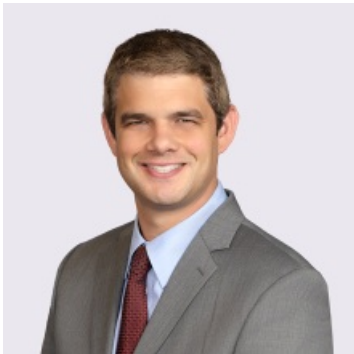


2022: The Year Ahead for Employers – The Regulatory Landscape

By Andrew F. Maunz, Laura A. Pierson-Scheinberg & John J. Porta

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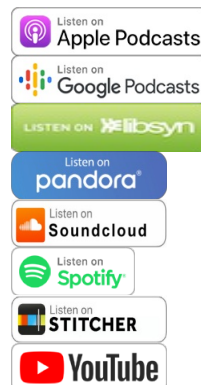
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Details

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As we enter the third year of the pandemic, change continues to be the one constant for employers. On this episode of *The Year Ahead* series, we focus on the shifting regulatory landscape, identifying the provisions in large scale legislation impacting employers and the current climate at influential regulatory bodies like the EEOC and NLRB.

Jackson Lewis P.C. · 2022: The Year Ahead for Employers -The Regulatory Landscape



Takeaways

Large-scale pieces of legislation have become law or are moving through Congress with obvious and not-so-obvious implications for employers. Coupled with a shift in leadership and policy at influential regulatory bodies like the EEOC and NLRB, employers will face challenges on a variety of fronts.

Contractor Requirements

Companies new to government contracting need to be aware of the copious reporting and compliance obligations that come with the designation as they seek federal contracts stemming from the proposed legislation.

Data and Privacy

Privacy and cybersecurity have become a focal point for the federal government. Contractors can expect scrutiny of these practices in future contracts and should prepare accordingly with a thorough review of policies, protocols and vendor agreements.

Agency Priorities

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Related Services

Affirmative Action, OFCCP and
Government Contract Compliance
Class Actions and Complex Litigation
Disability, Leave and Health Management
Employee Benefits
Employment Litigation
Immigration
Labor Relations
National Compliance and Multi-State
Solutions
Privacy, Data and Cybersecurity
Trials and Appeals
White Collar and Government Enforcement

The EEOC will likely zero in on arbitration agreements and utilize class action lawsuits in disparate impact claims because it enforces federal employment discrimination laws. The NLRB will continue its aggressive enforcement through increased investigations and steep penalties for violations. Funding sources will dictate how OSHA pursues complaints and investigations in 2022. Tenfold increases in penalties for OSHA violations are included in the BBBA and could go into effect with the legislation's passage.

Transcript

Alitia (00:08):

Each year, Jackson Lewis publishes *The Year Ahead for Employers*, a forecasting resource to support organizations as they navigate the legislation, regulation, and litigation trends impacting their business. In 2022, we provide the insights and analysis of our attorneys on labor and employment law from the field in a variety of digital and print formats, including this four part podcast series.

As we enter the third year of the pandemic, change continues to be the one constant for employers. Return to office plans have been disrupted by COVID-19 variants and labor shortages. Coalitions of social forces have amplified calls for equal rights and changes in how we work, and policy shifts ushered in by the Biden administration and influential regulatory agencies converged, creating yet another challenging year ahead for employers.

On this episode of *The Year Ahead* series, we focus on the shifting regulatory landscape, identifying the provisions in large-scale legislation impacting employers and the current climate at influential regulatory bodies, like the EEOC and the NLRB. Joining us today are Andrew Maunz of counsel in our Pittsburgh office, and Laura Pierson-Scheinberg and John Porta, principals respectively in the San Francisco and New York City offices of Jackson Lewis.

Drew recently joined the firm after serving as the EEOC's chief in-house lawyer, now providing valuable agency insight to clients. Laura represents employers in labor and employment matters with a particular focus on traditional labor issues, union elections, and unfair labor practice charges. Before entering private practice, Laura served as an intern staff attorney to NLRB member Sarah M. Fox. John, as strategic advice to national, regional, and local client relationships, advises management teams on their most sensitive and important matters. Drew, Laura, and John welcome and thank you for joining us today on *The Year Ahead* series.

