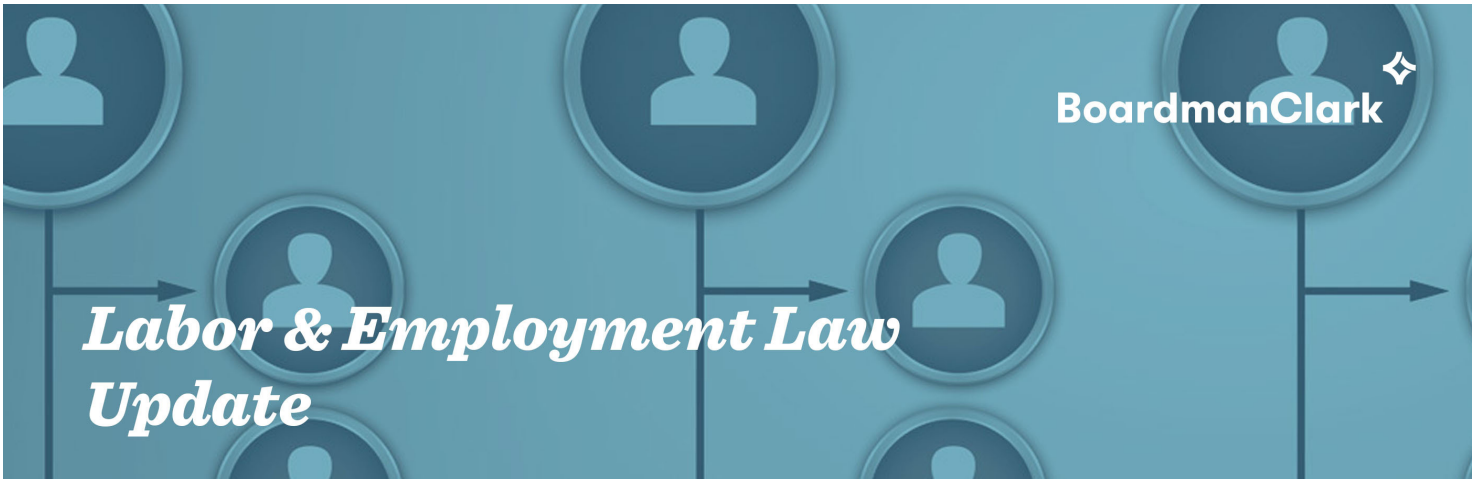

EEOC Issues More Extensive COVID-19 Guidance

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LEGISLATIVE AND ADMINISTRATIVE ACTIONS

EEOC Issues More Extensive COVID-19 Guidance. The EEOC has issued its most comprehensive guidance so far regarding COVID-19. This updated Guidance may be very salient at present, given the OFCCP, OSHA, and growing employer mandates for COVID-19 vaccinations and testing. The Guidance includes both information previously issued and new information issued in November and December, all together in a single document.

Department of Labor Announces New Rules Timeframe. DOL announced that it is starting the proposal process for new wage and hour regulations regarding (1) Davis-Bacon Act prevailing wage standards for federal contractors, and (2) increasing the minimum pay level for salaried exempt employees under the Fair Labor Standards Act (currently $684 per week). The process will include opportunities for public and industry comments once proposed rules are released.

LITIGATION

COVID-19

Off Again – On Again OSHA COVID-19 Vax-Test Requirements. The 6th Circuit Court of Appeals lifted the stay on implementation of the OSHA emergency rule (ETS) requiring employers of 100 or more employees to demand COVID-19 vaccination or weekly testing of employees. Lower courts had issued stays. However, the 6th Circuit was designated to consolidate all cases and reach a binding, nationwide determination. A three-judge panel (2–1 decision) decided the emergency rules were justified since the pandemic put workers in grave danger.

In Re: *MPC #165 v. OSHA* (6th Cir., 2021). However, this decision was quickly appealed, and the U.S. Supreme Court will hear the matter on January 7, 2022. By the time you read this, the on-off switch may have flipped again. Whatever is decided will not be the final decision. So far this is all about a temporary stay on enforcement until the 6th Circuit can hear arguments and make a decision on the merits of the case sometime in the future. Stay tuned.

