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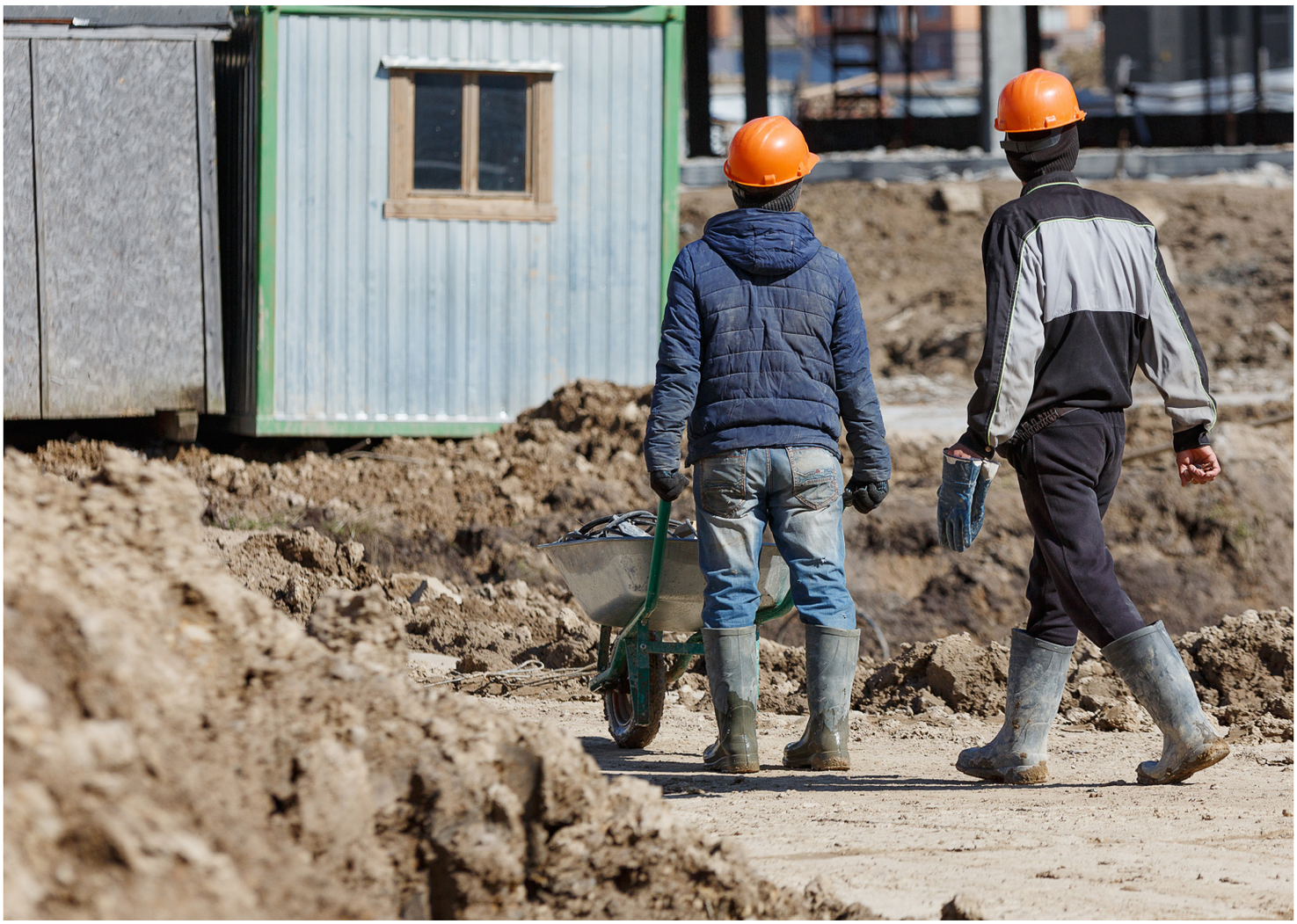

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NLRB GENERAL COUNSEL SIGNALS NON-COMPETE AGREEMENTS ARE IN HER CROSSHAIRS

On May 30, 2023, NLRB General Counsel Jennifer Abruzzo sent a memo to all Regional Directors, Officers-in-Charge, and Resident Officers, outlining her view that the inclusion, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act, except in limited circumstances. The memo explains that overly broad non-compete agreements are unlawful because they deter employees from exercising their rights under Section 7 of the National Labor Relations Act, which safeguards employees' rights to engage in collective action for the betterment of their working conditions. Specifically, the memo concludes that these agreements impede employees' ability to:

(1) Act collectively to threaten resignation in order to secure improved working conditions.

