

Employer's Edge – Navigating Labor & Employment Law Updates

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Federal Labor & Employment Updates

Fair Labor Standards Act (FLSA)

- » Employees are generally entitled to overtime for hours worked over 40 in a work week
 - » Paid at time and one-half of the employee's "regular rate"
- » Exemptions:
 - » Must perform exempt duties
 - » Executive, Administrative, Professional, Outside Sales, and Computer Employees
 - » Paid on salary basis (generally)
 - » Other than required or permitted deductions, cannot deduct from salary of exempt employee for partial day absences and non-availability of work



FLSA Updates

- » Thresholds
 - » 2004 – Raised to \$455 per week
 - » 2019 – Raised to \$684 per week
- » New Rule in Effect for 2024
 - » Current as of July 1, 2024 - \$844 per week (\$43,888 annually)
 - » January 1, 2025 - \$1,128 per week (\$58,656 annually)
- » Highly Compensated Employee
 - » Current - \$132,964
 - » January 1, 2025 - \$151,164
- » Assessed Every Three Years Moving Forward
 - » First on July 1, 2027



National Labor Relations Board

- » National Labor Relations Board
 - » Constantly changing interpretations of work rules
 - » Applicable to unionized and non-unionized workplaces
 - » Stericycle, Inc., 372 NLRB No. 113 (2023).
 - » New standard for employer rules
 - » Does the rule have a reasonable tendency to chill employees from exercising their rights
 - » Employer may rebut – legitimate and substantial business interest that the employer is unable to advance with a more narrowly tailored rule
 - » Non-Disparagement
 - » Knowingly, maliciously untrue
 - » Restrictive Covenants
 - » *Jo. Mory Inc.*



2024 Updates to Pay Transparency Laws

Pay Transparency Laws

- » What is Pay Transparency?
 - » Pay transparency laws refer to active legislation requiring businesses to disclose compensation information with employees and sometimes potential employees.
 - » Currently, there is no federal law pertaining to pay transparency. All pay transparency laws are either state laws or municipal laws.
 - » While usually limited to salaries, pay transparency can also apply to: bonuses, stock options, commission structures, compensation increases with promotions, and wage ranges for specific roles and departments.



Pay Transparency Laws

- » Current States/Cities with Pay Transparency Laws
 - » California, Colorado, Connecticut, Hawaii, Maryland, Nevada, and Rhode Island have pay transparency laws on the books for all employers, regardless of the number of employees.
 - » New York City; Westchester County, NY; Jersey City, NJ (5+ Employees); Ithaca, NY; Cincinnati, OH (15+ Employees); and Toledo, OH (15+ Employees) also have pay transparency laws on the books.



Pay Transparency Laws

- » New Laws Passed Regarding Pay Transparency
 - » Massachusetts: On July 31, 2024, Gov. Maura Healey signed a new wage equity bill into law, which will take effect on July 31, 2025. This law mandates that all employers with over 25 employees in Massachusetts disclose salary ranges in job postings, provide pay range information for promotions, transfers, or new roles, and share pay range details with current employees upon request.
 - » Maryland: Maryland is enhancing its Equal Pay for Equal Work Act by adding a Wage Range Transparency requirement. This update, effective October 1, 2024, requires employers to disclose a “wage range” for job openings and provide a general description of benefits and compensation. The wage range must be a good faith estimate based on various factors, including applicable pay scales and current salary rates for similar positions. The law now applies to all businesses in the state, regardless of size, and employers must submit a compliance form to the state.



Pay Transparency Laws

- » **New Laws Passed Regarding Pay Transparency**
 - » Minnesota: Starting January 1, 2025, Minnesota will require employers with 30 or more employees to include salary ranges and detailed benefits information in job postings. This includes health insurance, retirement plans, bonuses, and other financial perks associated with the position.
 - » Vermont: Vermont's law is set to take effect on July 1, 2025, and requires employers with 5 or more employees to include a maximum and minimum annual salary or hourly wage in any job advertisements. The law requires employers to disclose the range or wage that they expect, in good faith, to pay.



