2021 LABOR & EMPLOYMENT LAW SEMINAR

WHERE DO WE GO FROM HERE? NAVIGATING A CHANGING LEGAL LANDSCAPE IN EMPLOYMENT

MARCH 31, 2021

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MOVING FORWARD

LABOR & EMPLOYMENT PREDICTIONS FOR 2021 AND BEYOND

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MARCH 31, 2021

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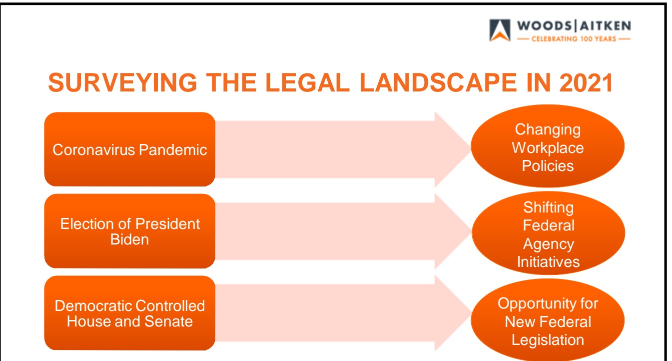
SURVEYING THE LEGAL LANDSCAPE IN 2021



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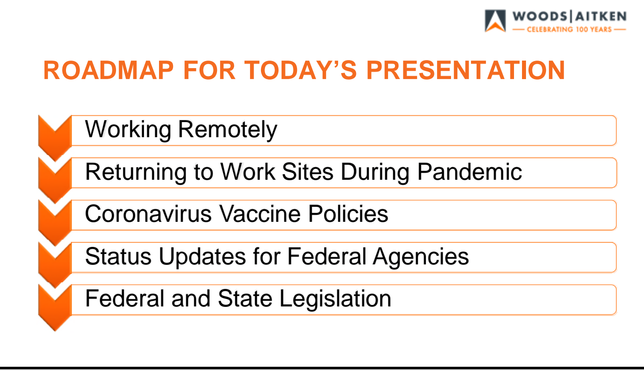
ROADMAP FOR TODAY'S PRESENTATION



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WORKING REMOTELY

- Common Mistakes With Remote Workers
  - Wage and Hour Violations
    - –Reporting Hours Worked
    - –Cost of Working from Home
      - Generally, not required to reimburse
      - Must be cautious of deductions

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WORKING REMOTELY

- Common Mistakes With Remote Workers
  - Establishing Expectations and Managing Performance
    - –Communicate deadlines and productivity expectations
    - –Work hours and availability
    - –Recording work time
    - –Data privacy & security
    - –Safe conditions
    - –Office space and equipment
    - –Communication
    - –Expense reimbursement
  - Best Practice: Statement of Understanding and Agreement

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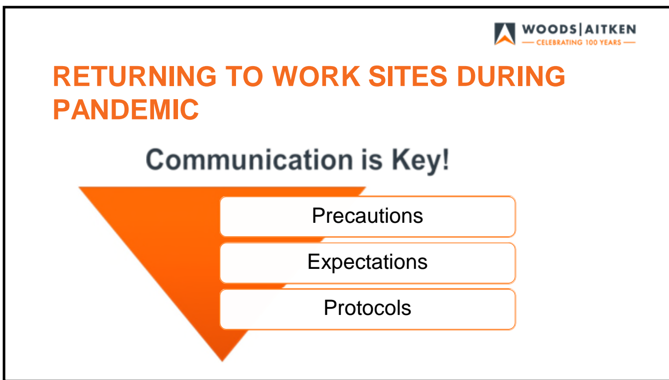
RETURNING TO WORK SITES DURING PANDEMIC



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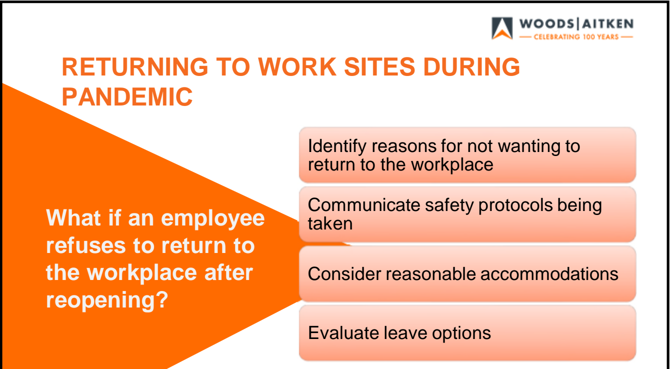
RETURNING TO WORK SITES DURING PANDEMIC



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CORONAVIRUS VACCINE POLICIES

- Employers can generally require that employees obtain vaccinations.
- However:
  - Legal challenges for mandatory vaccinations with emergency use authorization.
  - Employers also need to consider:
    - Americans with Disabilities Act ("ADA")
    - Genetic Information Nondiscrimination Act ("GINA")
    - Title VII of the Civil Rights Act of 1964 ("Title VII")

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CORONAVIRUS VACCINE POLICIES

- ADA and Vaccinations
  - Medical examinations and medical inquiries must be "job-related and consistent with business necessity."
  - Administration of COVID-19 vaccines or requiring proof of vaccination are not medical examinations or medical inquiries.

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CORONAVIRUS VACCINE POLICIES

- ADA and Vaccinations
  - Follow-up questions may elicit disability information or information about genetic information.
  - Pre-screening vaccination questions are likely to elicit disability and genetic information.
  - Medical information must be kept confidential.

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CORONAVIRUS VACCINE POLICIES

- GINA and Vaccinations
  - GINA prohibits employers from asking for an employee's genetic information.
  - Pre-screening vaccination questions are likely to elicit genetic information (e.g., questions about employee's family medical history).

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CORONAVIRUS VACCINE POLICIES

- Vaccines and Reasonable Accommodations
  - Employer must be able to show that an unvaccinated employee presents a **direct threat** to the workplace.
  - If so, employer must engage in interactive process to identify potential reasonable accommodations that may eliminate or reduce risk.
  - If no reasonable accommodation possible, employer may exclude the employee form workplace.
  - Employer cannot automatically terminate the employee.

