

CSC Network and  
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Present:  
*Is Your Company Ready for  
2022?*

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# Remote Workplace

- An increasing number of employers will delay the return to the office for their workforces, or have all or parts of their workforces not return at all. Employees may not want to return to work and given their new leverage, they may not be required to do so. In this new economy, with the remote workforce revolution, is your Company ready?
  - Do you have employees that work remote all or part-time (everyone does, sales, CSRs, etc.)?
  - Do you have a remote workplace policy to address?

# Remote Workplace

## WAGE AND HOUR ISSUES

- Working from home became entrenched in the lives of up to 60% of American workers for much of 2020 and 2021.
- Employers are using apps to communicate with employees outside of the office.
- We are seeing a wave of wage and hour litigation from workers claiming they are not getting paid for all hours worked (including time spent checking employer-required apps) and have not been properly reimbursed for business expenses (Wi-Fi, data plans, cell phones, etc.). Your Company needs to:
  1. Track employees' work through technology and consistent communication.
  2. Proactively develop policies and compliance systems.

# Remote Workplace

- Have a policy that requires each nonexempt employee to:
  - Accurately report all hours worked
  - Not work more than 40 hours in a work week (or in excess of the daily maximum in those states that require overtime pay in excess of eight hours in a day) without written authorization from a manager.
  - Use timesheets to document work and projects, with a description of work performed and time spent.
  - Clock in and out via a provided timekeeping application, e-mail or other method chosen by your company. Your policy should also clearly state that employees are subject to termination of employment for failure to report all hours worked, truthfully.

# Remote Workplace

## **SAFETY AND HEALTH CONCERNS**

•OSHA and workers' Compensation issues can apply to remote workers. If an employee is injured while working at home, the key issue will be whether the employee was injured while performing work for the company. Again, policies for reporting hours worked, safety policies and other pertinent rules, detailed time records detailing work assignments and tasks performed, are necessary to limit exposure.

## **DATA SECURITY**

- Work with IT to make sure the equipment employees are using is “safe.”
- Update and review policies regarding the use of VPN and other remote/cloud-based networks and policies regarding what client/customer information may be brought home or accessed from home. Policies should cover both company-owned and employee-owned computers, laptops and mobile devices.
- Update confidentiality and restrictive covenant agreements
- Restrict use of personal computers, smart phones, etc.

# President Biden's Pro- Employee Agenda

- The midterm elections in November 2022 will ultimately control President Biden's ability to pass his political agenda, which includes labor and employment laws like the ultra pro-Union PRO Act
- The outcome of the election will not change Biden's ability to implement new rules and regulations through various federal agencies – so expect to see a flurry of pro-employee and pro-labor activity at the Department of Labor, the National Labor Relations Board (NLRB), OSHA, and various other agencies.
- Even without the assistance of the President's Pro-Union Agenda, 2021 saw critical developments regarding union organizing in the workplace with several high profile strikes and organizing efforts
- Workers are now feeling more empowered than ever in this

economy

# NLRB Broadens Enforcement

## **The NLRB Will Broaden Enforcement and Expand its Agenda:**

The NLRB is unique in that any change in administration causes a shift in the regulations and interpretations of prior cases. 2022 will be the first full year that the NLRB can make these changes since the balance changed to favor the Democrat appointees (the Board currently has 3 Democrat appointees and 2 Republican appointees).

Changes that you can expect in 2022:

# NLRB Broadens Enforcement

- **A change to the joint employer standard –**
- The rule will likely make it much easier for employers to be classified as joint employers if both employers have the right to direct an employee's working conditions. This rule will dramatically affect any employer that uses staffing companies, including temporary employee services.
- It is expected that the NLRB will move to a standard that does not require the purported joint employer to actually exercise control over employment conditions, as long as it possesses such authority
- Will be much easier to establish joint employer status
- **ACTION ITEMS:** Updated temporary service agreements and other documentation to ensure maximum protection from being stuck with pay and other workplace violations of temp employers and others.

# NLRB Broadens Enforcement

- **Union organizing** – The Board will expand union access to employer property, including the employee email for union solicitation and distribution of organizing materials.
- **Protected Activity** - The NLRA protects "concerted activities" that employees engage in to improve working conditions. New NLRB General Counsel has made clear that she will push for an expansive view of the type of worker conduct protected by the National Labor Relations Act that includes rights to participate in protests and social movements.
- NLRB has filed complaints claiming Whole Foods and Home Depot violated the NLRA by barring employees from wearing Black Lives Matter facemasks and other attire at work. A new era of labor litigation and restrictions on rules that limit employees' ability to express their views at work.