(2) Collaboratively execute threats of resignation or concertedly resign to achieve enhanced working conditions.

(3) Jointly pursue or accept employment with a local competitor to attain better working conditions.

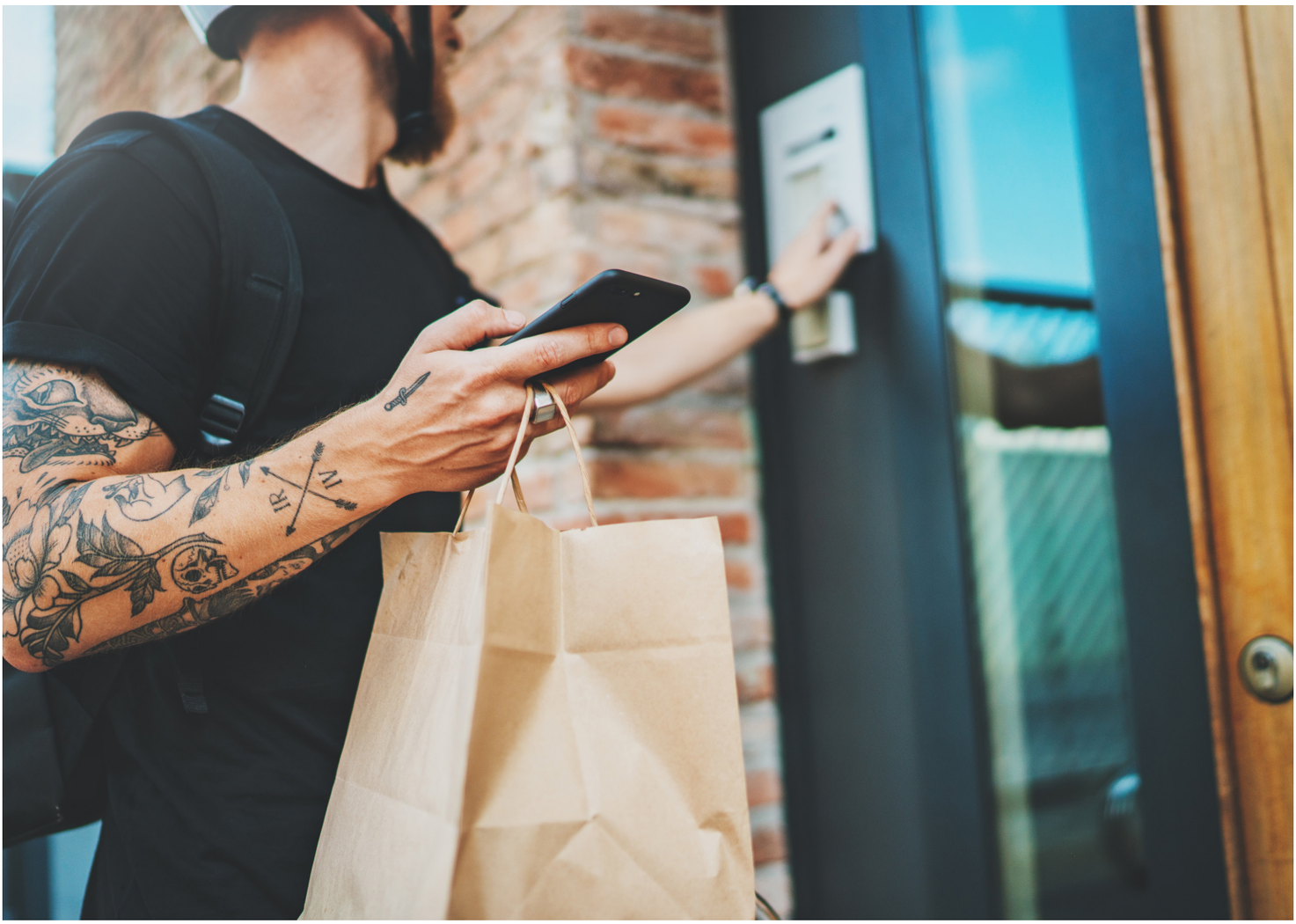
(4) Solicit their co-workers to join a local competitor's workforce as part of a larger protected concerted activity.

