# Quarterly Review

Volume 17 Issue No. 1 Winter 2022

## Ohio Association *of* Civil Trial Attorneys

**A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...**

## Contents



OACTA
Ohio Association of Civil Trial Attorneys
*The Source for Defense Success*

OACTA
OHIO ASSOCIATION of CIVIL TRIAL ATTORNEYS
*The Source for Defense Success*

# 2022 Officers

**President**
**Benjamin C, Sassé**
Tucker Ellis LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
(216) 696-3213
bsasse@tuckerellis.com

**Vice President**
**David W. Orlandini**
Collins, Roche, Utley & Garner, LLC
655 Metro Place S., Suite 200
Dublin, Ohio, 43017
(614) 901-9600
dorlandini@cruglaw.com

**Treasurer**
**Paul W. McCartney**
Bonezzi Switzer Polito & Hupp Co. L.P.A.
312 Walnut Street, Suite 2530
Cincinnati, OH 45202-9914
(513) 345-5501
pmccartney@bsphlaw.com

**Secretary**
**Elizabeth T. Smith**
Vorys Sater Seymour & Pease
52 E. Gay Street
Columbus, OH 43215
(614) 464-5443
etsmith@vorys.com

**Immediate Past President**
**Natalie M. E. Wais**
Young & Alexander Co., L.P.A.
One Sheakley Way, Suite 125
Cincinnati, OH 45246
(513) 326-5555
nwais@yandalaw.com

# 2022 Board of Trustees

**Anthony E. Brown**
Milligan Pusateri Co., LPA
4684 Douglas Cir. NW
Canton, OH 44718
(330) 526-0770
tbrown@milliganpusateri.com

**Steven G. Carlino**
Weston Hurd LLP
10 W. Broad St., Suite 2400
Columbus, OH 43215
(614) 280-0200
scarlino@westonhurd.com

**Gregory Farkas**
Frantz Ward LLP
200 Pubic Square, Suite 3000
Cleveland, OH 44114
(216) 515-1628
gfarkas@frantzward.com

**Timothy J. Fitzgerald**
Koehler Fitzgerald LLC
1111 Superior Ave., E., Suite 2500
Cleveland, OH 44114
(216) 539-9370
tfitzgerald@koehler.law

**Thomas F. Glassman**
Bonezzi Switzer Polito & Hupp Co. LPA
312 Walnut Street, Suite 2530
Cincinnati, OH 45202
(513) 345-5502
tglassman@bsphlaw.com

**Stu Harris**
Nationwide Insurance
One Nationwide Plaza, 35th Flr.
Columbus, OH 43215
(614( 249-4700
harris44@nationwide.com

**Brigid E. Heid**
Eastman & Smith Ltd.
100 East Broad Street; Suite 2100
Columbus, Ohio 43215
(614) 564-1473
Bheid@EastmanSmith.com

**Melanie Irvin**
Branch
875 N. High St.
Columbus, OH 43215
(440 590-0536
melanie@ourbranch.com

**Jill K. Mercer** - DRI State Representative
Nationwide Insurance
One Nationwide Plaza, 1-30-302
Columbus, OH 43215
(614) 677-7924
mercerj3@nationwide.com

**Nicole A. Mitchell**
Freund, Freeze & Arnold
8899 Brookside Ave., Suite 203
West Chester, OH 45069-4992
(513) 587-3917
nmitchell@ffalaw.com

**Michael M. Neltner**
Staff Counsel for the Cincinnati Insurance Company
6200 South Gilmore Rd.
Cincinnati, OH 45014
(513) 603-5082
michael_neltner@staffdefense.com

**Daniel A. Richards**
Weston Hurd LLP
1300 East 9th Street, Suite 1400
Cleveland, OH 44114-1862
(216) 687-3256
drichards@westonhurd.com

---

**EXECUTIVE DIRECTOR**
**Debbie Nunner, CAE**
OACTA
400 W. Wilson Bridge Road
Worthington, OH 43085
(614) 228-4710- Direct
(614) 221-5720
debbie@assnoffices.com

**EXECUTIVE ASSISTANT**
**Brooke Hill**
OACTA
400 W. Wilson Bridge Rd., Suite 120
Worthington, OH 43085
(614) 228-4727; Fax (614) 221-1989
brooke@assnoffices.com

# President's Note

**Benjamin C. Sassé, Esq.**
Tucker Ellis, LLP

Turning the page to March, I'm reminded of the proverb: "No matter how long the winter, spring is sure to follow." For two years, the first President's Note focused on ways OACTA promoted fairness, excellence, and integrity in the civil justice system in a virtual world while we waited for the COVID-19 threat to recede. This year, as companies and law firms roll out return-to-office plans and mask mandates wane, we look forward to a full schedule of in-person events, while continuing to provide online education and engagement.

Besides in-person and virtual events, OACTA advances its mission with scholarly articles for the bench and bar in the Quarterly Review. This issue, compiled by OACTA's Employment Law Committee, gives important updates on legal trends and recent state legislation, helpful suggestions from a judge on how to move your cases forward, and timely advice on lingering pandemic-related topics. I want to thank committee Chair Brigid Heid and her Vice-Chair, Doug Holthus, for taking the laboring oar in putting this issue together. Please enjoy the collection of excellent articles. I guarantee you'll learn something.

Also, be on the lookout for emails announcing coffee chats (our informal Zoom meeting series) and webinars, as well as the return of the in-person Young Lawyer Happy Hour series. And please mark your calendars for these in-person events:

- Insurance Coverage Seminar – this year's seminar by the Insurance Coverage Committee will be held at Grange Insurance on May 6. The speakers at the Insurance Coverage seminar are always top-notch and this year will be no different.
- Women in the Law Regional Summit – this summit, two years in the making and hosted by OACTA, the Defense Trial Counsel of Indiana, and Kentucky Defense Counsel, will take place on June 9-10 in Cincinnati, Ohio.
- Personal Injury Seminar – plans for a seminar hosted by the Personal Injury Defense Committee are still being finalized. We anticipate a date in June or July.
- Annual Meeting – this year's annual meeting will be held November 9-10 in Cleveland. More information to follow.

If you have yet not done so, please take a moment to renew your membership. My fellow officers – David Orlandini (Vice President), Paul McCartney (Treasurer), and Elizabeth Smith (Secretary) – and I look forward to serving you over the coming year. And we're open to any suggestions you may have. Send an email, call, or pull us aside at a seminar. Let us know how we can make the organization even better, and enjoy the opportunity to form new relationships and strengthen old bonds.

We hope to see you soon.

# Introduction

## Employment Law Committee

**Brigid E. Heid, Esq., Committee Chair**
Eastman & Smith, Ltd.

It goes without saying that the COVID-19 pandemic has irrefutably altered the practice of law. As Chair of OACTA's Employment Law Committee, I am especially pleased to present this compilation of articles by attorneys and one self-described "new-ish" judge who bring their perspective on significant legal developments of the past two years, and without whom this issue would not have been possible. I thank you all! To you, our members and readers, I trust you will find this issue to be as informative, enlightening, and thought-provoking as I have.

The first article explains the nationwide legal trends adversely affecting the enforceability of non-competition agreements (NCAs), written in collaboration by **myself, Barry Fissel** and **Jacob Kinder**. We summarize new and proposed legislation, offer practical takeaways for employers, and close with Barry's thoughts on potential consequences of these disturbing trends.

A special thanks is owed to my friend and former colleague, **Judge Carl Aveni**, who shares his observations during his first year on the bench as a common pleas court judge. Judge Aveni was a business attorney and commercial litigator for 24 years, and we would all do well to heed his recommendations!

**Doug Holthus**, Vice Chair of the Employment Law Committee, apprises us on the EEOC's views that COVID-19 can be a disability and updates us on vaccine mandates (at least as of the time of his submission). **Ian Mitchell,** an active OACTA member, further expands on the likely treatment of long COVID as a disability and discusses the implication for employers.

**Shafiyal Ahmed**, a new member of OACTA and my committee, successfully summarizes Ohio's Employment Law Uniformity Act, effective January 12, 2021 (the "ELUA"). The ELUA substantially alters how employment law claims are litigated in Ohio and is a must-read for any Ohio employment lawyer.

The last three articles are presented by some of my other Eastman & Smith colleagues. **Mark Shaw, Melissa Ebel** and **Jacob Kinder** recap changes to Ohio's workers' compensation statute. **Emilie Vassar** ruminates on concerns for employers who permit workers to telecommute (a.k.a. work remotely) and the unique challenges presented by out-of-state workers (also mentioned in the NCA takeaways). **Anne Schmidlin** and **Jacob** ("Over-achieving") **Kinder**, close with an article on notable shifts at the NLRB under the Biden Administration.

Enjoy reading, and if you are not an OACTA member, I encourage you to join!

# Shifting Attitudes and Legal Changes Impacting Non-Competition Agreements

**Barry W. Fissel, Esq., Brigid E. Heid, Esq.** and **Jacob S. Kinder, Esq.**
Eastman & Smith, Ltd.


**Barry W. Fissel, Esq.**


**Brigid E. Heid, Esq.**


**Jacob S. Kinder, Esq.**

The year 2021 marked a time of change and uncertainty for many employers as they wrestled with an array of new challenges, from navigating policy shifts inherent with a new presidential administration, to wrestling with the safety and compliance problems posed by the seemingly never-ending COVID-19 pandemic. With little or no media attention, however, another threat loomed in 2021 that may soon weaken employers' ability to protect their businesses by non-competition agreements with their employees.

In 2021, a number of state law-makers introduced legislation seeking to shield their citizens from post-employment restrictions. In addition, at the federal level, both President Biden and members of Congress unveiled unique visions for setting a national standard on enforcement of non-compete agreements. The changes already adopted by multiple states, and the changes proposed in the coming year, if adopted, would profoundly weaken employers' ability to effectively protect their intangible business assets such as company goodwill with customers and intellectual property.

Non-competition agreements are controversial – opponents argue they are unfairly restricting worker mobility and thereby harming the overall economy, while advocates argue that they are an essential tool for protecting business investment and preventing competitors from gaining unfair advantage by hiring its former workers who hold valuable confidential and proprietary information. This article surveys these emerging federal and state legal changes to restrict non-competition agreements and suggests the practical business consequences of the proposed restrictions on non-competition agreements.

## The Federal Government Targets Non-Compete Agreement Reform

Historically, non-compete agreements (referred to in this article as "NCAs") have been predominately regulated by state courts and legislatures. In 2021, the Biden Administration and federal legislators sought to change this by introducing their own vision for regulating non-compete contracts at the federal level. Should one of these groups be successful in implementing a national NCA regulatory scheme, we could see the legal landscape around this issue shift dramatically.

