2020 LABOR AND EMPLOYMENT LAW UPDATE

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COVID-19 IN THE WORKPLACE

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Timeline of Events

- **January 21, 2020:** CDC confirmed the first U.S. 2019 novel coronavirus disease (COVID-19) case.
- **January 31, 2020:** The Trump administration restricted travel from China.
- **March 11, 2020:** WHO declared COVID-19 a pandemic.
- **March 12, 2020:** Governor Evers issues Executive Order #72 declaring COVID-19 a public health emergency.
- **March 13, 2020:** President Trump declared a national emergency in the U.S.
- **March 13, 2020:** Travel ban on non-U.S. Citizens traveling from Europe goes into effect.
- **March 18, 2020:** President signs the Families First Coronavirus Response Act (FFCRA).

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Timeline of Events

- **March 24, 2020:** Governor Evers issues Emergency Order #12: "Safer at Home Order."
- **March 27, 2020:** President Trump signs the Coronavirus Aid, Relief, and Economic Security (CARES) Act.
- **May 13, 2020:** The Wisconsin Supreme Court strikes down Governor Evers' "Safer at Home Order."
- **July 30, 2020:** Governor Evers declares a Public Health Emergency and issues executive order requiring face masks.
- **August 8, 2020:** President Trump signs Presidential Memorandums which defer the withholding, deposit, and payment of the OASDI portion of the Social Security taxes and extends the offer of supplemental unemployment benefits at a reduced rate.
- **November 10, 2020:** Governor Evers issues order recommending Wisconsinites to stay at home.
- **November 20, 2020:** Governor Evers issues Executive Order #95 declaring hospitals nearing capacity a public health emergency.

Families First Coronavirus Response Act

Families First Coronavirus Response Act

- Main provisions impacting employers:
  - Emergency Family and Medical Leave Expansion Act ("EFMLA"); and,
  - Emergency Paid Sick Leave.
- Effective April 1, 2020 – December 31, 2020.
  - New paid leave requirements are not retroactive.
  - Temporary rules issued on April 1, 2020. https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act
  - IRS issued FAQs on Tax credits on April 1, 2020
    - https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

Families First Coronavirus Response Act

- Provides for quarterly tax credits to employers to offset the cost of Emergency Paid Sick Leave and EFMLA.
  - 100% of qualified Emergency Paid Sick Leave wages paid and EFMLA wages paid.
    - "Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period."
      - If employer provides group health coverage, employees are entitled to continued group health coverage during expanded family and medical leave on the same terms as if they continued to work.

Emergency Paid Sick Leave

Emergency Paid Sick Leave

- Provides for ten (10) days of paid sick leave to an employee of a covered employer who is unable to work due to COVID-19.
- Effective April 1, employees may use immediately.
- Covered Employer:
  - 50-499 employees.
  - Under 50 employees, unless the Small Business Exemption applies and employee is seeking leave for the closing of their child's school or childcare is unavailable.

Emergency Paid Sick Leave

- Covered Employees:
  - All
    - Full-time
    - Part-time
    - No length of service required (unlike EFMLA discussed later)
  - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee.

Emergency Paid Sick Leave

- Reasons for paid leave is when an employee is unable to work for the following reasons related to COVID-19:
  1. The employee is subject to a quarantine or isolation order;
  2. The employee has been advised by a health care provider to self-quarantine;
  3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  4. The employee is caring for an individual who is subject to an order as described in 1 or 2, above;
  5. The employee is caring for their son or daughter if the school or place of care for the son or daughter has been closed, or the child care provider is unavailable; and,
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Emergency Paid Sick Leave

- Amount of Leave:
  - Eighty (80) hours for full-time employees.
  - Part-time employees are entitled to paid leave hours equal to the average number of hours that the employee works over a two (2) week period.

