ROE | LAW GROUP

Jessica L. Roe
Attorney

612-351-8305 (D)
612-810-1807 (C)
jroe@roelawgroup.com

60 South Sixth Street
Suite 2670
Minneapolis, MN 55402
612-351-8300 (O)
612-351-8301 (F)
www.roelawgroup.com

2021 Year-End Review and a Look Ahead to 2022

Another year, another list. I doubt anyone expected at the end of 2020 to still be talking about social distancing, mask wearing, and virtual holiday gatherings. Yet, here we are. In preparing these materials, I thought about what we have written in the past about planning for new initiatives, new laws, and reinvigorating compliance efforts. This year, my list of to do's looks a bit different than in years past. To be sure, some old favorites are back, but I challenge us all to think a bit bigger and a good way beyond our usual list of projects. The times demand it. So hit the ground running in 2022 and think about the following:

ETS, CMS and Federal Contractor Update

ETS

Since our last webinar, the federal government has filed an emergency motion with the Sixth Circuit to immediately lift the stay issued by the Fifth Circuit or, alternatively, to modify the stay order to allow the ETS testing and masking requirements for unvaccinated employees to go into effect. Based on the Sixth Circuit's briefing schedule, it seems unlikely that it will rule on this emergency motion any earlier than December 10. Responses to this emergency motion are due by December 7, and replies are due by December 10.

Though it seems unlikely at this point, it is possible that the Sixth Circuit lifts the stay before December 10, at which point the ETS requirements could become effective on the date of the order or on a later date set by the Court. However, any decision issued by the Sixth Circuit will almost certainly be appealed to the U.S. Supreme Court, which could address the issue through its "shadow docket" reserved for rulings issued on an expedited basis without full briefing.

Remember, the ETS can remain in place only for six months, at which point it must be replaced by a permanent standard that undergoes the typical notice-and-comment period. When OSHA published the ETS, it simultaneously issued a Notice of Proposed Rulemaking, making clear that the ETS acts as its proposal for a permanent standard when the ETS expires in six months on May 4, 2022. OSHA has extended the public comment period for the ETS to January 19, 2022. If the ETS converts to a permanent rule in May, there is a 60-day period within which it can again be challenged in court.

What should you do now? We still suggest that employers—at a minimum—continue collecting the vaccination status of employees while the litigation plays out, as this information is likely to be instructive for purposes of planning to comply with the ETS in the event that the stay is lifted, especially on the questions of testing, exemption requests, and compliance with federal, state, and local wage and hour laws.

For the 21 states that have their own state-based OSHA programs, the current scenario is even more befuddling. The ETS gave those states 30 days to implement their own vaccine and testing standards that would be at least as effective as OSHA's mandate. If a state does not enact a mandate, OSHA can file an administrative action, but the process is generally slow.

New York City: Mayor Bill de Blasio announced major expansions to the "Key to NYC" program, the first-in-the-nation vaccination mandate for workers and customers at indoor dining, fitness, entertainment, and performance venues. Starting December 14, the program will require children aged 5-11 to show proof of one vaccination dose for those venues. Starting December 27, New Yorkers aged 12 and older will be required to show proof of two vaccine doses, instead of one, except for those who have received the Johnson & Johnson vaccine.

The mayor also announced a first-in-the-nation vaccine mandate for private-sector workers. The mandate, which will take effect on December 27, will apply to roughly 184,000 businesses. It is unclear how this will affect remote employees and the City is set to issue additional enforcement and reasonable accommodation guidance on December 15, along with additional resources to support small businesses with implementation. Further muddying the waters though, is that incoming mayor Eric Adams, who takes office January 1, 2022, has not committed to keeping these new rules in place. Regardless, it's coming to a theatre near you soon!

CMS Mandate Applicable to Healthcare Workers

On November 29, U.S. District Judge Matthew Schelp of Missouri granted a preliminary injunction barring implementation of the vaccine mandate for healthcare workers in 10 states (MO, NE, AR, KS, AK, IA, WY, SD, ND and NH). The federal government has already appealed this ruling to the Eighth Circuit and filed an emergency motion to stay pending appeal. Appellees' expedited response to the motion is due December 8. The federal government also filed a motion to stay in the district court, which was denied on December 1.

On November 30, U.S. District Judge Terry Doughty of Louisiana issued a preliminary injunction barring implementation of the CMS requirement nationwide. On December 2, this ruling was appealed to the Fifth Circuit, which has already issued a stay on OSHA's ETS. Also on December 2, the DOJ filed a motion to stay pending appeal, which the court denied later that afternoon. Stay tuned!