## The Biden Administration

On July 9, 2021, the Biden Administration issued the "Executive Order on Promoting Competition in the American Economy". The stated goal of the order is to restore a fair, open, and competitive marketplace in the United States by enforcing existing anti-trust laws against corporations in a number of different industries, support aggressive legislative reforms to prescription drug pricing regulations, and further the enactment of a public health insurance option. Among the order's targets for reform was non-compete clauses in employment contracts. The Executive Order explicitly encourages the Federal Trade Commission ("FTC") to use its rulemaking power to curtail "the unfair use of non-compete clauses and other clauses

CONTINUED

or agreements that may unfairly limit worker mobility."[1] The FTC has begun exploring this issue through a series of two-day "workshops", informal fact-gathering, and panels titled "Making Competition Work: Promoting Competition in Labor Markets".[2] Ordinarily, a reasonable NCA has been considered an exception to unlawful restraint of trade; however, through the FTC's rulemaking authority, freedom of contract between employers and employees would be undermined. As the FTC shifts to formal proceedings later this year, employers and their legal counsel should watch for new FTC policies toward NCAs and whether the FTC may take action to curtail their use.

## Congress on Non-Compete Agreements

President Biden is not the only federal official with plans to reshape the existing law around non-compete agreements. In 2021, three separate bills were introduced in Congress each with their own take on NCA reform ranging from outright bans on the contracts to some limited restrictions on the applicability of NCAs. It is particularly noteworthy that these bills are coming from both sides of the aisle.

### *The Workforce Mobility Act of 2021, S.B. 483*

The first of the group of bills is the "Workforce Mobility Act of 2021" introduced in the Senate on February 25, 2021. This bill has received bipartisan support.[3] The Workforce Mobility Act takes the most aggressive position against non-compete agreements of any legislation introduced in 2021 and would impose an outright ban on entering into, enforcing, or threatening to enforce a non-compete agreement with two limited exceptions:

1. The first exception is the use of non-compete clauses included as a term in a sale of goodwill or ownership interest in a business; and
2. The second exception is the use of a non-compete agreement as a term in the dissolution of a partnership.

Since the use of non-compete agreements is most prevalent in the relationship between a private business and its employees, these two exceptions would carve out relatively few non-compete contracts.

For this reason, passage of the Workforce Mobility Act would likely have a profound impact on the ability of a business to prevent an employee from leaving the company and taking a job with a direct competitor in the same market. The bill would also provide multiple avenues for enforcement by endowing the Department of Labor with enforcement power to seek equitable and legal relief for violations, and by creating a private right of action for citizens against their former employers who attempt to enforce a noncompete agreement in violation of the act.

### *The Freedom to Compete Act, S.B. 2375*

A second NCA-focused legislation presented in the Senate is the "Freedom to Compete Act" introduced by Republican Senator Marco Rubio on July 15, 2021 and supported by Democratic Sen. Maggie Hassan, which would amend The Fair Labor Standards Act (FLSA). Rather than impose a complete ban on non-compete agreements, the Freedom to Compete Act would provide a carve out to employees who are exempt from minimum wage and/or overtime requirements, as defined by section 13(a)(1) of the FLSA.[4] Section 13(a) is commonly known as the "white collar exemptions" because it exempts "executive employees, administrative employees, and professionals.[5] To qualify for the exemption, employees must satisfy the job duties requirement and be paid a salary of at least $684 per week.[6]

The Freedom to Compete Act would give employers greater latitude to protect their business interests by imposing non-compete restrictions against management-level employees who are more likely than an hourly worker to have access to a company's proprietary and confidential information. In addition, the Freedom to Compete Act contains lighter punishments for violations and does not appear to create a private right of action. Enforcement would be delegated to the Department of Labor, which could pursue legal and equitable relief after an employer's third violation. Sponsored by a prominent Republican, the FCA provides some insight into what Republicans may view as palatable NCA reform. A third reform bill known as the "Employment Freedom for All Act" was introduced on November 3, 2021, by an all-Republican coalition of House Representatives. Unlike the first two pieces of legislation, the Employment Freedom for All Act has a

CONTINUED

narrow purpose in that it would only prohibit employers from enforcing a non-compete agreement against an employee who is terminated based on the employee's COVID-19 vaccination status. Clearly, this bill serves as a disincentive for employers to consider vaccination status in their employment decisions and is consistent with the hostility conservatives have demonstrated toward employer-mandated COVID-19 vaccination requirements. The Employment Freedom for All Act grants enforcement and rulemaking authority to the Federal Trade Commission, and also permits state attorneys general to seek a various forms of relief including injunctions, civil penalties, and damages. The state-level enforcement mechanism may be a political statement of distrust of the Biden Administration's FTC.

As of this writing, the three bills have been sent to committee but have yet to receive a vote in their respective Congressional Chambers. Bipartisan support of the Workforce Mobility Act makes it the most likely of the three bills to gain momentum this year. However, according to Bloomberg News, success in enacting noncompete restrictions has been largely limited to Democrat-controlled statehouses.[7]

## State Statutes Changing Non-Compete Law

In the world of non-compete agreements, state courts and legislatures have been the primary battlefields for decades. While only California, North Dakota, Oklahoma and most recently, Washington D.C., have passed outright bans on the enforcement of NCAs against their residents, more states are considering joining their ranks. While some states recently enacted new legislation regulating NCAs, other states chose to amend their existing laws to further limit non-compete agreements.

In January of 2021, Washington D.C. passed one of the broadest bans on non-compete agreements in the country. The new law would invalidate most NCAs entered into with D.C. employees on or after April 1, 2022 and prohibit employers from retaliating against employees refusing to comply with the terms of an NCA. The new bill empowers both D.C. officials and private citizens to enforce the law by providing both governmental and private rights of action against potential violations.

On July 6, 2021, Colorado became the first state to criminalize the enforcement of void non-compete agreements. Colorado's previous NCA statute voided any covenant not to compete between and employer and an employee, with certain exceptions. The 2021 bill included the provision that any employer who violates this code section is guilty of a class 2 misdemeanor, which can carry up to 120 days imprisonment and a $750 fine. The new provision becomes effective on March 1, 2022.

In 2021, several states passed significant amendments to their existing non-compete statutes by setting narrower limitations on who can be required to sign them and reducing the kinds of post-employment opportunities that can be prohibited. An amendment to Illinois' NCA statute prohibited the enforcement of a non-compete against any employee earning less than $75,000 annually, and further prohibited the enforcement of a non-solicitation agreement against anyone earning less than $45,000 annually. The amendment also required employers to provide employees with a 14-day period to consider the terms of the contract and encouraging employees to consult with counsel before signing. Oregon adopted an amendment which imposed a twelve-month limit on the length of a non-compete restriction and made NCAs unenforceable against any employee earning less than a minimum income level of $100,533 per year. The income threshold will be adjusted annually for inflation.[8]

Nevada took a slightly different approach from Illinois and Oregon when it amended its current statute. The amendment prohibits enforcement of an NCA against hourly employees. Further, Nevada requires employers to cover the attorney's fees of any employee who successfully brings a claim against the employer.

## No Changes to Ohio Law

Ohio does not currently have a statute governing NCAs and unlike the states mentioned above, Ohio did not encounter any significant change in its position on non-compete agreements in 2021. As it stands, NCAs are enforceable in the state of Ohio so long as they are reasonable and necessary to protect the legitimate

CONTINUED

interests of the employer. The seminal Supreme Court of Ohio case remains *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21, 26, 325 N.E.2d 544 which held that NCAs are enforceable to the extent they are "reasonable" meaning that they: 1) are no greater in scope than is necessary to protect an employer's legitimate interest; 2) do not impose an undue hardship on the employee; and 3) are not injurious to the public. These principles have remained stable in Ohio for more than 40 years; however, the national trend of hostility toward post-employment restrictive covenants could soon sweep into Ohio as it has in many other states, or the FTC or Congress could preempt Ohio law.

### Takeaways:

With more and more states and now the federal government disfavoring non-competition agreements, employers may be uncertain about how to protect their business interests. Some considerations for Ohio employers this year and beyond:

- The federal government will likely get involved in regulating non-compete agreements to some degree. Even if the proposed NCA bills never make it out of the Senate, it is highly likely that the FTC will use rulemaking authority to impose restrictions on the use of NCAs to satisfy President Biden's agenda of promoting what he believes is good for competition in the American economy.
- With members of both political parties introducing legislation regulating NCAs, we may see a rare compromise on this issue.
- State limitations on the use and enforcement of NCAs, especially with lower wage earners, are likely to gain momentum.
- Employers should be prepared for increased litigation from employees seeking to avoid enforcement.
- Moving forward, it is important for legal counsel representing employers to try to anticipate the sea change and craft agreements that can withstand legislative or FTC challenge. While Ohio lawmakers have not yet taken action on NCAs, now is the time Ohio employers should evaluate their business strategy for using non-compete agreements, and select carefully the categories of employees to be required to sign an NCA based on compensation levels, customer goodwill, and access to confidential and proprietary information.
- Employers using NCAs with employees in multiple states must be vigilant to monitor changes to each state's NCA laws.
- Employers with newly adopted remote work arrangements must consider where an employee is actually performing work and whether the location impacts enforcement of an NCA.
- Employers who use NCAs should consult legal counsel with experience drafting and enforcing NCAs to proactively review the terms of the employer's current agreements in anticipation of changes in state or federal legislation or FTC policy.

### Perspectives and Opinions of a Veteran Non-Compete Litigator

*Co-author Barry Fissel has been litigating NCAs as a major area of his practice for more than 30 years, sometimes representing the enforcing employer, sometimes the hiring competitor, sometimes the transitioning employee. The following are his perspectives on the consequences of restricting NCAs or banning them completely.*

NCAs are the most effective defensive weapon to protect the trade secrets and customer goodwill of a business. For Congress, state legislatures or the FTC to weaken NCAs would give a big advantage to unscrupulous parties bent on stealing trade secrets.

The Achilles heel of the computer age and internet commerce is cyber security breaches by hackers with malicious intent or bent on industrial espionage (some of which is state sponsored).[9] One measure of the damage, premiums for cyber breach insurance are skyrocketing.[10]

A version of The Uniform Trade Secrets Act has been enacted in almost all 50 states, but the statutory claims are not as effective as enforcement of an NCA and are more expensive to prove. Congress enacted the Defend Trade Secrets Act as recently as 2016 to strengthen protection of trade

CONTINUED

secrets.[11] However, as we know from 30 years of litigation experience, the legal fees and forensics expenses needed to prosecute a trade secret litigation are likely multiples of the cost of noncompete litigation. And the results are much less predictable and protective. An employer's frontline defense to protect its trade secrets is a reasonable NCA signed by all employees with access to trade secrets.

