2021 Employment Law Update

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SHRM GUAM CHAPTER

Breakfast Briefing Agenda

2021 EMPLOYMENT LAW UPDATES
SHRM WORKPLACE POLICY AGENDA
ARPA COBRA SUBSIDY
Developments in the Judicial Branch

- Judicial Appointments –
- President Biden announced on Tuesday March 30, 2021, plans to nominate ten individuals to serve as Federal Circuit and District Court Judges and one individual to serve as a Superior Court Judge for the District of Columbia.
Developments in the Judicial Branch

Employment Discrimination Cases
- Comcast Corp. v. National Assoc. of African American Owned Media
- Babb v. Wilkie
- Bostock v. Clayton County, Georgia
- Our Lady of Guadalupe School v. Morrissey-Berru

DACA Case
- DHS v. Regents of Univ. of California

ERISA Benefits Cases
- Retirement Plans Comm of IBM v. Jander
- Intel Corp. Investment Policy Committee v. Sulyma
- Thole v. U.S. Bank, N.A.
- Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania

Non-Compete Clause
- Island Eye Ctr., Inc. v. Lombard (2020 Guam 32)

Developments in the Judicial Branch

SCOTUS Arbitration Case – Cert Dismissed (1/25/2021)
- Henry Schein, Inc. v. Archer and White Sales, Inc.

Pending SCOTUS Affordable Care Act Case
- California v. Texas

Pending SCOTUS CFAA Case
- Van Buren v. United States
Executive Branch Developments

♣ Stimulus Bill

On March 6, 2021, the House passed the American Rescue Plan, a $1.9 trillion Covid-19 relief and stimulus package, which includes $1,400 stimulus checks for many Americans, $350 billion in aid to state and local governments, and an extension of federal unemployment benefits.

♣ On March 8, 2021, the Senate passed the relief bill.

♣ Minimum Wage

The American Rescue Plan originally included a proposal to increase the federal minimum wage to $15.

Minimum wage was removed from the final bill because the Senate Parliamentarian ruled that it could not be included in a budget reconciliation bill.

Biden Administration “Regulatory Freeze Pending Review” Memo

♣ Presidential Action issued January 20, 2021

♣ Memorandum for the Heads of Executive Departments and Agencies

♣ Subject to exceptions, generally forbids the proposing or issuing of pending rules, including sending a rule to the Office of the Federal Register (“OFR”), until a department or agency head appointed or designated by the President reviews and approves the rule.

♣ Rules that have been sent to the OFR but not published immediately withdrawn for review and approval.

♣ Rules that have been published in the Federal Register or issued in any manner but have not taken effect are postponed for 60 days with a 30-day comment period suggested.
Executive Branch Developments

Biden Administration Executive Appointments

- Marty Walsh
  Secretary of Labor
- Jenny Yang
  OFCCP
- Charlotte Burrows
  Chair, EEOC
- Lauren McFerran
  Chair, NLRB

Federal Agency and Department Updates

- Developments at the DOL
- Independent Contractor Rule Delay/Withdrawal
- Joint Employer Rule Rescission
- Withdrawn Opinion Letters
  - FLSA2021-4 (restaurant tip pooling and credit), FLSA2021-8 (IC status of food product distributors), and FLSA2021-9 (IC status of tractor-trailer truck drivers)
  - FLSA2019-6 (IC status of SP for virtual marketplace) and FLSA2019-10 (compensability time spent in truck’s sleeper berth)
- OSHA Temporary Standards for COVID-19
- Persuader Rule
Federal Agency and Department Updates

- **Developments at the OFCCP**
  - Affirmative Action Plan Verification Interface Landing Page
  - Removed Focused Reviews and Compliance Checks
  - Discontinued Compliance Assistance Portal

- **Developments at the EEOC**
  - State Access to EEO-1 Component 2 Information – *State of California et al v. Burrows et al*
  - Upcoming EEO-1 Submissions
  - Conciliation Revamp

- **Developments at the NLRB**
  - Legislative Priorities: Multiemployer Pension Fund Reform and the PRO Act
  - Possible Rulemaking: Joint Employer and Quickie Elections
  - Reversal of NLRB Case Law

