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Recent Developments In Labor and Employment Law

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Federal Legislation

As of the present date, Congress has not passed any federal labor and employment legislation in 2024.

New Florida Legislation

New Florida Legislation

- Governor Ron DeSantis signs amendments to §450.081, Florida Statutes, expanding the hours certain minors can work.
  - On March 22, 2024, the Governor signed Florida House Bill 49
  - Effective July 1, 2024:
    - Minors 15 years of age or younger may work longer than 15 hours in a week during summer months when school is not in session

New Florida Legislation continued

- Minors aged 16 and 17 are permitted to:
  - Work past 11:00 p.m.;
  - Work 6 days in a week; and
  - Work in excess of 30 hours in a week

If they have the approval to do so from a parent, legal guardian, or the minor's school superintendent.

New Florida Legislation continued

Florida's Minimum Wage Increase

- Currently, the minimum wage in Florida is $12.00 an hour, or $8.98 an hour for tipped employees.
- Effective September 30, 2024, Florida's minimum wage will increase one dollar to $13.00 an hour, or $9.98 an hour for tipped employees.

Federal Developments Involving Administrative Agencies

Recent Developments at the National Labor Relations Board

- On March 8, 2024, a federal court in Texas declared that the NLRB's Final Rule on Joint Employer Status was unconstitutional and vacated the rule.
- The NLRB Final Rule, issued in October of 2023, announced that an employer could be deemed a "joint employer" if it merely had the right to exercise indirect control over an essential term or condition of employment, even if the employer never actually exercised that that control.
- Opponents of the NLRB's Final Rule challenged it in a case called **Chamber of Commerce v. NLRB.**

Recent Developments at the National Labor Relations Board continued

- A federal district judge in Texas ruled that the Final Rule's standard was unlawful because it exceeded the bounds of the common law, which requires employers to have the power to control "the material details of how the work is to be performed."
- Notably, the NLRB did not appeal the Court's ruling.
- Although NLRB can always draft another rule on joint employer status, for now the Board's 2020 Rule, which requires direct control over the terms and conditions of employment, remains in effect.

New Developments at the Department of Labor

1. DOL issues a Final Rule on Independent Contractor Status.
2. DOL issues a Final Rule increasing Salary Thresholds for White Collar Exemptions.
3. OSHA issues a final regulation allowing non-employees to participate in workplace inspections.

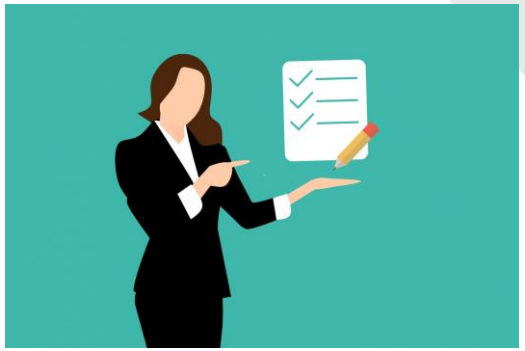
New Developments at the Department of Labor continued

1. **DOL issues a Final Rule on Independent Contractor Status.**
    - On January 9, 2024, the DOL issued its Final Rule addressing how to determine if a worker is properly classified as an independent contractor or an employee under the Federal Fair Labor Standards Act. ("FLSA")
    - The DOL's Final Rule on Independent Contractors Status took effect on March 11, 2024.
    - The Final Rule sets forth a 6-factor Economic Realities Test to determine a worker's status:

New Developments at the Department of Labor continued

6-Factor Economic Realities Test

1) Opportunity for profit or loss depending on managerial skill
2) Investments by the worker and the potential employee
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 employer's business
6) Skill and initiative



New Developments at the Department of Labor continued

2. DOL issues a Final Rule increasing Salary Thresholds for White Collar Exemptions.

- On April 23, 2024, the DOL issues its "Overtime Final Rule", which increases the salary level of executive, administrative, and professional employees from $684 per week to:
    1) $844 per week, effective July 1, 2024; and to
    2) $1,128 per week, effective January 1, 2025.
- Effective July 1, 2027 (and then every three years thereafter), the weekly salary will increase to an amount set by the DOL using the most recent four quarters of data at the 35th percentile of weekly earnings of full-time, non-hourly workers in the lowest-wage census region.

New Developments at the Department of Labor continued

2. DOL issues a Final Rule increasing Salary Thresholds for White Collar Exemptions.

- As a result of the DOL's new Overtime Final Rule, the minimum annual compensation for the highly compensated employee increases from $107,432 to:
  1) $132,964 per year, effective July 1, 2024; and to
  2) $151,164 per year, effective January 1, 2025.