The ostensible goals of the Biden "Executive Order on Promoting Competition in the American Economy", FTC Workshops, and the Workforce Mobility Act of 2021, are in the opinion of this veteran noncompete litigator, not valid. They seek to tear down barriers to worker mobility for the purpose of increasing worker income levels. However, worker mobility alone does not increase the number of jobs or pay levels as a whole. If an employee leaves and takes trade secrets or customer relationships to a competitor, the business of the former employer will suffer, and other employees could lose their jobs or have their pay cut because of the departure of one co-worker who takes business away. Indeed, the departing worker may receive higher pay, but this reward stems from having been highly trained or being in possession of intangible assets of the former employer.

Legislation or FTC rules banning NCAs will help one set of employees only to the detriment of another set of employees. To understand the consequences of legislation banning NCAs, even with some exceptions, let us review some facts of actual cases litigated by the author (omitting client names to preserve privilege):

### *Case 1: Machinery Installer*

In one case, a US based employer was a worldwide leader in specialized single-industry machinery it has developed through many decades and hundreds of millions of dollars in R&D. Each production line sells for $50-75M. When a production line was sold, the employer assigned a lead installer to spend six-nine months on site at the customer's factory to oversee installation and testing. To enable the employee to be effective, the employer gave the employee installer not only an "owner's operation manual" to give the customer, but a laptop with a CAD program and complete set of trade secret as-built parts drawings. None of the state or federal legislation proposed in 2021 would preserve enforceability of the installer's NCA because he was not a professional engineer, but the employer's business could be destroyed, and hundreds of its employees laid off if the installer were free to go work for a competitor, especially if the competitor were in a country that does not take US trade secrets litigation seriously, like China. No doubt a competitor would pay a huge bonus to the employee to bring his technical knowledge to the competitor.

### *Case 2: The Medical Device Manufacturer*

In another case, an employer designed and sold patented medical devices used to save and preserve lives in hospitals. The employer's customers were large multi-hospital healthcare systems which buy large quantities. The employer's medical devices were promoted by, and customer trust and confidence were developed and maintained by, an employee sales representative paid to develop close relationships with hospital administrators who made purchasing decisions. Generally, each contract to supply devices to a healthcare system is long term, renewable every three years. The competitor's sales representative had been diligently working for six years (two contract cycles) to promote a competing line of medical devices to the same customer hospital system, without success. The competitor secretly offered a huge bonus to the incumbent sales representative to switch companies, just a few months before the renewal of the three-year contract. If legislation or FTC rule banned enforcement of the sales representative's NCA, he would be free to take the three-year hospital contract to his new employer. And the millions lost in sales would result in many jobs at his former employer.

### *Case 3: The Machinery Maintenance Worker*

As a third case example, an employer manufactured a low-cost plastic product sold in large quantities to customers who were very cost conscious. Several competitors sold comparable products of acceptable quality, so a few pennies difference in price would result in customers shifting orders from one supplier to another. The ingredients of the plastic product are low cost, and all competing suppliers use the same ingredients. The only two controllable variables in production cost are the

CONTINUED

result of increases in speed of production, and reduction of waste. If the production line ran faster, and if waste was minimized, the cost per unit of product was reduced, and the cost savings enabled the employer to offer customers a somewhat lower price, which increases sales. The employer's machinery maintenance employee who was paid hourly knew, from years of experience and trial and error, exactly what adjustments made the production process run faster and reduce waste. If legislation or FTC rule invalidated the machinery maintenance employee's NCA, he could take what he knows to a competitor and his former employer would lose sales, and probably an entire shift of production workers would be laid off.

### *Case 4: IP Protection and Business Succession*

In a fourth case, the employer was in the business of repairing electricity generating power plant equipment and learned of a need for immediate access to replacement parts to minimize the time of costly shutdowns and lost power generation. Patents on the power plant equipment had expired, and makers of the equipment long ago went out of business or stopped making replacement parts. The employer invested more than 10 years and much money to reverse engineer more than 12,000 different parts that were the most likely to be needed by utility customers and invested $9M to keep an inventory of these parts on hand for emergency repairs. The owner of the employer spent years training and mentoring a young protégé and started talking with the employee about someday buying the company. However, a competitor secretly offered the employee a bonus to switch companies and bring the CAD drawings for the employer's 12,000 replacement parts. The employee left without notice on a Friday night and took two other employees with him to the competitor. None of the employees had NCAs. The employer's attorney had to engage a computer forensics expert to image and inspect more than a dozen computers of the competitor to prove that trade secrets were misappropriated. The employer successfully obtained a three-year injunction, but the forensics costs alone were in excess of $250,000; whereas litigation to enforce a NCA would have achieved an injunction sooner and at a fraction of the cost.

### *Case 5: The Successor Sales Representative*

As a final illustration, the employer is a manufacturer which had a sales representative who had been paid to develop and maintain a book of business with about 200 customer relationships. The sales representative, who was the only company contact with customers, was reaching retirement age; therefore, a new sales representative with no prior experience or customer relationships was hired to work alongside the incumbent representative for 12 months, to make sure customers liked and gained confidence in the new representative. The employer paid both employees for 12 months to invest in the transition. If legislation of FTC rule invalidated the new representative's NCA, as soon as the new representative became trusted by the customers and the incumbent rep retired, a competitor could hire away the new rep, and many other employees of employer would be laid off or have their pay cut because of loss of 200 customers.

The author could recount hundreds of other examples of litigation when enforcement of an NCA was vital to preserving jobs of other employees. The Biden administration and FTC assume that the employer's owner uses NCAs to oppress workers and keep their pay artificially low by preventing their departure, but the author has represented countless employers enforcing NCAs who were equally concerned about preserving the business to provide jobs and overtime pay to hardworking loyal employees. Likewise, on the other hand, when there are no legitimate business interests to protect (the employee has no trade secrets or customer goodwill) a reasonably experienced noncompete lawyer will advise the employer not to enforce, or even require the employee to sign, a NCA. For over 30 years in Ohio, Michigan and Indiana, the author has seen very few cases of employer abuse of noncompete agreements, and courts put a stop to it.

Therefore, based on litigation experience, this co-author is of the opinion that the fundamental rationale for banning NCAs is flawed. In most cases, invalidating an NCA will benefit only the transitioning employee and the new employer (sometimes dishonest and motivated by greed), and will cause a corresponding harm to the employees of the former employer.

CONTINUED

## Endnotes

1 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

2 https://www.jdsupra.com/legalnews/ftc-reviews-non-compete-agreements-an-3719988/; FTC workshop materials reveal a pro-employee bias that sees NCAs as employer oppression of workers. *See* https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-slides.pdf

3 Two Democrats, Senator Christopher Murphy and Senator Tim Kaine, and two Republicans, Senator Todd Young and Senator Kevin Kramer, cosponsoring the bill

4 Sec. 13 (a)(1) **exempts** "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)"

5 Sec. 13 (a)(1) also includes outside sales, computer employees, and highly compensated employees.

6 29 CFR Part 541.

7 Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, Feb. 9, 2022, https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/

8 Or. Rev. Stat. Ann. § 653.295 (West)

9 *Foreign Economic Espionage in Cyberspace*, NATIONAL COUNTERINTELLIGENCE AND SECURITY CENTER, 2018, https://www.dni.gov/files/NCSC/documents/news/20180724-economic-espionage-pub.pdf.

10 Scroxton, Alex, *Cyber Insurance Costs up by a Third*, Computer Weekly, July 06, 2021, https://www.computerweekly.com/news/252503591/Cyber-insurance-costs-up-by-a-third

11 Defend Trade Secrets Act of 2016, 18 U.S.C. §§ 1832 – 1839.

**Barry W. Fissel, Esq.**, has been a litigator with Eastman & Smith for 40 years and, since the late 1980s, has concentrated on partnership, shareholder and employment disputes, often involving injunctions, covenants not to compete, and trade secrets. For more information, visit Barry W. Fissel Trade Secret Attorney (eastmansmith.com).

**Brigid E. Heid, Esq.**, is a member of Eastman & Smith Ltd., where she represents private and public sector employers in all facets of employment law. She is Chair of OACTA's Employment Law Committee and a member of OACTA's Board of Trustees. She serves on The American Bar Association's House of Delegates as the Columbus Bar Association (CBA) Representative and is a past-president of the CBA. For more information, visit Brigid E. Heid Employment Attorney (eastmansmith.com).

**Jacob S. Kinder, Esq.**, is an associate in Eastman & Smith's Labor & Employment and Workers' Compensation Practice Groups. Areas of particular interest are employment discrimination and harassment defense as well as representing employers in workers' compensation proceedings. For more information, visit Jacob Kinder (eastmansmith.com).

# A Still New-ish Judge's Look Back On An Extraordinary Year

**Judge Carl A. Aveni**
Franklin County Court of Common Pleas

Having taken the bench on January 1, 2021, I still have no idea what it is like to be a judge in normal times. The COVID-19 pandemic has been the overlay to every matter and issue before the Court at every moment throughout my tenure. From the plexiglass partitions isolating each part of the courtroom, to the docket rescheduling each time a lawyer, litigant or witness enters quarantine, the pandemic has completely reshuffled the adjudicatory process.

Excepting a handful of special cases, the Franklin County Court of Common Pleas held no jury trials at all during that first uncertain COVID year between late March, 2020 and early April, 2021. Meaning that a year's worth of the criminal docket in particular was caught in a holding pattern. For those criminal Defendants denied bond, that meant a year in jail awaiting trial; enjoying a constitutional presumption of innocence and a constitutional right to speedy trial; but having no opportunity for their day in court. There is simply no analogue in the modern history of Ohio's courts. The ripples are still being felt.

Once trials resumed last Spring, social distancing requirements limited the number of jurors that could be on site at any given time. Deliberations were moved from smaller jury rooms into adjacent court rooms, further limiting the number of trials that could happen at any given time. Even so, especially in those early months, only a third of the summoned jurors actually appeared. A courtwide prioritization system was developed, with trials of incarcerated criminal defendants getting the highest priority. When there were more trials sought than available jurors in a given week, cases on the civil docket, lacking speedy trial and incarceratory issues, were the most likely cases to be continued. Even so, I found myself in trial for 7 full weeks over the 12 weeks between mid-August and mid-November. Chipping away at the previous year's backlog, month by month.

Coming to the bench from 24 years of mostly civil trial experience, I have acutely felt the frustration of my friends and former colleagues in the civil bar. Its easy to imagine their conversations with clients, about the lack of scheduling predictability, delayed responses on motions, and their basic right to have their disputes heard and adjudicated. And all I can say in response is "I hear you. I understand. Bear with us. We're working on it."

