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2022 Labor & Employment Law Update: The Year in Review

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Overview

- Significant Court Decisions
  - Supreme Court Update
  - Seventh Circuit Update
- EEOC Year in Review
- DOL Updates
- NLRB Updates
- What to Watch For in 2023

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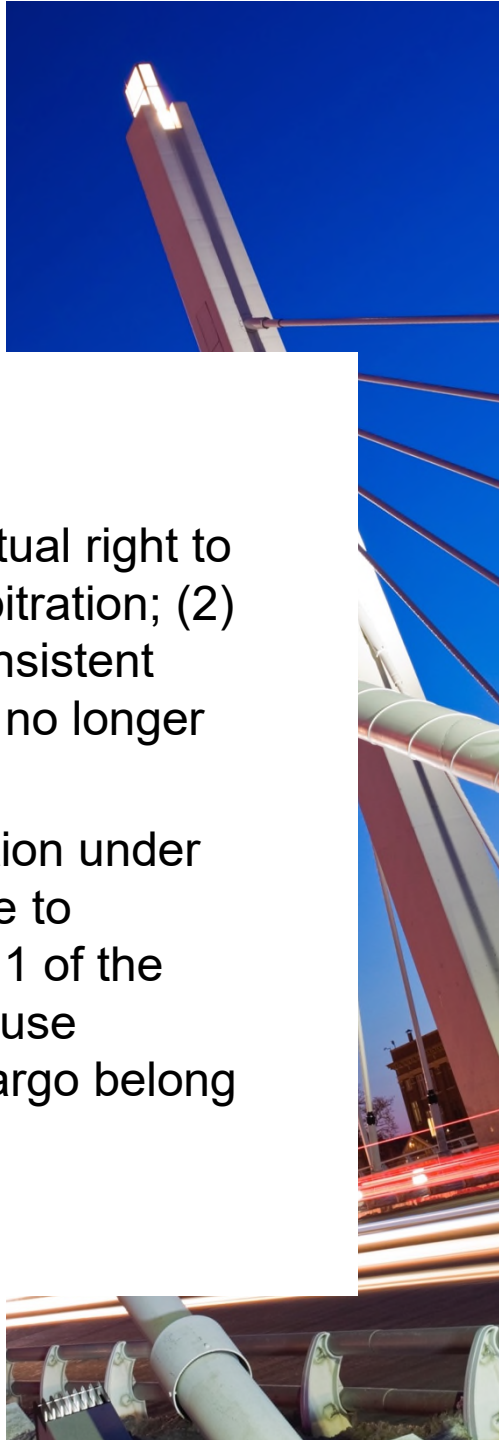
Supreme Court Update

New Justice, New Term

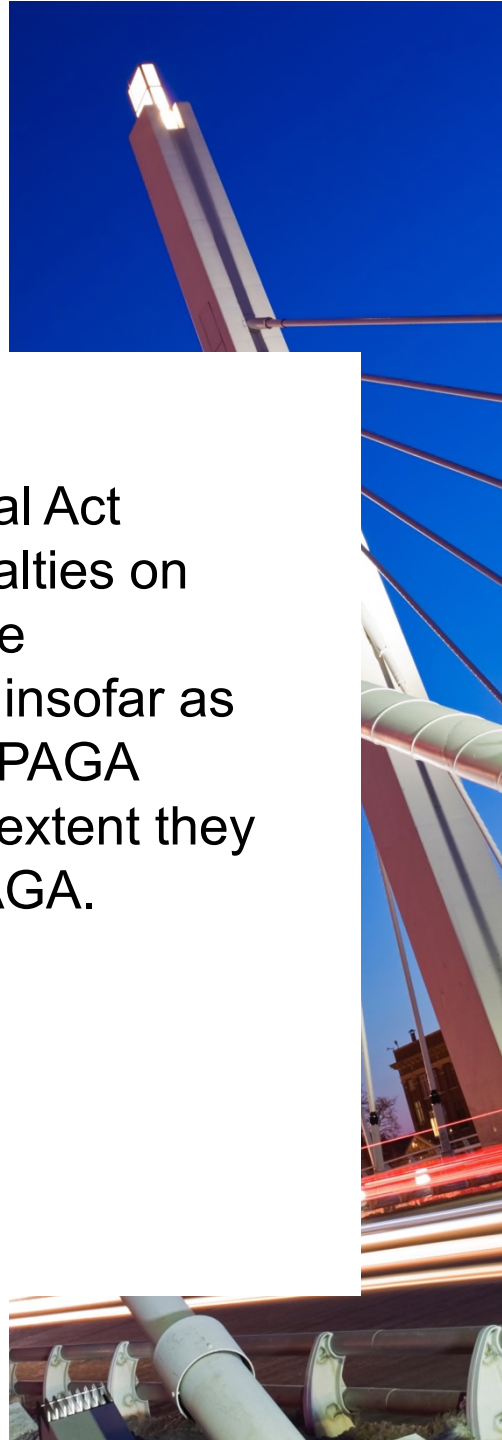
- Justice Ketanji Brown Jackson confirmed as an associate justice in April of 2022
- Political breakdown now 6 – 3
- The 2022 – 2023 term began in October

Arbitrations & the Federal Arbitration Act (FAA)



- The Court issued multiple decisions this term related to arbitration agreements
- ***Morgan v. Sundance, Inc.*** – Prior to this case, in order to establish waiver of a contractual right to arbitration, a party needed to establish that (1) the opposing party knew of its right to arbitration; (2) acted inconsistently with that right; (3) and caused prejudice to the other side by its inconsistent actions. In a 9–0 decision, Justice Kagan eliminated the third requirement. Prejudice is no longer required to establish waiver.
- ***Southwest Airlines Co. v. Saxon*** – A Southwest employee brought a putative class action under the FLSA. Southwest sought to enforce an arbitration agreement requiring the employee to arbitrate the dispute individually. In an 8–0 decision, Justice Thomas wrote that Section 1 of the FAA, which exempts workers engaged in foreign and interstate commerce, applied because airplane cargo loaders and ramp supervisors who frequently load and unload airplane cargo belong to a class of workers engaged in foreign or interstate commerce.

Arbitrations Continued . . .

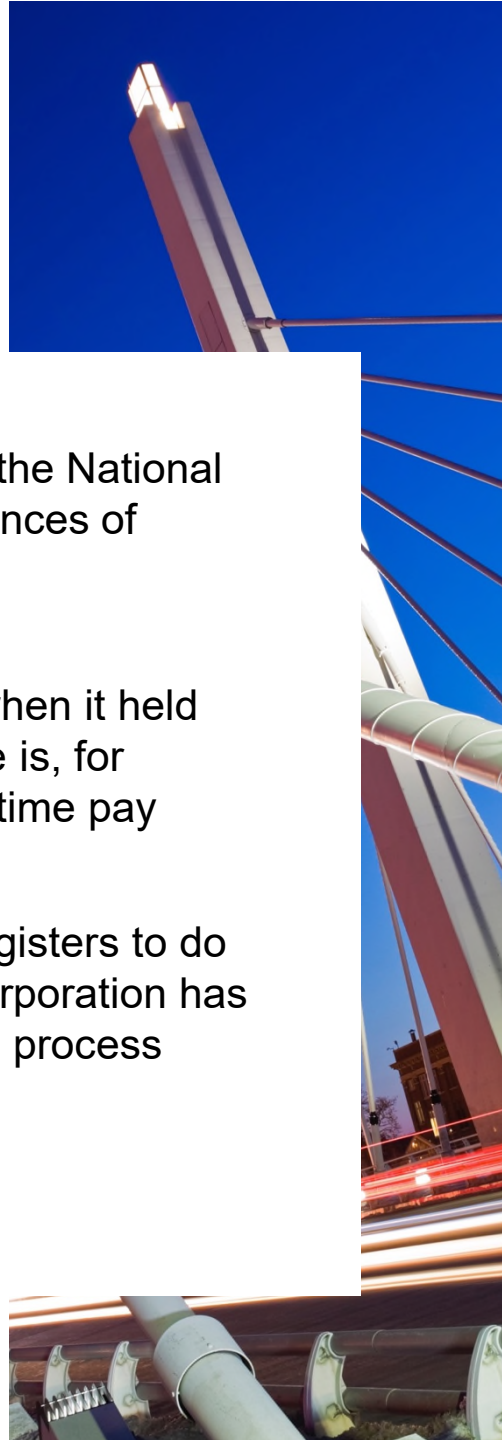


- ***Viking River Cruises v. Moriana*** – Under California's Private Attorneys General Act (PAGA) California employees are authorized to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the state of California for labor code violations. In an 8–1 decision, Justice Alito wrote that the FAA preempts PAGA insofar as PAGA would invalidate contractual waivers of the right to assert representative PAGA claims. In other words, an employer can enforce arbitration agreements to the extent they require employees to arbitrate individual claims, even those that arise under PAGA.

Roe Overruled

- The Supreme Court overruled *Roe v. Wade*
- In turn, many states have adopted laws that restrict abortion access
- In response, some people will be traveling out of state to seek reproductive health
- Employers are faced with questions about whether they can offer travel benefits, whether employees can seek job-protected leave to travel, etc.

