



SHRM Guam 2022 Labor & Employment Legal Update

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SHRM GUAM CHAPTER – VP OF LEGISLATIVE
AFFAIRS

MAY 11, 2022




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Welcome Back

Did you know weight loss program enrollments and cosmetic surgeries increased the more Zoom and other virtual meeting increases?



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The Great Resignation

- Average unemployment rate for 2021: 3.9%
- In December 4.4 million employees left their jobs
- Another 4.2 million in January; 4.3 million in February
- Unemployment in February 2022: 3.8% Record low labor participation rate (61.9%)
- Where did all the employees go?



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Remote Workplace

- 6% of employees working remotely before 2020
- 33% of employees working remotely now
- Major employers permit indefinite remote work (e.g. Amazon, Apple, Facebook, Microsoft etc...) Executives disagree on remote work impact on culture and productivity



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Work / Life Balance

- More states adopting paid family leave laws
- New parental leave laws
- Noncompetition laws with garden leave
- Congress considers paid FMLA



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Where are we now?

- COVID in decline/states opening up
- Low unemployment Brisk competition for available workers
- Wage inflation
- End to mask policies
- End to vaccine mandates?



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What's Next?

- Reexamining workspaces/smaller footprint?
- More employees on the move
- Employees value more paid time off
- The skills employers and employees will be focused on are clearly influenced by lessons learned by the pandemic
- No going back?



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Expectations

- Backlash of lagging discrimination cases left over from COVID policies
- Hybrid work becomes the norm (and work from home means work from anywhere)
- Requests to make permanent some accommodations
- Greater focus on cultural improvements and flexible arrangements as key to retaining employees
- Some employers will still insist on returning to full time in person
- Preparation for another pandemic (with capital reserves for equipment, policies and communication strategies for rapid response/pivot)?



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Predictions

- Jobs with highest physical proximity are most likely to be disrupted
- End to 9 to 5 and 40 hour workweek?
- Focus more on production/retention and less on location
- Change in focus for low skill positions
- More automation Indefinite remote work?



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Remote Work

Advantages

- Recruitment and Retention
- Flexible schedules
- More creativity? Greater production
- Work/Life Balance reinforced
- Cut down on commuting time
- Yoga pants?
- Others?

Disadvantages

- Lack of integration/collaboration/detachment = disloyal?
- Isolation/stress
- Potential misconduct (sex harassment/IP theft)
- Increased need to monitor online activity
- Increased worker's compensation risk (no employer control over home/remote workplace)
- Potential data breach



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Workplace Trends

- More investment in employee wellness
- Increased minimum wage
- Employers replacing FTEs with contingent workers as cost savings
- Changes to privacy laws
- Expanded data collection
- More hybrid/remote work
- Expanded role of employer as social safety net
- Increase in organizational complexities
- Increased mobility
- More data breach protections
- NLRB, EEOC, USDOL recognition of remote work realities



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Legal Challenges

- Wage and hour timekeeping challenges
- Impact of bonuses on overtime
- Monitoring of social media/employees .
- Lagging and new discrimination/ retaliation claims
- Joint employer/independent contractor refocus by NLRB/USDOL



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Opportunities

- Clarifying new work rules/expectations
- Updating recruitment/hiring practices
- Designing or updating micro and shared spaces
- Enhanced safety procedures
- Revisiting leave policies
- Improving performance evaluation methods to monitor remote work
- Train managers on new normal
- Rethink benefit policies to retain talent



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Executive Branch



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National Labor Relations Board

- Jennifer Abruzzo issued Memorandum 21-04
 - *The Boeing Co.*, 365 NLRB No. 154 (2017) – Reconsider legality of employer rules governing employee confidentiality, nondisparagement, social media, media communication, civility, respectful and professional conduct, offensive language rules, and no-camera policies.
 - Remember the Obama-Era “War on Employee Handbooks?” It’s BACK.
 - Presumptively lawful policies may not be so presumptive anymore...
 - *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) – Reclassify independent contractors as employees.
 - *Velox*: misclassification would be an Unfair Labor Practice
 - *Tri Cast*, 274 NLRB 377 (1985) – Limit certain truthful employer statements during campaigns, e.g., that employee access to management will be limited if employees vote in a union.
 - *Baylor University Medical Center*, 369 NLRB No. 43 (2020) – Limit confidentiality and non-disparagement clauses in separation agreements.
 - *Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019) – Permit employees to use employer electronic communication systems, such as email, Discord, Slack, and Groupme, for union organizing and other conversations related to working conditions.
 - *Valley Hospital Medical Center*, 368 NLRB No. 139 (2019) - Continue dues checkoff after contract expiration.
 - *General Motors*: Will Board revisit standards for civility, and anti-harassment in the workplace and on the picket line? • Highlighted by EEOC in 2016 Report as an obstacle for employers.



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NLRB (cont.)

- **Joint-Employment**
- 2015: *Browning-Ferris Industries*, 362 NLRB 1599 (2015), expands the scope of whether an entity is deemed a joint employer under the NLRA.
 - Previously, only “direct and immediate” control over employment terms and conditions in more than a limited and routine manner
 - *Browning-Ferris*: ability to control, even if not exercised
- 2017: *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017): overrules *Browning-Ferris* reinstates prior “direct and immediate” joint employment standard
- 2018: Board vacates *Hy-Brand* September 2018: Board publishes NPRM to promulgate regulations restoring pre *Browning-Ferris* test
- February 2020: Final rule, effective April 27, 2020



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NLRB (Cont.)

- Other Initiatives
 - Expand duty to bargain by replacing Trump's "contract coverage" test to Obama's "clear and unmistakable waiver" standard
 - Extend Weingarten rights to non-union employees
 - Revive Joy Silk doctrine to require recognition by card check, higher stakes for election mistakes
 - Legalize more secondary conduct by unions
 - Toughen standard for disciplining employees for harassing behavior during the protected concerted activity



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NLRB (Cont.)

