EMPLOYMENT LAW UPDATE

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Jay has been Board Certified in Labor and Employment Law since 1998. He has tried dozens of jury trials and arbitrations and has litigated hundreds of cases, including claims of age, disability, gender, race and religious discrimination; sexual harassment matters; wage and hour/overtime disputes; breach of contract cases; occupational health and safety issues; and retaliation and whistleblower suits. He has also defended employers against dozens of civil rights claims, including due process, equal protection, false arrest, excessive force and First Amendment lawsuits. In addition, Jay has defended numerous religious organizations against sexual abuse claims. He has also litigated dozens of covenant non-compete cases.

On the administrative side of his practice, Jay represents employers before federal, state and regional government agencies, including the Occupational Safety and Health Administration, the Department of Labor, the Equal Employment Opportunity Commission, the Texas Department of Insurance Division of Workers' Compensation and the Texas Workforce Commission.

Jay's honors and memberships include the following:

- BEST LAWYERS IN AMERICA, Houston Lawyer of the Year, Litigation – Labor and Employment, 2020
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- CHAMBERS USA, Chambers & Partners, Texas Labor & Employment, 2015-2021
- TEXAS MONTHLY, Texas Super Lawyer, 2005-2021
- LAWDRAGON, 500 Leading U.S. Corporate Employment Attorneys, 2021 (named one of the top 175 Corporate Labor & Employment Litigators in America)
- MARTINDALE-HUBBELL, AV Preeminent Rating, 2003-2021
- Life Fellow, Texas Bar Foundation
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Jay has served as Chairman and Commissioner for the Harris County Sheriff's Office Civil Service Commission and has also served as an Instructor on civil rights law at the Harris County Sheriff's Department Academy.

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EMPLOYMENT LAW UPDATE

1. UNITED STATES SUPREME COURT OPINIONS

A. Religious Discrimination

Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ___ , 140 S. Ct. 2049 (2020). Two elementary school teachers at Roman Catholic schools in Los Angeles sued claiming discrimination. One claimed her contract was not renewed because of her age and the second contended she was terminated because she requested a leave of absence to obtain breast cancer treatment. The trial court granted summary judgment to the defendants based on the ministerial exception established by the Supreme Court's *Hosanna-Tabor* case. The First Amendment protects the right of religious institutions to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." The Ninth Circuit reversed the summary judgment, concluding that the ministerial exception was not applicable to the teachers because they did not have the title of minister nor were their functions primarily religious. In a 7-2 opinion, the Supreme Court reversed. The Court noted the two teachers worked under agreements that set out the schools' mission to develop and promote a Catholic School faith community; imposed commitments regarding religious instruction, worship and personal modeling of the faith; and explained that teacher performance would be reviewed on those bases. The Court also emphasized that each of the teachers taught religion in the classroom, worshiped with their students, prayed with students and had their performance measured on religious bases. The Supreme held that the 9th Circuit mistakenly treated the ministerial exception factors identified in the *Hosanna-Tabor* case as a checklist and in doing so erred in suggesting that an employee can never come within the ministerial exception unless they are a practicing member of the religion. The Supreme Court held that the ministerial exception under the First Amendment precluded the teachers' discrimination claims. The fact they were not ministers did not control. What matters most, the Court concluded, is "what an employee does." The opinion added, "Courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions. Justices Ginsburg and Sotomayor dissented.

B. Sexual Orientation and Gender Identity Discrimination

Bostock v. Clayton County, Georgia, 590 U.S. ___, 140 S. Ct. 1731 (2020). In a 6-3 opinion, the Court ruled in three consolidated cases that discrimination against homosexual or transgender employees is barred because it constitutes sex discrimination under Title VII. In the first case, Clinton County, Georgia fired a male employee for "conduct unbecoming" a county employee shortly after he participated in a gay recreational softball league. In the second case, a private company fired a man days after he mentioned he was gay. In the third case, a funeral home fired a person who presented as male when hired but later said they planned to live and work full time as a woman. The Eleventh Circuit had concluded Title VII does not prohibit employers from firing employees because they are homosexual. The Second and Sixth Circuits had reached the opposition conclusion.