Emergency Paid Sick Leave

- Caps on payments:
  - Regular pay up to $511 per day (and $5,110 in the aggregate) when:
    - The employee is subject to a quarantine or isolation order;
    - The employee has been advised by a health care provider to self-quarantine; and,
    - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - 2/3 pay up to $200 per day (and $2,000 in the aggregate) when:
    - The employee is caring for an individual who is subject to a quarantine, self isolation, or was advised to self-quarantine by a health care provider;
    - The employee is caring for their son or daughter if the school or place of care for the son or daughter has been closed, or the child care provider is unavailable; and,
    - The employee is experiencing other substantially similar condition as defined by the DOL.

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Emergency Paid Sick Leave

- Expires December 31, 2020; unused paid sick leave does not carry over into 2021.
- Failure to comply constitutes a failure to pay minimum wages in violation of the FLSA.
  - Civil suit possible
  - DOL enforcement
  - Double damages
  - Attorneys' fees
  - Civil penalties
  - MN Wage Theft Act

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Emergency Family and Medical Leave Expansion Act (EFMLA)

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Emergency Family and Medical Leave (EFMLA)

- Amends FMLA until December 31, 2020.
- Sole reason for leave:
  - **Unable to work (or telework) to care for a minor child if their school or licensed child care is unavailable due to a public health emergency (COVID-19).**
  - The term ''son or daughter'' is defined in the FMLA:
    - a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is--
      - under 18 years of age; or
      - 18 years of age or older and incapable of self-care because of a mental or physical disability.

Emergency Family and Medical Leave (EFMLA)

- Covered Employer:
  - 50-499 employees.
  - Under 50 employees, unless the Small Business Exemption applies.

Emergency Family and Medical Leave (EFMLA)

- Covered Employee:
  - Anyone employed for 30 days.
    - Includes part-time employees.
  - An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee.
- Length of protected leave:
  - Twelve (12) weeks.

EFMLA & FMLA

- Employees may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the EFMLA.
  - If an employee takes some, but not all 12, workweeks of EFMLA by December 31, 2020, employees may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period.
  - If an employer was covered by the FMLA prior to April 1, 2020, an employee's eligibility for EFMLA depends on how much leave the employee has already taken during the 12-month period that the employer uses for FMLA leave.

Emergency Family and Medical Leave (EFMLA)

- Paid leave:
  - The first two (2) weeks (10 working days) is unpaid.
    - Employees can substitute Emergency Paid Sick Leave, PTO, or vacation pay.
  - Ten (10) weeks paid.
    - 2/3 regular rate of pay up to $200 per day ($10,000 in the aggregate).

New FFCRA Rule

New FFCRA Rule

- On September 11, 2020, the DOL released revised Families First Coronavirus Response Act (FFCRA) rules in response to a federal court's decision that invalidated a handful of previous FFCRA regulations.
  - On August 3, 2020, a federal court in New York ruled four parts of the FFCRA's final rule were invalid:
    - the requirement that leave under the FFCRA is only available if an employer has work available for the employee;
    - the requirement that an employee must have employer consent to take FFCRA leave intermittently;
    - the definition of an employee who is a "health care provider"; and,
    - the requirement that employees must provide their employers with certain notice and documentation before taking FFCRA leave.

Available Work

- The DOL confirmed that:
  - an employer must have work available for an employee to qualify for FFCRA leave for any reason.
  - The qualifying reason for leave must be the "but-for" reason for the leave, not a lack of work for the employer because of a closure order, decline in demand, or other COVID-19-related reason.

Intermittent Leave

- The DOL confirmed an employer must consent to allow an employee to take leave intermittently.
  - New DOL Rule balances the employee's need for leave with the employer's need to avoid disruption to its business.
    - The DOL further explains that because employer consent is a condition for teleworking, employers similarly must consent to intermittent teleworking arrangements.
- The DOL also explains that the employer consent requirement does not apply when an employee needs leave because, for example, a child attends school in person on an alternate-day schedule.
  - Each school day closure constitutes a new reason for leave.
  - When school reopens the need for leave ends.
  - When it closes again the employee may start a new leave period.
    - The DOL does not view this as "intermittent leave".
    - In contrast, an employee seeking leave for various intervals during multiple days when a school remains closed is intermittent and requires the employer's consent.

