2024 YEAR IN REVIEW

Employment Law

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Employment Law

Key Shifts and Emerging Trends for 2025

As we reflect on the past year in employment law, it is clear that both New Jersey and federal employment laws have seen significant shifts. In 2024, we witnessed major legal developments that impacted workers, employers, and the way businesses operate, both in New Jersey and across the country. In New Jersey, lawmakers continue to focus on strengthening protections for vulnerable workers. On the federal level, the U.S. Department of Labor has been active in enforcing worker misclassification rules, while the National Labor Relations Board has focused on minimizing noncompete agreements. Pregnant employees also found themselves at the center of significant legal changes this year, with the EEOC issuing new guidance interpreting the Pregnancy Discrimination Act to offer more robust protections and New York becoming the first State to require paid leave for prenatal care.

This year's Employment Law Year in Review summarizes these key developments in six important categories:

1. Independent Contractors & Domestic Workers,
2. Joint Employers,
3. Employee Protections,
4. Noncompete Agreements,
5. Pregnant Employees, and
6. Protecting the Workplace.

These categories highlight the trends and challenges that employers and employees will face as we move into the new year.

As we turn the page on 2024 and look forward to 2025, the employment law landscape in New Jersey and across the United States will almost certainly continue to evolve. On the federal level, the return of President Trump to office should significantly shift federal labor policies. We expect regulatory rollbacks. The Trump administration may move to limit the expansion of worker protections, reduce regulatory burdens on businesses, and reinstate policies favoring employers in disputes over workplace issues.

We also anticipate seeing the impact of AI having a significant impact on employment law, particularly in areas related to workforce automation, discrimination, and privacy. As AI takes over more routine tasks, there will be greater pressure to address job displacement, requiring lawmakers and businesses to find ways to balance technological advancement with workforce protection. Additionally, AI-powered systems will increasingly be used in hiring, performance evaluations, promotions, and workplace surveillance, prompting calls for more oversight to ensure fairness, privacy concerns, and transparency while continuing to avoid discriminatory practices.

In the pages that follow, our team has compiled detailed articles on each of these important areas, offering a deeper dive into the specific legal developments that have shaped 2024 and will continue to impact employers and employees in 2025. We hope this review provides valuable insights as you navigate the complex and dynamic world of employment law.

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When Is an Independent Contractor Really an Employee? New USDOL Rule Sheds Light On Issue

January 12, 2024
By Rahool Patel

On January 10, 2024, the United States Department of Labor (USDOL) published a Final Rule that establishes a totality-of-the-circumstances six-factor economic reality test to determine whether a worker is an employee or independent contractor under the federal Fair Labor Standards Act (FLSA). See Employee or Independent Contractor Classification Under the Fair Labor Standards Act. This Rule, which goes into effect on March 14, 2024, rescinds an earlier 2021 Rule that the USDOL now recognizes was “a departure from the consistent, longstanding adoption and application of the economic reality test by [the] courts.”

Under the new Rule, a worker’s classification as an employee or independent contractor will focus on “the economic realities of the worker’s relationship with the worker’s potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themselves.” 29 C.F.R. § 795.105(a). “Economic dependence” is not based on “the amount of income the worker earns, or whether the worker has other sources of income.” 29 C.F.R. § 795.105(b).

The six non-exhaustive factors that the USxxxxDOL will now consider are:

1. Opportunity for profit or loss depending on managerial skill.
2. Investments by the worker and potential employer.
3. Degree of permanence of the work relationship.
4. Nature and degree of control.
5. Extent to which the work performed is an integral part of the potential employer’s business.
6. Skill and initiative.

29 C.F.R. § 795.110(b)(1)-(6).

No factor, or subset of factors, is dispositive because the totality of the circumstances must be considered. Moreover, “the weight to give each factor may depend on the facts and circumstances of the particular relationship.” In certain circumstances, other factors may be relevant.

While the Rule establishes a new test under the federal FLSA, employers should keep in mind that the laws of many states apply a different test to determine whether a worker is an employee or independent contractor under state law. For instance, the majority of states, including New Jersey, use the “ABC” test to determine a worker’s status. Other states use a common law control test. Notably, the USDOL expressly declined to adopt the “ABC” test and the common law control test in the Rule.

Under the “ABC” test, a worker is an employee unless all of the following are true:

1. The individual has been and will continue to be free from control or direction over the performance of work performed, both under contract of service and in fact.
2. The work is either outside of the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed.
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business.

If one or more elements are not met, the worker is an employee.

The common law control test focuses on whether the potential employer has the right to tell the worker what must be done and how it must be done.

When there is uncertainty as to the classification of a worker, the better course of action in general is to classify them as an employee. A worker should only be classified as an independent contractor if the applicable tests can be satisfied because the law almost always presumes that a worker is an employee unless and until proven otherwise. In light of the varying legal landscape at the federal and state levels, companies and other organizations should consult with experienced employment counsel because the same worker may—in some circumstances—be classified differently depending on what law and test is being applied.

New Jersey’s Domestic Workers Bill of Rights Takes Effect, Transforming Home Employment Laws

July 1, 2024

By Rachel Fairley, Brian Giardina

As of July 1, 2024, the Domestic Workers Bill of Rights has taken effect here in New Jersey. Governor Phil Murphy signed the Domestic Workers Bill of Rights on January 12, 2024. This new law has fundamentally altered the nature of our economic relationships with workers in the home.

Under the Act, a “domestic worker” means any hourly or salaried employee (inclusive of full or part-time, live-in and live-out) and independent contractors who work in a residence for the purpose of providing any of these services:

- Caring for a child(ren)
- Serving as a companion or caretaker for a sick or elderly person with a disability
- Housekeeping and cleaning services
- Cooking or providing food or butler services
- Parking cars
- Cleaning laundry
- Gardening
- Personal organizing

The Act provides exemptions for certain types of short-term, familial, and non-domestic work, such as caring for a family member; engaging in house sitting, pet sitting, or dog walking; or operating a business primarily out of a residence.

The Act is expansive and applies to all work that exceeds five hours per month. Under the Act, domestic workers who work more than five hours per month must receive a written contract in the language preferred by the domestic worker, which must clearly outline their specific duties, pay, schedule, breaks, time off, and more. Notably, this contract may not require arbitration, may not prohibit the domestic worker from disclosing confidential information, and may not prohibit the worker from providing domestic services to a competitor.

Domestic workers must also be afforded an uninterrupted 30-minute meal break for every five hours worked and a 10-minute break for every four hours worked unless the nature of the work prevents the domestic worker from being relieved for such a time period. Live-in domestic workers must also be given an unpaid day off after working six consecutive days for the same employer.

Additionally, domestic workers will receive many statutory protections previously unavailable under New Jersey Law, including protection under the New Jersey Law Against Discrimination and the New Jersey Wage and Hour Law. Further, employers are required to notify their domestic employees of their rights under the law.

In most cases, employers must provide a minimum of two weeks’ notice to a domestic employee before terminating them. However, this can expand to a minimum of four weeks for live-in domestic employees, challenging the at-will nature of their employment.

Overall, the Act provides stringent protections to domestic workers and places considerable requirements on domestic employers, providing procedural safeguards for violations of domestic workers’ rights. With fines upward of $14,000, household employers and organizations that employ or place domestic workers are strongly encouraged to consult with labor and employment counsel to review policies and procedures and revise client/employment agreements to limit any potential exposure.

New Year, New Rules: NLRB Reverses Course (Again) on Joint-Employer Standard, Employers Should Beware

Employment Law Monthly | January 2024
By Thomas Reilly

Precedent is a core principle in every field of legal practice. Courts interpret statutes and issue decisions, and those decisions become guideposts for practitioners and later courts alike. It is exceedingly rare for a court to reverse course and overturn a prior decision based on nothing more than a radical reinterpretation of the law. Although it may seem inflexible, adherence to precedent ensures consistency in the law, clarity in what the law requires of the governed, and the avoidance of unpleasant surprises.

Not so in the world of federal administrative agencies such as the National Labor Relations Board. The Board can and frequently does overturn prior decisions based on nothing more than changing political forces. Because Board members serve for limited terms and are appointed by the President, the Board often revisits prior decisions once a new political persuasion gains a majority. Simply put, precedent often takes a back seat to political policy considerations. Businesses subject to the NLRB's rules therefore must be diligent in keeping up to date with the Board's most recent decisions, given that prior decisions are subject to change, if not wholesale reversal, every few years.

The NLRB's New Joint-Employer Rule

Recently, the NLRB revisited its rule regarding joint-employer status for employees. In October 2023, it issued a new final rule for joint-employer status, reversing a 2020 decision on the same subject. It is the third time in the last decade that the NLRB has changed its rules regarding joint employers. The new rule took effect on December 26, 2023.

