

How 2020 Changed Employment Law and What Changes May Be in Store for 2021

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2020 – IT IS FINALLY [INSERT CHOICE DESCRIPTIVE WORD] OVER!!!



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AGENDA

- SUPREME COURT
- EEOC
- WHD
- OSHA
- Executive Orders
- NLRB



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SUPREME COURT

- *Bostock v. Clayton County* (June 15, 2020): Title VII protects workers from discrimination on the basis of sexual orientation and gender identity
 - Left open the issue of whether the Religious Freedom Restoration Act (RFRA) could “supersede Title VII’s commands in appropriate cases”



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PREDICTION FOR 2021 EQUALITY ACT

- <https://joebiden.com/lgbtq-policy/#>
- Plans to pass Equality Act within first 100 days WITHOUT a religious exemption
- Equality Act has been stalled for years because of fight about religious exemptions
- Supreme Court left this issue open
- EEOC's recent new draft guidance on religious accommodation leaves this issue open



SUPREME COURT – ACA

California v. Texas (argued November 10, 2020):

- Republican officials argue the mandate requiring insurance became unconstitutional after Congress in 2017 eliminated the penalty for failing to obtain health insurance
- They argued that because the mandate was a crucial feature of the law, and the entire law should be thrown out
- 5 justices (**Roberts, Kavanaugh**, Kagan, Breyer, Sotomayor) indicated that they would reject attempts to end the Affordable Care Act

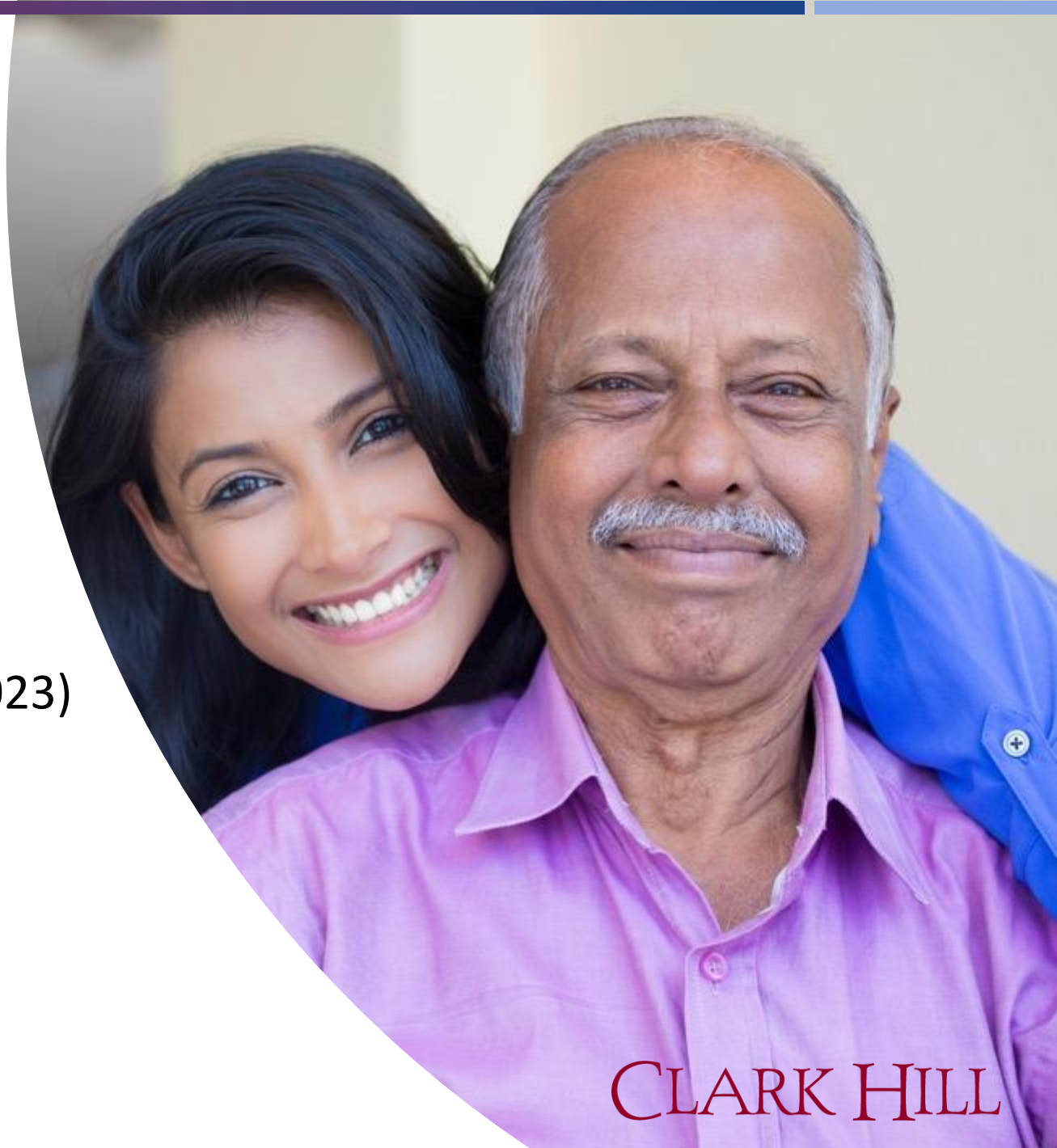
EEOC – REPUBLICAN MAJORITY UNTIL JULY 2022