Notice and Documentation Requirements

- The new Rule clarifies that employees:
  - do not need to provide notice in advance of or as a prerequisite to paid sick leave entitlement; and
  - must provide notice of the need for EFMLEA leave as soon as practicable (which for foreseeable leave, may be in advance of taking the leave).

FFCRA FAQS

COVID-Related Inquiries

COVID-Related Inquiries

- What types of questions can an employer ask employees related to COVID-19 symptoms, diagnoses, and exposure?

COVID-Related Inquiries

- Employers may ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19, as well as if they have symptoms.
- Employers may not ask employees if a family member has COVID-19 or symptoms, as that would violate the Genetic Information Nondiscrimination Act's prohibition on medical inquiries about family members.
  - Employers are permitted to ask, however, if employees have had contact with anyone who has the disease or symptoms.
- If an employee who works onsite calls in sick or reports feeling ill, the employer may ask questions about their symptoms.

COVID-Related Inquiries

- An employer may ask an employee why they have been absent from work.
- An employer may ask an employee where they have traveled, even if the travel was personal – such question is not a medical inquiry under the ADA.
- An employer may bar an employee from the workplace if they refuse to undergo screening or answer questions about testing, symptoms or infection with COVID-19.
  - The EEOC recommends, however, that the employer ask about the reasons for the refusal, as the employer may be able to address the employee's concerns about providing the information (e.g. privacy, needing accommodations for screening).

Mask FAQS

Masks

- An employer may require that the employee provide medial documentation of the employee's limitation from wearing masks (or other face coverings).
  - This includes the right to require that the medical documentation specifically identify the issue with masks.
    - For example, is it the density of the mask, the fabric used for the mask, or the length of time wearing the mask.
  - The employer should ask for the employee's healthcare provider to state what accommodation, if any, can be made for the employee in lieu of the face covering.
    - For example, maybe the employee can wear a mask for short periods of time and the employer can provide a space for the employee to safely take extra mask breaks during the day.
- OSHA has released information regarding the safety of masks: https://www.osha.gov/SLTC/covid-19/covid-19-faq.html.

Resources

Resources

- **PRK&A Blog:**
  - https://www.prkalaw.com/publications/
- **DOL FAQs on the FFCRA:**
  - https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- **CDC COVID-19 information for employers:**
  - https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html
- **Wisconsin COVID-19 information for employers:**
  - https://www.dhs.wisconsin.gov/covid-19/employers.htm

FEDERAL, STATE AND LOCAL REGULATORY UPDATES

New I-9 Form Effective May 1, 2020

- Starting May 1, 2020, employers are required to use the Form I-9 with the 10/21/19 edition date.
  - This revised form lists additional countries in the Country of Issuance field in Section 1.
  - It also clarifies that an employer may designate anyone to be an authorized representative to complete Section 2, but the employer is still liable for any violations committed by the designated person.
  - Writing N/A in the identity document columns is no longer necessary.
  - The new form clarifies that a worker's Employment Authorization Document (EAD) that contains a photograph is a List A document.

I-9 Audits by the Numbers

- Big increase in Department of Homeland Security audits since 2017.
  - 2017: 1,360
  - 2018: 5,981
  - 2019: 6,456
- $14,300,000 worth of judicial fines, forfeitures, and restitutions against employers in violation of I-9 requirements in 2019 alone.
  - Fines are determined on a per violation basis and are not capped.
    - If employers continually make the same mistake, the fines can increase exponentially.

I-9 Completion Basics

- On the first day of employment, the employee must complete Section 1.
  - Employer may have employee complete it before first day, but only after job has been offered and accepted.
- Employer must complete remainder of form by employee's third day.
  - Do not abbreviate for consistency (e.g., Avenue instead of Ave.).
  - Verify employee correctly filled out Section 1—their errors are the employer's responsibility.

