

# Excellence

A report on emerging legal trends from the attorneys of DBL Law

SPRING 2021

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## Kentucky Legislative Review

by Mark Guilfoyle | [mguilfoyle@dbllaw.com](mailto:mguilfoyle@dbllaw.com)

The 2021 Regular Session of the Kentucky General Assembly adjourned on Tuesday, March 30, 2021.

Many of the legislative changes were efforts to strengthen the independence of the legislative branch of state government, a trend that began under former Gov. John Y. Brown in the late 1970s and early 1980s.

**COVID Liability.** SB 5 is a liability protection bill that was sought by Kentucky companies. It passed late in the session.

**Education.** House Bill 563 will allow the use of education opportunity accounts, a type of scholarship, for educational expenses, and for students in some of the state's largest counties, for private school tuition.

**Kindergarten.** House Bill 382 will make \$140 million available for full-day kindergarten in Kentucky schools.

**Organizational Guidelines.** House Bill 1 created a framework for businesses, local governments, schools and nonprofits to operate during COVID-19 restrictions. It suspends interest on unpaid unemployment insurance contributions until next year. It also provides guidelines for noncustodial parental visitation during the state of emergency and will allow each resident at long-term care facilities to designate an "essential personal care visitor" that will be exempt from visitor restrictions. (This is one of several new laws being challenged in court by the Governor.)

**Unemployment Insurance Overpayment.** Senate Bill 7 will allow the state to waive unemployment insurance overpayment debts that occurred between Jan. 27 and Dec. 31 of last year if the overpayment is not the fault of the recipient and if requiring repayment would be "contrary to equity and good conscience."

**Worker Safety Regulations.** House Bill 475 will prohibit the Kentucky Occupational Safety and Health Standards Board from adopting or enforcing any occupational safety and health administrative regulation that is more stringent than the corresponding federal provision.

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## New Proposed Joint Employer Rule Submitted To White House

by Bob Hoffer | [rhoffer@dbllaw.com](mailto:rhoffer@dbllaw.com)

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On February 23, 2021, the U.S. Department of Labor (DOL) submitted a proposed rule on joint employer status under the Fair Labor Standards Act (FLSA) to the White House for review. This is not the first time the DOL has attempted to clarify guidance on the determination of joint employer status under the FLSA. A little over a year ago, on January 12, 2020, the DOL announced a final rule narrowing the definition of joint employer.

The final rule specifies that when an employee performs work for the employer that simultaneously benefits another person, that other person will be considered a joint employer only if they are acting directly or indirectly in the interest of the employer in relation to the employee. The final rule also adopts a four-factor balancing test for assessing whether the potential joint employer 1) hires or fires the employee, 2) supervises the employee's schedule or conditions of employment, 3) determines the employee's rate and method of payment, and 4) maintains the employee's employment records.

This rule was short-lived. On September 8, 2020, a federal judge in the Southern District of New York invalidated substantial por-

tions of the rule. The rule was first challenged in February 2020 by a group of state attorney generals in the U.S District Court for the Southern District of New York. The complaint claims that 1) the rule was promulgated in violation of the Administrative Procedure Act and 2) it will harm workplace protections in their states. In his September 8 opinion, Judge Gregory Wood found the new regulations were inconsistent with the FLSA as well as arbitrary and capricious. The Department of Labor appealed the decision to the Second Circuit Court of Appeals, requesting reversal of the district court opinion and reinstatement of the final rule.

The Biden administration has now sought to abandon the rule by starting a new rulemaking process. The substance of the proposed rule is still unknown. However, it is likely that the proposed rule recommends a return to a broader and more expansive interpretation of the joint employer rule. The next step in the rulemaking process will be the publication of the rule in the Federal Register for public comment. The public comment period generally stays open for 30 to 60 days. Public comments submitted will be considered before the final rule is announced.



## Boone County/Cincinnati Bell Partner On High Speed Internet Expansion Project

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The COVID-19 pandemic has highlighted the critical need for access to reliable, high-speed internet. With remote learning and working, online gatherings and e-medicine becoming the new norm, internet powerhouse Cincinnati Bell Inc. sought to develop a County-wide fiber network. On March 23, 2021, Cincinnati Bell partnered with the innovative and future-focused Boone County Fiscal Court to approve the development of one of the first county-wide fiber networks in the United States.

