

## HRAGC LEGAL UPDATE

SEPTEMBER 15, 2022

### FEDERAL

#### United States Supreme Court

The United States Supreme Court generated considerable attention in its most recent term, leaving employers with much to consider.

In two decisions issued January 13, 2022 the Court addressed the ability of federal agencies to mandate vaccination against Covid-19. The Court focused on the agency's authority and whether the challenged regulatory action was consistent with that authority.

In *Biden v. Missouri*, the Court (in a 5-4 decision) upheld a rule issued by the Secretary of Health and Human Services requiring that healthcare facilities participating in Medicare and Medicaid ensure all of their employees were vaccinated against Covid-19 unless exempted on medical or religious grounds. The Court found the rule was within the Secretary's authority and thus prevented enforcement of injunctions issued by two lower federal courts.

But in *National Federation of Independent Business v. Department of Labor*, the Court (in a 6-3 decision) overturned an OSHA rule requiring that employers with 100 or more employees ensure their covered workers were vaccinated against the virus. The Court found the rule exceeded OSHA's authority to regulate occupational hazards and prevented enforcement. The decision turned on the Court's determination that the virus was not an occupational hazard.

On May 23, 2022, in *Morgan v. Sundance*, the Court (in a 9-0 decision) ruled that when a court evaluates whether a party waived its right to enforce an arbitration agreement it may not require a showing of prejudice as part of the analysis. The case involved a former Taco Bell franchise employee who had signed an employment agreement with a provision requiring arbitration of disputes. But the employee filed a claim in court. The employer delayed asserting its right to arbitration and after going through much of the court process, including mediation, the employer filed a motion to compel arbitration which the employee opposed. The lower courts required the employee to show that he was prejudiced by the employer's delay in asserting the contractual right to arbitration. The Supreme Court reversed and ordered the lower courts to review whether the employer's lengthy participation in the case was sufficient to constitute a waiver of a contractual right. This case demonstrates the importance of prompt assertion of contractual rights, such as an arbitration, and avoiding conduct that is inconsistent with that right.

On June 27, 2022, in *Kennedy v. Bremerton School District*, the Court (in a 6-3 decision) ruled that a School District improperly terminated a football coach for engaging in prayer on the field after games. The Court examined two key questions: whether the employee was acting as a private person at the time and whether the District's interests outweighed the employee's right to engage in private speech on a matter of public concern. Though this case involved a public employer it is instructive for private employers who seek to regulate religious or other speech at work: it is important to carefully balance the needs of the parties and objectively assess whether the employer's asserted interests outweigh the employee's interests.

In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overturned *Roe v. Wade* in a 6-3 decision issued June 24, 2022. In New Hampshire abortion is banned after 24 weeks with limited exceptions, but there is no law specifically protecting the right to an abortion. Employees may push for changes to employee benefits or policies, particularly if new legislation is introduced. Employers considering those requests should carefully evaluate the requirements of federal and state laws governing leaves, benefit programs, accommodations, and others.

## Centers for Disease Control and Prevention

On August 11, 2022 the CDC revised its guidelines for how to address an exposure to Covid-19. The CDC now advises that a person wear a high-quality mask for 10 days when with others at home and when indoors in public settings, isolate if experiencing symptoms, get tested after 5 days and isolate if testing positive. This can make it more challenging for employers who want employees to be in the workplace as exposed persons may be at work provided they follow certain precautions, but this may make some employees uncomfortable. Employers may have to be proactive to address accommodation needs of other employees if an exposed co-worker returns and another employee, particularly someone with a health issue, is uncomfortable with that. Employers should be careful to protect the privacy of both the exposed employee who disclosed his medical information (as wearing a mask may cause others to ask questions) and any employee who disclosed his or her health condition.

## National Labor Relations Board

On September 6 the NLRB proposed a new Joint Employer standard. The proposal focuses on whether an employer utilizing the employees of another shares or codetermines “matters governing employees’ essential terms and conditions of employment.” If it becomes final this proposal would replace the rule that was effective in April 2020 which focused on whether an employer had direct control over the terms and conditions of employment of another company’s employees. Employers using temporary employees or working with other employers should be careful to avoid having indirect control or even having the right to do so in an agreement, to avoid being deemed a joint employer and being exposed to additional liability and obligations in connection with those other employees.

## NEW HAMPSHIRE

### Paid Family Medical Leave

The Executive Council approved a paid family medical leave plan awarding a contract to MetLife. It begins January 1, 2023. State employees will be able to receive 60% of the average weekly wage for up to 6 weeks for qualified leave. Private employers may voluntarily participate in the program and employees may join on their own if their employer does not opt in. The benefits and details may be different for private employees and groups. Certain employers may be required to perform certain functions to facilitate their employees’ participation in the program.

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