(5) Seek employment, at least in part, with the specific intention of engaging in protected activities, including union organizing, alongside other workers within an employer's establishment.

In her memorandum, General Counsel Abruzzo explained, "Non-compete provisions have the potential to unreasonably dissuade employees from exercising their Section 7 rights when employees could reasonably interpret these provisions as limiting their ability to resign or change jobs, thereby restricting their access to alternative employment opportunities for which they are qualified based on their experience, skills, and preferences regarding the nature and location of work." She specifically stated that the denial of access to employment opportunities interferes with workers participating in Section 7 activity in various ways—such as the challenge of replacing lost income if they are terminated for exercising their statutory rights to organize and collectively act to enhance working conditions; undermining their bargaining power during lockouts, strikes, and other labor disputes; and weakening social connections and solidarity that contribute to improvements in workplace conditions as they disperse in various directions.

General Counsel Abruzzo further clarified that non-compete agreements might be deemed lawful in "special circumstances," including when (1) provisions solely restrict individuals' managerial or ownership interests in a competing business; (2) they apply to genuine independent contractor relationships; and/or (3) they are narrowly tailored to safeguard trade secret information.

Currently, the General Counsel's memorandum does not hold the status of law, but it offers insight into how the NLRB will view these agreements going forward under the NLRA. General Counsel memos serve as an announcement of the enforcement stance the General Counsel will adopt on specific matters from a prosecutorial standpoint. However, similar to many of General Counsel Abruzzo's prior memoranda, it raises several questions about the boundaries of enforcement. Nationally, there has been a growing resistance against non-compete clauses at both the state and federal levels. In the realm of non-competes, courts have consistently acknowledged that employees possess individual rights deserving of protection, while employers may also have valid interests to safeguard. It is at the intersection of these two principles that courts often grapple. The GC's Memorandum, while aligned with the overarching trend of disfavoring non-compete clauses, offers limited clarification on how the NLRB will reconcile these conflicting interests moving forward.



NEW YORK CITY GIG WORKERS RECEIVE WAGE INCREASE AMIDST ONGOING LEGAL CHALLENGES

New York City's gig economy is undergoing significant changes. Mayor Eric Adams and the NYC Department of Consumer and Worker Protection ("DCWP") have introduced a minimum wage increase for food delivery workers, starting at $17.96 per hour on July 12th, 2023, with plans to reach $19.96 by April 2025. This wage hike, tripling the current minimum of $7.09 per hour, is expected to impact over 60,000 food delivery professionals.

The DCWP's payment structure allows app-based platforms to choose how they pay workers as long as the average meets or exceeds $17.96 per hour (or $19.96 by 2025). This wage increase comes after work by advocacy by groups like *Los Deliveristas Unidos*, which aim to address working conditions and the operational costs in the gig economy. These changes could bring about changes for gig workers nationwide and reshape the gig economy.

Despite these developments, there are legal processes that must take place before any of these policies go into effect. Major gig companies, including Uber, DoorDash, and Grubhub, are currently contesting the city's minimum pay regulations, arguing that flawed data led to compensation rules that may have unintended consequences for local businesses and delivery workers. This legal dispute has led these companies to seek temporary restraining orders in the State Supreme Court in Manhattan, thus putting the final decision of the wage increase in the hands of the judicial system. Unlike most states, New York's lowest court is called the Supreme Court.

The crux of the companies' argument is that higher wages will lead to increased costs for consumers, potentially causing price hikes that could negatively impact local restaurants. The companies also express concern that they may have to closely monitor app activity to control costs, even when workers are not actively making deliveries.

In response to these legal actions, Uber spokesperson Josh Gold has called for a pause in implementing the rule, emphasizing the potential harm it could cause to restaurants, consumers, and couriers. Vilda Vera Mayuga, the commissioner of DCWP, defends the new wage standard, by arguing the challenges faced by delivery workers and emphasizing their commitment to litigate for higher compensation for their workers.

This legal battle over delivery worker pay in New York City is part of a larger national clash between gig companies and labor advocates. Several states have already implemented their own minimum pay standards for gig workers.

In a broader context, this battle for higher compensation for gig workers highlights the evolving relationship between gig companies and the workers who use their platforms. While the flexibility of gig work is attractive to both parties, questions about compensation and protections continue to shape the gig economy landscape, with New York City's recent developments representing a significant moment in this ongoing debate.