What is a joint employer? In simple terms, joint employment may occur any time two or more entities share control and supervision of a particular employee. If an entity is considered a "joint employer" of a worker, then that entity must adhere to the National Labor Relations Act, meaning it must provide the worker with all of the protections the Act requires, including minimum wage, overtime, and more. The question of whether a worker is a joint employee of a particular entity is a legal question. In practical terms, this means a business entity may be a joint employer of a particular worker even if the entity did not intend to or did not want to be a joint employer. For example, a company may receive temporary workers through a staffing agency. The company may believe the workers are not its employees, but rather employees of the staffing agency because the company does not pay them or provide them with other benefits. Even so, if the workers meet the NLRB's standard for joint employment vis-à-vis the company, then the company is a joint employer, with all of the additional obligations the title requires. If the workers are not receiving the rights to which they are entitled under the National Labor Relations Act, the company may be liable even though it received the workers indirectly through the staffing agency and was not directly responsible for providing them pay and other employment rights under the Act.

The NLRB's 2020 Joint-Employer Rule. Under the Board's previous joint-employer rule, an entity would be considered a joint employer if it exercised **actual and direct control** over a **specified and clearly defined list of essential terms and conditions of employment**. The prior rule was business-friendly. Business entities easily could take steps to ensure they did not exercise the great degree of control and oversight necessary to confer joint-employer status.

The NLRB's New Final Rule. The new rule removes the prior rule's strictures, significantly broadening the scope of joint-employer status and increasing the risk that a business may unwittingly become a joint employer. Accordingly, an entity may be considered a joint employer under the new rule if it "possesses the authority to control" – whether **directly or indirectly** – one or more of the employee's essential terms and conditions of employment. Unlike the old rule, the new rule does not require that the entity actually exert control. Rather, the entity can be a joint employer so long as it has the ability to exert control. The new rule also removes the "list" of essential terms and conditions of employment. Now, an entity need only have the potential to exert control over any single essential term or condition of employment, including wages and benefits; hours of work; job duties; supervision; work rules and grounds for discipline; working conditions; and tenure of employment, such as hiring and discharge. There are no exceptions to the new rule; it applies in every state and to every industry, including industries where workers performing tasks for various entities is expected and widespread, such as construction, healthcare, seasonal work, and other industries and trades where staffing agreements and temporary workers are common.

There are no exceptions to the new rule; it applies in every state and to every industry.

What Should Business Entities Do?

The new rule creates a significant risk that businesses that accept workers from third-party staffing agencies and other similar entities will be deemed a joint employer of those workers. In fact, it is exceedingly likely to occur if businesses are not careful, given the new rule's broad scope. To manage these new risks, businesses should review their contracts with third parties, particularly staffing agencies, to determine whether those contracts permit the business to exercise control over the third party's workers as described above. Businesses also should speak with their managers and supervisors and, to the extent possible, train them to avoid interactions in which they exert direct or indirect control over another entity's employees. Limitations over the manner and means of a worker's job duties are the key for businesses to avoid falling unwittingly into an unwanted joint employment arrangement.

The Porzio Employment Team is available to help employers with policy development, training, and guidance to mitigate the risk of joint-employment claims under the National Labor Relations Act.

When It Comes to Whistleblower Protection, It Is No Longer the Thought That Counts

Employment Law Monthly | Feburary 2024
By Brian Giardina

The United States Supreme Court may have just complicated employers' internal processes for handling whistleblowers. Employers now will be held to a higher standard under federal law when it comes to how courts view the adverse employment actions that an employer may take against a whistleblower. Despite this latest ruling, careful and consistent employers still have some ability to protect themselves from claims of unlawful retaliation.

In *Murray v. U.B.S. Securities, LLC*, 144 S. Ct. 445 (2024), a unanimous Supreme Court ruled that an employer subject to the Sarbanes-Oxley Act, 18 U.S.C. §1514A(a), need not act with "retaliatory intent" in taking an adverse employment action against a whistleblower. While only publicly-traded companies, with some exceptions, are subject to the Sarbanes-Oxley Act, the Act is the basis for many whistleblowing statutes. The employer in the underlying matter, U.B.S., terminated Murray shortly after he raised issues regarding what he believed was unethical and illegal conduct. Murray, raising issues of unlawful retaliation under Sarbanes-Oxley, was successful before the District Court, with a jury finding that he had established a claim under §1514A(a). U.B.S. appealed to the Second Circuit Court of Appeals.

The Second Circuit held that retaliatory intent is required to trigger the protections contained in §1514A(a) of the Sarbanes-Oxley Act. This ruling created a new standard by requiring a claim for retaliation to include evidence that the employer intended to retaliate against a whistleblowing employee. The Second Circuit's holding in U.B.S.' favor caused a circuit split with the Fifth and Ninth Circuits, which had previously held that no such retaliatory intent was required. Murray appealed to the Supreme Court, which agreed to hear the case and resolve the split among the lower federal courts.

Justice Sotomayor's majority opinion concluded that Congress did not intend to require plaintiffs bringing whistleblower claims under the Sarbanes-Oxley Act to show retaliation. The Court's opinion explains that "[s]tatutory context confirms" that the Act "does not import a 'retaliatory intent' requirement: Requiring a whistleblower to prove his employer's retaliatory animus would ignore the statute's mandatory burden-shifting framework. The burden-shifting framework was conspicuously absent from the Second Circuit's opinion, and UBS now insists that the statute's burden shifting addresses only "causation, not intent."

The Court's clarification of the Sarbanes-Oxley Act's whistleblowing provisions brings federal law much closer to New Jersey's Conscientious Employee Protection Act, CEPA. Any adverse action that an employer takes against a whistleblower, or perceived whistleblower, can trigger the protections of CEPA. However, employers are not left powerless in the face of whistleblowing employees.

The Supreme Court's ruling does not foreclose all defenses for the employer who makes a non-retaliatory determination. The Sarbanes-Oxley Act provides that an employer will not be held liable where it "demonstrates, by clear and convincing evidence, that [it] would have taken the same unfavorable personnel action in the absence of the protected behavior." *Murray*, 144 S. Ct. at 456. Put another way, would the employer have retained an otherwise identical employee who had not engaged in any protected activity? *See Bostock v. Clayton County*, 590 U.S. 644, 660 (2020). If an employer can show that a similarly situated employee received the same treatment, they should prevail under the law.

Employers who have received a report from an employee that could be perceived as whistleblowing under state or federal law must develop internal procedures for ensuring that those employees are treated in a fair and non-retaliatory manner. Employers who already have policies should immediately review their policies to ensure that they are robust and detailed. Employers who can demonstrate that they treat all employees consistently will be able to avail themselves of the protections outlined above. Those employers who are less careful in how they treat similarly situated employees will find it difficult to claim the protections carved out by this newest Supreme Court precedent.

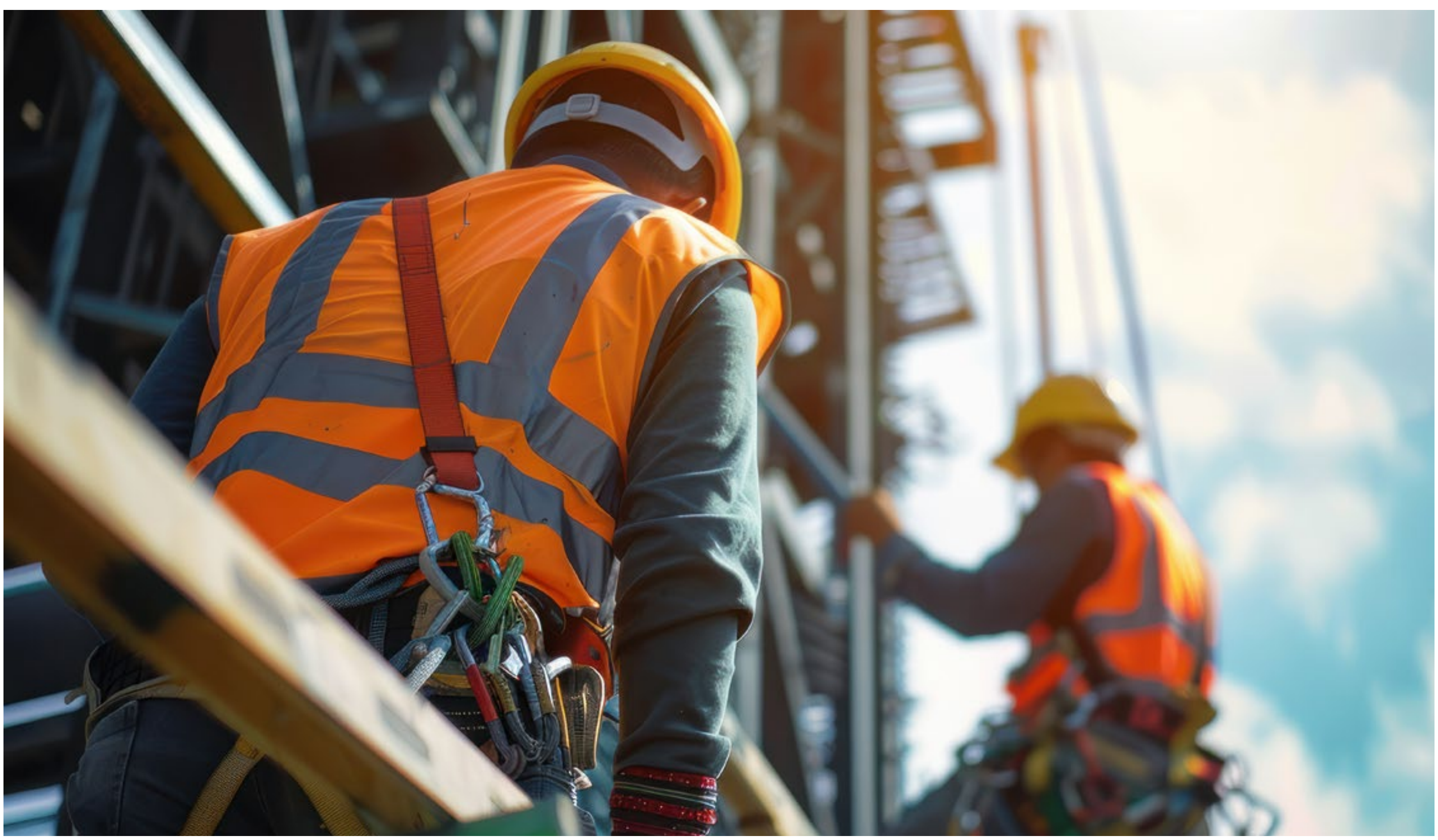
Employers should also ensure that strong anti-retaliation provisions are in place to protect employees who bring complaints. Employers with clear policies and strong anti-retaliation provisions will have more success in defending claims of employee retaliation.