- Section 10 (j) Injunctions will be aggressively sought in:
 - discharges that occur during an organizing campaign;
 - violations during organizing campaigns that lead to a need for a Gissel bargaining order;
 - violations that occur during the period following certification when parties should be attempting to negotiate their first collective bargaining agreement;
 - cases involving withdrawals of recognition from incumbent unions,
 - cases involving a successor's refusal to bargain and/or refusal to hire
- Remedies
 - Increased monetary penalties, such as consequential damages and paying union's organizing costs
 - No compromise, full admission approach to settlements, employer apologies. Coupled with threat of 10(j) mini-trials, goal is apparently to bully employers into early settlements or raise publicity for unions with more trials.



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NLRB & DOL

- The NLRB and DOL W&H Division signed an interagency MOU in December 2021 – not novel but more robust and likely to be utilized than in the past
- Agencies to share information about potential violations of laws within each other's jurisdiction
- NLRB to advise employees when they may file a charge with DOL and vice versa
- Provides for coordinated investigations and settlement
- Targets independent contractor structures, e.g., gig economy



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Department of Labor

WAGE & HOUR



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Senate Bill 53 (HR603): Raise the Wage Act of 2021



- Introduced 1/26/2021
- This bill increases the federal minimum wage for regular employees over a 5-year period, for tipped employees, and for newly hired employees who are less than 20 years old.
- The bill sets forth a schedule of annual increases in the federal minimum wage for individuals with disabilities. The Department of Labor shall no longer issue special certificates for the payment of subminimum wages to such individuals after the final wage increase under this bill for such individuals takes effect.
- Labor shall provide, upon request, technical assistance and information to employers to (1) help them transition their practices to comply with wage increases and other requirements under this bill for individuals with disabilities, and (2) ensure continuing employment opportunities for such individuals.
- The bill eliminates the separate minimum wage requirements for tipped, newly hired, and disabled employees. After a specified period, these employees shall be paid the same minimum wage as regular employees.
- Labor must publish any increase in the minimum wage in the Federal Register and on its website 60 days before it takes effect.



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Raise the Wage Act 2021

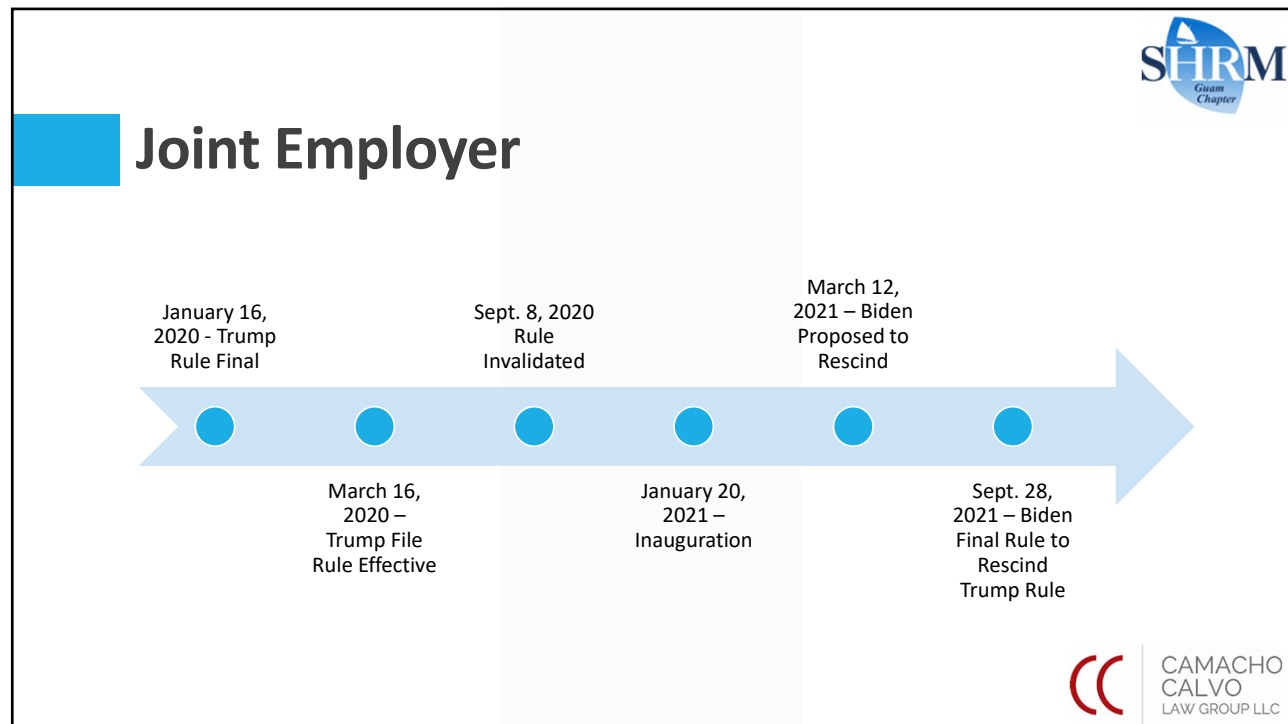


- \$9.50 upon passage
- \$11.00, 1 year after
- \$12.50, 2 years after
- \$14.00, 3 years after
- \$15.00, 4 years after
- Thereafter, the annual percentage increase of the median hourly wage (BLS)
- S53 (37 co-sponsors) and HR603 (201 co-sponsors) introduced January 2021
- S555, introduced by Senator Josh Hawley (R-MO), March 3, would increase the minimum wage on the same schedule but limited to employers with annual revenue of \$1 billion or more