What's Coming in 2023



- ***Glacier Northwest, Inc. v. International Brotherhood of Teamsters*** – Court will decide whether the National Labor Relations Act prevents employer from suing unions in state court for the economic consequences of strikes (i.e., spoiled products)

- ***Helix Energy Solutions Group, Inc. v. Hewitt*** – Court will decide whether the Fifth Circuit erred when it held that daily rate pay is not equivalent to a salary, regardless of how highly compensated an employee is, for purposes of overtime pay, meaning a supervisor making over $200k annually is still entitled to overtime pay

- ***Mallory v. Norfolk Southern Railway Co.*** – Under Pennsylvania law, a foreign corporation that registers to do business in the commonwealth consents to personal jurisdiction there regardless of whether the corporation has any continuous and systematic connections to the state; Court will decide whether this violates due process

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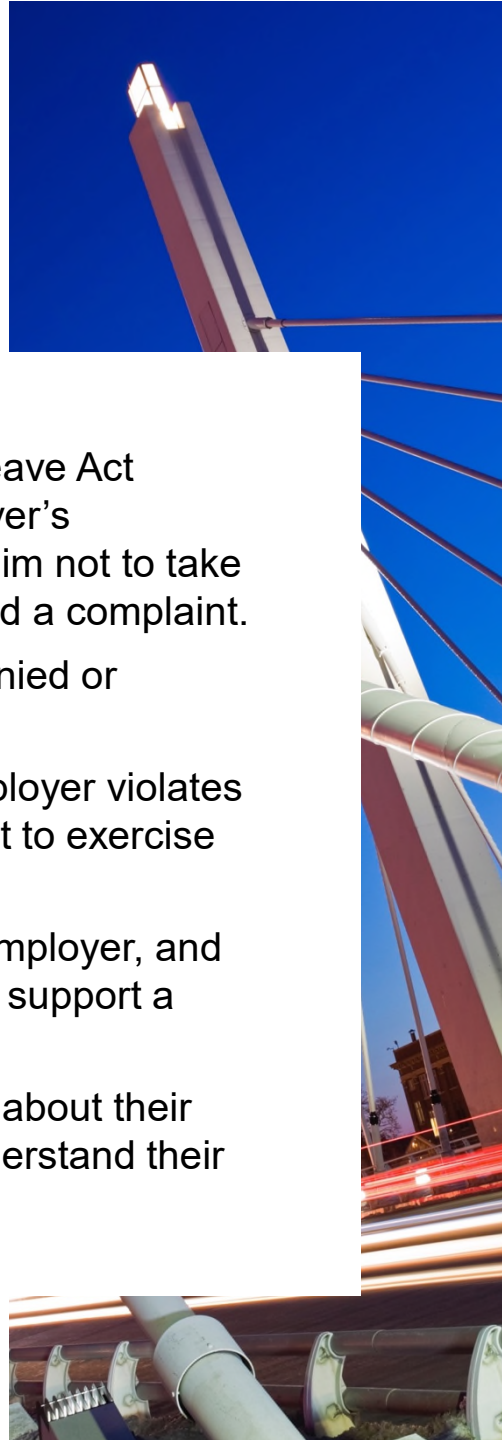
Seventh Circuit Update

U.S. Court of Appeals for the Seventh Circuit

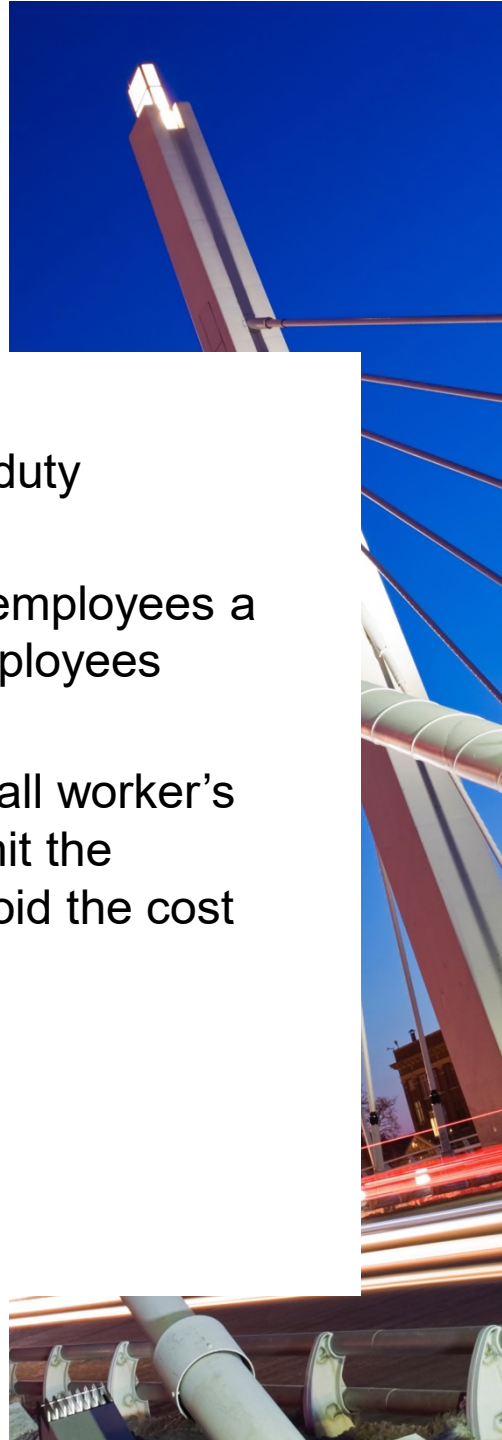
- Covers Wisconsin, Illinois, and Indiana
- Two new judges nominated by Biden: Candace Jackson-Akiwumi and John Z. Lee
- Currently one vacancy
- It remains one of the more conservative court of appeals

Ziccarelli v. Dart et al.



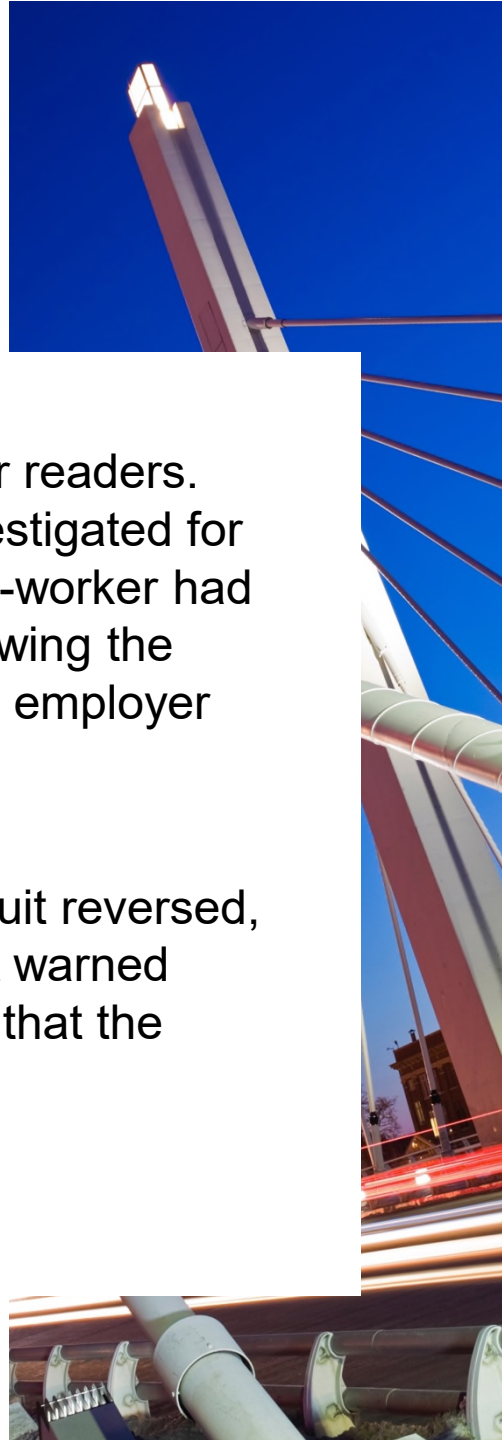
- An employee with serious health conditions used hundreds of hours of leave under the Family Medical Leave Act (FMLA) in a year. The employee then requested an additional 8 weeks of leave. In response, the employer's representative told the employee that he had already taken a significant amount of FMLA leave and told him not to take any more leave or he would be disciplined. The employee did not take any more leave, resigned, and filed a complaint.
- To make an FMLA interference claim an employee must allege, among other things, that the employer denied or interfered with FMLA benefits to which the employee was entitled resulting in harm to the employee.
- The FMLA does not require an actual denial of FMLA benefits for a violation of the FMLA to occur. An employer violates an employee's FMLA rights when it denies, interferes with, or restrains the employee's exercise or attempt to exercise such rights.
- Here, the employee had more than a month of FMLA leave available when he requested leave from his employer, and the alleged statement by the employer that he would be disciplined if he took more leave was sufficient to support a claim.
- The opinion serves as a reminder to employers to exercise caution when communicating with employees about their requests for FMLA leave and to carefully document such conversations in order to ensure employees understand their rights and to limit future disputes regarding what was communicated to the employee.

EEOC v. Wal-Mart Stores East, L.P.



- Wal-Mart did not discriminate against pregnant employees by reserving temporary light duty positions only for those employees injured on the job
- EEOC argued that accommodating all employees injured on the job by providing these employees a temporary light duty position and not providing a similar accommodation to pregnant employees constituted sex discrimination in violation of Title VII and the PDA
- Wal-Mart argued that it had a legitimate business reason – its program is part of its overall worker's compensation program to bring injured employees back to work as soon as possible, limit the Company's legal exposure under Wisconsin's worker's compensation statute, and to avoid the cost of hiring new employees to replace injured employees
- The Court found that these reasons were legitimate, nondiscriminatory justifications

Dunlevy v. Langfelder



- Plaintiff (white) and a co-worker (black) were hired around the same time as water meter readers. Both were hired with a probationary period. At the end of their probation, both were investigated for misconduct. Plaintiff had inaccurately recorded meter readings at seven homes. His co-worker had poor attendance and had lied on his application by failing to disclose a conviction. Following the investigations, the supervisor recommended that both employees be terminated, but the employer only terminated the white employee.