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Braidwood Management Inc. v. Becerra:

CHALLENGING THE MANDATE OF CERTAIN PREVENTIVE CARE MEASURES

The Patient Protection and Affordable Care Act of 2010 ("ACA") required non-grandfathered group health plans to cover a range of preventive services without cost-sharing (i.e., copayments, deductibles, or coinsurance) and empowered three agencies to unilaterally determine what kinds of preventive care services non-grandfathered group health plans must provide without cost-sharing, so that Americans would have access to medical care and interventions that help prevent or detect health conditions early on. Specifically, the ACA tasked the Health Resources and Services Administration ("HRSA") with developing guidelines for these preventive services.

These guidelines are informed by recommendations from the Advisory Committee on Immunization Practices ("ACIP") and other relevant medical bodies, including the U.S. Preventive Services Task Force ("Task Force"), an entity of national medical experts created during the Reagan Administration that issues recommendations about clinical preventive services. The Task Force makes evidence-based recommendations about health care services, which have been proven to provide concrete health benefits, including preventative care services.

Although many of the experts in the Task Force are appointed by members of the executive branch, many others are simply government officials who were not specifically appointed to the position. It was this fact—the constitutionality of the extent of authority vested by Congress in the Task Force—that ultimately determined the holding issued by the U.S. District Court for the Northern District of Texas in the case of *Braidwood v. Becerra*.[1] On appeal, the Fifth Circuit affirmed the decision.

Both the district and circuit court determined that two of the three delegations of power by the ACA violate the Appointments Clause of the U.S. Constitution, which provides for the appointment of "Officers" of the United States.[2] In effect, these holdings stripped the Task Force of its congressional authority and narrowed the kinds of federal agencies to whom congressional authority may be delegated. Further, group health plans are no longer obligated to provide coverage for PrEP HIV medications, or any items and/or services the Task Force rated "A" or "B" on or after March 23, 2010 without cost sharing, such as preventive services related to screening to breast cancer, lung cancer, and in some cases colorectal cancer. For a list of major additions and revisions to Task Force recommendations made on or after March 23, 2010, visit https://www.kff.org/policy-watch/qa-implications-of-the-ruling-on-the-acas-preventive-services-requirement/.

THE APPOINTMENTS CLAUSE

The Appointments Clause outlines the process by which certain federal officers are appointed and represents a crucial aspect of the system of checks and balances in the U.S. government, as it allows the President to make appointments to key positions, while requiring the Senate's approval to prevent abuse of executive power. The Clause states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President has the authority to nominate individuals for certain positions, including Judges of the Supreme Court, Ambassadors, other public Ministers and Consuls, and all other Officers of the United States (except for those positions for which a different appointment process is specified elsewhere in the Constitution). The Senate must provide its advice and consent to the President's nominations. In other words, the Senate must approve or confirm the appointments by a majority vote.

Congress has the ability to empower executive agencies or other bodies to create rules, policies, and regulations within a specific area of authority to provide guidelines for the implementation of the broader laws that pass, while retaining overall control of such laws. Congress can also pass laws to delegate the appointment authority for "inferior Officers" to the President, the courts, or the heads of executive departments, without requiring Senate confirmation. This delegation of congressional power allows for efficient governance, specialization in various areas, and adaptation to changing circumstances, while maintaining checks and balances to ensure that agencies act within the bounds of the law and serve the public interest.[3]

BRAIDWOOD PLAINTIFFS: TWO CAMPS, ONE CASE

The original focus of the *Braidwood* case related interference with the free market and the infringement of the plaintiffs' freedom of religious rights. In Texas, two groups took issue with the preventative care provisions in the ACA, in what was perceived as outside interference with the free market and an attack on freedom of religion. These two groups banded together to challenge the requirement that insurance providers must cover preventative services, by first alleging that it is unconstitutional to require specific expert committees and a federal government agency to recommend covered preventive services; and thereafter indicating that the requirement to cover preexposure prophylaxis (PrEP)[4] violated their religious rights via the Religious Freedom Restoration Act of 1993.[5] At their core, both legal theories brought forth by the *Braidwood* Plaintiffs challenged outside interference with the free market and took issue with the restrictions the ACA placed on insurance providers by requiring the coverage of preventive services without cost-sharing.

Secular Plaintiffs: All *Braidwood* Plaintiffs argued that that their inability to purchase insurance coverage that excluded the unwanted preventive care services is a separate injury from the violation of one's sincerely held religious beliefs, because those unwanted and/or unnecessary services resulted in higher monthly premiums.

