

# Labor & Employment Updates In these Interesting Times

Breakfast Briefing

Oct. 20, 2021

# Presenter | Abby (Busler) Tilkens



## Associate | Labor & Employment Team

Abby is a member of the firm's Labor & Employment team and the School and Higher Education practice group. Her practice primarily focuses on counseling education clients in **school law** and **labor and employment issues**. Abby worked as a law clerk for the Department of Public Instruction, where she conducted extensive legal research on educational law issues and assisted the legal department in representing the state superintendent in cases regarding open enrollment, expulsion appeals, the school choice program, and the food and nutrition programs.

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# Presenter | **Anthony (Tony) J. Steffek**



## **Shareholder | Labor & Employment Team**

As a member of Davis|Kuelthau's labor and employment team, Tony proactively and reactively assists employers, both big and small, in wading through the various HR-related issues that arise in today's employment world. Proactively, Tony helps with issues such as **hiring/firing, noncompetition agreements** and other **restrictive covenants, disability and ADA issues, FMLA** and other leave matters, **employee handbook review** and revision, sensitive personnel matters and investigations, **OSHA compliance, wage and hour issues**, and labor negotiations. He also provides public entities and schools, both primary/secondary and post-secondary, with advice and counsel on issues specific to those clients.

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# Presenter | **Robert (Bob) W. Burns**



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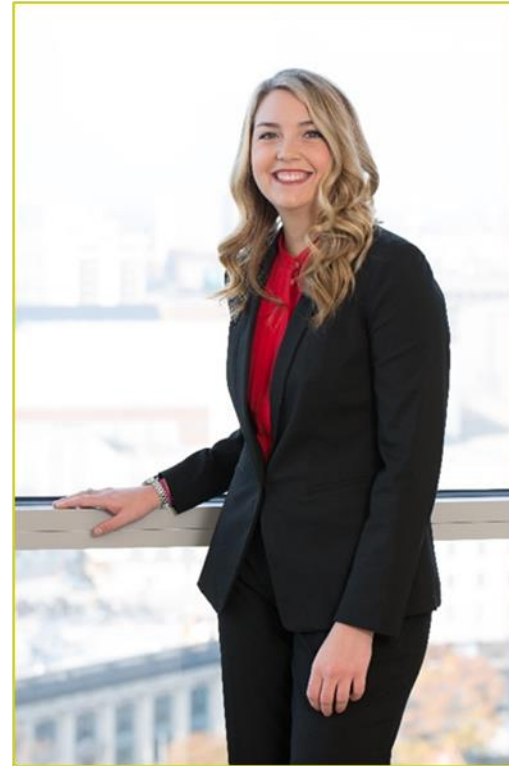
## **Shareholder | Labor & Employment Team**

Bob assists clients with a wide variety of issues which arise in the workplace. He represents employers in **labor negotiations, discrimination defense, disability and ADA issues, wrongful discharge or employment contract disputes, non-compete issues** and other sensitive personnel transactions. He also provides advice on a wide variety of school law issues.

Bob works with businesses and governmental entities as general or special counsel. He represents employers of all sizes, including those with union and non-union workforces.

# COVID-19 UPDATES

Presented by: Abby Tilkens



# COVID Updates – Federal Contractor Vaccine Mandates Guidance.

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# Background - How did we get here?

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- President Biden issued two Executive Orders on September 9:
  - 1) Federal employees and federal contractor employees must receive the COVID vaccine.
  - 2) The Occupational Safety and Health Administration (“OSHA”) Issued Emergency Temporary Standard rules requiring private employers with 100 or more employees ensure their workforce is fully vaccinated or mandate unvaccinated workers to undergo weekly testing.

# Background (cont'd)

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- Status of Executive Orders:

- 1) Safer Federal Workforce Task Force (“Task Force”) issued Guidance (“Guidance”) implementing the Executive Order with respect to federal workers and federal government contractors.
- 2) OSHA’s rules are under review by the Office of Management and Budget.

# New Guidelines

By December 8, 2021, covered federal contractors and subcontractors must ensure and verify through documentation that their workforces are fully vaccinated against COVID.

