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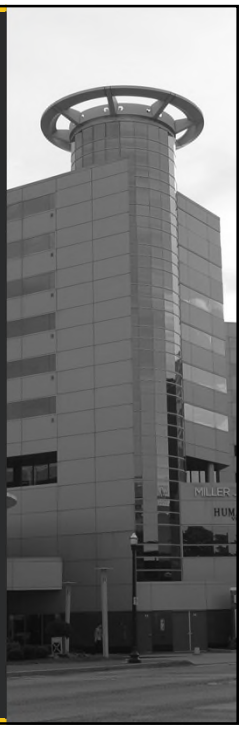
Employment Law Seminar: General Session 2024



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Legal Update:

Has It Only Been a Year?

Michigan Minimum Wage and ESTA:

It Wouldn't Be a MJ Employment Seminar Without It

We Got a Decision!

- On July 31, 2024, the Michigan Supreme Court ruled that the Michigan Legislature violated Michigan's Constitution when it adopted and then amended two 2018 ballot initiatives regarding minimum wage (Wage Act) and paid sick time (Earned Sick Time Act).
- The decision voided the then-existing minimum wage law and the MPMLA and reinstated the Wage Act and Earned Sick Time Act effective February 21, 2025.

Minimum Wage

- Phase-in approach that reflects the original intent of the ballot initiative.

February 21, 2025	▪ **Minimum wage will be $10/hour plus the state treasurer's inflation adjustment** ▪ **Tip credit will be 48% of minimum wage**
February 21, 2026	▪ Minimum wage will be $10.65/hour plus the inflation adjustment ▪ Tip credit will be 60% of minimum wage
February 21, 2027	▪ Minimum wage will be $11.35/hour plus the inflation adjustment ▪ Tip credit will be 70% of minimum wage
February 21, 2028	▪ Minimum wage will be $12/hour plus the inflation adjustment ▪ Tip credit will be 80% of minimum wage
February 21, 2029	▪ Minimum wage will be calculated annually by the state treasurer using the inflation adjustment specified in the Wage Act ▪ There will no longer be a tip credit

Minimum Wage and Tip Credit

- In September, MSC issued a follow-up ruling directing the State Treasurer to determine a new minimum wage adjusted for inflation.
- Michigan Department of Labor and Economic Opportunity just announced the following:
  - Effective 1/1/25: minimum wage will be $10.56 (currently $10.33)
    - Tipped minimum wage will be $3.93
  - Effective 2/21/25:minimum wage will be $12.48
    - Tipped minimum wage will be $5.99
  - Tipped minimum wage will be 90% on 2/21/29 and phase out 2/21/30

Earned Sick Time

- Civil liability and damages for failure to comply; mini-FMLA
- Significant differences from MPMLA, such as:
  - All employers and all employees
  - Clear job protection + rebuttable presumption of retaliation for adverse action taken within 90 days of "protected activity"
  - 1 hour/30 hours worked
    - Usage cap of 72 hours per year
  - Carryover required
  - Smallest increment available in payroll for tracking attendance or leave
- The good news: can use existing paid time off benefits

Likelihood of Changes

- Any change would have to originate in the legislature
- Several interest groups are lobbying for changes
  - Tipped minimum wage
  - Paid sick time
- Appears to be optimism amount those groups; unclear if shared among legislators
- If changes occur, would likely be after the election and before the holiday

Status of FTC Rule Banning Non-Competes

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FTC Rule on Non-Competes

- Reminder of What Happened Last Year:
  - FTC proposed rule – Published January 5, 2023
    - Bans non-competes in most employment contracts
    - Requires rescission of existing non-competes
    - Requires notice to employees and former employees about the fact that their non-competes are no longer enforceable
    - Narrow exceptions for "senior executives" covered by existing agreements, and agreements related to the sale of a business
  - Final Rule published May 7, 2024
  - Rule was to go into effect September 4, 2024

FTC Rule on Non-Competes

- Lawsuits were filed almost immediately after FTC approved the rule
- August 20, 2024, a federal court in - - - issued a **final judgment** prohibiting the FTC from enforcing the rule
  - *Any guesses as to which court issued the order??*
  - Court ruled that:
    - Congress did not grant FTC authority to make substantive rules regarding unfair methods of competition
    - Rule is "arbitrary and capricious" because a categorical ban on all non-competes was not justified by evidence or reasoning cited by FTC, and FTC didn't consider benefits of non-competes or a narrower alternatives to the rule
  - FTC filed Notice of Appeal to the Fifth Circuit on October 18
- But…here comes the NLRB to save the day

NLRB Says Non-Competes and "Stay-or-Pay" Provisions Are Unlawful

May 30, 2023 Memo from NLRB GC

- Jennifer Abruzzo issued a memo stating her opinion that non-compete provisions in employment contracts and severance agreements violate the NLRA except in limited circumstances:
  - Those that clearly restrict only individuals' managerial or ownership interests in competing business, or
  - True independent contractor relationships
- Her position is that non-competes "chill employees in the exercise" of their rights under the Act because:
  - they know they will have greater difficulty in finding new work if they are discharged for engaging in protected activity;
  - They are unable to leverage their relationships with each other and with competitors to exercise their rights in improving workplace conditions
- Remember – the NLRA doesn't cover supervisors…but NLRB will try…

