



DICKINSONLAW



2021: Back in the Groove

EMPLOYMENT LAW VIRTUAL SEMINAR - NOV. 4, 2021

Welcome / Agenda

| | |
|---------------|--|
| 9:00 - 9:05 | Introduction |
| 9:05 - 9:25 | Two Song Playlist: The NLRB and Your Policies |
| 9:25 - 9:55 | Sierra and the Supremes: Case Law Update |
| 9:55 - 10:10 | Break |
| 10:10 - 11:10 | Diversity, Equity & Inclusion Recalibrated |
| 11:10 - 11:40 | Rock-a-Bye-Baby: Momma's Rights |
| 11:40 - 12:40 | Lunch |
| 12:40 – 1:10 | Battle of the Bands: Non-Competes, Non-Solicitations, and the Like |
| 1:10 - 1:30 | World Music: Immigration Updates |
| 1:30 - 1:45 | Break |
| 1:45 - 2:15 | Reading Sheet Music: Evaluating and Improving Documentation |
| 2:15 – 2:45 | Do You Recognize That Beat? The Biden WHD |
| 2:45 - 3:15 | Old Song, New Arrangement: COVID-19 Lessons for Remote Work |
| 3:15 - 3:45 | Second Verse: Federal Vaccination Laws |
| 3:45 – 3:50 | Closing |

Disclaimer

- The material presented is designed and intended for general informational purposes only.
- **It is not intended and it should not be construed or relied upon as legal advice.**
- **The information in this presentation is current as of approximately five business days prior to the virtual seminar on 11/4/2021. Viewers should check for new laws, regulations, FAQs, Q&As, or other guidance from applicable government agencies before using these materials.**
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.



Jill Jensen-Welch

Two-Song Playlist: The NLRB and Your Policies



NLRA Section 7

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of** collective bargaining or other **mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

General Counsel: Recent Verses of the Two Songs in the Playlist

- Peter Robb – Pres. Trump's GC
 - Refused to resign for Pres. Biden
 - Biden fired him at 5:00 p.m. on 1/21/2021
- Peter Sung Ohr, Acting GC
- Jennifer Abruzzo, Senate-approved GC as of 7/21/2021

GC 0hr, 21-02 (2.2.21)

Rescission of Certain General Counsel Memoranda

Rescinded GC 18-04, Guidance on Handbook Rules Post-*Boeing*

GC 0hr, 21-03 (3.31.21)

Effectuation of the NLRA Through Rigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines

- Protect “precursor” activities of a speaker and a listener, even if group action is not yet contemplated and even if the two do not agree
- Employee activity on “societal issues” may constitute “protected activity”
- Inherently protected topics by Board decisions and Advice Memos
 - Wages
 - Work Schedules
 - Job Security (termination)
 - Workplace health & safety
 - Discrimination

GC Abruzzo, 21-04 (8.2.21)



Mandatory Submissions to Advice

A. Reconsideration of Overruled Precedent

1. Handbooks/Policies
2. Confidentiality Clauses in Separation Agreements & Arbitration Agreements
3. Protected Concerted Activities
4. GC's Burden of Proof for ULPs
5. Remedies for NLRA Violations
6. Union Access
7. Union Dues
8. Employee Status (Independent Contractors)
9. Jurisdiction over Religious Institutions
10. Employer duty to Recognize and to Bargain
11. Deferral of ULPs on Issues Previously Arbitrated

GC Abruzzo, 21-04 (8.2.21)



Mandatory Submissions to Advice

B. Other Areas and Initiatives

1. Employee Classifications
2. *Weingarten* rights in non-unionized settings
3. National Medical Board Jurisdiction
4. Employer Duty to Recognize and to Bargain
5. Right to Strike & Picket
6. Remedies and Compliance
7. Employer Interference with Section 7 Rights

C. Other Case Handling Matters

GC Abruzzo, 21-06 (9.8.21)



Seeking Full Remedies

- Board is willing to explore new make-whole remedies beyond those traditionally awarded
- Consequential damages suffered as a direct and foreseeable result of an unfair labor practice
- Examples of Possible New Awards for Terminated Employees
 - Health insurance and health care expenses
 - Late fees on credit cards
 - Loss of home or car
 - Front Pay
 - Liquidated Back Pay
 - Employer sponsorship or work authorizations for undocumented workers
 - Unlawful terms of employment for undocumented workers (e.g., reduced pay)
- Posting Notices via texting, social media, intranets, internal messaging apps

GC Abruzzo, 21-07 (9.15.21)



Full Remedies in Settlement Agreements

- RDs have more flexibility in settling cases than the NLRB has in deciding them
- Reinstatement is the most important remedy
- No less than 100% of back pay and benefits owed
- Direct & Consequential Damages
- Rescind facially lawful rules that have been unlawfully applied
- Default Language for Employer Breaches of Settlements
- Security if payments are made in installments
- Non-Admission is the Exception, Not the Rule!
- Employee Notices
- If no reinstatement, then
 - Front pay is due