Cincinnati Bell will provide one gigabit of high-speed internet access to every address in Boone County by expanding its existing fiber network infrastructure to reach an additional 40,000 unserved or underserved business and residential addresses. Cincinnati Bell will also offer a free speed upgrade to all current and prospective customers within Boone County under its "Boone County Affinity Package." The robust fiber network will be rolled out within an accelerated 24–36 month time frame, with some Boone County residents eligible for service upgrades within a few weeks.

The Boone County Fiscal Court pledged to contribute \$13.6 million, while Cincinnati Bell plans to invest more than \$30 million to install fiber optic cable along every mile of road and right-of-way in the County. Cincinnati Bell also pledged to contribute an additional \$500,000 in "Unicity" Smart City funding, which will allow Boone County to develop neighborhood-based enhancements and promote public safety. The partnership garnered widespread support from the community, including the Boone County Public Library and School District, particularly for its inclusion of discounted pricing and other subsidized broadband programs for qualified K-12 students in Boone County.

DBL Law is proud to have participated in forming this groundbreaking partnership, which will change the way Boone Countians learn, work, and play for decades to come.



## Unemployment Benefits Extended To Individuals Refusing Unsafe Return To Work

by Erin Shaughnessy | [eshaughnessy@dbllaw.com](mailto:eshaughnessy@dbllaw.com)

On January 22, 2021, President Biden signed Executive Order 14002 Economic Relief Related to the COVID-19 Pandemic. Concurrently with the Executive Order, the White House released a fact sheet calling on the Department of Labor (DOL) to consider clarifying unemployment insurance guidance for workers who refuse to return to unsafe working conditions caused by the COVID-19 Pandemic. The DOL took up that directive, and on February 25, 2021, the Department issued new guidance expanding eligibility for unemployment benefits to individuals who refuse to return to work due to unsafe working conditions caused by COVID-19.

The new guidance addresses eligibility for the Pandemic Unemployment Assistance (PUA) Program under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Individuals are only eligible for PUA benefits if they are not eligible for regular unemployment compensation, the Pandemic Emergency Unemployment Compensation, or Extended Benefits and are unemployed, partially unemployed, or unable or unavailable to work due to a specific COVID-19 related reason.

Under the new guidance, eligibility for unemployment insurance is expanded to three categories of workers. First, the new guidance covers individuals who refuse to return to work or accept an offer of new work that is unsafe. Refusal to return to work or accept an offer of new work must be because the worksite is not in compliance with local, state, or federal health and safety standards related to COVID-19. This includes, but is not limited to, failure to (1) require the use of a facial mask, (2)

maintain physical distancing measures, or (3) provide personal protective equipment consistent with public health guidelines. Second, the guidance covers specific individuals providing services to educational institutions or educational service agencies. This category includes school employees working without reasonable assurance of continued employment or who face



reduce paychecks because of school closures due to COVID-19. Third, the guidance also covers individuals who have been laid off or who have had their work hours reduced due to the pandemic.

Previously, individuals were only deemed eligible for PUA if their place of employment was closed. Now, individuals laid off because their place of work is partially closed or who have experienced a reduction in hours are eligible to receive the benefit.

These new guidelines apply retroactively, which means that they apply as if they had been included from the beginning of the PUA program. Furthermore, the DOL has emphasized that these guidelines do not apply to workers who quit their job because of COVID-19 concerns. Instead, the new guidance only covers individuals who were already receiving unemployment but determined to be ineligible under state laws because they refused an offer of work.

### YOU'RE INVITED...

## Biden's First 100 Days: Tax, Wealth, and Estate Planning Update Thursday, May 6, 2021

Join us for a conversation on  
tax, wealth, and estate planning.

As we look back on the first 100 days of President Biden's administration, there have been many proposed changes to both individual and business tax rates, estate planning considerations, and more. While the effective date for these changes remains unknown, being prepared is the best approach.