The Supreme Court noted that Title VII prohibits discrimination where the protected status is a "but for" cause. A defendant cannot avoid liability under the statute by simply citing some other factor that contributed to the challenged employment action. The Court observed that Title VII's repeated use of the term "individual" means that the focus is on a particular person as opposed to a class of persons. Hence, an employer violates Title VII if it intentionally fires an individual employee based in part on sex. According to the Court, it makes no difference if other factors besides the plaintiff's sex contributed to the decision. The Court held that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. The Court reasoned that when an employer discriminates against homosexual or transgender employees, the employer inescapably intends to rely on sex.

The Court pointed to three decisions that it concluded confirmed what the plain language of Title VII suggests. In the first case, *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971), a violation was found because the employer refused to hire women with young children despite the fact the employer actually preferred hiring women over men. In the second, *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), an employer that required women to make larger pension fund contributions because women as a class live longer was held to have violated Title VII despite the fact the discrimination was based in part on differences in longevity. In the third case, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1978), a male plaintiff was permitted to proceed with his Title VII sexual harassment claim involving co- workers, despite the fact they were also male.

In *Bostock*, the Court concluded the three cases were instructive. First, one could glean from the opinions that it is irrelevant what an employer might call its discriminatory practices, or how others might label them, or what else might motivate the employer. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against the individual in part because of sex. Second, the plaintiff's sex need not be the

sole or primary cause of the discriminatory practice. The Court stated that it is of no significance if another factor, such as the plaintiff's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role. Third, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. The law prohibits discrimination against individuals. An employer that intentionally fires an individual homosexual or transgender employee, in part because of that individual's sex, violates the law even if the employer is willing to subject all male and female homosexual transgender employees to the same rule.

The employers in each of the three consolidated cases asserted that even the Plaintiffs would likely respond in conversation that they were fired for being gay or transgender rather than because of sex. However, the Court concluded that conversational conventions do not control Title VII's legal analysis. The Court also rejected the employers' notion that homosexuality and transgender status are distinct concepts from sex, and that if Congress wanted to address those matters in Title VII it would have specifically made reference to them. The opinion stated that when Congress chooses not to include any exceptions to a broad rule, courts must apply the broad rule. Finally, the employers contended that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. The majority disagreed, stating that legislative history had no bearing on the issue because no ambiguity existed with respect to Title VII's terms. Justices Alito, Kavanaugh and Thomas dissented.

C. Age Discrimination

Babb v. Wilkie, 589 U.S. ___, 140 S. Ct. 1168 (2020). In an 8-1 opinion, the Court noted that the statute governing federal employees states that all personnel actions must be free of age discrimination. Age cannot be a factor and all personnel actions must be untainted by any consideration of age. But the statute also states that in order to obtain reinstatement, damages, or other relief, the employee must show that the personnel action would have been different if age had not been taken into account. The Court held that this showing requires "but for" proof. However, if age discrimination played a lesser part in the personnel decision, other remedies may be appropriate. Justice Thomas dissented.

Mount Lemmon Fire Dist. v. Guido, 586 U.S. ___, 139 S. Ct. 22 (2018). In *Mount Lemmon*, the Court held that the Age Discrimination in Employment Act applies to state and local governments without regard to whether or not they have 20 employees. The 20-employee requisite applies only to private employers.

D. The Civil Rights Acts of 1866 and 1871

Comcast Corp. v. Nat'l Ass'n of African American Owned Media, 589 U.S. ___, 140 S. Ct. 1009 (2020). An African-American owned television network sued Comcast alleging racial discrimination pursuant to 42 U.S.C. § 1981. According to the Plaintiff, Comcast was discriminatorily refusing to carry its programs. The district court dismissed the complaint, holding the Plaintiff had failed to show that "but for" racial animus, Comcast would have contracted with the Plaintiff. The Ninth Circuit reversed, holding that a plaintiff need only prove facts showing that race played "some role" in the decision-making process. The Supreme Court, in a unanimous opinion, then reversed the Ninth Circuit. The Court rejected the "motivating factor" test and held that in order for a plaintiff to prevail under Section 1981, "but for" causation must be proven at every stage of the lawsuit.