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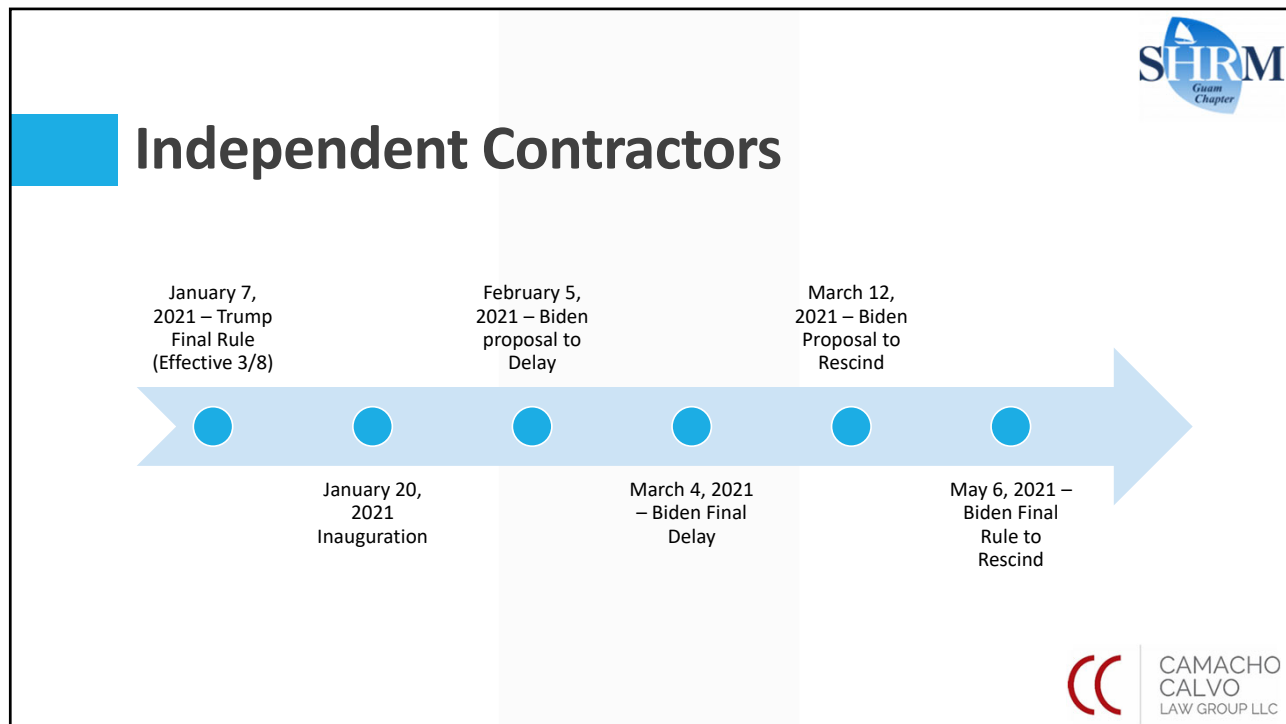
Joint Employer

- Four Factor Balancing Test
 - Does the alleged employer:
 - Hire or fire the employee;
 - Supervise and control the employee's work schedule or conditions of employment to a substantial degree;
 - Determine the employee's rate and method of payment; and
 - Maintain the employee's employment records.
- Administrator's Interpretation FLSA2016-1 (Jan. 20, 2016)

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Independent Contractors

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- Economic Reality Test

An individual is an employee “if as a matter of economic reality, the individual is economically dependent on that employer for work”

- Two Core Factors:
 - The nature and degree of control over the work
 - The worker’s opportunity for profit or loss
- Other Factors
 - The amount of skill required for the work
 - The degree of permanence of the relationship
 - Whether the work is part of an integrated unit of production

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Independent Contractors

- **Workplace Innovation v. Walsh** (March 14, 2022, E.D. Tex.)
 - Recission was arbitrary and capricious because DOL refused to consider any alternatives to total withdrawal of the Trump rule and “left regulated parties without consistence guidance”
 - The Trump rule “became effective on March 8, 2021, the rule’s original effective date, and remains in effect.”
- Until resolution of an appeal or a new regulation:
 - In DOL investigations and private litigation, argue for application of the Trump regulation
 - When setting company policy, apply Fact Sheet #13 and the David Weil Administrator’s Interpretation



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Civil Money Penalties

- Final rule published Sept. 24, 2021, and effective Nov. 23, 2021
- Civil money penalties available against employers, managers or supervisors who take tips earned by their employee
- Violations need not be repeat or willful
 - Willfulness defined
 - The employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA
 - Advice from WHD that conduct was not lawful
 - Failure to adequately inquire into whether the conduct was in compliance with the FLSA



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Davis Bacon Rule Making (3/18/2022)

- Return to the 30% Rule
- Adoptions of BLS Wage escalators
- Undoing separation between rural and urban wage rates
- Seeking comments on counting DBA covered projects in future wage surveys
- Redefining the single wage factor in counting percentages
- Adopting state prevailing wage rates
- **Expanding the site of the work**
- **Increased recordkeeping requirements**
- Expanding type of activities deemed construction
- Holding contractors responsible without notice of DBA requirements
- Expanding DOL's debarment and withholding powers
- Adding Anti-retaliation provisions
- Adding new classification without agency or contractor input on wage data
- Adding fringe benefits annualization to the regulation and codifying administrative costs restrictions
- Consolidating treatment of apprenticeship under the DBA
- Clarifying when multiple wage determinations are required in a contract



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Overtime White Collar Exemptions

- Listed on the Fall 2021 Regulatory Agenda
- For publication of a Notice of Proposed Rulemaking in April
- "Primary goal" is "to update the salary level requirement" for exemption
- Changes to the duties test also will be considered
- DOL holding stakeholder meetings
- Six 90-minute meeting scheduled March 8 to April 6
- Three meetings with unions and worker advocates
- Three industry groups



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Proposed White Collar Exemptions Rules



- Proponents argue the DOL should phase up the salary threshold to near the 55th percentile of earning of full-time salaried workers nationwide.
- \$ 73,551 in 2021
- \$82,745 by 2026
- Final Rule 2020 \$35,568
- Duties Test: Only workers who truly spend most of their time on high-level duties or managing staff are exempt.
- A tougher test for employers that use algorithmic systems to micro-manage may salary workers that do not truly exercise discretion and independent judgment and should not be exempt.