The webinar is FREE but you must register in order to receive the Zoom link.

**REGISTER TODAY!**



## America Rescue Plan Addresses COVID-Related Employee Leave

by Kelly Holden | [kschoening@dbllaw.com](mailto:kschoening@dbllaw.com)

The America Rescue Plan of 2021 (ARPA) was signed into law in March 2021 and has many facets to address the economic challenges that our country is still facing as a result of the pandemic.

The ARPA addresses employee leave for COVID-related reasons. The Families First Coronavirus Response Act (FFCRA) that was in effect last year mandated leave for COVID-related reasons, but its provisions expired December 31, 2020. The ARPA re-enacted the FFCRA but expanded the scope in some ways. However, the biggest change is that the leave is voluntary for employers. The incentive for employers to provide such leave is that employers receive a dollar-for-dollar payroll tax credit for providing paid leave.

The leave must be taken between April 1 and September 30, 2021. It still applies to employers with less than 500 employees.

The Emergency Paid Sick Leave (EPSL) provides a bank of 80 hours for the original six reasons plus the following three reasons for leave to: (1) get a COVID vaccine; (2) recover from adverse reactions from the vaccine; (3) obtain results of a COVID diagnosis or test after having close contact. The pay under EPSL is subject to a cap of \$511 per day for the tax credit.

The Emergency Family & Medical Leave Expansion Act (EFMLEA) was expanded to cover not just childcare related to day-care or school closures but also to include any of the qualifying reasons under the EPSL. Under the FFCRA, the first two weeks of EFMLEA were unpaid, but they are paid under the ARPA. The maximum amount for the tax credit is \$12,000.

Even if employees exhausted 12 weeks of leave pursuant to FMLA and/or FFCRA in the previous year, the leave bank resets on April 1, 2021 for another 12 weeks if employers decide to provide such leave.

There is a non-discrimination component so employers may not provide such benefits for some employees but not others. Employers can, however, offer leave under EPSL and not EFMLEA or vice versa.

The Department of Labor is set to issue more guidance on leave under the ARPA.

Employers should also be advised that the CDC updated its guidance on quarantine as it pertains to those fully vaccinated. A vaccinated person no longer has to quarantine if it has been at least two weeks since the last dose and that person is asymptomatic. Employees should monitor symptoms for at least 14 days.



## Department of Labor Issues Guidance on Electronic Posting of Required Notices

by Colleen Fausz | [cfausz@dbllaw.com](mailto:cfausz@dbllaw.com)

The Department of Labor (DOL) recently issued Field Assistance Bulletin No. 2020-7, which allows employers to post required labor law notices via electronic means due to the COVID-19 pandemic in certain circumstances.

This bulletin affects the employer's continuous posting requirements under the Fair Labor Standards Act, the Family and Medical Leave Act, Section 14(c) of the FLSA, the Employee Polygraph Protection Act, and the Service Contract Act.

The DOL will consider electronic posting an acceptable substitute for the continuous posting requirement when: (1) all employees exclusively work remotely, (2) all employees customarily

receive information from the employer by electronic means, and (3) all employees have readily available access to the electronic posting at all times. If an employer has both on-site and remote employees, the employer may supplement the hard-copy notices with electronic posting. The DOL encourages both methods of posting the required notices.

The electronic posting can be done through an intranet site, internet website or shared network drive, or file system posting. However, the DOL makes it clear that these electronic methods must be at least as effective as the hard-copy notices, and the employer must already customarily post notices to employees electronically.

## Firm & Attorney News more at [dbllaw.com/news](http://dbllaw.com/news)

### Firm News



DBL Law has been named one of the 100 Best Places to Work in Kentucky by the Kentucky Chamber of Commerce, the Kentucky Society for Human Resource Management (KYSHRM) and ClearPath Mutual Insurance.

### DBL Law Welcomes New Partner:



DBL Law welcomes new Partner **Tony Bickel**. Tony's practice includes a broad range of transactional matters, including commercial finance, corporate law, mergers and acquisitions, and leasing and real estate acquisitions. Tony holds a Juris Doctorate from the University of Cincinnati College of Law where he graduated *magna cum laude* and Order of the Coif.

### Attorney News



**Katie Tranter** has been promoted to Partner. Katie practices in the areas of Employment Law and Civil Litigation. She holds a Juris Doctorate from the University of Cincinnati College of Law and graduated *cum laude*.



DBL Law attorney **Rebecca Sheehan** joins the Renaissance Covington Board.



DBL Law attorney **Brad Steffan** joins the USO Ohio board.

### Attorney Spotlight



**Betsy Weber**, Partner

Practice Areas: Business, Banking, and Commercial Law

#### What led you to become a lawyer?

I am a 5th generation lawyer. Honestly, when I was younger, career choices for women were fewer than they are today. But everyone in my family went to law school, so I did too. My father, grandfather, great-grandfather, and great-great-grandfather were all lawyers. I was named for my great aunt, Elizabeth Graham, and she earned her law degree in the late 1920s, which was very rare for women back then. Aunt Betty, as she was called, actually chose not to practice law, and eventually moved to Ireland and taught art on Dingle Bay. My father sold the family law practice, Graham and Graham, a few years ago, although the firm is still in business and operates under the family name in Springfield, Illinois.

#### Describe your most interesting and memorable case.

The early 1990s – *Gallenstein vs. United States of America*. It was a tax case that changed how the IRS treats stepped-up basis in certain real property held by spouses as joint tenants upon the death of the originally surviving spouse. I did not know anything about tax going in. Our opponent was the Justice Department, whose attorneys commented when we won at the US District Court level, that they just needed to get to the Sixth Circuit Court of Appeals where complex issues like this were understood by both counsel and the court. And then we won in the Sixth Circuit! It was really a groundbreaking case, and what came to be known as “The Gallenstein Rule” still exists.

[Discover more here.](#)

### DBL Law On The Move

The downtown Covington headquarters of DBL Law has taken a major step toward completion with the installation of the final steel beam on the project, an \$11.3 million refurbishment of the historic Monarch Building.

The installation of the beam - which was signed by construction workers, DBL law employees and leaders - was celebrated Monday, April 12, 2021. The project is expected to be complete this Fall.





## Steps Unsecured Creditors Can Take When Customers Face Bankruptcy

by Betsy Weber | [bweber@dbllaw.com](mailto:bweber@dbllaw.com)



Many small businesses will struggle to survive the financial challenges brought on by the pandemic. Historically, Chapter 11 of the Bankruptcy Code was more attractive for large businesses, but recent changes may make it a good option for small businesses. The Small Business Reorganization Act of 2019 added the Subchapter V provision to Chapter 11. To be eligible for relief under Subchapter V, a business could have no more than USD 2,725,625 in non-contingent, liquidated, secured and unsecured debt. On 27 March 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act expanded Subchapter V's application by raising the debt ceiling of qualifying businesses to USD 7.5 million. While the CARES Act bankruptcy provisions were originally due to sunset on 27 March 2021. The COVID-19 Bankruptcy Relief Extension Act extends those bankruptcy provisions through March 2022.

There are steps that an unsecured creditor can take prior to a customer's filing for bankruptcy that may significantly reduce the creditor's ultimate exposure.

### Avoid the Preference Claim

Unsecured creditors may be liable to a debtor's bankruptcy estate when they have received payments within the 90 days

before the debtor filed bankruptcy. The creditor is not, however, without defenses to these actions. You should keep accounts current and follow ordinary billing practices. If an invoice is due within 30 days, do not allow the account to slip beyond contractual terms. If you know a filing is imminent, discuss with legal counsel how payments should be applied and against which invoices.

### Monitor Customer Solvency

If you extend trade credit to a customer who represents a significant source of your revenue, intermittently request credit opinions from a financial service firm relative to the customer's ability to meet obligations as they come due.

### Establish Protective Payment Requirements

For customers facing imminent potential credit risk, institute payment requirements such as advance payments or cash on delivery of shipments. Such payments will provide insulation from a preference claim. Alternatively, establish an evergreen retainer or cash deposit system or consider conditioning the provision of further goods and services upon the guarantees of the customer's principals.