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Wright Daves & Jones, PLLC
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Briefly

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"VIRTUAL" HARASSMENT IS A *REAL* THING

Fredrick J. Bissinger

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"Particularly with more employees working virtually and participating in all manner of virtual platforms and activity, there is opportunity for inappropriate and harassing conduct ..."

Since the COVID pandemic hit the U.S. in March 2020, employers have been navigating the difficult straights between maintaining safe workplaces (as required by OSHA and related state enforcement entities) and staying afloat both operationally and financially. For many employers (especially white-collar employers), remote working has proven to be a viable method by which to maintain operational readiness and productivity, and at the same time, maintain a safe workplace. But, as with most "solutions" there are inevitably both unintended consequences and new issues to address.

The Good. Our general observation (both internally within our law firm and with our clients) is that remote working has been an effective tool in helping businesses remain operationally ready and productive. In fact, many businesses are shedding some or all of their commercial real estate obligations and related overhead expenses, and consequently, have no intentions of ever returning to a pre-COVID operational platform. Others are going to use an approach that requires employees to work in-person for a portion of the work-week and work remotely for the balance. On the whole, employees generally like the remote work platform, assuming they have the necessary Wifi access, a functional computer, and the requisite safety software to protect company information.

The Bad. Aside from the issue of protecting private and confidential information from hackers and malware, one of the most noticeable side-effects of remote working is a loss of interpersonal connection with co-workers and clients, which is potentially problematic on multiple levels, but especially problematic in terms of maintaining healthy and productive interpersonal relationships. Maintaining such relationships (both internally and externally) is critical for both personal and company success. By default, employees have increased their reliance on email, text messages, and social media platforms, as opposed to in-person communications. Obviously, phone usage is still common, but not as effective as being in-person. And Zoom-type platforms are very efficient and helpful, but still not the same as being in-person.

The Ugly. Based on the current trends in our society there is a growing intolerance for those who think differently than others on various sides of the political spectrum. That intolerance and lack of willingness to consider opposing points of view has quickly invaded the workplace causing significant tension, especially as to issues of race, sex, LGBTQ, gender identify, religion, disabilities, and relations between generations.

When you factor into this equation the social discord in the U.S. that has existed for some time and which has been inflamed by the last several election cycles, the George Floyd scenario, multiple international issues (GWOT, mass migration, weather-related disasters, etc.), the increasing role and reliance on technology in all phases of life, and the COVID pandemic issue, our society and workplaces have changed and are changing rapidly and on many levels – some for the better and some for the worse. One of the most obvious negative changes is the growing misuse of social media platforms. Although well intended, social media platforms have too often become platforms that encourage and perpetuate bad and irresponsible behavior.

Particularly with more employees working virtually and participating in all manner of virtual platforms and activity,

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there is opportunity for inappropriate and harassing conduct via the virtual worlds. The categories of such misconduct have been referred to variously as virtual harassment, cyber-stalking, sexting, and texting harassment. A few examples follow.

In a case brought by the EEOC, Frye Electronics paid $2.3 million to settle a harassment and retaliation case. A manager allegedly sent multiple sexually charged texts to a young female salesperson and asked her to his home for drinks. She raised a concern to her direct supervisor, who took the matter to the legal department and was promptly discharged. The EEOC charged that the company did not address the harassment and of course retaliated against the supervisor.

In *Espinoza v. County of Orange*, the California Court of Appeals upheld a $1.6 million verdict against an employer and in favor of an employee who was being harassed by co-workers on a blog. The employee reported the harassment to his supervisor, who indicated that the complaint would be forwarded through the proper channels, but the employer failed to conduct any official investigation. Ultimately, the Court of Appeals determined it was proper to allow the jury to conclude that the employer was liable for harassment arising from a blog maintained by co-workers outside of the workplace, because it was aware of the harassment and did not take action.