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Other Policy Changes



- Programs that are Out
 - PAID Program
 - No more Opinion Letters
 - DOL not bound by Arbitration Agreements on FLSA
 - Still available in private FLSA litigation
- Programs that are In
 - Liquidated damages
 - The FLSA requires courts to award liquidated damages equal to the unpaid wages, unless the employer can prove that it acted in good faith
 - “reasonable grounds for believing” that it complied with the FLSA
 - In an April 2021 blog post, DOL announced that it would seek liquidated damages to settle investigations prior to litigation
 - Employers should expect to pay double damages if DOL investigates



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Enforcement 2022

- More investigators (Hiring 100 investigators)
- More double liquidated damages
- More civil money penalties
- More litigation
- More difficult to settle



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HIRE – Hiring Initiative to Reimagine Equity

- | | |
|--|---|
| <ul style="list-style-type: none"> ▪ EEOC and OFCCP ▪ Multi-year approach ▪ Goal: greater access to quality jobs for underrepresented communities <ul style="list-style-type: none"> ▪ Race ▪ Gender ▪ LGBTQ+ Status ▪ Religion ▪ Age ▪ Disability ▪ Veteran Status | <ul style="list-style-type: none"> ▪ Host convenings on organizational policy ▪ Identify strategies to remove barriers and promote practices for hiring a diverse pool of qualified applicants ▪ Promote equity in the use of tech-based hiring systems ▪ Develop resources to promote use of innovative and evidence-based recruiting and hiring practices to advance equity |
|--|---|



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What types of policies/practices may involve systemic discrimination?



- Hiring/Recruitment
 - Criminal Background Checks that auto-reject applicants with positive background
 - Word-of-mouth recruitment practices
 - Steering applicants to certain jobs based on race or gender
 - Customer preferences
 - Big Data using algorithms to sort applications
 - Historically segregated occupations or industries
- Policies/Practices
 - English only rules
 - Age based limits on benefits or contributions to benefits/pensions
 - Mandatory maternity leave
 - Differentiated paternal leave for men and women
 - Mandatory religious practices for companies that do not qualify as religious organizations



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What types of policies/practices may involve systemic discrimination?



- Layoff/RIF/Discharge
 - Mandatory Retirement
 - Disparate treatment or impact based on protected characteristic
 - Waivers that prohibit filing complaints with the EEOC
 - Waivers that do not comply with the Older Workers Benefit Protection Act
- ADA/GINA
 - No Fault Attendance Policies
 - No Accommodation for Medical Leave
 - Light Duty Policies for work-related injuries
 - 100% Healed return to work requirements
 - Pre-employment medical inquiries
 - Policies for leaves that extend beyond FMLA leave



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EEOC's Priority: Disability Discrimination



- Since July 2013, the EEOC has filed > 50 lawsuits alleging disability discrimination
- Claims:
 - Failure to accommodate
 - Failure to provide appropriate leave for disability-related needs or treatment
 - Asking prohibited disability-related questions of employees
 - Refusal to hire qualified applicants based on myths, fears or stereotypes
 - Termination based on disability



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Prediction: Focus on Mental Health Issues



- COVID – 19 brought attention to issues of depression, anxiety, and PTSD (as a response to trauma), and substance abuse
- Likely that the EEOC will focus on employer's responses to mental health disabilities
- Does the impairment "substantially limit" one or more major life activities, incl: brain/neuro functions such as communicating, concentrating, eating, sleeping, regulating thoughts or emotions, self-care, or interacting with others
- Accommodations: altered break and work schedules, time off for treatment, changes in supervisory methods, eliminate non-essential functions, telework, reassignment to vacant position



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Judicial Branch



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Hughes v. Northwestern University 142 S. Ct. 737 (January 2022)



- Current and former employees brought action under ERISA against employer, its retirement investment committee, and plan administrators for defined-contribution employee retirement plan, alleging that defendants breached their fiduciary duty of prudence by offering range of investment options that was too broad and thereby causing participant confusion and poor investment decisions, by failing to monitor and control recordkeeping fees, and by offering mutual funds and annuities in form of retail share classes that carried higher fees than those charged by otherwise identical institutional share classes.
- The Court through Justice Sotomayor held that the mere fact that the plans offered some mutual funds and annuities with lower fees did not preclude plaintiffs' claim for breach of duty of prudence.
- 7th Circuit Decision vacated and remanded to reevaluate the allegations.



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National Federation of Independent Business v. DOL (OSHA)

142 S. Ct. 661, January 2022



- States, businesses, trade groups, nonprofit organizations, and others filed separate petitions for review of emergency temporary standard (ETS) issued by the Secretary of Labor, acting through OSHA, mandating that employers with more than 100 employees required the employees to undergo COVID-19 vaccination or take weekly COVID-19 tests at their own expense and wear a mask in the workplace.
- The Court held that petitioners were likely to succeed on claim that ETS exceeded the Secretary's statutory authority, and equities did not justify withholding interim relief through a stay.
- The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set workplace safety standards, not broad public health measures. See 29 U. S. C. §655(b) (directing the Secretary to set "occupational safety and health standards" (emphasis added)); §655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, e.g., §§651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.*



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Legislative Branch



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SB 3238 (HR2373): Transformation to Competitive Integrated Employment Act

- Introduced 11/18/2021
- Bill addresses employment standard for people with disabilities.
- USDOL must award grants to states and certain eligible entities to assist them in transforming their business and program models to support people with disabilities by providing competitive integrated employment, assisting them in finding and retaining work in such employment, providing with integrated employment and integrated community participation and wraparound service, and ensuring that such services comply with federal regulations for individuals receiving home and community-based services.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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HR 2062 (SB880): Protecting Older Workers Against Discrimination Act of 2021