A New Need For "Uniform" Policies: NLRB Reverses Course, Provides Greater Protection To Employees Who Display Political Slogans On Work Uniforms

Employment Law Monthly | March 2024
By Weston Kulick, Thomas Reilly

Most private employers probably believe they can exercise a great degree of control over what their employees wear, especially if those employees engage with clients or customers every day. In particular, most private employers probably feel that they can prohibit their employees from wearing, writing, or otherwise showing political or similar slogans on their work uniforms or generally on their person. After all, private employees do not have traditional First Amendment free speech rights in the workplace, and private employers have a vested interest in protecting customer and client relationships.

From 2020 up until about a month ago, the National Labor Relations Board (NLRB) agreed. In 2020, the NLRB issued a decision holding that Whole Foods did not violate the labor rights of its employees when it disciplined them for wearing accessories containing the "Black Lives Matter" slogan. Rather, the NLRB concluded that Whole Foods had the right to avoid the "controversy and conflict" that the messaging "would invite." The NLRB's decision seemed quite clear: whatever employees might be permitted to do outside of work, they were not free to express their private political opinions on company time.



Critically, the NLRB is a federal agency and its members are appointed by the President. Unlike courts, the NLRB is not bound by the concept of precedent — a legal principle by which courts abide and that requires them in most instances to adhere to prior decisions. Instead, the NLRB's decisions often depend on the political persuasion of its members, which in turn depend on the political preferences of the President. Consequently, the NLRB can and often does revisit prior issues and change course.

As is its prerogative, the NLRB seems to have reversed course on the issue of employees displaying political slogans on their work uniforms. In a decision dated February 21, 2024, the NLRB held that Home Depot had violated federal labor law by prohibiting an employee from wearing an apron with the slogan "BLM" (Black Lives Matter) written on it. Although it did not reference the prior Whole Foods decision, the NLRB appeared to distinguish it by noting that the Home Depot employee was engaged in "concerted activity" under the National Labor Relations Act because the employee chose to display the insignia amid numerous complaints of racial discrimination by other employees and customers at the employee's work location. The Board explained that workers "have the right to join together to improve their working conditions — including by protesting racial discrimination in the workplace." Moreover, "an employee who acts individually to support a group protest regarding a workplace issue" is protected under federal labor law.

The NLRB's explanation notwithstanding, the decision is a clear departure from its prior holding in Whole Foods and a warning to employers who are overzealous in policing employee dress and political activity.

In general, employers should follow several basic principles to guide decisions in this area:

1. Employees who engage in activity designed to address discrimination or other such issues ***in the workplace*** are protected by federal labor law from disciplinary action.

2. Employees who engage in activity designed to address discrimination or other social issues, ***in general***, may not necessarily be protected in all instances, although employers still should exercise caution and consult with their counsel before taking any action.

3. Employers should enforce dress codes and other policies ***uniformly***. To the extent employers do not enforce dress codes and other similar policies clearly, consistently, and equally, they are opening themselves to discrimination and retaliation claims, and potential NLRB claims.

Porzio's team of employment and labor attorneys are ready to assist employers in reviewing, preparing, and revising policy documentation and employee handbooks to align with the NLRB's new guidance.

The Board explained that workers "have the right to join together to improve their working conditions — including by protesting racial discrimination in the workplace."

In Addition to Affecting Employers, Is the High Court's Muldrow Decision a Harbinger for the Future of Employer-Supported Programs?

Employment Law Monthly | June 2024

By Rahool Patel

A recent United States Supreme Court decision will make employers reexamine their transfer policies. On April 17, 2024, the Court unanimously ruled that a female police sergeant in the City of St. Louis, who was transferred out of a plainclothes position in the intelligence division and into a uniformed role in another division, had made the requisite showing of "some" harm necessary for her Title VII claim to survive the police department's motion for summary judgment. *Muldrow v. City of St. Louis*, Missouri, No. 22-193, ___ U.S. ___ (Apr. 17, 2024) (slip op. at 1). In doing so, the high court resolved a split among the federal courts of appeal, in which most circuits had concluded that a Title VII plaintiff in a transfer case had to establish that the harm they suffered was "materially significant," "significantly adverse," "serious," or some other phrase indicating a heightened level of harm. Id. at __ (slip op. at 4). The Supreme Court held that the plain text of Title VII only required plaintiffs in transfer cases to show that "some" injury had occurred. *Id.* at __ (slip op. at 10). Because they found Muldrow to have satisfied this requirement, the Court reversed the lower court's grant of summary judgment in favor of her employer. *Ibid.*

The Court's decision provides much clarity about what a Title VII plaintiff is required and not required to show. Going forward, "some" harm is needed, but a "significant," "substantial," "serious," or "material" harm is not. *Id.* at __ (slip op. at 7). Undoubtedly, the Court's decision is a significant boon to employees and the plaintiffs' bar, who will no longer need to treat summary judgment as a serious hurdle to vault over but as a mere bump on the path to trial. By lowering the standard that Title VII plaintiffs must satisfy, "many cases will come out differently" and "claims that failed under a significance standard should now succeed." *Id.* at __ (slip op. at 7 and n.2). To that end, Justice Alito's comment that "careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years" appears to be off the mark. *Id.* at __ (slip op. at 2) (Alito, J., concurring in judgment). To the contrary, this decision will make a significant difference in how lower courts will treat these types of cases and will make it harder for employers to successfully obtain dismissal of such claims.

Notwithstanding the Supreme Court's guidance, the boundary line between "some" harm (that is actionable) and something lesser (that is not) will not always be clear. While the Court provided examples of what now satisfies Title VII—*i.e.*, an engineer assigned to work in a wind tunnel, a shipping worker required to work only nights, and a school principal moved into an administrative role outside of the school—these examples raise new questions of their own. Does an employer violate Title VII by transferring an employee from one team to another in the same department while compensation and benefits remain unaffected? Is Title VII violated when an employer moves an employee's office down the hall further away from a key decision-maker? Does modifying an employee's schedule by one hour in either direction implicate Title VII?

For Justice Kavanaugh, the answer to these questions unequivocally would be "yes." In his view, "the text of Title VII does not require a separate showing of some harm." *Id.* at __ (slip op. at 2) (Kavanaugh, J., concurring in judgment). As he explained, "the discrimination is the harm." *Ibid*. While disagreeing with the Court's requirement that Plaintiffs must show "some" harm, Justice Kavanaugh nonetheless noted that this bar is "relatively low" and any change in "money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like" would be sufficient. *Id.* at __ (slip op. at 3) (Kavanaugh, J., concurring in judgment). He contends that his approach will lead to the same result as the Court's approach in 99% of discriminatory transfer cases.

In light of *Muldrow,* employers should carefully examine and, when necessary, update their policies and procedures to remain compliant with Title VII and similar state laws, where federal precedent is often considered persuasive authority. When transferring employees, employers would be prudent to meticulously document the business reasons supporting these moves. The fact that a transferred employee maintains the same level of seniority and compensation is unlikely—on its own—to be sufficient to defend against a Title VII claim.