The Commission

- Janet Dhillon, Chair (R-2022)
- Keith E. Sonderling, Vice Chair (R-2024)
- Charlotte A. Burrows, Commissioner (D-2023)
- Jocelyn Samuels, Commissioner (D-2025)
- Andrea R. Lucas, Commissioner (R-2025)

The General Counsel

- Sharon Fast Gustafson (2023)



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EEOC ACTIONS IN 2020

- Reassigned authority pertaining to systemic discrimination litigation to commissioners = less systemic litigation
- Overhauled conciliation process to give employers more information and increase chances of settlement = less litigation
- Issued updated draft guidance on religious discrimination
- Entered into revised MOU between EEOC, DOJ and OFCCP
- Released Technical Assistance Documents on Opioid Addiction and Employment

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EEOC – COVID-19

- March 21: EEOC suspended issuing charge dismissals unless requested (started again 8-3-20)
- May 7: Delayed EEO-1 data collection until 2021 (2 years of data to upload in new Westat tool)
- <https://www.eeoc.gov/coronavirus>
 - EEOC provided guidance to employers on their ability to screen, test, and accommodate employees
 - On March 19, EEOC updated its pandemic preparedness guidance from H1N1
 - Chair Dhillon issued a statement about unlawful national origin and race discrimination against Asian Americans and people of Asian descent in the workplace during the pandemic
 - December 16, 2020: Updated Q&A TA Doc on vaccinations



WHD IN 2020 – JOINT EMPLOYMENT

Issued final rule to update the regulations interpreting joint employer status. Four-factor balancing test for determining FLSA joint employer status. Whether the potential joint employer:

1. Hires or fires the employee;
2. Supervises and controls the employee's work schedule or conditions of employment **to a substantial degree**;
3. Determines the employee's rate and method of payment; and
4. Maintains the employee's employment records.





WHD IN 2020 – FFCRA

Families First Coronavirus Response Act

- Guidance
- Posters
- Temporary regulations
- FAQs –updated to address expiration/
voluntary provision until March 31, 2021
- Infographics



How much paid leave can employees take?

In general, applies to you if you are an employee of either a private employer with fewer than 500 employees or a covered public sector employer



You are following a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You have COVID-19 symptoms and are seeking a diagnosis

TIME OFF

Up to two weeks or 80 hours of paid sick leave at higher of regular rate or minimum wage*



You must care for someone under a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

TIME OFF

Up to two weeks or 80 hours of paid sick leave at higher of 2/3 regular rate or minimum wage*