- The district court granted summary judgment in favor of the employer. The Seventh Circuit reversed, finding that the employees were similarly situated and engaged in similar misconduct. It warned that lower courts should not narrowly construe similarly situated comparators and found that the misconduct was of comparable seriousness and culpability.

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EEOC Year In Review

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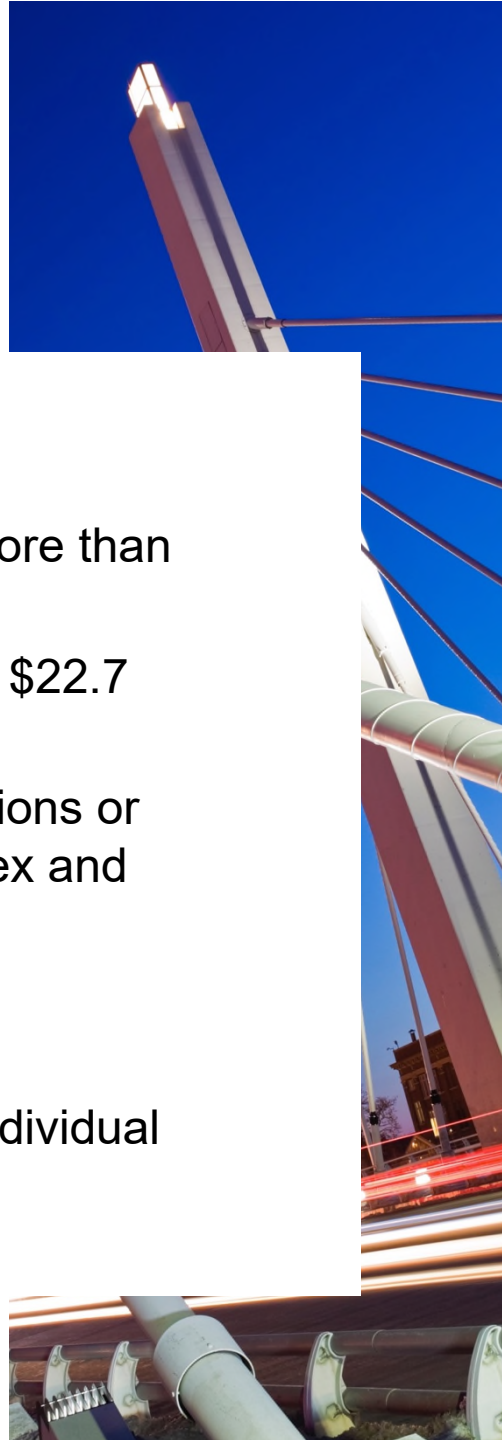
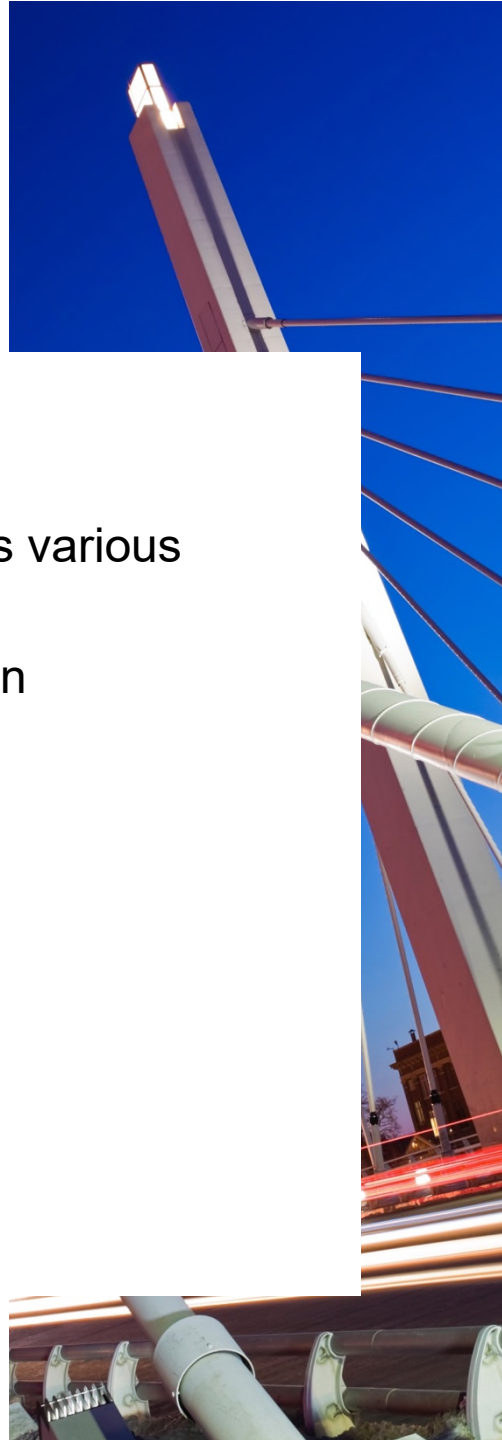


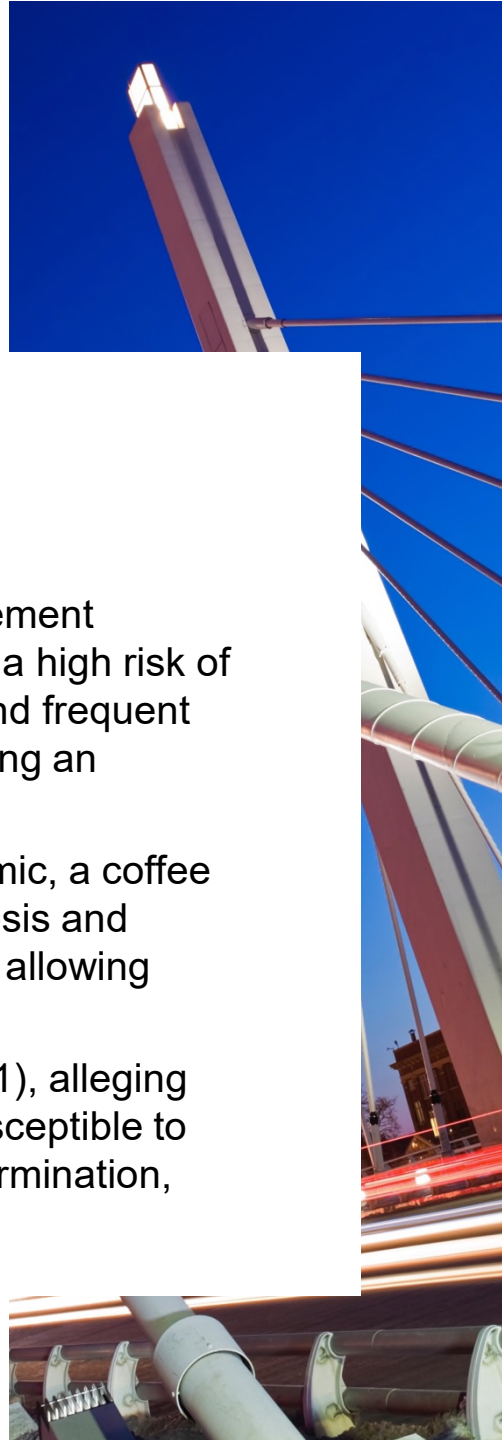
- In fiscal year 2021 (ending September 30, 2021), the EEOC:
  - Resolved 342 investigations of “systemic” discrimination or retaliation and obtained more than $24.4 million plus equitable relief for complainants
  - Resolved 26 lawsuits alleging systemic discrimination or retaliation and obtained over $22.7 million for 1671 individuals
  - Filed 13 new systemic discrimination lawsuits involving challenges to employment actions or policies related to alleged disability, sex-based failure to hire, harassment based on sex and pregnancy, discharge based on race or national origin, and layoffs based on age
  - Resolved 21 systemic or class lawsuits alleging race or national origin and obtained approximately $15 million on behalf of 798 individuals
  - Filed 9 new systemic or class lawsuits alleging race discrimination and filed 14 new individual lawsuits alleging race or national origin discrimination

EEOC Year in Review



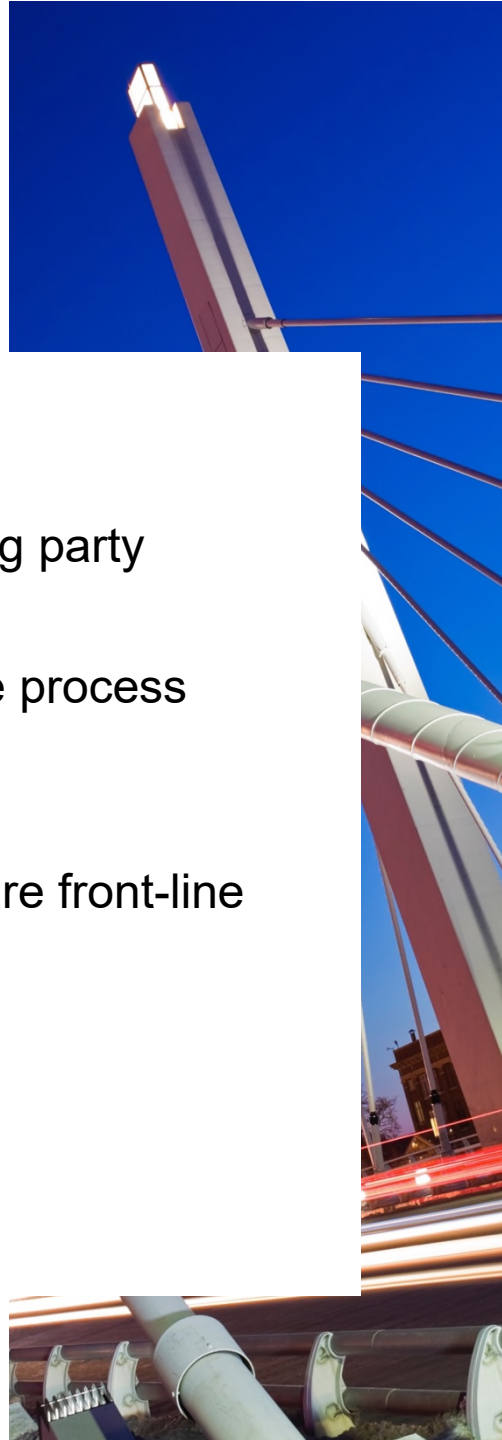
- In fiscal year 2021 (ending September 30, 2021), the EEOC (continued):
  - Conciliated multiple race charges and obtained over $10 million in monetary relief plus various forms of equitable relief for complainants
  - Resolved 10 compensation discrimination cases and obtained approximately $1 million benefitting 51 individuals
  - Filed 5 new compensation discrimination lawsuits – 5 based on sex, 1 based on race
  - Released COVID-19/disability accommodation guidance (and updated it 20 times)
  - Published a COVID-19 fact sheet
  - Processed 3,631 charges alleging COVID-19 related discrimination

