



**MITA**  
**LABOR & EMPLOYMENT LAW DEVELOPMENTS**  
**BODMAN PLC - WORKPLACE LAW GROUP**

AARON GRAVES | JOHN BELOW | GARY FEALK

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# WELCOME

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- Now more than ever, employers must think proactively in their workforce management. Successful working environments require clear and effective policies and procedures.
- This presentation focuses on how employers can best position themselves to handle the various anticipated changes in the labor and employment landscape during the Biden administration.
- During this interactive presentation, participants are encouraged to ask questions.



# AGENDA

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- Independent Contractor vs Employee
- OSHA – Workplace Safety
- ERISA – Withdrawal Liability
- Non-Compete Law



**CLASSIFYING WORKERS:  
INDEPENDENT CONTRACTOR VS. EMPLOYEE**

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# INDEPENDENT CONTRACTOR OR EMPLOYEE?

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- Employers are increasingly turning to independent contractors and staffing companies to fill positions in their organizations.
- Misclassifying workers as ICs when they *should* be treated as employees exposes companies to risks regarding workers compensation insurance, unemployment benefits and income tax issues.



# TRUMP ADMINISTRATION – NEW TEST

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- Slated to Take Effect March 8, 2021
  
- Shorter & Simpler Standard to Classify “Independent Contractors”
  
- Proposed Formulation:
  - The nature and degree of worker’s control over his/her work;
  - Worker’s opportunity for profit or loss based on personal initiative or investment;
  - Amount of skill required in the work;
  - Degree of performance in the work relationship; and
  - Whether the work is part of an integrated unit of production.



# BIDEN ADMINISTRATION – POLICY FREEZE

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- Department of Labor Stalling Until May 7, 2021
- President Biden's Goals:
  - Aggressively pursue employers who intentionally misclassify employees as independent contractors.
  - Increase investigations to facilitate large anti-misclassification effort.
  - Fine owners and businesses for misclassification of employees.
  - Enact more stringent independent contractor test.



# PRESIDENT BIDEN – POTENTIAL NEW TEST

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- ABC Test – Codified in California in 2019
  
- A hiring entity seeking to classify a worker as an independent contractor must prove:
  - The worker is relatively free of the hiring entity's control as to how the work is done;
  - The worker is performing work outside the usual course of the hiring entity's business; and
  - The worker customarily and regularly does work (for third parties) in the established trade, occupation, or business being performed for the hiring entity.





# WHAT THIS MEANS FOR EMPLOYERS

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- Far Fewer Workers Bona Fide Independent Contractors
  - IRS and State tax implications
  - FLSA and FMLA implications
  - Unemployment Agency implications
- Revisit All Contractor and Consultant Agreements
  - Clarify individuals will be ICs and not full-time employees
- Train Managers to Avoid Dictating Specific Practices and Details of ICs Work Process



# ERISA - WITHDRAWAL LIABILITY

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# MULTIEMPLOYER PENSION PLANS

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## ■ Multiemployer Pension Plans

- Collectively bargained defined-benefit retirement plans between two or more employers and a union.
- Administered by a board of trustees with employer and union representatives.
- Plans backed by Pension Benefit Guaranty Corporation's (PBGC) multiemployer revolving fund.

## ■ Multiemployer Pension Plans in Financial Distress

- Roughly 1,400 multiemployer pension plans exist.
- Covering about 10 million active and retired workers.
- Collectively hold \$496 billion in assets.
- Collectively face \$1.2 trillion in liabilities.
- Net deficiency of \$672 billion.



# WITHDRAWAL LIABILITY

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- Withdrawal Liability
  - Imposes financial requirements on an employer that drops out of an underfunded multiemployer plan.
  - Represents an employer's allocable share of the plan's unfunded vested benefits.
  - Ensures a plan's financial stability even if an employer terminates its participation.
- Unfunded Vested Benefits
  - Promised future benefits accrued by participants that exceed the value of the plan's assets.
  - Withdrawal liability exists when there are unfunded vested benefits.
  - Plan funding status is determined annually by the plan's actuary based on various assumptions.



# BUILDING AND CONSTRUCTION INDUSTRY

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- Building and Construction Employers Avoid Withdrawal Liability unless:
  - Employer ceases to have an obligation to contribute under the plan; and
  - Continues to perform similar work in the jurisdiction where contributions were required; or
  - Resumes such work within 5-years after the date it ceased making contributions.