Unfortunately, with many more employees working from home and communicating with co-workers and clients via electronic communication and social media platforms, the lines between business and personal, as well as appropriate and inappropriate, are frequently blurred and crossed. The big-ticket issue is how can employers successfully manage remote working and the corresponding increase in reliance on technology to communicate, a blurring of the lines between business and personal, as well as the rapidly changing societal norms on what is and is not appropriate communication. Add to this equation a transition from the Trump-era regulatory agenda to President Biden's regulatory agenda, and the result is going to be a significant increase in regulatory scrutiny applied to employers as they try to enforce their behavioral expectations and related policies, including those contemplated on social media.

Accordingly, employers are in the unenviable position of having to navigate these very difficult and rapidly changing (and at times countervailing) forces. At the same time, employers are grappling with the challenge of recruiting and retaining talent, as well as contending with significant world-wide competition, especially with countries that do not have the same regulatory constraints.

Where Do We Go From Here? Given these dynamics, our collective experience informs us that sticking to and focusing on the basics is the foundation to successfully navigating the issues outlined above, especially as it pertains to electronic communications and social media. The following baseline issues are a good starting point for your analysis:

1. Does your company have a relevant set of Core Values?

- Do those Core Values resonate in today's dynamic and quickly changing work environment?
- Do you effectively communicate those values?
- Do you live those values?
- Do you hold yourself and others accountable to those values on a consistent basis?

2. Do your company behavioral policies (including harassment, discrimination, and retaliation, as well as work from home rules and expectations, including use of electronic communications) ***accurately reflect the realities of how you conduct business today?***

- Have you effectively communicated those policies, and more importantly, the key expectations of same to the workforce?
- Do you consistently hold yourself and others accountable to those policies?

3. More specifically, have you effectively communicated to all employees who work remotely the following:

- The expectations for work-related conduct and communications (as opposed to what is not work-related)?
- The fact that social media behavior outside of work can have work-related consequences such as when conduct is illegal, harassing, or discriminatory? (Remember to consider Section 7 protections under the NLRA when reviewing specific instances of conduct for which discipline is being considered.)
- Have you provided examples of what is and is not acceptable behavior, especially as it pertains to electronic communications and social media platforms?

4. When issues arise, have you consistently and appropriately investigated them?

5. Have you applied an objective quality control process when analyzing such issues and how to respond to them (so as to ensure an appropriate level of consistency)***, while also dealing with each scenario on its own merits?***

- Have you appropriately analyzed the potential implications of the NLRA's Section 7 protections and applicability to the behavior in question?

6. Depending upon the results of any such investigations, have you consistently taken appropriate remedial action (designed to effectively end the inappropriate behavior)***?***

7. Have you effectively used such issues as an opportunity to further educate the workforce and re-set the behavioral expectations in a manner that is easily understood?

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THE TIMES THEY ARE A'CHANGING - WAGE AND HOUR UNDER THE BIDEN ADMINISTRATION

Carol R. Merchant

"[W]hite House Chief of Staff Ron Klain issued a memo … that would have the effect of halting all regulations published by the Trump administration that had not yet become effective."

Not surprisingly, President Biden's administration has acted quickly to counteract many of the regulations and interpretive guidance issued by the previous administration in various areas. The U.S. Department of Labor's (DOL, or "Department") Wage and Hour Division is certainly one of the agencies that is experiencing those changes.

On January 29, 2021, the day of President Biden's inauguration, White House Chief of Staff Ron Klain issued a memo to all federal agencies directing them to take a series of actions that would have the effect of halting all regulations published by the Trump administration that had not yet become effective.

The memo directed that all work on pending regulations was to stop until Biden-appointed officials review and approve the rule. Additionally, all final rules not yet published in the *Federal Register* were to be withdrawn. And lastly, agencies were instructed to consider imposing a 60-day freeze on the effective dates of any rules already published in the *Federal Register* but not yet effective so the regulations could be reviewed.

