Developments in Labor and Employment Law in the United States

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The legal news in the United States in recent months has been marked by two Supreme Court cases (I), union election petitions filed with the National Labor Relations Board (II), and the passage of new state laws (III).

I - UNITED STATES SUPREME COURT

During its past term, the US Supreme Court swung sharply to the political right as major cases were decided by a 6-3 vote, with the six conservative justices in control - including the three Supreme Court justices appointed under the Trump Administration. Some of the decisions directly affect the workplace, while others have important implications for labor and employment-related issues.

Two related cases, decided in January 2022, concern vaccine mandates issued by federal government agencies and have a direct impact on workplace health and safety. In the first case¹, in a 6-3 decision, the US Supreme Court blocked enforcement of the Occupational Safety and Health Administration's (OSHA) emergency regulation mandating that employers with 100 or more employees require that their workers are fully vaccinated against Covid-19, or undergo weekly testing and wear a face covering at work. In the second case², in a 5-4 decision, the Court upheld the Department of Health and Human Services (HHS) vaccine mandate for all employees at health care facilities that receive federal funding for Medicare funding and Medicaid programs, which provide health insurance for elderly, disabled, and low-income people.

The legal grounds for the different outcomes in these two cases were based on different philosophies about the appropriate scope of federal agencies' regulatory power. In the first case, the six conservative Justices held that the federal Occupational Safety and Health Act (OSH Act) provided OSHA with the statutory power « to set workplace safety standards, not broad public health measures »³. The Court concluded that the OSHA rules mandating vaccine-or-testing were not

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¹ National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 142 S.Ct. 661 (2022).
³ 142 S.Ct. at 665.
supported by evidence of dangers to safety and health in particular occupations. In their dissenting opinion, the three liberal Justices argued that Congress had delegated regulatory power to OSHA as a federal administrative agency with expertise in workplace health and safety, which OSHA properly exercised to protect employees affected by the national health crisis of the pandemic. In the second case, however, two of the conservative Justices joined the three liberal Justices to uphold the enforcement of the HHS mandate, given the direct relationship between the HHS vaccine mandate and the HHS statutory authority to protect the health and safety of patients. Further, as the HHS vaccine mandate applies to health care workers in facilities receiving federal Medicaid and Medicare funds, the HHS rule can be upheld as an exercise of the government’s power to impose conditions on receipt of federal funds.4

By itself, the Court’s decision in the OSHA case is alarming, given the negative impact on OSHA’s ability to take emergency action to protect worker safety and health during a pandemic. Even more broadly, the Court’s decision reveals the majority’s narrow view of the scope of federal agencies’ regulatory power authorized by Congress to use their expertise in enforcing federal statutes in the public interest. This conservative judicial philosophy came out in full force this past term in the Supreme Court’s 6-3 decision of West Virginia v. EPA5, striking down the Environmental Protection Agency’s (EPA) regulation of carbon dioxide emissions at power plants as part of the efforts to fight global warming. Despite the EPA’s power to regulate under the federal Clean Air Act, the conservative six-justice majority invalidated the EPA’s regulation by creating a «major questions doctrine», under which judges may conclude that a federal agency did not have sufficiently «clear» Congressional authorization to issue a government regulation that is of «vast economic and political significance». This new «major questions doctrine» gives businesses and employees a powerful weapon to file legal challenges against enforcement of federal agency regulations for health, safety, labor, and environmental protections. The Supreme Court’s decision in the EPA case sends the message that such legal challenges may well succeed.

In Dobbs v. Jackson Women’s Health Organization7, the conservative six-Justice majority rejected fifty years of precedent by overruling the 1973 Supreme Court decision in Roe v. Wade, which had held that women have a constitutionally protected fundamental right to obtain an abortion. The Dobbs majority opinion concludes that Roe was incorrect in finding that women’s abortion rights are based in the fundamental constitutional right to privacy, which is part of substantive due process in the Fourteenth Amendment to the US Constitution. As a result of the Dobbs decision, state legislatures may enact restrictions on abortions, which has already occurred in some Republican-controlled states - including laws with complete bans on abortion.

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4 The legal arguments raised in these two Supreme Court cases challenging federal vaccine mandates would not apply to states or cities, which have been found by the courts to exercise broad authority to adopt measures to protect the public health.

5 142 S. Ct. 2587 (2022).

6 Ibid., at 2605.

7 142 S. Ct. 2228 (2022).
and prohibitions on aiding or abetting someone in obtaining an abortion. The ripple effects of Dobbs reach the workplace, as employers consider possible changes to their employee health-care benefits in states that have adopted such laws. Beyond the specific holding of Dobbs, the Court’s reasoning may portend the weakening of other precedents based on the constitutional substantive due process right to privacy, including the rights of sexual intimacy in same-sex relationships, rights of marriage equality, and the right to obtain and use contraceptives. Such drastic changes would reach broadly and, like Dobbs, could open the door to restrictive state legislation with broad consequences, including for employee workplace rights and benefits.

One Supreme Court decision this past term did uphold First Amendment freedom of speech of public employees. It is likely, however, that this outcome in the 6-3 decision is due to the conservative majority’s bias toward the exercise of religion in the public sphere and is part of the conservative majority’s steady erosion of the First Amendment’s separation of church and state. In Kennedy v. Bremerton School District, the Court held that a public high school violated both the First Amendment protections of free speech and free exercise of religion when it did not renew the contract of a high school football coach who engaged in a practice of praying, often with student football players, in the middle of the field immediately after each game. The Court also concluded that the public school’s actions were not necessary to avoid a violation of the First Amendment Establishment Clause, which is the constitutional provision designed to maintain the separation of Church and State.