Thankfully, there is also good news. As the backlog of the most serious and time-sensitive criminal cases has whittled down, there have been increasingly greater openings to handle civil trials. Hopefully you've seen that in your own caseloads. Particularly where the parties have been willing to waive jury, the Court has had increasing latitude. And where juries aren't waived, it is increasingly more often just a question of whether there are enough jurors on hand to seat a civil panel. If the recent, sharp reductions in new COVID-19 cases locally and statewide continue their downward trends, it is reasonable to expect the Court to edge closer to historically normal operations in the near-mid term.

In the meantime, here are 4 suggestions for the civil bar to help move their cases along in this remarkable time.

1. **If A Motion Is Agreed By All Parties Or Is Wholly Unopposed, Say So Prominently.** Yes, the local rules in most courts specify a formula for how motions are styled. And those formulas, for the most part, do not contemplate including that information in the title of the filing. Nevertheless, it is helpful to have

CONTINUED

that information in the title, as well as prominently represented in the motion itself, preferably bolded or otherwise set off. If we can see it right away, we can give the request an expedited review. If we have to hunt for it in the middle of the body, we are likely to wait until the motion briefing cycle is complete before beginning to engage on the issues at all.

2. **Jointly Approach The Court's Gatekeeper Early To Address Developing Discovery Disputes.** Just as the pandemic has delayed civil jury trials, it has also compounded the complexities and mechanics of discovery practice. For that reason, and perhaps because of the delays associated with the trials themselves, we've seen an uptick in motions to compel. While different courts have varied approaches to such things, I have found that a half hour status conference on the front end of the dispute can often spare litigants the substantially greater expense and delay associated with full formal motions practice. Once counsel have met and conferred per Civ. R. 37, upon impasse, I would much rather they pick up the phone and call my staff attorney to set a status conference—if possible in person, but otherwise by Zoom video link. I lead those meetings personally, and explore whatever possibility there may be for practical solutions by consensus. In the event the parties are unable to reach agreement in that process, the next step remains a formal motions practice that creates a record, preserves issues for appeal, and decides the issue. But more often than not, those informal conferences have proven a more effective, less expensive, and quicker way to get to the heart of the issue.

3. **Brevity Is The Soul Of Wit.** As a trial lawyer, I sometimes enjoyed assembling a well-crafted turn of phrase in my motions or briefs. I valued the chance to build nuanced, even lyrical, arguments, that showcased my written advocacy skills within the full parameters allowed by the rules. But now, as a judge reviewing those briefs, lyricality is the least of my concerns. Certainly, a well-written, carefully constructed argument is more likely to carry the day. And I still stop to admire particularly effective efforts. But I especially value arguments that concisely get to the point without a lot of foofaraw or embroidery. As my old American Lit. professor might have said—more Hemingway, less Faulkner.

4. ***Ad Hominem* Attacks Are Counterproductive, And Diminish The Attacking Counsel In The Eyes of the Court.** Perhaps it's grandstanding to cure strained relations between lawyers and their clients, occasioned by pandemic delays. Perhaps it's because the civil bar has fewer opportunities now for direct, personal interactions with each other in social, professional settings. Maybe it's because the pandemic has put a strain on society at large, and we're all a little frazzled after two years of this. Whatever the cause, I've seen a marked increase in incivility amongst some quarters of the civil bar. Whether directed at opposing counsel or opposing litigants--it must end. It is counterproductive. It is unprofessional. It forces the parties into intractable positions. But most importantly, it diminishes the attacking counsel in the eyes of the court. Judges compare notes on such things, and keep mental lists. And if I haven't sanctioned anyone yet, there have been a few pointed discussions along the way. It's perfectly fair to attack arguments, and when warranted, to dispassionately argue prior courses of conduct and reasonable inferences therefrom. But character attacks and sputtering exasperation are unlikely to carry the day or help the cause.

Across the state, courthouses are looking forward to a "new normal" that minimizes the disruptions of the last several years, and allows all cases a full, fair hearing on the merits. As a still new-ish judge, I'm eager to see what that looks like.

**Judge Carl Aveni** took office as Judge on the Franklin County Court of Common Pleas, Gen. Div. on January 1, 2021. For 24 years before joining the bench, he was a civil trial lawyer handling commercial disputes and business litigation across the state.

# COVID-19: Jabs, Jumps and Jurisprudence

**Doug Holthus, Esq.**
Freeman, Mathis & Gary, LLP

Some readers are doubtless experiencing fatigue. Others remain vigilant.

Regardless of any single point on the spectrum of response, many areas of the law continue to be impacted by the realities of and reactions to COVID-19 and its expanding variants. Thus, also, consequential impacts upon US employers and workers, if not perhaps impacts occurring on a consistently inconsistent basis.

This article explores two such areas.

**I. EEOC / "Long Term COVID" Disability**

On December 14, 2022, the Equal Employment Opportunity Commission ("EEOC") issued updated COVID-19 response Guidance. In particular, the EEOC expressed that those individuals diagnosed with COVID-19 (or a post-COVID health condition) *may*, in certain circumstances, be considered to have a disability within the definition of "Disability" as outlined by Title I of the Americans with Disabilities Act (the "ADA") and Section 501 of the Rehabilitation Act.

**A) The New EEOC Guidance**

By adding "Section N: COVID-19 and the Definition of 'Disability' under the ADA/Rehabilitation Act" (See: N. COVID-19 and the Definition of "Disability" Under the ADA/Rehabilitation Act") to its earlier Guidance, the EEOC (among other provisions of the revised Part "N"), specifically instructed as follows:

> *"N.4. What are some examples of ways in which an individual with COVID-19 might or might not be substantially limited in a major life activity?*
>
> *As noted above, while COVID-19 may substantially limit a major life activity in some circumstances, someone infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to the common cold or flu that resolve in a matter of weeks—with no other consequences—will not be substantially limited in a major life activity for purposes of the ADA. Based on an individualized assessment in each instance, examples of fact patterns include:*
>
> *Examples of Individuals with an Impairment that Substantially Limits a Major Life Activity:*
>
> *An individual diagnosed with COVID-19 who experiences ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating, which the employee's doctor attributes to the virus, is substantially limited in neurological and brain function, concentrating, and/or thinking, among other major life activities.*
>
> *An individual diagnosed with COVID-19 who initially receives supplemental oxygen for breathing difficulties and has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months, is substantially limited in respiratory function, and possibly major life activities involving exertion, such as walking.*
>
> *An individual who has been diagnosed with COVID-19 experiences heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last,*

CONTINUED

*or are expected to last, for several months. The individual is substantially limited in cardiovascular function and circulatory function, among others.*

*An individual diagnosed with "long COVID," who experiences COVID-19-related intestinal pain, vomiting, and nausea that linger for many months, even if intermittently, is substantially limited in gastrointestinal function, among other major life activities, and therefore has an actual disability under the ADA. For other examples of when "long COVID" can be a substantially limiting impairment, see the DOJ/HHS Guidance.*

*Examples of Individuals with an Impairment that Does Not Substantially Limit a Major Life Activity:*

*An individual who is diagnosed with COVID-19 who experiences congestion, sore throat, fever, headaches, and/or gastrointestinal discomfort, which resolve within several weeks, but experiences no further symptoms or effects, is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is so even though this person is subject to CDC guidance for isolation during the period of infectiousness.*

*An individual who is infected with the virus causing COVID-19 but is asymptomatic—that is, does not experience any symptoms or effects—is not substantially limited in a major bodily function or other major life activity, and therefore does not have an actual disability under the ADA. This is the case even though this person is still subject to CDC guidance for isolation during the period of infectiousness.*

*As noted above, even if the symptoms of COVID-19 occur intermittently, they will be deemed to substantially limit a major life activity if they are substantially limiting when active, based on an individualized assessment."*

(Emphasis added.)

**B) The ADA**

Most understand that Title I of the ADA generally prohibits both public and private employers (having 15 or more employees) from discriminating against employees with disabilities. It also requires that such employers provide their employees with "reasonable accommodations" across the board … during the application process, during the hiring process and in the context of active employment.

Sec. 12101 of the Act is instructive and considering the recent EEOC Guidance, a review is in order. In material part:

"(a) Findings. - The Congress finds that-

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education,

CONTINUED

transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including out-right intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, over-protective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. - It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-today by people with disabilities."

(Emphasis added.)

Sec. 12102 of the Act follows and provides expansive definitions for the term "Disability", for purposes of the Act. In material part, a Disability under the Act is defined as *"(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment* ****. (Emphasis added.) Sec. 12102(B) continues, and defines "Major life activities", indicating that *"(A) In general - For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking,* com-

CONTINUED

*municating, and working*." (Emphasis added.) Subpart (B) then defines "Major bodily functions" and provides *"For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."* (Emphasis added.)[1]

It could be said the EEOC's new Guidance is only minimally didactic, inasmuch as the EEOC also indicates that any determination of whether COVID-19 constitutes a disability for purposes of either Act must and will be determined on a case-by-case basis. Specifically, it will depend on whether or not the individual's medical condition or any of the symptoms "is a 'physical or mental' impairment that 'substantially limits one or more major life activities.'" Stated differently, (generally) an individual who is asymptomatic, or who only experiences mild symptoms with no other consequences, will not be considered "Disabled."

On the other hand, an individual experiencing symptoms associated with "Long Covid," (i.e., the lingering health conditions associated with COVID-19), could possibly be considered "Disabled." Furthermore, even if COVID-19 or the health conditions resulting from COVID-19 could be considered a disability, it does not automatically entitle an employee to reasonable accommodations from their employer. Accommodations will be provided "when their disability requires it, and the accommodation is not an undue hardship for the employer." (Covid-19 Technical Assistance, 2021) This new guidance makes clear that a COVID-19 diagnosis or related symptoms will, in certain circumstances, require employers to engage in an interactive dialogue with the impacted employee to determine whether a reasonable accommodation is needed and available.

## II. Vaccine Mandate

### A) History

On Friday, December 17, 2021, the Sixth Circuit Court of Appeals reversed an earlier stay entered by the Fifth Circuit and in so doing had permitted enforcement of OSHA's COVID-19 Emergency Temporary Standard ("ETS".)

Previously (November 5, 2021) OSHA announced the particular ETS, mandating that all employers having at least one hundred (100) employees must develop a vaccination policy. Employers impacted by the ETS were required to develop such a policy by not later than December 6, 2021, making certain and requiring that by not later than January 04, 2022, all affected employees must either (a) have received the COVID-19 series of vaccinations, or (b) otherwise be obligated to submit to weekly COVID-19 testing.

Multiple legal challenges followed. Just one week later (November 12, 2021) the Fifth Circuit Court of Appeals issued a twenty-two-page Order Staying enforcement and implementation of the OSHA ETS. The Sixth Circuit then was randomly selected to decide the consolidated case, encompassing all challenges to the ETS brought nationally.