Federal Contractor Mandate

On November 30, U.S. District Judge Gregory Van Tatenhove of Kentucky granted a preliminary injunction barring implementation of the federal contractor mandate in three states (KY, OH and TN). The judge declined to issue a nationwide injunction, limiting the scope of the injunction to these three states. However, yesterday, U.S. District Court Judge R. Stan Baker of the Southern District of Georgia granted a preliminary injunction that bars implementation of the federal contractor mandate nationwide. This injunction will likely be appealed to the Eleventh Circuit, which coincidentally is the same court that recently denied the State of Florida's request for a preliminary injunction to block the implementation of the CMS mandate.

At present, this means that all three of the federal government's mandates are enjoined nationwide, and we fully anticipate that each of these decisions will be appealed to their respective federal appeals courts. In the meantime, however, employers are still free to implement their own vaccine mandates and testing protocols on their own accord if they choose to do so, provided that state or local law does not prohibit the same.

Handbooks

As the year winds down and many companies prepare budgets for 2022, employers should consider revising or at least relooking at their employee handbook. This limited investment is likely to reap dividends in the future by mitigating costly litigation through full compliance with the latest rules and laws. Aside from the key revisions discussed below, other aspects we consider when revising or ensuring the client has an up-to-date handbook include:

a. The handbook introduces the company's background, culture, and current expectations of employees.
b. The handbook demonstrates the employer's compliance with applicable local, state, and federal laws.
c. The handbook generates employee goodwill by showing the employer's commitment to treating everyone fairly and equitably.
d. The handbook serves as a reference guide to supervisors and managers, ensuring that policies are applied in the same manner by all those responsible.
e. The handbook may preclude employees from succeeding on certain claims, such as breach of employment agreement, breach of confidentiality, or (in certain circumstances) unpaid PTO claims.
f. The handbook may support affirmative defenses and shield companies against certain claims, including harassment or improper wage deductions.
g. Safety-related policies and procedures can provide additional safeguards for employees.
h. Monitoring procedures may preclude or reduce theft of information and unfair competition.

So, what specifically should we consider or watch for in 2022?

Here's my history lesson:

During the Obama administration, the Board followed *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), concluding that employers' facially neutral workplace rules violated the National Labor Relations Act ("NLRA") if they could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. For example, the Obama Board used *Lutheran Heritage* to invalidate employer rules directing employees to delete social media posts regarding employees' wages or other terms or conditions of employment. *Chipotle Services LLC*, 364 NLRB No. 72, slip op. at 1 n.3 (2016).

Under the Trump administration, *Lutheran Heritage* was overruled by the Board in *The Boeing Company*, 365 NLRB No. 154 (2017), which established a new test: "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board said it would evaluate two things:

- The nature and extent of the potential impact on NLRA rights.
- Legitimate justifications associated with the rule.

Under the *Boeing* balancing test, employer facially neutral rules and policies are far less likely to be struck down and this resulted in employers having greater leeway to implement broad handbook rules without worrying that they might be interpreted as interfering with employees' NLRA section 7 rights. That is going to be a thing of the past.

In the NLRB's General Counsel's memorandum, 21-04, Jennifer Abruzzo articulated a need to re-examine doctrinal shifts that have overruled "legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers." In other words, Abruzzo plans to use employer handbook rules to target employers and head back to the *Lutheran Heritage* standard. The Memorandum indicates that rules pertaining to the following subjects will receive scrutiny:

- Confidentiality
- Electronic communications
- Dress code
- Non-disparagement
- Social media
- Medical communication
- Civility
- Professional manner
- Offensive language
- No camera

Social Media

In the Obama era, the NLRB found the following statements as *unlawful* social media policy:

- Employees may not post "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites."

- Employees may not post "disparaging comments about the company through any media, including online blogs, other electronic media or through the media."

- "Employees should generally avoid identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner."

Why did the NLRB decide these policies were unlawful? Because it said that employees have the right to engage in protected concerted complaints regarding employer policies and the treatment of employees, even if that speech is defamatory. The NLRB found the above policies stifle such protected concerted activity.

However, the NLRB upheld the following social media policy:

> Employees are prohibited from using social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

The NLRB found this policy to be lawful because it would not reasonably be understood to restrict legal concerted activity.

Wage and Hour Policies

More employees are working remotely, making it difficult for supervisors to observe the work hours of nonexempt employees. New work arrangements might necessitate updates to current timekeeping policies and procedures to ensure that nonexempt employees accurately report all hours worked and understand what prior approval, if any, is required to work overtime hours. You may want to consider adopting policies that strictly prohibit off-the-clock work and require employees to thoroughly review their time and pay records to ensure accuracy.