I-9s for Rehires

- If you rehire employees within three years from the date you completed their previous Form I-9, you may either use that form or complete a new one.
  - If they are still authorized to work, they do not need to provide any additional documents. This includes U.S. citizens, noncitizen nationals, and lawful permanent residents who presented a Form I-551. For these employees, you must:
    - Enter the employee's full name from the original Form I-9 at the top of Section 3.
    - Enter any name change in Block A.
    - Enter their rehire date in Block B.
    - Enter your name and sign and date Section 3.

I-9s for Rehires (cont.)

- However, if their employment authorization has expired, you must:
  - Enter the employee's full name from the original Form I-9 at the top of Section 3.
  - Enter any name change in Block A.
  - Enter the rehire date in Block B.
  - Re-verify their employment authorization in Block C.
  - Enter your name and sign and date Section 3.
- If the employee's previous form is an old version of the form, you must complete Section 3 on the current version I-9.

The Department of Labor (DOL)

OSHA Record-keeping

Recording COVID-19 as a Workplace Illness

- COVID-19 can be a recorded as a workplace illness if all of the following is true:
  - The case is a confirmed case of COVID-19;
  - The case is work-related; and
    - Defined by OSHA as "an event or exposure in the work environment either caused or contributed to the resulting condition. Work-relatedness is presumed for illnesses resulting from events or exposures occurring in the work environment."
    - Some exceptions include if employee was present at work as member of general public or if symptoms surface at work but resulted from non-work-related event or exposure outside of work.
  - The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.
    - For example, the illness required medical treatment beyond first aid or employee had to take days off from work.

Recording COVID-19 as a Workplace Illness (cont.)

- In determining whether an employer has complied with this obligation and made a reasonable determination of work-relatedness, OSHA will apply the following considerations:
  - The reasonableness of the employer's investigation into work-relatedness.
    - Sufficient to: 1) Ask employee how they believe they contracted it; 2) discuss with employee their work and out-of-work activities that may have led to illness; and 3) review employee's work environment for potential COVID-19 exposure.
  - The evidence available to employer at the time of determination.
  - The evidence that a COVID-19 illness was contracted at work.
    - More likely when several cases develop among close-working employees, it was contracted shortly after lengthy, close exposure to customer or coworker who has a confirmed case, or when job duties include frequent, close exposure to general public with ongoing community transmission and no alternative explanation.
    - Not likely when employee is the only one to contract it and job duties do not include frequent contact with general public, regardless of rate of community spread.

New FMLA Forms

New Model FMLA Forms

- On July 16, 2020, the DOL released a series of new forms that can be used by employers to document leave under the Family and Medical Leave Act ("FMLA").
  - Forms are available here: https://www.dol.gov/agencies/whd/fmla/forms
  - Employers are not required to use the new forms, but, the DOL claims the new forms are "easier to use".
  - Employees who already provided information on the old forms cannot be required to provide it again.
  - Some of the more significant updates include the replacement of questions that required written responses with statements that can be completed by checking a box, and electronic signature features.

New COBRA Forms

New Model COBRA Notices

- On May 1, 2020, the Department of Labor ("DOL") released updated versions of its model COBRA notices.
  - Both the general notice (required when an employee enrolls in employer-sponsored medical coverage) and the election notice (required after a qualifying event) have been updated.
  - New notices are available at: https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

New Model COBRA Notices (cont.)

- There are new sections to explain how Medicare eligibility affects COBRA participants.
  - Specifically, the new notices explain Medicare election obligations and, for those that have Medicare coverage and also elect COBRA coverage, that COBRA coverage pays secondary to Medicare.
- Employers should update their COBRA notices with the new model notices.

Other DOL Activities

EEO-1 Employment Data Deadline Extended

- In light of the pandemic, the Equal Employment Opportunity Commission ("EEOC") has delayed its annual collection of employment data until March 2021.
  - Their reasoning was that it would ensure the information obtained was more accurate and reliable than it is now with record unemployment, layoffs, and furloughs.
- Generally, this data includes the race, gender, and job categories of employees and is submitted via form EEO-1 by private sector employers.
  - Pay data is no longer required to be collected as of 2020.