Drew Maunz (02:20):

Hello, everyone. My name is Drew Maunz. I have Laura Pierson-Scheinberg with me and John Porta. We're going to be talking about the regulatory landscape for the year ahead in 2022. I can't believe we're going to be into 2022 soon, but here we are. And a little bit about myself. I joined Jackson Lewis earlier this year. We're still in 2021 when we're talking. And prior to that, I was the EEOC's legal counsel. So my contribution to the discussion today is going to be really looking at what to expect from the EEOC. In the coming year, and I think there's going to be quite a bit to expect from the EEOC in the coming year. And I'll talk a little bit more about why that is. I think the EEOC's been a little quiet thus far in the Biden administration, but I think they're going to let their voice be heard soon. And I'll kick it off to Laura. Laura?

Laura Pierson-Scheinberg (03:12):

Hi, everybody. Laura Pierson-Scheinberg from San Francisco office and the Baltimore office. My practice primarily focuses on labor law. And unlike the EEOC, the NLRB has been extremely busy. So we've been very busy on our labor team here at Jackson Lewis. And I have a lot of updates for you that we're going to be talking about today. How about you, John?

John Porta (03:37):

Hey. Hi. How are you everyone? My name is John Porta. I am an attorney in our New York City office, and really what my practice focus is on is... I support national clients in basically litigation and a lot of advice and counseling. And preventative practices really is sort of one of my focus areas. And we can't speak anymore more about compliance, compliance, compliance within this new regulatory landscape. And I think to start it off, let's start off big, right? With the big bills, the big Infrastructure Bill and Build Back Better. And I think it's important sort of that sort of sets the tone for what we can expect in 2022. And then what I thought would be helpful is we will reach out to Laura and to Drew to really talk through the specifics at the EEOC and really importantly at the NLRB as well.

So we all have heard all this hype about the Infrastructure bill and the Build Back Better bill, and it's like each day there's more action on the Build Back Better. The Infrastructure bill, just to start off with that's the Infrastructure Investment in Jobs are, right? This is the New Deal of 2022, right? This is sweeping infrastructure legislation, bipartisan legislation that was passed right after Thanksgiving and... Not after Thanksgiving, right before Thanksgiving.

And what that focused on really was, there was a focus expanding industry-specific grant programs. But really a focus on transportation, energy efficiency, climate control, and the way that that impacts employers, right? It's a budgetary bill. So what it does is it's infusing money into the economy with a focus on certain industries, right? And as employers, a lot of employers are involved in these industries.

Maybe the focus is on transportation or energy, but a lot of different

employers work within that space. And with this influx of infrastructure money, there's going to be an increase in jobs. We're going to have a number of employers vying for this federal work, and there are significant effects. So the Infrastructure bill really isn't imposing additional obligations on employers, but what it is, is there's going to be a particular effect on employers throughout 2022 and beyond, specifically with the Infrastructure bill. One of the things that the Infrastructure bill is going to force is we are going to have a lot more government contractors, right?

The work is out there, bids are going out, and a lot of us are going to be seeing ourselves bidding on these employment, federal contracts. What does that mean? Big question, right? A lot of us were not federal contractors before, and there are certain obligations that really relate to our responsibilities as federal contractors. So OFCCP compliance, right and things like that, where OFCCP where reporting and certain obligations and affirmative action obligations go along with that. So it's important that we really look at what those obligations are, and really have an understanding of that before clients start bidding for that work. Laura, you had a.

Laura Pierson-Scheinberg (07:02):

Yeah. So the Service Contract Act. I want to remind everybody about that when you're looking to do something new on federal contracting. The Service Contract Act is a requirement that has a lot of labor-significant issues. So that's another of law that will be sort of needs to be on the radar of everybody beyond those. It's important.

John Porta (07:24):

Absolutely. And so that's really thinking through when we're applying for these contracts, this work is out there, right? So we need to be prepared in terms of what it is that we need to do once we get these contracts. And then this also falls into with the influx of work, right? We're still, with the influx of work, we also need to be thinking about retention and recruiting, right. More work, but we're still not finding any more workers, right? This is a big struggle that we see a lot of our clients facing is the lack of available workers. So again, this is something that we need to be as employers bidding on this work with the expansion of these projects is, well, what are we going to do once we get this work? How are we going to retain employees? Where are we going to find them from, right? So this is part of big picture planning for 2022, even not so much related to just the Infrastructure Act, but to just general business practices in general.