EEOC Year in Review



- In fiscal year 2021 (ending September 30, 2021), the EEOC (continued):
  - Filed 3 lawsuits related to COVID-19
    - *EEOC v. ISS Facility Services*, No. 1:21-cv-3708 (N.D. Ga. Sept. 7, 2021), alleging a facility management company denied a health, safety, and environmental quality manager with chronic lung disease and a high risk of contracting COVID-19 the reasonable accommodations of working from home two days per week and frequent breaks while on site, and then discharged her because of her disability and in retaliation for requesting an accommodation;
    - *EEOC v. 151 Coffee*, No. 4:21-cv-01081 (N.D. Tex. Sept. 24, 2021), alleging that early in the pandemic, a coffee shop refused to provide two baristas reasonable accommodation for their disabilities, multiple sclerosis and pulmonary valve stenosis, and discharged both because of their disabilities based on a policy of not allowing employees with certain disabilities to return to work until a COVID-19 vaccine was developed; and
    - *EEOC v. U.S. Drug Mart, Inc., d/b/a Fabens Pharmacy*, No. 3:21-cv-00232 (W.D. Tex. Sept. 24, 2021), alleging that after a pharmacy technician requested to wear a mask because his asthma made him more susceptible to COVID-19, the head pharmacist subjected him to a hostile work environment, including threats of termination, resulting in the clerk's constructive discharge.

EEOC Year in Review



- In fiscal year 2021 (ending September 30, 2021), the EEOC (continued):
  - Resolved an increased percentage of charges with outcomes favorable to the charging party
    - *19.2% in fiscal year 2021 compared to 17.4% in fiscal year 2020*
  - Secured over $350 million in monetary relief without lawsuits during the administrative process and obtained equitable relief in 100% of conciliation agreements
  - Resolved 41.1% of conciliations, down from 43.6% in 2020
  - Filled 450 positions and ended the fiscal year with 2100+ employees, most of whom are front-line workers (i.e., investigators, attorneys, mediators, etc.)

EEOC Top Priorities

- Since 2021, the EEOC's top priorities have continued to be:
  - Addressing systemic/class wide discrimination
  - Addressing race and national origin discrimination (with an increased focus on Asians/Pacific Islanders due to discrimination/harassment stemming from COVID-19)
    - Race and national origin charges make up approximately 1/3 of all charges
  - Addressing harassment, particularly sex-based harassment and race/national origin harassment
  - Addressing pay disparities based on sex and race

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OSHA Updates

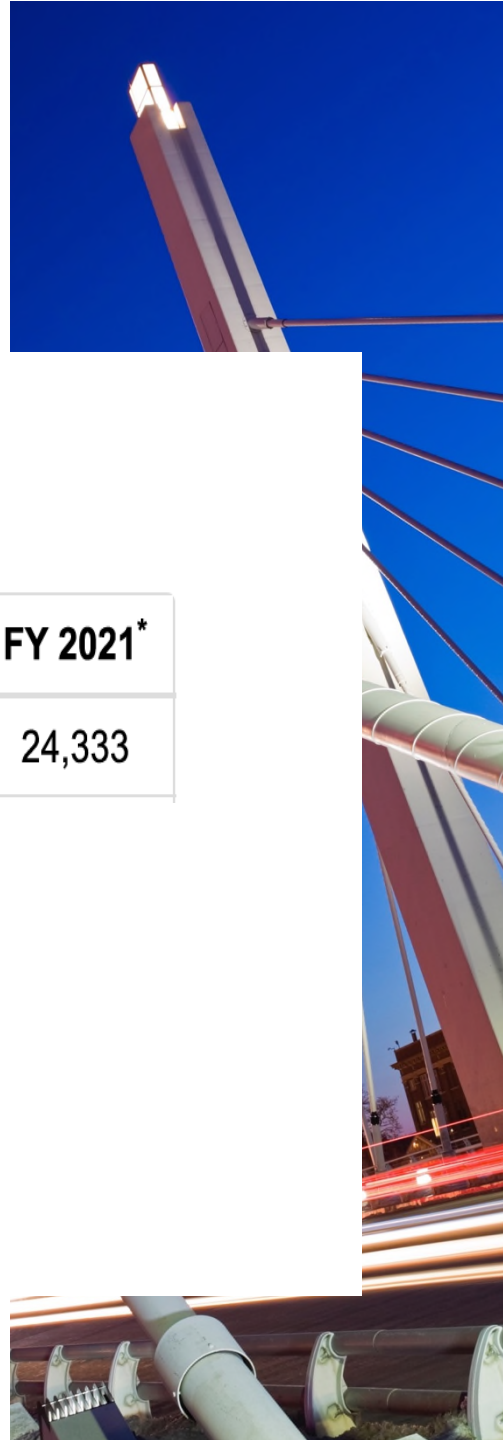
OSHA Under Biden

- OSHA activity slowed during pandemic

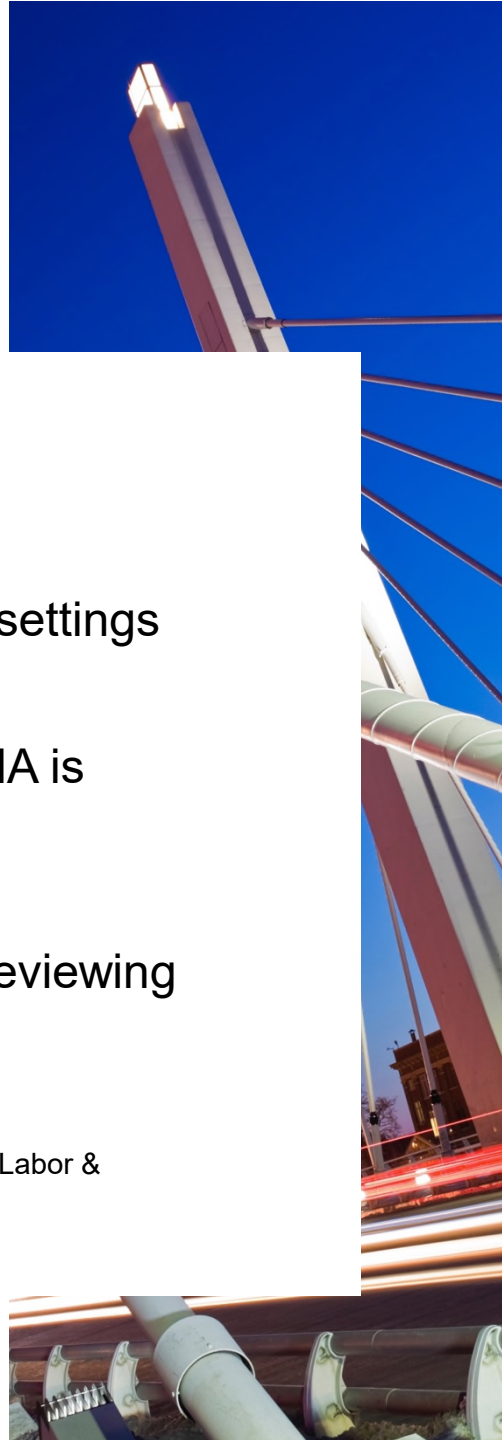
OSHA Inspection Statistics	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020*	FY 2021*
Total Inspections	31,948	32,408	32,023	33,393	21,710	24,333

- Biden admin. has successfully brought OSHA activity back to pre-pandemic levels
- The 2022 fiscal year goal was 31,400 inspections, OSHA is on pace to meet its goal
- Congress has funded more than 85 new inspector positions

Source: Bruce Rolfsen, *OSHA Inspection Numbers Rebounding Close to Pre-Pandemic Level*, Bloomberg (Sept. 14, 2022)



New NEP for Heat Hazards



- OSHA announced a new National Emphasis Program (NEP) for heat hazards in April
- OSHA will conduct proactive inspections for heat-related hazards in indoor and outdoor settings
- NEP outlines various items that will trigger a heat-related inspection, such as when OSHA is conducting a non-heat related inspection and observes a hazardous heat condition
- NEP mandates various steps OSHA must take when inspecting heat hazards, such as reviewing injury and illness logs and incident reports for entries indicated heat-related illnesses

Source: Katelynn Williams, *The Heat is On: OSHA Launches National Emphasis Program for Indoor and Outdoor Heat Hazards*, Foley & Lardner: Labor & Employment Law Perspectives (April 8, 2022)

Updated Penalty Structure

- OSHA's penalty structure was updated for inflation in 2022
- It is updated every year under the Federal Civil Penalties Inflation Adjustment Act

Source: https://www.osha.gov/memos/2022-01-13/2022-annual-adjustments-osha-civil-penalties