DOL Proposed Rule on Independent Contractor Status

- On September 22, 2020, the DOL proposed a simplified test—the "economic reality" test—to determine whether a worker is considered an "employee" under the FLSA or an "independent contractor."
- The "economic reality" test considers whether a worker is:
  - In business for him/herself (thus, an independent contractor); or
  - Economically dependent on an employer for work (thus, an employee).
- The DOL identifies two "core factors" that hold the greatest weight in the analysis:
  - The nature and degree of the worker's control over the work; and
  - The worker's opportunity for profit or loss based on initiative and/or investment.
- However, three lower impact factors to consider include:
  - The amount of skill required for the work;
  - The degree of permanence of the working relationship between the worker and the potential employer; and
  - Whether the work is part of an integrated unit of production.

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DOL Opinions on Employee Compensability

- Construction Travel Time
  - Travel time is compensable if employee is required to report to a designated/central place before going to a worksite.
    - If employees are traveling from home to a local worksite directly, that time is not compensable. It can be compensable if it is a remote worksite further away.
  - Additionally, travel time is compensable when it keeps employees from home and it cuts across their normal working hours.
    - Exception: Passengers.
  - Employers should set their own rules regarding employee compensability.
- Continuing Education Classes
  - The DOL explains that there are 4 factors in considering whether training programs and other similar activities count as working time. It is *not* "work time" if:
    - Attendance is outside of the employee's regular working hours;
    - Attendance is voluntary;
    - The course, lecture, or meeting is not directly related to the employee's job; and
    - The employee does not perform any productive work during such attendance.
  - Generally, on-demand training (i.e., webinars) during normal working hours is compensable, but outside of work is not.
  - Additionally, an employee who chooses to travel to an out of town seminar on days they do not normally work is not required to be compensated for training or travel time.

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NOTABLE FEDERAL CASES

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Bostock v. Clayton County, GA

- *Bostock v. Clayton County, GA*, 140 S.Ct. 1731, 2020 WL 3146686 (June 15, 2020).
  - Issue: Whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against individuals for being gay or transgender.
  - *Bostock v. Clayton County, GA* is a trio of consolidated cases where lower courts were split on these issues.
    - In *Bostock*, Gerald Bostock promoted a gay softball league at work. Soon after, the County conducted an audit of funds controlled by Bostock and he was subsequently fired for "conduct unbecoming a county employee."
    - In *R.G. and G.R. Harris Funeral Homes Inc. v. EEOC*, Aimee Stephens, a six-year employee, explained to her manager that she was transitioning and would begin wearing attire appropriate for female employees. Within two weeks of this notice, she was terminated.
    - In *Altitude Express, Inc. v. Zarda*, Donald Zarda was fired days after he mentioned that he was gay.
  - Lower Level Decisions:
    - *Bostock*: The US District Court for the Northern District of GA dismissed Bostock's case. Bostock appealed to the 11th Circuit, who affirmed the District Court's dismissal.
    - *Harris Funeral Homes*: The US District Court for the Eastern District of Michigan ruled in the funeral home's favor holding that neither transgender persons nor gender identity were protected classes under Title VII and that the Religious Freedom Restoration Act gave the funeral home director—as a devout Christian who ran the funeral home under the religion, which does not accept changing of gender—the ability to fire Stephens for not conforming to dress code. The EEOC appealed to the 6th Circuit, which reversed the District Court's order, holding that Title VII's "discrimination by sex" includes transgender persons and that this did not burden the owner from expressing his religious freedom.
    - *Zarda*: The US District Court for the Eastern District of New York granted summary judgment in favor of the employer. On appeal, the 2nd Circuit reversed.

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Bostock v. Clayton County, GA (cont.)

- Holding: An employer violates Title VII, which makes it unlawful to discriminate against an individual "because of" the individual's sex, by firing an individual for being homosexual or being a transgender person.
- **Takeaway:** Employers cannot fire someone because they are gay, lesbian, or transgender.