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CORONAVIRUS VACCINE POLICIES

- Vaccine Incentives
  - Many employers are providing cash or time off incentives to employees for receiving vaccinations.
  - Questions remain on whether this practice is permissible.
    - –Do employers have to provide incentive benefit to an individual with a disability or religious objection who does not receive vaccination?
    - –Is the incentive part of a wellness plan? If so, is it more than a minimal or de minimis benefit, such that it violates the ADA?

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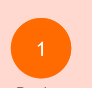
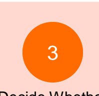
CORONAVIRUS VACCINE POLICIES

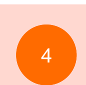


Review Applicable Law in Light of Your Workplace's Risk Assessment

Determine Your Policy on Vaccinations



Decide Whether to Provide Incentives



Develop Communication Plan

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FEDERAL AGENCIES

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STATUS UPDATES FOR FEDERAL AGENCIES

- Department of Labor
  - Secretary of Labor Marty Walsh
    - First union member in approximately 50 years to be Secretary of Labor
    - Expected to push for a $15 minimum wage and initiate an OSHA COVID Emergency Temporary Standard

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STATUS UPDATES FOR FEDERAL AGENCIES

- Department of Labor
  - Independent Contractor
  - Joint Employer
  - Opinion Letters
  - End of DOL's PAID Program

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STATUS UPDATES FOR FEDERAL AGENCIES

- Office of Federal Contract Compliance Programs
  - Minimum Wage Increase
  - Revocation of Executive Order 13950
  - Religious Exemption
  - Pre-Determination Notice
  - Decreased focus on employer compliance assistance and increased (and aggressive) enforcement efforts

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STATUS UPDATES FOR FEDERAL AGENCIES

- Equal Employment Opportunity Commission
  - Sexual Orientation
  - Transgender Status
  - Race, Color, and National Origin
  - Pay Equity
  - End of pilot program on mediation and conciliation

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WOODS | AITKEN
CELEBRATING 100 YEARS

PREPARING FOR FEDERAL AGENCY ENFORCEMENT

1. Check documentation and record-keeping compliance
2. Update and recirculate policies, procedures, and posters
3. Perform internal wage and hour audits
4. Conduct anti-discrimination and harassment training

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WOODS|AITKEN — CELEBRATING 100 YEARS —

FEDERAL LEGISLATION

- American Rescue Plan
  - Voluntary Paid Leave Programs
    - Tax Credits Available through September 30
      - Now available to state and local government employers
    - Additional Covered Reasons for Providing Paid Sick Leave
    - Resets allocation of paid leave beginning on April 1
    - Non-Discrimination Rules

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WOODS|AITKEN — CELEBRATING 100 YEARS —

FEDERAL LEGISLATION

- American Rescue Plan
  - Employee Retention Credit
  - COBRA Subsidies

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FEDERAL LEGISLATION

- Paycheck Fairness Act
  - Reintroduced in the House of Representatives in January 2021
  - Key Provisions:
    - –Restrict the bases upon which pay disparities may be legally justified and exclude “any factor other than sex”;
    - –Enhance nonretaliation prohibitions;
    - –Make it unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing wage information; and
    - –Increase civil penalties for violations of equal pay provisions.

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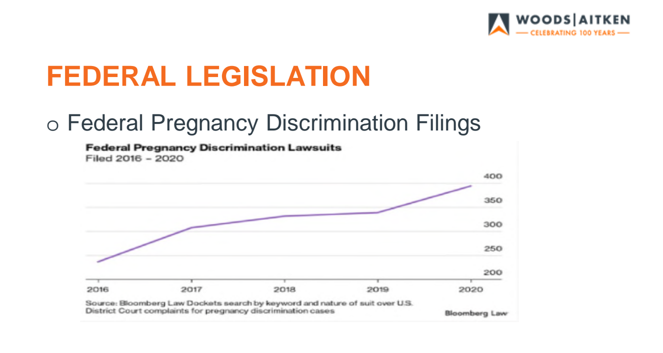
FEDERAL LEGISLATION

- Federal Pregnancy Discrimination Filings



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FEDERAL LEGISLATION

- Pregnant Workers Fairness Act
  - Passed by U.S. House of Representatives in September 2020
  - Act has bi-partisan and business community support
  - Key provisions:
    - –Aims to clarify protections for pregnancy workers under federal discrimination law
    - –Require employers to provide reasonable accommodations

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FEDERAL LEGISLATION

- Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”)
  - Passed by U.S. House of Representatives on December 4, 2020
  - Key Provisions:
    - –Remove marijuana from Controlled Substances Act
    - –Provide a process for expungement of federal cannabis arrests and offenses
    - –Impose a 5% tax on sale of cannabis products

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STATE LEGISLATION PROPOSALS

Nebraska LB258
Adopt the Healthy and Safe Families and Workplaces Act

- Would require employers to provide 1 hour of paid sick and safe leave for every 30 hours worked by employees, up to 40 hours each year.

Nebraska LB290
Adopt the Paid Family and Medical Leave Insurance Act

- Would require employers to either provide at least 12 weeks of paid FMLA leave or participate in the state administered insurance program.