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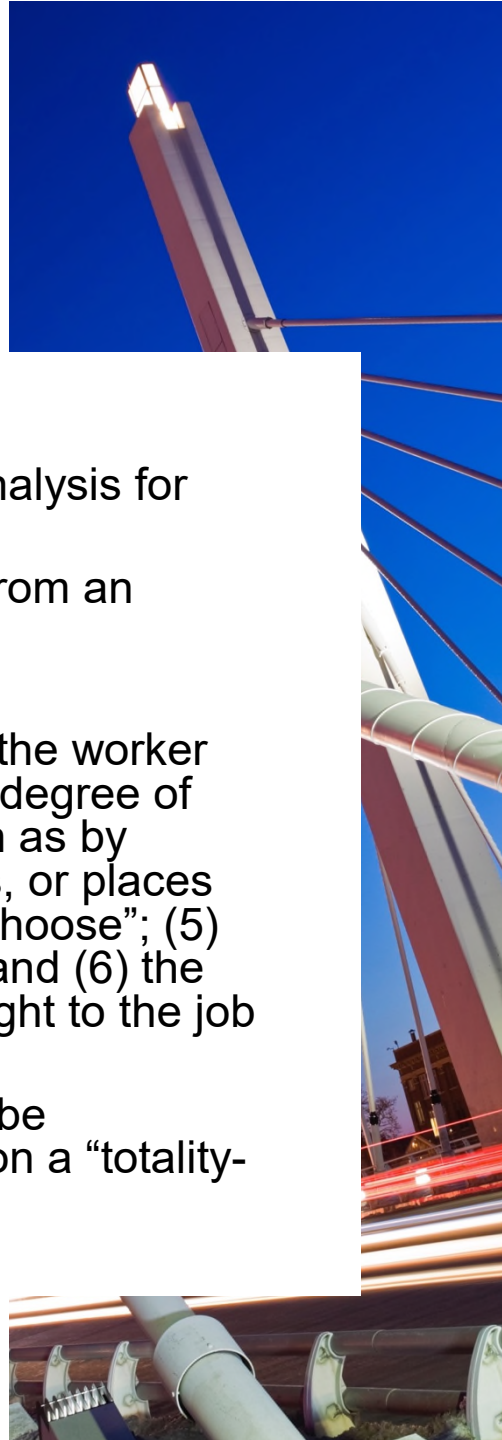
Department of Labor Updates

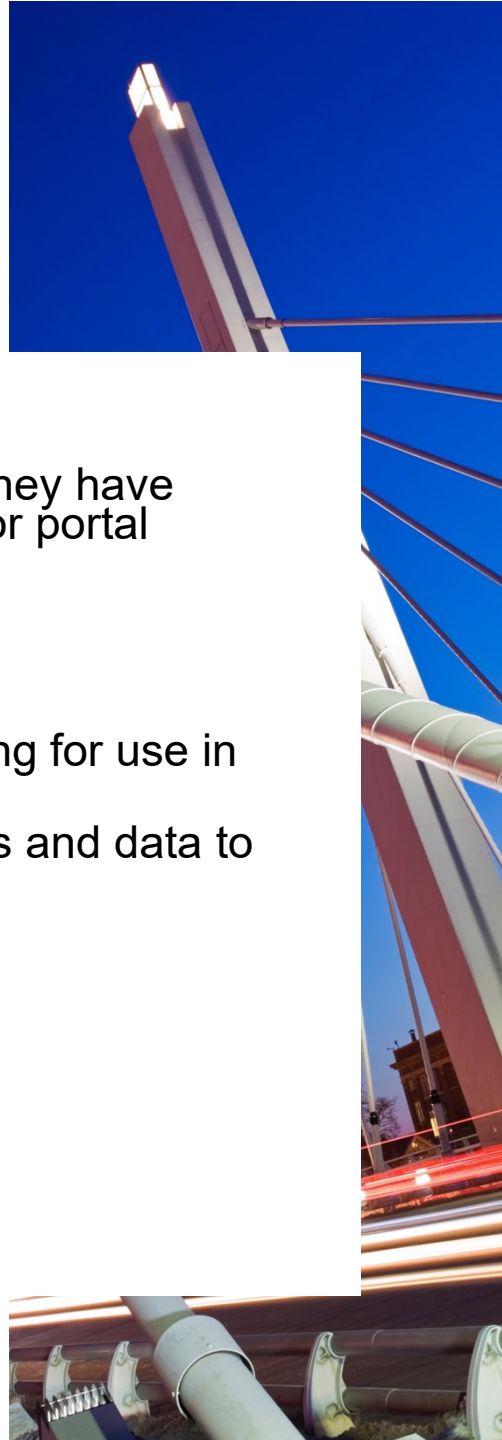
DOL Update



- **Employee or Independent Contractor Classification**
  - On October 13, 2022, the DOL published a Notice of Proposed Rulemaking revising the analysis for determining whether a worker is an independent contractor or an employee
  - The proposed rule would rescind and replace the prior January 2021 rule and would shift from an "economic reality" test to a more complex "totality of circumstances" approach
  - Analysis would involve 6 factors
    - (1) the "opportunity for profit or loss depending on managerial skill"; (2) "investments by the worker and the employer"; (3) "degree of permanence of the work relationship"; (4) "nature and degree of control," including "whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose"; (5) the "extent to which the work performed is an integral part of the employer's business"; and (6) the "skill and initiative" of workers, referring to whether a worker uses specialized skills brought to the job or is "dependent on training from the employer to perform the work."
  - Question is whether the "economic realities of the working relationship" reveal a worker to be economically dependent on the employer for work or in business for him or herself based on a "totality-of-the-circumstances

DOL (OFCCP) Update

- **Certification of Compliance with AAPs by Federal Contractors**
  - Effective 2022, covered federal contractors and subcontractors must certify annually that they have prepared and maintain compliant affirmative action plans via the OFCCP's online contractor portal
  - First certification was due on June 30, 2022
  - Annual certification thereafter
- **New Proposed Scheduling Letter for OFCCP Audits**
  - On November 21, 2022, the OFCCP proposed a new Scheduling Letter and Itemized Listing for use in audits of federal contractor affirmative action compliance
  - The proposed letter and listing would increase the amount and specificity of the documents and data to be provided in connection with the audit
  - Areas of additional inquiry include:
    - Details regarding good faith efforts
    - Policies and practices related to use of AI in hiring
    - More detailed data on promotions and termination, including reasons for terminations
    - More detailed data on compensation and compensation analyses
    - Production of EEO policies and arbitration agreements



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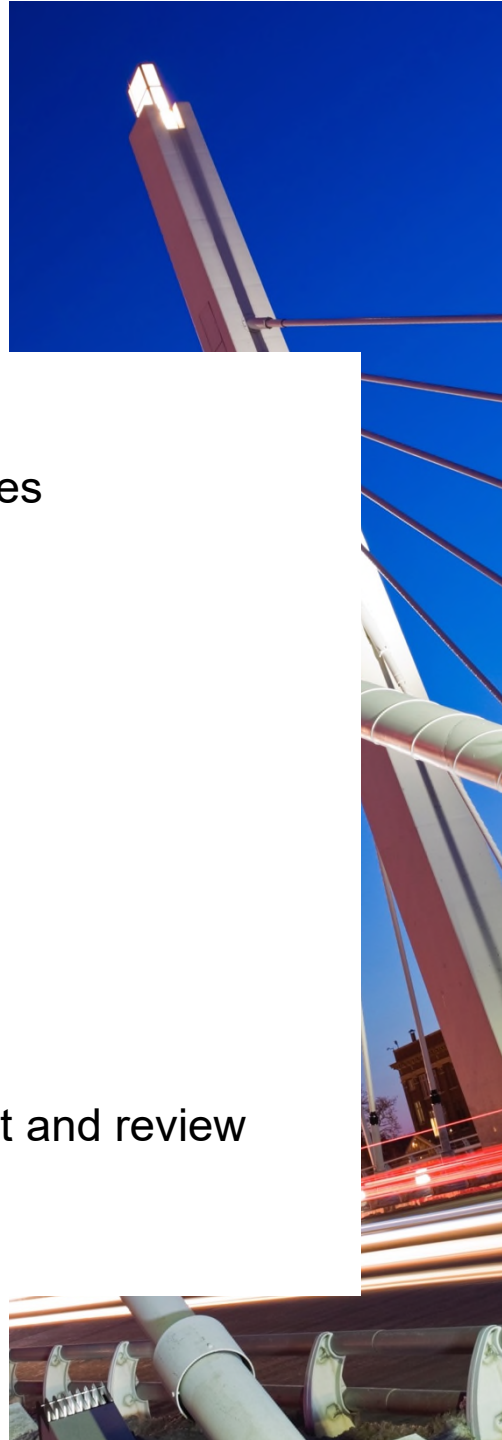
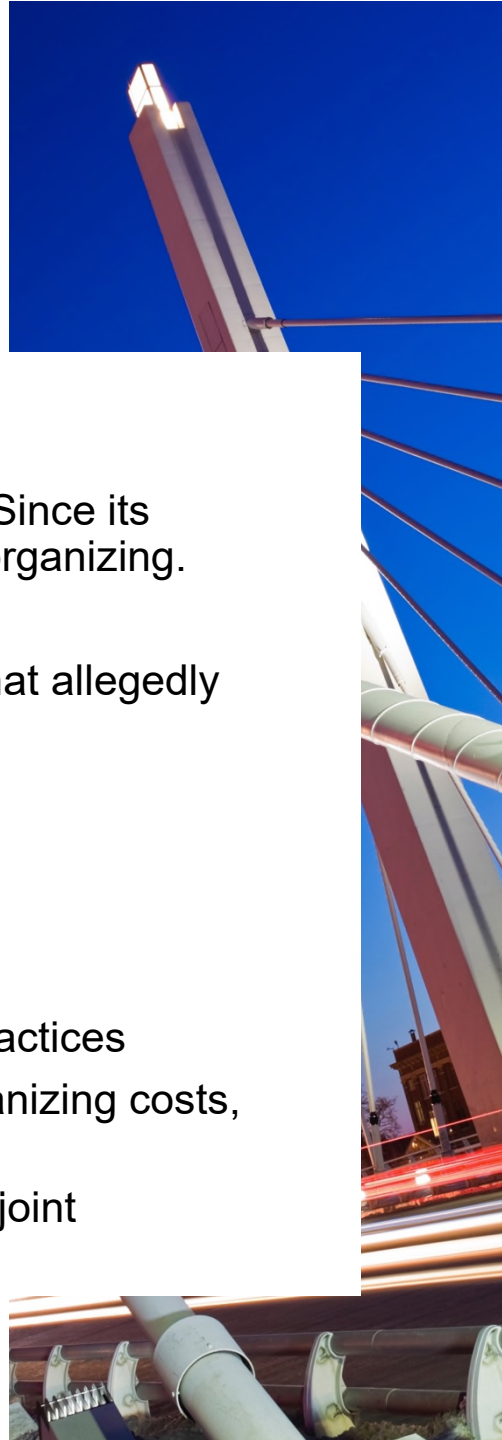
NLRB Updates

