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Employment Law Happenings Having Nothing to Do with COVID-19!

Presenters

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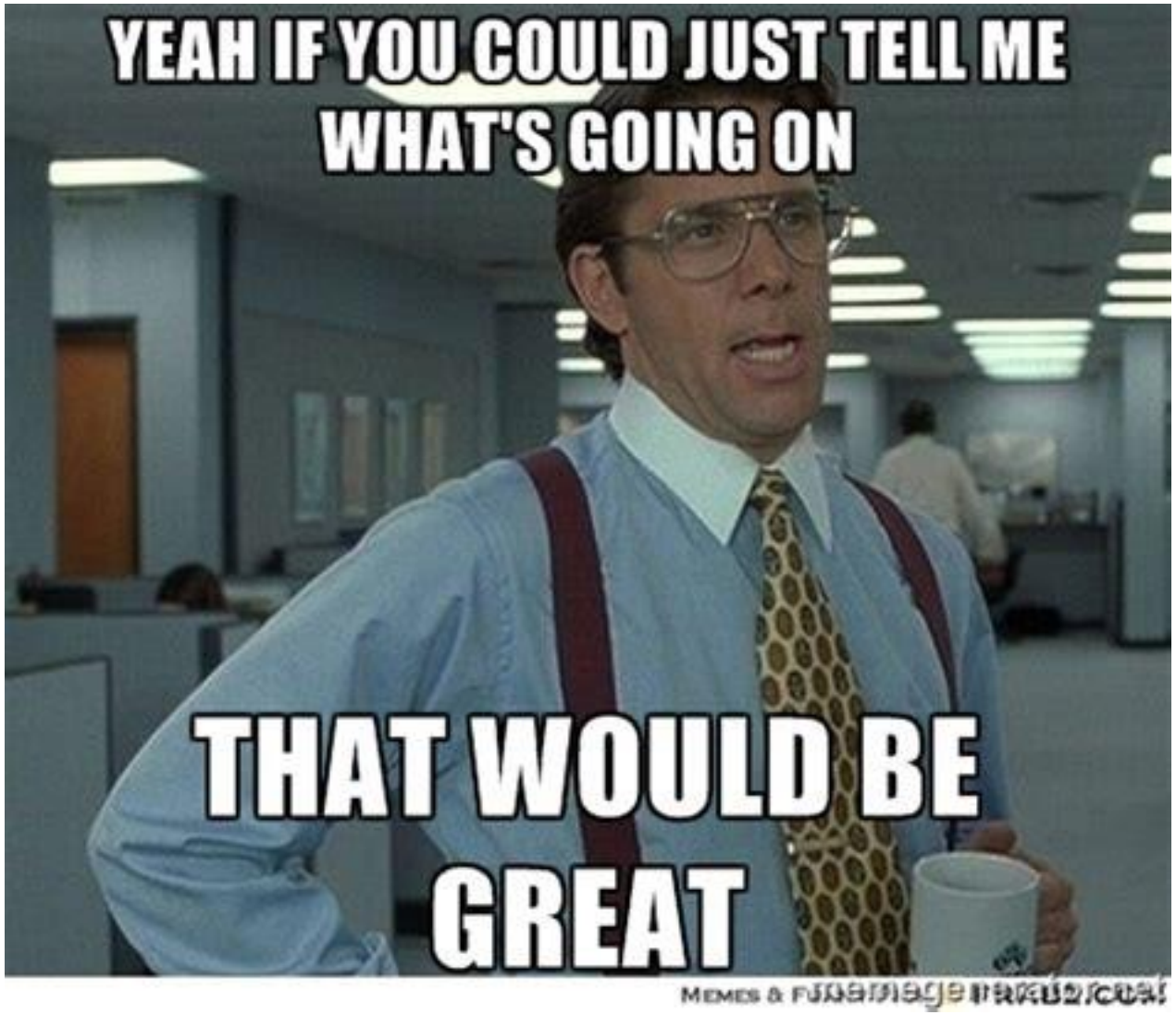
What's Going On Post-COVID-19