Legislative Branch Updates

- **Filibuster Issue**
  - Senators have two voting options on measures and motions:
    - Use of “unanimous consent,” asking if any of the 100 Senators objects to ending debate and moving to a vote. If no objection is heard, the Senate proceeds to a vote.
    - If the majority leader cannot secure the consent of all 100 senators, the leader or another senator files a cloture motion, which then requires 60 votes to adopt. If fewer than 60 senators—a supermajority of the Chamber—support cloture, then the measure or motion has been filibustered. If no cloture, unlimited debate continues and all other business of the Senate stops.
    - Some have called for the elimination of the filibuster through a formal change to the text of Senate Rule 22, the cloture rule that requires 60 votes to end debate on legislation.
    - A majority can amend Rule 22 with 50 votes plus the Vice President, but cannot abolish the rule. Some suggest limited amendment, including requiring actual speeches to hold the floor or limiting the filibuster to not include voting rights.
Legislative Branch Updates

❖ Oversight of and partnership with the Biden Administration
❖ Chair Alma Adams, Democrat – North Carolina
❖ Priorities:
  ❖ $15 Minimum Wage
  ❖ Mandatory Arbitration Clause
  ❖ Independent Contractor Definition
  ❖ Increase in Salary Basis under FLSA to 55th Percentile or $82,732 by 2026
  ❖ Rule to Mitigate Transmission of Covid-19 in the Workplace

Legislative Branch Updates

❖ Paycheck Fairness Act (H.R. 7)
❖ Passed House 3/27/19; Re-introduced in House 1/28/21
❖ Presumes all employee current pay rates result from employer discrimination and rewrites existing legal standards, remedies, and class action procedures contained in the EPA.
❖ Effectively eliminates the “factor other than sex” defense.
❖ Prohibits an employer from seeking or relying on an applicant’s pay when extending a job offer.
❖ Imposes unlimited compensatory and punitive damages while inserting a more attorney-friendly class action device.
Legislative Branch Updates

- **Protecting Older Workers Against Discrimination Act (H.R. 1230)**
  - "POWADA"
  - Passed House 1/15/20; Re-introduced in House 3/18/21
  - Mixed Motive Theory Imported into Four Laws:
    - ADA
    - ADEA
    - Rehabilitation Act
    - Title VII Retaliation Provisions
  - No Individual Remedies; Attorneys Fees; Affirmative Declaratory Relief.

- **Protecting the Right to Organize Act of 2021 (H.R. 842)**
  - "PRO Act"
  - Originally introduced in House 5/2/19; Passed House 2/6/20
  - Revived bill introduced in House 2/4/21; Passed House 3/9/21
  - Revises definitions of employee, supervisor, and employer to broaden scope of individuals covered by FLSA.
  - Includes the “ABC test” for independent contractors and the “indirect control test” for joint employers.
  - Permits labor organizations to encourage participation in secondary strikes.
  - Prohibits employers from bringing claims against unions that conduct secondary strikes.
  - Allows collective bargaining agreements to require contribution of fees by employees represented, despite contrary state law.
  - Expands unfair labor practices to include prohibitions against replacement of, or discrimination against, workers who participate in strikes.
  - Makes it an unfair labor practice to require or coerce employees to attend employer meetings intended to discourage union participation.
Legislative Branch Updates

- **Protecting the Right to Organize Act of 2021 (H.R. 842) Cont.**
  - Prohibits employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation.
  - Prohibits employers from taking adverse actions against employees, including employees with management responsibilities, in response to their participation in protected activities related to the enforcement of the prohibitions against unfair labor practices (i.e., whistleblower protections). Such protected activities include:
    - providing information about a potential violation to an enforcement agency,
    - participating in an enforcement proceeding,
    - initiating a proceeding concerning an alleged violation or assisting in such a proceeding, or
    - refusing to participate in an activity the employee reasonably believes is a violation of labor laws.
  - Addresses the procedures for union representation elections, provides employees with the ability to vote in such elections remotely by telephone or the internet, 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.