II. FIFTH CIRCUIT OPINIONS

A. Age Discrimination

McMichael v. Transocean Offshore Deepwater Drilling, Inc., 934 F.3d 447 (5th Cir. 2019). Summary judgment for the employer was affirmed in this Age Discrimination in Employment Act case. The Court noted that a plaintiff must establish that age was a "but for" cause of an adverse employment action. Here, the Plaintiff could not do so because two of three decision-makers were in same age class and a number of younger employees were also laid off by the company. The Court also rejected the Plaintiff's contention that an alleged comment about retirement eligibility made by a former manager should preclude summary judgment. Because the manager was not involved in the layoff decision, the purported comment was not relevant.

Salazar v. Lubbock County Hosp. Dist., No. 20-10322 (5th Cir. 2020). The 57-year old Plaintiff worked as a therapist for almost 30 years but was terminated for performance issues. She filed suit alleging age discrimination. She asserted that the real reason she was let go was her age and the District's desire to bring in younger workers whom they could pay less. In support of her claim, she indicated that three other long-term employees in her department, all of whom were more than 60 years old, had been terminated by the same manager in the same year. However, the Fifth Circuit affirmed summary judgment for the Hospital District because Plaintiff had failed to prove that her age was the "but-for" cause of her termination. The Court rejected the Plaintiff's claim that receiving merit increases gave an inference of pretext. The Court stated, "prior good evaluations alone cannot establish that later unsatisfactory

evaluations are pretextual. The Court also rejected the Plaintiff's assertion that the Hospital District's failure to follow its progressive discipline policy showed pretext. The Court said, "Although the District did not follow its progressive discipline policy, it didn't have to. The policy specifically provides for the use of discretion. With respect to the allegation that other older workers had also been terminated, the Court concluded the Plaintiff had failed to adequately corroborate that claim because her testimony alone was insufficient to establish the other employees' ages, whether they were actually terminated and, if so, why they were terminated.

Alaniz v. U.S. Renal Care, No. 19-40043 (5th Cir. 2020). In Alaniz, the Plaintiff was a Licensed Master Social Worker. He alleged he was harassed multiple times because of his age. He reported the conduct to HR and it was investigated by the regional director. The Plaintiff then filed an EEOC Charge. It, too, was investigated by the regional director. In the midst of that investigation, the director informed the Plaintiff he was being fired for forging patient's signature on a document. The Plaintiff protested, indicating that the patient would be in later that day and could attest that the Plaintiff had not forge the signature. The regional director refused to look into the Plaintiff's claim. Later that day, the Plaintiff obtained a letter from the patient's husband saying that it was the husband, rather than the Plaintiff, who had signed the patient's name on the form. Nevertheless, the termination was not reversed and the Plaintiff filed an age discrimination lawsuit. U.S. Renal Care moved for summary judgment contending that it could not be liable for age discrimination because the Plaintiff was replaced by an older employee. The district court granted summary judgment but the Fifth Circuit reversed. The Court pointed to the fact that shortly after the older replacement was hired, a person much younger than the Plaintiff was hired as a replacement. Because there was a material issue of fact as to whether the initial replacement was actually hired in order for the employer to evade liability on an age claim, the Court determined that the issue should be decided by a jury.

B. Retaliation

Brown v. Wal-Mart Stores E., L.P., 969 F.3d 571 (5th Cir. 2020), as revised (Aug. 14, 2020). The Court affirmed summary judgment for the employer in this retaliation lawsuit. The Court noted the Plaintiff had received a final warning for violating multiple work rules. After being issued that warning, Plaintiff accused the store manager of sexually harassing other employees. Following that accusation, Plaintiff then committed another workplace rule violation. The Defendant, Wal-Mart, established that Plaintiff had indeed violated policy and was discharged for that misconduct. The Court recognized that the Plaintiff could prove a prima facie case of discrimination; nevertheless, the Court ruled that a reasonable jury could not conclude that her sexual harassment complaint motivated her termination.

Welsh v. Fort Bend Indep. Sch. Dist., 941 F.3d 818 (5th Cir. 2019). The Plaintiff in Welsh was a long-time teacher in the Fort Bend Independent School District. In fact, she had worked for the District since 1971. She sued after being placed on a series of Performance Improvement Plans, claiming that the plans prohibited her from being eligible for promotions. The Fifth Circuit rejected the Plaintiff's claim that being placed on a performance improvement plan following filing of an EEOC charge was an actionable adverse employment action that could give rise to a claim of retaliation. The Court stated, "Certain of our cases have held that reprimands can constitute adverse employment actions, but mere 'criticism' cannot. Welsh never received a reprimand. Instead, she was placed on a growth plan that sought to improve upon her weaknesses. An employer's decision to place an employee on a performance improvement plan is not an adverse employment action." The Court also concluded that the Plaintiff's retaliation claim failed because she lodged her EEOC Charge in August 2010 and was not placed on a Performance Improvement Plan for another 19 months. The Court said, "There is no causal connection between the [PIP] and Welsh's protected activity. This court has repeatedly held that gaps of 8-10 months between protected activity and alleged adverse employment action break a causal chain."