The Sixth Circuit reversed. In doing so, an in reinstating the OSHA COVID-19 ETS, the Sixth Circuit Court claimed it had found historical support for OSHA's authority to protect workers against infectious disease. The Sixth Circuit also found justification in upholding the concept of an emergency buttressing the ETS by considering what it referred to as evidence of more workers returning to their workplaces, the increasing incidence of newly identified disease variants and the availability of COVID vaccines.[2]

CONTINUED

OSHA almost immediately responded announcing that the Agency could "now once again implement this vital workplace health standard."

In quite short order, an appeal to the United States Supreme Court followed.

**B) SCOTUS**

In the first of two opinions issued on January 13, 2022, the Supreme Court noted as follows:[3]

> *"OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID-19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here."*

Bottom line: in issuing these two Decisions, SCOTUS on one hand put a hold on the concept of any far-reaching federal rule obligating larger private employers to adopt a vaccine or testing policy, yet at the same time permitted the current Biden Administration (through OSHA) to enforce a similar rule limited in its application to those healthcare facilities which accept Medicaid or Medicare funding.[4]

In *National Federation of Independent Business, et al. v. Dept. of Labor, Occupational Safety and Health Admin., et al.*, the Court reasoned that OSHA's vaccine-or-test edict was indiscriminate and failed to account for the important and ultimately (for the Court) controlling distinction between occupational risks on one hand, and general health risks, on the other. As a result, the Court determined that the OSHA ETS mandate, as applied to such larger private employers, was most properly interpreted as being an impermissible bureaucratic general public health measure rather than an "occupational safety or health standard."

However, in *Ohio, et al. v. Dept. of Labor, Occupational Safety and Health Admin., et al.,* SCOTUS determined otherwise, deciding that the OSHA ETS vaccine mandate was applicable and enforceable on a limited basis, namely as respects healthcare workers engaged in offering care within or though entities receiving Medicaid or Medicare funding. The court reasoned that in this limited regard, the OSHA ETS mandate was justified by application of the Spending Clause of the US Constitution, which allows the federal government to impose conditions when it provides funding for programs like Medicare or Medicaid. In addition and in part, the Court reasoned that the OSHA ETS mandate particularly and appropriately served to protect those receiving in-patient care.

## Endnotes

1 The Rehabilitation Act of 1973 (Pub. L. 93-112) (Rehab. Act), as amended, prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment and in the employment practices of federal contractors.

2 The concept of availability as distinguished from delivery was not significantly discussed.

3 *National Federation of Independent Business, et al. v. Dept. of Labor, Occupational Safety and Health Admin., et al.*, Slip Op. 595 U.S. ___ 2022 (per curium); *Ohio, et al. v. Dept. of Labor, Occupational Safety and Health Admin., et al.*, Slip Op. 595 U.S. _____ 2022.

4 Federal government spending for health care grew 36.0% in 2020, significantly faster than the 5.9% growth in 2019. This faster growth was largely in response to the COVID-19 pandemic. Source: CMS.gov; U.S. Centers for Medicare & Medicaid Services; NHE Fact Sheet (Last Modified: 12/15/2021.)

**Doug Holthus, Esq.,** is a Partner with Freeman, Mathis & Gary, LLP. His practice includes counseling and defending employers in respect of various employment matters.

# Damage Caps For Employment Claims Under the Revised Ohio Civil Rights Law

**Shafiyal Ahmed, Esq.**
Freeman, Mathis & Gary, LLP

Ohio's own Civil Rights law underwent a few significant reforms last year.

On January 12, 2021, Governor Mike DeWine signed into law House Bill 352, passed by the 133rd General Assembly, which took effect on April 15, 2021. Titled the "Employment Law Uniformity Act (ELUA)", the revised statute now addresses some of the more convoluted sections within the prior Code provisions. Specifically, the revisions contained within ELUA tighten and more clearly state the statutory scheme in respect of the applicable statute of limitations, available affirmative defenses, filing requirements for claimants, those circumstances which might expose individual actors to the possibility of personal liability exposure, and the parameters of an age discrimination claim.

The ELUA also now provides for enumerated caps for damages.

**A. The Revised Law / Seven Key Points**

The revised version of the Ohio Revised Code 4112.08 (eff. April 15, 2021) is now amended to include those substantive changes contained within House Bill 352. The revisions include several clarifications and substantive changes.

1. **Removes Personal Liability for Managers and Supervisors.** Previously, managers and supervisors could potentially be held personally liable for workplace discrimination claims. This was inconsistent with Federal anti-discrimination laws. The ELUA removed the potential for personal liability for supervisors and managers unless they are the employer.

2. **Exhaustion of Administrative Remedies.** The ELUA now *requires* that claimants first exhaust their available administrative remedies before proceeding to suit. This is in line with applicable Federal law. Under the new ELUA, claimants must now first file their discrimination claims with the OCRC, whereas before claimants could proceed directly to a civil suit. After the passage of sixty (60) days following the initial administrative filing, a claimant may file a request with the OCRC and ask for a "Notice of Right to Sue" letter. If such a Notice is then issued, the claimant may proceed to file a civil action in court following the passage of an additional forty-five (45) days after the employer receives a copy of the same Notice.

3. **Revised Statute of Limitations.** The revised ELUA also implements a revised a statute of limitations relative to claims made pursuant to R.C. Chapter 4112. Previously, the period of time for any claimant to bring suit was six (6) years. The timeframe for filing an administrative claim with the OVRC was six (6) months.

   House Bill 352 changed these time periods as follows: (a) for the filing of a lawsuit – two (2) years, and (b) for the filing of an administrative charge of discrimination – two (2) years.

4. **Simplification of Age Discrimination Lawsuits.** The ELUA also now simplifies the process for age discrimination lawsuits.

CONTINUED

Now, the law provides that age discrimination claimants must file suit pursuant to Ohio Revised Code 4112.08, thereby creating a single cause of action and streamline procedures. The process and remedies for age discrimination claims will be the same as for other protected classes.

5. **Affirmative Defenses Added.** Importantly, the ELUA also identifies specific affirmative defenses to a hostile workplace harassment claim as determined by the U.S. Supreme Court.

   Known as the "*Faragher-Ellert*h defense," an employer can likely avoid vicarious liability for any employee found to have sexually harassed another provided the employer can establish, by a preponderance of the evidence: (a) the employer exercised reasonable care to prevent or promptly correct any sexually harassing behavior; or (b) the employee alleging the hostile work environment unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. See O.R.C. 4112.054.

6. **Exclusive Remedy.** The ELUA now also provides for an exclusive remedy for unlawful discrimination claims. Common law claims, such as wrongful discharge in violation of public policy, are no longer available for claimants if their charges fall under O.R.C 4112.

7. **Limits for non-Economic and Punitive Damages.** Lastly, the ELUA enacts limits for the recovery of both *non*-economic and punitive damages for employment discrimination claims under the statute.

   The new damages caps enable employers to better understand what their potential economic liability might be and also likely enhances an employer's negotiation position.

**B. New Limits on Non-Economic and Punitive Damages**

Clarifying the caps on damages under Ohio's Tort Reform Act (R.C. 2315.18), the ELUA has implemented new limits for the recovery of *non*-economic and punitive damages for those litigants filing employment discrimination claims.

The ELUA now distinguishes limits for compensatory damages (economic and non-economic losses) and punitive damages. In particular, House Bill 352 amended the statutory definition of "tort action." Under the Bill, "'[t]ort action' means a civil action for damages for injury or loss to person or property." A civil action is "based on an unlawful discriminatory practice relating to employment brought under section 4112.052 of the Revised Code, and a civil action brought under section 4112.14 of the Revised Code." Therefore, civil actions regarding employment discrimination claims that fall under Chapter 4112 are now defined as a "tort action."

Although the law does not limit compensatory damages for *economic* loss, ELUA places caps on non-economic compensatory damages, with limited exceptions for certain situations.

*Non*-economic losses cannot exceed the greater of $250,000 or three times the amount of the plaintiff's economic loss … to a maximum of $350,000 for each plaintiff in the legal action, or $500,000 for each occurrence.

Also, the ELUA mandates that *punitive* damages cannot exceed two times the number of compensatory damages awarded to the plaintiff, or ten percent (10%) of a small employer's or individual's net worth when the alleged act was committed, with a maximum penalty of $350,000.

If a claimant requests punitive damages, they then have the burden of proving, *by clear and convincing evidence*, that they are entitled to recover punitive or exemplary damages.

If a jury awards a claimant more than the available statutory punitive damages amount, the trial court

CONTINUED

*must* amend the award pursuant to Ohio Revised Code § 2315.18. Further, the trial court can make specific findings of fact to change the punitive damages award. For example, the trial court may find, by a finding of clear and convincing evidence, that the total amount of prior punitive or exemplary damages awards against the same employer was insufficient to punish the employer's behavior and to deter them and others from similar behavior in the future.

The trial court may also reduce the amount of the punitive damages award by the sum of any punitive or exemplary damages awards previously rendered against the same employer in any state or federal court.

**C. Looking Forward**

Several Ohio courts have held that the punitive damages cap is based upon the uncapped compensatory damage award. Although the Ohio Supreme Court has yet to offer clear guidance as to the constitutionality of the damage caps now applicable to discrimination claims, there appears minimal doubt that (for the time being, at least) judicially modified punitive damages awards in discrimination claims will likely be held constitutional.

In 2007, the Ohio Supreme Court determined in the landmark case of *Arbino v. Johnson & Johnson*[1] that damage caps were not unconstitutional and did not violate a plaintiff's rights to a trial by jury or due process, equal protection rights and Ohio constitutional provisions. The General Assembly would decide damage caps, not the courts. *See also Simpkins v. Grace Brethren Church of Delaware*[2] (holding that the statutory cap was constitutional as applied to the facts in the case—a child rape victim—and that this case involves a single "occurrence" for purposes of applying the caps).

The Ohio Supreme Court also has determined a case dealing with the uncapped jury-awarded compensatory damages issue. In the *Brandt* case[3], the Court addressed the issue of the reduction of a child rape victim's damages award from $100 million in punitive damages to $250,000 pursuant to the statutory damages cap. In *Brandt*, the appellant had challenged the constitutionality of Ohio's statutory cap on noneconomic tort damages (R.C. 2315.18), arguing that the precedent established in *Arbino* should be overturned. The appellant further argued that Ohio's statutory cap is unconstitutional because it: (1) violated her right to a jury trial because the trial court altered the jury's finding that she had suffered a catastrophic injury; (2) deprived her of a meaningful remedy; and (3) deprived her of due process and the equal protection of the laws because the award reduction impinged on fundamental rights and was not narrowly tailored to serve a compelling state interest when reviewed under the strict scrutiny standard. The Ohio Supreme Court in *Brandt* upheld the trial judge's decision to modify the punitive damages award to comport with Ohio Revised Code § 2315.21. Similarly, the Supreme Court had previously ruled in *Wayt v. DHSC, L.L.C.*[4] that a trial court erred by awarding damages in excess of the applicable caps on damages set forth in R.C. 2315.18(B)(2) because the statute unambiguously capped the noneconomic damages that could be recovered as a result of a "tort action."