Religious Plaintiffs: The religious *Braidwood* Plaintiffs alleged the Preventive Care Mandate violated their religious beliefs by forcing them to purchase a good that facilitated homosexual behavior, drug use, and sexual activity outside of marriage. They wanted the option to purchase health insurance that excluded the preventive care services required by the ACA.

THE RELIGIOUS FREEDOM RESORATION ACT

The Religious Freedom Restoration Act of 1993 generally prevents the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[6] For a plaintiff to prevail on such a claim, they must demonstrate "(1) the relevant religious exercise is grounded in a sincerely held religious belief and (2) the government's action or policy substantially burdens that exercise by, for example, forcing [the plaintiffs] to engage in conduct that seriously violates [their] religious beliefs."[7]

Thereafter, the burden shifts to the government, who, under the Act "*may* substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden to the person

(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[8]

THE DEFENSE

In regard to the argument made by the secular *Braidwood* Plaintiffs, the Defendants argued that the breadth of coverage provided by private insurance vastly outweighed the services required by the Preventive Care Mandate. In other words, while most insurance policies offer services that do not apply to every individual, the purchaser of an insurance policy does not automatically suffer an injury if the policy includes coverage for services that the purchaser does not personally require.

In regard to the argument made on the basis of religion, the Defendants stated that the Preventive Care Mandate did not actually harm the religious *Braidwood* Plaintiffs, because they opted out of the insurance market for unrelated reasons (i.e., the cost of coverage). As a result, the Preventive Care Mandate did not affect the religious Plaintiffs, let alone force them to violate their religious beliefs, as the religious *Braidwood* Plaintiffs were not current participants of the health care market. The Defendants did not attempt to address the religious *Braidwood* Plaintiffs' contention that the choice between purchasing health insurance with objectionable services or forgoing health insurance altogether is an injury-in-fact, foregoing any chance they may have had to present an alternate point of view.[9]

THE OPINION

The Court's opinion in *Braidwood* centered around its finding that Congress' delegation of power to two of the three entities designated by the ACA violated the Appointments Clause. The remainder of the opinion, which addressed the arguments related to religion and the free market, is written largely in dicta, and accordingly serve as observations by the court that do not create legally binding precedent.

Secular Plaintiffs: The district court agreed with the Defendants' argument regarding the secular *Braidwood* Plaintiffs who wanted to purchase conventional health insurance without paying for unwanted and/or unnecessary services and associated costs, finding that such Plaintiffs did not suffer any current injury due to the Preventive Care Measures, as they were not prevented from purchasing health insurance due to undue financial burden, and in fact were current policyholders of health insurance.

Religious Plaintiffs: In contrast, the district court found that the religious Braidwood Plaintiffs were injured as a result of the passage of the ACA and the Preventive Care Measures, because they lost access to health insurance plans they could purchase without objection.[10] The court stated that the religious Plaintiffs needed only to show that they lost the opportunity to purchase their desired product and that it could not be disputed that health insurance companies stopped selling insurance plans that excluded objectionable coverage after the passage of the ACA.[11]

THE APPEAL TO THE FIFTH CIRCUIT

On June 20, 2023, the Fifth Circuit issued a ruling that sided with the district court's finding that the ACA violated the Appointments Clause by delegating power to officers that fall outside of the purview of the executive branch. Further, the Fifth Circuit stated that, in accordance with the Religious Freedom Restoration Act, certain non-grandfathered group health insurers could be exempted from the provisions in the ACA which require insurers to cover of preventive services without cost-sharing, if compliance with the ACA's provisions would substantially burden the employer's ability to adhere with its religious beliefs.

IN CONCLUSION

The *Braidwood* case highlights the ongoing tension between employers' rights to religious freedom and Congressional power to regulate health care.[12] However, because both ACIP and HRSA are ultimately subject to the "supervision and direction" of the Secretary of the HHS, the *Braidwood* ruling likely does not extend to preventive care recommended by ACIP or HRSA, including contraceptive coverage and vaccines, and only applies to the guidance and regulations issued by the Task Force. To date, it is unclear whether the parties will submit a petition for review by the U.S. Supreme Court. For additional information, please contact our office.