Legislative Branch Developments

- **Pregnant Workers Fairness Act (H.R. 1065)**
  - Passed House 9/18/20; Reintroduced in House 2/15/21
  - Reasonable Accommodations for Pregnancy
  - Follows ADA
  - Bi-Partisan Support
Legislative Branch Developments

- Providing Urgent Maternal Protections for Nursing Mothers Act (H.R. 5592)
  - “PUMP Act”
  - Introduced in House 1/13/20
  - Expands employee access to break time and space
  - Clarifies application of unpaid break time provision to hourly and salaried workers as well as remedies.

- Expect vigorous legislative action to expand employment protections and union rights.
- Expect activity as the administration appoints sub-agency heads at DOL and takes control of the NLRB and EEOC.
SHRM Workplace Policy Outlook

SHRM Public Policy Priorities

- Workforce Development
- Workplace Equity
- Workplace Flexibility & Leave
- Workplace Immigration
- Workplace Healthcare
- Workplace Governance
Workforce Development

Issue:
Over 1 in 5 employers have asked employees to learn new skills to support change in their business. It is important for employers to maintain investments in training and workplace learning to give them and their employees a competitive edge.

Recommendations:
- **Work-Based Learning**: SHRM supports public policies that foster and expand work-based learning opportunities, including apprenticeships, skills-based learning and enhanced employability skills instruction in K-12 education.
- **Untapped Talent**: SHRM supports policy initiatives that promote hiring from underutilized talent pools such as the formerly incarcerated, older workers, individuals with disabilities and veterans.
- **Education Assistance**: SHRM believes employer-provided education assistance should be expanded to include student loan repayment and the monetary limit increased to give employers flexibility in the design of benefit offerings for recruitment and retention purposes.

Bottomline:
To help close the skills gap and improve individual prosperity, employers and government should adopt practices and policies that support efforts to hire, educate and train individuals for the modern workplace, including using non-traditional talent pools.

Workforce Development

- **Workforce Innovation and Opportunity Act**

  The Workforce Innovation and Opportunity Act (WIOA) was signed into law on July 22, 2014. WIOA is designed to help job seekers access employment, education, training, and support services to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy. Congress passed the Act by a wide bipartisan majority; it is the first legislative reform of the public workforce system in 15 years.

- **Apprenticeships**

- **Employer-provided educational assistance**
Issue:

Everyone in the workplace deserves fair treatment. SHRM research found that 27 percent of American workers believe workplace equity is the most important issue they face at work. Addressing pay disparities remains a challenge for employers, as pay gaps may be attributable to discrimination but could also be due to differences in employee duties, contributions and/or experiences that require individualized examinations.

Recommendations:

- **Workplace Culture**: SHRM urges employers to foster healthy workplace cultures. Strong anti-harassment and anti-discrimination policies are important, but culture is key to prevention.
- **Pay Audits**: SHRM believes public policy should incentivize employers to proactively conduct self-evaluations of pay and correct improper disparities in compensation.
- **Transparency**: SHRM encourages employers to have discussions about pay expectations and share their employees information on how pay decisions are made.
- **Federal Framework**: SHRM advocates for a federal standard of equal pay for equal work, rather than different standards at state and local levels.

Bottomline:

Bias, discrimination and inequity in the workplace are organizational culture issues. The path toward equity means recognizing there are systemic gaps that adversely impact one group over another and addressing them proactively.

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**Workplace Equity**

- **Equality Act** – Passed House
  - Discrimination can occur on the basis of the sex, sexual orientation, gender identity, or pregnancy, childbirth, or a related medical condition of an individual, as well as because of sex-based stereotypes. Each of these factors alone can serve as the basis for discrimination, and each is a form of sex discrimination. The purpose of this Act is to expand as well as clarify, confirm and create greater consistency in the protections and remedies against discrimination on the basis of all covered characteristics and to provide guidance and notice to individuals, organizations, corporations, and agencies regarding their obligations under the law.