Nebraska LB451
Amendment to Nebraska Fair Employment Practice Act

- Include characteristics associated with race, culture, and personhood (including hair texture and protective hairstyles)

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U-TURN AHEAD: GETTING READY FOR THE PRO-UNION CHANGES BIDEN HAS PROMISED

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MARCH 31, 2021

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THE CURRENT LABOR LANDSCAPE

- Public approval for unions is at its highest in nearly two decades at 65% overall
- Public support for unions has generally been rising since the Great Recession of 2008, when support hit its lowest point of 48% in 2009
- In 2009, 66% of Democrats, 29% of Republicans, and 44% of Independents viewed labor unions favorably
- Currently, 83% of Democrats, 45% of Republicans, and 64% of Independents view labor unions favorably
- Americans largely think unions help their own workers, but are less inclined to say they are helpful to the U.S. economy overall
- As such, support for unions has been weaker during challenging economic times

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AMAZON WAREHOUSE UNION DRIVE IN BESSEMER, ALABAMA

- Has garnered nationwide attention and support across the political spectrum
  - Bernie Sanders has gone down to the facility and spoken with workers
  - Marco Rubio wrote an opinion piece in USA Today in support of the push for unionization
- If the majority of eligible workers vote for unionization, it will be the largest increase in workers gaining union membership in an NLRB election since 1991
  - Could be the start of unionization gaining momentum nationwide
- Voting ended March 29, 2021

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BIDEN'S PROPOSED LABOR CHANGES

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RECENT ACTIVITY

- Biden recently made a pro-union address on his presidential Twitter account
- The timing coincided with, and alluded to, the union voting drive occurring at an Amazon warehouse in Bessemer, Alabama
- Labor historians have called the President's message the most pro-union message they'd ever seen from a sitting president

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BIDEN'S CAMPAIGN PROMISES

- Promoting the Right to Organize
- Creating a Cabinet Level Working Group
- Passing the PRO ("Protecting the Right to Organize") Act
- Biden has publicly expressed that he is going to be both the "strongest labor president" and the "most pro-union president" the United States has ever had

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CHANGES TO THE NLRB UNDER THE BIDEN ADMINISTRATION

- Lauren McFerran named NLRB Chair
  - An Obama appointee, she was renominated and confirmed to the NLRB again in 2020
  - Her term expires on December 16, 2024
- Peter Sung Ohr has been named General Counsel for the NLRB
  - The previous General Counsel for the NLRB's term was set to expire on November 16, 2021 but Biden terminated him at 12:30 p.m. on Inauguration Day, marking the first time the GC for the NLRB has been fired prior to the end of his/her term
    - The legality of the firing has come into question, but has not been ruled on yet
    - While Board members may only be removed for neglect of duty or malfeasance in office, there is no such limitation in the NLRA for removing the General Counsel

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CURRENT NLRB

- Chair Lauren McFerran (Obama appointee)
- William Emanuel (Trump appointee) – term expires on August 27, 2021
- John F. Ring (Trump appointee) – term expires on December 15, 2022
- Marvin E. Kaplan (Trump appointee) – term expires on August 27, 2025
- Open seat – Biden appointment expected soon

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WHAT WE'RE LIKELY TO SEE

- How the landscape of labor law will likely be changed by these appointees:
  - Reinstatement of NLRB standard in Purple Communications, allowing employees to use their work email addresses to engage in union activities on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions
  - Reversal of recent precedent-setting NLRB decisions
  - Reversal of regulations enacted by the NLRB in the last few years

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NRLB GUIDANCE MEMOS RESCINDED BY NEW GENERAL COUNSEL

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GENERAL COUNSEL DIRECTIVES RESCINDED

- Recission of the previous General Counsel's directives because they were "inconsistent" with the Board's goal of encouraging collective bargaining and protecting workers' rights under the Act or "no longer necessary"
  - Rescinded guidance regarding types of facially-neutral employer rules that were or were not lawful under Boeing since several cases interpreting Boeing have since been issued
  - Rescinded directive requiring Regions to no longer oppose intervention in ULP hearings by proposed intervenors such as individuals who have filed a decertification petition or circulated a document relied upon by an employer to withdraw recognition from a labor organization

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GENERAL COUNSEL DIRECTIVES RESCINDED (CONT'D)

- Rescinded directive (1) requiring unions asserting a mere negligence defense in duty of fair representation cases to show the existence of established, reasonable procedures or systems in place to track grievances and (2) providing that a union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party constitutes more than mere negligence and rises to the level of arbitrary conduct absent a reasonable excuse or meaningful explanation

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GENERAL COUNSEL DIRECTIVES RESCINDED (CONT.)

- Rescinded GC directive regarding deferral of complaints under Dubo when the complaint is likely to be resolved pursuant to a grievance procedure outlined in the parties' bargaining agreement.
  - –Noted that the directive was out-of-date since it relied on Babcock, which has since been overruled by United Parcel Services, Corp.
- Rescinded a directive that attempted to require unions to provide the reduced amount of dues and fees for Beck objectors in the original Beck notice, to limit dues authorization window periods prior to an anniversary date, finding certified mail requirements for revocation requests unlawful, and mandating unions accept untimely revocation requests as a future request for revocation or notify the employee of the next available revocation period

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GENERAL COUNSEL DIRECTIVES RESCINDED (CONT.)

- Rescinded a directive that more closely scrutinized union fees to Beck objectors
- Rescinded a directive regarding obtaining testimony of former supervisors and agents and receiving recordings that may be used in a proceeding
- Rescinded a directive urging regions to argue that Alamillo Steel should be overturned and replaced with a lower-threshold standard requiring the GC to show an employee's grievance had arguable merit, rather than the current "would have prevailed" standard, in duty of fair representation cases where the union is alleged to have failed to process an employee-member's grievance

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GENERAL COUNSEL DIRECTIVES RESCINDED (CONT.)

- Rescinded a directive urging the Board to apply the same standard, the "more than ministerial aid" standard, in assessing the lawfulness of employer support for union organizing drives
  - –Same standard used in cases assessing the lawfulness of the employer's support for employee decertification efforts
  - –Also urged the Board to adopt a bright-line test that would find a violation of the Act whenever an employer and union enter into a pre-recognition agreement where: (1) the parties negotiate terms and conditions of employment prior to the union attaining majority status; (2) the parties agree to restrain employee access to Board processes and procedures; or (3) the parties agree to any provision that is inconsistent with the purposes and policies of the Act, such as by impacting Section 7 rights by providing support of the union's organizing activities, rather than neutrality

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REGULATORY CHANGES TO THE NLRB UNDER BIDEN

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REGULATORY CHANGES

- Freeze on midnight rules and regulations, pausing any regulations from moving forward and giving the Biden administration time to review regulations the Trump administration tried to finalize in its last days
- Reinstatement of the Obama quick election rules that were gutted by Trump

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REPRESENTATION ELECTION RULES

- Effective May 31, 2020, in part
- Summary of Enacted Changes:
  - New deadlines
  - Additional briefing options
- Some provisions enjoined but the remainder are in effect
- Legal challenges continue

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ELECTION PROTECTION RULE

- Election Protection Rule (effective July 31, 2020)
- Changes:
  - Eliminates blocking charge doctrine
  - Voluntary Recognition "bar"
  - Construction Industry – converting 8(f) agreements into 9(a)
- Status: AFL-CIO has challenged the rule. The case has been stayed pending the appeal on the earlier election rule.

