 2021, the Biden administration, through OSHA, instituted an emergency mandate requiring employers with 100 or more employees to either
require each of their employees be vaccinated or provide a weekly negative COVID-19 test. Predictably, the legality of the mandate was immediately met with numerous lawsuits in courts across the country. The Biden administration decided not to attempt to enforce the mandate until the courts decided its lawfulness, but they will soon have a definitive answer as to whether they can move forward with enforcing the mandate.

In a rare move, the Supreme Court has significantly expedited the process for a case to appear before the Court and will hear oral argument on the legality of the OSHA mandate on January 7, 2022. What the Supreme Court decides will determine the fate of the mandate and, consequently, whether employers will ultimately need to ensure they are compliant with its requirements. Whatever the Court decides will be a huge development and will be a matter worth paying close attention to for both employers and employees alike.

**New Requirements for Federal Contractors**

Federal contractors know that keeping up with developments in employment laws, regulations, and best practices is a job in itself, and that looks to again be the case heading into 2022. The Office of Federal Contractor Compliance Programs (OFCCP) has long required contractors to create Affirmative Action Plans (AAP), but to date the only tool the OFCCP had to verify that federal contractors were creating, and following, AAPs was subjecting contractors to random audits. This looks to change dramatically in 2022, once the OFCCP opens its “AAP-VI” online reporting system. Although the date the new AAP-VI reporting system will go online is uncertain, what is almost certain is that all federal contractors will likely have to submit yearly AAPs to the system. Historically, when federal contractors are subjected to an audit, not having a written AAP on file is among the most common violations. However, that is likely to change under an AAP-VI reporting system that places reporting burden on every federal contractor rather than the unlucky few that are audited.

Also of consequence to federal contractors is the implementation date of Executive Order 14026, which raises the minimum wage for all federal contractor workers to $15 per hour. Beginning January 30, 2022, all new contracts, renewals of contracts, and extensions of existing contracts must comply with the $15 minimum wage requirement. Federal contractors should note that although the scope of who qualifies as a worker who must receive the $15 per hour wage is very broad, it is not absolute. There are a number of nuanced exceptions that may exempt either a worker or the type of work the worker is performing from being entitled to the $15 minimum wage. Federal contractors will have to take adequate steps to ensure that they are aware of the new federal contractor minimum wage and which of their employees are entitled to receive it.

**Return to an Employee-Friendly NLRB**

When up against an ongoing pandemic and possible vaccine mandates, some potentially important developments can garner minimum attention. One such development may prove to be the shift from the employer-friendly NLRB of the Trump administration to the Biden administration’s NLRB, which has vocalized the intent to be more employee friendly and early returns show that to be true. In Biden’s first
year in office the acting general counsel for the NLRB announced a return to “vigorous enforcement” of employee rights under the NLRA. Biden also announced a “White House Task Force on Worker Organizing and Empowerment” that is dedicated to “mobilizing the federal government’s policies, programs, and practices to empower workers to organize and successfully bargain with their employers.” While it remains to be seen how, and if, the Biden administration will take steps to further advocate for employees, the renewed discourse on organizing and unions is something to monitor in 2022. Likewise, many of the Trump Board decisions are under scrutiny and face reversal.

Renewed Attention to Employment Discrimination Legislation

Responding to the pandemic in 2020 required an all-hands-on-deck approach from Congress and state legislatures. And while 2021 did not bring about the end of the pandemic, it did see legislatures return to taking an interest in labor and employment legislation unrelated to COVID-19. On the federal level, the Senate is currently waiting to vote on the Pregnant Workers Fairness Act (PWFA), which would strengthen protections for pregnant workers by making it unlawful for employers to deny a pregnant person a reasonable accommodation (and not just those experiencing “difficult” pregnancies), just as it is unlawful to deny a reasonable accommodation to a disabled person under the ADA. Although the 50-50 gridlocked Senate is currently famous for not voting on bills that come before it, the PWFA has been championed as a bipartisan bill and support from both sides of the aisle may be enough to get the bill on President Biden’s desk.

There has also been a renewed interest in combating discrimination at the state and municipal level. California has made it unlawful to require employees to sign settlement or non-disparagement agreements relating to discrimination. Illinois has made it unlawful to discriminate against an employee for associating with a disabled person. In Montana, employers may no longer discriminate against an employee for the lawful use of marijuana while they are off work. In parts of North Carolina, the definition of protected class has been expanded to include sexual orientation, gender identity, gender expression and natural hairstyle. While non-exhaustive, this list demonstrates that the desire to legislate against workplace discrimination is on the docket for various local legislatures, across geographic and political spectrums. It will be interesting to find out both if this trend continues in 2022, as well as if it inspires similar legislation at the federal level.

© 2022 Bradley Arant Boult Cummings LLP

National Law Review, Volume XI, Number 364