- Introduced 3/18/2021 (6/24/2021) **Passed House on 6/23/2021**
- This bill revises the evidentiary standard for age discrimination by establishing an unlawful employment practice when the **complainant party demonstrates that age or participation in an investigation, proceeding, or litigation related to an age discrimination claim was a motivating factor for an adverse practice**, even though other factors also motivated the practice (thereby allowing what are commonly known as *mixed motive* claims).
- The bill (1) permits the **complainant party to rely on any type or form of admissible evidence**, which need only be sufficient for a reasonable trier of fact to find that an unlawful practice occurred; and (2) declares that the **complainant party shall not be required to demonstrate that age or retaliation was the sole cause of the employment practice** (thereby rejecting the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, which requires the complainant to prove that age was the *but-for* cause for the employer's decision).
- The bill applies this evidentiary standard to other employment discrimination and retaliation claims, including claims under the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990, and the Rehabilitation Act of 1973.
- In a claim in which age discrimination is shown, but where the employer demonstrates that it would have taken the same action absent the motivating factor of age, the bill authorizes courts to grant declaratory and injunctive relief but prohibits the court from awarding damages or issuing an order requiring any admission, reinstatement, hiring, promotion, or payment. This limitation also applies to claims of discrimination based on disability.
- Referred on Senate Committee, Health, Education, Labor, and Pensions.



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HR 3648: EAGLE Act of 2021

- Introduced 6/1/2021
- The bill increases the per-country cap on family-based immigrant visas from 7% of the total number of such visas available that year to 15% and eliminates the per-country cap for **employment**-based immigrant visas.
- The bill establishes transition rules for **employment**-based visas such as (1) reserving a percentage of EB-2 (workers with advanced degrees or exceptional ability) and EB-3 (skilled and other workers) visas for individuals not from the two countries with the largest number of recipients of such visas, and (2) allotting a number of visas for professional nurses and physical therapists.
- The bill imposes additional requirements on an employer seeking an H-1B visa, such as prohibiting (1) an employer from advertising that a position is only open to H-1B applicants or that H-1B applicants are preferred, and (2) certain employers from having more than half of their employees as nonimmigrant visa workers.
- The Department of **Labor** shall create a publicly available website where an employer seeking an H-1B visa must post certain information about the open position.
- The bill also expands **Labor's** authority to review and investigate H-1B applications for fraud or misrepresentations.
- The bill also allows certain aliens to obtain lawful permanent resident status if the alien (1) is in the United States as a nonimmigrant, (2) has an approved immigrant visa petition, and (3) has waited at least two years for a visa.
- Ordered to be Reported.



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SB 3578: Slave-Free Business Certification Act of 2022

- Introduced 2/3/2022
- This bill requires businesses with annual revenue greater than \$500 million to audit their supply chains for labor practices or human trafficking activities that violate specified national or international standards and report the results to the Department of Labor.
- Referred to Senate Committee on Health, Education, Labor and Pensions.



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HR 6280 (SB4092): FLSA Exemption

- Introduces 12/14/2021
- This bill expands the exemption of certain seasonal employees from the federal maximum hour requirements to include employees of outdoor recreational outfitting or guiding services.
- Referred to House Committee on Education and Labor; Senate Committee on Health, Education, Labor, and Pensions.



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HR 6699 (SB3641): Part-Time Worker Bill of Rights

- Introduced 2/9/2022
- This bill modifies various employment, leave, and pension rules with respect to part-time workers. Specifically, the bill **removes the requirement that employees work a minimum number of hours during the preceding 12-month period before becoming eligible for family and medical leave**. The bill also sets the maximum length of service on which employers may condition the eligibility of part-time employees for a qualified pension plan (e.g., 401(k) retirement plan). Except as required by an applicable collective bargaining agreement, such service requirement may be no longer than two consecutive 12-month periods of at least 500 hours of service for part-time employees who have reached the age of 21 by the end of such periods.
- The bill **further prohibits employers of more than 15 employees from setting disparate terms of employment or working conditions for part-time employees**, including with respect to compensation, notice of work hours, and promotion opportunities, among others. Additionally, **the bill requires such employers to offer available, qualified part-time employees additional work hours before hiring new employees for such hours**. Among other enforcement methods, employers must maintain three years of records for offers of additional hours and employee responses to such offers. The bill also provides a private right of action for employees to enforce the nondiscrimination requirements of this bill.
- Referred to House Committees Education and Labor, Oversight and Reform, and Ways and Means.



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SB1486 (HR1065): Pregnant Workers Fairness Act



- Introduced 4/29/2021
- This bill prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions. A *qualified employee* is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions.
- Specifically, the bill declares that it is an unlawful employment practice to:
 - fail to make reasonable accommodations to known limitations of such employees unless the accommodation would impose an undue hardship on an entity's business operation;
 - require a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
 - deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
 - require such employees to take paid or unpaid leave if another reasonable accommodation can be provided;
 - or take adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.
- The bill sets forth enforcement procedures and remedies that cover different types of employees in relation to such unlawful employment practices.
- The Equal Employment Opportunity Commission must provide examples of reasonable accommodations that shall be provided to affected employees unless the employer can demonstrate that doing so would impose an undue hardship.
- The bill prohibits state immunity under the Eleventh Amendment to the Constitution from an action for a violation of this bill.
- Placed on Senate Legislative Calendar under General Orders.



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HR 6746: Lifetime Income for Employees Act



- Introduced 2/15/2022
- This bill allows fiduciaries of pension plans to make default investment arrangements in annuity contracts upon providing certain notice to plan participants or beneficiaries and complying with certain prohibitions on liquidity restrictions.
- Referred to House Committee on Education and Labor.



