BUSINESS IN 2024

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

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TODAY'S AGENDA

Adam Mastroleo

- Welcome / Agenda

Jim McGrath – (12 - 12:15 p.m.)

- National Labor Relations Board (NLRB)

Kseniya Premo – (12:15 - 12:30 p.m.)

- Immigration in Transition – Preparing for the Post-Election Era

Kate McClung – (12:30 - 12:45 p.m.)

- Potential Developments in Employment Law

Adam Mastroleo

- Questions

National Labor Relations Board (NLRB)

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NLRB

- General Counsel (GC) – Jennifer A. Abruzzo (D)
  - Began serving on July 22, 2021
  - The GC is appointed by the President to a 4-year term
  - Independent of the Board
  - Responsible for investigation and prosecution of unfair labor practices and for the general supervision of the NLRB field offices in the processing of cases
  - Expect the incoming administration to appoint a new GC upon inauguration

NLRB

- GC memos that are likely to be immediately reversed by a new GC
  - **GC Memo 24-04:** *Securing Full Remedies for All Victims of Unlawful Conduct*
  - **GC Memo 21-07:** *Full Remedies in Settlement Agreements*
  - **GC Memo 23-02:** *Electronic monitoring and Algorithmic Management of Employees Interfering with the Exercise of § 7 Rights*
  - **GC Memo 25-01:** *Non-Compete and Stay-or-Pay Provisions*

GC Memo 24-04 – Securing Full Remedies for All Victims of Unlawful Conduct

- Directs regions to seek settlements that include make-whole relief for employees who were disciplined or subject to legal enforcement resulting from an unlawful work rule or contract term, unless the employer can show that the conduct actually interfered with the employer's operations, and it was that interference—and not reliance on the unlawful rule or term—that led to the employer's actions
  - Previously, the Board generally did not seek any remedy beyond rescission of the unlawful rule or policy unless a specific employee had alleged harm from the enforcement of the offending rule

GC Memo 21-07 – Full Remedies in Settlement Agreements

- Instructs regions to always seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice, in addition to seeking no less than 100 percent of the backpay and benefits owed.
  - *"It is critical that our settlement agreements provide the fullest and most effective relief possible to the victims of unfair labor practices and send a message to workers nationwide" – J. Abruzzo*

GC Memo 23-02 – Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of § 7 Rights

- The memo highlights the increasing use of technologies to monitor employees, such as GPS tracking, security cameras, employer-issued phones, and keylogging software on company computers
  - GC posits that such surveillance practices can interfere with employees' rights under § 7 by hindering their ability to engage in protected activity (diminished confidentiality)
  - The GC also sought to limit the use of artificial intelligence and algorithm-based employee productivity software and the use of personality tests and scrutiny of applicants' social media accounts
  - GC urges the Board to (1) enforce existing law and (2) to adopt a new legal framework

GC Memo 23-02 Continued

- New Legal Framework
  - Employers are presumed to have violated § 8(a)(1) if their surveillance and management practices likely deter or prevent reasonable employees from engaging in protected activities
  - If employer establishes that its practices are narrowly tailored to a legitimate business need, the Board should balance employer and employee interests to determine whether the Act permits the employer's practices
  - If business needs outweigh § 7 rights, employers must disclose the technologies used, reasons for use, and how information is utilized, unless special circumstances justify covert use

GC Memo 25-01 – Non-Competes

NLRB

- **Members of the Board (one seat is currently open)**

Member	Term Expiration
Lauren M. McFerran, Chairman (D)	12/16/2024
Marvin E. Kaplan (R)	8/27/2025
David M. Prouty (D)	8/2026
Gwynne A. Wilcox (D)	8/27/2028

NLRB

- Decisions that are likely to be targeted for reversal by the new administration
  - *Cemex Construction Materials Pacific*, 372 NLRB No. 130 (2023) regarding union recognition
  - *Stericycle, Inc.*, 372 NLRB No. 113 (2023) regarding work rules and handbook policies
  - *McLaren Macomb*, 372 NLRB No. 58 (2023) regarding confidentiality and non-disparagement provisions
  - *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023) regarding independent contractor status.
  - *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023) regarding concerted activity
  - *Lion Elastomers, LLC, II*, 372 NRLB No. 83 (2023) regarding misconduct during protected activity
  - *Amazon.com Service, LLC*, 373 NLRB No. 136 (2024) regarding captive audiences

Union Recognition – Cemex Construction Materials Pacific, 372 NLRB No. 130 (2023).