You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

AND

You've been employed at least 30 calendar days

TIME OFF

Up to 10 additional weeks of family leave paid at 2/3 regular rate*

*Paid leave is capped at specific maximum amounts per worker

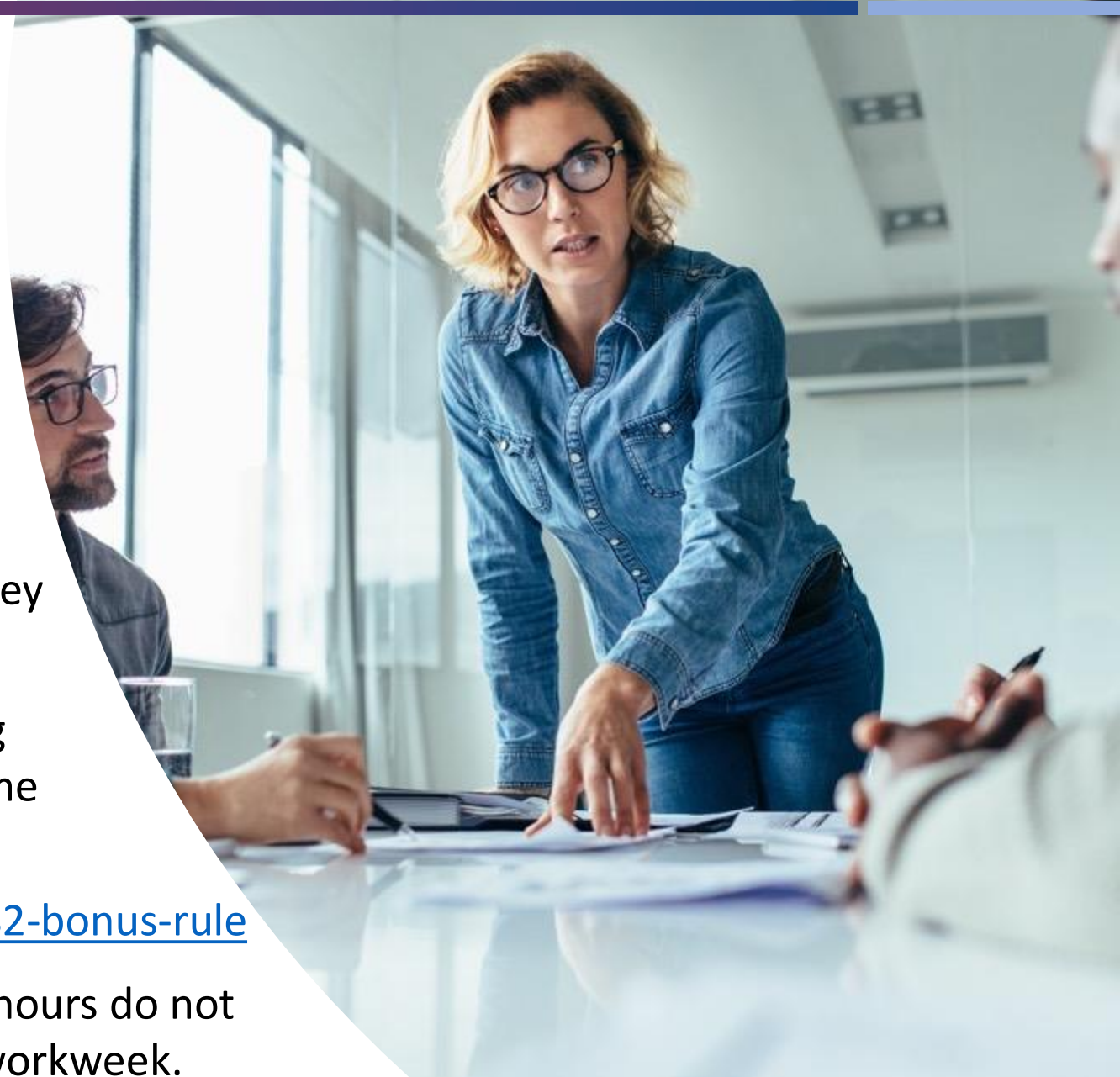
Learn more at dol.gov/FFCRA



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WHD IN 2020 – FLUCTUATING WORK WEEK

- Employers can pay bonuses or other incentive-based pay, such as commissions or hazard pay, above and beyond workers' fixed salaries when they are paid using the fluctuating workweek method
- Such payments must be included when calculating the regular rate unless they are excludable for some other reason explained in the law
- <https://www.dol.gov/agencies/whd/fact-sheets/82-bonus-rule>
- Also issued opinion letter stating that employees hours do not have to fluctuate above and below 40 hours per workweek. Instead, just have to fluctuate from week to week.





WHD IN 2020 – INDEPENDENT CONTRACTORS

- Issued a proposed rule (**published today!**) making it easier for businesses to classify workers (especially in the gig economy) as independent contractors, rather than employees (meaning, not covered by FLSA)
- Adopts an updated 5 factor “economic reality” test

Core factors to determine if a worker is in business for them self

1. Nature and degree of the worker’s control over the work
2. Worker’s opportunity for profit or loss based on initiative and/or investment

Guideposts

1. Amount of skill required for the work
 2. Degree of permanence of the working relationship
 3. Whether the work is part of an integrated unit of production
- The actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor

WHD IN 2021

- Mandatory Extension of FFCRA (expired on 12/31) or proposal of another paid leave act (FAMILY Act)
- Freeze of independent contractor rule set to take effect in early March, re-open for comments, or initiation of a new rulemaking to rescind it
- Expansion of joint employment
- Wages:
 - President-elect Biden previously called for a \$15 federal minimum wage by 2026
 - Possible elimination of the reduced minimum wage for tipped employees (i.e., the tip credit)
 - Possible increase in the minimum salary to qualify as an exempt employee under the FLSA



OSHA IN 2020 AND 2021

- 2020: Although the COVID pandemic calls for more federal safety and health guidance, it has not resulted in any formal action to date by OSHA
- 2021:
 - It is expected a Biden appointee will take up employer safety rules to address employer pandemic safety and health compliance at a national level
 - OSHA will be more focused on enforcement
 - Fines
 - Public shaming of employers who are found to have violated OSHA rules and regulations

EXECUTIVE ORDERS

- President-elect Biden will most likely revoke President Trump’s controversial “Executive Order on Combating Race and Sex Stereotyping”
- Restricts the federal government, federal contractors, and certain federal grant recipients from conducting specific types of diversity and unconscious bias training
- December 22, 2020 U.S. District Court for Northern District of California enjoined OFCCP



NLRB

NLRB Members:

- John Ring – Chair (R-2022)
- Marvin E. Kaplan (R-2025)
- William J. Emmanuel (R-2021)
- Lauren McFerran (D-2024)
- Vacant





NLRB AND COVID

- March 19: suspended all representation elections through April 3
- November 9: issued factors to allow for an election by mail:
 1. The Agency office tasked with conducting the election is operating under “mandatory telework” status
 2. Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher
 3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size
 4. The employer fails or refuses to commit to abide by [GC Memo 20-10](#), *Suggested Manual Election Protocols*
 5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status

NLRB IN 2020 – JOINT EMPLOYER

- Issued a final rule that restored the joint-employer standard that the Board applied for several decades prior to the 2015 decision in *Browning-Ferris*
 - *To be a joint employer, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees*





NLRB & ELECTION RULES

June 1, 2020 rolled back majority of 2014 election rules.
[GC 20-07](#)



NLRB IN 2020 – PROTECTED SPEECH

- *General Motors LLC, 14-CA-197985 369 NLRB No. 127 (2020)*: NLRB modified the standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements—including profane, racist, and sexually unacceptable remarks—in the course of activity otherwise protected under the NLRA.
- Employer must prove it would have taken the same action even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct.



NLRB IN 2021?

Protecting the Right to Organize (PRO) Act:

- bans employer mandatory “captive audience” group meetings;
- requires mandatory immediate collective bargaining days after a union becomes employees’ representative for 90 days and, if no agreement is reached, binding interest arbitration of contract terms;
- preempts states’ “right to work” laws;
- allows “unfair labor practice” claims to be brought as civil actions in court; adding fines and liquidated damages (possibly six figures) as remedies for unfair labor practices; and
- adds personal liability for unfair labor practices for corporate directors and officers.

NLRB IN 2021?

- Work rules/handbooks (Boeing, Co., 12-14-17; NLRB Memo, June 2018)
- Investigation confidentiality (Apogee Retail, 12-17-19, vs. Banner Health, 2015)
- Use of employer email (Ceasars Entertainment, 12-17-19, v. Purple Communications, 2015)

WHAT ELSE?

- FAIR Act? Forced Arbitration Injustice Repeal Act.
- Expanded access to immigrant workers (especially STEM graduates) and reversal of Trump's October 2020 rules to restrict H1-B Visas.
- Reinstatement of Deferred Action for Childhood Arrivals (DACA), an Obama-era executive action that Trump rescinded in 2017, which provides protection from deportation for an estimated 650,000 people who arrived in the U.S. illegally as children.



WHAT ELSE?

- Elimination of noncompetes?
- Further extensions of CARES Act waiver of employer student loan repayment from income?
- Legalization of marijuana?
- Ability for employees to go on exchange?



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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time. Please visit www.clarkhill.com/pages/covid-19 for access a range of resources related to coronavirus, and www.clarkhill.com/pages/webinars for all of the firm's L&E and other subject matter webinar content.

Thank You!



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Legal Disclaimer

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