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SB2603: Commission on Retirement Security Act of 2021



- Introduced 8/4/2021
- This bill establishes within the executive branch the Commission on Retirement Security to
 - conduct a comprehensive study of the state of retirement security, and
 - submit to Congress recommendations on how to improve or replace existing private retirement programs.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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SB 3674 (HR6767): Portable Benefits for Independent Workers Pilot Program Act



- Introduced 2/17/2022
- This bill requires the Department of Labor to award grants for FY2022, on a competitive basis, to states, local governments, or nonprofit organizations to support broad innovation and experimentation with respect to portable benefits.
- Portable benefits are work-related benefits that are provided to workers who are not traditional full-time employees in a manner that allows the worker to maintain the benefits upon changing jobs.
- The grants must be used for (1) the evaluation, or improvement to the design or implementation, of existing models or approaches for providing portable benefits; or (2) the design, implementation, and evaluation of new models or approaches for providing such benefits. The grants may not be used for a model or approach that provides only retirement-related benefits.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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SB 338 (HR1063): Helping Gig Economy Workers Act of 2021



- Introduced 2/22/2021
- This bill temporarily permits digital marketplace companies (e.g., Lyft, DoorDash, Airbnb, etc.) to provide benefits to workers during the COVID-19 (i.e., coronavirus disease 2019) pandemic without such actions establishing those workers as employees or independent contractors or establishing the company as a joint employer under federal, state, or local laws. This bill applies to digital marketplace companies that provide, among other things, financial assistance, health benefits, training, health checks and personal protective equipment to individuals working through such marketplaces during the period beginning on March 15, 2020, and ending on the later of December 31, 2021, or the expiration of the COVID-19 public health emergency.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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SB2601: Strengthening Financial Security through Short-Term Savings Account Act of 2021



- Introduced 8/4/2021
- This bill allows employers to enroll employees in short-term savings accounts that are funded using automatic contributions deducted from participating employees' wages.
- For each pay period, the employer must transfer to the account an amount equal to the percentage of the employee's compensation or a fixed amount, as determined by the employer.
- Employees may elect to adjust, stop, or pause their contributions. The balance in an account may not exceed \$10,000 (adjusted annually for inflation) and must be made readily available to the employee at any time.
- Referred to Senate Committed on Health, Education, Labor, and Pensions.



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SB420 (HR842): Protecting the Right to Organize Act of 2021 (PRO Act)



- Introduced 2/24/2021 (**Passed House 3/9/2021**)
- This bill expands various labor protections related to employees' rights to organize and collectively bargain in the workplace.
- Among other things, it revises the definitions of *employee*, *supervisor*, and *employer* to broaden the scope of individuals covered by the fair labor standards; permits labor organizations to encourage participation of union members in strikes initiated by employees represented by a different labor organization (i.e., secondary strikes); and prohibits employers from bringing claims against unions that conduct such secondary strikes.
- The bill also allows collective bargaining agreements to require all employees represented by the bargaining unit to contribute fees to the labor organization for the cost of such representation, notwithstanding a state law to the contrary; and expands unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes.
- The bill makes it an unfair labor practice to require or coerce employees to attend employer meetings designed to discourage union membership and prohibits employers from entering into agreements with employees under which employees waive the right to pursue or a join collective or class-action litigation.
- Finally, the bill addresses the procedures for union representation elections, modifies the protections against unfair labor practices that result in serious economic harm, and establishes penalties and permits injunctive relief against entities that fail to comply with National Labor Relations Board orders.
- Referred to Senate Committee on Health, Education, Labor, and Pensions



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SB 3720: H1-B and L-1 Visa Reform Act of 2022



- Introduced 3/1/2022
- This bill modifies requirements related to H-1B (specialty occupation) and L-1 (intracompany transfers) nonimmigrant visas and contains related provisions.
- Provisions relating to H-1B visas include: requiring the Department of Labor to review petitions for indicators of fraud or misrepresentation of material fact; requiring the *Department of Homeland Security (DHS) to prioritize certain petitions, with top priority for workers with advanced degrees in science, technology, or engineering; requiring an H-1B worker to possess at minimum a bachelor's degree to meet specialty occupation requirements* (currently, relevant experience may be used instead); and prohibiting an alien classifiable in certain H-1B categories from obtaining a B-1 (temporary business visitor) visa.
- Provisions relating to L-1 visas include: requiring a waiver from Labor for an L-1 worker to be primarily stationed with an employer other than the petitioning employer; prohibiting an alien from receiving an L-1 visa to open or be employed in a new office if the alien has received two or more such visas in the last two years; and increasing the L-1 worker minimum wage to the highest of certain amounts, such as the median wage for the worker's occupational classification in the area of **employment** (currently, an L-1 worker must be paid at least the higher of the federal or state minimum wage).
- The bill (1) expands the authority of DHS and Labor to take various enforcement actions, and (2) directs DHS to conduct annual audits of a certain percentage of employers.
- Referred to Senate Committee on the Judiciary.



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SB3219 (HR5994): Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD Act)



- Introduced 11/17/2021
- This bill expands protections against discrimination and harassment in the workplace and raises the minimum wage for tipped employees.
- Specifically, the bill (1) ***makes it an unlawful employment practice to discriminate against an individual in the workplace based on sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, or a sex stereotype***; and (2) provides a statutory definition for what constitutes workplace harassment. Further, these protections apply to all workplaces, regardless of size, and to all workers, including independent contractors, interns, volunteers, and trainees.
- The bill prohibits employers from entering into contracts or agreements with workers that contain certain nondisparagement or nondisclosure clauses and prohibits certain predispute arbitration agreements and postdispute agreements. It also establishes grant programs to (1) prevent and respond to workplace discrimination and harassment, (2) provide legal assistance for low-income workers, and (3) establish a system of legal advocacy in states to protect the rights of workers.
- The bill further provides employees the right to retain their tips and it increases, in specified annual increments, the minimum wage for tipped employees to match the federal minimum wage for non-tipped employees.
- Additionally, the bill requires the Equal Employment Opportunity Commission to provide specified training and resource materials, establish and convene a harassment prevention task force, and establish an Office of Education and Outreach with regard to prohibited discrimination and harassment in employment.
- The bill also requires specified studies, reports, and research on prohibited workplace harassment.
- Referred to Senate Committee on Health, Education, Labor and Pensions; House Subcommittee on Oversight and Investigations.



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HR 7517: Guaranteeing Overtime for Truckers Act



- Introduced 4/14/2022
- The bill requires employers of commercial truckers to provide overtime pay to such drivers engaged in a workweek longer than 40 hours.
- Referred to House Committee on Education and Labor.