- On July 1, 2027 (and then every three years thereafter), the weekly salary will increase to an amount set by the DOL using the most recent 4 quarters of data at the 35th percentile of weekly earnings of full-time, non-hourly workers in the lowest-wage census region.

New Developments at the Department of Labor continued

2. DOL issues a Final Rule increasing Salary Thresholds for White Collar Exemptions continued

CHALLENGES TO THE DOL'S OVERTIME FINAL RULE:

- Presently, two lawsuits have been filed challenging the Final Rule by seeking to enjoin and invalidate it; however, it is not clear if those legal challenges will be heard before the initial effective date of July 1, 2024.
- Oddly, a three-judge panel of the United States Court of Appeals for the Fifth Circuit, on May 22, 2024, ruled that it would not "fast track" an employer's appeal of the DOL's 2019 Overtime Final Rule which raised the salaries for executive, administrative, and professional employees to their current levels (i.e., at least $684 per week.)

New Developments at the Department of Labor continued

2. DOL issues a Final Rule increasing Salary Thresholds for White Collar Exemptions continued

CHALLENGES TO THE DOL'S OVERTIME FINAL RULE continued:

- The employer had asked the Fifth Circuit in a motion to expedite its ruling on its Appeal of the 2019 Final Rule so that its ruling would be issued before the DOL's new Final Rule went into effect on July 1, 2024.
- The Fifth Circuit, however, denied the employer's motion. No reason was given by the Fifth Circuit for the denial.

New Developments at the Department of Labor continued

3. OSHA issues a final regulation allowing non-employees to participate in workplace inspections.
   - On April 1, 2024, OSHA issued a final regulation permitting third parties who are not employees to accompany OSHA Compliance Officers during an inspection of an employer's work premises if the Compliance Officer determines "good cause" has been shown that the third party is "reasonably necessary to either make a positive contribution," or "aid" in the inspection.
   - The final regulation rule took effect on May 31, 2024.

New Developments at the Department of Labor continued

3. OSHA issues a final regulation allowing non-employees to participate in workplace inspections continued

- Proponents of the final regulation argue that the presence of such third parties will make OSHA's inspections more effective.
- Opponents of the final regulation argue that the final regulation raises security concerns and makes it easier for labor unions to organize in the workplace.

New Developments at the Federal Trade Commission ("FTC")

FTC issues a Final Rule Banning Most Non-Compete Agreements.

- On April 23, 2024, the FTC issued a Final Rule banning virtually all noncompetition agreements between employers and employees.
- Under the Final Rule, employers may still enforce pre-existing noncompete agreements against "senior executives," but cannot enter into such agreements going forward.
- Under the new Final Rule, all pre-existing non-competes involving employees other than "senior executives" will be void once the rule goes into effect. Moreover, under the Final Rule, employers will be required to notify their current and former employees that their existing noncompete agreements cannot be enforced.

New Developments at the Federal Trade Commission ("FTC") continued

FTC issues a Final Rule Banning Most Non-Compete Agreements.

- The Final Rule goes into effect on September 4, 2024 (120 days after the Rule was published in the Federal Register.)
- Presently, at least three lawsuits have been filed challenging the constitutionality of the FTC's Final Rule. These lawsuits have been filed in Federal Courts in Texas and Pennsylvania

New Developments at the Federal Trade Commission ("FTC") continued

FTC issues a Final Rule Banning Most Non-Compete Agreements continued.

- The Texas and Pennsylvania lawsuits argue:
  1. The FTC exceeded its rulemaking authority with respect to the Final Rule; and
  2. The Final Rule constitutes an unconstitutional usurpation of legislative authority by an administrative agency; and
  3. The Final Rule is arbitrary and capricious.

New Developments at the Federal Trade Commission ("FTC") continued

FTC issues a Final Rule Banning Most Non-Compete Agreements, continued.

- On May 3, 2024, the case filed in the Eastern District of Texas was transferred to the Northern District of Texas. A ruling on the Plaintiffs' Motion to Stay the FTC's Final Rule is expected to be issued on or before July 3, 2024.
- Similarly, the Eastern District of Pennsylvania has indicated that it intends to issue a ruling on the Plaintiffs' Motion to Stay the FTC's Final Rule on or before July 23, 2024.

Recent Developments at the Equal Employment Opportunity Commission ("EEOC")

1. EEOC issues Final Regulations for the Pregnant Workers Fairness Act ("PWFA").
2. EEOC issues Charge Filing Statistics for Fiscal Year 2023.

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

1. **EEOC issues Final Regulations for the Pregnant Workers Fairness Act ("PWFA")**
    - On April 19, 2024, the EEOC issued its Final Regulations concerning the PWFA. These Final Regulations will take effect on June 18, 2024.
    - These regulations flesh out the provisions of the PWFA.
    - These regulations differ, in many such instances, from ADA Regulations concerning familiar concepts such as "reasonable accommodations," "undue hardship," and the kind of documentation an employee can request to confirm the existence of a "pregnancy-related condition."