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JOINT EMPLOYER RULE

- Restored the joint-employer standard applied pre-*Browning-Ferris*
- Rule: To be found a joint employer, a business must possess and exert substantial, direct and immediate control over at least one essential condition of employment of another employer's employees.
- Essential terms and conditions of employment are:
  - Wages; benefits; hours of work; hiring; discharge and discipline; supervision; and direction

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VOTER LIST AND MILITARY BALLOTS

- Eliminates requirement that employer provide personal email address, home and personal cell numbers
- Provides for absentee ballots for employees on military leave
- Notice posted on July 2020, no final rule

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NLRB DECISIONS A MAJORITY DEMOCRAT-APPOINTED BOARD MAY REVISIT

- Will there be another "war" on employee handbooks? (Lutheran Heritage and Boeing)
- Will confidentiality of workplace investigations be preserved? (Banner and Apogee)
- Will unions gain access to employer email systems? (Purple Communications and Caesar's (overruled Purple Communications, allowing employers to limit email communications))

55

NLRB DECISIONS A MAJORITY DEMOCRAT-APPOINTED BOARD MAY REVISIT (CONT.)

- Will employer rights to terminate abusive employees be protected? (General Motors)
- Will the Board change the definition of independent contractor? (FedEx and SuperShuttle)
- Will micro-units return? (Specialty Healthcare and PCC Structurals)
  - This was part of Biden's campaign platform

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NLRB DECISIONS A MAJORITY DEMOCRAT-APPOINTED BOARD MAY REVISIT (CONT.)

- Will the Board increase union access rights to employer property?
- Will the Board authorize "minority unions?"
  - Google's Alphabet Workers Union is a so-called minority union that is primarily an effort to give structure and longevity to activism at Google, rather than to negotiate for a contract.

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NLRB DECISIONS A MAJORITY DEMOCRAT-APPOINTED BOARD MAY REVISIT (CONT.)

- Will the Board ban or restrict the hiring of permanent replacements for striking employees?
  - Most likely. Biden has long been a supporter of this.

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PROTECTING THE RIGHT TO ORGANIZE ACT ("PRO ACT")

- House of Representatives passed by a vote of 225-206
- Probably the biggest change in labor law since the Taft-Hartley Act
- Bans employers from holding mandatory "captive audience" meetings with their employees
- Preempts state right-to-work laws
- Expands the definition of employees to include most 1099s (a national "ABC" test)

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PRO ACT (CONT.)

- Expands personal liability for unfair labor practices for corporate directors and officers
- Creates a private right, allowing unfair labor practices claims to be brought as civil actions
- Adds fines and liquidated damages as penalties for unfair labor practices
- Compels mediation in first contract negotiations where agreement is not reached in 90 days

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PRO ACT (CONT.)

- Reinstates the persuader rule which requires employers to report the activities of third-party consultants that work behind the scenes to manage employers' campaigns in response to union organizing
- Codifies into law the more expansive Browning-Ferris joint employer rule and the 2014 representation election rules with shorter union election timelines

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PRO ACT (CONT.)

- Permits workers to engage in secondary boycotts and prevents employers from permanently replacing strikers
- Narrows the definition of supervisors
- Eliminates the ability of employers to avoid class action lawsuits via arbitration
- Creates new "whistleblowing" claims

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AREAS OF BIDEN'S AGENDA THAT ACTUALLY GO FURTHER THAN THE PRO ACT

- Repealing the ability of states to implement right-to-work laws
- Unionization through card-check authorization
  - Biden wants to bypass the NLRB's election process and allow unions the right to secure recognition by collecting authorization forms from employees stating that they want to be represented by the union
  - The PRO Act just requires employers to recognize unions by card check authorization if the NLRB determines that the employer improperly interfered in the election

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AREAS OF BIDEN'S AGENDA THAT ACTUALLY GO FURTHER THAN THE PRO ACT (CONT.)

- Increased legal and financial security for unions
  - Biden wants to ban right-to-work laws and allow unions to collect dues from all workers who benefit from union representation, regardless of union membership
  - Conversely, the PRO Act aims to supersede right-to-work laws by allowing employers and unions to bargain for contract provisions that require all workers to pay a "fair share" of the costs of union representation

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AREAS OF BIDEN'S AGENDA THAT ACTUALLY GO FURTHER THAN THE PRO ACT (CONT.)

- Sectoral Bargaining
  - Biden's campaign promise to create a working group to explore the expansion of sectoral bargaining

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QUESTIONS?

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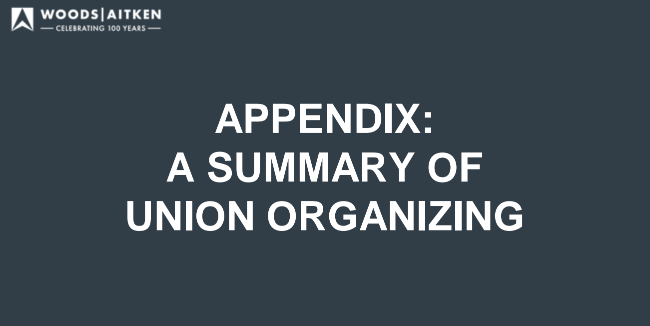

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HOW UNIONS ACQUIRE THE RIGHT TO REPRESENT EMPLOYEES

- There are four methods by which you may become obligated to recognize and bargain with a union as the representative of your employees:
  - Through an election conducted by the National Labor Relations Board;
  - By remedial order as a consequence of committing unfair labor practices;
  - By voluntary agreement or by a private election; or
  - By operation of law under several Board doctrines

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THE BOARD'S ELECTION PROCEDURES

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PETITION

- In order to secure an election, a union submits a petition for election to the Board's Regional Office for the employer's geographic area
- When it files the petition, the union must demonstrate a "showing of interest" from at least 30% of employees it seeks to organize in a group appropriate for collective bargaining
  - Normally, this showing of interest takes place in the form of "authorization cards" signed by employees

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PETITION (CONT.)

