

Employment Law Seminar 2023: General Session

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Legal Update:

Our Usual **Even** Crashier
Course on 12-Months of
Employment Law
Developments

Your Severance Agreements Are Unlawful

Severance Agreements: What Happened?

- In February, the NLRB ruled that certain standard terms in employer severance agreements violate Section 7 of the National Labor Relations Act. Specifically:
 - Overbroad confidentiality provisions
 - Overbroad non-disparagement provisions
- Important Caveat: The NLRB's ruling applies only to "employees," not to "supervisors."

Severance Agreements: Additional Guidance

- In March, the General Counsel provided some additional guidance, which . . . didn't help
 - A "safe" confidentiality clause may be one that restricts "the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications"
 - There is no "safe" non-disparagement provision
 - Other provisions may also interfere with Section 7 rights:
 - Non-competition clauses
 - No-solicitation clauses
 - No poaching clauses
 - Overbroad release language

Severance Agreements: What To Do?

- Revise your templates. In particular:
 - More narrowly tailor your confidentiality and non-disparagement provisions
 - Or consider eliminating them
 - Add disclaimers that address protected, concerted activity
 - Add disclaimers that address access to the NLRB
 - Include a severability provision
 - Consider multiple templates

Michigan Increased Minimum Wage and PST are Still Alive

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- **What Happened?:** On January 26, 2023, the Michigan Court of Appeals ruled that the amended versions of the laws (what we have now) are valid and enforceable.
- **What's Next?:** The decision was appealed to the Michigan Supreme Court. The parties are filing briefs, and the Court will have oral argument.
- **When Will We Have Closure?:** Likely 2024. Briefing will conclude in October, but oral argument has not been scheduled.

Michigan Minimum Wage and EST: What to Do?

- Understand what the changes would mean for your organization if the Michigan Supreme Court reverses.
 - Minimum Wage: Would be adjusted for increases in the consumer price index unless the unemployment rate is 8.5% or higher (yikes!). Also would impact the tipped minimum wage.
 - Earned Sick Time: Significant expansion of MPMLA
 - All employees
 - 72 hours/year
 - Accrual upon hire
 - Must allow carryover
 - Clear job protection

Your Non-Competes Are Allegedly Unlawful

Your Non-Competes Are Allegedly Unlawful

- **What Happened?:** In May, the GC published a memo in which she stated that the NLRB prohibits most non-compete clauses between employers and employees.
- Important Caveat: Again, just applies to employees.
- Important Caveat: This is not law.
- Counter-Caveat: The NLRB will look to make it law.
- **What to Do?**

It's Not Just The NLRB...

FTC Proposed Rule

- **What Happened:**
 - FTC proposed rule – Published January 5, 2023
 - Bans non-competes in most employment contracts
 - Requires rescission of existing non-competes
 - Narrow exceptions for businesses not subject to FTC jurisdiction and agreements related to the sale of a business
 - Final vote delayed until April 2024

State Activism

- **What Happened:**
 - State activism
 - Legislation ranging from complete bans (MN, CA, OK, ND and NY (pending governor signature)) to bans for certain groups of employees to other onerous requirements
 - MI HB 4399: Employers may not require employees to enter non-compete agreements unless the employer: (1) provides each applicant for the position with written notice of the non-compete requirement; (2) discloses to the employee or applicant in writing the terms of the non-compete before the employee was hired; and (3) posts the non-compete law in a conspicuous place at the worksite.
 - Judicial conservatism

It's Not Just the NLRB....

- **What to Do:**
 - Explore alternative ways to protect business's competitive advantages – people, relationships and information
 - Watch OTC live show

Your Handbooks Are All Unlawful, Again

Handbooks: Old vs. New Standard

Old Standard

- Weighed a policy's potential impact on employee rights against the employer's legitimate business justification for the policy.

New Standard

- Weighs only how an employee would understand the policy.
 - Employer intent is "immaterial"
 - Existence of a reasonable, non-problematic interpretation also immaterial
 - Whether it actually *did* chill an employee in the exercise of their rights is immaterial

Handbooks: New Standard

- **Commonsense Rules Will Be Unlawful:** Rules that a reasonable person would find to be absolutely uncontroversial—and that have not caused any issue with any employee—will now violate the National Labor Relations Act.
- **Only Defense:** an employer can rebut the presumption if it can prove both:
 - The rule “advances a legitimate and substantial business interest”
 - There is no way to advance that interest with a more narrowly tailored rule.

Handbooks: What To Do

- **Revise your handbooks.** Especially any stated work rules. But also evaluate:
 - Your confidentiality policies
 - Your non-disparagement policies
 - Your electronic communications policies
 - Your social media policies
 - Your conflict of interest policies
 - Basically . . . all your policies
- **Add disclaimer(s)**

Handbooks: Good vs. Bad News

Good News

- The General Counsel offered a “model prophylactic statement of rights” that could constitute an effective disclaimer.

Bad News

- This is what it would include:
 - You have the right to form a union
 - You have the right to assist a union, such as by sharing employee contact information
 - You have the right to talk about or solicit for a union during non-work time
 - You have the right to distribute union literature
 - You have the right to discuss wages with your co-workers
 - You have the right to complain to the NLRB about your working conditions
 - You have the right to strike or picket
 - You have the right to take photos or make recordings in the workplace
 - You have the right to wear union hats, buttons, t-shirts, and pins at work

DOL Salary Basis Increase; Is it 2016 Again?