- Except for employees who are legally entitled to a medical or religious accommodation.

\* The Safer Federal Workforce Task Force's guidance does not include a testing option in lieu of vaccination for federal employees or federal contractors at this time.

# New Guidelines (cont'd)

- Covered employers must ensure all employees and visitors adhere to the CDC's guidance on:
  - Physical distancing; and
  - Masking while in the workplace.



# New Guidelines (cont'd)

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- Covered employers must also designate a COVID-safety coordinator who is required to:
  - Coordinate;
  - Implement; and
  - Ensure compliance with safety protocols.

# New Guidelines (cont'd)

## How is this legal for Federal Contractors?

- COVID safety protocols are implemented and effectuated by an additional clause in federal contracts awarded on or after November 14, 2021;
- COVID safety protocols are also included in any federal contract solicitations, extension, renewals and options taking place on or after October 15, 2021.

## What does this mean?

- Contractually obligated to comply with the safety requirements.

Covered contractors are not required to provide onsite vaccination for employees.

# Affected Employer and Employees

- Who does the Guidance apply to?
  - Federal contractor employees on covered contracts;
  - Those who perform duties in connection with a covered contract; and
  - Those working at the same workplace as covered employees.



# Affected Employer and Employees (cont'd)

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- Who are federal employees and federal contractor employees?
  - Federal employees:
    - Employee as defined in 5 U.S.C. Sec. 2105 (including an employee paid from non-appropriated funds as referenced in 5 U.S.C. Sec. 2105(c))

# Affected Employer and Employees (cont'd)

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- Federal Contractor Employees :
  - ***Covered contractor*** - means a prime contractor or subcontractor at any tier who is party to a covered contract.
  - ***Covered contractor employee*** means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

# Affected Employer and Employees (cont'd)

- Workplaces :
  - ***Covered contractor workplace*** – means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee's residence.
  - ***Federal workplace*** – means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency's jurisdiction, custody, or control.
  - ***Contractor or subcontractor workplace location*** – means a location where covered contract employees work, including a covered contractor workplace or Federal workplace.



# Implementation of Guidance

- Guidance requires **FEDERAL** employees to be fully vaccinated by November 22, 2021.
  - What does that mean?
    - “fully vaccinated” means two weeks have passed since receiving a single-dose vaccine or the second shot of a two-dose vaccine.
    - To comply with the deadline, employees must receive the final dose by November 8.



# Implementation of Guidance

- Guidance requires **covered contractors and their employees** to be fully vaccinated by December 8, 2021.
  - What does that mean?
    - “fully vaccinated” means two weeks have passed since receiving a single-dose vaccine or the second shot of a two-dose vaccine.
    - To comply with the deadline, employees must receive the final dose by November 24.



# Implementation of Guidance (cont'd)

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- Enforcement:
  - U.S. Office of Personnel Management (“OPM”) announced that:
    - Agencies may start disciplining federal employees on November 9<sup>th</sup> and covered contractor employees on November 24<sup>th</sup> if the employees have not completed their vaccination process.

# Implementation of Guidance (cont'd)

- Enforcement:
  - OPM Director stated: *"Employees who refuse to be vaccinated or provide proof of vaccination are subject to disciplinary measures, up to and including removal or termination from federal service"*
  - OPM Director continued: *"The only exception is for individuals who receive a legally required exception pursuant to established agency processes."*



# Implementation of Guidance (cont'd)

## Acceptable forms of vaccination documentation

- Copy of a record of immunization from a health care provider, pharmacy;
- Copy of the COVID Vaccination Record Card;
- Copy of medical records documenting the vaccination;
- Copy of immunization records from a public health or State immunization information system; or
  - NOTE: Wisconsin has a state immunization registry.
- Copy of any other official documentation verifying vaccination with:
  - Vaccine name;
  - Date(s) of administration;
  - Name of health care professional or clinic site.



# Implementation of Guidance (cont'd)

- Vaccination and Safety protocols:
  - Vaccination status of visitors:
    - Communicate to visitors prior to arrival;
    - Post signage at entrances and protocol for masking and physical distancing.