Pregnant Workers Fairness Act (PWFA)

Pregnant Workers Fairness Act

» Pregnant Workers Fairness Act

- » The law went into effect on June 27, 2023, and the EEOC issued its final regulation to carry out the law on June 18, 2024.
- » The PWFA applies to private employers and public sector employers (state and local governments) that have 15 or more employees. It also applies to Congress and Federal agencies, and to employment agencies and labor organizations.
- » The PWFA provides for reasonable accommodations for qualified applicants or employees who have known limitations. Under the PWFA, “limitations” are physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.



Pregnant Workers Fairness Act

» What Does the PWFA Prohibit?

1. Failing to make a reasonable accommodation for the known limitations of an employee or applicant, unless the accommodation would cause an undue hardship;
2. Requiring an employee to accept an accommodation other than a reasonable accommodation arrived at through the interactive process;
3. Denying a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
4. Requiring an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
5. Punishing or retaliating against an employee or applicant for requesting or using a reasonable accommodation for a known limitation under the PWFA, reporting or opposing unlawful discrimination under the PWFA, or participating in a PWFA proceeding (such as an investigation);
6. Coercing individuals who are exercising their rights or helping others exercise their rights under the PWFA.



FTC Final Rule's Non-Compete Clause and (Potential) Impacts on M&A

The FTC's April 23, 2024 Final Rule

- » The Broad Strokes of the Rule
 - » Employers will no longer be able to impose non-competes on workers.
 - » Applicable to employees, independent contractors, and unpaid workers.
 - » Other terms that “prohibit” a worker from, “penalize” a worker for, or “function to prevent” a worker from either seeking or accepting work in the U.S. after employment ends will also be prohibited.



The FTC's April 23, 2024 Final Rule (continued)

- » The Broad Strokes of the Rule
 - » Exemptions
 - » Existing non-competes on senior executives
 - » Non-competes in “Sale of Business” agreements
 - » Non-competes in franchisor/franchisee agreements (maybe)



“Sale of a Business” Exemption Deconstructed

- » The “Bona Fide Sale” Requirement
 - » The sale must be between two independent parties at arm’s length.
 - » Seller must have a reasonable opportunity to negotiate.
 - » Creative structuring to drive around the rule may invalidate the exemption.
 - » However, non-competes included within a transaction involving repurchase rights or mandatory stock redemption programs are out!



Uncertainties with Sale of Business Exemption

- » What type of ownership interests must be sold for the exemption to apply:

Class A, Class B, Voting, Non-voting?

- » Non-competes contained in an operating agreement executed by the seller post-M&A transaction:

Enforceable or kick rocks?

- » Non-competes related to equity grant or profit share agreements:

No reference is made, so now what?

- » Will the seller be classified as a “worker” under the Rule post-sale:

Who knows?



Uncertainties with Enforceability of Rule Altogether

- » The *Ryan LLC v. Federal Trade Commission* Decision, U.S. District Court in the Northern District of Texas
 - » Enforcement of the Final Rule after September 4, 2024, was set aside
 - » Nationwide block from all enforcement and for all employers
 - » How did the Court get there, you may ask?
 - » The Final Rule faced its first legal challenge within hours of passing
 - » Arbitrary and capricious
 - » Battle won, but not the war? Appeal



Takeaways for Employers and M&A Buyers

- » Employers Should Consider
 - » Enhancing other provisions and/or drafting completely new agreements related to:
 - » Non-solicitation
 - » Non-disclosure
 - » Confidentiality
 - » Trade secrets
 - » But remember not to get too cute as the “other terms and conditions” language in the Final Rule dislikes cute.



Takeaways for Employers and M&A Buyers

» Buyers Should Consider

- » Requiring sellers to obtain confidentiality and trade secret agreements pre-closing in lieu of traditional restrictive covenant agreements
- » Enhancing diligence on terminated employees
- » Requiring the seller to enhance the duties of care, loyalty, and others that are applicable to key people pre-closing
- » Mandating seller enhancements to non-solicitation provisions in employment agreements
- » Pushing those non-competes on senior executives before the (likely) appeal gets to the Supreme Court



Questions?

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Thank You!

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