The last instruction in this directive was immediately used to freeze the Trump administration's independent contractor rule and its tip-pooling regulation, both of which were to have become effective in March. The effective date for these two regulations was extended for 60 days so that they could be reviewed. In addition, the DOL revoked three opinion letters that referenced these two rules. Another two opinion letters were withdrawn in February, one dealing with independent contractor status and one dealing with compensable time for long-haul truck drivers.

Independent Contractors and Joint Employers. The review of these two regulations resulted in a proposal on March 11, 2001, to rescind Trump's regulatory guidance on independent contractors plus its final rule on joint employers.

A. The reasons provided for withdrawing the final rule on independent contractors included the following:

- The rule adopted a new "economic reality" test to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA).
- Courts and the Department have not used the new economic reality test, and FLSA text or longstanding case law does not support the test.
- The rule would narrow or minimize other factors traditionally considered by courts, making the economic test less likely to establish that a worker is an employee under the FLSA.

The Biden administration is not proposing an immediate substitute, which means previous rules are back in effect. Practically speaking, this means that it will remain more difficult to classify a worker as an independent contractor than it would have been under Trump's proposed rule.

B. On the same day, a second notice was issued to rescind the current regulation on joint employer relationships under the FLSA, which took effect on March 16, 2020. In February 2020, 17 states and the District of Columbia filed a lawsuit in the Southern district of New York against the Department, arguing that the joint employer rule violated the Administrative Procedure Act. The court vacated the majority of the joint employer rule on September 8, 2020, stating that the rule was contrary to the FLSA and was "arbitrary and capricious" due to its failure to explain why the Department had deviated from all prior guidance or to consider the effect of the rule on workers. Again, rescinding this rule makes it more difficult for employers to avoid a finding of joint employment when two or more employers effectively share an employee.

Tipped Workers. With respect to Trump's regulation related to tipped workers, the Biden administration has decided to let parts of the rule go into effect while proposing a reconsideration of other parts of the rule.

A. The parts of the rule that will be allowed to go into effect on April 30, 2021, are portions that implemented the 2018 Consolidated Appropriations Act passed by Congress. These portions include a prohibition on employers keeping any tips received by tipped workers, regardless of whether the workers are paid the full minimum wage or whether they are paid $2.13 per hour (with tip credit being taken for the additional $5.12 per hour). A second implemented

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"WAGE AND HOUR UNDER THE BIDEN ADMINISTRATION"

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section allows an employer who pays tipped workers the full minimum wage of $7.25 per hour, to require tipped workers to share their tips with non-tipped workers, such as cooks and dishwashers. Owners, managers, and supervisors may not share in the tips.

B. The portions of the regulation that will not go into effect and that will go through a full new rule-making process deal with the assessment of civil monetary penalties, the definition of "managers or supervisors" who may not participate in tip pools, and when a tipped worker who also performs non-tipped duties can still be paid $2.13 per hour.

PAID Program. A final change which has been made is the cancellation of the Payroll Audit Independent Determination (PAID) program. The PAID program began in March 2018 as a pilot program to allow employers an alternative method to rectify overtime and minimum wage violations of the FLSA. Under the PAID program, employers were able to self-report a wage violation, submit a calculation of back wages to the DOL, and enter into an agreement to pay the back wages owed.

It is almost a certainty that further changes will be coming, a reflection of the administration's more employee-friendly inclinations.

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The next few years will be both interesting and very challenging for employers, especially as it relates to integrating multiple generations in the workplace setting and enforcing workplace behavioral expectations, and successfully competing in a dynamic and quickly changing economy. Electronic and social media communications will inevitably be an ongoing source of conflict and potential harassment, discrimination, and retaliation liability exposure.

Is your organization ready to successfully grapple with these issues?

"WE'VE MOVED!"

As of March 1, 2021, our Nashville, Tennessee office has moved to the following new address (phone and fax remain the same):

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