# Implementation of Guidance (cont'd)

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- Exemptions for vaccination requirement:
  - Medical exemption/ medical accommodation;
    - Treat as a request for disability accommodation.
  - Religious exemption under Title VII – sincerely held belief.

# Compliance

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Federal law supersedes any and all contrary state or local law or ordinance.

- State or local law or ordinance may establish more protective workplace protocols.

Prime contractor is responsible for ensuring compliance and flow down of subcontractor compliance.

# Answers to Guidance Questions

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Employees that had prior COVID infection are required to be vaccinated;

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Employer cannot accept a recent antibody test as proof;

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Guidance also applies to workplace locations that are outdoors;

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Applies equally regardless of whether the covered contractor is a small business.

# Answers to Guidance Questions (cont'd)

If the covered contractor only performs duties in one building or site, is the contractor considered a covered contractor workplace?

- Yes. Unless can affirmatively show none of its employees at a site will come into contact with covered contractor, including:
  - interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Bottom line: difficult to find exceptions.

# Answers to Guidance Questions (cont'd)

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- Remote covered contractor employees:
  - Must comply; still categorized as a covered contractor employee.
    - The residence is not a covered contractor workplace and need not comply with workplace requirements.

# Answers to Guidance Questions (cont'd)

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- Subcontractor application:
  - Applies to subcontractors at all tiers, except:
    - Subcontractors solely for provision of products.
  - Flows:
    - Prime contractor → first tier subcontractor → higher-tier subcontractor → next lower-tier subcontractor → subcontractor solely for provision of products.

# What about Texas?

- Governor Abbott issued an executive order banning COVID vaccine mandates – both private and public entities.
  - Is it enforceable?
    - Unlikely given that it is a state mandate and federal law supersedes it.
    - Let the courts battle it out.



# Questions for Private Employers

How will the 100-employee threshold be counted?

- Use the FMLA calculation?

Will employers be required to collect proof of vaccination?

What type of testing will be required?

Will remote employees be covered?

What to do if employees refuse to comply?

# Other Considerations

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- Seventh Circuit Court of Appeals Upheld Indiana University's vaccine mandate.
  - The mandate did not violate a constitutional right.
  - U.S. Supreme Court rejected appeal.
    - The mandate allowed for accommodations.
    - The vaccination is a condition of attending Indiana University.
      - Each university may decide what is necessary to keep other students safe in a congregate setting. Health exams and vaccinations against other diseases (measles, mumps, rubella, diphtheria, tetanus, pertussis, varicella, meningitis, influenza, and more) are common requirements of higher education.
      - Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university, close contact is inevitable.

# Other Considerations (cont'd)

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- Wisconsin parents are suing two school districts over COVID mitigation efforts.
  - District removed student mask requirement and other mitigation measures at the beginning of the school year.
    - Argued that the systems failed to protect their children from infection.
    - Alleged the Districts recklessly refused to implement COVID mitigation strategies recommended by the CDC.
    - Seeking class action status.

# **FLSA “REGULAR RATE” REVIEW THERE AIN’T NOTHING “REGULAR” ABOUT THIS!**

Presented by: Tony Steffek



# Good Time for a Refresher

Number of class action lawsuits focused on proper overtime pay are on the rise

- Currently handling three of such suits, with an additional suit that just settled
- In the suit that just settled, the named plaintiff received a grand total of \$3.33

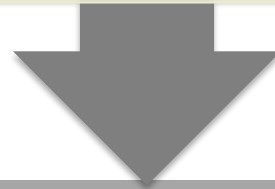
“Paid Program” terminated in February 2021

- Trump Administration “get out of jail free program that allowed errors to be corrected without fear of lawsuits, penalties and attorneys’ fees
- No ability to fix mistakes and avoid litigation

# “Regular Rate” – The Basics

No employer shall employ an employee for a workweek longer than forty hours ... unless such employee receives compensation for employment in excess of 40 hours “at a rate not less than one and one-half times the regular rate” at which he or she is employed.

29 U.S.C. § 207(a)(2)(C)



As used in this section, “Regular Rate” has a specific definition

# “Regular Rate” – The Definition

Regular Rate” ... “shall be deemed to include *all remuneration for employment* paid to, or on behalf of, the employee.”