C. Harassment

Gardner v. CLC of Pascagoula. LLC, 915 F.3d 320 (5th Cir. 2019). In *Gardner*, a nurse in care facility was harassed by a patient. The district court granted summary judgment to the employer but the Fifth Circuit reversed. The Court found there were issues of material fact as to whether the harassment was severe or pervasive and whether the employer knew of the harassment and failed to take appropriate action. Here, the patient was mentally ill and had a reputation for groping female employees. The Fifth Circuit reversed the district court's finding that summary judgment should be granted because it was not clear the harassing comments and attempt to grope were beyond what a nurse should expect of patients in a nursing home. The Fifth Circuit held that while patients with reduced mental capacity will be expected to make inappropriate comments, and those comments would not be sufficiently severe or pervasive to give rise to a sexual harassment claim, the facility was required to take steps to protect its employees from inappropriate physical contact.

D. Charging Parties and Plaintiffs

Simmons v. UBS Fin. Servs., Inc., 972 F.3d 664 (5th Cir. 2020). The Plaintiff worked for a company that sold life insurance products to clients of UBS. He frequently worked out of UBS's offices. The Plaintiff's daughter was a UBS employee. She filed an EEOC Charge alleging pregnancy discrimination. The daughter eventually resigned from UBS and settled her claims. In the following months, the Plaintiff's relationship with UBS deteriorated. UBS barred him from working with its clients and cut off his access to UBS facilities. That effectively ended his ability to succeed at the company he worked for and he resigned. He sued, alleging retaliation. The Fifth Circuit noted that no federal court of appeals has addressed whether non-employees could bring such claims. The Court concluded they cannot. The Court held, "Title VII claims require an employment relationship between plaintiff and defendant. James Simmons essentially asked this court to adopt an exception where a nonemployee (Simmons) is the intentional target of an employer's retaliatory animus against one of its employees (Simmons's daughter). That we cannot do. As a nonemployee, Simmons asserts interests that are not within the zone that Title VII protects. We therefore affirm the dismissal of the complaint for lack of statutory standing." The Court added, "The purpose of Title VII is to protect employees from their employers' unlawful actions. It would be a remarkable extension of Title VII to rule that a nonemployee has the right to sue. The zone of interests that Title VII protects is limited to those in employment relationships with the defendant."

E. EEOC Administrative Process

Texas v. EEOC, 933 F.3d 433 (5th Cir. 2019). The Equal Employment Opportunity Commission has issued a Guidance in which the agency condemns any policy or practice that requires an automatic exclusion from all employment opportunities if someone has been convicted of a crime. Instead, the EEOC indicates employers should focus on the dangers of particular crimes in making employment decisions. Texas, however, has had a long-standing policy that excludes persons with felony convictions from many public jobs. Therefore, the State of Texas sought an injunction against enforcement of the Guidance. The State's request for injunctive relief was granted. The Court held that the EEOC can only issue procedural regulations, and cannot issue binding, substantive guidance. The Court stated, "We agree that the Guidance is a substantive rule subject to the APA's notice-and-comment requirement and that EEOC thus overstepped its statutory authority in issuing the Guidance." As a result, the EEOC and the United States Attorney General were enjoined from enforcing the EEOC's interpretation of the Guidance against the State of Texas.