- After processing the petition and determining that it appears to be supported by the requisite showing of interest, the Regional Office notifies the employer of the filing of the petition, provides a copy of the petition, a summary of the Board's procedures, and several copies of a Notice which it "suggests" that the employer post
  - Posting is not required by law and there are no adverse consequences if you decline to post the Notice

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HEARING

- Unless you voluntarily agree to allow the Board to hold an election, the Regional Office next schedules a hearing to determine the scope of the voting unit, and whether that unit is "appropriate for collective bargaining"
  - Such hearings are scheduled promptly, sometimes within a few days of the petition being filed

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HEARING (CONT.)

- As long as the employees in the petitioned for group share a community of interest, the Board will find the unit to be appropriate and schedule an election
  - Factors the Board considers in determining whether a unit is appropriate include:
    - Common supervision
    - Similar wages, benefits, and working conditions
    - Interchange of employees between the group in question and other employees
    - Similarity of skills
    - Integration of operations
- Current three-part community of interest test from *Boeing*:
  - Shared interests within the petitioned-for unit
  - Shared interests of petitioned-for and excluded employees
  - Special considerations of facility, industry, or employer precedent

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WITNESSES AND SUBPOENAS

- Either party may call witnesses at the hearing, and can subpoena individuals to attend
- Unions frequently attempt to disrupt a company's operations by issuing subpoenas to all, or a substantial number of its employees
  - In such cases, you may attempt to have the subpoenas revoked by showing abuses of the Board's processes, that the union has not included the required witness fee, or that the absence of employees will be burdensome and oppressive to your operations

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DECISION AND DIRECTION OF ELECTION

- Following the close of the hearing, the employer and the union are allowed one week to submit briefs
  - The Regional Director will normally issue a decision almost immediately after receipt of the briefs
- If the Regional Director finds that the appropriate unit is different from the one requested by the union, he or she may ask the union whether or not it wishes to proceed
  - If the unit is broader than the one petitioned for, this may require the union to obtain additional authorization cards in order to reach the 30% showing of interest required
- Assuming that the union wishes to proceed in the unit found appropriate, the Regional Director's decision will also include a direction of election
- Absent unusual circumstances or agreement of the parties, the election is normally held between 25 and 30 days after the decision is issued

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STIPULATED OR CONSENT ELECTIONS

- The Board, the union, and the employer are frequently able to avoid the expense of a hearing by formally agreeing on the issues normally resolved through a hearing and selecting a mutually acceptable date for the election
  - In a stipulated election, the parties agree that any post election disputes will be resolved through the Board's normal appeal processes
  - In a consent election, the parties agree that the decision of the Regional Director will be binding on all the parties, and that there can be no appeal to the full NLRB in Washington

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EXCELSIOR LIST

- Once the election has been directed or agreed upon, the employer must provide the NLRB with an alphabetized list of the full names and addresses of all employees who are eligible to vote in the election
- The NLRB will, in turn, provide this list to the union and it may, if it wishes, contact your employees at their homes in an effort to persuade them to support unionization

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OFFICIAL ELECTION NOTICES

- Shortly after the date of the election is set, the Board provides copies of official election notices
- These notices must be posted at least three full working days prior to 12:01 a.m. of the date the election is held
- Failure to post the notices in a timely fashion gives the union the right to demand a rerun election if it loses

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THE 24-HOUR RULE

- Contrary to what some employers may instinctively believe, during the pre-election period, you are permitted to actively campaign against union representation and hold employee meetings for that purpose on company time
  - Union representatives need not be invited nor allowed access to your property to respond
  - Such meetings, however, may not be held within 24 hours of the time the voting is scheduled to begin
  - Managers and supervisors are allowed to discuss the issue with individual employees up to the moment the polls are open
  - However, no manager or supervisor may talk to more than one employee at a time during this 24-hour period

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VOTING

- During the election, managers and supervisors must stay away from the area where voting is taking place in order to avoid intimidating employees
- The only persons allowed at the polling place during voting hours are the voters themselves, the NLRB agent conducting the election, one or more non-supervisory observers selected by you, and an equal number of observers selected by the union

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VOTING (CONT.)

- The employees vote by secret and cannot sign the ballot or otherwise identify themselves in any way
- A ballot with any identifying marks is considered void
- Ballots have a single question printed on them: "Do you wish to be represented for purposes of collective bargaining by the [name of union]?"
  - There are two squares marked "yes" and "no"
- After marking the ballot yes or no, the voter places it in a ballot box

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VOTING (CONT.)

- The union or the union's observers, or the Board agent, may challenge any voter claimed to be ineligible
- A voter who is challenged is still entitled to vote, but places his or her marked ballot inside an envelope with his or her name written on it
- The envelope will not be opened unless
  - The outcome of the election could be affected by the ballot, and
  - The Board later determines (through a hearing or agreement of the of the parties) that the voter should be considered eligible
- In order to win the election, the union must have received a majority (50% plus one) of all valid votes cast

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POST ELECTION PROCEDURES

- Within five business days following the election, the losing party may file with the Regional Office formal objections to any misconduct alleged to have affected the outcome of the election and submit evidence in the form of affidavits
- If the Board finds the objections have any facial validity, or if the number of challenged ballots was sufficient to affect the outcome of the election, it will schedule a hearing to determine whether the objections have merit, or whether the challenged employees were eligible to vote

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POST ELECTION PROCEDURES (CONT.)

- After the hearing, the Regional Director issues a decision on the objections or challenges
- At the same time, the Regional Director can either certify the results of the election if the union failed to gain a majority or, if the union won the election, certify it as the representative of the employees in the unit and order you to bargain with it
- Alternatively, the Regional Director may order that the election be set aside because of objectionable conduct by one side or the other and schedule a new election to be held

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POST ELECTION PROCEDURES (CONT.)