Prior to the passage of House Bill 352, *Luri v. Republic Services, Inc.*[5], an Eighth District Court of Appeals decision, addressed whether tort damage caps apply to discrimination cases under Chapter 4112. The court in *Luri* determined that punitive damage caps set out in Ohio Revised Code § 2315.21(D)(2)(a) also apply to Chapter 4112 statutory discrimination claims, thus limiting the plaintiff's punitive damage award to twice the amount of compensatory damages. However, the court provided little rationale for its decision.

The Southern District of Ohio in *Kramer Consulting, Inc. v. McCarthy*[6] considered the applicability of limits to the amount of punitive damages available under a particular statutory claim. Although *Kramer* construed a different statutory claim, it specifically

CONTINUED

referenced Chapter 4112 claims for discrimination and determined that "if the statute does not explicitly specify such a limit, one should not be applied".

By applying the damage caps from § 2315.21, the *Luri* court implicitly ruled that a Chapter 4112 discrimination claim is a "tort action" under the Ohio Tort Reform Act. This implicit ruling is now explicitly codified. Under the District Court's rationale in *Kramer*, and Ohio Supreme Court decisions regarding the constitutionality of punitive damages, the damage caps now applicable to employment claims per Chapter 4112.08 will force employees to justify excessively high demands. Ultimately, the damage caps place employers in a better position to assess their exposure in discrimination claims and limit litigation costs.

## Endnotes

1 (116 Ohio St.3d 468, 2007-Ohio-6948)
2 149 Ohio St. 3d 307, 2016-Ohio-8118, 75 N.E.3d 122
3 *Brandt v. Pompa*, No. 2021-0497
4 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92
5 1 953 N.E.2d 859, 864 (Ohio Ct. App. 2011)
6 No. C2-02-116, 2006 WL 581244 (S.D. Ohio Mar. 8, 2006)

**Shafiyal Ahmed, Esq.**, is an Associate in Freeman Mathis & Gary, LLP's Columbus office. His practice focuses on the defense of insurers, employers, businesses and commercial entities, licensed professionals, and government entities.

Mr. Ahmed handles all aspects of litigation, from pre-suit investigations to trial and through appeal. His broad litigation background ranges from successfully representing businesses in contract disputes and employment litigation, to defending local governments in litigation under § 1983 for alleged violations of constitutional rights. His experiences uniquely prepare him to serve as an advocate and counselor.

# House Bill 75 and Workers' Compensation Changes

**Mark A. Shaw, Esq., Melissa A. Ebel, Esq.** and **Jacob S. Kinder, Esq.**
Eastman & Smith, Ltd.


**Mark A. Shaw, Esq.**


**Melissa A. Ebel, Esq.**


**Jacob S. Kinder, Esq.**

On June 29, 2021, Governor Mike DeWine signed HB 75 which directly affected workers' compensation claims and benefits and made modifications to the journalist exception. These changes became effective on September 28, 2021, and are highlighted below. Prior to arriving on Governor DeWine's desk, HB 75 received near unanimous, bipartisan support in both houses of the Ohio General Assembly.

### Occupational Disease Claims

HB 75 changed the statute of limitations in the workplace for a claimant to file an occupational disease claim from two-years to one-year. The one-year statute of limitations to file a claim for an occupational disease is now consistent with the one-year statute of limitations to file a claim for an injury. The one-year statute of limitations begins from the date disability due to the disease began, or death.

In determining when the disability due to the disease began, courts look to the latest of these three events:

(1) on the date the claimant first became aware through medical diagnosis that he/she was suffering from the disease;

(2) on the date the claimant first received medical treatment for the disease; or

(3) on the date that claimant first quit work on account of the disease.

Moving forward, the change from a two-year statute of limitations to just one-year may decrease the total number of claims filed for an occupational disease.

### Application for Permanent Partial Disability Compensation

When an employer knows an employee has a compensable workers' compensation claim, the employer may choose to continue paying the employee's salary in lieu of temporary total disability (TT) compensation. Historically, there has been a 26-week waiting period from when a claimant receives his/her last payment of TT compensation to when he/she could file an application for permanent partial disability (PPD) compensation. There was no similar waiting period for when an employee received salary continuation in lieu of TT compensation. In the interest of uniformity among Ohio's workers' compensation statutes, the HB 75 clarified that an employee receiving salary continuation is prohibited from filing an application for PPD compensation until 26-weeks after receipt of his/her last payment of salary continuation. In both situations, claimants receiving TT or salary continuation cannot file an application for PPD compensation until 26 weeks from when the last payment occurred.

This new change may have the effect of encouraging workers to return to work sooner, and further incentivize employers to take advantage of salary continuation agreements. Even before this change, salary continuation may be a mutually

CONTINUED

beneficial option for both employers and employees. Continuing to pay an employee's salary in lieu of TT compensation potentially allows employers to mitigate claim costs and future premiums. Salary continuation also allows for employees to avoid disruptions in their compensation and receive their payments in a timelier manner. The new 26-week waiting period to file for PPD compensation following receipt of salary continuation may provide employers with an additional incentive to enter into a salary continuation agreement with an injured worker to pay the employee's regular salary and benefits in lieu of TT compensation.

**Permanent Total Disability**

Another change under the HB 75 comes when the Industrial Commission has previously denied a claimant's application for permanent total disability (PTD) compensation. If the claimant files a new application for PTD compensation, the claimant must demonstrate evidence of new and changed circumstances since the determination of the prior PTD application. For example, if there are additional conditions added to the claim that may now qualify an injured worker for PTD compensation, significant medical treatment in the claim, including surgeries, or significant periods of temporary total disability compensation. This amendment should prevent a claimant from refiling a PTD application based simply on the passage of time.

**Journalist Exception and Disclosure of Information**

Under continuing law, disclosure of claimant information generally is prohibited. However, HB 75 expands the current journalist exception in Ohio Revised Code 4123.88, and requires the BWC and the Industrial Commission to disclose certain personal information of claimants if a journalist makes a written request. In that written request, a journalist is required to attest that the information received is not a public record and will not be shared for any purpose outside of journalism. The 149.43 defines journalist as "a person engaged in, connected with, or employed by any news medium ... for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public."

R.C. 4123.88(G), however, does prohibit the Industrial Commission and BWC from disclosing the name, address, or telephone number of a claimant if the disclosure would reveal that the claim is for a condition that arose form sexual conduct in which the claimant was forced by threat of physical harm to engage or participate.

Finally, HB 75 created a civil cause of action against any person where claimant information that is not a public record is recklessly disclosed or received after being obtained by a journalist. Since the enactment of this law last September, there have not been any citable cases brought under this new cause of action.

**Mark A. Shaw, Esq.**, is a member of Eastman & Smith Ltd., where he represents private and public sector employers in workers' compensation matters, at all administrative levels before the Industrial Commission, as well as in litigation and employment matters in state and federal Courts. He is actively involved in the Ohio Chamber of Commerce Workers' Compensation Committee. For more information, visit Mark A. Shaw Workers' Compensation and Labor & Employment Attorney (eastmansmith.com).

**Melissa A. Ebel, Esq.**, is a member of Eastman & Smith Ltd., where she focuses her practice on litigating and advising employers in the areas of workers' compensation and employment law in the public, private, and non-profit sectors. For more information, visit Melissa A. Ebel Employment Law Attorney (eastmansmith.com).

**Jacob S. Kinder, Esq**., is an associate in Eastman & Smith's Labor & Employment and Workers' Compensation Practice Groups. Areas of particular interest are employment discrimination and harassment defense as well as representing employers in workers' compensation proceedings. For more information, visit Jacob Kinder (eastmansmith.com).

# Post-Pandemic Employment: How Remote are your Employees?

**Emilie K. Vassar, Esq.**
Eastman & Smith, Ltd.

It is old news that the COVID-19 pandemic brought office life to a screeching halt in 2020 and forced companies across industries to pivot quickly into the telework world. The pandemic sped up a change that was already in process, as technology made telework more available and accessible to employees, forcing companies resistant to that change to accept that more could be done remotely than they previously believed or acknowledged.

As the world emerged from lockdown, however, many employees comfortable in their yoga pants or happy to avoid the commute were reticent to return to the old ways. Continuing uncertainty regarding the state of the pandemic and subsequent surges have provided a reason to stay home periodically, but two years after the pandemic began in earnest, the employment landscape has changed more fundamentally.

Particularly in the face of the "Great Resignation," in which record numbers of people have left jobs with which they are dissatisfied, many employers are redesigning workplaces to accommodate remote or hybrid work arrangements for employees. Employers, however, may run into trouble if they do not consider just HOW remote their employees might be and set appropriate remote work parameters.

**Where is the employee working?**

Generally, employers are subject to federal, state, and local laws based on the jurisdictions in which employees perform their work. If an employee transitions to a permanently remote position (generally, 20+ weeks per year), their private residence becomes a separate worksite for the employer. While an employer advertising nationally for a remote position may be aware of this, employers living close to state borders may not realize that they have inadvertently subjected themselves to a new set of state laws.

While there are many commonalities between state laws, there are also subtle distinctions and requirements about which employers should be aware. The applicability of various state laws may also vary based on how many employees are working in a particular state.

***Wage and Hour:*** Employees may be subject to different state and local minimum wage rates. Some states also have daily overtime requirements, in addition to the standard 40 hours per week. Others require a day of rest or mandate specific meal or rest breaks. States may also vary their payroll requirements, such as information that must be included on pay stubs, frequency of paydays, and payment upon separation from employment.

***Insurance:*** Employers may be required to enroll unemployment insurance or workers' compensation programs for states in which remote employees are working. An increasing number of states are moving towards paid leave insurance programs, which may be funded through payroll deductions. For instance, employers must participate in the New York Paid Family Leave Insurance program for all New York employees, even if they only have one employee in the state.

***Leave Requirements:*** Many states require employers to permit unpaid leave in particular circumstances, such

CONTINUED

as for crime victims, school activities, voting, or military activity. States also vary in requirements regarding sick leave, personal time, and family leave.

***Policies, Notifications, and Trainings:*** States may mandate employers provides specific notifications or display posters in the workplace. Employers may need to provide remote employees these notifications, as well as federally-required postings, electronically or by mailing hard copies. Employers may also need to provide addendums to their handbooks for employees working in different states, to the extent a state mandates a particular policy or the handbook conflicts with applicable state law. Some states may also have different training requirements for employees. For example, in the wake of the #MeToo movement, some states began mandating employee sexual harassment training.

