

# Spring 2021 Employment Law Update

*COVID-19 and Beyond*

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# COVID-19 Vaccinations

- ▶ Still less than 25% of Americans fully vaccinated
- ▶ Nearly half of U.S. adults have received at least one dose
- ▶ 26% of NY population fully vaccinated
- ▶ 20-30% of Americans don't currently intend to get vaccinated

# Protections/Limitations

- ▶ Asymptomatic,
  - ▶ Fully vaccinated (at least 2 weeks since final dose), and
  - ▶ Within 3 months following final dose
- 
- ▶ Within 3 months following date of symptom onset from initial laboratory confirmed COVID-19 infection or date of first positive test if asymptomatic during illness

# EEOC on Vaccinations

- ▶ Vaccination itself not a “medical examination,” but pre-screening questions would be
- ▶ Mandating proof of vaccination is not a disability-related inquiry
- ▶ Asking “why” could become problematic
- ▶ Employees may have accommodation rights based on disability or religious beliefs

# Vaccine Passports

- ▶ Typically a smartphone app that confirms a person's vaccination (or COVID test results)
- ▶ Initially aimed at attending public events, but could be used for work
- ▶ Privacy and security concerns
- ▶ New York has “Excelsior Pass” available now



# U.S. Department of Labor

- ▶ Marty Walsh is the new Secretary of Labor
- ▶ Was a local Laborers' Union president before becoming Mayor of Boston, Mass.
- ▶ Efforts underway to halt or rollback Trump administration regulations and interpretations ASAP
- ▶ All developments will result in greater restriction on employers



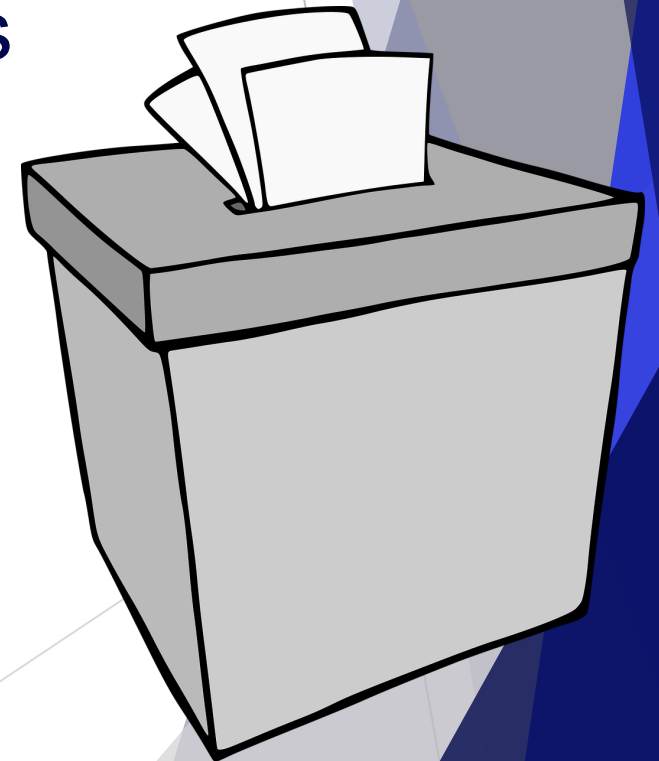
# National Labor Relations Board

- ▶ Pres. Biden immediately fired NLRB General Counsel Peter Robb
- ▶ Breaks with tradition of letting GC finish term
- ▶ Expedites more aggressive prosecution of unfair labor practices
- ▶ Board itself likely to retain Republican majority until August



# Expected NLRB Policy Shifts

- ▶ Return to Obama-era rulings
- ▶ More expansive joint employer standards
- ▶ Faster union elections
- ▶ Greater scrutiny of workplace policies