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SB 2935 (HR5031): Parental Bereavement Act of 2021



- Introduced 10/05/2021
- This bill entitles an eligible employee to up to 12 workweeks of leave during any 12-month period because of the death of a son or daughter.
- Such an employee may substitute any available paid leave for any leave without pay.
- The bill applies the same leave entitlement to federal employees.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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HR7489: Time Off to Vote Act



- Introduced 4/11/2022
- This bill requires an employer, upon the request of an employee, to provide the employee with a minimum of two consecutive hours of paid leave in order to vote in a federal election.
- The employer may determine the two-hour period, excluding any lunch break or other break.
- Taking such leave shall not result in the employee losing accrued **employment** benefits.
- The bill makes it unlawful for an employer to interfere with the right to take such leave or for an employer to discriminate against an employee for taking such leave. Further, the bill makes it unlawful for any employer to retaliate against an employee for (1) opposing any practice made unlawful by this bill; (2) filing a charge, or instituting or causing to be instituted any proceeding, under or related to this bill; or (3) testifying or preparing to testify in an inquiry or proceeding relating to such leave.
- The bill specifies penalties for employers who violate these provisions.
- Referred to House Committee on Education and Labor.



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HR 2954 (SB1443, 1703, 1730): Securing a Strong Retirement Act of 2021



- Introduced 5/4/2021 **Passed House on 3/29/2022**
- This bill makes various changes with respect to employer-sponsored retirement plans, including providing for the automatic enrollment of employees in certain plans and increasing the age at which participants are required to begin receiving mandatory distributions.
- Referred to Senate Committee on Finance.



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SB3642 (HR6670): Schedules that Work Act



- Introduced 2/14/2022
- This bill provides employees with the right to request changes to their work schedules related to the number of hours they are required to work or be on call, the location of the work, the amount of notification about work schedule assignments, and fluctuations in work hours. Employers must negotiate in good faith with employees who make such requests and comply with certain work schedule notice and split shift pay requirements for retail, food service, cleaning, hospitality, or warehouse employees.
- Referred to Senate Committee on Health, Education, Labor, and Pensions.



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HR3110 (SB1658): PUMP for Nursing Mothers Act



- Introduced 5/11/2021 (Passed House 10/22/2021)
- Providing Urgent Maternal Protections (PUMP)
- This bill expands workplace protections for employees with a need to express breast milk. Specifically, it expands the requirement that employers provide certain accommodations for such an employee to cover salaried employees and other types of workers not covered under existing law. Further, time spent to express breast milk must be considered hours worked if the employee is also working. The bill also extends from one year to two years the available time period for such accommodations.
- Additionally, before making a claim of liability against an employer, an employee generally must first notify the employer that they are not in compliance and provide them with 10 days to come into compliance with the required accommodations.
- Finally, the bill provides certain exemptions from these requirements for air carriers.
- Placed on Senate Legislative Calendar under General Orders.



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HR3992: POJA: Protect Older Job Applicants Act of 2021



- Introduced 6/17/2021 (Passed House 11/04/2021)
- This bill prohibits employers from limiting, segregating, or classifying job applicants based on an applicant's age. It also requires the Equal Employment Opportunity Commission to study and report on claims received from job applicants involving age discrimination.
- Referred to Senate Committee on Health, Education, Labor and Pensions.



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HR6557 (SB3747) Striking Workers Healthcare Protection Act



- Introduced 2/2/2022
- The bill prohibits an employer from terminating or significantly altering the employer-provided health insurance coverage of an employee engaged in a lawful strike.
- An employer in violation is subject to a maximum penalty of \$50,000 for each violation.
- Referred to House Committee on Education and Labor.



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HR7284 (HR7310) Informed Savers Act (Protecting America's Retirement Security Act)



- Introduced 3/30/2022
- This bill requires the Department of Labor to review the fee disclosure requirements associated with the administration of defined contribution retirement plans.
- Referred to the House Committee on Education and Labor.



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36th Guam Legislature



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Stats: As of May 9, 2022

- Introduced 304 Bills
- Introduced 346 Resolutions
- 94 Public Laws Enacted



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Bill No. 4-36: Liability Protection for Employers in a Declared State of Public Health Emergency



- Introduced 2/2/2021
- Provides immunity from civil liability and professional disciplinary action for any action or inaction as a result of, in response to, or arising out of a disaster or emergency declared at the federal or local level, if the person complied with or made a good faith effort to comply with the federal and local mandates.
- Immunity provided if person complies with any federal or local mandate.
- Standard: Reckless or willful misconduct
- No private right of action



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Bill No. 181-36: Informed Consent in the Workplace Act



- Introduced 8/23/2021
- To establish policy and provisions to ensure informed consent and to prohibit employers from discriminating against an individual because the individual has not received or declines to receive certain vaccinations; to prohibit retaliation; and to provide remedies.
- Qualified person may decline a specified vaccination offered by the employer by providing a written statement. Not required to provide a reason for declining the vaccination.
- Injunctive relief and treble damages, including costs and reasonable attorney fees.
- During a health care emergency – business are required to establish safety policies for employers and guests



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Bill No. 294-36: Prohibits Pre-Employment Inquires or Testing for Cannabis Use



- Introduced 4/21/2022
- Prohibits employers, unions, and employment agencies to require an applicant to:
 - Provide an answer verbally or in writing about their use of cannabis in an interview;
 - provide an answer in writing about their use of cannabis as part of a written employment application; or
 - submit to pre-employment drug testing for cannabis
- **Exceptions:**
 - Positions in law enforcement/peace officers; requiring a commercial driver's license; involving the supervision of children, medical patients, persons with disabilities, or the elderly; **with the potential to significantly impact the health or safety of employees or members of the public, as determined by the DPHSS**
 - Positions covered by DOT
 - Any federal government contract or grant
 - Any safety or security position covered by federal or Guam law
 - Any positions covered under a CBA that specifically require pre-employment testing
- Civil Fine of \$1,000 for first offense; \$2,000 for subsequent offenses



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Bill No. 297-36: Pregnant Workers Fairness Act



- Introduced 4/25/2022
- Requires employer to make reasonable accommodations related to the pregnancy, child birth, or related medical conditions of an employee, unless employer can show undue hardship.
- Prohibits discrimination in hiring.
- Prohibits employers from requiring employees to take leave (paid or not), if another reasonable accommodation can be provided.
- Prohibits adverse employment action.
- Civil penalties/fine - \$1,000 for 1st offence and \$2,000 for subsequent offenses.
- Injunctive relief including recovery of attorney fees.