Laura Pierson-Scheinberg (08:19):

Yeah, we have the great resignation right now, right. We're hearing from our clients begging for workers. Yeah. And so, one of the things from a labor perspective that we're all hearing is where do we find them, the vying for those candidates. And as you said, really focusing on recruitment and retention and that all is about keeping employees happy. And that hits all of our space, I think.

John Porta (08:42):

Yeah, it's going to be an even bigger issue moving forward, especially when we're getting more work and we need people to do the work. So again, these are important initiatives, not only for legal, but also for human resources in terms of retention. The Infrastructure bill has a very particular impact on the construction industry. And that, we're not going to go into detail about it today, but those in the construction industry, there are certain prevailing wage issues and requirements associated with projects in that space. So again, if you're bidding for work, if you're in that particular industry, there are many additional governmental requirements that are going to come along with that type of work.

And interestingly enough, which I was surprised to see in the Infrastructure bill is a focus on data privacy and cybersecurity. Although only related to Department of Transportation contracts and Department of Energy contracts, the federal government is attuned to data breaches and data privacy. And baked into this Infrastructure Act is the requirement that employers or contractors who are working on these specific contracts, have certain mechanisms in place for cyber security and data privacy. So to me, this is, although it's only related really to those contracts under specific department contracts, I think it's important for all of us to understand, listen, the federal government's on top of it and acquiring this. As employers, a lot of our vendors and our clients, data privacy and cybersecurity is now something that all of us need to have as part of our yearly compliance program.

So those are really the key points. I mean, the Infrastructure bill also removed the Employee Retention Tax Credit, to help fund the infrastructure, build that tax credit that we got during the CARES Act has been pulled back. So we're going to be seeing less of savings on that, but otherwise, in terms of immediate issues for employers, the Infrastructure Bill really has more of an effect on us, but the Build Back Better Act, that's really something that would have significant impact. And as of Tuesday evening, it's pretty clear that the Build Back Better Act, which is this huge social services safety net bill that was introduced, passed by the House. It has not passed the Senate, and Manchin has been very clear that he's not casting it in its current form. But I think what we can do is we could read the tea leaves based upon what's been proposed and what we could see moving forward probably in 2022.

So this Build Back Better Act basically would encompass many different areas of compliance for employers. In that bill was a provision for universal paid family leave. There were amendments baked into the Affordable Care Act, which shifted around the affordability standard, which would make more plans or lessen the cost of plans, would have the effect of lessening the cost of plans on employees. There was a piece of immigration reform including in there. There was effects on retirement savings plans. There was also which I find particularly interesting and something very important for all of employers out there is significantly increasing the penalties for

wage an hour violations. So right now we know that there's liquidated damages of a hundred percent on the federal level. This would increase that exponentially, the penalties. We've seen it in various different state and local jurisdictions where you have more than just double damages where have trouble in more, even higher calculation of damages for violations.

There's also a significant piece in the Build Back Better Act that increases penalties for workplace safety violations, right? And all different types of penalties and increased penalties associated with that can have a large impact on employers. So again, these are huge areas that were in the bill. But one of the things that was in the bill, and universal paid family leave, Manchin, who is going to be a deciding factor in a lot of this has said that he basically will not support a paid family leave law. I mean, granted, a lot of us are dealing with our local and state ordinances with paid family leave, so we're already grappling with that. We probably already have a lot of paid leave you in our policies and practices as it is. But one of the pieces that's really important of the Build Back Better Act, which I do believe will manifest itself somewhere else is it's commentary and it's provisions related to organized labor.

So I think it's really important that we showcase this piece of it. Although the Build Back Better Act is not going to pass in its current form, I do think that we are going to see something in 2022. Manchin has said that he's going to speak and work with Congress and work with the Senate and the house to put together a bill. And we all know that Manchin supports pro-labor initiatives. So I think it's important that we sort of, and I want Laura to sort of give us some background and dissect what was in the Build Back Better Act and sort of, if you can foresee the future as to what that's going to mean for employers?