- 29 U.S.C. § 207(e)
- Not for the employee and employer to decide; the nature of the employment and compensation rules the day. (29 C.F.R. § 778.108.)

Except for eight excluded categories of remuneration.

# “Regular Rate” - Exclusions

“Sums paid as gifts; payments made in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.” (29 U.S.C. § (e)(1).)

- Must be a true “gift” – cannot have any tie to company or personal performance. (29 C.F.R. § 778.212(b).)
- If so substantial that employees consider it a part of wages, cannot be considered a gift. (*Id.*)
- Can still be a gift, even if regularly expected (e.g., annual Christmas bonus). (29 C.F.R. § 778.212(c).)

Makes me think: “You don’t want to give bonuses, fine. But when people count on them as their salary, well what you did just plain ...” – WHO SAID IT?

# “Regular Rate” - Exclusions



# “Regular Rate” - Exclusions



“Payments made for occasional periods when no work is performed due to vacation, holiday, illness ... reasonable payments for expenses ... and similar payments which are not made as compensation for hours of employment.” (29 U.S.C. § 207(e)(2)).



Regulations specify several categories of payments covered by this exclusion (29 C.F.R. § 778.224):

E.g., loans to employee, costs of conveniences such as parking, locker rooms and on-the-job medical care, EAP programs, gym access/memberships, employee wellness programs, discounts on employer-provided retail goods, adoption assistance.

# Discretionary Bonuses (29 U.S.C. § 207(e)(3).)

- Employer must retain discretion as to what to pay and when – any prior promise or agreement to pay removes discretionary nature. (29 C.F.R. § 778.211(b).)
- Payments made pursuant to bona fide profit sharing-type plans or funds (29 U.S.C. § 207(e)(3).)



# “Regular Rate” Exclusions

Extra compensation provided by a premium rate for work outside of hours set by employment contract or CBA, provided premium rate is at least 1 ½ times normal, non-overtime rate.

- (29 U.S.C. § 207(e)(7).)

Value or income derived from stock option/stock appreciation/bona fide employee stock purchase program, with several conditions.

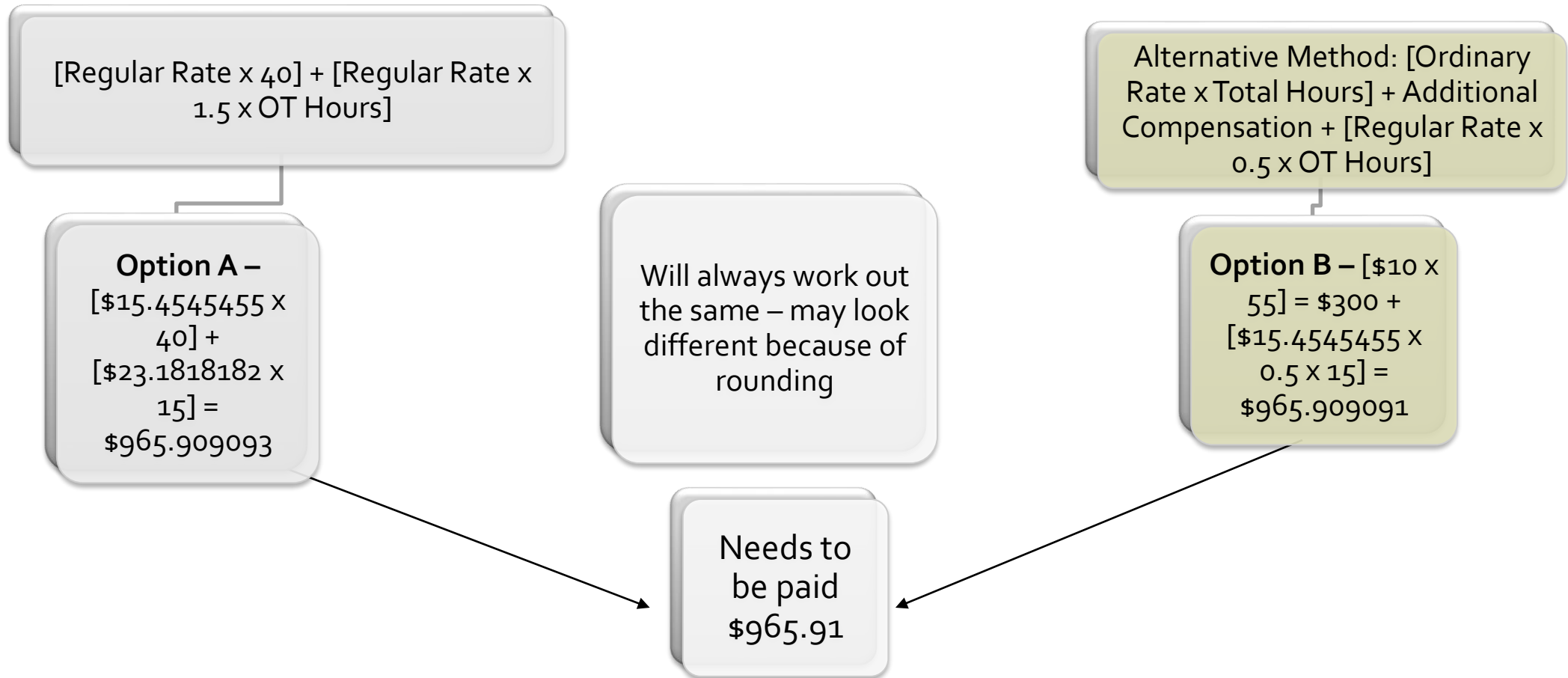
- (29 U.S.C. § 207(e)(7).)