- The decision of the Regional Director takes effect immediately, though the losing party may file exceptions to the Decision and Order and the Board may, if it wishes, grant the exceptions and overrule the Regional Director
- Unless and until the Board acts, however, the Regional Director's decision is binding on the parties

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THE BLOCKING CHARGE RULE

- If, in the course of the campaign between the filing of the petition and holding of the election, either the employer or the union files an unfair labor practice charge against the other, the Board will (unless the party filing the charge requests that the election go forward) suspend the election process until the charge can be investigated and resolved
- Normally, such a charge is filed as a campaign tactic, or simply because the party filing the charge thinks it is losing and wants some time to regroup
  - Because this is a common tactic, the Board generally investigates such charges on an expedited basis

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THE AT THE EMPLOYER'S PERIL RULE

- In many cases, an employer may wish to dispute the Regional Director's certification of the union as the representative of employees
- Unfortunately, there is no direct appeal from such a certification
- The only way to obtain review of a union's certification is to formally refuse to bargain, await the unfair labor charge for refusing to bargain, and then litigate the Board's order in a Circuit Court of Appeals
- The Court of Appeals may order a new election if you originally lost, or uphold the original election if you won
  - In such cases, the Board's initial order to bargain, or the certification, is null and void

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THE AT THE EMPLOYER'S PERIL RULE (CONT.)

- If your appeal to the Court of Appeals is unsuccessful, the original certification or bargaining order is held to have been valid throughout the pendency of the appeal
- The result is that any change in wages, hours, or working conditions during the appeal (changes over which you would have had to bargain if the union represented your employees, but over which you did not bargain because you did not believe you had to do so) will be held to be unlawful and the employee will be entitled to be "made whole"

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BARGAINING ORDERS AS A REMEDY FOR UNFAIR LABOR PRACTICES

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BARGAINING ORDERS AS A REMEDY

- The NLRB can order a company to recognize the union as the representative of its employees even if the union loses the election or – in the cases of "blocking charges" – even if no election has been held
- The Board orders such bargaining orders if it finds that:
  - A majority of employees in the unit have signed authorization cards;
  - The employer has committed unfair labor practices; and
  - The unfair labor practices were so serious that a fair election cannot now be held

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VOLUNTARY AGREEMENT

- Employers may voluntarily recognize unions without a formal Board election
- In such cases, the union must demonstrate that a majority of employees desire to be represented by that union
- Such a demonstration may be made in a variety of ways, including authorization cards or a petition signed by a majority of employees, a showing of hands, or by a private election
  - If you initially agree to recognize a union conditioned on a demonstration of majority support, you may not revoke that agreement after the union makes the necessary showing of majority status
- Once you agree to recognize a union, you may not withdraw recognition for one year, even if the employees subsequently tell you they made a mistake

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BY OPERATION OF LAW

- The Board frequently resorts to a number of legal fictions to require employers to recognize unions, even in the absence of unfair labor practices, and with no showing that a majority of the employees desire union representation

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SUCCESSORSHIP DOCTRINE

- Under the Board's successorship doctrine, you will be required to bargain with a union if:
  - A majority of your employees were employed by a different company and were represented by a union when working for that company, and
  - Your business is regarded as a "continuation" of that previous employer
- This usually arises in the case of one business purchasing the assets of another, but it can also arise when one service contractor (e.g., a janitorial or guard service) replaces another service contractor

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SUCCESSORSHIP DOCTRINE (CONT.)

- In such cases, you will be required to recognize the union as the representative of all employees in the unit, but you will not normally be bound by your predecessor's collective bargaining agreement with the union
- Exceptions arise if you:
  - Voluntarily adopt the contract;
  - Operate under terms and conditions set forth in the contract; or
  - State that you will offer employment to the predecessor's employees without reserving your right to establish different terms of employment

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SUCCESSORSHIP DOCTRINE (CONT.)

- The Board frequently finds successorship even in cases where a majority of a new employer's employees had not worked for the predecessor employer
- If the Board finds that you discriminated against your predecessor's employees by refusing to hire them in order to avoid successorship, the Board will presume that those employees would have been a majority if there had not been unlawful discrimination
- Moreover, in such cases, the Board may require you to abide by the predecessor's union contract

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JOINT EMPLOYER DOCTRINE

- Joint employment cases arise when employees may be said to work for two employers at the same time
  - Common example is employment agencies and employer of agency applicant
- Joint employment can also occur when one company performs services for another and the second employer has enmeshed itself in the labor relations of the first
  - For example, if a customer tells a contractor how much to pay its employees or directs the contractor's employees in the performance of their work
- Cases most commonly arise when a customer attempts to terminate a contractual relationship and the union which represents the contractor's employees suddenly claims that the customer was a joint employer and therefore cannot terminate the relationship without bargaining with the union
  - In addition, one joint employer is liable for the unfair labor practices committed by the other

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THE ALTER EGO DOCTRINE

- When a unionized employer establishes a new business in the same general field, the Board often finds that the new business is the "disguised continuation" of the unionized operation and will impose on the new business the same bargaining and contractual obligations which bound the original business
- In considering whether one business is the alter ego of another, the Board considers the following factors:
  - Common management, common ownership, common business purpose, common equipment, common customers, and common supervision

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RELOCATED OR CONSOLIDATED UNIT DOCTRINES

- When a unionized employer relocates work or consolidates its operations, the Board may require the employer to continue to bargain with the union at the new facility if the employees at the old facility were discriminatorily denied transfer rights, or if they constitute a majority of the employees at the new facility
  - In some cases, the Board has required continuation of bargaining even where the transferred union employees constituted a "substantial percentage" (40% to 50%) of all employees in the unit at the new facility

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UNIT DOCTRINES (CONT.)