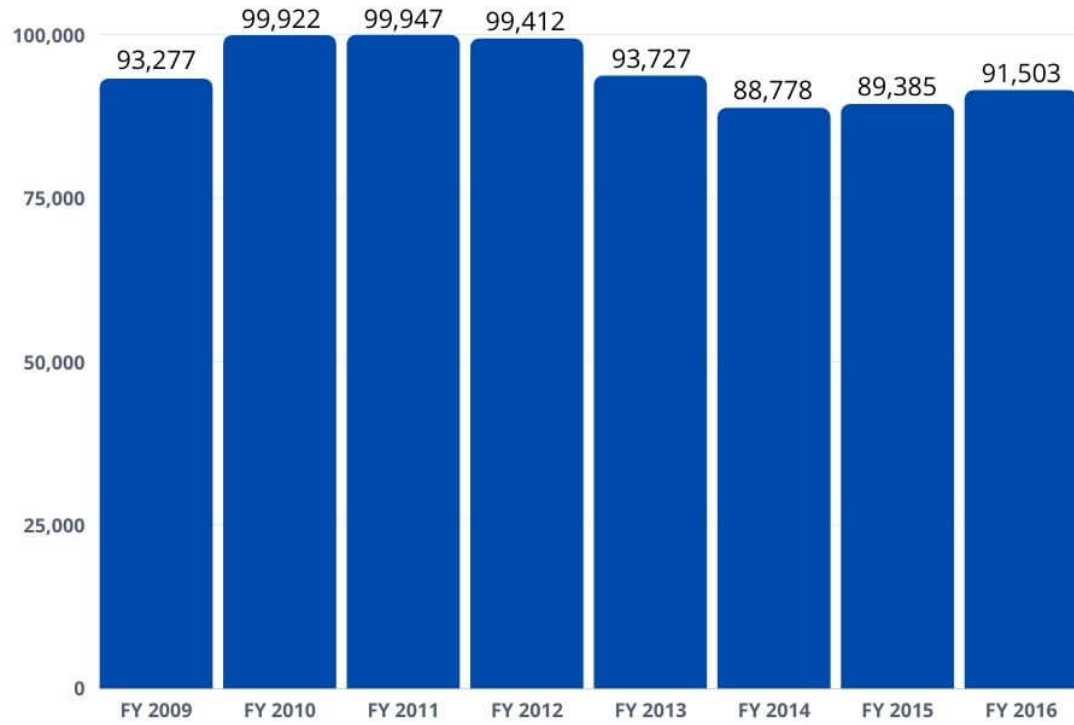
# PRO Act

- ▶ Multifaceted legislation aimed to protect workers and unions
- ▶ Gives more workers right to unionize
- ▶ Restricts employers' ability to resist unionization
- ▶ Imposes new penalties on employers
- ▶ Pres. Biden's support embodied in his recently announced "American Jobs Plan": "It has never been more important for us to invest in strengthening our infrastructure and competitiveness, and in creating the good-paying, union jobs of the future."
- ▶ Filibuster may stand in the way of passage in Senate despite slim Democratic majority