# NLRB Broadens Enforcement

- **Expanding the definition of covered employees** – The NLRB will be looking to expand the NLRA to cover college athletes and workers previously classified as independent contractors. The NLRB will adopt a new standard for determining whether a worker is an independent contractor, and it will make it more difficult for workers to be properly classified as independent contractors.
- **Social Media protections**

# Non-Competes in 2022

- In 2021, President Biden issued an executive order directing the Federal Trade Commission (“FTC”) “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”
- The Biden Administration wants to limit non-compete agreements—especially those it feels are “unfair.” The business community has opposed such drastic measures, and it remains unclear as to how the FTC will respond since this area of the law has traditionally been left up to the states.

# Non-Competes in 2022

- In addition, states have amended their laws in order to protect employees—particularly low-wage earners.
  - For example, Maryland, Virginia, Oregon and Illinois recently amended their non-compete statutes to prohibit non-competes for certain employees earning less than a designated amount. Nevada amended its non-compete law to restrict employers from entering into such agreements with employees who are paid solely on an hourly wage basis, exclusive of any tips or gratuities.
- In the meantime, Congress has been unable to pass legislation restricting the use of non-compete agreements. [The Freedom to Compete Act](#) (the “Act”) could potentially ban the use of non-compete agreements for all employees who are non-exempt under the Fair Labor Standards Act (“FLSA”). However, the Act remains stalled in committee.

# Non-Competes in 2022

- Whether federal action regarding non-compete agreements is forthcoming remains uncertain. However, the state-by-state patchwork of laws limiting the enforceability of non-compete agreements and other restrictive covenants continues to pose potential challenges to employers.
- **ACTION ITEM:** Employers should ensure that their current and future agreements are compliant with relevant state laws. Laws are changing, new court rulings are coming out all the time, and particularly in this era of mobility you need to make sure you stay compliant and updated.

# Wage and Hour Issues in 2022

- Class action claims are increasing
- Most notably in this industry:
  - Off-the-clock claims
  - Automatic deductions for meal and rest breaks where employees are working through the breaks
  - Time clock rounding

# Wage and Hour Issues in 2022

- The DOL has indicated it will issue a new federal regulation transforming the overtime rule in 2022. Under the FLSA, only employees who earn more than \$35,568 (and meet certain job criteria) are exempt from overtime pay. The DOL may not only significantly raise the minimum salary –it could be close to the \$47,000 rate proposed by the Obama DOL or as high as \$82,000 by 2026 – but also include a mechanism calling for automatic updates every one to three years.
- The time is now for you to once again focus on who should and should not be classified as exempt and reevaluate how to compensate non-exempt employees.

# Wage and Hour Issues in 2022

- The DOL announced in early February that it will be hiring dozens of new wage and hour investigators in an effort to target more investigations in 2022. Increases in charges, litigation will follow.
- **ACTION ITEMS:** Tighten policies and procedures to avoid issues and enforce them; management training; and arbitration agreements. Begin auditing your pay practices now to ensure compliance before any outside investigation – or lawsuit – takes place.

# OSHA in 2022

With Covid issues declining, and the vaccine mandate behind us, it is anticipated that OSHA will return to its other workplace areas of focus with a vengeance, in an effort to make up for lost time. One high priority target area is particularly pertinent to the industry is heat:

- OSHA ordered all of its regional offices to step up inspections of facilities for heat-related complaints. They were also instructed to pay attention to hot working conditions this during regular inspections.
- OSHA plans to take the following steps: (1) launch a rulemaking process to develop a workplace heat standard; (2) implement an enforcement mechanism on heat-related hazards using its existing tools; (3) develop a National Emphasis Program on heat inspections; and (4) form a heat work group to engage stakeholders and inform ongoing efforts.

# Service Agreements in 2022

- Considerations include:
  - Assignment/Successors clauses
  - Force Majeure
  - Unilateral Price Increases due to unforeseen circumstances
  - Extending agreement as a result of periods when customer closed or reduced
  - Documenting amendments

# Service Agreements in 2022

- Developments including:
  - Default penalties
    - Customer contracts
    - Non-competition and restrictive covenant agreements
    - Labor Agreements
  - Force Majeure
    - Flowing both ways

# Thank You

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