October 7, 2024 Memo from NLRB GC

- Expands upon 5/30/23 memo, setting forth **intent to prosecute employers who require employees to sign non-competes OR "stay-or-pay" provisions**
- Abruzzo argues that "stay or pay provisions have serious potential for suppressing union organizing and other concerted activity for mutual aid or protection, including by impairing job mobility."
- "Stay-or-pay" provisions include any agreement where an employee is required to pay back something to the employer if their employment ends, such as reimbursement agreements related to:
  - Training costs
  - Education/tuition fees
  - Recruiter fees
  - Sign-on bonuses
  - Relocation expenses

NLRB's View on Stay-Or-Pay Provisions

- Stay-or-pay provisions are only lawful if:
  - (1) is entered into voluntarily in exchange for a benefit;
    - Employee may not suffer adverse financial consequence or employment action if refuses to sign
  - (2) has a reasonable and specific repayment amount;
    - The amount can be no more than what the benefit cost the employer and must be specified up front
  - (3) has a reasonable "stay" period; and
    - Fact-specific determination based on factors such as cost of the benefit bestowed, its value to the employee, whether the repayment amount decreases over time, and the employee's income.
  - (4) does not require repayment if employee is terminated without cause

NLRB's View On Remedies for Non-Competes

- Remedies will encompass "make whole relief" for any employee who suffers financial harm **as a result of a non-compete**, including:
  - Difference between pay in a lower-compensation job they were forced to take from one that would have paid more but they could not take because of non-compete;
  - Lost wages due to longer period of unemployment while searching for a job outside of scope of;
  - Relocation-related costs incurred because they were force to move due to geographic restrictions in non-compete;
  - Costs of any retraining that they needed to obtain job outside of protected field

NLRB's View On Remedies for Stay-Or-Pay

If provision is not lawful, Board will seek to require that the employer:

- rescind the provision; and
- notify employees that the "stay" obligation has been eliminated; and
- erase the debt

If employer has already taken steps to enforce the agreement, it should:

- make the employee "whole" for any losses suffered as a result (i.e., reimburse for their costs, attorneys fees, etc.)
- Take steps to ensure their credit rating has not been harmed

If employee can show they were discouraged from applying for or accepting another position because of stay-or-pay provision, Board will seek the same remedies it will for an unlawful non-compete

Abruzzo announced that employers would have 60 days to "cure" any pre-existing stay-or-pay agreements

FLSA Salary Basis

Revision Of The White Collar Salary Basis

- The new minimum weekly salary for exempt employees is $844 (Annual is $43,888)
  - *Effective July 1, 2024*
- The new minimum weekly salary for exempt employees will be $1,128 (Annual is $58,656)
  - *Effective January 1, 2025*
- The new minimum weekly salary will be $???????
  - Effective July 1, 2028 and every three years thereafter

Revision Of The White Collar Salary Basis

- The salary requirement for highly compensated employees will be $132,964 annually
  - *Effective July 1, 2024*
- The salary requirement for highly compensated employees will be $151,164 annually
  - *Effective January 1, 2025*
- The minimum salary threshold will adjust every three years based on changes in overall market wages
  - Job duties requirements did not change!

Bonuses

- The Basics:
  - Non-discretionary bonuses, incentive payments, commissions
    - Includes incentive bonuses tied to productivity and profitability
  - Can satisfy up to 10% of the minimum salary level
    - Salary can be 90% of the minimum salary ($52,790 per year under January 1, 2025 new minimum salary)
  - Can be paid in any increment (monthly, quarterly, annually, etc.)

Catch-Up Payments

- If the commissions, bonuses, incentive payments we take credit for (up to 10%) fall short, the employer can make a "catch-up" payment **no later than the next pay period after the end of the year**
- The catch-up payment will count toward the prior quarter's salary amount, not the quarter in which it was paid

Impact Of The Revisions

- Minimum salary will adjust every three years based on the labor market (35th percentile of the labor market)
- So … if an employee is given a raise to meet the new minimum salary, those individuals may need to be given another raise in 2027, 2030 …
  - Employers will need to review this issue every three years

Don't Mess With Texas

- Two cases are currently pending in the Eastern District of Texas
- Both seek to invalidate the rule and allege that the DOL exceeded its statutory authority because the new rule's focus on minimum salary levels improperly focuses on salary, rather than the employee's duties
- June 28: Ruling that applies only to the State of Texas as an employer
- Still waiting to hear whether the DOL rules will survive for all other employers. Decision promised before 1/1/25.

