

A portrait of Helen Hapner, a woman with long brown hair, smiling, wearing a black blazer over a dark red top. The background is a red geometric pattern.

Recent Developments in Federal Law

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Biden Administration Employment Agenda



Executive Order on Promoting Competition in the American Economy

- Executive Order directs FTC to ban or limit “non-compete agreements and other clauses and agreements that may unfairly limit worker mobility”
 - non-solicitation clauses
 - no-hire/no-poach agreements
- Aim of increasing economic competition and growth by removing barriers to worker mobility

Executive Order on Promoting Competition in the American Economy

- FTC Rulemaking?
- Employers should review the use of non-competes and non-solicitation clauses and agreements with an awareness of potential changes in federal law

Strengthening unions and collective bargaining

- Protecting the Right to Organize (PRO) Act (proposed legislation)
 - Nullify right-to-work laws
 - Protect union elections
 - Ban “captive audience” employee meetings
 - Mandatory mediation

Strengthening unions and collective bargaining

- Protecting the Right to Organize (PRO) Act (proposed legislation)
 - Unfair labor practices
 - Terminate strikers or penalize employees who support or participate in a strike
 - Mandatory class-action waivers
 - Monetary penalties for unfair labor practices
- Budget reconciliation

Strengthening unions and collective bargaining

- Task Force on Worker Organizing and Empowerment
 - Chaired by Vice President Kamala Harris and vice-chaired by Labor Secretary Marty Walsh
 - Identify existing policies and programs to “promote worker power in areas of the country with hostile labor laws, for marginalized workers (including women and persons of color) and hard-to-organize industries, and in changing industries”
 - Task force directed to identify new statutory and regulatory changes to support worker organizing and collective bargaining

Combating Gender Identity and Sexual Orientation Discrimination

- Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation, Executive Order 13988
- Applies holding in *Bostock v. Clayton*, Supreme Court Docket No. 17-1618, 590 US _ (2020) to federal agencies
 - Title VII's prohibition on employment discrimination "because of sex" inherently includes discrimination "because of sexual orientation or transgender status"

Combating Gender Identity and Sexual Orientation Discrimination

- Equality Act (proposed legislation)
 - Amends Title VII to prohibit discrimination based on sexual orientation and gender identity
 - Prohibits discrimination based on pregnancy or sex stereotypes and characteristics
 - Religious Freedom Restoration Act

Medic Ambulance Service, Inc.

NLRB Case



Medic Ambulance Serv., Inc., 370 NLRB No. 65 (Jan. 4, 2021)

- Employer's social media policy
 - Limited use of the employer's name and logo on social media to convey employee opinions
 - Prohibited posting of photos of coworkers without their written consent
 - Prohibited "inappropriate communications" on social media, including using social media to disparage the employer or coworkers
 - Prohibited sharing of employee compensation information or the proprietary or confidential information of the employer or coworkers on social media

Medic Ambulance Serv., Inc., 370 NLRB No. 65 (Jan. 4, 2021)

- Employer's social media policy challenged as violating provisions of the National Labor Relations Act ("NLRA")
 - Section 8(a)(1) of NLRA: unfair labor practice for employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7"
 - Section 7 of NLRA: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

Medic Ambulance Serv., Inc., 370 NLRB No. 65 (Jan. 4, 2021)

- *Boeing Co.*, 365 NLRB No. 154 (2017) balancing test
 - Employer's legitimate business justification for rule; versus
 - The degree to which employer's rule interferes with employee's NLRA rights, from perspective of reasonable employee

Medic Ambulance Serv., Inc., 370 NLRB No. 65 (Jan. 4, 2021)

- NLRB reversed ALJ's determination that:
 - 1) the employer's social media policy violated the NLRA; and
 - 2) prohibiting the sharing of employee compensation and the use of social media to disparage the employer or others violated the NLRA.

Medic Ambulance Serv., Inc., 370 NLRB No. 65 (Jan. 4, 2021)

- Changes in the NLRB
- Employer social media policies should reference the rights protected by the NLRA and shifting NLRB analysis of the Act

Thank you.

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