- Cases under this doctrine generally arise when an employer has closed one facility, opens or expands another one to perform substantially the same work for substantially the same customers, and has either unlawfully refused to consider transferring employees from the closed facility to the new location (it is not necessary to agree to such a proposal, but you must consider any such union demand and offer legitimate business reasons for your refusal), or has in fact transferred, by agreement with the union or unilaterally, employees to the new location

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UNION DOCTRINES (CONT.)

- In some cases, where the new facility is clearly just a replacement for the old one, the Board has held that the employer must recognize the union at the new facility even though no, or only a few, employees transferred, simply because of a Board presumption that the newly hired employees will desire union representation to the same extent the employees at the old location did

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ACCRETION DOCTRINE

- If a unionized employer establishes or purchases a new operation, the union frequently claims that the new operation is an "accretion" to the existing operation and that the employer must recognize the union as the representative of employees
- Factors considered by the Board in determining accretion include the distance between the two operations, the degree of integration of operations, as well as the similarity of skills and working conditions of the employees

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PROCEED CAUTIOUSLY: OSHA AND SAFETY ISSUES AHEAD

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MARCH 31, 2021

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THE ROADMAP

- Are we there yet?
- OSHA Enforcement Efforts
  - Examples of Real World Citations
  - President Biden's Executive Order
  - Company Reporting Obligations
- Liability Concerns
- Risk Management and Recommended Practices for Consideration

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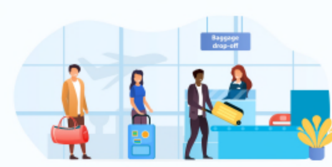
CHECK POLITICAL BAGGAGE AT GATE

- This presentation is not focused on the politics of masking or whether you believe COVID-19 concerns are valid or overblown.
- Our Focus:
  - Liability concerns
  - Risk Management



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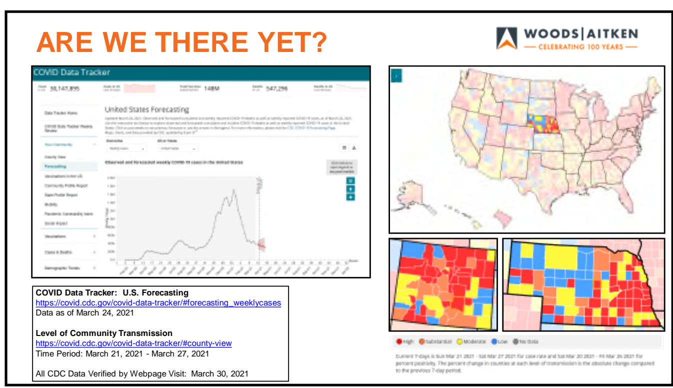

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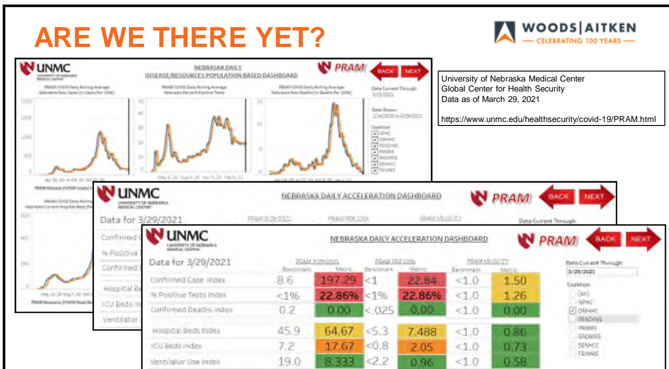

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ARE WE THERE YET?

NEWS · HEALTH

Colorado's COVID-19 cases, hospitalizations were roughly stable over March. Can that survive reopening?

Race to vaccinate more people as restrictions loosen and coronavirus variants spread

Omaha World-Herald

Nebraska vaccine hunters try to nab dose

Biden, CDC head warn of virus rebound

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OSHA ENFORCEMENT EFFORTS

- OSHA Citations
  - Standards Being Cited
  - Examples of Real World Citations
- President Biden's Executive Order
- Company Reporting Obligations

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OSHA ENFORCEMENT EFFORTS

- OSHA Citations
  - Standards Being Cited
    OSHA, "Common COVID-19 Citations: Helping Employers Better Protect Workers and Comply with OSHA Regulations," October 2020, *available at* https://www.osha.gov/SLTC/covid-19/covid-citations-guidance.pdf
  - Examples of Real World Citations
    OSHA, "Inspections with COVID-Related Citations, *last updated* Jan. 14, 2021, *available at* *https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations*

    Total Initial Penalties of $4,034,288

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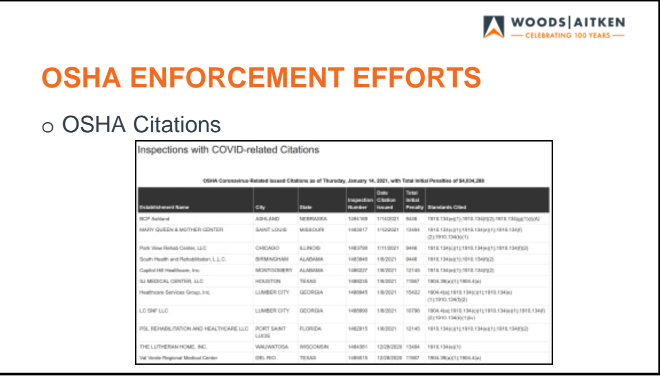

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OSHA ENFORCEMENT EFFORTS

- OSHA Citations

Inspections with COVID-related Citations

OSHA Coronavirus-Related Issued Citations as of Thursday, January 14, 2021, with Total Initial Penalties of $4,034,289