The Supreme Court's decision in *Muldrow* also raises questions as to its potential implications beyond the transfer context. While nothing in *Muldrow* expressly states it applies in other areas, the Court has shifted substantially to the right and expressed skepticism about certain programs in recent years. For example, less than a year ago, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the conservative Justices determined that college and university admissions programs that provided a "plus" factor on the basis of race violated the Equal Protection Clause. 600 U.S. 181 (2023). If the "some" harm requirement can be met by a transfer that has some impact on professional relationships or networking opportunities, as Justice Kavanaugh posits, employers should be mindful of this new standard and its potential application to other employment decisions and perhaps even affinity or diversity, equity, and inclusion programs. Employers will be wise to review their policies, practices, and programs to ensure that all meet this new standard and are carefully considered.

Recommended Actions for Employers

In light of the Supreme Court's decision in *Muldrow*, even when considering a transfer that will not change an employee's rank, title, and compensation, employers should comprehensively evaluate whether the transfer might run afoul of the "some" harm standard. Failing to do so will likely result in many more cases proceeding beyond the summary judgment stage. In addition, human resources personnel should receive additional training and be involved in all cases where transfers are under consideration.

Porzio's employment and labor attorneys are ready to counsel employers and design tailored training and prevention programs to minimize claims and avoiding litigation.

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Mobley v. Workday: A Potential Shift in Employment Discrimination Liability

July 31, 2024
By Rachel Fairley

As recruiting with Artificial Intelligence (AI) continues to increase in popularity, so does the litigation surrounding it. Specifically, concerns continue to grow regarding the conscious and unconscious biases that are alleged to creep into the recruiting process. In a case of first impression (*Mobley v. Workday, Inc.*), class-action Plaintiffs allege that Workday's AI screening software tool is biased and that Workday is directly liable for alleged unlawful employment discrimination caused by an employer's use of Workday's AI-powered hiring tools. On July 12, 2024, the court issued a mixed ruling in the closely watched class action case. By partially denying Workday's motion to dismiss, Judge Rita Lin of the Northern District of California determined earlier this month that the Plaintiff's claims would be heard. While the court dismissed the claims that Workday acted as an "employment agency," it allowed claims that Workday acted as an "agent" of employers, allowing the case to proceed to discovery. This ruling has significant implications for both AI vendors and employers using AI-powered hiring tools, potentially expanding the scope of liability under federal anti-discrimination laws.

In this class action lawsuit, the named Plaintiff alleges that since 2017, he has applied to over 100 positions at companies utilizing Workday screening tools for recruiting and was rejected from each of those 100 positions, despite his claim that he possessed the relevant qualifications.

Mobley's Complaint alleged race discrimination in violation of Title VII of the Civil Rights Act (Title VII), age discrimination in violation of the Age Discrimination in Employment Act (ADEA), and disability discrimination violative of the Americans with Disabilities Act (ADA). In his Complaint, Mobley asserts that Workday's software repeatedly rejected him based on a number of identifying criteria, such as his graduation date, his alma mater, a historically Black college, and a plethora of personality tests and assessments which he claims screened him out due to his depression and anxiety. Mobley's assertions that Workday's rejections were automated were grounded in that he often received rapid rejections and rejections in the middle of the night.

Workday filed a motion to dismiss, alleging that Mobley failed to state a claim upon which relief can be granted and further argued that, as a software vendor, Workday is not liable for employment discrimination. The court denied the motion on the grounds that Workday acts as an agent of employers under the relevant laws, and therefore, the laws which would otherwise apply to the employer also apply to Workday.

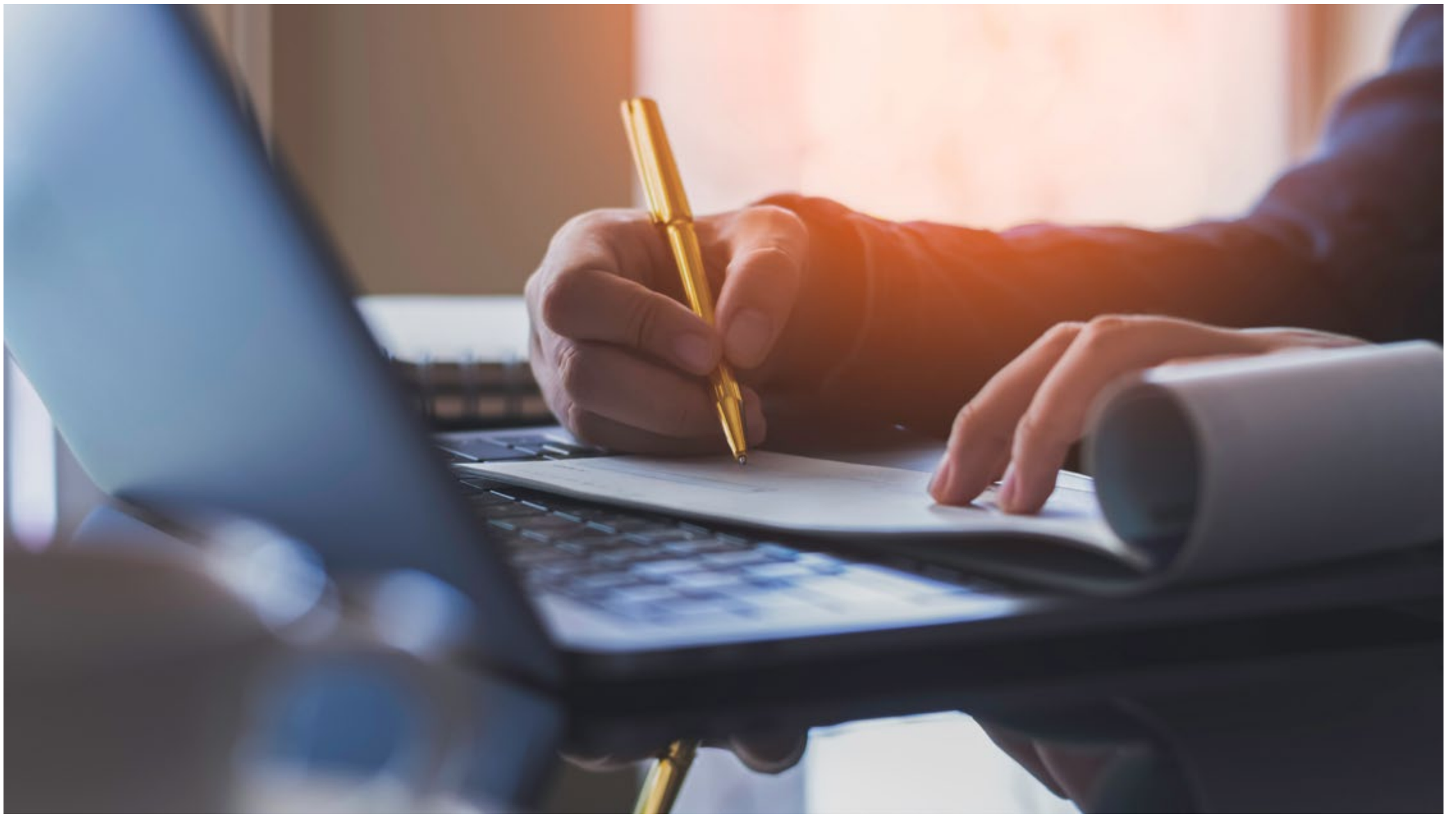
The federal district court judge held that "Workday's software is not simply implementing in a rote way the criteria that employers set forth, but is instead participating in the decision-making process by recommending some candidates to move forward and rejecting others." "Given Workday's allegedly crucial role in deciding which applicants can get their 'foot in the door' for an interview, Workday's tools are engaged in conduct that is at the heart of equal access to employment opportunities."

Judge Lin accepted the Plaintiff's claim that an AI vendor could be directly subject to liability for employment discrimination under Title VII, the ADA, and the ADEA, specifically under the theory that the AI vendor was acting as an "agent" of the employer. However, the court rejected the theory that Workday, the AI vendor, was an "employment agency" under federal law, finding that Workday's alleged activities did not meet the statutory definition of "procuring" employees for employers.

By allowing the Plaintiff's agency theory to proceed, as supported by the EEOC in its amicus brief submitted to the court, the ruling opens the door for a significant expansion of liability for AI vendors in the hiring process, with potentially far-reaching implications for both AI service providers and for employers using those tools.

In light of this decision and the EEOC's overt support of the Plaintiff's novel theory of liability, employers using AI-powered recruiting and hiring tools should review their processes to ensure they can clearly articulate the role these tools play in their hiring decisions and ensure that these tools are not granted definitive discretion in the hiring process that may result in disparate impacts on protected groups. Employers also should review their contracts with these vendors in order to fully understand the scope of liability and whether there is any obligation on the part of the vendor to indemnify the employer in the event of similar litigation.