- **Paycheck Fairness Act** – Passed House
  - This bill addresses wage discrimination on the basis of sex, which is defined to include pregnancy, sexual orientation, gender identity, and sex characteristics. Specifically, it limits an employer's defense that a pay differential is based on a factor other than sex to only bona fide job-related factors in wage discrimination claims, enhances nonretaliation prohibitions, and makes it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee’s wages. The bill also increases civil penalties for violations of equal pay provisions.

- **Protecting Older Workers Against Discrimination Act** – Passed House
  - This bill amends the Age Discrimination in Employment Act of 1967 to establish as an unlawful employment practice that age or participation in investigations, proceedings, or litigation under such Act were a motivating factor for any unlawful employment practice, even though other factors also motivated the practice (thereby allowing what are commonly known as mixed motive claims).

- **Pregnant Workers Fairness Act** – Passed House
  - 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.
Workplace Flexibility and Leave

Issue:
Organizations with modern workplace flexibility and leave policies are better positioned to balance the needs of their workplaces and workers. However, U.S. employers are burdened by a patchwork of state and local paid leave laws that create a fragmented, costly system. A voluntary, national paid leave program will provide employers certainty and predictability through a standardized option.

Recommendations:

- **Voluntary Leave**: SHRM encourages employers to voluntarily offer paid leave and flexible work options to their employees.

- **No Mandates**: SHRM believes government mandates limit employer flexibility. Public policy should accommodate varying work environments, employee representation, industries and organizational size.

- **Federal Framework**: SHRM supports public policies that provide employers with certainty and predictability through a voluntary federal framework rather than a fragmented patchwork of state and local laws.

Bottomline:
The United States/Guam needs a 21st century workplace flexibility and paid leave policy that is free of mandates, works for employers and employees and foregoes a one-size-fits-all approach.

Workplace Flexibility and Leave

- **Guam Family Medical Leave Act**

- **Family Act – Introduced in the Senate**
  - To provide paid family and medical leave benefits to certain individuals, and for other purposes.

- **Healthy Families Act – Introduced in House**
  - To allow Americans to earn paid sick time so that they can address their own health needs and the health needs of their families
Workplace Immigration

Issue:

Global talent contributes to and complements the American workforce. According to SHRM research, 86 percent of C-suite executives have workforce strategies that rely on temporary visas. The U.S. immigration system should promote competition and innovation and provide tools to recruit and retain top global talent.

Recommendations:

- **Access to Talent**: SHRM supports policies that ensure employers have access to visas to recruit, hire, transfer and retain top talent, especially those educated and trained in the United States.
- **Employment Verification**: SHRM advocates for one reliable, entirely electronic employment verification system that integrates the Form I-9, provides users a good faith defense and is only for new hires.
- **Pre-Certified Employers**: SHRM believes a “Trusted Employer” program should be implemented to create efficiencies for employees, employers and the government.

Bottomline:

The United States needs a modern workplace immigration system that allows employers to access top global talent, creates efficiencies and protects workers.

Workplace Immigration

- **Comprehensive Immigration Reform**
- **H-1B Lottery Rule**
  - The regulation would authorize U.S. Citizenship and Immigration Services (USCIS) to end the H-1B lottery and instead grant petitions based on registrations starting with the highest salary level and working down.
  - In place of the H-1B lottery, USCIS would receive registrations before the start of a fiscal year (likely before April 1) and if more are received than the H-1B limit allows, the agency would award the petitions from highest to lowest salary. This process would be used for the 65,000 petitions under the annual limit and 20,000 petitions for individuals with an advanced degree from a U.S. university.
Workplace Healthcare

Issue:

More than a third of employees registered to vote believe health care is the most important issue for the 46th president to address. The employer-based system is the foundation of health insurance in the United States. These plans provide access to valuable benefits that address physical and mental health. Rising costs and continued policy uncertainty pose risks to sustaining employer-sponsored health insurance.

Recommendations:

- **Employer-Based System:** SHRM believes public policy should strengthen and improve the employer-based health care system, including preservation of the current tax treatment of employer-sponsored health plans.
- **Definition of Full-time:** SHRM believes the definition of full-time employment for purposes of health care coverage should be 40 hours per week, consistent with the Fair Labor Standards Act overtime requirement.
- **Wellness Programs:** SHRM supports adoption of employer wellness programs to encourage healthy behavior and to lower costs for employers and employees.