- Under *Cemex*, unions can more easily secure recognition from an employer based solely on signed union authorization cards, rather than garnering a majority of votes in a secret ballot election among the employees.
- After a union demands recognition, the employer must recognize and bargain with the union or file an NLRB petition for an election within 2 weeks of the union's demands.
- If the employer does not file a timely petition (and assuming the union the union has not also commenced an election proceeding), the employer is at risk of a § 8(a)(5) ULP for declining to recognize the union.

Work Rules and Handbook Policies - Stericycle, Inc., 372 NLRB No. 113 (2023).

- Before *Stericycle*, if facially neutral employer rule or policy could reasonably be interpreted to interfere with the exercise of NLRA rights
  - Balance the nature and extent of the potential impact on employees' exercise of protected rights with the legitimate business justifications
  - If adverse impact on NLRA protected rights outweighed business justification, violation
- Under *Stericycle*, if challenged rule has a reasonable tendency to chill employees' exercise of their rights under the NLRA, the rule is deemed illegal
- Employer may rebut illegality by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule.

Captive Audiences – Amazon.com Service, LLC, 373 NLRB No. 136 (2024)

- Ban on mandatory meetings during work time where the employer expresses views on unionization, regardless of the content of the employer's message
- Voluntary meetings remain permissible
  - Reasonably in advance of the meeting, the employer must inform the employees that:
    - The employer intends to express its views on unionization at a meeting at which attendance is voluntary
    - Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting
    - The employer will not keep records of which employees attend, fail to attend, or leave the meeting

NLRB – Related Litigation

- Potential Removal of NLRB Board Members
  - The NLRB is an independent agency not under the White House's direct control.
  - However, if McFerran is confirmed for a third term, potential for incoming administration to take steps to remove Board members to advance policies aligned with the administration.
- 7th Amendment (Right to Jury Trial) and Other Potential Implications of *Securities & Exchange Commission v. Jarkesy*
  - The U.S. Supreme Court's decision in *Jarkesy* (issued in June of this year) outlines when an administrative agency can lawfully subject a party to an enforcement action using internal adjudication processes.
  - While authority of the NLRB was not directly placed into issue in the *Jarkesy* decision, such decision could have trickle-down implications.
  - *Jarkesy* also has called into question the ability of an administrative agency to impose penalties of consequential damages.

Immigration in Transition
Preparing for the Post-Election Era

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Immigration Post-Election: What We Know and What We Don't

- Immigration remains a key issue from the 2024 election cycle
- The primary focus has been on illegal immigration
- Employers are concerned about potential changes impacting their workforce
- No specific policies or legislative changes have been announced
- Campaign rhetoric highlights immigration broadly, but legal immigration rules remain uncertain

Potential Changes

- Increased worksite enforcement measures (*i.e.,* I-9 compliance audits and raids, E-Verify compliance audits, onsite inspections by Immigration & Customs Enforcement (ICE)
- Increased inspections and/or audits by Department of Labor (DOL) to oversee immigration practices designed to protect the rights of U.S. workers, including but not limited to PERM audits
- Increases in prevailing wage standards, which impact certain non-immigrant work visas and some employment-based green card processes, hiring and recruitment practices, visa fraud issues, etc.

Potential Changes

- Expansion of the mandatory use of the federal E-Verify system
- Modifications to STEM Optional Practical Training (OPT) program
- Tightening of the H-1B work visa program (*i.e.,* changes to the definition of a “specialty occupation”, etc.)
- Slower processing times, more Requests for Evidence (RFEs) and higher denial rates for employment-based petitions and applications filed with the U.S. Citizenship and Immigration Services (USCIS)

Potential Changes

- Reinstatement of a biometrics requirement for dependent family members of foreign national workers
- Reinstatement of in-person interviews for employment-based green card applications filed with USCIS
- Elimination of the USCIS' deference policy when adjudicating visa renewals with the same employer when there has been no change in the job duties