The Porzio Employment Team is available to help employers navigate the evolving liability landscape, develop and refine policies and processes, and ensure compliance as corporate technology continues to advance.



Don’t Fall Behind on Addressing Employee Compensation: Recent DOL Rule Sets Increases to FLSA Minimum Salary Threshold for Nonexempt Employees for Years to Come

September 30, 2024

By Janelle Edwards-Stewart, Weston Kulick

A Department of Labor final rule announced earlier this year increases thresholds for determining whether certain salaried employees are exempt from minimum wage and overtime requirements under the Fair Labor Standards Act, potentially impacting how employers may choose to compensate their nonexempt employees in response.

A final rule announced by the Department of Labor (DOL) this past spring went into effect over the summer and modified the regulations issued under the Fair Labor Standards Act (FLSA) by increasing the minimum salary thresholds required to exempt a salaried executive, administrative or professional from federal minimum wage and overtime pay requirements. The rule also raised the highly compensated employee total annual compensation threshold. Both raises became effective July 1, 2024, with additional raises set to occur in the future.

The FLSA guarantees a federal minimum wage and entitlement to overtime pay to covered, nonexempt employees (independent contractors are not covered). An employee generally is covered by the FLSA so long as the employee is employed by an enterprise with an annual gross volume of sales or business done of $500,000 or more. Certain businesses are subject to FLSA regulations irrespective of the amount of business done, such as hospitals, schools, and public agencies. Even if an employer is not subject to the FLSA on the basis of the size of its enterprise, an employee still may be entitled to FLSA protections if engaged in interstate commerce. Notably, the FLSA does not include any carveout for non-profit organizations, which are subject to the same $500,000 enterprise threshold as for-profit organizations. This enterprise coverage for non-profit organizations considers only the activities performed for business purposes but does not include the organization's charitable activities.

An employee may be exempt from the FLSA's minimum wage and overtime protections if employed in an executive, administrative, or professional capacity (which includes teachers, practitioners of law or medicine, and creative professionals). This is known as the EAP exemption. Outside sales positions, computer employees, and other highly compensated employees also may be exempt. To fall within the EAP exemption, an employee generally must satisfy three criteria:

- Salary basis: be paid a salary—a fixed amount not subject to reduction due to variability in either the quantity or quality of the work performed;
- Salary level: be paid at least a specified weekly salary level; and
- Duties test: perform duties that are primarily executive, administrative, or professional duties.

The DOL rule modified the salary basis element of the above criteria, and is what employers should be careful to consider. Essentially, the rule expands overtime protections for additional lower-paid salary workers through the increased salary thresholds that must be met in order to exempt an employee from FLSA overtime pay requirements. Specifically, as of July 1, 2024, the minimum salary requirement increased from $684 per week ($35,568 annually) to $844 per week ($43,888 annually). The second increase set for January 1, 2025 will further raise the minimum salary requirement to $1,128 per week ($58,656 annually). The minimum annual salary threshold for highly compensated employees increased from $107,432 to $132,964 on July 1 and will raise again to $151,164 on January 1, 2025. The rule also provides for future updates to both of these figures starting on July 1, 2027, and for every three years thereafter at an amount to be determined, reflective of earnings data.

Employer Takeaways

With the fall upon us and the time for year-end raises approaching rapidly, employers should consider how best to make year-end changes to employee compensation in light of the minimum salary threshold increase set to take effect on January 1, 2025. For each employee who is affected by the increased earnings threshold, some of these measures might include the following:

- Increasing salaries of employees to meet the new thresholds and preserve those employees' exempt status, which may be more cost effective than permitting these employees to fall below the newly heightened thresholds and become entitled to premium overtime pay.
- In the absence of increasing salaries, enacting measures to reduce or eliminate overtime pay for newly nonexempt employees.
- In the absence of increasing salaries or mitigating overtime, reducing pay allocated towards base salaries (without falling below the applicable hourly minimum wage) to account for, and offset the effect of, increased overtime pay.

The goal for employers is to strike the right balance between legal compliance, costs, and care for their employees. To achieve that end, employers are encouraged to confer with legal counsel for support in analyzing their existing payroll structure, navigating compliance requirements, and strategizing to help keep their businesses agile during these changing times.

Essentially, the rule expands over-time protections for additional lower-paid salary workers through the increased salary thresholds that must be met in order to exempt an employee from FLSA overtime pay requirements.

Pay Transparency Arrives in New Jersey

November 25, 2024

By Sarah Wisniewski

Governor Murphy signed S2310 into law last week, making New Jersey the 14th state to require pay transparency. The new law requires employers to be transparent about compensation and benefits for promotions, job listings, and transfer opportunities.

The stated goal of S2310 is to promote fairness in the workplace and increase career advancement opportunities. S2310 mirrors Jersey City's existing pay transparency law, Ordinance 22-045. Ordinance 22-045 applies to employers with five or more employees and whose principal place of business is Jersey City. Covered employers are required to disclose the minimum and maximum annual salary or hourly wages in employment opportunities, and the penalty for noncompliance is up to $2,000.

S2310 does not standardize local pay transparency ordinances, and employers should be aware of the variability between the State and local pay transparency laws. Though local laws may provide some stronger protections to supplement the State law, S2310 sets the floor for all employers throughout the State, who must abide by its minimum requirements.

Covered Employers

S2310 defines an "employer" as "any person, company, corporation, firm, labor organization, or association. . . ." An employer may be subject to S2310 if the employer: (1) employs 10 or more employees over the course of 20 calendar weeks, and (2) does business, employs individuals, or takes applications for employment within New Jersey. Job placement and referral agencies may also be subject to S2310 if they meet both requirements.

The language of S2310 is unclear whether an employer is subject to the law if the "employment" is located in New Jersey or if the employer accepts applications from someone in New Jersey for an out-of-state job. Therefore, until the issue is clarified, we recommend any business that accepts any employment applications in New Jersey, regardless of whether the "employment" is located in New Jersey, review and update their processes for advertising job opportunities to ensure they are in compliance with the law.

Disclosure

Employers subject to S2310 must disclose the hourly rate, annual salary, or range for any advertised position, as well as all benefits and additional compensation an employee may be eligible for within the first 12 months of employment. Employers, however, are not prohibited from “increasing the wages, benefits, and compensation identified in the job opening posting at the time of making an offer for employment to an applicant.”

Notice

S2310 also requires that employers make “reasonable efforts” to make known to all employees in an applicable department any promotional opportunities available. S2310 defines “promotion” as a “change in job title and an increase in compensation.”

Regarding S2310’s notice requirement, Assemblywoman Quijano (D-Union) emphasized the law’s intent, stating, “[n]obody deserves to be overlooked when it comes to promotional opportunities and this legislation is about ensuring fairness in the workplace.”

Noncompliance

S2310 does not provide a private right of action that would allow individuals to sue a noncompliant employer. Instead, employers who violate the law may be fined up to $300 for an initial violation and $600 for each subsequent violation.

Important Takeaways

- S2310 will go into effect in mid-June 2025, seven months after Governor Murphy signed the bill into law.
- Employers will be required to disclose the hourly wage, annual salary, or range for a position, and include a description of benefits and additional compensation an applicant may be eligible for within the first 12 months of employment.
- Noncompliance will result in civil penalties: $300 for a first violation and $600 for every subsequent violation. The law does not permit employees a private right of action to sue their employers for noncompliance.
- S2310 only applies to employers: (1) with 10 or more employees over the course of 20 calendar weeks and (2) who do business, employ individuals or take applications in New Jersey.

Employers who are subject to S2310 should review and update their processes for advertising job opportunities to ensure they are in compliance with the law. While S2310 will not take effect until mid-2025, employers should begin planning now to ensure they have the appropriate information in place when the law takes effect. Porzio’s employment and labor attorneys are ready to assist employers in navigating compliance with the new pay transparency law.

FTC Votes to Ban Noncompete Agreements

April 24, 2024
By David Schloss

The Federal Trade Commission (FTC) voted 3-2 Tuesday to ban noncompete agreements that many employers require employees and contractors to sign, prohibiting them from working for a competitor or starting a competing business once they have left their job. It is estimated that 18% of the US workforce is covered by a noncompete agreement, amounting to about 30 million workers.

The ban prohibits companies from requiring new hires, including senior executives, to sign a noncompete agreement as a condition of employment, and requires companies to inform current and former employees that the company will not enforce any such agreements already in effect. An exception is made for current senior executives, defined as workers in a "policy-making position" who earn more than $151,164 per year.

The FTC argues that noncompete agreements "block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand." The Commission believes that banning noncompete agreements will promote "greater dynamism, innovation, and healthy competition" and ultimately lead to lower costs for consumers.