Safety

Monsanto Will Pay $12 Million and Plead Guilty to Criminal Pesticide Exposure of Agricultural Workers. Monsanto was accused of being a "serial violator" of safety and environmental laws, by repeatedly exposing workers to pesticides that cause serious health problems. It sent workers into cornfields soon after pesticide spraying on multiple occasions. The defense is compounded by the fact that Monsanto had entered a 2019 deferred prosecution agreement for previous pesticide storage and use violations. *United States v. Monsanto* (D. Hawaii, 2021).

Fair Labor Standards Act

Joint Employment at CBD/Marijuana Companies. *Ross v. Sherman Hemp LLC and Ashten LLC* (E.D. TX, 2021). Two separate but interrelated companies operated CBD shops under separate franchise agreements with a national retail brand. The owners of the separate franchised stores were husband and wife. They shared employees. Each individual worker was separately hired as an employee by each store, then would work hours for one, and additional hours for the other, receiving two separate paychecks, W-2's, etc. The workers were scheduled for under 40 hours per week at each store, but well over 40 hours per week in combination without receiving overtime pay. The two stores also readily sent workers and inventory to each other to cover absences or supply shortages. So, even though they were separate corporate entities, they operated in tandem. The Fair Labor Standards Act treats such employee sharing arrangements as creating one Joint Employer for overtime purposes. The Department of Labor has often found these arrangements to amount to illegal efforts to evade the FLSA and has sought extra damages for intentional violations. Further, other agencies such as the IRS may also get involved if there is evidence the joint arrangement resulted in underpaid or underreported taxes; with even more drastic penalties.

COVID-19 Appreciation Pay Not So Appreciated by Workers – Where's the OT? Albertsons Groceries gave employees an extra $2.00 per hour as an appreciation for coming to work during the initial months of COVID-19 in 2020. However, this gift was not incorporated into the "regular rate" for computing overtime pay. So, a class action has been filed by Albertson employees alleging willful violations of the FLSA, seeking the extra overtime pay plus extra damages. The FLSA requires that bonuses or extra compensation, which is tied to hours worked, must be included as part of the regular rate of pay when computing any OT. Thus,

raising the effective hourly rate and the time-and-a-half OT rate. *Johnson et al v. Albertsons Companies, Inc.* (D. Del, 2021).

Tip Credit Computation. A class action lawsuit has been filed against Buffalo Wild Wings for improper use of the FLSA Tip Credit. The suit alleges the restaurant chain did not properly inform waitstaff of how the tip credit impacted wages, required them to do more than 20% of their time in non-tip qualifying work, and required them to pay for uniforms, pants, shirts and shoes without reimbursement, which lowered their effective pay to below minimum wage. *DePalo v. Buffalo Wild Wings, Inc.* (N.D. GA, 2021). The Tip Credit/Tip Pooling rules are important for the hospitality industry, but also can be complicated. For more information, see the article, Don't Get Soaked by Tip Pooling: Key Tip Pooling Issues For Employers by Boardman Clark attorneys Storm Larson & Jennifer Mirus.

DISCRIMINATION

Isometric Test Violated Title VII – Had Disparate Impact for Female Truck Drivers. A trucking company will pay $500,000 and hire applicants rejected by an "arbitrary hiring test" which could not be shown to meet the Title VII "job-related and consistent with business necessity" requirement for pre-employment evaluations. A disproportionate number of female job applicants were rejected due to the CRT Isometric Test of physical strength. Plus, already employed female drivers, with established good performance records, were also let go because they could not meet the CRT Test standards. So, the test weeded out people who could effectively demonstrate they could perform the actual job. *Stan Koch & Sons Trucking, Inc. v. EEOC* (D. MN, 2021). The EEOC also won another recent case regarding the same CRT Test in *EEOC v. Schuster, Inc.* (N.D. IO, 2021). Beware if your company uses an invalid test which you purchase from a vendor or consultant. You are liable for any discriminatory results and lawsuits. The test developer, vendor, or consultant has no liability. You pay twice, once to the vendor, then even more in liability for the resulting suits. If you are using such tests or any other pre-employment assessment devices, you should consider having validity assurance from the seller and perhaps an indemnity clause in that contract. [For additional information on this issue, see the article Pre-Employment Testing by Boardman Clark.]

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