DOL Independent Contractor Rule

We've Come Full Circle

- January 2024: The DOL issued a new rule announcing that it would return to the six-factor "economic reality" test to determine whether a worker is a true independent contractor
- Took effect March 11, 2024
- The bottom line: Workers who are in business for themselves are more likely to be classified as independent contractors, while workers who are economically dependent on an employer for work are more likely to be employees
- IRS and NLRB have their own rules, as do many states

Economic Reality Test – 6 factors

- The worker's opportunity for profit or loss depending on his or her managerial skill;
- The financial stake and nature of any resources the worker invested in the work;
- The degree of permanence of the work relationship;
- The company's nature and degree of control over the worker and the work;
- Whether the work performed is an integral part of the company's business (*i.e.*, whether the work is "critical, necessary or central to the company's principal business"); and
- The worker's skill and initiative

PWFA Regulations

Pregnant Workers Fairness Act

- Law went into effect June 2023
- EEOC proposed regulations in August 2023
- EEOC issued Final Regulations in April 2024, which took effect in June 2024
- Applies to employers with at least 15 employees
- Requires covered employers to provide reasonable accommodations if employee has limitations due to pregnancy, childbirth, or related medical conditions unless accommodations would cause undue hardship

Covered Conditions

- EEOC has interpreted "related medical conditions" extremely broadly, to potentially (depending on circumstances) include things like:
  - Post-partum conditions
  - Reproductive health conditions
  - Lactation (PUMP Act also applies)
  - Abortion
  - Menstruation
  - Conditions related to fertility treatment
  - Conditions related to contraception
- Whether courts agree remains to be seen…

Differences from ADA

- It is like the ADA in some respects, but very different than the ADA in others:
  - PWFA covers "known limitations", which may be modest, minor or episodic
  - Under ADA, you never have to remove or suspend essential job functions
    - **You do** under the PWFA as long as it is "temporary", the employee can perform the functions "in the near future", and it doesn't cause you an undue hardship
  - Your ability to ask for documentation is extremely limited under the PWFA

EEOC Enforcement

- Two cases filed by the EEOC so far
  - *EEOC v. Polaris Industries*: Alleges Polaris refused to excuse intermittent absences for pregnancy-related absences and required her to work mandatory overtime. Employee resigned to avoid termination and protect her pregnancy.
  - *EEOC V. Urologic Specialists of Oklahoma*: Alleges USO did not allow medical assistant to sit, take breaks or work part-time during a high-risk pregnancy. Instead, employee was forced to take unpaid leave. After pregnancy, USO could not guarantee that she would have breaks to express breast milk.

What Do You Need to Do?

- Make sure your leaders are trained
- They need to understand the differences from the ADA, and how the law could overlap with the FMLA and ESTA
- Create a different process for evaluating accommodation requests – do not simply adopt your current ADA process

Title IX

New Regulations Effective August 1, 2024

Major Changes Include:

- Expanded Definition of "Sexual Harassment"
  - From so "severe, pervasive **and** objectively offensive" to effectively deny equal access to an educational program or activity to so "severe **or** pervasive" that it limits a person's ability to participate in or benefit from the program or activity.
- Formal Inclusion of "Gender Identity" in Definition of "Sex"
- Formal Inclusion of Protection for Events that Occur Off-Campus
  - Now covers conduct that is subject to the Institution's disciplinary authority regardless of location
- Grievance Procedures differ depending on nature of complaint

New Regulations Effective August 1, 2024

Major Changes Continued:

- Broadened the Definition of "Complaint"
  - Oral complaints are now sufficient to trigger Title IX obligations
- Lowered the Standard of Proof that Can Be Applied
  - 2020 regs required "clear and convincing" proof in cases of sex harassment. Now institution can choose between that and "preponderance of the evidence"
- Added special rules for accommodations for pregnancy, childbirth or related medical conditions
  - To be in line with PWFA
- Decisionmaker can now be same as Title IX Coordinator/Investigator

We Can Help You Update Your Policy If You Haven't Already

Peeking Around the Corner: Legal Trends

Pay Transparency

- Require businesses to provide pay information to applicants and current employees
- Disclosure of pay ranges and other compensation in job postings
- Also include bans on asking about wage history
- Federal Salary Transparency Act and Pay Equity for All Act were introduced in Congress in March 2023

Protections for Lawful Use of Marijuana

- Prohibition on refuse to hire an applicant based solely on positive test for marijuana
- Non-discrimination for legal off-duty use of marijuana
- Ban on termination or discipline for positive THC test unless employees was under the influence while working
- Confusion and lack of clarity over standard for showing employee was impaired while working
- Exceptions for certain safety sensitive position and obligations to comply with federal requirements

Artificial Intelligence

- Bills introduced to:
  - Prohibit employers from using automated decision making tools that result in algorithmic discrimination,
  - Require impact assessments, and/ors
  - Require notification of applicants/employees that an AI decision-making tool is being used in an employment-related decision process.
- US Congress – "No Robot Bosses Act"

Workplace Violence Prevention

- State OSHA standards addressing workplace violence
- Require plans to present workplace violence
- Training to ensure employees know the procedure and protocols in the event of violence

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Separation Agreements

- Limits on confidentiality provisions, particularly with regard to claims of harassment and discrimination
- Requirements to list certain laws in the release paragraph
- Specific disclosures
- Requirements for consideration and revocation periods beyond OWBPA/ADEA
- Can invalidate the release if not drafted correctly

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