Several states, including California and Minnesota already have noncompete agreement bans in place. Noncompete agreements in New Jersey are under attack but currently are enforceable so long as they are reasonable in scope, duration, and geography and protect a legitimate interest of the employer without causing undue hardship on the employee. It is possible that the confusion resulting from having different laws in various states, may, in part, have led to the movement simply to ban noncompete agreements altogether.

Employer advocates believe that noncompete agreements are an essential tool businesses need to protect proprietary information and intellectual property. While some advocates of this ban may suggest that this argument is undercut by the FTC leaving in place an employer's ability to enforce nondisclosure and confidentiality agreements, recent decisions and pronouncements from the National Labor Relations Board severely curtailed employer's rights to enforce nondisclosure and confidentiality agreements. This leaves employers with limited tools at their disposal to protect their trade secrets and their investments in certain employees.

The ban becomes effective 120 days from publication in the Federal Register. Business groups such as the US Chamber of Commerce are expected to sue to block implementation of the ban, questioning the FTC's authority to issue a blanket ban, particularly one that applies retroactively.

One thing is for certain: If the ban is not blocked by court order and becomes law, businesses and their HR departments will be busy identifying and notifying current and past workers that their noncompete agreements will not be enforced and refreshing the confidentiality, inventions assignment, and non-disclosure agreements they currently use in order to comply with the law.

For HR teams and employers generally, the ban would be a bit of a double-edged sword, making it more challenging to prevent key workers from leaving and joining a direct competitor but easier to freely hire talent without the threat of that hire being enjoined as a result of a noncompete clause within a broader confidentiality agreement.

We will keep a close eye on developments in this area. In the meantime, employers should take steps to identify any individuals who may need to receive notification under this new ban. Should you have any questions, please do not hesitate to reach out to us for advice and direction.

Texas Federal District Court Strikes Down FTC Non-Compete Rule

Employment Law Monthly | August 2024
By Rachel Fairley

On August 20, 2024, a Texas federal court struck down the FTC's Final Rule (Rule) banning most non-compete agreements, which was scheduled to take effect on September 4, 2024. The Texas court's decision means that employers will not have to comply with the Rule on its scheduled timeframe, if at all. While employers can breathe easier knowing that non-compete agreements are still legally binding for the time being, the Texas court's ruling is unlikely to be the final word on whether the Rule can ultimately go into effect.

The FTC has announced it is considering and evaluating an appeal of the Texas federal court's decision. In addition, at least one other federal court in Pennsylvania has determined preliminarily that the Rule should be allowed to take effect. These competing decisions likely will require resolution by appellate courts and, ultimately, the Supreme Court. For now, employers need not comply with the FTC rule and may resume their focus on their applicable state laws that have historically governed non-competes.

Background of Legal Challenges to the Non-Compete Rule

On Tuesday, April 23, 2024, the FTC issued the "Non-Compete Rule" banning most non-compete agreements between employers and their workers. The Rule was intended to prohibit employers from entering into and otherwise enforcing non-compete clauses in existing agreements, beginning on September 4, 2024. The Rule also would require employers to notify employees subject to such agreements that their agreements are no longer enforceable.

Legal challenges to the Rule began almost immediately. Lawsuits were filed in federal courts in Texas and Pennsylvania following the release of the Rule. In both cases, employers sought to temporarily halt enforcement and implementation of the Rule, arguing that the Rule was unlawful.

Initially, the Texas court granted the employer's request to enjoin the implementation of the Rule, finding that "the FTC lacks statutory authority to promulgate the Non-Compete Rule," and that "the [Non-Compete] Rule is arbitrary and capricious." However, that ruling was preliminary and, therefore, only applied to the parties to the Texas action, thus leaving open the question of whether the Rule is enforceable beyond those parties. Thereafter, the Pennsylvania court denied an employer's efforts to temporarily halt implementation and enforcement of the Rule, contrary to the Texas court's prior holding. These two contradictory initial rulings left employers confused and eagerly awaiting further court rulings that might add clarity to whether compliance would be required on the September 4 implementation date.

The Texas Court's Final Ruling

On August 20, 2024, the Texas court issued its final ruling on the lawfulness of the Rule. The court struck down the Rule, stating that "the [Non-Compete] Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter." The Texas court reaffirmed its preliminary decision that the FTC lacked the statutory authority to implement the Rule and, that Rule was arbitrary and capricious, and therefore unenforceable.

Unlike the preliminary rulings from the Texas and Pennsylvania courts, which were limited to the parties to the lawsuit itself, the Texas court applied its final ruling to all employers nationwide. The court was explicit in its opinion that its decision to set aside the Rule has a "nationwide effect," is "not party-restricted," and "affects persons in all judicial districts equally."

Implications of the Texas Court's Final Ruling

The Texas court's final ruling marks the first time a court has set aside the Rule on a nationwide basis. As a result of the ruling, the FTC cannot implement or enforce its Rule against any employer without violating the Texas court's final ruling. Accordingly, employers that have been preparing to comply with the Rule by September 4, 2024, may set those efforts aside, at least for now.

The Texas court's ruling likely will not be the final word on the Rule. The FTC has indicated it is considering appealing the ruling to the Fifth Circuit Court of Appeals. While it is possible that the FTC could succeed on appeal with a ruling that overturns the Texas court's decision and deems the Rule to be lawful, it is not likely that the Fifth Circuit would do so. Additionally, the Pennsylvania court, whose preliminary ruling was directly contrary to that of the Texas court, has yet to issue a final ruling in the case pending before it. Ultimately, unless the FTC withdraws the Rule, the United States Supreme Court will likely need to weigh in to resolve finally the lawfulness issue concerning the Rule.

Impacts for Employers

For now, the FTC is permanently enjoined from enforcing its non-compete rule, and employers do not need to prepare notices to former employees regarding the Final Rule. Employers may continue to enforce and enter into new non-competes, subject to any limitations imposed by state law. Therefore, employers should narrowly tailor and remain mindful of applicable state law in drafting and enforcing non-competes. In the event that the Texas court's decision is overturned and the Rule is found to be lawful, employers should be prepared to comply with the Rule.

The Porzio Employment Team is available to help employers draft hiring documentation compliant with the quickly evolving legal landscape and ensure employers understand their obligations should the Non-Compete Rule ultimately be upheld.

Employers should narrowly tailor and remain mindful of applicable state law in drafting and enforcing non-competes.

New NLRB Memo Intensifies Crack-down on Non-Compete Agreements and "Stay-or-Pay" Provisions

October 30, 2024
By Sarah Wisniewski

The legal landscape surrounding non-compete agreements has been murky since the FTC issued a rule in April 2024 which banned most non-compete agreements. In August, a Texas federal court struck down the rule, leaving open the possibility of a future appeal. Now, the National Labor Relations Board's (NLRB) General Counsel, Jennifer Abruzzo, has added to the uncertainty. In a memo dated October 7, 2024, Abruzzo announced her intent to begin prosecuting most non-compete agreements and "stay-or-pay" provisions on December 6, 2024. GC Memorandum 25-01. Abruzzo's memo expands upon an earlier memo from May 2023, which expressed her position that non-compete agreements generally violate the National Labor Retaliations Act (NLRA). GC Memorandum 23-08.

In Abruzzo's view, a non-compete agreement that affects an employee's employment implicates Section 7 of the NLRA and is, therefore, unlawful. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protections," and the right "to refrain from any or all such activities." 29 U.S.C. § 157.

Abruzzo further argues that an employer's rescission of unlawful non-compete agreements will not sufficiently remedy the impact on employees. Abruzzo makes the argument that whether or not a non-compete agreement is enforced against an employee, the remedy should take into account the "pernicious financial harms" of non-compete agreements and place the employee in the same position they would have been in, but for the non-compete agreement.

Abruzzo outlines a few different types of "pernicious financial harms" for which employees may be eligible for relief:

The Employee Who Declined a Job with a Better Compensation Package

An employee may be entitled to the difference in pay between what the employee earned and what they could have earned if the employee can demonstrate that they: (1) declined a job opportunity with a better compensation package; (2) were qualified for the job opportunity; and (3) were discouraged from applying/accepting the job because of a non-compete agreement.

The Employee Who Complied with a Non-Compete Agreement

An employee who separated from their employer may be entitled to damages for the additional harms and costs of complying with a non-compete agreement. For example, if an employee can demonstrate they were out of work for a longer period of time than they otherwise would have been without the non-compete agreement, the employee may be entitled to payment for lost wages. Also, if an employee moved outside of the geographic region covered by the employee's non-compete agreement in order to find work, the employee may be compensated for moving costs.

The Employee Who Accepted a Job Outside of their Industry

An employee who accepted a job with a lower total compensation package outside of their industry but within the geographic scope of their non-compete agreement may be entitled to the difference between what the employee would have received working in their industry and the employee's actual earnings.