# Employee Claims

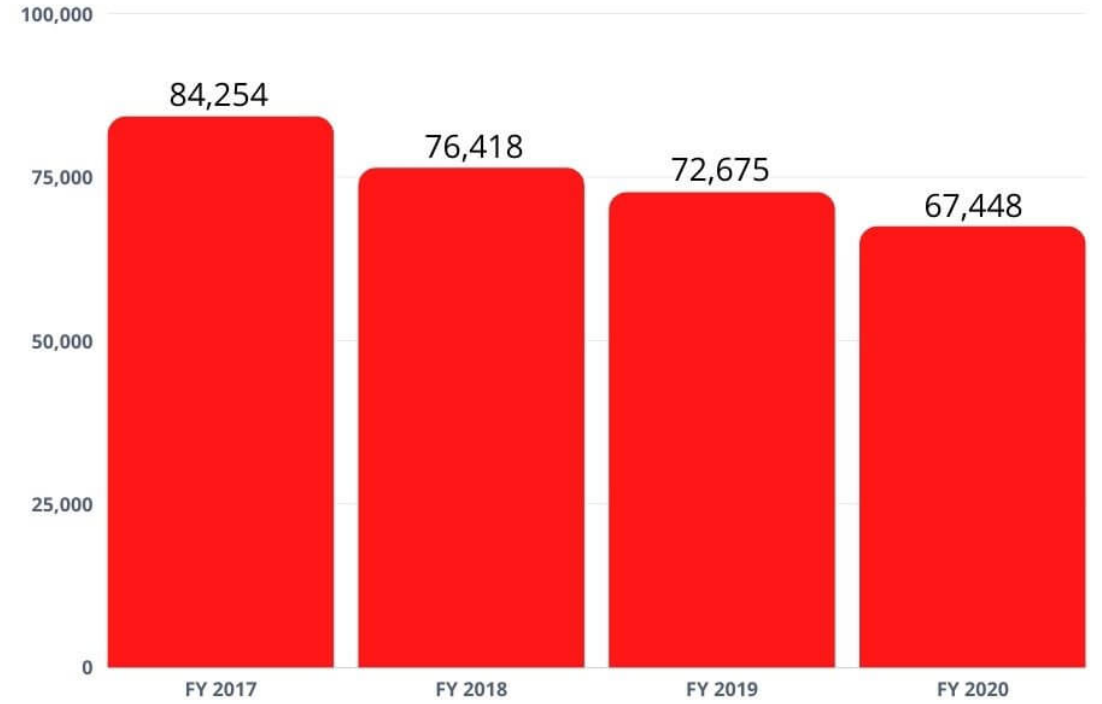
- ▶ Federal agencies will be more aggressive in outreach and enforcement
- ▶ Job displacement expected to contribute to more claims
- ▶ COVID-related actions

Annual EEOC Charges (All Categories) During Obama Administration



Source EEOC.gov

Annual EEOC Charges (All Categories) During Trump Administration



# New York Paid Leave Issues

- ▶ Statewide paid sick leave law fully in effect as of January 1, 2021
- ▶ Up to 56 hours of paid leave per year
- ▶ NY DOL “re-wrote” 2020 COVID quarantine leave law
- ▶ All employees get paid leave of up to 4 hours per COVID-19 vaccine injection

# New York Marijuana Regulation and Taxation Act

- ▶ Signed March 31, 2021
- ▶ Legalizes “recreational” marijuana use (with some limits)
- ▶ Adds specific protections for employees who use marijuana outside of work
- ▶ Does it matter that marijuana is still illegal under federal law?



# Lawful Activities (21+)

- ▶ Possessing, displaying, purchasing, obtaining, or transporting up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- ▶ Transferring, without compensation, to a person 21 years of age or older, up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- ▶ Using, smoking, ingesting, or consuming cannabis or concentrated cannabis (unless otherwise prohibited by state law).
- ▶ Possessing, using, displaying, purchasing, manufacturing, transporting, or giving to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
- ▶ Assisting another person who is 21 years of age or older, or allowing property to be used, in any lawful acts listed above.

# Employee Protections

- ▶ NY Labor Law Section 201-d protects employees' off-duty use of lawful consumable products (e.g., alcohol and tobacco)
- ▶ Now also specifically includes use of “cannabis in accordance with state law”
- ▶ Protects use (a) outside of work hours, (b) off the employer's premise, and (c) without the use of the employer's equipment or other property

# Section 201-d Exceptions

- ▶ The employer's actions were required by state or federal law.
- ▶ The employee is impaired by the use of cannabis.
- ▶ The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.



# Impairment

“The employee manifests specific articulable symptoms while working that decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position, or such specific articulable symptoms interfere with an employer’s obligations to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law.”

# Marijuana Challenges

- ▶ Determining Impairment
- ▶ Drug Testing
- ▶ Drug-Free Workplace Act
- ▶ Policies

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# Questions?



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