[1] *Braidwood Mgmt. Inc. v. Becerra*, 2023 U.S. Dist. LEXIS 54769.
[2] U.S. CONST. art. II, § 2, cl. 2.
[3] To prevent abuse of power, agencies remain subject to various checks and balances by all branches of government. The executive branch primarily influences agencies through policy direction, appointments, and budgetary priorities. The legislative branch creates, oversees, and funds agencies, shaping their scope and operations through legislation and oversight mechanisms. The judicial branch has the power of judicial review, which allows federal judges to examine agency actions, decisions, and regulations to determine if they are consistent with the Constitution, laws, and regulations.
[4] Medication for HIV prevention.
[5] Laurie Sobel et al., *Explaining Litigation Challenging the ACA's Preventive Services Requirements: Braidwood Management Inc. v. Becerra*, WOMEN'S HEALTH POLICY (May 15, 2023), https://www.kff.org/womens-health-policy/ issue-brief/explaining-litigation-challenging-the-acas-preventive-services-requirements-braidwood-management-inc-v-becerra/.
[6] 42 U.S.C. § 2000bb-1(a).
[7] *Ali v. Stephens*, 822 F.3d 776, 782-83 (5th Cir. 2016 (cleaned up) (interpreting RLUIPA).
[8] 42 U.S.C. § 2000bb-1(b) (emphases added).
[9] *See March for Life v. Burwell*, 128 F. Supp. 3d 116, 128-29 (D.D.C. 2015) ("The employee plaintiffs have demonstrated that the [Contraceptive] Mandate substantially burdens their sincere exercise of religion . . . [because] the Mandate, in its current form, makes it impossible for employee plaintiffs to purchase a health insurance plan that does not include coverage of [services] to which they object [on religious grounds].").
[10] *See Orangeburg*, at 1078 (cleaned up) (noting the "lost opportunity to purchase a desired product [is sufficient to demonstrate injury-in-fact]. . . even if [plaintiffs] could ameliorate the injury by purchasing some alternative product").
[11] *Braidwood*, at 22 (citing to *Competitive Enter. Inst.*, 901 F.2d at 112 (finding plaintiffs' "restricted opportunity to purchase" a desired product to be a "cognizable injury"); and *Center for Auto Safety*, 793 F.2d at 1332 (finding standing where plaintiffs had "less opportunity to purchase [the desired product] than would otherwise be available to them").
[12] 42 U.S.C.S. § 2000e-2(a)(1).

CHANGES TO ILLINOIS EMPLOYMENT LAW TO KNOW IN 2023

The state of Illinois has implemented a number of new employment rules which became effective this year. Below is a list of three of the new rules that impact both the employee and the employer. Employers should review their policies to ensure compliance with following rules.

1. FAMILY BEREAVEMENT LEAVE ACT.

Effective January 1, 2023, the Family Bereavement Act, which replaces the Child Bereavement Leave Act, mandates up to two weeks of unpaid leave due to the death of an employee's children, stepchildren, spouse, domestic partner, sibling, parents, mother-in-law, father-in-law, grandchildren, grandparents or stepparents. Leave under this new law also includes leave for miscarriage or unsuccessful rounds of IVF, failed surrogacy, diagnosis of infertility or stillbirth.

Leave must be taken within 60 days of the date when the employee receives notice of the death or other qualifying event but is limited to six weeks total of FBLA leave in a 12-month period.

This rule only applies to employers who are subject to and employees who are eligible for leave under the federal Family Medical Leave Act (FMLA). Accordingly, employers must have at least 50 employees and an employee must have been working for the employer for 12 months and work in the same location where the employer employs at least 50 employees within 75 miles of the employee's worksite. Employers are entitled to request reasonable documentation to grant the request, including a death certificate or, in cases of pregnancy or fertility issues, a form completed by a medical professional / adoption agency / surrogacy agency. The form is located on the Illinois Department of Labor's website.

2. THE CREATE A RESPECTFUL AND OPEN WORKPLACE FOR NATURAL HAIR ACT ("CROWN" ACT).

Effective January 1, 2023, the Illinois Human Right Act's definition of race was amended to include "traits associated with race, including but not limited to, hair texture and protective hairstyles such as braids, locks and twists." It is now unlawful for employers to harass or make adverse employment actions on the basis of an employee's traditional hairstyle. That being said, an employer is still permitted to create a dress code or grooming policy that may include restrictions on attire, clothing or facial hair to maintain workplace safety or food sanitation.