**When is the employee working?**

Remote employment inherently makes the workday more fluid, as employees may feel freer to complete personal tasks, like throwing in a load of laundry, during the workday. For non-exempt employees, this fluidity could pose problems for employers. Non-exempt employees are subject to the "continuous work day rule," whereby all time between the first and last work activity in a day, beyond a non-working meal period, is compensable. A strict interpretation of this rule could potentially require employers to compensate employees for a significant amount of time spent on personal tasks.

Fortunately for employers, the Wage and Hour Division of the Department of Labor issued Opinion Letter 2020-19 (FLSA2020-19 (dol.gov)) in December 2020. The letter specifically addresses the compensability of travel time when an employee teleworks in the morning, but then travels to the office later, while completing personal tasks in between. Acknowledging the changing landscape, the Department of Labor concluded that the personal and commute time spent in between working from home and going into the office was not compensable under the continuous work day rule, provided the employee was not performing work during this time.

Applying this principle, if employers wish to avoid compensating employees for personal task, it is critical that they educate non-exempt employees regarding when they are permitted to work and how they should track time. If an employee takes a break during the day to complete personal tasks, they should record the times they stop and then resume work and ensure they are not working during that time. Employers should be cognizant of these considerations for non-remote employees as well. Non-exempt employees who have access to work email on personal devices or regularly conduct business on the phone could convert personal time to work time by responding to emails or phone calls after hours.

**How is the employee working?**

Employers used to working in person with employees may need to adjust supervisory techniques to ensure they are adequately monitoring the job performance and productivity of remote employees. While many employees are more productive in a remote setting, telework is not a good fit for all individuals. Some may become distracted by the demands of the home or may attempt to provide childcare while working. Others may become disengaged and withdraw from effective participation in the workplace. It is important for employers to create opportunities for engagement and appropriate supervision to avoid the "out of sight, out of mind" trap.

Employers considering moving to a hybrid work model, or even just permitting more flexibility with periodic remote work, should develop policies that specifically lay out expectations for employees working remotely. Telework policies provide an opportunity to address issues related to teleworking equipment, confidentiality, and timekeeping, and they permit an employer to establish discretion regarding their ability to call an employee back to the office, should they desire.

**What are employees missing?**

While remote or hybrid work is certainly a rising trend, many employers still desire employees to be in the office. As much as employees can perform their work remotely,

CONTINUED

some employers may feel that they've lost a little "je ne sais quoi." Remote work inherently separates and isolates employees and, despite the progression in video technology, it is not perfect. Remote work may create challenges for collaboration, engagement, and education of employees, and employers may need to create pro-active opportunities to address these challenges.

For employers who believe in-person work is necessary, it is more critical than ever to be able to articulate why it is necessary and to what extent. Gone are the days in which an employer could rely on a job description that asserts that in-person attendance is an essential function of the day. More is needed to back that assertion up, particularly in the face of a request for accommodation of a disability.

Despite the many factors employers must address when moving to a remote or hybrid option, the change is a great option for many employers and may provide a significant increase in employee morale and retention. Employers, however, would be well-advised to be deliberate and intentional as they make this transition and to consult with counsel to ensure they remain compliant with applicable laws.

**Emilie K. Vassar, Esq.**, is an associate at Eastman & Smith Ltd. and is admitted to practice in Ohio and Michigan. She represents clients across many industries in her labor, employment, and education law practices, including automotive, manufacturing, healthcare, temporary staffing, K-12 and post-secondary schools, non-profits, and the performing arts. Emilie received her J.D. from Boston University School of Law in 2008.

For more information, see Emilie's full bio at Emilie K. Vassar Labor & Employment Attorney (eastmansmith.com).

# Disability Discrimination in the Time of "Long" COVID: What's Next?

**Ian D. Mitchell, Esq.**
Reminger Co., L.P.A.

The last two years of the COVID-19 pandemic have seen a marked shift in how most people work and the manner in which employers engage with their workforce in the face of changing circumstances due to the coronavirus. One specific aspect of this shift is the way in which COVID-19 has altered the traditional considerations employers must make when evaluating their obligations under the Americans with Disabilities Act. In addition, employers have had to adjust to periodically-issued, new guidances from the EEOC over the last two years concerning revised standards for complying with the ADA. More adjustments will inevitably be necessary as a result of the most recent EEOC guidance concerning "long COVID" as a disability, and this article focuses on the issues employers and litigators may face as a consequence of the federal government's new policy position.

As a refresher, Title I of the ADA applies to private employers with 15 or more employees, and also applies to state and local government employers, employment agencies, and labor unions.[1] The law generally prohibits discrimination against "qualified individuals" with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.[2] Under the Act, a "qualified individual" is one who, with or without reasonable accommodation, can perform the essential functions of his or her job. Individuals may be considered "disabled" for purposes of the ADA if they: (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such an impairment; or (3) are regarded as having such an impairment.[3]

On July 26, 2021, following remarks from President Biden concerning the debilitating long-term effects of COVID-19 in some individuals,[4] the Department of Health and Human Services, in coordination with the Department of Justice's Civil Rights Division, issued a guidance defining the condition known as "long COVID" or "long-haul COVID".[5] The guidance went further to state that "long COVID can be a disability under the ADA, Section 504, and Section 1557 if it substantially limits one or more major life activities."[6] On December 14, 2021, the EEOC followed suit and updated its "COVID-19 Technical Assistance" page to reflect new guidance on the law relating to COVID-19 as a disability under the ADA.

First, defining "long COVID" presents a unique challenge for employers, as the condition generally refers to the long-term effects of a COVID-19 infection, which often resemble symptoms associated with numerous other medical conditions. However, in an effort to provide a more cohesive working definition of long COVID, the CDC defines individuals suffering from it as those who "have a range of new or ongoing symptoms that can last weeks or months after they are infected with the virus that causes COVID-19 and that can worsen with physical or mental activity."[7] In particular, the (non-exhaustive) list of known symptoms that help define the condition include the following: tiredness or fatigue; difficulty thinking or concentrating (sometimes called "brain fog"); shortness of breath or difficulty breathing; headache; dizziness

Continued

on standing; fast-beating or pounding heart (known as heart palpitations); chest pain; cough; joint or muscle pain; depression or anxiety; fever; loss of taste or smell.[8] Critically, though, the DOJ/DHHS guidance goes on to state that long COVID is a physical or mental impairment that *can* substantially limit one or more major life activities.

The clarification advanced in the federal agencies' guidances from July and December 2021 is important because it effectively lowers the bar for an employee to state a cognizable claim for disability discrimination when the health condition at issue is long COVID. Prior to the new position taken by the EEOC, DOJ, and DHHS, employers could (and often did) seek dismissal of claims brought under the ADA by arguing that COVID-19 and its symptoms did not qualify as a "regarded as" disability because of its "transitory and minor" nature. Recall that the ADA does not provide relief for an adverse employment action where the employer perceives the employee to have a disability that is objectively transitory and minor.[9] Given that most people infected with COVID-19 recover from their symptoms after several days or weeks, the transitory and minor exception would seem applicable to the majority of cases. However, long COVID potentially complicates that analysis, as illustrated in one of the EEOC's Technical Assistance examples: "An employer would regard an employee as having a disability if the employer fires the individual because the employee had symptoms of COVID-19, which, although minor, lasted or were expected to last more than six months."[10] As a result, the new guidance position makes clear that courts must consider the nature and duration of symptoms associated with an individual's COVID-related condition when evaluating claims brought under the ADA.

The DOJ/DHHS Guidance and EEOC position also make it clear that, so long as an individual's long COVID condition "substantially impairs a major life activity," there should be no hesitancy to view long COVID as an "actual disability" for purposes of an ADA claim.[11] Even so, the EEOC reminds that "[d]etermining whether a specific employee's COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically."[12] As such, each claim should be considered on a case-by-case basis and the employer should continue to take care to engage in the interactive process, particularly when evaluating whether a reasonable accommodation must be provided to an employee suffering from long COVID.[13] Notably, symptoms related to long COVID can be considered an "actual disability" under the EEOC's new analysis, even if those symptoms are episodic in nature, provided that they still substantially limit a major life activity when active.

The end result of this new analysis is that, although many federally-mandated job-protected leave policies for employees have expired (*e.g.*, the Families First Coronavirus Response Act), employers with 15 or more employees might still be obligated to make reasonable accommodations for employees impacted by long COVID and/or other COVID-19 related conditions into the foreseeable future. As such, employers should be cognizant of the fact that they might need to provide time off, flexible hours, revised job assignments (including remote work), or other modifications to an employee's job responsibilities in order to enable employees suffering from long COVID to continue performing the "essential functions" of their jobs. This flexibility and an employer's awareness of its obligations under the ADA, particularly in light of the new policy clarifications, will be critical to avoid incurring a disability discrimination claim associated with long COVID.

In addition, the process of working with employees to recognize instances of disability due to long COVID and working with employees to determine whether a reasonable accommodation can be made is exacerbated by the known symptoms of the condition. How, for example, can or should an employer accommodate an employee whose symptoms are inability to focus or loss of taste/smell? The challenges presented by long COVID as a disability,

CONTINUED

though new and changing, require employers and their counsel to thoroughly examine the EEOC's Technical Assistance page and stay abreast of new developments in the law, while at the same time continuing to apply the traditional framework for engaging in the interactive process. Employers can take some comfort in recalling that they are within their rights under the ADA to ask the employee for additional information related to his/her condition, so that the disability can be verified by a medical professional and so that the employer can better determine the appropriate accommodation to provide.

## Endnotes

1 See 42 U.S.C. § 12111(5).

2 See 42 U.S.C. § 12112(a).

3 29 C.F.R. § 1630.2(g).

4 *Biden Administration Suggests Long-Haul COVID Illness May Constitute A Disability Under ADA*, Laura Lawless, NATIONAL LAW REVIEW, July 28, 2021, https://www.natlawreview.com/article/biden-administration-suggests-long-haul-covid-illness-may-constitute-disability.

5 *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, July 26, 2021, Dept. of Health and Human Services.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Eshleman v. Patrick Indus., Inc.*, 961 F.3d 242, 246 (3d Cir. 2020) (citing 42 U.S.C. § 12102(3)(B)); *see also Matias v. Terrapin House, Inc.*, Case No. 5:21-cv-02288, 2021 U.S. Dist. LEXIS 176094, at **11-12 (E.D. Pa. Sept. 16, 2021) (finding that employee had stated a viable claim for "regarded as" disability discrimination, citing the DOJ/DHHS Guidance in support of employee's claim, and rejecting employer's "transitory and minor" exception argument).