How Employers Can Prepare

- Review I-9 policies and E-Verify policies (if applicable) to determine overall process compliance
  - Ensure that you have a completed Form I-9 on file for every employee hired on or after November 5, 1986
  - Make sure that I-9 reverifications are performed, where needed, and done so in a timely manner
  - Ensure that the individuals responsible for conducting the I-9 verification / reverification process have been properly trained

How Employers Can Prepare

- Implement annual compliance training for the Human Resources team or the employees designated to conduct the I-9 verification process
- Ensure that the correct (current) version of the Form I-9 is being used
- Conduct internal I-9 and E-Verify audits, particularly if a voluntary self-audit has not been conducted within the past three (3) years
- For employers that have enrolled in the E-Verify system, make sure that E-Verify cases are created, and done so in a timely manner

How Employers Can Prepare

- If you employ H-1B workers:
  - Make sure that the H-1B Public Access File (PAF) is complete and easily accessible
  - Employers who fail to prepare and maintain accurate PAFs for H-1B workers may be subject to civil penalties, back wage orders, and potential debarment from the H-1B program

How Employers Can Prepare

- Each PAF should contain:
  - A signed copy of the certified Labor Condition Application
  - Documentation of the employee's exact pay rate
  - Documentation reflecting the determination of the prevailing wage
  - Documentation confirming how employees in the workplace were notified that a Labor Condition Application had been filed, including dates and location of any posted notices
  - A summary of benefits offered to all employees, including the H-1B worker(s)
  - Documentation that a copy of the Labor Condition Application has been provided to the H-1B worker

How Employers Can Prepare

- Identify which employer representative will be the organization's point(s) of contact for employee immigration matters in case of a government audit, onsite inspection, etc.
- Consider filing new petitions for non-immigrant work visas early and, when possible, consider filing extension petitions for non-immigrant work visas near the beginning of the 6-month filing window
- Consider whether upgrading a petition filing to Premium Processing is appropriate under the circumstances

Potential Developments in Employment Law

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FLSA Minimum Salary Levels

- 5/23/16 – Obama DOL issues final rule to increase salary thresholds for white collar exemptions to take effect 12/1/16 ($455 → $913)
- 11/22/16 – Federal judge blocks rule, and Obama DOL appeals
- 2017 - Trump DOL drops appeal and rescinds Obama rule
- 9/27/19 –Trump DOL issues final rule increasing salary thresholds effective January 1, 2020 ($455 → $684) ($100,000 → $107,432)

FLSA Minimum Salary Levels (cont.)

- 4/23/24 – Biden DOL issues final rule to take effect 7/1/24, plus another round of increases to take effect 1/1/25 ($684 → $844 → $1,128) ($107,432 → $132,964 → $151,164)
- 11/15/24 – Federal judge vacates final rule in *State of Texas v. United States Department of Labor*, No. 4:24-cv-00499 (E.D.N.Y.)
- 11/26/24 – Biden DOL files notice of appeal
- Trump administration expected to rescind rule and/or not pursue appeal

FLSA Minimum Salary Levels (cont.)

- Impact
  - Salary thresholds for **federal** white-collar exemption based on 2020 Rule
  - Employers who made changes on 7/1/24 need to decide whether to keep these changes going forward

Independent Contractor Rule

- 1/7/21 – Trump DOL issues final rule to change independent contractor standard to take effect 3/8/21
  - New standard – more weight to control and worker's opportunity for profit/loss
  - More employer-friendly rule that permits classifying a broader range of workers as independent contractors
- 3/8/21 – Biden DOL issues final rule delaying effective date to 5/7/21
- 5/6/21 – Biden DOL issues final rule withdrawing Trump rule

Independent Contractor Rule (cont.)