3. ONE DAY REST IN SEVEN ACT.

Illinois amended this rule by changing the day of rest compliance requirements for employers. Under the former rule, employers were required to give employees one day of rest in any calendar week. Under the new rule, employers must be given at least 24 hours of consecutive rest each "consecutive seven-day period." Employers are also no longer permitted to schedule employees for up to 12 consecutive days. At least one day of rest will need to be provided to employees every seven days.

Also under this Act, employees must be provided with additional meal periods during longer shifts. Employers must provide a 20-minute meal break to any employee who has worked 7.5 hours and another 20-minute meal break for every 4.5 hours worked over the first 7.5 hours. Employees covered by a collective bargaining agreement that addresses day of rest and meal periods are exempt from these requirements.

YELLOW TRUCKING AND HOW LABOR FIGHTS PLAY OUT IN THE PUBLIC SPHERE

When parties negotiate, many believe that the Union solely looks out for its members' interest and the Company for its shareholders and bottom line and the parties either work together or battle to impasse. But the parties would be wise to remember that there is often a third party that should be considered, the customer. One such dispute ended in the rapid loss of customers and was part of the reason that Yellow Trucking, a 99-year-old trucking company, filed for bankruptcy in August, leaving 30,000 people without jobs, including 22,000 unionized employees represented by the Teamsters.

In 2023, the Teamsters and Yellow engaged in fraught negotiations. The Teamsters were owed more than $50 million in pension contributions and the parties were extremely far apart in negotiations. During negotiations, the Union threatened job actions and the Company claimed poverty, alleging it was running out of cash. Whether the respective positions were true or just posture, the unrest ultimately scared Yellow's customers who simply took their business elsewhere. Yellow lost nearly 80% of its freight volumes in one week, after they were already down 13% earlier in the year.

Despite the fact that parties eventually agreed to an extension and the Union never actually went on strike, too many customers had already pulled their business, and the Company decided to file bankruptcy.

Important background is that Yellow had been in financial trouble long before its bankruptcy. In 2008, after the housing crisis, the Teamsters Union agreed to massive concessions to allow Yellow to avoid bankruptcy. In January of 2008, the Teamsters agreed to a 10% pay cut to help the company's massive financial difficulties. Later that year, they agreed to an additional 5% pay cut and a pause on pension contributions for 18 months to help the Company avoid bankruptcy and in exchange were given equity in the Company. Despite this, Yellow continued to have financial troubles, leading to the need for a $700 million loan from the US government as part of the CARES Act. This loan has drawn a lot of scrutiny because the Congressional Oversight Commission issued a finding that Yellow should never have received the loan under the CARES Act because Yellow was not the only carrier that could have delivered the goods that were vital to National Security and it was already in financial difficulty prior to the pandemic.

The bailout was also approved despite the fact that Yellow was being investigated for overbilling on shipments for the Department of Defense. Yellow settled the dispute, but admitted to no wrongdoing, paying a $6.85 million fine.

While in the case of Yellow, it is likely that the Company would eventually have failed, or should have failed years ago, this topic should be on the forefront of both labor and management as negotiations increasingly play out in the media. Front and center today is the UAW strike. Similar to the Teamsters in Yellow trucking, the UAW believes it is owed what essentially amounts to back wages due to concessions the Union made during the Great Recession. The Big Three automakers push back that they could not possibly afford what the Union is looking for and compete with non-union and foreign carmakers. However, in the last few years, the Companies have given their executives substantial increases that they should have anticipated would anger the Union and employees in negotiations. While it remains to be seen how it will all play out, many experts have already predicted that Tesla will be the only winner in this fight. While it is important for labor and management to fight for their own interests, both sides would be wise to remember that in crowded markets, the customers often have a vote, too.

“AI's potential impact also extends to the legal profession and could leave roles like paralegals and legal assistants vulnerable.”

RISE OF AI THREATENS WHITE COLLAR JOBS

Artificial Intelligence (AI) has become a pivotal force in today’s world, creating a wave of high-tech changes that may reshape several aspects of our society. One of the most profound implications of AI is its potential impact on white-collar jobs. While AI presents several advantages to the workforce including increased efficiency, productivity, and innovative solutions, it also raises issues about the future of employment in white-collar sectors. Currently, AI has the potential to replace 1 in 5 white-collar jobs. The white-collar jobs that may be at risk from AI include roles in the legal industry, technology sector, financial sector, and media-related jobs.