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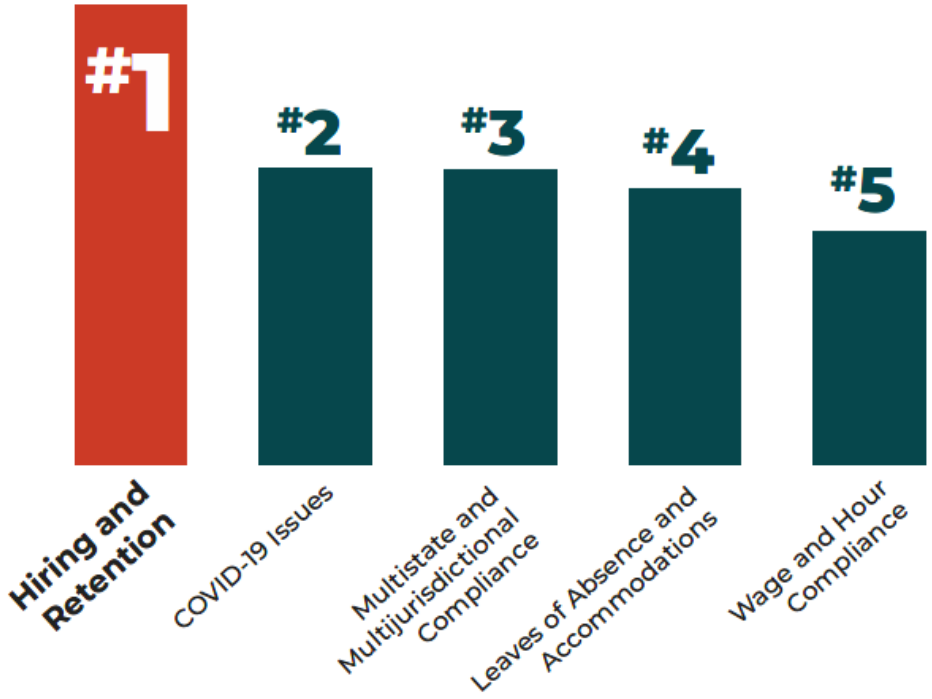
Ogletree's Annual Benchmark Survey

Hiring and Retention is the Top Challenge

Most challenging issues, ranked from 1 (most challenging) to 5 (least challenging)



71%

of respondents consider **hiring and retention** to be their most challenging issue currently.

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Hiring Challenges & Responses

20.5%
of companies have **eliminated COVID-19 vaccination requirements.**

17.2%
of companies have **eliminated or relaxed background check requirements.**

16.8%
of companies have **relaxed educational requirements.**

15.8%
of companies have **eliminated pre-employment drug testing.**

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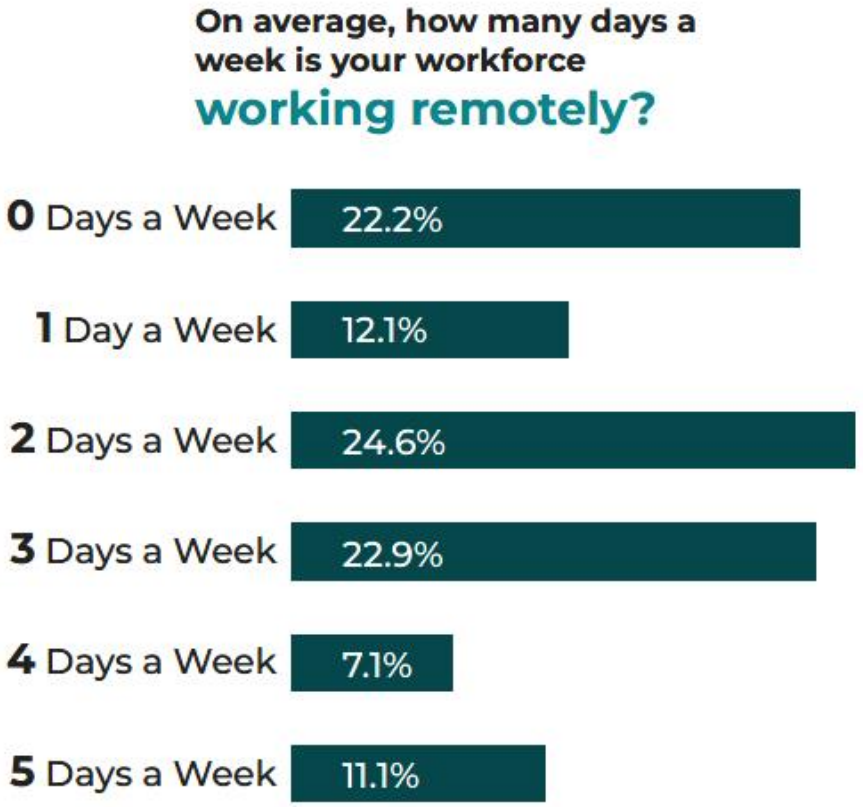
Status of Remote Work