Laura Pierson-Scheinberg (14:04):

Absolutely. So Manchin did support the PRO Act. So remember that the current National Labor Relations Act has not seen any actual amendments since the 1930s, 1940s. So this is a law that's really kind of outdated and one of the issues, but we all operate sort of in the space under those old rules. And that's why our clients struggle with how do we, how do we make this law that's kind of antiquated fit into the modern day workplace? And my view is that it really does need to change, but unfortunately for our clients, it's not the way that I would be looking to change it. So really what the NLRB and what Congress is trying to do here is they're trying to create more teeth in the law. So it's all about the damages provisions, just like they're doing with wage an hour, et cetera, they're doing it here.

So under the current law, the damage that are essentially reinstatement and back pay and then compound interest and a posting, that's really it. And so what the proponents of editing say is we should really have... It doesn't dissuade employers from following it. And so that's the focus of really penalty, penalty, penalty, penalty. And when I talk penalties, I mean penalties. So they're looking at new civil penalties, not to exceed \$50,000

for each violation of the act. And just to get an idea of oftentimes when someone files a charge, they file multiple allegations and violations. And so each one of those conceivably could be \$50,000 each and up to a double the penalty, not to exceed a hundred thousand dollars for an employer that is for example, it's called an A3, so that's a discrimination claim. So discriminating for union activity.

Now, the most important part to remember, and everybody kind of seems to forget, and they're like, oh yeah, that's that labor lady talking again. But it's really, really important to remember that the National Labor Relations Act applies to both union employers and non-union employers alike and as the labor market and people start to push more and more and more. And remember guys, labor unions are cool right now. It's really, really hip, it's the cool thing to do among the young workers. And so those old union avoidance tricks absolutely do not work. And we really have to focus on the employee experiences John was talking about. We were talking about that recruitment and retention piece, but as it relates to penalties, it means that that non-unionized workforces need to understand what the rules are under the National Labor Relations Act and how it applies to them because these penalties will apply to them too, if there are violations, because we will see a lot of focus on protected concerted activity, which is in those non-unionized workforces, which was a lot of those claims were very, very hot during the Obama administration.

And we believe they're going to be back with full force. Additionally, for the current law, which the penalty is for the very first time, officer and director liability. So personal liability for employers. So we were looking at just a reinstatement and back pay and all of a sudden, it's a very, very different face of the law. The bill also continues to have 350 million in additional funding for carrying out the board. It was actually, that number has been reduced from 500, but the original bills, earmarking of 5 million towards electronic voting system actually has been removed. So one of the funny things about current National Labor Relations Board elections are they're old school paper, like paper ballots for you to check yes, and check no. They were trying to move an electronic system.

The current bill actually removed that. And so that's been removed as a focus, but now the actual funding is still there. And so what does that mean? That means that they're going to put a lot more money into the National Labor Relations Board, into their coffers to go, as John said, compliance, compliance, compliance. So they're going to be really going after that. So what happens now? Obviously we're waiting, but Drew, I don't think there's any EEOC components to that under the Build Back Better, but I know that things are happening on your side of the fence. Tell us about it.

Drew Maunz (18:33):

Sure, absolutely. Yeah. And there's not the kind of sweeping changes in Build Back Better related to the EEOC that it, that sounds like are

proposed as far as labor, but the EEOC is definitely going to see an increased in enforcement funding. That's been in all the White House's budget proposals and a very big focus on hiring and in increasing their enforcement attorneys. So that's happening. There's a few other kind of smaller pieces of legislation, as John said, as kind of the Build Back Better may in its current forum be maybe its fate is uncertain, Congress may be focusing on other legislation that it can try to pass and get the White House some wins maybe perhaps before the midterm elections.

So a couple of those areas are the Paycheck Fairness Act. That's a law that focuses on equal pay issues and the Older Worker Protection Against Discrimination Act is it will change the causation standard under the ADEA, that make it a motivating factor standard rather than a butt for. So those who have been involved in that kind of litigation, that causation standard does matter, and that well has had some bipartisan support.