GC Abruzzo, 21-07 (9.15.21)



Full Remedies in Settlement Agreements

- Additional Remedies When No Reinstatement – esp. if Voluntarily Waived
 - Front pay
 - Outplacement services
 - Neutral references
 - No protest of unemployment
 - Written letter of apology to employee (esp. if employee is likely to accept reinstatement—not re-employed)
- Additional Remedies for Immigrant Workers (loss of job and loss of work auth)
 - Sponsor the H-1B, H-2B, J-1, F-1, TN, etc.
 - Reimburse legal fees, application fees, and travel costs associated with seeking to regain the lost work authorization
 - If Employer misused E-Verify, require E-Verify training conducted by DOJ

Takeaways

1. At minimum, have Handbooks/Policies reviewed in 1-2 years after each change in the party of the Presidential administration
2. Get legal advice from competent EL counsel before disciplining an employee for conduct that involves complaints about the workplace or supervisors, or outside activities on issues that may relate to work issues
3. Prepare yourself for Unfair Labor Practice charges
4. Gird your loins if you want to settle a ULP
5. Pay attention to what's happening at the NLRB



Thank You!

Jill Jensen-Welch

jjensen@dickinsonlaw.com

(515) 246-4536



Sierra McConnell

Case Law Update: Sierra and the Supremes



Iowa Supreme Court & U.S. Supreme Court

- Iowa Supreme Court
 - *Rumsey v. Woodgrain Millwork, Inc.*
 - *Iowa Ass'n of Bus. & Ind. v. City of Waterloo*
 - *Dix v. Casey's Gen. Stores, Inc.*
 - *Woods v. Charles Gabus Ford, Inc.*
- U.S. Supreme Court:
 - *Van Buren v. U.S.*
 - *Schein, Inc. v. Archer & White Sales, Inc.*
 - *Cedar Point Nursery v. Hassid*
 - *Mahanoy Area Sch. Dist. v. B.L.*



Iowa Supreme Court

Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Former employee, who was deaf and who had continued to work while receiving workers' compensation for workplace injury, brought action against employer, as well as human resources (HR) director and production manager, after he was terminated, alleging disability discrimination, failure to accommodate, and retaliation for requesting accommodation under the Iowa Civil Rights Act (ICRA).



Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Disability Discrimination:

- (1) Employee has a disability.
- (2) Employee is qualified to perform the essential functions of the job.
- (3) The circumstances of his termination raise an inference of illegal discrimination.



Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Failure to Provide Reasonable Accommodation:

- (1) Employee was a qualified individual.
- (2) Employer knew of the disability.
- (3) Employee requested a reasonable accommodation.
- (4) Employee suffered an adverse employment action.

Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Failure to Provide Reasonable Accommodation:

- (1) Employee was a qualified individual.
- (2) . . .
- (3) . . .
- (4) . . .

Disability Discrimination:

- (1) . . .
- (2) Employee is qualified to perform the essential functions of the job.
- (3) . . .

Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Retaliation under the Iowa Civil Rights Act:

It is an unfair or discriminatory practice for: ... Any person to ... retaliate against another person in any of the rights protected against discrimination by this chapter because such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint, testified, or assisted in any proceeding under this chapter.

Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Request for a Sign Language Interpreter:

Discrimination Claim: The employee failed to establish he could perform the essential functions of any available job, therefore a claim for discrimination based on his hearing-impairment fails.

Failure-to-accommodate and Retaliation Claims: “The Iowa Supreme Court could not tell whether the jury returned a favorable jury verdict due to the sit-down restriction or for the request for an interpreter, Defendants are therefore entitled to a new trial on the employee's claim for failure to accommodate his request for an interpreter and the claim of retaliation.”

Disability Discrimination

Rumsey v. Woodgrain Millwork, Inc.,
962 N.W.2d 9 (Iowa 2021)

Individual liability:

An individual is liable if they are personally involved in, and have the ability to effectuate, an adverse employment action and may be subject to individual liability for discrimination under the Iowa Civil Rights Act.



Ban the Box Ordinance



Iowa Association of Business & Industry v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)

Conducting background checks on potential employees may be more difficult than your business thinks. State and local laws may have disrupted the practice of using standardized background forms and processes.

Ban the Box Ordinance



Iowa Association of Business & Industry v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)

Ordinance 5522 contains two regulations on employers:

- (1) When an employer can inquire into an applicant's criminal history, and
- (2) Whether the employer can consider that criminal history in making its hiring decisions. Essentially, an employer is forbidden from making an actual "adverse hiring decision" for certain reasons.

Ban the Box Ordinance



Iowa Association of Business & Industry v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)

Iowa Code section 364.3(12)(a) provides:

A city shall not adopt, enforce, or otherwise administer an ordinance, motion, resolution, or amendment *providing for any terms or conditions* of employment that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, *hiring practices*, employment benefits, scheduling practices, *or other terms or conditions of employment*.