10 *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#N (last visited February 16, 2022).

11 *See id.*

12 *Id.*

13 *See id.*

**Ian D. Mitchell Esq.,** practices at Reminger Co., L.P.A.'s Cincinnati office, where he focuses on employment litigation, commercial litigation, directors' and officers' liability, and professional liability cases.

# Employment Policies under the Biden NLRB Board

**Anne Schmidlin, Esq.** and **Jacob S. Kinder, Esq.**
Eastman & Smith, Ltd.

**Anne Schmidlin, Esq.**

**Jacob S. Kinder, Esq.**

Since taking office, President Biden has reshaped the composition of the National Labor Relations Board (NLRB) by nominating two new board members, Gwynne Wilcox and David Prouty, and appointing Lauren McFerran as the Chair of the Board. Additionally, President Biden nominated Jennifer Abruzzo as General Counsel (GC) to the NLRB. Many have anticipated the new faces on NLRB will have a substantial impact on how the Board rules on labor issues. One issue in particular that will affect both unionized and non-unionized workforces is how the Board analyzes and addresses facially neutral workplace policies.

GC Abruzzo has already taken the initial steps to facilitate a shift away from the current standard under *The Boeing Co.*[1] On February 1, 2021, the GC released a memo rescinding a number of previous GC memos, including a guidance memo published in 2018 informing regional boards on the proper way to apply the *Boeing* standard in these cases. Approximately six months later, GC Abruzzo released GC 21-04, a memorandum requesting all regional directors submit cases for review by the Board when they involve certain labor issues, including "Employer Handbook Rules." The GC framed the implementation of the Boeing standard as a "Doctrinal Shift" requiring further review by the NLRB. Indeed, during her tenure, GC Abruzzo has been signaling substantial changes to the *Boeing* standard are ahead.

### The *Boeing* Standard

Instituted under the Trump-appointed Board, the core analysis of the *Boeing* standard involved evaluating two main considerations: (1) the nature and extent of the potential impact on NLRA rights; and (2) legitimate business justifications associated with those rules. These considerations were meant to strike a balance between assessing the asserted business judgments with the potential impact the rule could have on employee rights. Along with the core analysis, the Board also examined additional considerations, including whether the rule's risk of intruding on the NLRA was "comparatively slight," assessing how the rule would be reasonable interpreted, considering the perspective of employees; and allowing a rule to be potentially deemed lawful even though it could not be lawfully applied against employees who engage in NLRA-protected activity.

In a purported effort to improve clarity and reliability, the Board established three distinct categories in which different types of workplace rules would inform future litigants of the likely outcome of challenging a similar rule.[2] The three categories are as follows:

- *Category 1* includes rules the Board designates as lawful to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential

CONTINUED

adverse impact on protected righwts is outweighed by justifications associated with the rule. This category generally includes civility rules, no recording/ photography rules, rules against insubordination, confidentiality rules regarding customer information, and loyalty rules.[3]

- *Category 2* includes rules that warrant individualized scrutiny in each case to determine whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. This category may include broad conflict of interest rules, rules against disparagement of the employer, rules banning off duty conduct, and rules against making false or inaccurate statements.[4]

- *Category 3* includes rules the Board will designate as unlawful to maintain because they prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.[5] This category may include confidentiality rules regarding wages or benefits and rules against joining outside organizations or voting on matters concerning the employer.[6]

On December 14, 2017, the National Labor Relations Board issued its decision regarding the Boeing Company and their inclusion of a "no-camera" rule in their employee handbook.[7] The rule in question prohibited employees from using camera-enabled devices to "capture images or video…without a valid business need and an approved camera permit that has been reviewed and approved by security".[8] Boeing had included a no-camera rule in their handbook for decades and applied it equally to all employees. The Boeing Company justified the rule on several grounds, including its need for heightened security considering its involvement in the designing and manufacturing of military aircraft, and also its need to protect sensitive proprietary information and the personal information of its employees. The rule was challenged as a violation of Boeing's employees' protected rights under Section 8(a)(1) of the National Labor Relations Act, which makes it unlawful for any employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[9]

Using the *Boeing* standard, the NLRB held that Boeing's no-camera rule was lawful, explaining that the substantial and important justification for the rule outweighed the limited risk it posed to employee rights.[10] Additionally, the Board categorized no-camera rules as falling under the first category.

Board member, and current chair, Lauren McFerran, wrote a dissent in the *Boeing* decision voicing her opposition with the majority's break from the prior *Lutheran Heritage* test.[11] Member McFerran stated that the Board should not have changed the test when neither of the parties in the case, nor any external authority, requested the change.[12] She also criticized the Board's decision not to consider briefs from the public on the matter.[13] Ultimately, Member McFerran was dissatisfied with the new standard because she believed it did not adequately consider the employee's perspective.[14]

### The *Boeing* Effect

As a result of the *Boeing* standard, employers were given more autonomy to implement and enforce work and civility rules in the workplace, and a close examination of differences between the *Lutheran Heritage* standard and the *Boeing* standard reveals why. Under *Lutheran Heritage*, the analysis of the Board essentially began and ended with the perspective and experience of the party bringing the challenge. The standard stated that a facially neutral rule would be deemed unlawful if any of the following three prongs were present: (1) employees could reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of Section 7 rights.[15] The

CONTINUED

*Boeing* decision criticized this standard, stating that it possessed several inherent defects: it failed to properly consider employers' legitimate justifications for their policies; it devalued the importance of workplace rules to both employers and employees; it invalidated rules simply because they were ambiguous; and, it was too unpredictable in its results.

The three prongs of the *Lutheran Heritage* test created a multifactor gauntlet through which any rule would face three different considerations, each of which could immediately invalidate the rule. With three opportunities to fail, one of which relied solely on the perspective of the employee, many employer rules were unable to survive challenges from employees and were deemed unlawful as a result. In fact, so many rules were found unlawful in 2015 under the *Lutheran Heritage* standard that former GC, Richard Griffin, released a memo summarizing all of them.[16] Not surprisingly, the GC mentioned in his memo that the vast majority of these rules were deemed unlawful because of their failure to pass the first prong.[17]

The *Boeing* standard shifted the focus of work rule analysis away from the challenging party's perspective to the viewpoint of the employer. This test asked what the employer's justification for the rule in question was and how that justification balanced with the potential impact the rule may have on the employee's section 7 rights. Unlike the *Lutheran Heritage* standard, *Boeing* permitted a greater degree of infringement deterrence to employers *Boeing* still considered the perspective of the employee; however, that was one consideration amongst the list of considerations the Board assessed. As a result, employers were much more successful in defending their employment policies against challenges before the NLRB, particularly in the case of cameras in the workplace. In the cases of *BMW Manufacturing Co., G&E Real Estate Mgt. Services, Inc.*, and *Securitas Sec. Services USA*, the NLRB applied the *Boeing* standard to find that an employer's policy against recording in the workplace to be lawful.[18]

**The Return of *Lutheran Heritage?***

Prior to the *Boeing* decision in 2017, *Lutheran Heritage* was the standard for evaluating facially neutral workplace rules. Given Chairman McFerran's history with this issue, the case of *Stericycle, Inc.* could be the opportunity she has been looking for to end the use of *Boeing* and move back to the *Lutheran Heritage* standard. *Stericycle, Inc.* is a case involving the legality of numerous workplace rules. The administrative law judge ("ALJ") who heard the case applied the *Boeing* standard and held that some of the work rules did violate Section 8(a)(1) of the NLRA, while others did not. The rules that were found to have violated the NLRA were: a "personal conduct" rule; a "conflict of interest" rule; and, a "confidentiality of harassment complaint" rule.[19] The NLRB has since requested briefs from the public on the continued application of the *Boeing* standard in this case and in subsequent cases.[20] Applying the *Lutheran Heritage* standard to these issues is unlikely to change the outcome with respect to all of the rules examined by the ALJ as it is less permissive of employer rules than *Boeing*; however, Chairman McFerran may have requested briefs on this issue because she wants to use this case as a vehicle to return to overturn *Boeing* and return to *Lutheran Heritage.*

Another option the NLRB could consider for evaluating facially neutral work rules is a hybrid standard that adopts the strengths of each standard. *Lutheran Heritage* was criticized for not adequately assessing the employer's perspective and focusing too much on the employee, while B*oeing* was viewed as giving employers too much deference. Whatever the result of *Stericycle Inc.* may be, employers should take affirmative steps to ensure they are prepared for challenges to work rules that likely would have passed NLRB scrutiny under the *Boeing* standard. Employers should review their current handbooks and work with counsel to assess any rules that could potentially limit employees' Section 7 activities rights.

CONTINUED

## Endnotes

1 The Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017)
2 *Id.* at 15
3 Memorandum GC 18-04 (June 6, 2018)
4 *Id.*
5 *The Boeing Company*
6 GC 18-04
7 *Id.*
8 *Id.* at 5.
9 29 U.S.C.A. § 158 (West).
10 *Id.* at 19
11 *Id.* at 29.
12 *Id.* at 30.
13 *Id.*
14 *Id.* at 35
15 *Lutheran Heritage Village-Livonia and Vivian A. Foreman*, 343 NLRB No. 75 (November 19, 2004).
16 Subject: Rep. of the Gen. Couns. Concerning Emp. Rules, No. MEMORANDUM GC 15- 04, 2015 WL 1278780, at *1 (Mar. 18, 2015).
17 *Id.* at *1.
18 *BMW Mfg. Co.; G&E Real Est. Mgmt. Servs., Inc.*, 369 NLRB No. 121 (July 16, 2020); *Securitas Sec. Servs. USA & Ryan Patrick Murphy*, 369 NLRB No. 57 (Apr. 14, 2020).
19 *Stericycle, Inc. and Teamsters Local 628*, 371 NLRB No. 48 (January 6, 2022).
20 *Id.*

The alphabet soup of employment law – ADA, EEOC, FLSA, FMLA – can be daunting. **Anne K. Schmidlin, Esq.**, works with businesses to meet their needs complying with these and other labor and employment laws. Ms. Schmidlin assists clients with noncompete agreements, severance packages, wage and hour matters, employment handbooks and employment discrimination charges. Ms. Schmidlin also works in the Firm's immigration practice, where she assists employers in navigating the legal requirements of hiring foreign nationals.

**Jacob S. Kinder, Esq.**, is an associate in Eastman & Smith's Labor & Employment and Workers' Compensation Practice Groups. Areas of particular interest are employment discrimination and harassment defense as well as representing employers in workers' compensation proceedings. For more information, visit Jacob Kinder (eastmansmith.com).

OACTA

OHIO ASSOCIATION of CIVIL TRIAL ATTORNEYS

*The Source for Defense Success*

400 W. Wilson Bridge Rd.
Worthington, Ohio 43085