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LOOKING FORWARD: THE BIDEN ADMINISTRATION

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The PRO Act

Protecting the Right to Organize (PRO Act)

- Overrides "right to work" laws in roughly 27 states.
- Allows card checks in lieu of elections
- Reclassifies independent contractors as employees
- Returns to BFI joint employer standard
- Returns to ambush election rules
- Allows for private causes of action for ULPs and civil penalties
- Requires expanded reporting for use of persuaders
- Forces arbitration of first-time bargaining agreements.

Protecting the Right to Organize (PRO Act)

- Passed the House by a vote of 224-194.
- Biden has said he would sign the Pro Act.
- Even without Senate flip, Biden could enact some of the criteria through executive order binding upon federal contractors.

The Department of Labor (DOL)

How the DOL Affects Businesses

- The DOL is a federal government agency that is able to shape employment in the private sector through labor laws, legal guidance, and other regulations.
  - It is particularly responsible for occupational safety (OSHA), wage and hour standards, unemployment insurance benefits, and reemployment services.
- The DOL is led by the Secretary of Labor, whose vision and direction will influence employment and labor law for at least the next four years.

The DOL's Next Secretary of Labor

- The Biden Transition team has yet to announce its choice for this top cabinet position.
- Current conjecture suggests Biden will appoint someone more progressive to this position as opposed to the more moderate nominees he has already named.
- Among those rumored for placement as Secretary include Julie Su (Sec. of the CA Labor and Workforce Development Agency), Tom Perez (former Obama Labor Secretary and DNC Chairman), Seth Harris (Acting Labor Secretary in 2013), and Rep. Andy Levin (D-Mich., former labor organizer for SEIU and Asst. Director of Organizing for AFL-CIO).

OSHA

OSHA

- Short list of Leadership: Jim Fredrick (USW Union) and Chris Crain (NA Building Trades)
- More aggressive stance on worker safety
- Immediate declaration of a emergency temporary standard to combat COVID-19.
- Linking COVID-19 illness/death to workplace more likely
- More emphasis of PPE
- OSHA has received 9800+ workplace complaints of COVID-19 hazards with 9300 resolved.
- More whistleblower protection

Wage & Hour

Minimum Wage

- Biden has promised in the past to increase the federal minimum wage from $7.25 per hour (set in 2009) to $15.00 per hour.
  - Generally speaking, Wisconsin's current minimum wage reflects the federal minimum wage of $7.25 per hour.
- Although it is unclear exactly how such a measure would come into play, there is precedent for how this could roll out.
  - For example, the cities of Minneapolis and St. Paul in Minnesota have instituted an annual bump in minimum wage until they reach their agreed upon minimum.
  - Additionally, the State of Florida recently voted for a statewide $15 minimum wage which it will gradually increase until 2026.

Other Wage and Hour Items

- Expect focus on independent contractor status
- Wage and hour opinion letters rescinded?
  - Provide employers with a complete good faith defense against FLSA liability
  - Obama administration rescinded and stopped issue opinion letters
  - Trump administration reintated
- PAID program rescinded?
  - Voluntary self-audit programs
  - Calculate and pay two years back pay but not third-year, double damages or penalties

Joint employment

- DOL issued joint employment rules under Trump administration
- Invalided by District Court, but on appeal to 2nd Circuit
- Biden DOL/DOJ may not prosecute the appeal

FMLA

- Expansion of FMLA?
  - Expand number of employers covered by Act?
  - Mandate paid FMLA?

Other Items

Health Care Coverage

- In 2017, the Trump administration eliminated the individual mandate of the Affordable Care Act, removing the tax penalty for anyone failing to have health insurance.
- On November 10, 2020, the U.S. Supreme Court heard a case on the ACA and how the removal of the individual mandate affects the enforceability of the ACA.
- The Biden administration has proposed to "build on" the ACA by addressing complaints that the ACA premiums are unaffordable and consider creating a public option of health insurance.

QUESTIONS?

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THANK YOU!

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