Ban the Box Ordinance



Iowa Association of Business & Industry v. City of Waterloo, 961 N.W.2d 465 (Iowa 2021)

Ordinance 5522 contains two regulations on employers:

- (1) When an employer can inquire into an applicant's criminal history. **Allowed.**
- (2) Whether the employer can consider that criminal history in making its hiring decisions. Essentially, an employer is forbidden from making an actual "adverse hiring decision" for certain reasons. **Preempted by State Law.**



Private Sector Drug Testing

Iowa Code section 730.5, effective July 1, 2018

Private Sector Drug-Free Workplaces

Private Sector Drug Testing – Part 1



Dix v. Casey's General Stores, 962 N.W.2d 671 (Iowa 2021)

This case raises significant issues under Iowa's private employer drug-testing statute, including (1) when an employer is entitled to immunity, (2) what it takes to comply with the statutory requirements, (3) the meaning of "safety-sensitive positions," and (4) the process for selecting employees for testing, among others.

Lesson: Review your drug testing policies to ensure they cover every employee you wish to test and that your procedure for executing the test complies with Iowa Code section 730.5.

Private Sector Drug Testing – Part 2



Woods v. Charles Gabus Ford, 962 N.W.2d 1 (Iowa 2021)

The nuances of Iowa's workplace drug testing statute are addressed, as well as the importance of complying with all aspects of its notice provisions, and the consequences for failing to do so.

Iowa Code section 730.5(7)(j)(1)



If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing **by certified mail, return receipt requested**, of the results of the test, the employee's right to request and obtain a confirmatory test of the second sample ... at an approved laboratory of the employee's choice, **and the fee payable** by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample.

Drug Testing Lessons



Lessons:

- Iowa's private sector drug testing law is detailed. It has lots of traps that Employers can easily fall into.
- Drug testing policies should be very clear, detailed, and comply with Iowa's law.
- Even though "substantial compliance" is the standard, full compliance with each part of the law is the best way to avoid litigation



U.S. Supreme Court

Employee Trespass into Computer Files



Van Buren v. United States, 141 S. Ct. 1648 (2021)

A police officer was authorized to search computer records about license plates for law enforcement purposes. However, he was also searching the records and obtaining information for improper *private* purposes.

Holding: The Court found that the CFAA did not “cover” people like the officer who “have improper motives for obtaining information that is otherwise available to them.”

Lesson: Court’s decision significantly narrowed the applicability of the CFAA in employment cases. Review computer policies!

Unambiguous Arbitration Clause

Schein v. Archer & White Sales, 139 S. Ct. 524 (2019), dismissed as improvidently granted (2021)

A request for injunctive relief excluded the parties from arbitrating their dispute, even though they had an arbitration clause in their agreement.

Holding: the plain language of the arbitration clause requires the parties to take their dispute to District Court, not to arbitration.

Lesson: Be clear in arbitration clauses about what is subject to arbitration and what must be heard by a court. Review contracts to ensure they say what you actually intend them to mean.

Labor Organizing on Ag Employer's Grounds



Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)

Does a state regulation allowing union organizers to traverse an employer's personal property at will for three hours a day, 120 days a year, constitute a taking?

Holding: The regulation appropriates a right to physically invade the employers' property—to literally “take access,” as the California Regulation provides. Therefore, a *per se* physical taking.

Lesson: Agricultural employers' land is personal property and therefore, may provide more protections than other employers.

Student Free Speech

Mahoney Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021)

Can the use of profanity in a social media post, made off campus and on a Saturday, constitute grounds for punishment at a public high school?

Holding: School violated student's First Amendment rights when it suspended her from the cheerleading squad for speech that criticized the school.

Lesson: Schools need to be wary of regulating a student's speech. "Disruption to the classwork" may be construed more narrowly than the school may think.



Thank You!

Sierra McConnell

smcconnell@dickinsonlaw.com

(515)246-4522

Diversity, Equity & Inclusion Recalibrated

Desmund Adams

Author of “DE&I Has Died”

desmund@focusandfind.com

515.985.0400

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND®



Who I Am

Desmund Adams

- Husband
- Father
- Friend
- Golfer
- Founder / CEO of Focus & Find®

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

What I Do

Help Clients Connect People & Ideas

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

It is all fun and games until it costs you money...
Not having a DE&I strategy can impact
your bottom line!



D & I Has Died

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

The challenge defined

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

Why diversity programs fail

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

The challenge – solutions

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

Now let's overlay the solutions with the challenge defined and experience how inclusive and harmonious an organization can become.



Profitability

SOCIALLY RESPONSIBLE BOARD & EXECUTIVE SEARCH®

FOCUS & FIND® 

Now do you see the profit
you have been missing and why D & I Has Died?