So I think there's certainly some possibility that that does get passed, but like all regulatory agencies, the EEOC doesn't need new legislation to make changes and make things interesting for employers. So I'll talk about a little, some of the things that I think are on the horizon, kind of, regardless of what happens with legislation. Couple things, new personnel. As I said, at the beginning of our talk, the EEOC has been quiet and part of the reason for that, or part of the reason for that is the EEOC is a commission. It operates kind of a panel of five presidentially-appointed Senate-confirmed commissioners. And by statute, it's a bipartisan commission. They're appointed. At least there cannot be more than three commissioners of the same political party. So there's always a representation of the minority party. Even the president, if a Democrat or Republican president, sometimes has to appoint Democrat or Republican commissioners, even though they're the opposite political party, just to maintain that balance.

So currently the EEOC has a majority of three Republican commissioners versus two Democrat commissioners. And even though the chair of the EEOC currently Charlotte Burrows as a Democrat, she has to get majority support to really make major changes in regulations. Some of the guidance documents that the EEOC puts out need a commissioner approval litigation. Almost every case the EEOC files now in litigation must be approved by the commissioners. So that really is dictating a lot of what the EEOC can do now. And maybe there might be some areas that they can move forward on a kind of bipartisan support basis and get a majority of commissioners. But probably a lot of the big Biden administration priorities, at least that are could be implemented through the EEOC, at this point, it's difficult to do that based on the current commission makeup.

But that's going to change. In July, the president will have an opportunity to appoint a new commissioner that will flip the majority to a Democrat majority. So the chair will be able to advance her priorities much easier. The administration will be able to implement priorities through the EEOC much easier once that occurs. And depending on how things work out, it's expected that likely the president will nominate someone earlier this...

beginning of 2022, they'll go through the confirmation process and likely be in place in July, kind of immediately once that spot opens up. And the EEOC will go from there. And I'll talk about kind of what kind of things I think that will mean as far as implementation in just a few minutes. Another new personnel, the individual that's expected in is the EEOC will need a new general council at some point.

The president fired the holdover general council from the Trump administration earlier this year. So there's been a general council operating on an acting basis since then, but at some point, the president has to nominate a permanent general counsel to even allow that acting individual continue to act under the Federal Vacancies Reform Act, which is a law that allows acting officials for certain periods of time. But there's lots of caveats and they're kind of bumping up against their limitation pretty soon, and they need to nominate someone. So we'll see who that person is. I mean, I would expect a much more aggressive EEOC litigation program kind of, regardless of who the general counsel is. And I'll talk about why that will be the case in a few minutes.

But potentially who that person is may mean even more aggressive or even more creative. If it's someone who really wants to kind of make a name for themselves, or has a very distinguished point of view, as far as kind of some of the theories or some the cases that the EEOC can bring or should bring, then you could be seeing much more creative and aggressive litigation.

And like I said, I think you're going to see that regardless, but I think it could be go beyond on that. And I know it kind of towards the tail end of the Obama administration, the EEOC was pursuing some pretty novel cases. And I think you're definitely going to see that to some degree but perhaps even more so, depending on who that general council is. So let me talk about a few areas of what I think to expect from the EEOC in the coming year. First I'm going to talk about litigation and the EEOC is... Probably its main enforcement mechanism, its main ability to enforce our employment discrimination laws at the federal level is a very robust ability to bring cases itself against employers who it feels like has have engaged in discrimination.

And as I said, I mean, I think it's going to be more aggressive. And part of the reason for that is first, the commission majority is going to change. As I mentioned earlier, the commissioners do approve litigation. And I think that especially happens with kind of very broad class and systemic cases. The EEOC has a tremendous authority to bring class actions. And probably the easiest litigant in the country to bring a class action against the company is the EEOC. They don't have to go through class certification. They don't have to go through any of those type of issues under the federal rules. Essentially, if the EEOC finds an issue, it can bring a class claim the next day, and you're facing a lawsuit potential with thousands of potential claimants. And there's been nothing more than a law, than that charge was filed.

And the EEOC can take a charge by a single employee and turn it into a class investigation and eventually a class lawsuit. So it's something everyone should really be aware of. And I think there's going to be a lot more systemic in class litigation because you've, A, I think that it's going to be easier for those cases to go through the process and actually end up in court within the EEOC. And I think it's going to be, those kind of cases are going to align with a lot of the priorities of both the current EEOC chair and the Biden administration. So definitely be on the lookout for potential class claims by the EEOC because I think we're going to see a lot more of them. And those will start in the investigation stage.