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# ASSET SALE AGREEMENT - § 4202 OF ERISA

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- Employers in Asset Sales Avoid Withdrawal Liability when:
  - Parties to the transaction inform the plan of intent to comply with § 4202;
  - Purchaser maintains substantially similar obligation to contribute to plan;
  - Purchaser posts a bond for 5-years, unless an exception is met; and
  - Seller remains secondarily liable if purchaser withdraws from plan within 5-years of sale.
- Bond Exceptions
  - *De Minimis* Transaction – bond amount less than \$250,000
  - Net Income Test – purchaser’s average net income exceeds 150% of required bond
  - Tangible Assets Test – based on value of unfunded future benefits in the plan



# AMERICAN RESCUE PLAN ACT OF 2021

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## ■ Pension Fund Bailouts

- Provides “special financial assistance” to “critical and declining” plans through 2051.
- Financial assistance is not subject to any repayment obligations.
- Pension Benefit Guarantee Corporation (PBGC) will partition dying multiemployer pension plans.
  - PBGC takes payment responsibility for portion of paid retiree benefits.
  - Plan trustee continues to administer now smaller plan with sufficient assets.
- Plans will reinstate and pay benefits that were previously reduced due to lack of funding.
- PBGC has discretion to determine withdrawal liability for plans that receive bailout.
- No withdrawal liability relief for employers that previously withdrew from plan.



# AMERICAN RESCUE PLAN ACT OF 2021 - OTHER IMPORTANT PROVISIONS

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## ■ Unemployment Benefits

- Extends \$300 per week unemployment benefit for workers through Sept. 6, 2021.
- Continues to encourage use of “short-time compensation” or “work share” programs.
- Makes first \$10,200 of 2020 unemployment benefits nontaxable (household incomes below \$150,000).

## ■ Family and Sick Leave Credits

- Continues tax credit program for employers that voluntarily provide paid leave through Sept. 6, 2021.
  - Fully refundable credits against payroll taxes.
  - Paid leave credits allowed for leave due to a COVID-19 vaccination.
- Resets 10-day (80 hour) limit for tax credit on April 1, 2021.
- Increased cap of eligible expanded family and medical leave wages per employee from \$10,000 to \$12,000.
- Employers cannot claim tax credits if paid leave provided discriminates in favor of highly compensated or full time employees.





**OSHA  
STRONGER STANCE ON WORKPLACE SAFETY?**

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# HANDLING COVID-19 PANDEMIC

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- Create National Standard for COVID-19 Workplace Safety
  - Initial OSHA Guidance – January 29, 2021
  - Emergency Temporary Standard Deadline – March 15, 2021 (Delayed)
  - Michigan OSHA Emergency Rules still Control – October 14, 2020
- Standard COVID-19 Guidance
  - Face masks and social distancing required in workplace
  - Preparedness and response plans
  - Maintain employer preparedness plans
  - Isolate symptomatic employees
  - Do not distinguish between vaccinated and un-vaccinated employees
  - MIOSHA cites any of the above COVID-19 violations as “serious”



# VACCINE ADMINISTRATION MANDATORY OR VOLUNTARY POLICY

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- EEOC – Employer may Adopt Mandatory Vaccination Policy
  
- Policy Subject to Workplace Anti-Discrimination Laws
  - Title VII
  - Americans with Disabilities Act
  - Genetic Information Nondiscrimination Act
  - Pregnancy Discrimination Act
  - Rehabilitation Act
  - Age Discrimination in Employment Act



# ADMINISTRATIVE HURDLES

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- ADA – Vaccine is not a Medical Examination
  - ADA Protections not Triggered
  
- CDC – Pre-Screening Question Requirement
  - Purpose: Ensure vaccination is medically safe for employee
  - ADA Protections Triggered: Prohibition on Disability-Related Inquiries
    - Exception: Employer Proves Direct Threat Exists
  - GINA Protections Triggered: Prohibition on Genetic Inquiries



# PUTTING SHOTS IN ARMS

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- 1) In-House Administration or Third-Party Contractor
  - Employer is Responsible for Pre-Screening Questions
  - ADA Exception: Employer Proves Direct Threat Exists
  - GINA: No Exception
  
- 2) Pharmacy or Private Health Care Provider
  - Employer not Responsible for Pre-Screening Questions
  - Employer Requests Vaccine Confirmation Receipt
  
- 3) Voluntary Vaccine Policy
  - Employer not Responsible for Pre-Screening Questions



# GENERAL REFUSAL

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- At-Will Employees
- Clearly Communicate Vaccination Policy to Employees
- Train Supervisors and Staff to Consistently Apply Policy
- Collective Bargaining Agreements & Unions



# SPECIAL REFUSALS

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- Title VII – “Sincerely Held” Religious Belief
  - Reasonable Accommodation: Flexible & Interactive Process
  - Undue Hardship: *De Minimis* Cost to Employer
  