Contact Desmond Adams:

Desmund@focusandfind.com

(515) 985-0400

@Desmund_Adams | @FocusAndFind






Melissa A. Schilling
& Megan E. Wilson

Rock-a-Bye-Baby: Momma's Rights

Pregnant Applicants & Employees



Pregnant Applicants and Employees

- Laws Governing Pregnant Employees & Applicants
 - Pregnancy Discrimination Act
 - Family Medical Leave Act
 - Iowa Civil Rights Act
 - Fair Labor Standards Act
 - New Federal Legislation?!?!?
- Real Life Scenarios

Pregnancy Discrimination Act

“PDA”



- Title VII of the Civil Rights Act
- Applies to Employers with 15 or more Employees
- Prohibits sex discrimination on the basis of pregnancy
- Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes as other persons not so affected but similar in their ability or inability to work



Pregnancy Discrimination Act

- What are protected classes under the PDA?
- What are the Employer's Obligations under the PDA?
 - Reasonable Accommodations?
 - Light Duty?
 - Pregnancy related leave versus parental leave?
- Risks of Non-compliance

Family Medical Leave Act “FMLA”

- Applies to Employers with 50 or more employees within a 75 mile radius
- Requires Employers to provide unpaid leave to eligible employees to care for a child
- Requires Employers to provide unpaid leave to eligible employees for serious health condition for self or child
- Who is considered an eligible employee?
- Risks of Non-Compliance

Iowa Civil Rights Act “ICRA”

- Prohibits discrimination on the basis of pregnancy
- Applies to employers with 4 or more employees



Iowa Civil Rights Act

- What are the protected classes?
- What are the employer's obligations under the ICRA?
 - Reasonable Accommodations?
 - Light Duty?
 - Pregnancy Leave versus Parental Leave
- Risks of Non-compliance

Fair Labor Standards Act

“FLSA”



- FLSA applies to most employers
- Requires employers to provide employees break time for an employee to express milk.
- Requires employers to provide employees with a private place, other than a bathroom, to express milk.
- What the FLSA doesn't require
- Risks of Non-Compliance



Summary

- Cannot discriminate against pregnant employees or applicants;
- Cannot retaliate against pregnant employees or applicants;
- **Covered employers** must provide 12 weeks of **unpaid** leave under the FMLA to **eligible employees**.
- **Covered employers** must provide up to 8 weeks of **unpaid** leave under the ICRA to **employees**.
- **Covered employers** must provide break time and a private place for **employees** who need to express milk.

Questions Employers Should NOT Ask During Interview Process



Failure to Hire Case



- Pregnant applicant applies for a position at ABC Company and receives an interview.
- At the time of the interview, applicant is pregnant with her second child but does not disclose her pregnancy and is not asked whether she is pregnant.
- After interview, applicant is offered position and accepts. After accepting the position, applicant (“App”) tells ABC she is pregnant.
- ABC asks App how much time off she took with first pregnancy, whether she plans on returning to work after baby is born, and whether she has arranged daycare.
- App tells ABC she took 12 weeks off, plans to return to work, and has arranged daycare.
- A few days later, ABC rescinds job offer.
- Did ABC violate any laws? If so, what laws? What if we change the facts?

Accommodations

- Employee works for ABC Company. ABC Company has 10 employees. Employee is the only female.
- Employee gives birth to first child. She returns to work and asks for an additional 15 minutes to be added to her two regular breaks so she can express milk.
- Supervisor tells employee she can add the time but only on days when the workload is light and only if she stays late or arrives early. Supervisor also tells employee that the additional breaks will be unpaid.
- Did ABC violate any laws? If so, what laws?

Leave



- Employee works for ABC Company. Employee tells supervisor she is pregnant.
- Employee is then moved to a different position. Her title, salary, benefits, and supervisor remain the same, but she is no longer the key contact for the ER's largest client account.
- Employee takes leave but while she is on leave she receives notice that she has been terminated as part of a RIF.
- Has ER violated any laws? If so, what laws?



Thank You!

Melissa A. Schilling

mschilling@dickinsonlaw.com

515-246-4530

Regan E. Wilson

rwilson@dickinsonlaw.com

515-246-4531

Battle of the Bands: Non-Competes, Non-Solicitations, Etc.



Bryan O'Neill &
Jill Jensen-Welch



Restrictive Covenants

- Types of Restrictions
 - Non-Compete
 - No Conflicts of Interest
 - Non-Solicitation (Customers and Employees)
 - Non-Disclosure/Confidentiality
 - Non-Disparagement
 - IP Protection (Inventions and Works)
- During and Post-Employment
- For Profit and Not For Profit
- Employees and Independent Contractors



Does your company have Restrictive Covenants with any employees?

Use the Reactions Buttons to Answer



Yes



No



Protectable Interests

- Trade Secrets
- Confidential and proprietary business information
- Customer, Vendor, Supplier, Employee Relationships
- Goodwill



Reasonable Restraint

- Time
- Geography or Customers
- Scope/Activity

State Law

- Out-of-State Workers
- Out-of-State Remote Work
- Workers Who Move





What We're Seeing

Possible Legal Claims



| | Former Employee | New Employer |
|---|-----------------|--------------|
| Breach of Contract | ✓ | |
| Misappropriation of Trade Secrets (federal & state statutes) | ✓ | ✓ |
| Violation of Stored Communications Act (federal and some states) | ✓ | ✓ |
| Intentional Interference with Business Relationships | ✓ | ✓ |
| Intentional Interference with Prospective Business Relationships | ✓ | ✓ |
| Conversion | ✓ | ✓ |
| Conspiracy | ✓ | ✓ |
| Breach of Fiduciary Duty (if Employee was an Officer or Director) | ✓ | |