Unions are Cool Again

- For many years, union membership has been low and on the decline
- However, public sentiment currently favors unions, particularly the views of younger employees
- Millennials and Gen Z are leading a renewed effort toward unionization
- In 2022, union activity has increased:
  - Union election petitions (1,638) increased by 53% over 2021
  - Unfair labor practice charges (17,988) also increased by 19% over 2021
- "Cool" employers are being targeted: Starbucks, Apple, Amazon, Trader Joe's, etc.
  - Current times have created the perfect storm for unionization:
    - Pandemic and the "Great Resignation"
    - Low unemployment
    - Prevalence of social media
    - Union-friendly Biden Administration and NLRB that is prioritizing aggressive enforcement and review of employer-friendly policies and standards

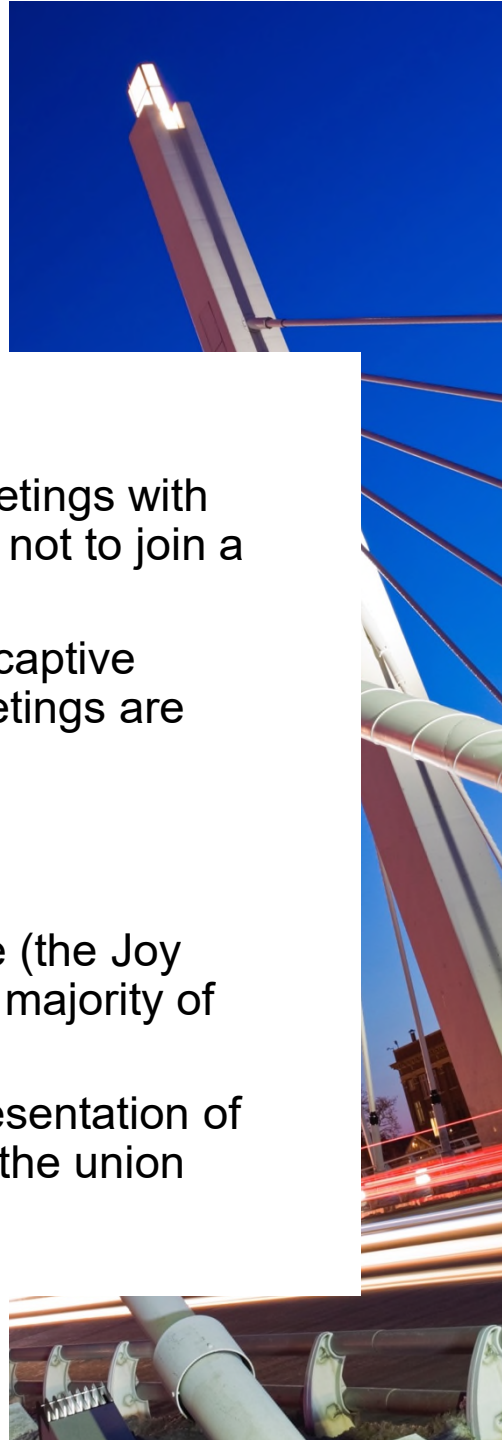


NLRB Developments



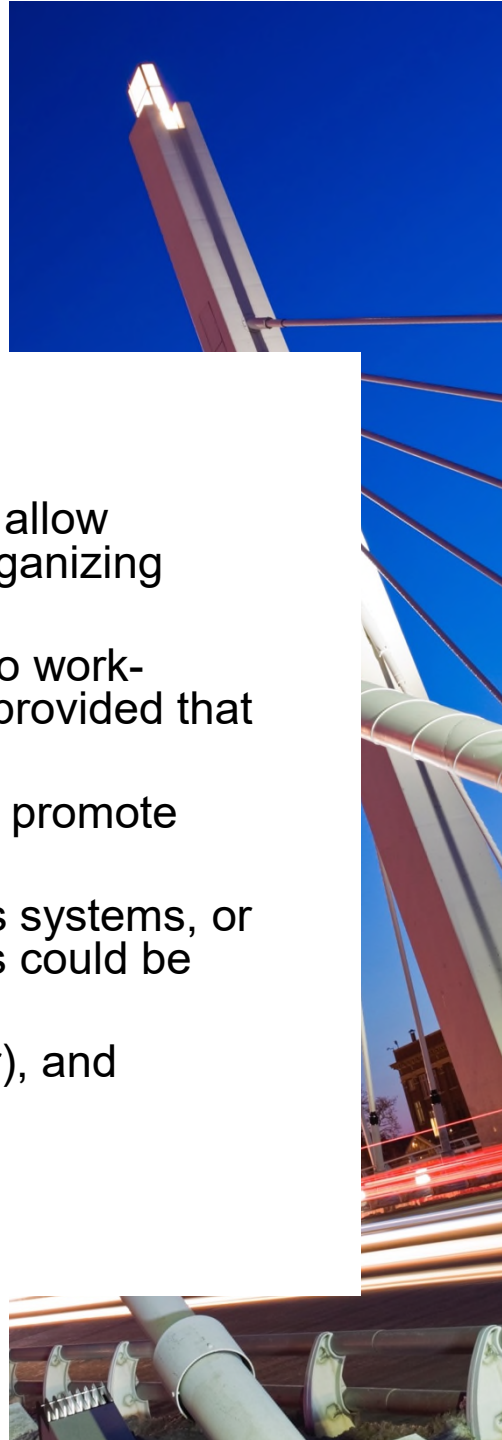
- **President Biden Pro-Union Task Force**
  - In 2021, President Biden created, by executive order, a task force to promote labor organizing. Since its inception, the task force has issued various guidance to federal agencies on how to ease labor organizing.
- **General Counsel Memo on Enforcement Priorities includes:**
  - Scrutiny of employer handbook rules and policies (including those intended to promote civility) that allegedly infringe on employee rights
  - Expanded view of "protected concerted activity" by employees
  - Expanded employee rights to strike and picket
  - Expanded union access to worksites
  - Limited rights of employers to take unilateral actions without bargaining with union
  - Encourages NLRB regional offices to seek "full panoply of remedies available" for unfair labor practices
  - For union election interference, remedies include union access rights, reimbursing union for organizing costs, and notice to employees of rights
- NLRB formally entered into agreements to coordinate with the DOL, DOJ, and FTC with regard to joint enforcement priorities and information sharing

NLRB Developments



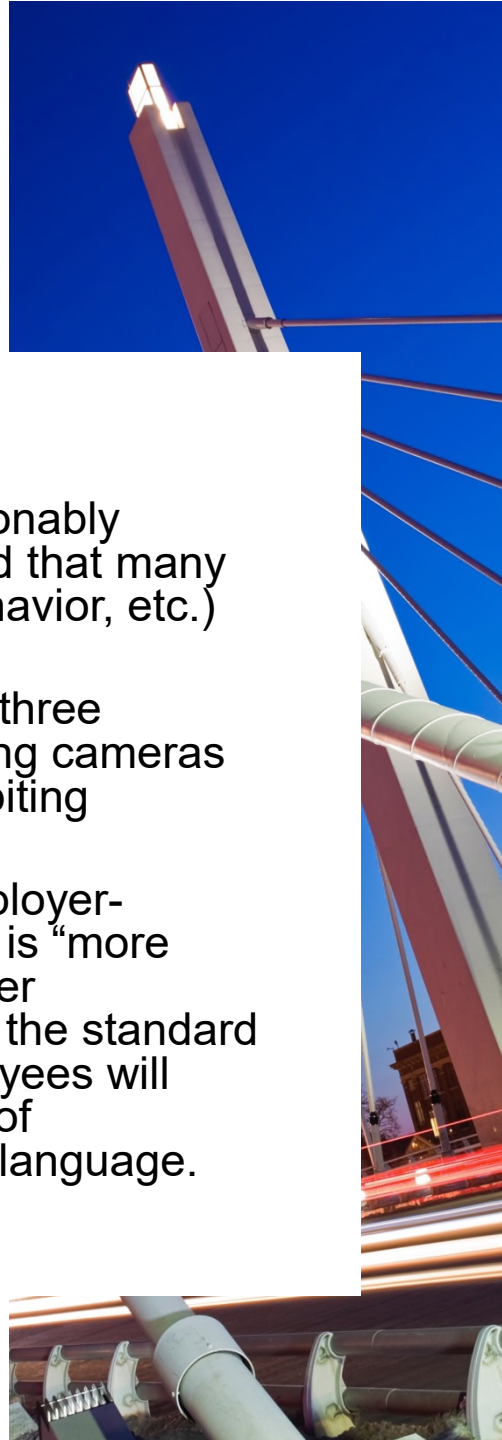
- **Captive Audience Meetings**
  - Employers currently and historically have had the right to convene “captive audiences” meetings with employees about labor-related issues, and employers can inform employees of their rights not to join a union or urge them to reject union representation.
  - On April 7, 2022, NLRB General Counsel recently announced that she will seek to curtail “captive audience” meetings by urging the NLRB to reverse a 1948 decision and find that such meetings are unlawful if attendance is mandatory.
  - To succeed, the GC will have to convince the Board to overturn decades of precedent.
- **Union Recognition Without Election**
  - NLRB General Counsel recently filed a brief advocating for the revival of a long-extinct rule (the Joy Silk standard) that would allow a union to be recognized, without secret ballot election, if a majority of workers sign authorization cards.
  - If reinstated, an employer could be ordered to bargain with a union based solely on the presentation of cards without a union election unless the employer can demonstrate good-faith doubt that the union has majority status.