F. Injunctive and Affirmative Relief

Bogan v. MTD Consumer Grp., Inc., 919 F.3d 332 (5th Cir. 2019). In *Bogan*, the jury found that the Plaintiff had been discriminated against but awarded her only $1.00. The district court then denied reinstatement and front pay, leaving Plaintiff with no real remedy. The Fifth Circuit held the district court's decision that Plaintiff did not mitigate her damages justified the denial of front pay. However, the Court added that reinstatement is a preferred remedy under Title VII and is normally granted if there is no retrospective relief. The Court held that two of the four reasons why the court denied reinstatement were legitimate: (1) the position no longer existed; and (2) the Plaintiff was clearly trying to change careers. However, the third and fourth reasons cited by the district court were erroneous. Here, the jury had rejected the argument that plaintiff would have been terminated in any event in the absence of discrimination. In addition, discord between the parties did not justify denial of reinstatement. The Court recognized that hostility in litigation is almost always present. It added that to deny reinstatement, acrimony between the parties must rise to the level at which the relationship is irreparably damaged. Because the district court did not make that finding, the Court remanded that issue to the trial court for reconsideration.

G. Race Discrimination/Retaliation

Foster v. Ferrellgas, No. 20-50446 (5th Cir. 2020). The Plaintiff, a black female, lost her position in a reduction in force after a little more than a year on the job. According to the Plaintiff, she was told when she was hired that her initial pay would be $50,000 but that amount would jump to $65,000 after 30 days on the job. However, the raise never happened. When she complained, she claimed her manager told her she did not get it because of her race. In addition, she indicated she had to train two white employees who were paid what she would have made had she been given the raise. She then complained again about not receiving the raise. One week later, she was terminated. She then filed a race discrimination and retaliation lawsuit. The Fifth Circuit affirmed summary judgment for Ferrellgas. The Court noted that the Plaintiff failed to provide evidence that the manager -- who had commented about the raise not being given to her because of her race -- was actually the person who made the decision regarding the raise. Because the comment was not linked to a decision maker, it had no probative value. Similarly, the Plaintiff failed to show the actual job duties or backgrounds of the two white employees she referenced. Finally, while the Plaintiff had complained about not getting the raise, she did not complain that the denial was because of her race. As such, she

could not sustain a retaliation claim because she had not engaged in any protected activity. As the Court said, Foster has "presented no evidence that she engaged in protected activity during the relevant meeting with [the two supervisors]. Rather she avers only that she 'asked again about her raise,' without any reference to claims of racially disparate treatment. Thus, the meeting does not qualify as protected activity."

H. Fair Labor Standards Act

Aldridge v. Mississippi Dep't of Corrections, No. 20-60311 (5th Cir. 2021). In Aldridge, the Fifth Circuit was presented with the question of whether the Fair Labor Standards Act preempts redundant state law claims. More than 890 Plaintiffs who were current or former employees of the Mississippi Department of Corrections alleged the Department had failed to properly calculate and dispense wages, including overtime and minimum wage. In addition, the workers pursued various state law tort claims, such as infliction of emotional distress, negligence, gross negligence, conspiracy and conversion. However, all of those claims pertained to their overtime and minimum wage allegations. The district court dismissed the state law claims, finding them to be duplicative of the FLSA claims. The Fifth Circuit affirmed, concluding that the FLSA preempts redundant state law claims for nonpayment of minimum wages and overtime compensation by way of conflict preemption. The Court noted, Employees in this case have a private right of action under the FLSA against employers for unpaid minimum wages and overtime compensation. The rule of state tort law for which employees argue would stand as an obstacle to the accomplishment of the FLSA's objective, namely, protecting workers from overwork and underpayment. In other words, the purposes of the two laws overlap and thus the federal law much control.

III. TEXAS STATE COURT OPINIONS

A. Texas Supreme Court

Texas Tech Univ.-El Paso v. Flores, 612 S.W.3d 299 (Tex. 2020). In Flores, the Plaintiff alleged age discrimination. She contended she was replaced by someone younger than her and the employer countered that she was not replaced because the position was eliminated, a new position was created, and that position had different duties than the previous one. The Supreme Court held that an employee is replaced if the alleged replacement's duties are so similar to the previous duties that a reasonable juror could conclude the employer put a replacement in the former position. Here, the new position's tasks were not as broad as the prior, nor did the position have the same level of authority. Therefore, the Plaintiff could not establish a prima facie case because she did not demonstrate she had been replaced. The Court concluded a plaintiff must prove that they were replaced by someone significantly younger or were otherwise treated less favorably than other similarly situated employees. The Court noted, "In the absence of evidence from which a reasonable juror could conclude that the new assistant took or was placed in [Plaintiff's] job or position, [Plaintiff] cannot sustain a prima facie true replacement case." The Court added that Plaintiffs cannot make out a prima facie case by merely relying on evidence that they were "otherwise discharged because of [their] age."