Notifying Regulators

E.O. 14036

- Promoting Competition in the American Economy
- Issued 7/9/2021
- Policy: To enforce anti-trust laws, especially when such issues arise in labor markets
- Revise 10/2016 FTC Antitrust Guidance for HR Professionals to better protect from wage collusion
- FTC to “address” agreements that unduly limit ability to change jobs



10 Tips for Employers



1. Include Restrictive Covenants with Offers
2. Get Signed Agreements
3. Remind Departers of Their Obligations
4. Check Activity of Departers
5. Send Cease & Desist Letters When Wrongdoing Is Identified
6. Ask Recruits About Restrictive Covenants
7. Do Not Review Trade Secrets or Confidential Information
8. Do Not Ignore C & D Letters Received from Former Employers or Attorneys
9. Do Not Share Legal Opinions
10. Monitor Activities of New Hires



Thank You!

Bryan O'Neill 515-246-4549
boneill@dickinsonlaw.com

Jill Jensen-Welch 515-246-4536
jjensen@dickinsonlaw.com



David B. Gonzales

World Music: Immigration Updates



Overture





Topics

- SSA No Match Letters
- Changes in DACA Program
- Changes to Asylum/MPP
- Temporary Protected Status (TPS)
- Short list of work authorizations

Social Security Administration No Match Letters

- Practice ended under the Obama administration
- Restarted under the Trump Administration
- Ended (again) under the Biden Administration
- Important because:
 - Requested assistance from employers deal with mismatches
 - No real enforcement mechanism for employers (failed rule)
 - Occasionally caused employers to lose employees unexpectedly

DACA Update

- January 20, 2021 Full reinstatement of DACA Program
- July 2021 District Court enjoined full reinstatement of DACA
 - Existing DACA holders could still renew
 - No new applicants may be approved
- Renewal can take time
 - Could cause a lapse in work eligibility





Changes to Asylum/MPP

- Biden Administration terminates Migrant Protection Protocols
 - a/k/a “Remain in Mexico”
- August 13, 2021 District Court orders program to be reinstated
 - Problem: Mexico has to agree to accept applicants
 - As of filing on September 15, Mexico has not agreed
- Why does this matter to US Employers?
 - Asylum applicants are eligible for work authorization 6 months after application for asylum

TPS Updates

- Residents of certain countries in the United States may be eligible for Temporary Protected Status
 - Usually for armed conflict or natural disaster
 - Burma (Myanmar), El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Venezuela, Yemen
- Does provide work authorization!
- Does not necessarily, provide a path to be Legal Permanent Resident



Who is allowed to work for me?



- Important to follow I-9 Instructions
 - Foreign Passport is not work authorization without more
 - Pay attention to receipt form numbers (in conjunction with foreign passport)
- Temporary Work Eligibility Visas
 - CW-1, E-1, E-2, E-3, H-1B, H-2A, H-2B, H-3, I, L-1A, L-1B, O-1, P-1A, P-1B, P-2, P-3, Q, R-1, TN
- Permanent Work Eligibility Visas
 - EB-1, EB-2, EB-3, EB-4, EB-5
- Certain Student Visas
 - F-1, M-1, J-1
- B-1 Temporary Business Visa (Similar process to B-1 for tourism)



Thank You!

David B. Gonzales
dgonzales@dickinsonlaw.com
(515) 246-4503

Reading the Sheet Music: Evaluating & Improving Documentation



Jill Jensen-Welch
Bryan O'Neill

Disclaimer

- The material presented is designed and intended for general informational purposes only.
- **It is not intended and it should not be construed or relied upon as legal advice.**
- **The information in this presentation is current as of approximately five business days prior to the virtual seminar on 11/4/2021. Viewers should check for new laws, regulations, FAQs, Q&As, or other guidance from applicable government agencies before using these materials.**
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.



Jane Smith – Verse 1

- Works at a factory of 200 employees in rural Iowa
- Jane's job
 - Installs parts on large farm equipment
 - Uses ladders and creepers
- 10 years of service
- Has a history of many WC injuries
- Jane fell off of a ladder on 1/4/21 right after her shift began at 6:00 am
- Safety Director filed the FROI and sent her to the company doctor for evaluation and treatment
- She returned around 10:30 am and gave her supervisor a doctor's note

Patient Name

☒ work ☐ school on 1/4/21 with ☐ no restrictions ☒ the following restrictions:
(date)

(lifting, climbing, standing, etc.)

Time 0950



Jane Smith – Verse 2

- Supervisor let Jane return to work on 1/4/21 without notifying Safety or HR.
- Jane sorted nuts, bolts & washers – typical “light duty” in this department
- Jane could sit or stand, as she wished
- At 2:00 pm on 1/4/21, Jane said she could not work anymore due to back/neck pain.
- Jane was sent to the Safety Director, who sent her back to the same doctor.