Abruzzo notes that employees subject to anti-moonlighting provisions in their employment agreements may be eligible to similar relief.

Next, Abruzzo asserts that "stay-or-pay" provisions impact an employee's job mobility, like non-compete agreements, and generally violate Section 8(a)(1) of the NLRA. Section 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA. 29 U.S.C. § 158. "Pay-or-stay" provisions are contract provisions that require an employee to repay their employer if the employee separates from the employer. For example, under a "stay-or-pay" provision, an employee may be contractually obligated to attend a training, but if the employee separates from their employer within a set period of time, the employee may be obligated to repay their employer for the cost of the training under a "pay-or-stay" provision.

Abruzzo will "urge the Board to find that any provision under which an employee must pay their employer if they separate from employment within a certain timeframe, whether voluntarily or involuntarily, is presumptively unlawful." GC Memorandum 25-01. Employers, however, may rebut the presumption that a "stay-or-pay" provision is unlawful by showing that the provision: (1) was entered into voluntarily in exchange for a benefit to the employee; (2) was reasonable as to the repayment amount; (3) outlines a reasonable "stay" period; and (4) specifies that repayment is not required if the employee is terminated without cause. Id. at 8-9. Otherwise, where an employer maintains a "stay-or-pay" provision with their employee, Abruzzo will encourage the Board to require the employer to rescind the provision and notify the employee that the provision and any associated debts are cancelled.

Key Take Aways

1. The NLRB's General Counsel intends to prosecute employers who require their employees to sign non-compete agreements, anti-moonlighting clauses, or consent to "stay-or-pay" provisions in an employment agreement.
2. Employers have until December 6, 2024, to review and revise any non-compete agreements or "stay-or-pay" provision to bring them into compliance with Abruzzo's memo.
3. Although memos from the NLRB's General Counsel are not "binding" on the Board, they do serve as guidance for regional offices, and the Board may choose to formally adopt the memo's position on an issue. If the NLRB chooses to adopt Abruzzo's position, employers may face potential liability from employees who can demonstrate they were harmed by a non-compete agreement or a "stay-or-pay" provision.
4. All of these potential recommendations likely will be subject to future legal challenges, and much of the memo's enforceability will depend on the outcome of the challenge to the FTC's non-compete ban currently playing out in the federal courts.

Porzio's team of employment and labor attorneys are ready to assist employers in reviewing, preparing, and revising employment agreements to align with the NLRB's new guidance.

What You Need to Know: EEOC's New Rule and Interpretive Guidance Implementing Pregnant Workers Fairness Act

Employment Law Monthly | April 2024
By Rahool Patel

The EEOC's New Rule and Interpretive Guidance Provide Greater Protections for Pregnant Workers and Require Employers to Navigate the Changing Regulatory Landscape Judiciously.

On April 15, 2024, the Equal Employment Opportunity Commission (EEOC) issued a final rule and interpretive guidance (the Rule) to implement the Pregnant Workers Fairness Act (PWFA). The Rule was published in the Federal Register on April 19, 2024 ,and will go into effect 60 days later on June 18, 2024. In this article, we provide a summary of the most notable features of the Rule.

Under the PWFA, employers are required to make reasonable accommodations to a qualified employee's (or applicant's) known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship on the operation of the employer's business. The definitions of "employer" (15+ employees) and "employee" under Title VII of the Civil Rights Act of 1964 apply to the PWFA.

The Rule defines a "known limitation" as "a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the covered entity[.]" 29 C.F.R. 1636.3(a). The "physical or mental condition" may be "modest, minor, and/or episodic." 29 C.F.R. 1636.3(a)(2). The Rule expressly provides that "[t]he physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990[.]" 29 C.F.R. 1636.3(a)(2).

In the Rule, the EEOC also provides clarity about what qualifies as a "pregnancy, childbirth, or related medical condition" under the PWFA. "Pregnancy" and "childbirth" include "infertility, fertility treatment, and the use of contraception[.]" 29 C.F.R. 1636.3(b). "Related medical conditions" are "medical conditions relating to the pregnancy or childbirth of the specific employee in question[,]" including but not limited to, "termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; [and] preeclampsia[.]" 29 C.F.R. 1636.3(b).

Notably, the Rule provides that an employee is "qualified" and afforded protection – even if the employee cannot perform one or more essential functions of the position so long as:

- Any inability to perform an essential function(s) is for a temporary period. "Temporary" means lasting for a limited time, not permanent, and may extend beyond "in the near future;"
- The essential function(s) could be performed in the near future. This determination is made on a case-by-case basis. If the employee is pregnant, it is presumed that the employee could perform the essential function(s) in the near future because the employee could perform the essential function(s) within generally 40 weeks of its suspension; and
- The inability to perform the essential function(s) can be reasonably accommodated. This may be accomplished by temporary suspension of the essential function(s) and the employee performing the remaining functions of the position or, depending on the position, other arrangements can be made.

29 *C.F.R.* 1636.3(f)(2)(i)-(iii).

The EEOC also has stated that the following requests for accommodations will "in virtually all cases" be considered reasonable and not constitute an undue hardship:

- Allowing an employee to carry or keep water near and drink, as needed;
- Allowing an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- Allowing an employee to take breaks to eat and drink, as needed.

29 *C.F.R.* 1636.3(j)(4)(i)-(iv).

Other accommodations that should be considered are schedule changes, part-time work, paid and unpaid leave, telework or remote work, closer parking, making existing facilities accessible or modifying the work environment, and acquiring or modifying equipment, uniforms, or devices.

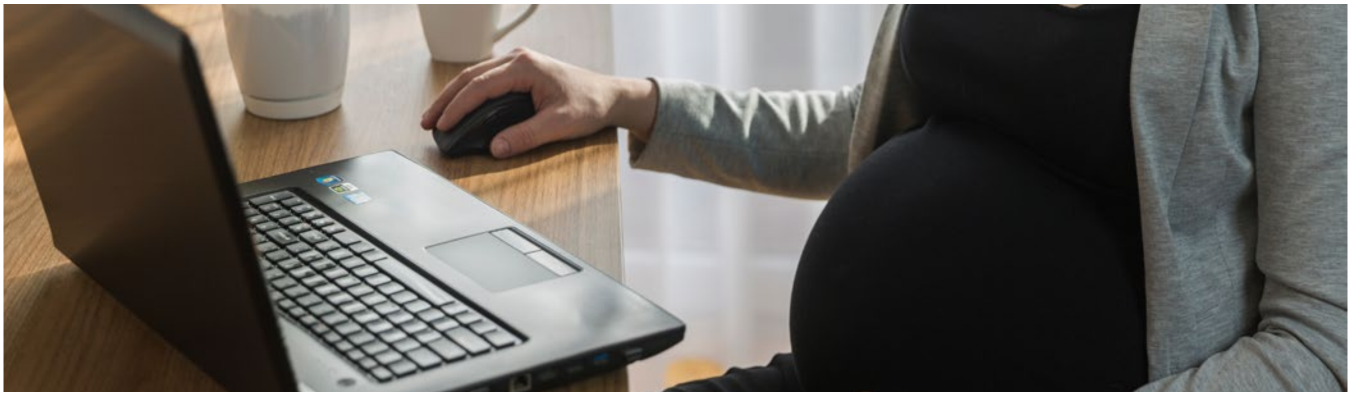
Nothing in the PWFA limits an individual's rights under any other federal, state, or local law that provides equal or greater protection.

Recommended Actions for Employers

In light of the Rule's broad scope, employers should:

- Review and update existing policies governing requests for reasonable accommodations and the interactive process;
- Provide training to human resources and supervisory employees about the four types of accommodations that almost always will be considered reasonable and not constitute an undue hardship; and
- Provide interim accommodations in time-sensitive situations while the interactive process is ongoing.

Employers also should consult with experienced employment counsel as needed.



New York Becomes First State to Require Paid Leave for Prenatal Care

May 13, 2024
By Rahool Patel

Governor Kathy Hochul signed a series of bills comprising the 2024-25 New York State Budget into law on April 22, 2024. New York employers should pay particular attention to Part M of the Public Protection and General Government Act (A-8305-C), which amends the state's Labor Law and establishes the nation's first-ever requirement to provide paid leave for prenatal care.

Starting on January 1, 2025, all employees in New York State will be entitled to 20 hours of paid prenatal personal leave annually separate and apart from any other paid sick leave required by law. Under the law, paid prenatal personal leave may be used for health care services received by an employee during their pregnancy or related to such pregnancy, including:

- Physical examinations.
- Medical procedures.
- Monitoring and testing.
- Discussions with a health care provider related to pregnancy.

Employees may use paid prenatal personal leave in hourly increments and shall receive their regular rate of pay. Employers are not required to pay an employee for unused paid prenatal personal leave upon separation from employment. An employer may not require an employee to disclose confidential medical information as a condition of using paid prenatal personal leave and retaliation against an employee is strictly prohibited.