B. Texas Court of Appeals

Fort Bend Indep. Sch. Dist. v. Moore, No. 14-18-01041-CV, 2020 Tex. App. LEXIS 10430 (Tex. App. Houston 2020). The Plaintiff schoolteacher was accused of inappropriately touching a student and was fired. He filed suit, alleging sex discrimination. In particular, he pointed to a female teacher who was accused of scratching a student but was not terminated. The Court of Appeals concluded that for the Plaintiff to establish a prima facie case, he had to show a comparator who was treated more favorably than him. The Court held that summary judgment was appropriate because the Plaintiff could not meet the "pretext plus" standard, which required him to prove both that the Defendant's reasons for termination were pretext and that discrimination was the real reason for the adverse employment action.

IV. STATE LAW

A. Texas Labor Code § 21.141

Title VII of the Civil Rights Action of 1964 and Chapter 21 of the Texas Labor Code have always required that only "employers" (not individuals) can be liable for claims of discrimination, harassment and retaliation and those "employers" must employ 15 or more persons. However, effective September 1, 2021, both of those prerequisites will dramatically shift in Texas sexual harassment cases.

On May 30, 2021, Governor Abbott signed Senate Bill 45. The legislation creates Section 21.141 of the Texas Labor code, which defines an "employer" as "a person who: (A) employs one or more employees; or (B) acts directly in the interests of an employer in relation to an employee." As a result of this definition, supervisors, co-workers and other individuals associated with employers are subject to liability for sexual harassment.

Furthermore, Section 21.141 creates a heightened standard for employer responses to sexual harassment. The Section states that an "unlawful employment practice" occurs if an employee is sexually harassed "and the employer

or employer's agents or supervisors: (1) know or should have known that the conduct constituting harassment was occurring; and (2) fail to take immediate and appropriate corrective action." The requirement that remedial measures be taken "immediately" is one that did not exist in the law prior to the passage of Senate Bill 45.

Also, on June 9, 2021, Governor Abbott signed House Bill 21, which amends Section 21.201(g) of the Texas Labor Code. Effective September 1, 2021, the section will expand the 180-day limitations period for filing a sexual harassment charge to 300 days.

V. COVID-19 WORKPLACE ISSUES

As a result of the pandemic, numerous governmental agencies have issued Guidances pertaining to the workplace. They include the Occupational Health and Safety Administration ("OSHA"), the Equal Employment Opportunity Commission ("EEOC") and the Centers for Disease Control and Prevention ("CDC"). Those documents are described below:

A. OSHA

Since the onset of COVID-19 in the United States, OSHA has issued three Guidances. On May 11, 2020, the agency distributed its *Guidance on Preparing Workplaces for COVID-19*; on June 18, 2020, a *Guidance on Returning to Work* was published; and on January 29, 2021, a *Guidance on Mitigating and Preventing the Spread of Covid-19 in the Workplace* was issued.

The key element of the May 11, 2020 Guidance is the agency's announcement of "steps all employers can take to reduce workers' risk of exposure." They include:

- Promoting handwashing by providing everyone a place to wash hands and providing alcohol-based hand rub materials in conspicuous places
- Providing everyone tissues and receptacles
- Providing no-touch trash cans
- Providing disposable towels to clean work surfaces
- Implementing heightened housekeeping practices using EPA-approved disinfectants
- Encouraging employees to self-monitor
- If someone exhibits symptoms, immediately isolating them until they can be removed
- Encouraging sick employees to stay home

And where feasible…

- Installing high efficiency air filters
- Increasing ventilation rates in work areas
- Installing physical barriers, such as plastic sneeze guards
- Replacing face-to-face meetings with virtual communications
- Discontinuing non-essential travel
- Training employees on how to wear protective equipment

B. EEOC

On December 16, 2020, the EEOC issued a document entitled *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.* It consists of 73 Technical Assistance Questions and Answers in the following categories:

- Disability-related Inquiries and Medical Exams
- Confidentiality of Medical Information
- Hiring and Onboarding
- Reasonable Accommodation
- Pandemic-Related Harassment Due to National Origin
- Furloughs and Layoffs
- Return to Work
- Age Discrimination
- Caregivers/Family Responsibilities
- Pregnancy Discrimination