NLRB Developments



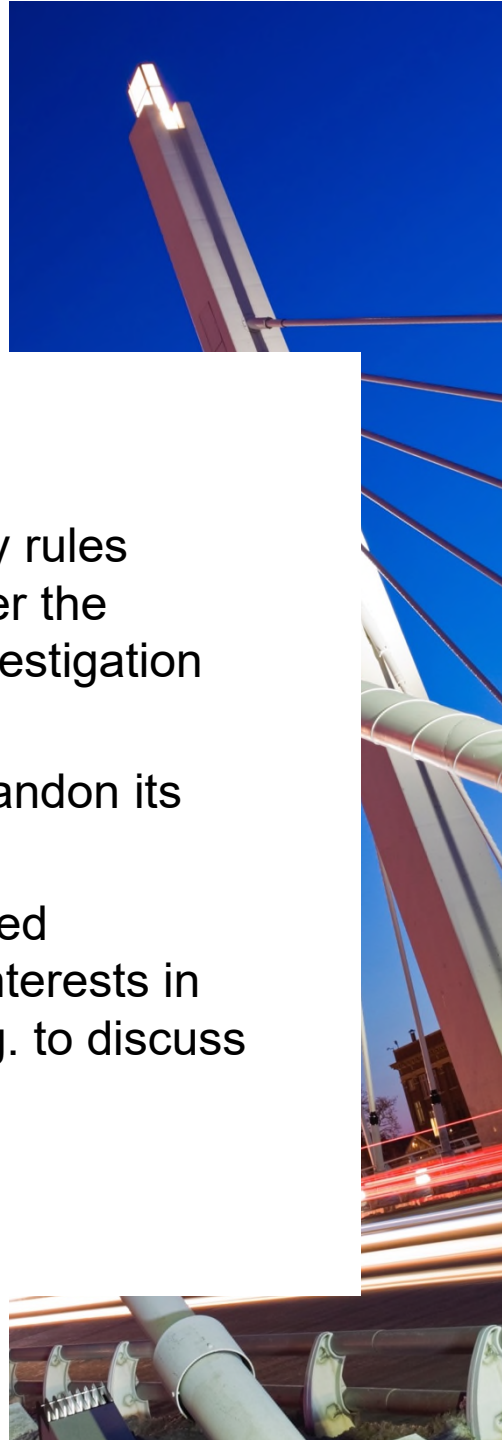
- **Employee Communications**
  - NLRB General Counsel has advocated reviving a 2014 rule (overruled in 2019) that would allow employees to use email and other company-provided communication systems for union organizing purposes.
  - Under current law, employers can restrict use of email and other communication systems to work-related reasons only and ban employees from using those platforms for union organizing, provided that such rules are non-discriminatory.
    - For example, an employer cannot allow employees to use email and other systems to promote charitable and other causes but not to support unions.
  - If an employer fails to set guidelines on acceptable use of email and other communications systems, or fails to enforce those guidelines by allowing use for non-work reasons, then such platforms could be used against the company during a union organizing campaign.
    - Keep this in mind for internal employee communication platforms (such as Beekeeper), and ensure that HR guidelines about use of such platforms are followed.

NLRB Developments



- **Workplace Rules**
  - Pre-2017, the Board's standard was whether an employer's workplace rule could be "reasonably construed" to prohibit exercise of employee's Section 7 rights. At the time, the Board found that many common workplace policies (e.g., prohibiting disruptive conduct, requiring professional behavior, etc.) violated this standard.
  - In 2017, in the *Boeing Company* case, the Board established a new standard and created three categories of workplace rules: (1) rules that were presumed lawful (such as rules prohibiting cameras in the workplace and civility rules); (2) rules that were per se unlawful (such as rules prohibiting discussion of pay/wages), and (3) rules that required individualized scrutiny.
  - On March 7, 2022, the NLRB General Counsel asked the Board to abandon this more employer-friendly standard for evaluating neutral workplace rules arguing that the *Boeing* framework is "more complicated, less predictable, and much less protective of employee rights." The GC further recommended that the Board not only revert to the prior pre-2017 standard but strengthen the standard by: (a) not presuming employees are aware of their NLRA rights, (b) presuming that employees will likely interpret any rule to be restrictive of their NLRA rights, and (c) providing a statement of employees' statutory rights that would be included in employee handbooks as safe harbor language.

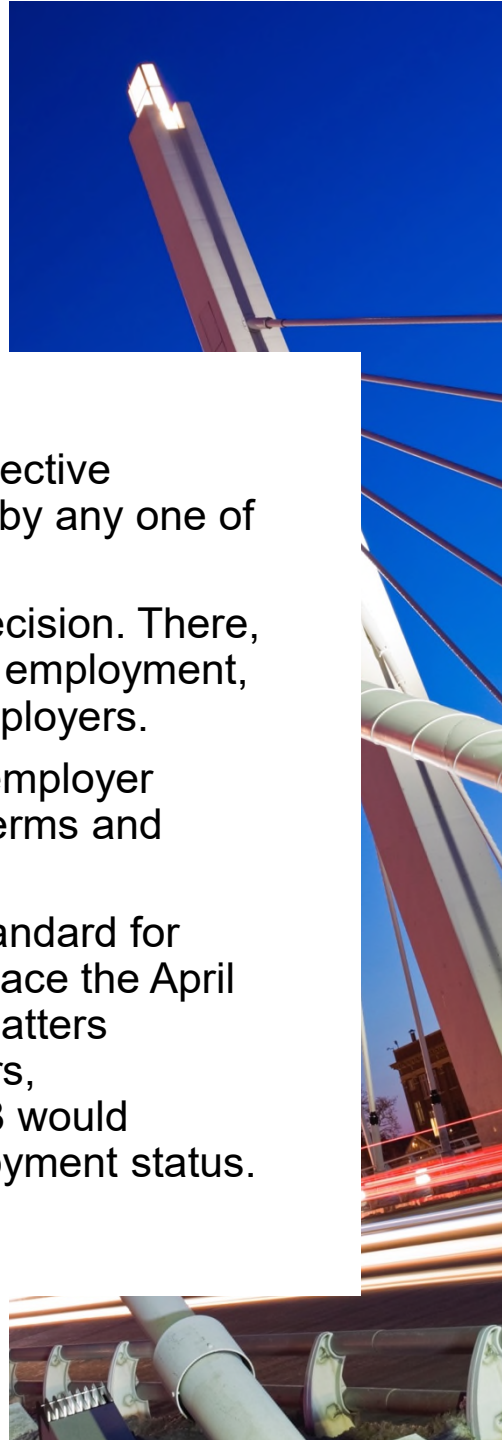
NLRB Developments



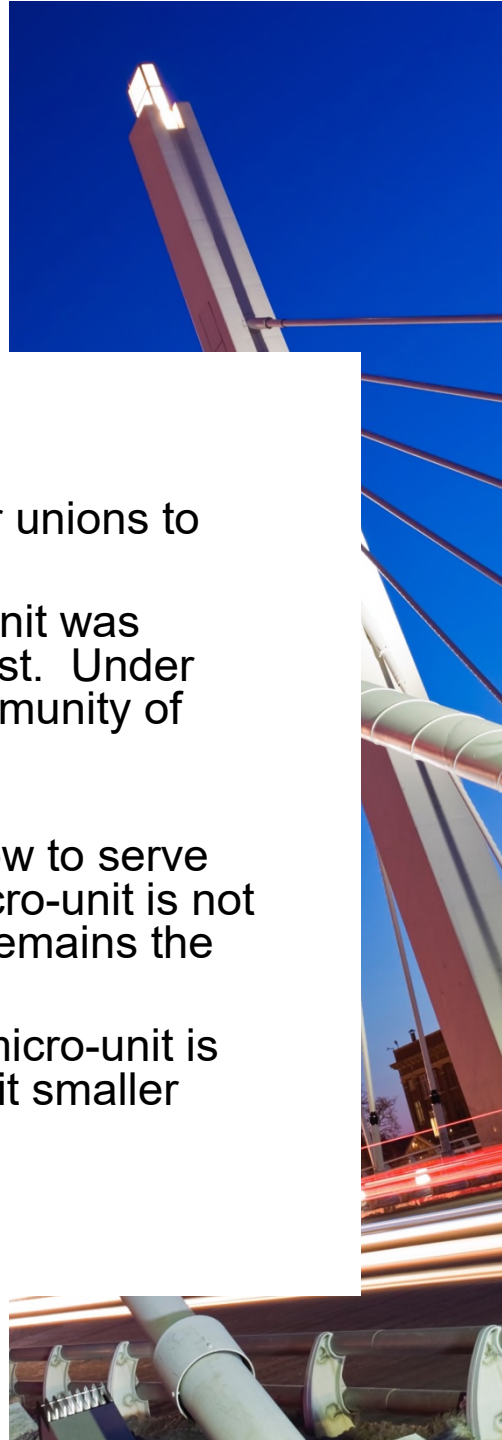
- **Confidentiality of Investigations**
  - Under the Board's current standard (*Apogee Retail LLC*), an employer's confidentiality rules governing information related to workplace investigations are categorically lawful under the *Boeing* framework so long as the confidentiality only applies for the duration of the investigation only.
  - However, on March 7, 2022, the NLRB General Counsel encouraged the Board to abandon its current standard for evaluating confidentiality rules during an investigation.
  - The GC recommended that the Board return to the pre-*Apogee* standard which required employers to determine, on a case-by-case basis for each investigation, whether its interests in preserving the integrity of the investigation outweighs employees' Section 7 rights (e.g. to discuss matters related to the investigation).

NLRB Developments

- **Joint Employer Standard**
  - If two or more entities are found to be joint employers, they may have a duty to participate in collective bargaining for the others' employees or may be jointly liable for unfair labor practices committed by any one of the employers.
  - The Board previously expanded the scope of joint employment in 2015 in the *Browning-Ferris* decision. There, the Board concluded that entities with the ability to exercise control over terms and conditions of employment, even indirectly, and even if the entity never actually exercises such authority, can still be joint employers.
  - In April 2020, the Board replaced the *Browning-Ferris* standard with a rule that requires that an employer "possess and exercise . . . substantial direct and immediate control" over employees' essential terms and conditions of employment in order to be a joint employer.
  - On September 6, 2022, the NLRB released a Notice of Proposed Rulemaking addressing the standard for determining joint employment under the NLRA. The proposed rule, which would rescind and replace the April 2020 rule, would treat two or more employers as joint employers if they "share or codetermine matters governing employees' essential terms and conditions of employment (e.g., wages, benefits, hours, scheduling, hiring and discharge, discipline, work safety and health, work rules, etc.). The NLRB would consider both direct control and indirect control over these matters when determining joint employment status.
  - Comments on the proposed rule must be submitted by December 7, 2022.

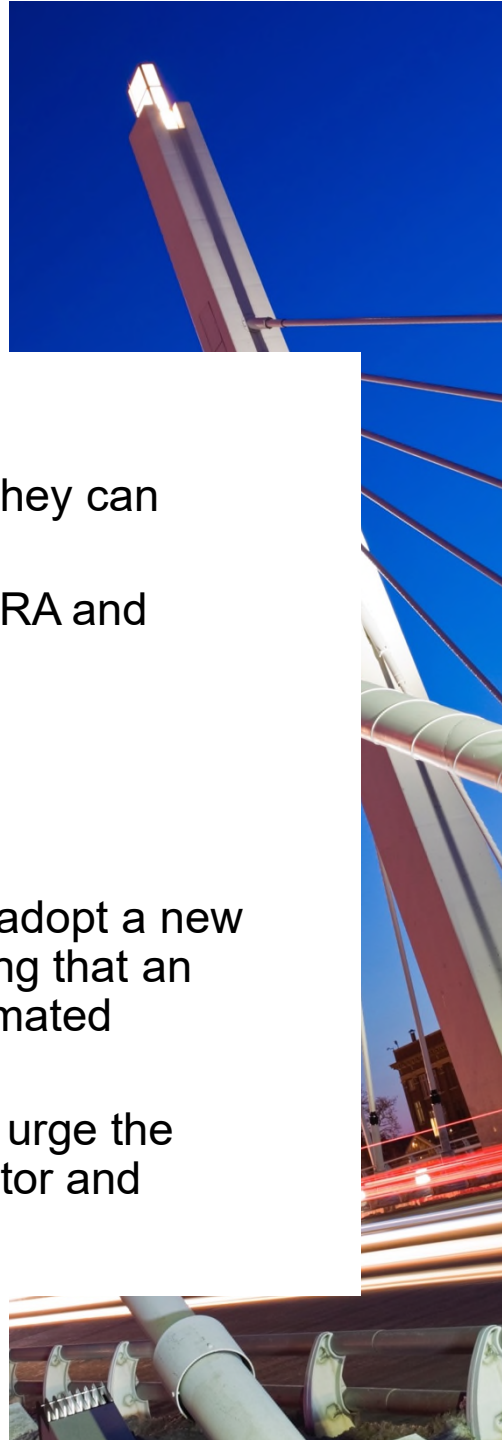


NLRB Developments



- **Micro-Units**
  - The ability to form smaller bargaining units – micro-units – is generally viewed as a way for unions to more easily organize and gain entry at an employer site.
  - Prior to 2017, the standard for whether a micro-unit qualified as a permissible bargaining unit was whether the employees were a readily identifiable group and shared a community of interest. Under this standard, whether employees outside the proposed bargaining unit also shared a community of interest with those in the micro-unit was irrelevant unless that community of interest was "overwhelming." (*Specialty Healthcare & Rehabilitation Center*)
  - In 2017 (*PCC Structurals*), the Board concluded that a petitioned for micro-unit is too narrow to serve as the bargaining unit when the community of interest shared among employees in the micro-unit is not sufficiently distinct from the interests of employees outside the micro-unit. Presently, this remains the standard for determining whether a petitioned-for unit is appropriate.
  - However, the NLRB has invited public input as to whether it should reconsider whether a micro-unit is permissible under the NLRA, suggesting that the NLRB may once again be willing to permit smaller bargaining units to organize and secure union representation.

NLRB Developments

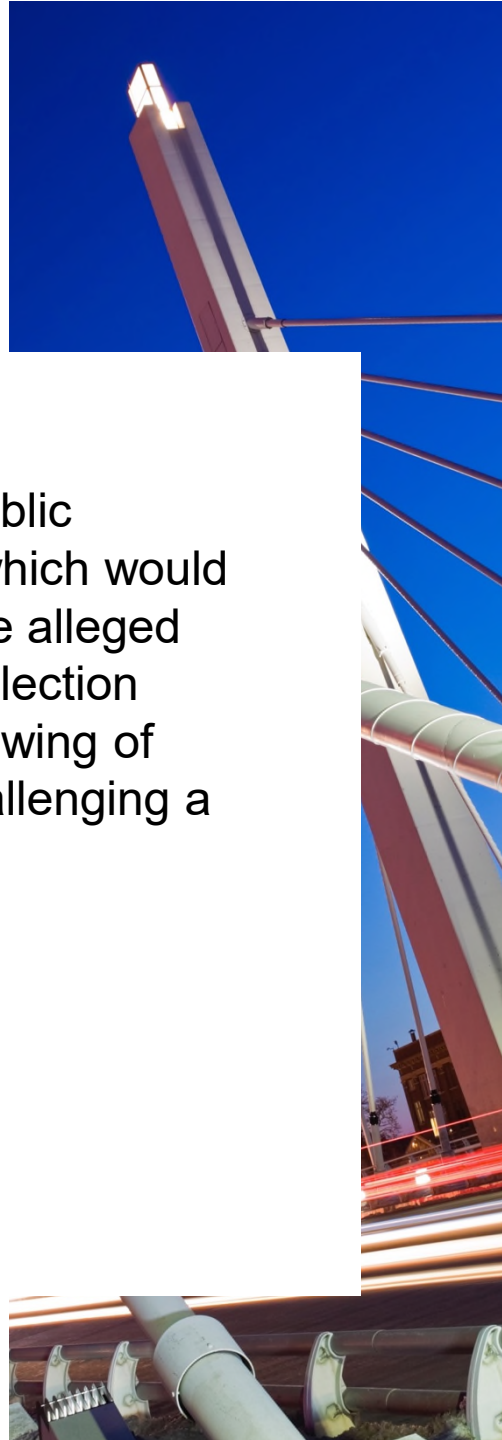


- **Independent Contractors/Misclassification**
  - NLRB is looking for ways to have independent contractors be deemed employees so that they can unionize.
  - NLRB GC wants to make misclassification of independent contractors a violation of the NLRA and impose fines for misclassification.
  - To succeed, the GC will have to convince the Board to overturn decades of precedent.

- **Electronic Surveillance**
  - On October 31, 2022, the GC published a memo indicating that she will urge the NLRB to adopt a new framework for protecting employees from employers' alleged abuse of technology by holding that an employer has presumptively violated the NLRA when an employer's surveillance and automated management practices would tend to interfer with employees' Section 7 rights.
  - In circumstances where the employer's business need outweighs Section 7 rights, she will urge the Board to require the employer to disclose to the employee the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information obtained.

NLRB Developments

- **Fair Choice and Employee Voice Rule**
  - On November 3, 2022, the NLRB issued a Notice of Proposed Rulemaking inviting public comment on a proposed rule that would rescind a rule adopted on April 1, 2020 and which would (i) allow delay of an election if ULPs are filed while an election petition is pending if the alleged conduct interferes with employees' free choice, (ii) eliminate the required notice-and-election procedure triggered by an employer's voluntary recognition of a union based on a showing of majority support, and (iii) restore a 6-month limitations period for election petitions challenging a construction employer's voluntary recognition of a union
  - Comments on the proposed rule are due by February 2, 2023



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What to Watch for in 2023

What to Watch for in 2023

- Continuing focus on pay transparency/equity
- Ongoing activity from the NLRB focusing on rescinding employer friendly standards
- Reasonable accommodation in a post-COVID world
- Cannabis in the workplace/modification of drug testing policies
- Misclassification enforcement
- Anticompetition prohibition/focus on noncompetes
- Increased need for union avoidance training
- Wage-related changes – minimum wage increases, raised thresholds for exempt status
- Reproductive health consideration and impact on benefits and policies

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