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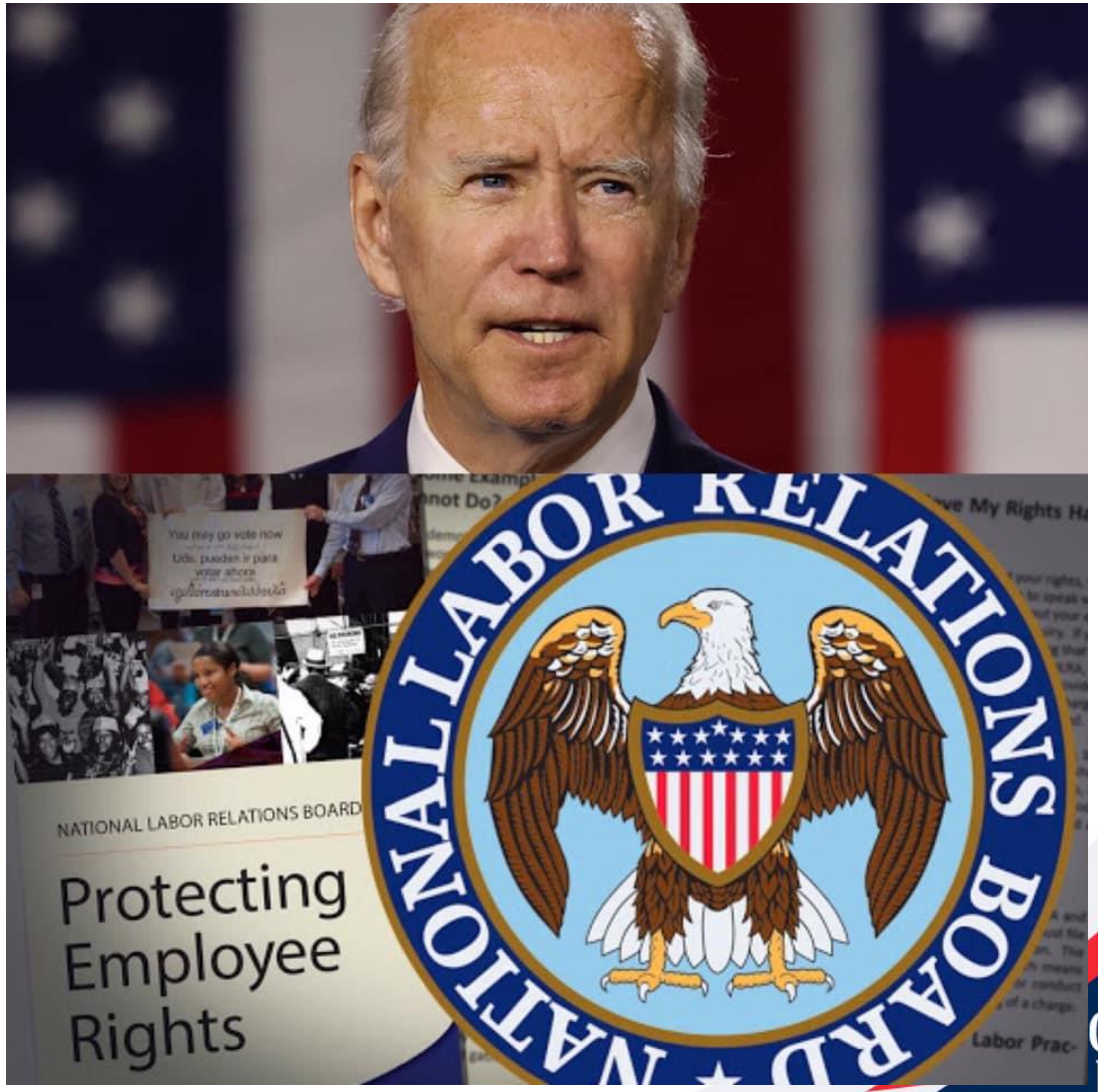
Agency Developments