So if you're faced with an EEOC charge and the EEOC investigator starts asking you for very broad information or very... Starts asking you about different locations that have nothing to do with what the person charge was about, start asking you for policies or things like that, your alarm bells should be going off. And if you don't have counsel engaged at that point, it probably is a good idea to do so, because very potentially that charge, the EEOC could issue a cause finding of a class or systemic find basis and that could move into the docket for the EEOC's General Counsel to file a lawsuit kind of on those claims. So definitely be aware of that.

Laura Pierson-Scheinberg (27:35):

Are there specific areas of claims that you would be getting that we should tell our clients to really be focusing on, or if you get a particular kind of case? I know in the past, it's been focusing like in past years it was pregnancy discrimination cases seemed to be one of the issues that they were pushing. Are you seeing any trend in that regard as to when you get this kind of claim really pay attention to it?

Drew Maunz (27:56):

I mean, I think pregnancy is definitely going to be, I think ADA issues, especially kind of if you have policies as far as medical examinations that people have to encounter. And I think there is definitely going to be very likely potential of broad class claims based on disparate impact and in particular for potentially racial issues or, or things like the... I think the overall administration is [crosstalk 00:28:34].

Laura Pierson-Scheinberg (27:56):

It sounds like everything to me.

Drew Maunz (28:34):

Equity. Yeah. If that's [crosstalk 00:28:34].

Laura Pierson-Scheinberg (28:34):

Someone who says.

Drew Maunz (28:33):

I think the equity issue is really going to find its way into EEOC class action lawsuits that are based on disparate impact. Think that's kind of the way that that concept kind of manifests itself, at least in the law currently or based on is disparate impact. So that's going to be an area that I think is going to be a lot of focus of the EEOC. And another thing, the EEOC puts out a enforcement kind of priorities every four or five years. And they last did it in 2016 and they're scheduled, I think, due on this year, although I'm not sure if that will necessarily occur. So we might have to wait till next year. But even if you look at the old, the 2016 document, a lot of those issues, it gives you a good preview of kind of where to expect, even today, because a lot of those are still the same. And I think there could be a lot of novel issues as far as the gig economy and all that.

So I think everything under the sun, check your prior, check your policies, make sure you're all under... you're in as good a shape as you possibly could be, but certainly if you get an EEOC investigator that's kind of fishing and being very aggressive, it should raise your alarm bells.

John Porta (29:53):

Drew, direct to two areas where I know clients have big concerns specifically now is what's the stance on arbitration agreements at the EEOC and also we were all ramping up for worried about it on the prior administration about pay data collection. Those are two big areas where I think the clients that I work with have concerns about. What are you seeing at the EEOC in terms of pay equity and data collection and mandatory arbitration agreements.

Drew Maunz (30:28):

I'll start with the arbitration agreements because I think it fits in with the litigation. I'll get into the paid data collection because it's definitely something that I think people should be aware of, and I think it's... So arbitration agreements and kind of any sort of waivers or things like that became an EEOC focus. And it's kind of my... what I said about kind of some of the more creative and novel cases that the EEOC filed. The EEOC filed a handful of cases where they used a theory that of resistance under Section 707 of Title VII to make a argument against arbitration agreements being... Or certain arbitration agreements violating Title VII. Those cases, they didn't have much success. We actually, while I was at the EEOC, I did an opinion letter that kind of rolled that the ability to file those cases back a bit.

But I think that's going to be... They're going to be right back to those kind of arguments. Whether they use the 707 argument remains to be seen. But I think they're definitely going to be focused on those types of... And in that 2016 document, I mentioned talks about those and says it's like it's preventing access to courts or whatever it may be. So I think they're going to be right back on focusing on that, kind of what theory they use or what approach they use remains to be seen. But I definitely would expect that kind of litigation, whether it would be they'll get to it in 2022 or soon

thereafter in 2023, I think that's going to be a priority and focus.

John Porta (32:03):

Because in the Build Back Better, the proposed legislation, that was one of the pieces of it was the non-enforcement of arbitration agreements. So obviously this is an issue for all of our clients to be looking at the extent that you have arbitration agreements. We should really be looking at and not only from the federal levels, but also from the state and local levels as well.