Bottomline:

SHRM believes any approach to U.S. health care reform must preserve the option for employers to provide health insurance, which supports more than 181 million Americans. Health care reform must also offer affordable access to care for all Americans.

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Workplace Healthcare

- Mental Health
- Telehealth
- EEOC Guidance on Vaccine Incentive
Workplace Governance

Issue:

Government policies affect a wide range of workplace issues, especially the relationship between employers and employees. The pace and complexity of change also affect workplace governance. As a result, clear, balanced rules and guidance on governance issues are critical to creating better workplaces.

Recommendations:

- **Labor-Management Relations**: SHRM supports balanced labor-management relations and recognizes the right of employees to form or join a union – and the right of employers to obtain advice on these matters. Decisions should follow democratic principles, including an open flow of information and a secret ballot that ensures majority interest prevails.
- **Minimum Wage**: Since the federal minimum wage has not changed since 2009, SHRM believes a reasonable increase, phased in over time to recognize the impact on small businesses, is warranted. President Biden increased minimum wage for federal contracts $15/hour.
- **Employment Relationships**: SHRM supports the ability of employers to enter into non-compete agreements with employees as an essential protection of their intellectual property. SHRM also supports arbitration clauses as an effective tool for employers and employees to resolve issues without costly and protracted legal processes. (Not permitted in Guam)

Bottomline:

To ensure workplaces function to the benefit of employers and employees and to avoid unintended consequences that hurt employers, employees and the overall economy, a range of perspectives should be considered in developing workplace governance policies.

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Workplace Governance

- **Minimum Wage**
  - Federal Contract minimum wage $15/hour
- **Protecting the Right to Organize (PRO) Act – Passed House**
  - This bill expands various labor protections related to employees' rights to organize and collectively bargain in the workplace.
- **Independent Contractor Rule**
  - The Final Rule provides a multifactor “economic reality” test for determining whether workers are independent contractors and six examples of the DOL applying the multifactor test.
  - Delayed for 60 days.
- **Joint Employer Rule**
  - The final rule provides updated guidance for determining joint employer status when an employee performs work for his or her employer that simultaneously benefits another individual or entity, including guidance on the identification of certain factors that are not relevant when determining joint employer status.
  - Provisions struck down by district court. Biden Administration requests 2nd Circuit to affirm down on appeal.
American Rescue Plan Act

Consolidated Omnibus Budget Reconciliation Act (COBRA)

Requires group health plans to offer continuation coverage to covered employees, former employees, spouses, former spouses, and dependent children when group health coverage would be otherwise lost due to certain events.

Generally – employers require covered employees to pay for COBRA continuation coverage.
Covered Employers

- **All private sector group health plans**
  - Employers with at least 20 employees on more than 50% of its typical business days in the previous calendar year.
  - Includes both full and part time employees
- **All plans by state and local governments**
- **Not applicable to federal government or churches**

Covered Employees

- **Qualified Beneficiaries (QB)**
  - Employee covered by group health plan on the day before a qualifying event occurred.
  - Includes employee’s spouse, former spouse, or dependent child or any child born or placed for adoption with a covered employee during the period of continuation coverage.
  - May include agents, independent contractors, and directors who participate in the plan.
- **Qualifying Event (QE)**
  - Employee – termination or reduction of hours
  - Spouse/Dependent Child – EE termination/reduction of hours; EE becomes entitled to Medicare; divorce or legal separation from EE; or death of EE.
  - Dependent Child – loss of dependent child status under plan rules.
COBRA Benefits

- Continuation coverage must be the same coverage the QB had before the QE.
- QB must receive the same benefits, choices, and services under the plan.
- QB subject to the same plan rules and limits (i.e., co-pays, deductibles, etc.)