County Medical Center

Jane Smith
Patient Name

The above patient was seen at the County Medical Center on 1/4/21 and is released to return to
(date)

☒ work ☐ school on 2/1/21 with ☐ no restrictions ☒ the following restrictions:
(date)

Off work until evaluation by Orthopedic Surgeon on Friday, 1/29/21. Reevaluate after that.
(lifting, climbing, standing, etc.)

Provider Signature Date 1/4/21 Time 1510



Jane Smith – Verse 3

- Jane's appointment with the Orthopedic Surgeon is rescheduled from 1/29/21 to 2/26/21 due a scheduling conflict of the doctor.
- Jane's time off work is extended through 2/26.
- Jane has a heart episode on 2/25/21.
- Jane's appointment with the Orthopedic Surgeon is delayed until 3/29/21 to give her time to recover from that illness.



Jane Smith – Verse 4

- Jane sees the Orthopedic Surgeon on 3/29/21.
- The WC nurse assigned to the case attended the appointment
- The WC nurse sends a doctor's note to the employer after the appointment



Orthopedic Surgery Center

Jane Smith
Patient Name

The above patient was seen at the County Medical Center on 3/29/21 and is released to return to (date)

[X] work [] school on 3/30/21 with [] no restrictions [X] the following restrictions: (date)

No repetitive lifting, pulling, pushing, bending, stooping or squatting. Avoid lifting over 10 pounds. Physical therapy 3x per week. Spinal injection on 4/9/2021. (lifting, climbing, standing, etc.)

Provider Signature Date 3/29/21 Time 1430

ESSENTIAL JOB FUNCTIONS

- In an efficient manner, uses hand tools to install parts on large farm equipment.
- Assist in the preparation process (moving parts with pallet jacks, cranes, and forklifts; opening parts packaging; disposing of packaging materials; prepping parts for installation).
- Cleans and maintains an orderly and organized parts storage area.
- Cleans and maintains hand tools, ladders, creepers, and other related equipment and tools.
- Works with the Safety Director to assure safe working conditions relative to the installation process to include
 - Following safety procedures for use of ladders, forklifts, hydraulic and battery operated tools.
 - Reporting any unsafe conditions to the supervisor or Safety Director
- Inspects own work and if needed, makes corrections. Once the job is finished completes inspection forms.
- Reinstalls parts, as needed, for rejections from Quality Assurance.
- Works with supervisor to set and maintain weekly schedule.
- Other duties as assigned.



KNOWLEDGE, SKILLS, AND ABILITIES

- Excellent knowledge of farm equipment and how to use hand tools to install parts.
- Ability to crawl into tight spots.
- Able to climb ladders and work extensively at heights.
- Ability to read, understand, and follow technical documents in order to install parts
- Understand and follow safety precautions.
- Trained in forklift operations.



Jane Smith – Verse 5

- There has been a significant slowdown in the Parts Installing Department due to supply chain disruptions.
- No light duty work available for anyone in the Parts Installing Department because of it
- Parts Installers are rotating into the Paint Department to learn and work jobs there just to keep busy and to try to avoid furloughs
- A hiring freeze has been put in place



Jane Smith – Verse 6

- While the company has been trying to determine whether they can accommodate Jane's work restrictions, her husband became symptomatic and tested positive for COVID-19 on 4/1/21
- Jane must quarantine for 14 days (per CDC guidelines at the time and Company policy)
- Jane's husband gets worse and is hospitalized on 4/9/21
- Jane requests FMLA to care for him

Jane Smith – Verse 7

- Jane takes all 12 weeks of FMLA and returns to work on July 5, 2021.
- Her back and neck pain have largely resolved with the help of the injection, physical therapy, and 6 months of not working for one reason or another
- She is medically released to return to work with no restrictions
- On 8/2/21, the company announces a Mandatory COVID-19 vaccination policy
- Jane requests a Reasonable Accommodation due to her religious beliefs

Excerpts from

Request for Reasonable Accommodation Due to Religious Concerns Regarding a COVID-19 Vaccination Requirement and Religious Attestations

Employee Name: Jane Smith Title: Parts Installer

Attestation of Religion/Beliefs

See the definition of “Religion” on page 3

1. Is your religious belief system part of a traditional, organized religion?

☒ Yes ☐ No

a. If yes, Name the religion & sect: Christian, Assemblies of God

2. Do your beliefs differ from the tenets or principles of the religious belief system described in Question 1.a. with regard to the COVID-19 vaccination? ☐ Yes ☒ No

Attestation of Sincerity

See the definition of “Sincerely Held” on page 3



3. When did you adopt the religion/beliefs described in your answer to Question 1? Raised Christian/Lutheran
4. Explain the circumstances under which you adopted the religion/beliefs described in your answer to Question 1? I accepted Jesus into my heart in 1990. A friend invited me to First Assembly of God church.
5. Do the beliefs described in your answer to Question 1 apply to all vaccinations? Yes ✓ No
If not, explain why not Not all vaccines have aborted fetal cells.

Attestation of Conflict

9. Explain how your religion, beliefs, practices, or observances would be violated if you were inoculated with the COVID-19 vaccine (Pfizer, Moderna, or J&J). The vaccines have aborted fetal cells which goes against my belief. I believe life begins at conception and abortion is an act of murder. Proverbs 6:16 informs that one of the things God hates are hands that shed innocent blood.
10. If requested, can you provide documentation or other authority to support your explanation of your religion/belief, the sincerity with which you hold your religion/belief, and the conflict between your religion/belief and the COVID-19 vaccination? ✓ Yes No



Requested Accommodation(s) See the definition of “Reasonable Accommodation” on page 3

11. Choose or list one or more specific adjustments or exceptions to the work environment you are requesting that will allow you to perform your job and comply with our mandatory vaccination requirement while maintaining consistency with your religion, beliefs, practices, or observances.

- ☒ Proof of negative COVID-19 test on a weekly basis
- ☒ Wear a face covering while on company premises or other assigned worksites
- ☒ Maintain six feet or more of distance from other people

Requests contrary to CDC Guidelines, or laws applicable to the Company (e.g., OSHA, CMS, EO 14042), cannot be provided.

12. Is complete exemption from the mandatory COVID-19 vaccination rule the only effective accommodation for your religion/beliefs? ✓ Yes No

If yes, explain why The COVID vaccine is the only thing that I’m declining. I will get weekly tests, wear a mask, and maintain 6 ft.



Training

Document, Document, Document: Training for Managers, Supervisors and HR Professionals

Questions It Answers



1. Why documentation is important
2. What should be documented, and what shouldn't, and how to tell the difference
3. When to document
4. How to document
5. Where to keep documentation and who keeps which types of documentation
6. Whether to allow Supervisor Desk Files, and what should and should not be in them
7. When to transfer or destroy documentation

“If it’s not written down, it didn’t happen.”



Thank You!

Bryan O'Neill 515-246-4549
boneill@dickinsonlaw.com

Jill Jensen-Welch 515-246-4536
jjensen@dickinsonlaw.com



Mike Staebell

Do You Recognize That Beat? The Biden WHD

Biden DOL Priorities



Secretary of Labor Marty Walsh – confirmed

WHD Administrator – Dr. David Weil nominated

- Served in same capacity under President Obama
- “The fissured workplace” (who is the employer?)
- WHD received additional \$30 million in funding
- WHD currently hiring additional Investigators

What to Expect

- Assessment of Liquidated Damages returning as SOP
- Increase use of subpoenas, civil money penalties (hot goods?)
- Emphasis on investigations vs outreach
- WHD ended “PAID” self-audit program
- Increase number of investigations
- Utilize power of firms at top of supply chain
- Focus on FLSA employment relationship

Regulatory Actions

Independent Contractor Rule

- Withdrawal of Trump DOL [independent contractor rule](#). Effective 5/6/21
- No new rule proposed – [WHD Fact Sheet #13](#), (Employment Relationship) dated 7-2008 still applies.



Regulatory Actions

Joint Employment Rule

- Withdrawal of Trump DOL [joint employer rule](#) effective 9/28/21
- No new rule proposed – Fact Sheet 13 the only guidance from WHD



7-Factor Test of FLSA Employment Relationship



1. The extent to which the services rendered are an integral part of the principal's business.
2. The permanency of the relationship.
3. The amount of the alleged contractor's investment in facilities and equipment.
4. The nature and degree of control by the principal.
5. The alleged contractor's opportunities for profit and loss.
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
7. The degree of independent business organization and operation.

Regulatory Actions



Tipped Employee Rule

- DOL proposed to amend its regulations to clarify that an employer may only take a tip credit when its tipped employees perform work that is part of the employee's tipped occupation. Work that is part of the tipped occupation includes work that produces tips as well as work that directly supports tip-producing work, provided the directly supporting work is not performed for a substantial amount of time.
- Proposed rule published 6/23/21. Comments closed 8/23/21

Regulatory Actions

Minimum Wage

- 4/27/21 – Biden [Executive Order](#) for \$15 MW applicable to certain employees of federal contractors. (Effective for contracts entered into on or after 1/30/2022)

Regulatory Actions



White Collar Overtime Exemptions

- DOL Secretary Walsh and some Democratic congress members have discussed raising the salary test for FLSA White Collar exemptions.
- No regulatory action taken to date.

Opinion Letters

- Still being issued by [WHD](#).
- Future uncertain – had ended under Obama DOL
- For 2021, a mishmash of rescissions of previous Trump DOL guidance. Several obscure subjects addressed.





Thank You!

Mike Staebell

mstaebell@dickinsonlaw.com

(515) 246-4547



Rachel Soderstrum

Old Song, New Arrangement: COVID-19 Lessons for Remote Work



Is remote work the new norm?

“Considering only remote work that can be done without a loss of productivity, we find that about 20 to 25 percent of the workforces in advanced economies could work from home between three and five days a week. This represents four to five times more remote work than before the pandemic and could prompt a large change in the geography of work, as individuals and companies shift out of large cities into suburbs and small cities.” – *The Future of Work after COVID-19 Report*, Susan Lund et al., MCKINSEY GLOBAL INSTITUTE



Tasks Best Done in Person

- Negotiations
- Critical Business Decisions
- Brainstorming Sessions
- Providing Sensitive Feedback
- Onboarding New Employees



Who should be allowed to work remotely?

- Determine what tasks can be done remotely and what criteria should be applied when selecting which employees can work remotely.
- Policy should be objective and based on legitimate business reasons.
- Ensure consistent application of policy
- Requested accommodation?

Workers in Multiple States

- Be mindful of other states' legal requirements regarding:
 - Conducting business (ex. Minimum wage)
 - Expanded civil rights protections for employees
 - Paid and unpaid leave
 - Unemployment Insurance
 - Workers Compensation



Common Remote Work-Related wage and hour issues

- More important now than ever to ensure employees are properly classified as exempt or non-exempt.
- Exempt Worker Reminders
- Non-exempt Worker Reminders





Company Data and Employee Privacy

- Robust IT department
- Technology Best Practices
- Disclose any monitoring to employees
- Conduct any monitoring equally and consistently



Thank You!

Rachel Soderstrum

rsoderstrum@dickinsonlaw.com

515-246-4521

Second Verse: Federal Vaccination Laws



Jill Jensen-Welch
Sierra McConnell

Disclaimer

- The material presented is designed and intended for general informational purposes only.
- **It is not intended and it should not be construed or relied upon as legal advice.**
- **The information in this presentation is current as of approximately five business days prior to the virtual seminar on 11/4/2021. Viewers should check for new laws, regulations, FAQs, Q&As, or other guidance from applicable government agencies before using these materials.**
- For specific information on recent developments, particular factual situations or the effect of a particular law, the opinion of qualified legal counsel should be sought.
- Consult with your own legal counsel before taking action or making changes.

Federal Vax Laws

- First Verse – Still Voluntary
 - Centers for Medicare and Medicaid Services Rule for LTC Facilities – 5.11.2021
 - OSHA ETS for Health Care – 6.21.21
- Second Verse – Mandatory
 - CMS Interim Final Rule – announced 8.18.2021 – Not issued by deadline for these materials
 - E.O. 14042 for Federal Contractors and Subcontractors – 9/9/2021
 - OSHA ETS for Employers with 100+ Employees announced 9.9.2021 – Not issued by deadline for these materials



Coverage

- Which employees count toward the 100+ threshold?
- Who is a covered employer?



Vaccination

- What does it mean to be “fully vaccinated?”
- Will or how will booster shots be considered?
- What is the date when covered employees must be fully vaccinated?
- Will proof of antibodies be an acceptable substitute for vaccination?
- Can vaccination be delayed for medical reasons?



Vaccination

- What will recordkeeping requirements be for vaccinated employees?
- Will New Hires have to be fully vaccinated before they begin work?
- Will employees working remotely be required to be vaccinated or will different rules apply?
- Will others in the workplace have to be vaccinated?

Reasonable Accommodations

- Will guidance be provided for reasonable accommodations that can/must be made for disabilities?
- Will guidance be provided for reasonable accommodations that can/must be made for pregnancy?
- Will guidance be provided for reasonable accommodations that can/must be made for religious conflicts?
- Is complete exemption from the vaccine an acceptable reasonable accommodation – especially if the employer did not choose the testing option?

Testing

- Will employers be required to offer testing as an option or can employers choose mandatory vaccination only?
- What test can we use/What test must we use?
- What if testing is unavailable or untimely?
- Who pays the cost of testing?
- Who can administer tests?
- How will testing apply to PRN/OC and very PT employees?
- Is time spent getting tested compensable time under the FLSA?
- Will the testing option include other requirements (e.g., masking, distancing)?



Leave

- Must/Can existing paid leave be used to cover time off to get vaccinated and recover from vaccination side effects?
- Must/Can existing paid leave be used to cover time off for weekly testing?
- If an employee has no paid leave available, or not enough, will they get special paid time off for vaccination and vax side effects, or for weekly testing?



Miscellaneous

- Can we still provide vaccination incentives, or are they moot now?
- Can we still assess surcharges on health care premiums for unvaccinated employees (those testing without an approved reasonable accommodation), or is that moot now too?



Miscellaneous

- Will the ETS cover more than just vaccinations & testing?
- How will penalties be assessed? What is “a violation” under the ETS?



Legal Challenges

- What if State or Local law prohibits vaccine mandates, vaccine passports, testing mandates, mask mandates, discriminating against unvaccinated employees, terminating unvaccinated employees, etc?
- Will ETS survive legal challenges?



Thank You!

Jill Jensen-Welch 515.246.4536

jjensen@dickinsonlaw.com

Sierra McConnell 515.246.4522

smcconnell@dickinsonlaw.com



DICKINSONLAW