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Public Law 36-1

- Signed into law 2/26/2021
- Law delayed the implementation of the second increase in the minimum wage from March 2021 until September 2021.



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Public Law 36-25: Ethics Training Required for all GovGuam Employees

- Signed into law 5/12/2021
- Requires all government of Guam employees to receive ethics training within their first six months of employment, and all existing government of Guam employees will be required to attend an ethics training within 36 months after enactment.
- Refresher training once every 4 years thereafter.
- Training must be done in a single day and cover: Guam law on ethical standards, lobbying, procurement laws and regulations, contracting laws and regulations, parliamentary procedures, fiduciary responsibility, personnel policy, government finance, open government law, and Sunshine Reform Act of 1999, and engage in group participation in discussing, analyzing, and solving general ethics-related dilemmas.



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Public Law 36-65: Local Employers Assistance Program



- Signed into law 12/23/2021
- Appropriated \$25 million from the General Fund for the Local Employer's Assistance Program established by Executive Order 2021-25.
- EO 2021-25
 - Total Assistance: \$25 Million ARPA \$25 Million GovGuam General Fund = \$50 Million
 - To support payroll and benefits costs, costs to retain employees, mortgage, rent, utility costs, and other operating costs
 - Loan proceeds used for employee wages and benefits will be forgiven
- **Program Closed 2/25/2022.**



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Applicability of Federal Employment Laws



- | | |
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| <ul style="list-style-type: none"> ▪ Employers 1+ Employees <ul style="list-style-type: none"> ▪ Fair Labor Standards Act (FLSA) ▪ Equal Pay Act (EPA) ▪ Uniformed Services Employment and Reemployment Rights Act (USERRA) ▪ Occupational Safety and Health Act (OSHA) ▪ Section 1981 Civil Rights Act of 1866 ▪ National Labor Relations Act ▪ Immigration Reform and Control Act (IRCA) ▪ Fair Credit Reporting Act (FCRA) ▪ Defend Trade Secrets Act (DTSA) ▪ Sarbanes-Oxley Act (SOX) ▪ Family First Coronavirus Response Act (FFCRA) | <ul style="list-style-type: none"> ▪ Employers with 4+ Employees <ul style="list-style-type: none"> ▪ Immigration Reform and Control Act (IRCA) |
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Applicability of Federal Employment Laws



Employers with 15+ Employees

- Title VII of the Civil Rights Act of 1964
- Americans With Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)

Employers with 20+ Employees

- Age Discrimination in Employment Act (ADEA)



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Applicability of Federal Employment Laws



Employers with 50+ Employees

- Family and Medical Leave Act (FMLA)

Employers with 100+ Employees

- Worker Adjustment and Retraining Notification Act (WARN Act)



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Applicability of Guam Employment Laws

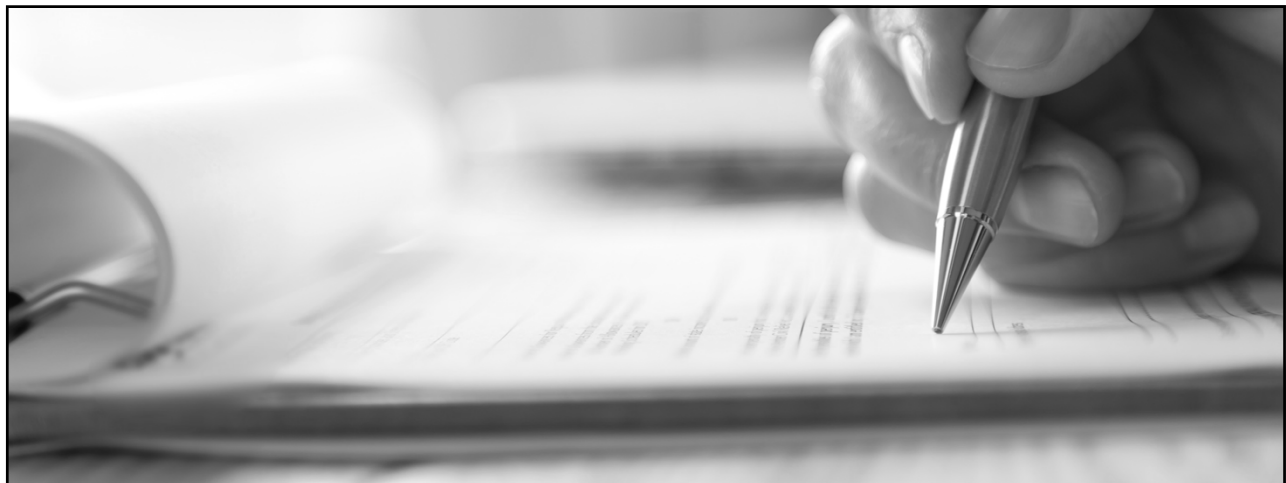


- **Employers with 1+ Employee**
 - Occupational Safety and Health Act of Guam
 - Guam Fair Labor Standards
 - Prohibit Age and Sex Discrimination
 - Employment Leave for Victims of Violence
 - Right to Privacy Act
 - Leave for Child School-Related Purposes
 - Right to Work
 - Guam Employment Relations Act
 - Nana Yan Patgon Act
 - Voting Leave
- **Employers with 15+ Employees**
 - Fair Chances Hiring Process Act
- **Employers with 20+ Employees**
 - Guam Family and Medical Leave Act



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Wrap Up

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Thank you

QUESTIONS?