DOL Salary Basis Increase: What Happened?

- On August 30, 2023 the DOL published a notice of proposed rulemaking to increase the salary basis threshold to (at least) \$1,059/week (currently \$684) or \$55,068/year (currently \$35,568)
 - Actual increase will be based on earnings data
 - Also proposed to automatically update thresholds every 3 years based on earnings data
 - Reminiscent of the proposal in 2016 that was struck down by a federal judge in Texas just before it was to go into effect and then rescinded by the DOL.

DOL Salary Basis Increase: What To Do?

What's Next

- Changes will likely be published after September 30 and will have a later effective date – possibly 1/1/24. Legal challenges are certain.

What To Do

- Identify exempt employees who will be impacted by increase and analyze options. (Sound familiar?)

Unions Without Elections

Unions Without Elections: What Happened?

- The NLRB issued a ruling last month that paves the way for union organizing without an election:
 - Unions with enough employee support can demand recognition, and absent prompt employer legal action, the union will automatically become the employees' representative
 - Unions with enough employee support can file an unfair labor practice charge, and if successful, get a "bargaining order" to become the employees' representative
 - Virtually any unfair labor practice charge may suffice

Unions Without Elections: What to Do?

- **What to Do:**
 - Have. A. Plan.
 - Train all leaders to avoid voluntary recognition and ensure timely filing
 - Consider employee training
 - Revise your handbooks

PUMP Act

PUMP Act: What Happened?

- Congress expanded the 2010 FLSA amended that requires employers to provide employees (1) reasonable breaks to express breast milk and (2) a private space that is not a bathroom to do so for a year after the birth of a child.
 - Now applies to exempt employees
 - Now applies to businesses with fewer than 50 employees (unless they can show that compliance would be a undue hardship or significant difficulty or expense)
 - Now provides private remedies (read: lawsuit with damages) for non-compliance

PUMP Act: What To Do?

- Confirm current break policies and lactation spaces are compliant with federal requirement. Review whether there are any additional state/local requirements.

Pregnant Workers Fairness Act – ADA+

PWFA– ADA+: What Happened?

- Congress amended the ADA to require employers to provide reasonable accommodations to pregnant employees – even if not a “disability” as traditionally defined by the ADA. This was effective June 27, 2023.
 - Pregnant employees can be “qualified” even they are not able to perform their essential job functions if they will have that ability “in the near future.”
 - Shifts burden to employer to demonstrate that restriction or accommodation would be an undue hardship.

PWFA– ADA+: What Happened? (Cont.)

- The EEOC published *proposed* regulations for the PWFA
 - “Pregnancy” includes infertility, miscarriage, abortion and other health concerns related to pregnancy.
 - Must forgive inability to perform essential job functions for up to 40 weeks unless it would be an undue hardship
 - Accommodations can include light duty or restricted work
 - Certain accommodations are presumptively reasonable (food/drink on person, restroom and eating/drinking breaks, sit/stand options)
 - Limits on required documentation
 - Definition of undue hardship focused on the impact on operations, including ability of other employees to perform their job duties and the organization’s ability to conduct business.

PWFA– ADA+: What To Do?

1. Understand the differences between the ADA and the PWFA
2. Develop separate reasonable accommodation process for accommodations needed due to pregnancy
3. Train leaders on new requirements

Broader Religious Accommodation

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- **What Happened?:** The United States Supreme Court in June changed the standard for undue hardship in the context of religious accommodation.
- **Old Standard:** More than “de minimis”
- **New Standard:** “Substantial” in the overall context of the employer’s business.
 - Considers “all relevant factors”

Broader Religious Accommodation: What To Do?

1. Elevate religious accommodation requests in terms of leadership awareness, policy, and response
2. Centralize the evaluation and accommodation process
3. Tie to substantial monetary cost or to core business objective
4. Wait for case law to develop

LGBTQ Statutory Protection, Case Closed

LGBTQ Statutory Protection: What Happened?

- **July 28, 2022:** Michigan Supreme Court ruled that ELCRA prohibits discrimination on the basis of sexual orientation.
- **March 16, 2023:** Governor Whitmer signed SB 4 into law to amend ELCRA to include “sexual orientation” and “gender expression” as protected categories
 - **“Sexual Orientation”** = having an orientation for heterosexuality, homosexuality, or bisexuality; or having a history of such an orientation; or being identified with such an orientation.
 - **“Gender identity or expression”** = having or being perceived as having a gender-related self-identity or expression, whether or not associated with an individual’s assigned sex at birth.

LGBTQ Statutory Protection: What To Do?

1. Educate leaders and decision-makers
2. Review policies

Michigan Distracted Driving

MI Distracted Driving: What Happened?

- Michigan's distracted driving law was amended, effective June 30
- Michigan drivers may not "hold or use a mobile electronic device while operating a motor vehicle."
 - "Hold" means hold
 - "Use" has some flexibility
 - "Single tap"
 - Permanent user interface

MI Distracted Driving: What To Do?

- Make certain anyone who is driving on behalf of your organization is complying with this law
 - Draft or update your policy
 - Communicate your expectations
 - Avoid actions that create or contribute to violations
 - Consider vehicle audits



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