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

- Almost immediately, business and religious groups attacked the EEOC's Final Regulations, in particular, for requiring employers to provide workplace accommodations for "purely elective abortions."
- Notably, the text of the PWFA requires employers to offer reasonable accommodations to employees and applicants for "known limitations" tied to pregnancy, childbirth, and "related medical conditions." However, the PWFA does not identify abortions as a "related medical condition." The EEOC's Final Regulation, however, does identify abortions as such.

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

- Mere days before the EEOC Final Regulations were to go into effect on June 18, 2024, a Federal Judge in Louisiana issued an order enjoining the EEOC's Final Regulations involving the PWFA insofar as those regulations require employers to reasonably accommodate an employee or applicant who has a known limitation resulting from a purely elective abortion.
- The Court's order specifies that abortions that are the result of an "underlying treatment of a medical condition related to pregnancy" are not subject to the injunction.

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

- Notably, the Court's injunction only prevents the EEOC's PWFA Final Regulations from applying to:
  1. The various religious organizations named as plaintiffs in the lawsuit; and
  2. The States of Louisiana and Mississippi, as well as their respective state agencies; and
  3. Employees whose primary duty station is located in either Louisiana or Mississippi.

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

2. EEOC issues Charge Filing Statistics for Fiscal Year 2023.

- The total number of EEOC charges filed in the U.S. in Fiscal Year 2023 was 81,055. This is more than a 10% increase from last year's number of 73,485.
- As in most years, the most frequent claim raised in charges filed with the EEOC in FY2023 was retaliation. A breakdown of the number of charges filed by category of discrimination is set forth below:

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

Breakdown of Charges Filed by Category of Discrimination:

1) Retaliation: 46,047 charges filed (56% of all charges filed in FY23 contained a retaliation claim.)
2) Disability: 29,160 charges filed (36% of all charges filed in FY 23 contained a disability discrimination claim.)
3) Race: 27,505 charges filed (33.5% of all charges filed in FY23 contained a race discrimination claim.)
4) Sex: 25,473 charges filed (31.4% of all charges filed in FY23 contained a sexual discrimination claim.)
5) Age: 14,144 charges filed (17.4% of all charges filed in FY23 contained an age discrimination claim.)

Recent Developments at the Equal Employment Opportunity Commission ("EEOC") continued

Breakdown of Charges Filed by Category of Discrimination:

6) National Origin: 6,983 charges filed (8.6% of all charges filed in FY23 contained a national origin discrimination claim.)
7) Color: 5,819 charges filed (7.2% of all charges filed in FY23 contained a color discrimination claim.)
8) Religion: 4,313 charges filed (5.4% of all charges filed contained a religious discrimination claim.)
9) Equal Pay: 1,012 charges filed (1.2% of all charges filed contained an equal pay discrimination claim.)
10) Genetic Information Claim: 361 charges filed (0.4% of all charges filed contained a GINA claim.)

Other Pertinent EEOC Statistics

According to the EEOC's statistics from Fiscal Year ("FY") 2023:

- The number of lawsuits filed by the EEOC in FY 2023 increased by more than 50%, from 86 lawsuits in FY 2022 to 143 lawsuits in FY 2023.
- The EEOC secured approximately $665 million for victims of discrimination in FY 2023, which is a 29.5% increase compared to FY 2022. The bulk of that amount, i.e., $440.5 million was obtained via mediation, conciliation, and settlements, as opposed to trying cases to verdicts.

Recent Supreme Court Decisions

1. Muldrow v. City of St. Louis – April 17, 2024

U.S. Supreme Court Rules That Proof of "Significant" or "Material" Harm is Not Required To Prevail in a Title VII Discriminatory Transfer Case

- Unanimous Decision.

Facts of the Case:

- Plaintiff is Janet Muldrow, a plain-clothes police sergeant with the St. Louis Police Department.
- For several years, Muldrow investigated public corruption, human trafficking, and oversaw the Police Department's Gang Crime and Gun Crime Units.
- In 2017, Muldrow got a new male boss who transferred Muldrow to supervising uniformed police officers working in neighborhoods within the city. Muldrow's new boss also frequently referred to her as "Ms. Muldrow" instead of "Sergeant Muldrow."
- Muldrow's boss believed Muldrow's previous duties were too dangerous and replaced her with a male officer. However, he did not change Muldrow's pay or benefits.