# Calculating Regular Rate

- Regular Rate = Total Workweek Compensation / Total Hours Worked
- Total Workweek Compensation = Total Pay (not counting statutory exclusions)
- Example:
  - \$10 per hour
  - 55 hours worked
  - \$300 in monthly non-discretionary performance bonus
  - REGULAR RATE = \$15.4545455



# Calculating Proper Pay



*If additional compensation not factored in, would have been paid \$625.00 [(\$10 x 40) + (\$15 x 15)]*

# Ridiculous Examples

- Dwight Schrute makes \$20 an hour as Assistant to the Regional Manager/Paper Salesperson. He works 70 hours in a week. The Regional Manager, Michael Scott, without consulting with Toby Flenderson in HR, tells the sales team that if they sell 100 reams by Friday, Dunder Mifflin will pay qualifying employees an additional \$1,000.00. Dwight sells 100 reams on Monday. How much does Dunder Mifflin owe Dwight for the week?
- \$2,914.29
  - Regular Rate - \$34.285714
  - $[\$34.285714 \times 40] + [\$51.428571 \times 30]$



# Ridiculous Examples

- Down in the warehouse, Darryl Philbin is frustrated with Michael's constant favoritism toward the sales team. So, this week he decides to take eight hours of PTO on Friday. He makes \$10 an hour, meets his weekly delivery quota and earns the pre-set \$250 for doing so, and works a total of 42 hours between Monday and Thursday. He also receives an additional \$50 for completing his health risk assessment and turning in to Toby. How much does Dunder Mifflin owe Darryl for the week?
- \$815.95
  - \$80 – PTO Pay
  - \$50 – Health Risk Assessment Pay
  - \$685.95 – Hourly Pay
    - Regular Rate - \$15.95238
    - [ $\$15.95238 \times 40$ ] + [ $\$23.92857 \times 2$ ]



# SELECTED CASE LAW

Presented by: Robert Burns



# Selected Case Law

The following judicial decisions do not constitute an exhaustive survey of all recent appellate cases, but is a sampling of holdings which should be of interest to employers on a variety of topics.



# Selected Case Law (cont'd)

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- *Gilfillan v. Bradley University*, 2021 WL 1808599 (7<sup>th</sup> Cir. 2021).

*Gilfillan* was a graduate student with mental health disabilities who alleged discrimination under the Rehabilitation Act. As the Court noted, the Rehabilitation Act and the ADA are “materially identical.” The Court dismissed the claims as it found the university provided multiple accommodations, but even with those *Gilfillan* showed she was not qualified for the program when dismissed. Additional accommodations she requested went to a level of “individual attention” which the Court found was not required by the Rehabilitation Act nor the ADA.