Drew Maunz (32:23):

Yeah. And I know the arbitration agreements, I believe that they had... I know there was a proposal to amend the NLRA, which I'm sure Laura knows to make that a violation of certain arbitration agreements. But yeah, certainly it's going to be in the EEOC's radar as well. And just real quick, as far as paid data collection, I would fully expect once the EEOC majority changes, they re-institute a new paid data collection under the EEO-1 process and what it was ended up being called component 2, where paid data was included as part of the collection. That's going to be... I fully expect that to come right back.

Laura Pierson-Scheinberg (33:02):

So like the EEOC, one of the things that we're seeing at the NLRB, it just kind of has been fast forward. So I think the Biden administration hit our agency first. And so we actually pretty much out of the gates for the whole year have been having a full board sitting that was appointed and confirmed. So there are significant changes taking place. Under the current board chair, the general counsel and the regional attorneys are all taking a dramatically different approach to the law. And this isn't just a return to policies from the Obama administration, and a lot of the change that we saw back then, but really that's setting the floor automatically. And now we're just seeing like a huge escalation from there that we've never seen before. So as I said before, if you have a unionized workforce, it's obviously important, but it's even more important if you don't that we kind of keep our eye sort of on this agency and what it's doing. So, in January of 2021, Lauren McFerran became chair of the NLRB.

And she served on the board as a member since 2014. And she's very commented publicly about her views of the National Labor Relations Act. And as I said before, about how it has... How she thinks it needs a lot of repair. And one of the things that they're doing that is through pushing those regulatory authority through their rule making and through their decision making at the board. And so not surprisingly, she's taking a quite an expansive view. So the act is looking to cover gig workers, again, this protected concerted activity and expanding that among employees and also advocating on the right of other employees. So we're seeing a lot of those high profile decisions that were in the Obama administration that were rolled back under Trump is actually now getting re-instituted. And there

really isn't enough time to dig into the details of that.

But there's lots of change going back on the joint employer standard on really pretty much those big things like the clear and mistake waiver standard, the use of electronic systems, email systems by unions within your workplace, lots of changes that are going to be rolled back. And then just to really quickly hit Jennifer Abruzzo, the new board's general counsel. I actually had a case against her right before she went in. She was the general counsel of the Communications Workers of America. And I tried a case with one of my colleagues right before she went in. I was surprised when she was appointed. She definitely is very, pro-labor very focused on changing the landscape and the reach of the NLRB. And so there she's really issued a series of memos that really focus. And again, we don't have a lot of time to dig into them, but really focusing on the remedies, right.

And you kind of get a good overview of what the board is looking to litigate. And so you're seeing expansion of wine garden rights. You're seeing a lot of focus on 10(j) injunctions. So the board does have injunctive authority that they're really focusing on using and flexing that muscle that they haven't before on cases. But now we're seeing requests for 10(j) on every single case. Tell me why the employer shouldn't be enjoined while this is going on, that kind of thing. And then the remedies. So one of the things that we're seeing at the regional level, and it's really making it difficult to settle cases, and I think that's going to be the trend. They're not allowing non-admissions clauses at all in agreement. So it's making it very, very difficult to settle cases. They're really not honoring. The NLRB is not honoring even private settlements among the union's attorney and the company's attorney or the individual's attorney and the company's attorney without board sign-off.

And they're requiring a very high standard of... It must be at least 80% of the back pay available. And they're looking at other damages such as front pay, letters of apology, all sorts of stuff that you haven't seen before on bargaining cases. They're actually setting the number of hours that they want you to meet. It used to be really much one session per month or two sessions per month were significant. Now they're saying very specifically, you need to have at least X number of sessions of six hours each. So they're getting very, very specific and really trying to stretch it out. So I know that that's a lot so really fast, but [crosstalk 00:37:57].

John Porta (37:58):

What I'm seeing here is, and I think I mentioned it earlier, really a shift from... We're deep into the Biden administration. And it seems like the shift from compliance assistance from the prior administration really to enforcement. Because I see what what Drew's talking about and what you're talking about is we're really seeing... We're talking about penalties. Build Back Better Act has increased penalties and all of that. So it really seems like enforcement is really something that is a concern. And so with that, it's sort of what are your recommendations? And we could start with

Laura, what are you thinking are top things for our employers, for our clients, to be thinking about in this new enforcement era?