OSHA®



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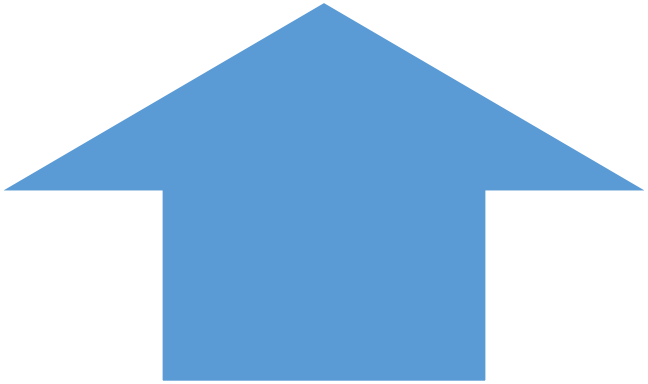
EEOC FY 2021 Statistics

Retaliation remains most frequently filed claim

9.1% decrease in total charges filed



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EEOC FY 2021 Statistics

- 30% of disability charges involved mental health
- 3,631 charges of COVID-19 related claims
- Sexual harassment claims fell to lowest level in 25 years

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Artificial Intelligence & the ADA

5/12/22: EEOC & DOJ issued guidance

- Use of AI & algorithmic decision-making processes to make employment decisions could result in discrimination against those with disabilities
- Ex: may need reasonable accommodation for pre-employment tests, such as extended time or alternate test

"Promising Practices"

- Inform applicants/e'ees steps to evaluative process (use of AI) and provide way to request accommodation
- Use AI designed to be accessible
- Ensure AI only measures abilities/qualifications necessary for job
- Ensure AI doesn't ask questions likely to elicit information about disability, impairments, health

OSHA's Heat Illness Prevention Campaign

4/8/22: new national emphasis program on indoor/outdoor heat-related illness prevention

Programmed inspection when NWS issues heat warning/advisory at high-risk workplaces

Un-programmed inspection if hazardous heat condition recorded in OSHA 300 log or 301 incident report OR if e'ee raises heat-related issue o compliance officer

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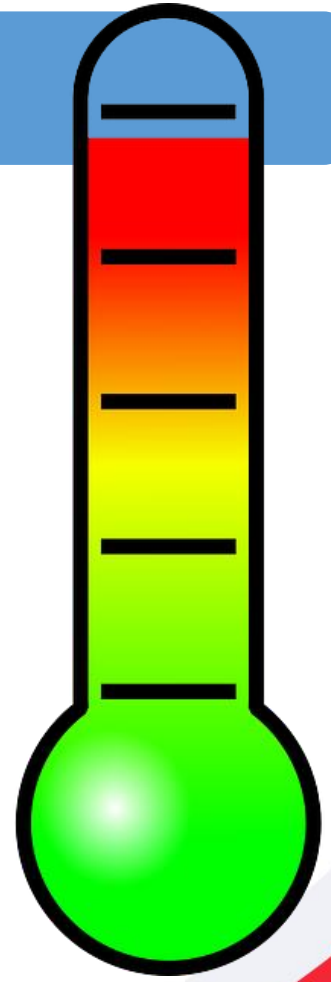
OSHA's Heat Illness Prevention Campaign