# Selected Case Law (cont'd)

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- *Ford v. Marion County Sheriff's Office*, 942 F3d 839 (7<sup>th</sup> Cir. 2019).

The Court states in this decision “As a threshold matter, we hold that hostile work environment claims are cognizable under the ADA.” The Court noted that when Congress wrote the ADA it used the language of Title VII, and Title VII recognizes hostile work environment claims. Thus, inappropriate comments or treatment by co-workers with respect to another employee’s disability or perceived accommodations needs to be addressed by supervisors, just as with harassment based on other protected classes.

# Selected Case Law (cont'd)

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- *Blinsky v. American Airlines, Inc.*, 928 F.3d 565 (7<sup>th</sup> Cir. 2019).

Blinsky had multiple sclerosis and had worked at home for years, but management changes at his employer resulted in the need for face-to-face meetings on short notice. As a result, the Court found the company's revocation of his work at home permission was not discriminatory. If COVID-era accommodations such as remote work are no longer to be permitted, employers should be prepared to articulate the rationale for such decisions.

# Selected Case Law (cont'd)

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- *Demkovich v. St. Andrew The Apostle Parish, et al.*, 2021 WL 2880232 (7<sup>th</sup> Cir. 2021)

In 2020, a divided panel of the 7<sup>th</sup> Circuit initially held that Demkovich, a ministerial employee, could proceed with a hostile work environment claim even though the “ministerial exception” would bar any judicial interference with hiring or firing decisions. The full 7<sup>th</sup> Circuit vacated the panel opinion and held that the constitutional protection afforded to religious entities by the ministerial exception applies to hostile work environment claims in the same manner as hiring and firing. “The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between.”

# Selected Case Law (cont'd)

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- *Slamka v. General Heating and Air Conditioning, Inc.*, 397 Wis. 2d 244 (Ct. App. 2021)

Wisconsin Court of Appeals holds that the Wisconsin Employment Relations Commission (WERC) properly dismissed Slamka's complaint under the Wisconsin "Right to Work" law, holding that the type of claim he presented is preempted by the National Labor Relations Act (NLRA). Slamka argued the Wisconsin Constitution guarantees a "remedy for a wrong," and he claims the employer violated Wisconsin's legally enacted Right to Work Law and he should be able to pursue it with the WERC.

# Selected Case Law (Slamka cont'd)

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The Court of Appeals disagreed and dismissed the case, but the Wisconsin Supreme Court has agreed to hear the case and decide the issues of whether cases under the Wisconsin Right to Work Act should be determined by the WERC and whether the Wisconsin Constitution provides a remedy in such cases.

# Selected Case Law (cont'd)

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*Hartsuch v. Ascension Medical Group, et al.*, 2021 WL 3809908 (W.D. Wis. 2021)

The Federal District Court for the Western District of Wisconsin dismissed Dr. Hartsuch's wrongful discharge and tortious interferences claims based on his allegation that he was fired for criticizing Ascension's COVID-19 procedures.

Applying long-standing Wisconsin precedent regarding the public policy exception to the employment-at-will doctrine, the Court found Hartsuch did not establish that he was fired for fulfilling a specific legal mandate related to COVID-19. While his complaints to the hospital might "implicate important concerns related to health and safety," there was no specific "legal command that compelled his safety-motivated complaint." The Court dismissed the wrongful discharge claim.

# Selected Case Law (cont'd)

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*Vesey v. Envoy Air, Inc.*, 999 F3d 456 (7<sup>th</sup> Cir. 2021)

Vesey was an airline employee who complained of racial harassment based on her African-American race. Allegedly biased supervisor may have pressured a co-employee to report Vesey's violations of the employer's flight and travel privileges. 7<sup>th</sup> Circuit Court of Appeals dismissed Vesey's retaliation complaint because the travel violations were independently investigated and thus the termination on that basis was not retaliation and "cat's paw" theory did not apply.

# Questions / Comments ?

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- At this point in the program, we would like to open the floor up to any questions or comments.

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