The technology sector may see changes due to AI, with several roles like coders, computer programmers, software engineers, and data analysts potentially being affected. These roles share similarities with AI capabilities, making them susceptible to being replaced by AI. AI excels in performing precise calculations and can produce code faster than humans, which may lead to reduced employment in these roles. When considering AI’s impact on tech jobs, some believe that AI tends to enhance rather than replace roles. In this evolving collaboration between human professionals and AI, emphasizing the potential for synergy and innovation in the technology sector becomes increasingly crucial.

AI's potential impact also extends to the legal profession and could leave roles like paralegals and legal assistants vulnerable. These positions may be vulnerable to AI due to their jobs largely involving consuming data and analyzing information. Nonetheless, the full use of AI in the legal field remains challenging as these roles require human judgment in assessing the needs and preferences of clients. AI may boost productivity in the legal profession as humans will be able to utilize tools that excel in consuming data and analyzing information, tasks that are typically very time consuming.

AI's influence may also impact the financial sector, potentially affecting jobs such as market research analysts, financial analysts, and personal financial advisors. AI's risk to finance jobs is due to its ability to proficiently identify market trends, evaluate investment performance, and effectively communicate this data. While AI can significantly enhance tasks in the finance industry, it's essential to recognize that the human element in understanding clients' needs remains irreplaceable by AI.

AI also has the potential to influence numerous careers within the media. Specifically, roles in advertising, writing, journalism, and content creation. AI's potential threat to media roles is due to the ability to understand, generate, and manage written content. It is notable that several news outlets have already started to implement AI within their organizations to improve their operations. However, most of the tasks carried out by media related roles cannot be automated due to these roles involving high degree of human judgment and creativity.

While there is growing concern about the potential effects AI may have on white-collar jobs, the true extent of its impact is unknown. AI's potential to automate tasks is undeniable; however, it's essential to remember that human judgment and creativity remain essential in these jobs. Going forward, white-collar workers might have to adapt new skills and utilize AI as a tool within their jobs as they work through this new kind of automation.

Recently, Congress stated that they are working on enacting legislation to try and curb any harm AI may have. President Biden has also hinted that his administration plans on issuing an Executive Order that also addresses AI. Although the Government has yet to take significant action to protect white-collar jobs from AI, it remains intriguing to see whether these professions will receive greater protection compared to blue-collar jobs.

THE PREGNANT WORKERS FAIRNESS ACT

On December 29, 2022, President Biden signed the PUMP for Nursing Mothers Act and the Pregnant Workers Fairness Act (PWFA) into law. The PUMP Act, which went into effect December 29, 2022, expands on existing employer obligations and requirements to providing nursing employees with break time for expressing breast milk at work. This article will focus on the PWFA, which went into effect June 27, 2023.

The PWFA applies to "covered employers," which includes private and public sector employers with at least 15 employees. Under the PWFA, covered employers are required to provide reasonable accommodations to worker's known limitations related to pregnancy, childbirth, or related medical conditions. For purposes of the PWFA, a known limitation includes any mental or physical condition the pregnant employee communicates to the employer. Although the PWFA's framework is similar to that of the Americans with Disabilities Act, a pregnant workers' condition does not need to amount to a disability.

The EEOC explained these scenarios will likely be an "interactive process" in which employers can expect workers to explain their condition, and both parties will work together to come up with reasonable accommodations. Some examples of "reasonable accommodations" include flexible work hours, the ability to sit or drink water, closer parking, appropriately sized uniforms and safety apparel, additional break time, leave or time off to recover from childbirth, and exemption from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

Employers are required to provide reasonable accommodations unless they would cause an "undue hardship" on the employer's operations, which is a significant difficulty or expense to operations. Covered employers are also prohibited from denying a job or other employment opportunity to a qualified employee or applicant based on the person's need for a reasonable accommodation, require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working, retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding, or otherwise interfering with any individual's rights under the PWFA.

The EEOC is required to issue regulations to carry out the PWFA. However, in the meantime, employers should update their policies and procedures to ensure compliance with the PWFA.

Many states, including Illinois, have additional laws relating to pregnancy and discrimination, so it is important to remember to look at both state and federal laws to make sure employers are complying with both. For additional information on how the PWFA impacts your organization, please contact our office.

Under the PWFA, covered employers are required to provide reasonable accommodations to worker's known limitations related to pregnancy, childbirth, or related medical conditions.

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