Compliance

- Accessible, cool drinking water at all times for free
- Written heat illness and injury programs with training
- Monitoring of ambient temps & work exertion
- Schedule rest & hydration breaks
- Access to shaded areas
- Time for acclimatization of new/returning e'ees
  - 20% normal duration 1st day and gradually increase
- Scheduled job rotations (earlier start times)
- Buddy system on hot days



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Who Can File an Unfair Labor Practice Charge

Federalist Media, LLC v. National Labor Relations Board

- Executive Officer of publisher of *the Federalist* posted a tweet: “First One of You Tries to get Unionized I Swear Will Send You Back to the Salt Mine.”
- A stranger to the situation filed a ULP Charge.
- ULP issued and ALJ determined tweet violated Section 8(a)(1)

Who Can File an ULP Charge

- *The Federalist* appealed and challenged whether "stranger" could file a ULP charge.
- Third Circuit reversed, reasoning no reasonable person would view tweet as threatening or interfering with exercise of rights.
- *BUT, the court recognized that a "Stranger" could file a ULP charge.*

Other NLRB Issues

- Card Check Elections – NLRB General Counsel Has Sought to Overturn Current Rules Regarding Requirement of Election to Establish Representation and Return to *Joy Silk* Doctrine which Compelled Recognition of Union Based Upon Card Check.

- Captive Audience Speeches – NLRB General Counsel Seeks to Limit Employer Activity to Address Employees Regarding Union Representation.

- Non-Union Handbook Review – As Part of a Regulatory Agenda, NLRB General Counsel Seeks to Overturn Decision Providing Reasonable Standards for Employee Conduct Guidelines in handbook.

EFASASHA

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EFASASHA: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Prohibits enforcement of contract provisions that mandate pre-dispute arbitration or waive the right to bring a joint, class, or collective action in cases involving workplace sexual harassment and sexual assault disputes, including claims brought under state antidiscrimination laws.
- This amendment invalidates any current pre-dispute agreement forcing an employee to arbitrate a “case” if it “relates to” a sexual harassment or sexual assault dispute, except as to disputes that have already arisen or accrued prior to enactment of the new federal law.

EFASASHA: What to Do?

- Consider whether to amend arbitration agreement now, or wait to see how amendment plays out in the courts.
- Consider current severability clause and consider including language requiring that exempted claims be severed from other arbitrable claims and stayed pending completion of arbitration on the claims that are subject to arbitration

Noteworthy Cases

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Some Surprising Court Results

Woods v. Cantrell (5th Cir. 3/24/22)

- African-American plaintiff alleged his supervisor called him lazy, using the N-word to punctuate the insult. The Fifth Circuit said the question of a hostile work environment depends on the totality of the circumstances. In this case, **a single use of a highly offensive racial epithet, directed at the plaintiff could support a claim of hostile work environment.**

Yarbrough v. Glow Networks, Inc. (E.D. Tex. 2022)

- Jury returned $70 million verdict in favor of 10 employees in race discrimination case. Compensatory and punitives only. No economic damages.

Age-Related Comments Must Be Specific

Harris v. City of Schertz (5th Cir. 2022)

- Mixed statements regarding reason for termination
- District court found reasons unworthy of credence, but granted summary judgment because "but for" causation not shown.
- Fifth Circuit held that City's belief that Harris was unqualified for growing responsibilities was insufficient evidence to infer City thought Harris was old and slow. Inference would require pure speculation.
- Comments that responsibilities assigned to Harris were too great were not age-specific enough.

Inference of Falsity Not Enough

Owens v. Circassia Pharmaceutical, Inc. (5th Circ. 5/13/2022)

- Evidence of pretext must be of "sufficient nature, extent, and quality" to permit a jury to reasonably infer discrimination
- While plaintiff had provided sufficient evidence for a jury to disbelieve Circassia's explanation for termination, that was not enough.
- Plaintiff's burden to create a fact dispute as to reasonableness that could give rise to inference of *discrimination* – not just an inference that the proffered reason is false.