COBRA &
American Rescue Plan Act (ARPA)

- Federal Government pays 100% of COBRA insurance premiums
- Period of Coverage April 1, 2021 – September 30, 2021
- Employer pays insurance premiums and apply for tax credits against quarterly tax returns
- Applies to covered employers with fully insured and self-insured group health plans
- Employers must provide coverage to Assistance Eligible Individuals (AEI) who elect COBRA coverage during the period of coverage.
COBRA & ARPA Requirements

- **Notice**
  - Covered Employers must provide Notice to AEI's losing coverage and eligible for COBRA
    - General Notice and COBRA Continuation Coverage Election Notice
      - AEI's who lose coverage due to reduction of hours or involuntary termination during 4/1 – 9/30
      - Must be provided together with ER standard COBRA Election Notice
    - Notice of Extended Election Period
      - AEI's who are still in 18-month COBRA window as of 4/1 (AEI who lost coverage on or after 10/1/2019)
      - All AEI's currently enrolled, previously declined, or enrolled and later dropped COBRA
      - Deadline May 31, 2021
    - Notice of Expiration of Premium Assistance
      - ER's must send this notice 15 – 45 days before the COBRA subsidy expires.
  - Summary of COBRA Premium Assistance Provisions under ARPA
    - Also includes a form for EE's to request for treatment as an AEI

COBRA & ARPA – Subsidy Period

- Assistance Period April 1, 2021 – September 30, 2021
- Subsidy may terminate earlier if:
  - EE becomes eligible for another group health plan
    - New ER / Spouse’s ER / qualified small employer health reimbursement arrangement / or a health flexible spending account (FSA)
    - or if they become eligible for Medicare
  - Reach the end of the maximize COBRA continuation period
    - 18 months from the end of employment
    - 29 months for persons with disabilities
    - 36 months for second QE during the continuation period (divorce or separation)
  - Subsidy election period does not cut off right to elect COBRA coverage
COBRA & ARPA -

- **Special Enrollment Period** – for AEI’s who:
  - Become eligible for COBRA before April 1, 2021, but have not elected coverage
  - Previously declined COBRA coverage
  - Elected and then terminated coverage early

- **Enrollment Period** –
  - Begins April 1, 2021
  - Ends 60 days after receipt of the Notice to Elect Coverage

- Notice needs to be sent out by May 31, 2021.

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COBRA & ARPA – Eligibility

- **EE who lost ER group health coverage**
  - Involuntary reduction in working hours
  - Involuntary termination of employment
  - Does not have to be COVID-19 Related

- **EE must elect coverage**

- DOL guidance does not address voluntary separation of employment (i.e., take care of kids during pandemic)
  - Unemployment assistance is available under CARES Act

- **Eligibility under another plan (spouses plan) disqualifies EE from subsidy**
  - EE must certify on the election form that they are not eligible for another plan

- No Administrative Fees
- EE entitled to Refunds if payment made during Covered Period

COBRA & ARPA - Questions

1. An employee is out on medical leave for six months. At the end of the sixth month, medical benefits end under the terms of the plan, but the EE remains employed. Is the EE an AEI for purposes of COBRA Premium Subsidy?

2. An employee was fired for poor performance last year. The employee went to another company, but his employment was terminated for poor performance. Which company is required to send COBRA notices and offer fully subsidized COBRA?

3. Does a second chance notice or subsidy eligibility notice go to all employees who lose coverage due to involuntary termination or a reduction in hours? What about those individuals that the company knows are eligible for Medicare or another employer plan?
COBRA & ARPA - Questions

4. If a company makes a taxable lump-sum cash payment intended to represent six months of COBRA premiums as part of a severance agreement, may the company claim a Medicare tax credit for the value of the lump-sum payment?

5. A former employee is not “AEI” if the EE is eligible for another ER’s plan. What if the former EE satisfies the eligibility requirements for the other ER’s plan but is not in open enrollment or special enrollment window where he could enroll in the other plan?

6. May an ER stop treating COBRA as fully paid when a former EE turns 65 and become eligible for Medicare, even if the EE does not notify the plan?

7. A company recently fired an EE for dishonesty. Does this qualify as “gross misconduct” that would make the EE ineligible for the COBRA subsidy?

Questions?

THANK YOU!