In light of this significant legal change, employers with employees in New York State should review and revise their employee handbooks, including their paid leave policies, to ensure compliance in advance of the January 1, 2025 deadline.

Risk and Vulnerability – Can It Happen Here?

Employment Law Monthly | May 2024

By Kevin M. Craig, MAS, CPP, CPM | Vice President, Safety, Security and Investigations, Porzio Compliance Services

Every organization, large or small, private, or public, has an obligation to provide a safe and secure working environment for employees. While it is common to view our organizations as inherently safe, no organization is immune from the potential for workplace violence in some form. Organizational leaders must be cautious not to fall into the "It can't happen here" mindset.

Workplace violence comes in many forms and varying degrees of severity. Whether the organization experiences employee aggression or intimidation, threats towards others, or acts of physical violence, no amount of violent behavior is acceptable.

For this reason, employers must take a proactive approach to assess risk and vulnerability as part of a comprehensive workplace violence prevention strategy.

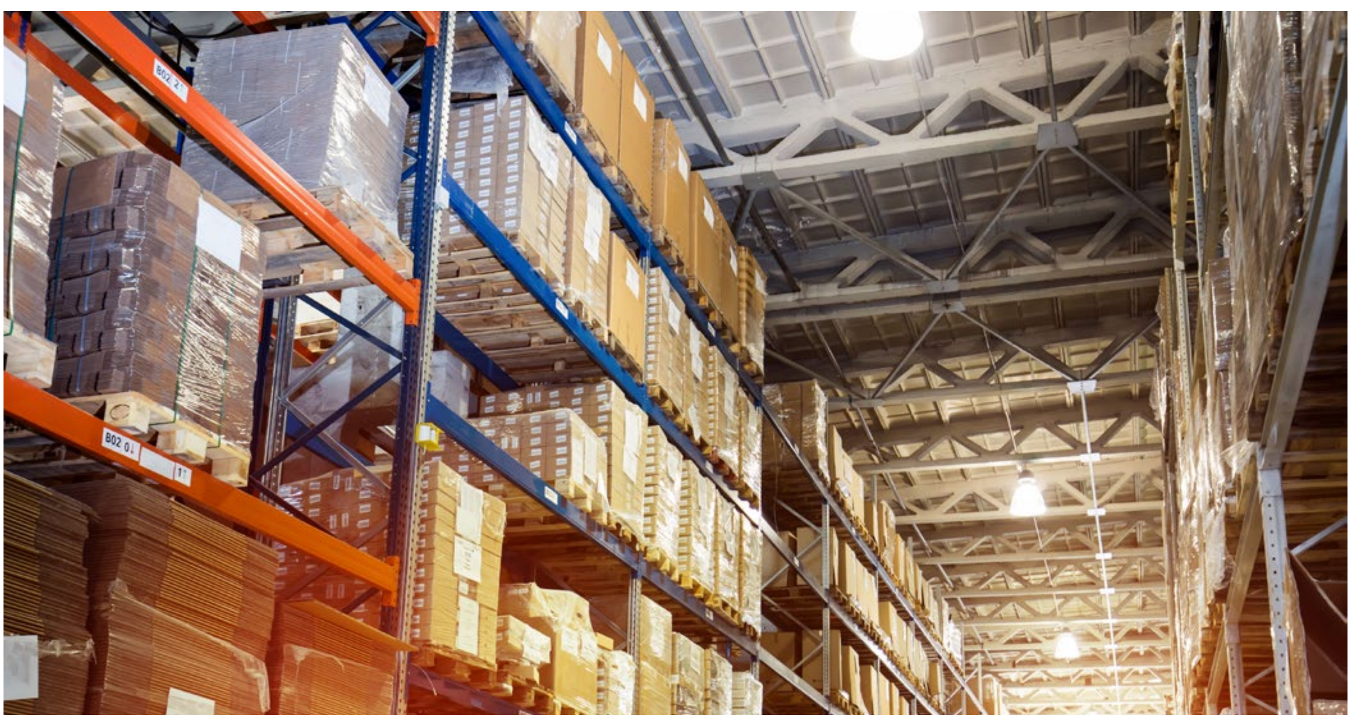
Effective workplace violence prevention strategies require multidisciplinary involvement. Top management and human resources personnel cannot accomplish this alone. Workplace violence prevention also must include employees, security personnel, and legal counsel.

Legal counsel plays a significant role in workplace violence prevention and must work closely with human resources and organizational leadership to ensure compliance with established policies and procedures, privacy rights of employees, legal obligations related to standards of care for workplace safety, due process, and disciplinary action when necessary.

Organizational Assessments

The first step in planning a workplace violence prevention program is assessing organizational needs, risk, and vulnerability. This exercise will help the organization understand safety and security needs to drive security strategies and prevention and mitigation measures.

Organizations should start by evaluating factors such as the potential for violent events, and the impact on both employees and the organization as a whole. The goal of the initial assessment is to identify, evaluate, and prioritize the risk of violence that may impact the workplace.



The risk assessment should include the potential for violence from internal and external sources. Understanding the ways they are targeted is an important factor in creating strategies to protect them. Violence in the workplace generally falls into four categories each with varying or overlapping mitigation strategies.

Type 1: Violence by strangers

Many acts of violence that impact organizations are perpetrated by individuals with no connection to the organization. These acts from outside sources are difficult to identify.

Type 2: Violence by customers or clients

In some cases, unsatisfied or aggrieved customers or clients perpetrate violence.

Type 3: Violence by co-workers

Employee conflict, disciplinary actions, or terminations also may be a catalyst for violence. Many incidents involve recently disciplined or terminated employees.

Type 4: Violence by personal relations

Other cases involve indirect connections to the targeted location. Perpetrators may have no direct connection to the organization themselves but target an employee who is a family member, spouse, former partner, or someone who they wish to seek revenge against. These cases often involve domestic violence.

Once the risk of violence and potential sources of violent behavior are identified, organizations should assess vulnerabilities. Vulnerabilities should be considered in relation to the types of threats identified in the risk assessment including the nature of the organization and industry and whether the threats are from internal or external sources.

Additional considerations related to organizational vulnerability include:

- Hours of operation- Do employees work beyond daylight hours?
- Location of assignments- Do employees work remotely, off-site, or alone?
- Location of the facility- Is the facility in an area prone to crime or violence?
- Public Access- Is the facility open to the public?
- Behavioral Threat Assessment- Does the organization have a mechanism to report and investigate concerning behavior?
- Other considerations: employee discipline, geopolitical or ideological target, high-risk industry, etc.

Evaluating Preparedness and Planning for Prevention

After risks and vulnerabilities have been identified evaluate existing practices and mitigation measures and establish a comprehensive plan. Actions include:

- Establishing comprehensive workplace violence prevention policies.
- Train employees on threat reporting and situational awareness.
- Address physical security vulnerabilities: office floorplan, clear exits, lighting, access control, visitor management, emergency response procedures, and safe spaces for employees.
- Consider security technology: emergency buttons or alarms, emergency notification for employees, cameras, electronic access control.
- Threat Assessment and Management: establish clear protocols for addressing concerning behavior.
- Employee Assistance Programs: provide resources to assist and support employees.

Every organization has a unique environment and culture and there is no one-size-fits-all approach to securing the workplace. Assessing and evaluating risk and vulnerabilities is the best way to identify the needs of any organization to effectively plan a comprehensive strategy to prevent and respond to potential incidents of violence. In doing so, organizations can implement policies and measures to provide a safe environment and establish a culture that prioritizes safety and security in the workplace.

Effective workplace violence prevention strategies require multidisciplinary involvement.

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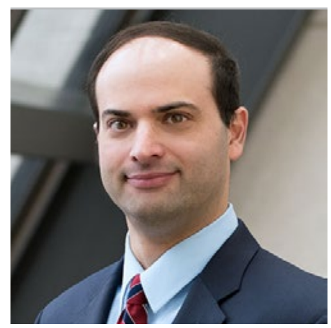

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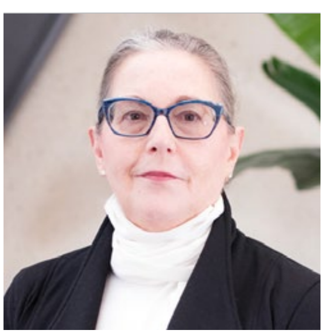

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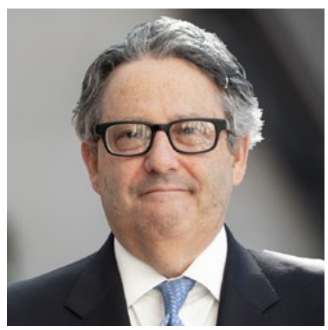

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