II - NATIONAL LABOR RELATIONS BOARD

One positive development over the past year has been a significant increase in the rate of unionization. Union election petitions filed with the National Labor Relations Board (NLRB) increased by 57% in the first half of fiscal year 2021 compared to the previous six months. Unions won 641 NLRB-conducted elections in the first half of 2022, which is the highest rate in nearly 20 years. This rise in unionization has occurred largely in the retail sector, including department stores such as sporting goods store REI, Starbucks coffee shops, Apple retail stores, and an Amazon warehouse. Public opinion of unions has increased, as well. A recent
Gallup poll shows that 71% of Americans now approve of labor unions, which Gallup reports as being the highest percentage it has recorded since 1965.\(^\text{15}\)

At the National Labor Relations Board (Board), three of the five Board members are Democratic appointments. The two newest members, appointed under the Biden administration, are former labor union attorneys. Additionally, the Biden-appointed General Counsel of the NLRB has identified issues that she is prioritizing in cases that may come before the current Board. These issues include recent decisions by the Trump-era Board restricting employee rights under the National Labor Relations Act (NLRA)\(^\text{17}\) and overruling earlier Board precedents.

In its August 2022 decision in the *Tesla, Inc.* case\(^\text{18}\), the current Board overruled the *Wal-Mart*\(^\text{19}\) decision from 2019, which had restricted the scope of employees’ NLRA Section 7 rights to communicate by wearing union pins. In *Tesla*, the current Board reaffirmed the traditional legal test that requires employers to prove «special circumstances» for restricting employees' Section 7 rights to communicate through wearing message pins or other insignia. The Board held that Tesla violated the NLRA by requiring production employees to wear shirts imprinted with a Tesla logo, as this rule implicitly prohibited employees from wearing any shirt with another logo, including a shirt with a union insignia. The Board found that Tesla had not established that it had special circumstances that made the rule necessary to maintain production or discipline.

On September 6, 2022, the current Board launched the process of replacing a regulation issued by the Board in 2020 under the Trump administration. The 2020 regulation defines a «joint employer» under the NLRA as two employers that «share or codetermine the employees’ essential terms and conditions of employment». This is further defined as meaning that «the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment», including wages, benefits, hours, hiring discharge, discipline, supervision, and direction. These definitions reduce the likelihood of finding joint employer status. The current Board has proposed replacing this with a new regulation that would expand the definition of «joint employer» status. Under the proposed regulation, two or more entities are joint employers if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment, such as wages, scheduling, hiring, discharge, workplace health and safety, and directions.


\(^{16}\) J. A. Abruzzo, General Counsel, *Mandatory Submissions to Advice*, Memorandum GC 21-04, 12 August 2021: https://www.nlrb.gov/es/guidance/memos-research/general-counsel-memos

\(^{17}\) 29 U.S.C. §151 et seq.

\(^{18}\) 370 NLRB No. 131 (2022).

\(^{19}\) Wal-Mart Stores, Inc., 368 NLRB No. 146 (2019).

about the manner, means, or methods of work. Under this proposed regulation, joint employer status may be found where an employer either possesses but does not exercise, or actually exercises direct or indirect control over terms and conditions of employment. This proposed regulation would more accurately reflect the economic circumstances of current employment relationships, including workers employed through temporary agencies and workers employed in franchises.

If the proposed regulation is formally adopted by the Board after a period for submission and consideration of public comments, its application could have a significant impact on industries that rely on franchises, as in the fast food industry. Given the level of direct or indirect control that large franchisor corporations like McDonald's exercise or reserve authority to exercise over the means for carrying out the work and other working conditions in their franchisees, unions may be able to prove joint employer status. This would mean that McDonald's corporation would be a joint employer for purposes of collective bargaining and would be liable for unfair labor practices of the franchisee.

III - STATE LAWS

A new state law in California will amplify employee voices in the fast food industry on a state-wide basis. The Fast Food Accountability and Standards Recovery Act, the first of its kind in the US, will establish a 10-member council of fast food workers, employers and state representatives to consult on industry-wide workplace standards for fast food restaurants, including wages, maximum work hours, and health and safety standards. The law was passed despite strong opposition by large corporations in the fast food industry. The final version of the statute, however, reflects concessions gained by industry opponents. The council can be set up only after at least 10,000 fast food employees sign a supporting petition. The law applies only to fast food restaurants that are part of a chain with 100 or more locations in the US. Further, the final version of the law eliminates a provision that would have made franchisors like McDonald's jointly liable for franchisees' violations of labor laws.

Even with its flaws, this new law is a significant step towards setting industry-based sectoral standards of working conditions through a state-wide council that includes worker participation. This can improve wages and working conditions and can build solidarity as a foundation for future collective action, including unionization.

Another development at the state and local levels takes aim at wage disparities based on gender and race. Several states or cities have enacted or are on the verge of adopting salary disclosure laws, which require employers to include a

salary amount or range in advertising job positions. Such legal requirements for disclosure of salary information will assist current employees and job applicants in salary negotiations. Further, transparency requirements provide an incentive for employers to create wage structures that are consistent, non-discriminatory, and based on legitimate business-related considerations.

Other state laws have been enacted that prohibit employers from requiring job applicants to disclose information about their previous salary history, as these will often reflect gender or race-based disparities. Prohibiting prospective employers from requiring applicants to disclose their prior salary history will prevent the employer from using such information to start negotiations at a lower salary offer that reflects gender or race-based wage inequalities.

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