Wage and hour claims continue to be among the most frequently filed claims in employment litigation, and related retaliation claims are increasing. Many employee handbooks do not address whom employees should contact about or with concerns regarding their hours and pay (or any other issues for that matter), which may leave some employers vulnerable to arguments that employees did not have avenues to resolve their

complaints. In addition, handbooks containing nonretaliation provisions related to employee complaints about hours or pay may be useful. While such provisions can be found in almost every policy prohibiting discrimination and sexual harassment, they are often forgotten in the context of complaints regarding wages.

Some Items Should Be Kept Separate from Your Handbook

You may want to consider including a disclaimer at the beginning of their handbooks expressly stating that the handbook does not constitute a contract and reiterating the at-will nature of the employment relationship, which is required in certain states to solidify employment-at-will principles. Moreover, contracts and other legally binding instruments—including non-compete, non-solicitation, and non-disclosure agreements, as well as arbitration agreements and releases of liability—may be better kept separate from the handbook. This may help to strengthen the handbook's enforceability and protect the entire handbook from being construed as a contract.

What Not to Put in Your Handbook

- Express Covenant of Good Faith: The handbook should not include language that may give rise to an express covenant of good faith and fair dealing. For example, "our mission is to manage with honesty, fairness, integrity and respect for the dignity of all employees. We will apply these principles in all aspects of the employment relationship."

- Probationary Period: The policy may not incorporate any "probationary period" however it is labeled (e.g., "introductory period" or "trial period"). Obviously, this is not a problem if the manual covers only unionized employees who are subject to a contractual probationary period.

- Lock-Step Disciplinary Policy: The handbook should not establish lock-step disciplinary procedures. Instead, the employer should retain sole discretion to impose discipline as it sees appropriate under the circumstances.

Invest in Training your Managers

I have always preached about training supervisors, especially middle managers, in how to manage legally and effectively. If you have been lax on this through the pandemic, it is time to refocus on your managers, forepersons, supervisors, team leads, and middle managers. These individuals can get your company into legal trouble if they aren't properly trained.

They need to learn how to give feedback to employees, to write meaningful performance evaluations, and to answer employee questions about breaks, time off, and employee relations. They also need to know when to handle a problem themselves and when to come to HR.

They must have at least a working knowledge of employment laws, know what to do when an employee is injured (or exposed to COVID-19), and understand when something triggers the need to do an investigation. They should know how to document and discipline employees and the reason you are asking them to be more diligent about all of that. Employees at many levels and in many businesses are promoted to management positions because they are good at the jobs they were hired to do: make widgets, bake pastries, teach students, even practice law. However, when their jobs change to managing other people, often people who were formerly their peers, they are often ill prepared to do so.

Hopefully, you are already doing that kind of training. If not, see our list of free trainings for clients on our website.

Assess Your Company Through the Lens of Mental Health

We have talked endlessly, and happily more frankly, about workplace mental health in the past year and a half. One of the silver linings of the pandemic is the increased openness with which mental health and wellness are being discussed. We are regularly telling our employees how important it is to engage in self-care and to ask for help when they need it.

But are we modeling that behavior and providing the right inroads for employees to seek the help we know they need? Do your health benefits provide adequate coverage for therapy and inpatient treatment for your employees and their family members? Are the out-of-pocket costs to the employee affordable? Does your EAP provide relevant and critical services and is it easily accessible? Do your leaders know how to deal with these issues and are they practicing what they should be preaching?

We are going to see a huge uptick in these claims because we still have not figured out how to deal with them or even to notice them (this is a training moment for supervisors as well). Please assess this area for your company in 2022.

Retool Your Recruiting and Onboarding

We are now seeing individual states outline their "own" way or requirements for new hires. We also see that every organization is having difficulty hiring and retaining skilled employees. The fallback solution seems to be raising wages and offering sign on bonuses. No question that increasing wages to market rates is not a bad thing. However, this strategy has resulted in businesses poaching employees from one another and employees just moving around for more money. At the same time, prospective employees are complaining about being ghosted by companies to whom they have applied for jobs, HRIS systems are losing applications and resumes, and candidates say they are not hearing back.

Even if hired, companies are moving at breakneck speed and having difficulty keeping up with individual state laws regarding onboarding and lack of training on company-specific policies and procedures.

For sure, HR has, of course, been stretched to the limit by the pandemic, and everyone is busier than ever, sometimes working with skeleton crews. This phenomenon has created a perfect storm of unhappy long termers and disillusioned new hires and scores of lawsuits related to paperwork and notice failures. An early focus for 2022 should be to carefully examine your process for finding and onboarding new employees (from the offer letter, to the background check and beyond). We suggest you take a look at your job postings, onboarding and introductions, training, and mentorship. An early misstep can be costly in more ways than one.

Last But Not Least…

Give yourself a break, take a little time off, and engage in some self-care during or after the holidays. We're all tired. But you need a break so that you are happy and healthy to tackle the absurdity that is likely to be 2022!