- 3/14/22 - Federal court vacates both of Biden's final rules (which delayed and withdrew Trump's rule) due to procedural legal defects and holds Trump's final rule became effective on 3/8/21
- 10/11/22 – Biden DOL releases proposed rule, rescinding Trump rule and changing independent contractor standard back to an "economic realities" test
- 1/9/24 – Biden DOL issues final rule effective 3/11/24
- Trump administration expected to change the standard back

FLSA Joint Employer Rule

- 1/20/16 – Obama DOL issues guidance broadening FLSA standard for joint employers
- 6/7/17- Trump DOL withdraws guidance
- 1/16/20 – Trump DOL issues final rule changing joint employer standard, to take effect 3/16/20
- 9/8/20 – Federal court strikes down significant portions of rule
- 7/30/21 – Biden DOL issues final rule rescinding Trump's rule, which takes effect 9/28/21 – no new rule provided
- Trump administration expected to revisit this issue

Federal Contractors – Minimum Wage

- 2/12/14 – Obama signs Executive Order 13658, establishing minimum wage of $10.10 for employees of certain federal contractors, with potential subsequent increases, effective 1/1/15
- 5/25/18 – Trump signs Executive Order 13838, exempting certain seasonal recreational employees from above minimum wage requirement
- 4/27/21 – Biden signs Executive Order 14026, increasing minimum wage for federal contractors to $15/hour effective 1/30/22* with potential subsequent increases; also revokes Trump's Executive Order 13838

Federal Contractors – Minimum Wage

- Multiple legal challenges:
  - There is currently a circuit split on whether Biden's Executive Order 14026 was lawful
  - A petition for certiorari to the Supreme Court is pending
- Trump DOL may revoke Executive Order 14026, decline to defend it in court, reinstate his Executive Order 13838, and/or issue a new Executive Order with new limitations on minimum wage requirements for federal contractors

Other Potential Trump DOL Actions

- Creating a comp time alternative to overtime for all employers (including private sector)
- Reinstating Payroll Audit Independent Determination program
- Removing or reducing taxation on tips
- Issuing employer-friendly opinion letters
  - Trump issued 72 letters total - 29 letters in 2018, 14 letters in 2019, 20 letters in 2020, and 9 letters from 1/8/21 – 1/19/21
  - Obama issued 0 letters (and suspended practice)
  - Biden has issued 1 letter

Equal Employment Opportunity Commission

- Trump administration likely won't have a Democratic majority until 2026, but likely to replace general counsel quickly
- Trump EEOC may shift agency's focus in numerous ways:
  - Limit scope of Pregnant Workers Fairness Act
  - Roll back protections for LGBTQIA+ workers
  - Scale back DEI initiatives
  - Reduce EEOC's data collection efforts
  - Pursue charges against employers offering pro-abortion benefits or with policies perceived to be anti-religion
  - Shift more resources to compliance initiatives instead of litigation
  - Revisit changes to conciliation process

FTC Restrictive Covenant Ban

- 7/9/21 – Biden issues Executive Order 14036, instructing the Federal Trade Commission to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility”
- 4/23/24 – Biden FTC announces final rule banning most post-employment non-compete* clauses between employers and workers, with effective date of 9/4/24
- 8/20/24 – Federal court strikes down Biden’s rule
- 10/18/24 – Biden FTC files notice of appeal
- Trump may abandon appeal and/or withdraw final rule

Diversity Initiatives

- Trump is likely to reinstate Executive Order 13950 which, in part, prohibited federal contractors from providing certain workplace diversity training and programs or discussing “divisive topics” in workplace trainings
- Trump may revoke various Biden Executive Orders on diversity and protections for LGBTQIA+ workers
- Some believe Trump may revoke Lyndon Johnson’s Executive Order 11246 (which requires federal contractors to recruit women/minorities and develop affirmative action plans to assess racial/gender demographics of employees)

OSHA

- Trump administration may:
  - Delay or withdraw proposed OSHA standards, like the Heat Stress Prevention standard
  - Soften COVID-19 standards
  - Reduce inspections – especially in low-risk industries
  - Fail to replace Compliance Officers and vacancies on OSH Review Commission
  - Increase focus on compliance and lessen enforcement efforts

Paid Leave vs. Tax Credits

- During first administration, Trump extended 12-week paid family leave to employees of federal agencies and contractors
- There is growing bipartisan support for some form of family friendly policies
- In Trump's second administration, it may be more like that this will be accomplished through child tax credits or tax credits for businesses instead of paid leave program for private sector employers

Questions?

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Sexual Harassment Prevention Training

To combat harassment in the workplace, every New York State employer must provide harassment prevention training for all employees annually.

For more information on Bond's online sexual harassment training click here or email bondonline@bsk.com

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Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.