- Vaccinations

In each of the categories, the agency provides scenarios in the workplace and then advises employers what they can and cannot do in those situations. The following such scenarios are likely ones you or your clients may encounter:

- May employers require stickers, pins, badges or other forms of identification for vaccinated employees in the workplace? Maybe. *A variety of federal, state and local laws obligate employers to maintain the confidentiality of medical information. As to the ADA, the EEOC has said that asking or requiring an employee to show proof of vaccination is not a disability-related inquiry; however, employers should not ask follow-up questions, such as why the individual did not receive a vaccination, as that question may elicit information about a disability and would be subject to the ADA standard that an inquiry be "job-related and consistent with business necessity."*
- May employers mandate COVID-19 vaccines? Maybe. *The EEOC typically permits employers to mandate "ordinary" vaccines, subject to limitations due to certain medical conditions and firmly-held religious beliefs. In December 2020, the EEOC Guidance implied employers could mandate COVID-19 vaccines. However, the current vaccines are available not through the FDA's formal approval process but through an "emergency use authorization process. The EEOC Guidance sidestepped the issue of whether employers may mandate vaccines authorized under an EUA, versus those approved by the FDA via a formal process.*
- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the pandemic? *The EEOC says that "during a pandemic, employers may ask such employees if they are experiencing symptoms of the pandemic virus, but must maintain all information about employee illness as a confidential medical record in compliance with the ADA."*
- When may an ADA-covered employer take the body temperature of employees during the pandemic? *EEOC: "Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature."*
- When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? Yes. *EEOC: Such inquiries are permitted under the ADA because they would not be disability-related or, of the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees."*
- May an employer administer a COVID-19 test when evaluating an employee's initial or continued presence in the workplace? Yes. *EEOC: "The ADA requires that any mandatory medical test of employees be job related and consistent with business necessity. Applying this standard to the current circumstances of the COIVD-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others."*
- May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? Yes. *EEOC: "Employers may ask all employees who will be physically entering the workplace if they have been tested for COVID-19. An employer may exclude those with COVID-19, or symptoms associated with COVID-19 (fever, chills, cough and shortness of breath), because their presence would pose a direct threat to the health or safety of others."*
- May employers ask an employee physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? No. *EEOC: "The Genetic Information Nondiscirmination Act (GINA) prohibits employers from asking employees medical questions about family members."*
- What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *EEOC: "Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19."*
- May an employer ask an employee why he or she has been absent from work? Yes. *EEOC: "Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work."*
- May an employer disclose the name of an employee to a public health agency when it learns the employee has COVID-19? Yes.
- If an employer is hiring, may it screen applicants for symptoms of COVID-19? Yes. *EEOC: "An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does to for all*

entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability."

- May an employer postpone the start date or withdraw a job offer to an applicant who is more than 65 years of age or pregnant, or order them to stay away from a worksite, because their age or pregnancy places them at higher risk from COVID-19? No. *EEOC: "The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date."*
- May an employer invite employees now to ask for reasonable accommodations they may need in the future when they return to work? Yes. *EEOC: "Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. If advance requests are received, employers may begin the 'interactive process' – the discussion between the employer and employee focused on whether the impairment is a disability and reasons that an accommodation is needed."*
- Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at a higher risk of severe illness from COVID-19 due to an underlying medical condition? No. *EEOC: "Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate and employee without a disability based on the disability-related needs of a family member or other person with whom she is associated."*
- Are there steps an employer should take to address possible harassment and discrimination against co-workers when it re-opens the workplace? Yes. *EEOC: "An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age, disability or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action."*

C. CDC

The CDC has issued three Guidances related to the workplace – its December 31, 2020 *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19),* a May 5, 2021 *Guidance for Unvaccinated People Returning to Work,* and a May 13, 2021 Revised "*Interim Public Health Recommendations for Fully Vaccinated People*."

The key takeaways from the *Interim Public Health Recommendations for Fully Vaccinated People* are that:

- "[f]ully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance."
- In general, a person is considered fully vaccinated two weeks after the second dose in a two-dose series vaccine or two weeks after the first dose of a single-dose vaccine, and
- Fully vaccinated people can refrain from testing following a known exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter