



# **The Changing Workplace: How the Pandemic, Protests, Fires, and an Election Will Alter the Workplace**

**Presented by Liani Reeves and John Stellwagen  
Bullard Law  
SDAO Conference – February 4, 2021**

## Welcome and Introductions



Liani Reeves



John Stellwagen

## Agenda

- The Future of Work Post-Pandemic
- The Impact of George Floyd on the Workplace
- Learning from the Wildfires
- Post-Election and a New Administration: A Preview of What's Coming

# The Future of Work

## Post-Pandemic



## Gallup Survey (October 2020):

- 33% of U.S. workers are always working remotely (down from 51% in April)
- 25% sometimes working remotely
- 41% never working remotely

**what's next?**

## COVID-19 is a Catalyst to Reinvent the Future of Work



- Forced workplace innovation has led to simpler, faster, and less expensive ways to operate.
- Some companies will capitalize on post-COVID opportunities to retain and attract talent.
- Others who cannot adapt will be left behind.

## Employees *Will* Continue to WFH



- Nearly two-thirds of U.S. workers who have been working remotely during the pandemic would like to continue to do so.

- 54% of U.S. workers would leave their current job for one that allowed them to work remotely.

(Gallup Survey)



## Employees Will Expect Flexibility

- Set expectations on what constitutes the “work day.”
- Set expectations for when employees are expected to be in the office, online for staff meetings, or other team activities.
- Set expectations for monitoring/responding to emails or messages after hours.
- Monitor hours worked and pay for overtime.



## Increased Emphasis on Home Offices



GetApp survey on WFH:

- The majority of survey respondents cited a lack of proper technology for remote work that hindered their success and productivity.

WhistleOut survey on WFH:

- 35% of those surveyed said that weak Internet has prevented them from doing their work at some point during the Coronavirus crisis.
- 43% said they have had to use their phone as a hotspot during the crisis.



## Employee Stipends for WFH

- Employers should consider stipends that will allow employees to customize their space to accommodate WFH.
- Employers that allow employees to WFH part-time save approximately \$11,000 per year for each employee working remotely (Global Workplace Analytics).
- Stipends will be a way to build employee loyalty and attract talent.



## Employer Legal Obligations Apply to WFH

- Wage and Hour
- Harassment and Discrimination
- Disability Accommodations
- Workers' Compensation

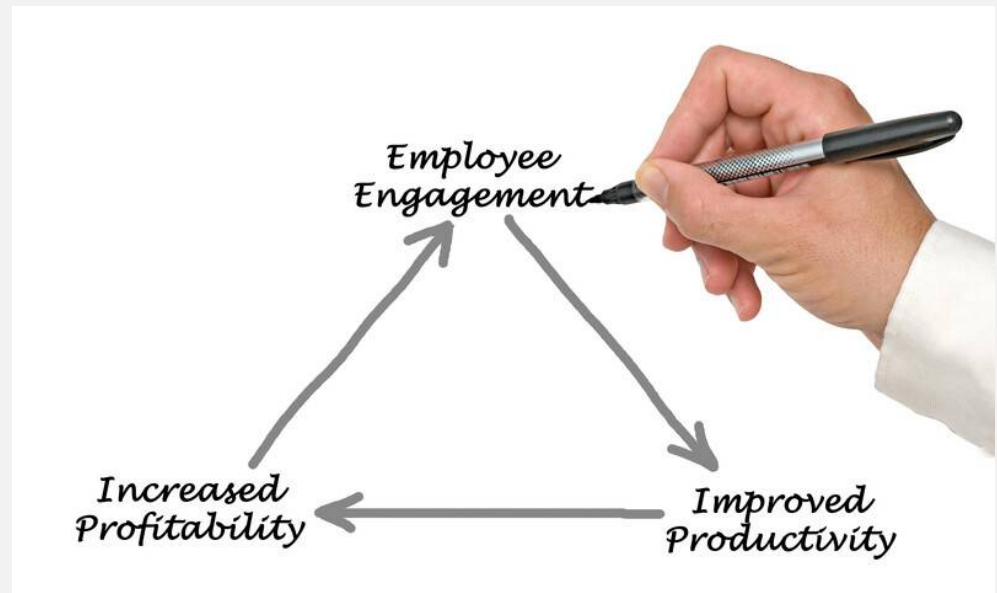
## Management Competences



- Managers need strong skills on managing employees, setting expectations, and monitoring performance.
- Managers need to be flexible to address disruptions as the workplace and workforce continue to adjust.
- Managers need have empathy and provide social support functions for their employees.

## Changes to the Management of Employees

- Control Replaced with Trust
- New Ways to Engage Employees
- New Ways to Monitor Productivity



## The Divide Between WFH and Everyone Else



## The Office Space Will Be Redefined

- WFH has decreased need for physical office space.
- Offices re-designed to emphasize community and team building as opposed to heads-down focus on individual productivity.
- Open layouts re-designed for health measures - spaced out desks, partitions, cleaning stations, etc.
- Use of more durable building materials, furniture, flooring and other surfaces that can stand up to frequent deep-cleaning.





## Health Concerns in the Office Will Remain



- Employers may continue protocols to check employees' temperatures and monitor for symptoms.
- ***Do not discriminate.***

## COVID-19 Vaccine



- Pfizer and Moderna received Emergency Use Authorizations from FDA
- Not full FDA approval
- Available in public health emergencies
- Approved with condition that individuals receiving the vaccine must be informed of their “option to accept or refuse” the vaccine and of “the consequences” for refusing

## Can Employers Mandate the COVID-19 Vaccine?



- EEOC says generally yes, with exceptions
- COVID-19 vaccine is not a medical examination
- Pre-screening vaccination questions can implicate the Americans with Disabilities Act
- Employers can require proof of vaccination

## Exceptions

- Religious Accommodations Under Title VII
  - More than De Minimus Cost or Burden

- Medical Accommodations Under the Americans with Disabilities Act
  - An action requiring significant difficulty or expense, when considered in light of:
    - The nature and cost of the accommodation;
    - The facility and the employer's financial resources and number of employees; and
    - The effect on operations

## “Direct Threat” Analysis



- Duration of the risk
- Nature and severity of potential harm
- Likelihood that potential harm will occur
- Imminence of potential harm

## Other Considerations

- Occupational Health and Safety Act
  - Pregnancy Discrimination Act
  - Collective Bargaining Agreements
  - National Labor Relations Act
- Oregon Health Care and Emergency Response Employees
    - Must provide preventative immunizations that are available and medically appropriate
    - Must be provided at no cost to worker
    - May not require immunization as condition of work unless required by federal or state law, rule or regulation

## Key Takeaways for Employers

- Emergency Use vs Full FDA Approval
  - Employee Buy In
  - Union Consultation
  - Education on Vaccine
- Develop policy and procedure related to COVID-19 vaccine
    - Mandatory or Encouraged
    - Who Bears Cost
    - Who Administers Vaccine
    - Incentives Programs
    - Time Off for Vaccination
    - Leave Related to Side Effects
  - Reporting and Tracking

## COVID-19 and the Future Impact on Employers



- Organizing efforts
- Walkouts, strikes
- Future CBA negotiations
- Demands for safer working conditions, paid sick leave, higher pay, health insurance



# The Future of Work

## Impact of George Floyd on the Workplace

# 2020: The Year of #BlackLivesMatter

- Public Statements
- Monetary Pledges
- Symbolic Changes

Change in ourselves helps drive change in the world

Jun 5, 2020 | [Microsoft Corporate Blogs](#)

United for change

We are united with the Black community and all those working toward racial justice

## Black Lives Matter: Corporate America Has Pledged \$1.678 Billion So Far

[Homepage](#) - [Business](#)



OPB

contribute



In The News

Oregon economy

Police killing

Sale

## Nike Joins Several Other Companies In Observing Juneteenth, Black Independence Day



By [Tiffany Camhi](#) (OPB)

Portland, Ore. June 11, 2020 2:16 p.m.

## Centering the Experience of Black Employees



## #BeyondTheStatement - Employees Will Expect Action

- African Americans continue to be underrepresented in the echelons of corporate America.
  - Fortune 500 has just four Black CEOs.
  - Senior leadership teams are still made up entirely of white men.
- According to the Economic Policy Institute, the overall average wage for black workers in 2019 was \$21.05. For white workers, it was \$28.66.
  - U.S., Black households have one-tenth the wealth of a typical white household, according to Federal Reserve data.

# Employers Will Be Held Accountable by Employees/Society

THE WALL STREET JOURNAL

BUSINESS

## Adidas Tweeted Against Racism. Its Black Workers Say That Isn't Enough.

Workers are pressing on the sportswear maker, Estée Lauder, other companies to act on racism, diversity



Neither Adidas AG's six-person executive team nor the German company's 16-person board of directors includes a black member.

TECHNOLOGY

## This spreadsheet is keeping track of the responses of 150+ tech companies to racial justice

by: Rich DeMuro

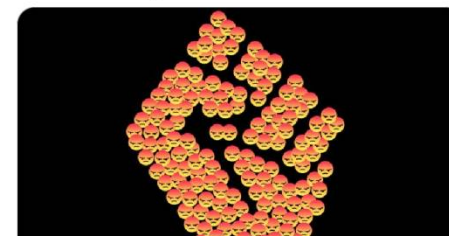
Posted: Jun 3, 2020 / 04:56 AM PDT / Updated: Jun 3, 2020 /

06:20 AM PDT



ColorOfChange @ColorOfCh... · 22 Jun

Companies like @YouTube and @Facebook will put out statements saying Black Lives Matter, yet their algorithms push users towards white nationalist content. Until the actions go #BeyondTheStatement, we can't take these corporations at their word.



Social Media Giants Support Racial Justice. Their Products Undermine It. nytimes.com

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## But Then Came Along the President Trump's Executive Order



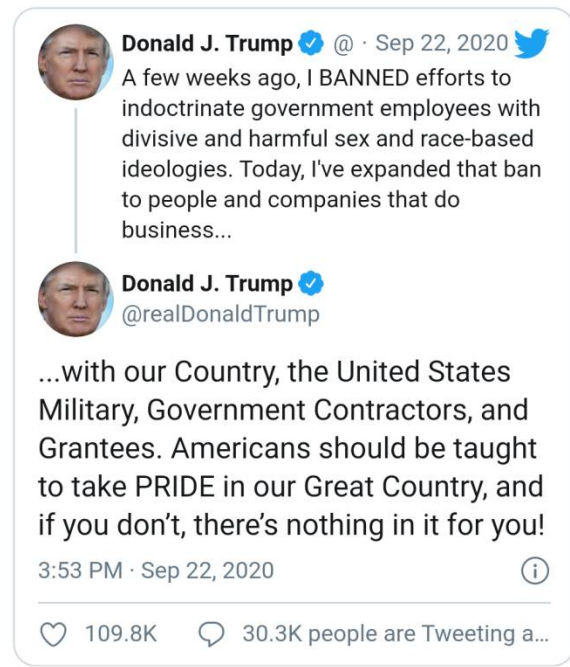
EXECUTIVE ORDERS

### Executive Order on Combating Race and Sex Stereotyping

LAW & JUSTICE

Issued on: September 22, 2020

★ ★ ★



**Donald J. Trump** @ · Sep 22, 2020

A few weeks ago, I BANNED efforts to indoctrinate government employees with divisive and harmful sex and race-based ideologies. Today, I've expanded that ban to people and companies that do business...

**Donald J. Trump** @realDonaldTrump

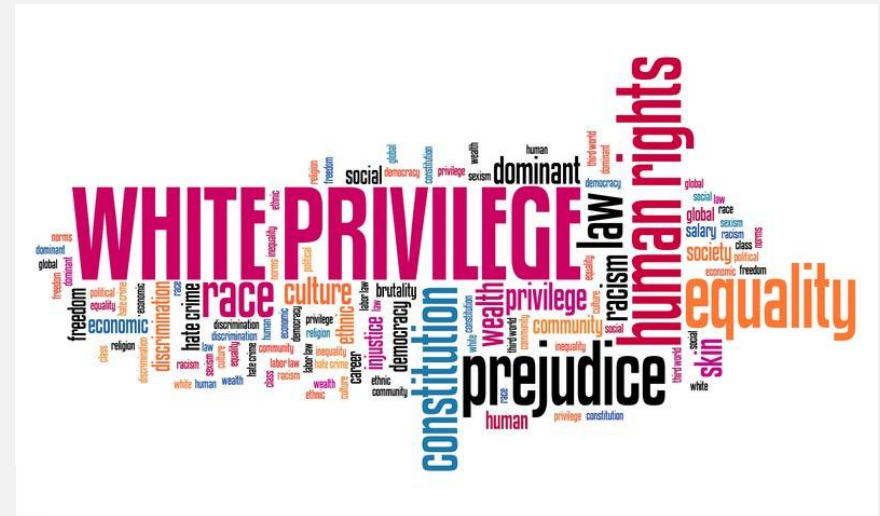
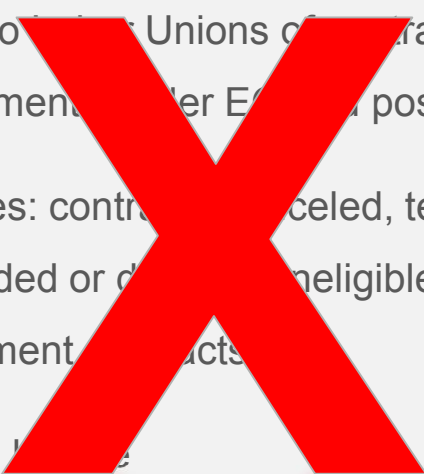
...with our Country, the United States Military, Government Contractors, and Grantees. Americans should be taught to take PRIDE in our Great Country, and if you don't, there's nothing in it for you!

3:53 PM · Sep 22, 2020

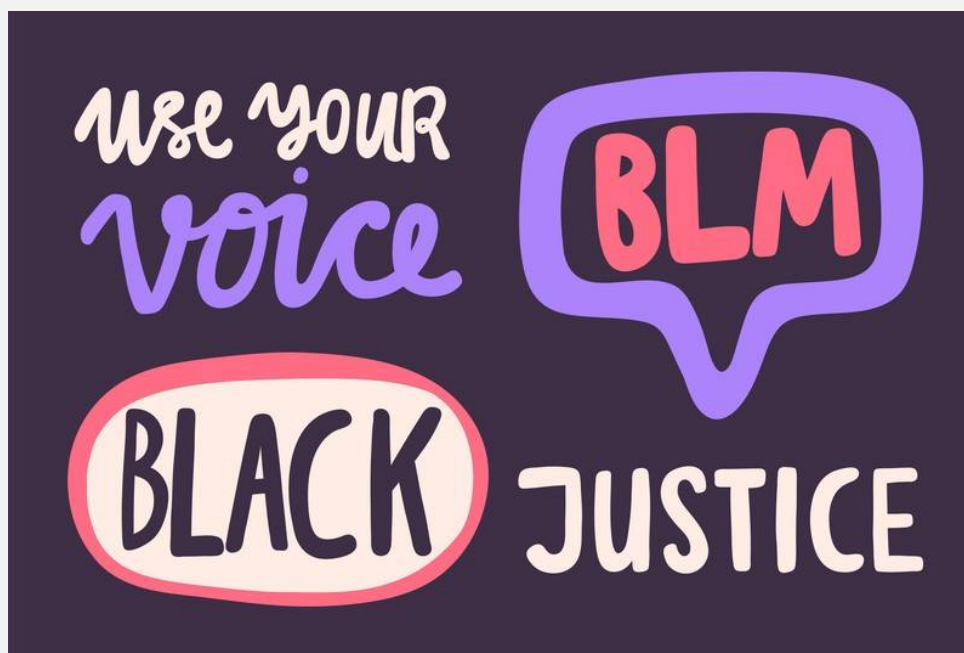
109.8K 30.3K people are Tweeting a...

## President Trump's Executive Order

- Notice to Labor Unions of Contractor's commitments under E.O. on post notices
- Penalties: contracts canceled, terminated, suspended or debarred; ineligible for future government contracts
- OFCCP...



## Employees Will Continue to Protest





## Employer Response to Protests During Work Hours

- Employers can enforce uniformly applied policies regarding requests for time off and neutral rules regarding no-call/no-show absences.
- Private employers should take steps to not violate federal labor legal protections protecting activities that involve expression regarding wages and working conditions or enforce policies that dissuade non-supervisory employees from exercising their rights to advance their "mutual aid or protection."
- Does collective bargaining agreement have "no strike" language broad enough to cover politically motivated absences?

## Employer Response to Off Duty Protests

- Public employees have a right to political speech if it's a matter of political, social or other concern to the community.
- Private employees/at-will employees can be disciplined for any reason as long as discipline is not violation of:
  - Laws that prohibit discrimination on the basis of protected status
  - Laws that protect from retaliation for a legally protected action (i.e. NLRA)
  - Collective bargaining agreements
  - Employer policies



## Workplace Policies Still Apply

- Discrimination and Harassment
- Tardiness and Leave
- Use of Company Resources
- Codes of Conduct
- Be consistent!

## Protesting Employees and Covid-19 Concerns

- Consistently follow the Organization's Return-to-Work Plan:
  - employee health and wellness checks;
  - social-distancing measures;
  - the use of personal protective equipment;
  - enhanced cleaning and sanitation;
  - recommended hygiene in the workplace; and
  - restrictions on non-essential business travel.
- Leave laws and policies still apply.
- Absent symptoms or a positive test for infection, employers should not take steps to keep employees out of work on the suspicion that, due to their conduct protesting in large group that they are at "higher risk."

## Common Theme: A Focus on Mental Health



- Cultivate Connection and Communication
- Have Conversations About Mental Health
- Offer and Encourage Use of Employee Benefit Programs for Mental Health (EAP)
- Review Policies to Allow Flexibility to Allow Use of Time Off and Encourage its Use
- Foster an Environment of Inclusivity
- Give Employees a Way to Provide Feedback
- Communicate Often
- ADA Accommodations

# The Future of Work

## Learning from the Wildfires

## Workplace Emergencies Come in Many Forms

- Earthquakes
  - Floods
  - Hurricanes
  - Tornadoes
- Fires
  - Chemical Spills
  - Workplace Violence
  - Global Pandemic

## Were You Prepared?





## Are You Prepared for the Next Big One?

- Assemble Emergency Planning Team.
- Brainstorm worst-case scenarios.
- Establish comprehensive emergency plan.



## Employer Obligations During a Disaster:

### Employees Unable to Work

#### Non-Exempt Employees:

- Paid for time worked only.
- If required to remain on-call, employee is considered working.

#### Exempt Employees:

- Paid the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.
- May be required to use accrued leave or vacation time (in full or partial days) for their absences.

# Employer Obligations During a Disaster:

## Business is Closed

### Non-Exempt Employees:

- The employer is not obligated to pay hourly, nonexempt employees.

### Exempt Employees:

- If business is closed less than a full workweek, employer must pay full salary. Employers may deduct leave bank for days the worksite was closed as long as employees is receiving salary.
- If business is closed for a full workweek, employer does not need to pay exempt employees for the week that the business was closed.

## Employer Obligations During a Disaster:

### Delayed Wage Payments

- Notify of delayed wage payments in writing as soon as possible.
- Review CBAs or/or approach union to discuss.
- Consider outsourcing payroll to avoid disruption.



## Employer Obligations During a Disaster:

### Other Considerations



- Leave
- ADA and Reasonable Accommodations
- Unemployment Compensation
- Layoffs and WARN Act
- USERRA

## Emergency Action Plan

- Emergency Notification Systems
- Chain of Command
- Responder Protocols
- Fire Extinguishers and First Aid
- Evacuation Policy and Procedure
- Post-Evacuation Protocol



## Preparedness Training



## Business Continuity Plan



- Identify continuity of leadership if key employee(s) impacted.
- Take steps to ensure continuity of finances (powers of attorney, joint bank accounts, etc.).
- Take steps to ensure continuity of payroll.
- Review IT infrastructure for back-up servers or cloud storage.
- Memorialize the plan in writing.
- Share the plan with whomever you decide should manage your business in your absence.
- Keep plan up to date with a lawyer.
- Keep all the business governance documents updated and together in one place.



# Post- Election and a New Administration

## A Preview of What's Coming

## Department of Labor

### Under New Management



Labor Secretary Marty Walsh

- Overtime and White Collar Exemptions
- Joint Employer Regulations
- Independent Contractors
- Tip Credit/Tip Pooling
- Increased Minimum Wage

## National Labor Relations Board

### Five Members

- Three Republican members
- One Democratic member
- One vacancy



A teal background featuring a laptop keyboard, a pair of glasses, and a pencil resting on a notebook.

# Change May Come Quickly in the Fall

bullard  
law



## National Labor Relations Board

### Five Members

- Three Democratic members
- Two Republican members



A black and white photograph of a snowy road winding through a forest of bare trees. The text "Winter Is Coming" is overlaid in the center.

**Winter Is  
Coming**

# PRO ACT

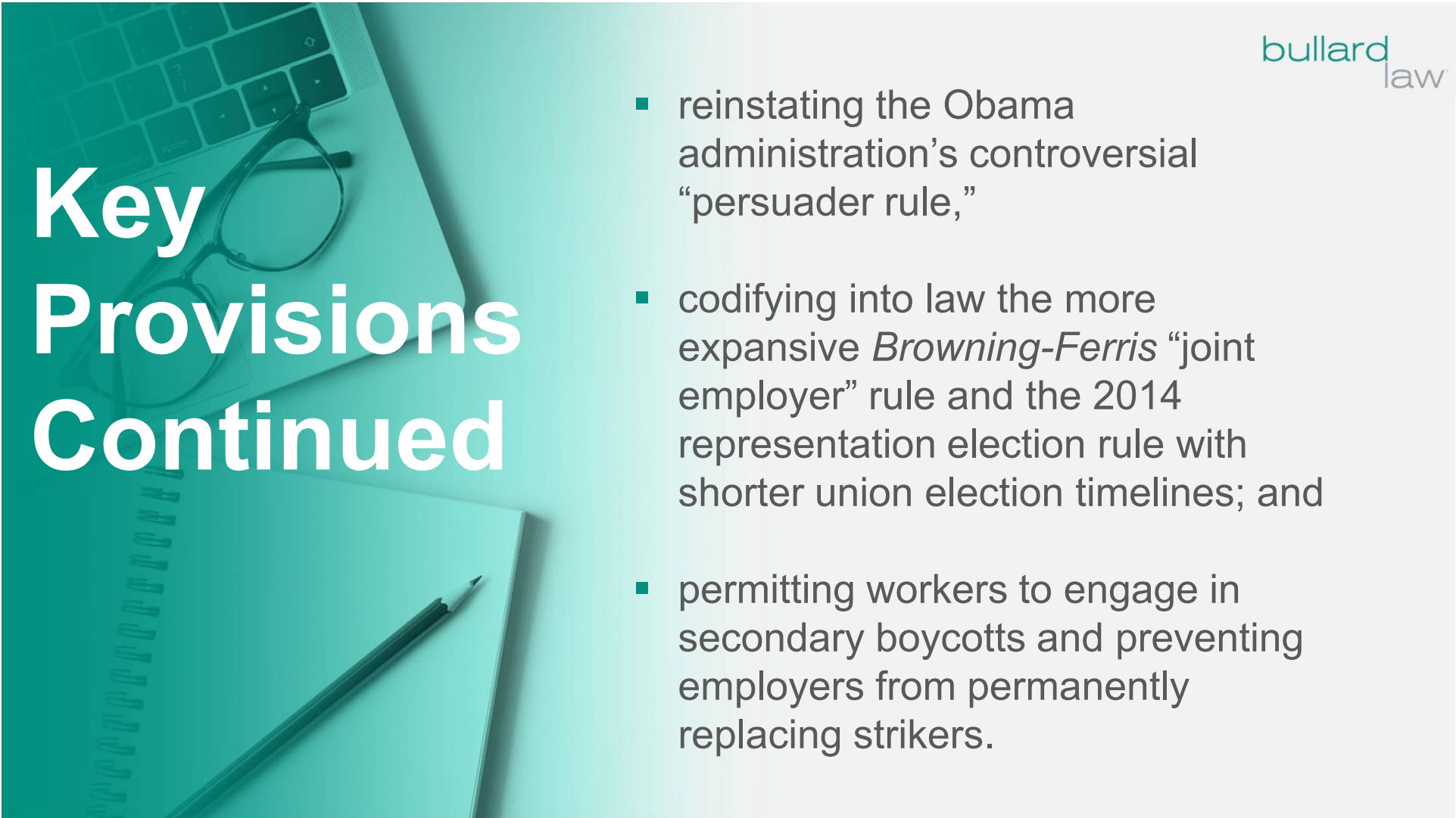
- Protecting the Right to Organize (PRO) Act
- If passed, would result in significant changes to long standing labor law under the NLRA



# Key Provisions:

- imposing financial penalties against employers for interfering with workers' organizing efforts;
- compelling mediation in first contract negotiations where agreement is not reached within 90 days;
- banning employers from holding mandatory meetings with their employees, including "captive audience" meetings;

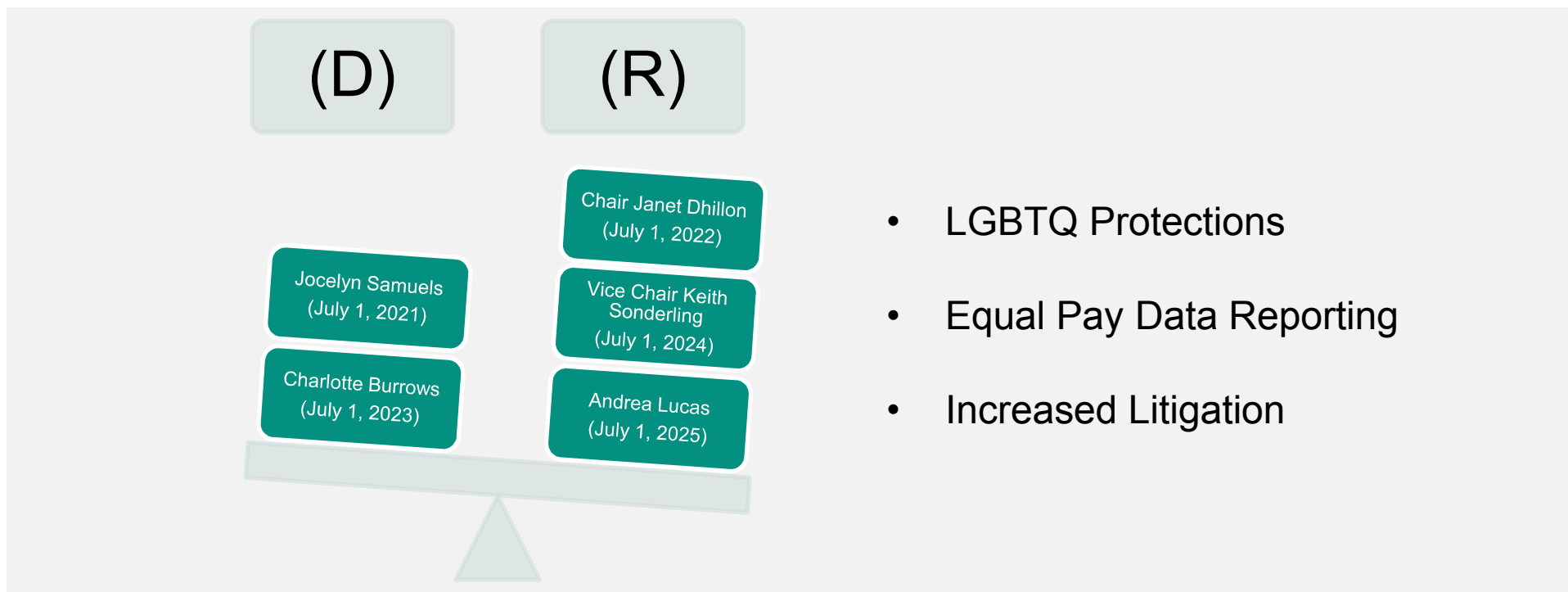




# Key Provisions Continued

- reinstating the Obama administration's controversial "persuader rule,"
- codifying into law the more expansive *Browning-Ferris* "joint employer" rule and the 2014 representation election rule with shorter union election timelines; and
- permitting workers to engage in secondary boycotts and preventing employers from permanently replacing strikers.

## Equal Employment Opportunity Commission



# Occupational Safety and Health Administration

Enforcement > Voluntary Compliance



# Occupational Safety and Health Administration

## Expected Changes:

- Release an Emergency Temporary Standard for COVID-19
- Greatly Increase the Number of OSHA Inspectors
- Return to the Original Electronic Reporting Rule
- Increase General Duty Clause Citations for COVID-19 Violations of CDC Guidelines
- Foster Greater Cooperation With And Stricter Oversight Of State OSHA Plans – similar to what Oregon has in place
- Enforce The 2016 OSHA Anti-Retaliation Rule
- Appoint an Agency Head

## Anticipated Actions Under Biden and Congress

- Equality Act
- Paycheck Fairness Act
- Federal Paid Family Leave
- Federal Minimum Wage Increase



# The Equality Act

- Adds sexual orientation and gender identity as protected characteristics to a number of federal civil rights laws

# Paycheck Fairness Act



# Federal Paid Family Leave





# Federal Minimum Wage - \$15