1. Muldrow v. City of St. Louis – April 17, 2024

U.S. Supreme Court Rules That Proof of "Significant" or "Material" Harm is Not Required To Prevail in a Title VII Discriminatory Transfer Case continued

- Muldrow filed suit alleging sex discrimination, but both the district court and the appellate court ruled in favor of the city because Muldrow could not show that her transfer caused her "significant" or "material" harm.
- Muldrow petitioned the U.S. Supreme Court, which reversed the lower courts.
- This decision overturns appellate rulings by the First, Second, Fourth, Seventh, Tenth, Eleventh, and District of Columbia Courts of Appeal.
- Now, only "some harm" must be proven by the plaintiff in a Title VII discriminatory transfer case. However, the question of what constitutes "some harm" will be left up to the lower courts to determine on a case by case basis.

2. Smith v Spizzirri– April 22, 2024

U.S. Supreme Court Rules That The Federal Arbitration Act Only Requires That Lawsuits Subject to Arbitration Need Only Be Stayed, Not Dismissed

- Unanimous Decision.

Facts of the Case:

- Petitioners are delivery drivers for an on-demand delivery service who filed suit against their employers in Arizona state court alleging violations of federal and Arizona employment laws.
- Respondent removed the lawsuit to federal court, then filed a motion to compel arbitration and dismiss the lawsuit.
- Although Petitioners agreed that their claims were subject to arbitration, they argued that Section 3 of the Federal Arbitration Act ("FAA") only required that their state court lawsuit be stayed pending the arbitration's outcome, not dismissed.

2. Smith v Spizzirri– April 22, 2024

U.S. Supreme Court Rules That The Federal Arbitration Act Only Requires That Lawsuits Subject to Arbitration Need Only Be Stayed, Not Dismissed

- Respondents argued that the term "stay", as used in Section 3 of the FAA, merely meant that the court must stop parallel in-court litigation, which could be achieved through dismissal.
- The District Court agreed with Respondent and dismissed Petitioners' lawsuit. Although Petitioners' appealed that ruling, the Ninth Circuit Court of Appeals affirmed the District Court.
- Petitioners' requested certiorari review by the United States Supreme Court, which reversed both lower courts.
- According to a unanimous Supreme Court, when a lawsuit involves an arbitral dispute and a party requests a stay of court proceedings pending arbitration, Section 3 of the FAA compels the court to stay the court proceeding, but the court lacks the discretion to dismiss the lawsuit.

3. Starbucks Corp. v McKinney, Regional Director of Region 15 of the National Labor Relations Board ("NLRB")– April 22, 2024

U.S. Supreme Court Rejects the NLRB's Less Rigorous Injunction Test

- 7-1 Decision.

Facts of the Case:

- After Starbucks fired several of its employees for violating company policy, the NLRB filed an administrative complaint against Starbucks alleging it had engaged in unfair labor practices.
- The NLRB's Regional Director then filed a petition for injunctive relief under Section 10(j) of the National Labor Relations Act ("NLRA"), seeking to have the terminated employees reinstated to employment during the course of the administrative proceedings.

3. Starbucks Corp. v McKinney, Regional Director of Region 15 of the National Labor Relations Board ("NLRB")– April 22, 2024 continued

U.S. Supreme Court Rejects the NLRB's Less Rigorous Injunction Test

- Normally to obtain preliminary injunctive relief, a moving party must establish the following four factors:
  1. A substantial likelihood of success on the merits;
  2. Irreparable harm in the absence of preliminary injunctive relief;
  3. The balance of equities favor an injunction; and
  4. The injunction is in the public's interest.

3. Starbucks Corp. v McKinney, Regional Director of Region 15 of the National Labor Relations Board ("NLRB")– April 22, 2024 continued

U.S. Supreme Court Rejects the NLRB's Less Rigorous Injunction Test

- However, under Section 10(j) of the NLRA, the Regional Director of the NLRB can obtain preliminary injunctive relief if he can demonstrate:
  1. There is "reasonable cause" to believe unfair labor practices have occurred; and
  2. Injunctive relief is "just and proper."
- Applying the NLRB's injunction test, the District Court issued a preliminary injunction requiring Starbucks to reinstate the terminated employees to employment.
- Although Starbucks appealed the District Court's ruling, the Sixth Circuit's Court of Appeals affirmed that decision.

3. Starbucks Corp. v McKinney, Regional Director of Region 15 of the National Labor Relations Board ("NLRB")– April 22, 2024 continued

U.S. Supreme Court Rejects the NLRB's Less Rigorous Injunction Test

- Starbucks then petitioned the United States Supreme Court for certiorari review.
- Justice Thomas wrote the majority opinion, which concluded that Congress, while enacting Sec. 10(j) of the NLRA, did not jettison the traditional four-factor injunction test in favor of a less rigorous standard.
- Justice Ketanji Brown Jackson wrote a separate opinion both concurring in part, and dissenting in part, with Justice Thomas's majority opinion.

Questions?