Laura Pierson-Scheinberg (38:44):

Yeah. So I think really you need to take it really high up and at the high level and say from the legal and social landscape it's changing and the degree to which change will continue, it was really unknown in the pandemic state. It keeps going and going. And that really impacts everything as well as just this regulations, et cetera. On the legal front, the changes in the composition of the NLRB and the general counsel is taking a remarkably different pro-labor tone and making early resolution of cases harder. So we need to make sure that all of are educated on that law because a lot of people don't really realize it applies to them and to make sure that they don't step in it because of all of the different liabilities that could be available, sort of hiding in the closet. How about you Drew?

Drew Maunz (39:29):

Well, I think bottom line, sounds like what you're talking about the NLRB is definitely true with the EEOC. I think this time next year, we'll be looking at a much more aggressive EEOC. And I think we'll be talking about kind of all these changes and these novel theories the EEOC is throwing out there and what should we do about them? So I think as far as preparation, I think employers should review policies. I think make sure you are as compliant as you possibly can be. I mean, obviously when we're talking about novel theories and kind of creative arguments is a little hard to prepare for those, but I think the biggest exposure is going to be kind of broad policy issues that maybe go on a kind of a nationwide basis.

So definitely if you can review those and make sure you're compliant, it's a good idea. Also, keep an eye on your EEOC charges. Even now, I mean the cases that are the EEOC class actions in the future are probably being investigated right now. So keep an eye on those. Definitely keep an eye on kind of investigators that are attempting to expand the charge and be prepared potentially to push back on that.

John Porta (40:40):

And just piggybacking off of that Drew, just from a general perspective, if we're looking at sort of this proposed legislation, we're looking at the increase in penalties everywhere, right? So talking about looking at our policies, right? Because this even falls into the NLRB, right, in terms of we're going to be looking probably, Laura, right about scrutiny of our policies for chilling protected concerted activity. Remember that was the big thing [crosstalk 00:41:07] focus.

Laura Pierson-Scheinberg (41:06):

All the rules, yeah. Absolutely, John, all the rules on the NLRB. The Obama with the handbooks and all of that go back to that old handbook from Obama's administration because that's in effect now.

John Porta (41:17):

And really looking at the penalties, this is what gets me nervous, given the increase in penalties. So the wage an hour violations significantly more, right? So it warrants a look at significantly more in penalties, warrants a look at our wage an hour practices, looking at data privacy, right? We've talked about data privacy, now it's even making into federal legislation, requiring government contractors to have certain plans in place. So again, we should be looking at and assessing our data, what our cybersecurity risks are. That's something that we all should be doing. And also with workplace safety, I mean the days of COVID and we are not beyond them, as I thought I would be when we were having this discussion, but really workplace safety. If we're increasing the fines on the table in terms of legislation, we really need to be focusing.

And I think a lot of us are focusing on our compliance with certain safety standards. So again, moving into the new year, really I'm thinking, focusing on and to pick up where Laura and Drew talked about is looking at our policies, making sure that they're compliant with the initiative set forth in the new administrative agencies, I've been really taking a look at our paid practices. And I'm not covering everything, but these are the areas that mistakes are higher, penalties are higher. So I think it's really important that we're going into 2022, that we take this into consider and really focus on compliance and looking at what we have internally, because the costs are going to be exponentially more in the event that there is some type of violation determined.

Laura Pierson-Scheinberg (42:44):

And then the last thing I would add is sort of in, during this great resignation and sort of the post-pandemic exhaustion that we're all feeling on a cultural level, it's a really great time for workplaces that don't currently have a union or have an active campaign to find out what employees may be unhappy about. What's working, what's not working and really assess whether there's this voice gap or any kind of vulnerability associated with potential union triggers. So I think it's also a really opportune time because as I said, unions are cool right now. So we have to make sure that we're well covered there. So change is coming and updates are happening every day. I appreciate all of you chatting with us now. And I look forward to continuing the conversation as the changes break

John Porta (43:36):

Same here. Thank you all so much.

Speaker 5 (43:39):

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