Religious Discrimination and Accommodating Sabbatarian Practices

Groff v. DeJoy (3d. Cir. May 25, 2022)

- Title VII requires employers to provide a reasonable accommodation to religious practices and observances, unless they constitute an undue hardship on the business operations of the employer.
- USPS created delivery schedule for Sunday delivery which included volunteers and non-volunteers. If no volunteer available, then non-volunteers called to work on Sunday on a rotating basis.

Religious Discrimination and Accommodating Sabbatarian Practices

- Groff asked for an exemption from the Sunday delivery due to Religious Observance of Sabbath. USPS attempted to work with him, including offering to schedule him on Sunday afternoons only so he could attend services and also have volunteers take his shifts.

- Volunteers could not always be found, finding substitutes was time-consuming and increased workload, and Groff's peers resented the additional workload and increased resentment toward management.

- A legally sufficient accommodation must eliminate the conflict between the religious practice and job requirements.

Religious Discrimination and Accommodating Sabbatarian Practices

- Undue hardship includes negative impacts on operations, such as productivity, quality, overtime costs, increased workload, and reduced morale.

- Court Concluded that proposed accommodation of being exempted from Sunday work would cause an undue hardship under the law.

- Employer provided proof of the impact of the forced rotation schedules on morale and associated costs.

Religious Discrimination and Accommodating Sabbatarian Practices

Key in Religious Accommodation Cases

Always offer some accommodation, if possible.

Collect evidence of more than *de minimus* costs, both in terms of actual monetary costs as well as impact on operations/morale.

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Texas Supreme Court Clarifies When Employees Due Commission

Perthius v. Baylor Miraca Genetics Laboratory, LLC (May 20, 2022)

- Employee to get commissions on 3.5% of net sales
- Employee negotiates large deal
- Employee fired 1 day before deal finalized
- Company refuses to pay commissions to employee

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Texas Supreme Court Clarifies When Employees Due Commission

- Court adopted “Procuring Cause” standard where commission arrangement is silent as to when commissions to be paid.

- “Procuring Cause” = Both Proximate and But For Cause of Sale.

- Any commission arrangement should spell out clearly when commissions will be earned and paid.

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Discouraging FMLA Leave Violates Law

Ziccarelli v. Thomas Dart, (7th Cir. June 1, 2022)

- Individual employee sought to use remaining balance of FMLA leave to attend a treatment program
- Claimed HR Rep told him he could not take any more time off and that he would be disciplined if he tried to use any more FMLA hours. Employee was unaware that they had additional FMLA hours at the time.
- Court ruled that this discouragement constituted interference with right to take FMLA leave, even though no actual denial of request to take FMLA leave

Texas Gun Law Reminder

- Firearm Carry Act 2021 (effective 9/1/2021) allows individuals 21 years or older to possess and carry handgun in public without a permit or license.

- Business owners still have the right to ban members of the public from bringing firearms into their places of business with appropriate oral or written notice.

- Employers may prohibit their employees from possessing firearms on their premises, but premises does not include parking areas.

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Restrictive Covenent/Anti-Trust Criminal Prosecutions

- Increased non-compete litigation in state courts
  - Historically, tight labor market generally associated with increased non-compete litigation
  - If hiring employee from other business, always verify existence of non-compete/non-solicitation/non-poaching agreements and require that employee not share any confidential information

- DOJ prosecution of No-Poach cases
  - DOJ anti-trust division filed and tried two criminal prosecutions against companies for no-poach agreements
  - North Texas jury acquits owner of orchestrating wage fixing scheme
  - Colorado jury acquits DaVita of no poaching agreement

- DOJ non-repentant and vows to continue filing cases

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Miscellaneous Labor and Employment Observations

- Senate rejects Biden's appointee David Weil for Wage & Hour Administrator
- DOL regulatory agenda targets April 2022 to publish proposed revisions to white-collar exemption regulations
- Likely passage of Pregnant Workers Fairness Act
- Proposed ERISA amendments – Will bar arbitration and prohibit discretionary review of administrative decision by court and require *de novo* review

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