- ADA – Disability
  - Reasonable Accommodation: Disability Must Require Accommodation
  - Undue Hardship: Significant Difficulty or Cost to Employer
  
- Pregnancy Discrimination Act
  - Reasonable Accommodation



# VACCINATION RISKS

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- Employee Experiences Serious Side Effect from Vaccine
  - Workers' Compensation Claim
  - National Vaccine Injury Compensation Program
  
- Time-Off After Vaccination
  - Families First Coronavirus Response Act
  - FMLA
  - Employer's Own Policy
  
- Violation of Anti-Discrimination Laws
  
- Employee Morale





# MANDATORY VS. VOLUNTARY VACCINE POLICY

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- OSHA's General Duty Clause
- Mandatory Policy: Tracking Compliance, Managing Exemption Requests, & Dealing with Potential Legal Claims
- Voluntary Policy: Maintain Status Quo
- Incentivize Vaccination



# EMPLOYER TAKEAWAYS

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- Balance Company Needs with Employee Interests
- Clearly Communicate Vaccination Policy to Employees
- Prepare for Variety of Exemption Requests
- Social Distancing and Mask Protocols Continue



# WORKER SAFETY RULES FOR NEXT PANDEMIC

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- Frontline Enforcement Boost
  - Increased inspections and enforcement
  - Eliminate OSHA inspection triggers (i.e. complaint or accident)
  
- Long-Term Infectious Disease Rule
  - Employers maintain infectious disease prevention plan.
  - Expect employers to safeguard their workers.
  - Anti-retaliation protection for symptomatic employees.



# LIMITING NON-COMPETE AGREEMENTS

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# WHAT IS A NON-COMPETE AGREEMENT?

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- Companies use Non-Competes to Protect Legitimate Business Interests
  - Allows companies to freely and efficiently share information with employees.
  - Protect trade secrets, confidential business information, goodwill, and other business interests.
  - Maintain investment in time and resources to train employees.
- Limit a Workers' Freedom Post-Employment
- State Law Ordinarily Governs Non-Compete Agreements



# ENFORCEABLE NON-COMPETES IN MICHIGAN

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- Must Protect Employer’s “Reasonable Competitive Business Interests”
  - Generally, more enforceable against high-level employee or sales employee with direct customer contact
  - Reasonable: chemist makes energy drink (*Innovation Ventures v. Custom Nutrition Lab*)
  - Not Reasonable: employees making sandwiches (*Illinois v. Jimmy John’s*)
  
- Agreement must be Reasonable
  - Duration (6 years vs. 6 months – depends on circumstances)
  - Geographical Area (entire state vs. 10-mile radius)
  - Type of employment or line of business

# BIDEN ADMINISTRATION'S HOSTILITY TOWARDS NON-COMPETES

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- “Non-compete clauses do nothing, but . . .
  - Suppress wages and limit wage growth
  - Trap employees in abusive and discriminatory work environments.”
- Limit Workers’ Exit Options
  - Move to entirely different location.
  - Find new line of work.
  - Remain unemployed for duration of non-compete clause.
- Employees Lack Bargaining Power to Resist Inclusion



# BIDEN ADMINISTRATION'S OPTIONS TO ELIMINATE NON-COMPETES

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- Executive Action
  - Highly controversial.
- New Federal Legislation
  - Congress has the power to regulate Commerce “among the several states.”
  - Both Houses of Congress must approve ban on non-competes.
- New Regulation by the Federal Trade Commission (FTC)
  - Authority to address unfair or deceptive acts or practices and unfair methods of competition.
  - Biden soon to appoint two members in five member FTC.





# WHAT THIS MEANS FOR EMPLOYERS

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- Reasonable Non-Compete Agreements Remain Enforceable (For Now)
- Shift Focus to Remaining Options
  - Non-Disclosure Agreements – restrict use of confidential information and trade secrets.
  - Non-Solicitation Agreements – prohibit solicitation of specific company’s customers.
  - No-Raid Agreements – prohibit solicitation of company’s employees.
  - Compensation-for-Competition Agreements – allow employees to either forfeit certain benefits or pay some amount of money to engage in competitive activity.



# Q&A

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# CONTACT INFORMATION

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**Aaron D. Graves**

[agraves@bodmanlaw.com](mailto:agraves@bodmanlaw.com) 313-392-1075

**John T. Below**

[jbelow@bodmanlaw.com](mailto:jbelow@bodmanlaw.com) 248-743-6035

**John D. Gardiner**

[jgardiner@bodmanlaw.com](mailto:jgardiner@bodmanlaw.com) 616-205-3123

**Gary S. Fealk**

[gfealk@bodmanlaw.com](mailto:gfealk@bodmanlaw.com) 248-743-6060

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