Establishment Name	City	State	Inspection Number	Date Citation Issued	Total Initial Penalty	Standards Cited
BCP Ashland	ASHLAND	NEBRASKA	1484169	1/14/2021	9448	1910.134(e)(1);1910.134(f)(2);1910.134(g)(1)(i)(A)
MARY QUEEN & MOTHER CENTER	SAINT LOUIS	MISSOURI	1483817	1/12/2021	13494	1910.134(c)(1);1910.134(e)(1);1910.134(f)(2);1910.134(k)(1)
Park View Rehab Center, LLC	CHICAGO	ILLINOIS	1483790	1/11/2021	9446	1910.134(c)(1);1910.134(e)(1);1910.134(f)(2)
South Health and Rehabilitation, L.L.C.	BIRMINGHAM	ALABAMA	1483846	1/8/2021	9446	1910.134(e)(1);1910.134(f)(2)
Capitol Hill Healthcare, Inc.	MONTGOMERY	ALABAMA	1486227	1/8/2021	12145	1910.134(e)(1);1910.134(f)(2)
SJ MEDICAL CENTER, LLC	HOUSTON	TEXAS	1488235	1/8/2021	11567	1904.39(a)(1);1904.4(a)
Healthcare Services Group, Inc.	LUMBER CITY	GEORGIA	1480845	1/8/2021	15422	1904.4(a);1910.134(c)(1);1910.134(e)(1);1910.134(f)(2)
LC SNF LLC	LUMBER CITY	GEORGIA	1485890	1/8/2021	10795	1904.4(a);1910.134(c)(1);1910.134(e)(1);1910.134(f)(2);1910.134(k)(1)(iv)
PSL REHABILITATION AND HEALTHCARE LLC	PORT SAINT LUCIE	FLORIDA	1482815	1/8/2021	12145	1910.134(c)(1);1910.134(e)(1);1910.134(f)(2)
THE LUTHERAN HOME, INC.	WAUWATOSA	WISCONSIN	1484351	12/28/2020	13494	1910.134(e)(1)
Val Verde Regional Medical Center	DEL RIO	TEXAS	1485015	12/28/2020	11567	1904.39(a)(1);1904.4(a)

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WOODS | AITKEN — CELEBRATING 100 YEARS —

OSHA ENFORCEMENT EFFORTS

- President Biden's January 21, 2021 Executive Order
  Executive Order on Protecting Worker Health and Safety

  Ordered OSHA to:
  - Issue revised guidance to employers within 2 weeks of order on workplace safety during COVID-19 pandemic
  - Consider emergency temporary standards, including mask mandates in the workplace by March 15, 2021
  - Review enforcement efforts and identify ways to better protect workers and ensure equity in enforcement
  - Launch a national program that:
    - Focuses enforcement efforts on companies that put the largest number of workers at serious risk of contracting the coronavirus
    - Prioritizes employers that retaliate against workers for complaints about unsafe or unhealthy conditions

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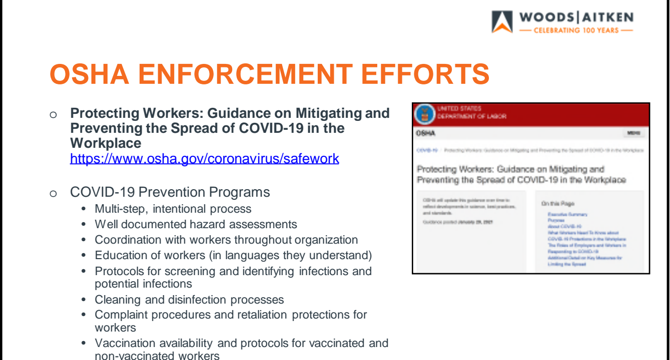

WOODS | AITKEN — CELEBRATING 100 YEARS —

OSHA ENFORCEMENT EFFORTS

- **Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace**
  https://www.osha.gov/coronavirus/safework
- COVID-19 Prevention Programs
  - Multi-step, intentional process
  - Well documented hazard assessments
  - Coordination with workers throughout organization
  - Education of workers (in languages they understand)
  - Protocols for screening and identifying infections and potential infections
  - Cleaning and disinfection processes
  - Complaint procedures and retaliation protections for workers
  - Vaccination availability and protocols for vaccinated and non-vaccinated workers

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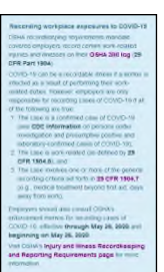
OSHA ENFORCEMENT EFFORTS

- **Recording and Reporting COVID-19 Cases**
  - Key Inquiry: Whether Infection was Work-Related
  - Sources to Review:
    - https://www.osha.gov/coronavirus/standards
    - https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19
- **OSHA's Current Enforcement Strategy**



Recording workplace exposures to COVID-19

OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their **OSHA 300 log** (**29 CFR Part 1904**).

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are true:

1. The case is a confirmed case of COVID-19 (see **CDC information** on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
2. The case is work-related (as defined by **29 CFR 1904.5**); and
3. The case involves one or more of the general recording criteria set forth in **29 CFR 1904.7** (e.g., medical treatment beyond first aid, days away from work).

Employers should also consult OSHA's enforcement memos for recording cases of COVID-19 effective **through May 25, 2020** and **beginning on May 26, 2020**.

Visit OSHA's **Injury and Illness Recordkeeping and Reporting Requirements page** for more information.

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LIABILITY CONCERNS

- **Suits or Claims From:**
  - Employees / Interaction with Workers' Compensation Laws
  - Third-Parties: Customers, Vendors, Sub-contractors, etc.
  - Government Regulators
- **Key Questions:**
  - Were you negligent?
    - Did you fail to act reasonably?
    - Are your actions consistent with recommendations from government agencies like the CDC, OSHA, or your local or state health departments?
  - Did you comply with applicable local, state, or federal law?
  - Does a COVID-19 Liability Protection Act apply?

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RISK MANAGEMENT AND RECOMMENDED PRACTICES

- **Make Choices Based On:**
  - Legal Requirements:
    - If a masking mandate applies, enforce it (even if you disagree with it).
  - Regulatory Advice: Document it because it is changing constantly. Common sources include:
    - CDC
    - EEOC
    - OSHA
  - Medical Professionals
    - Universities / Medical Schools
    - Local Hospitals
    - Epidemiologists
- **Documentation and Relying on Up-to-Date Information is <u>Critical</u>.**
  - Information is constantly changing.
  - Science builds on science. As we learn more about COVID-19, we should expect recommendations to change.
  - Risks change. Vaccinations and natural immunity status will change the risk factors *<u>over time.</u>*

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