2024 Employment Law Update

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Updated EEOC Charge Filings

TYPE	YEAR 2020	YEAR 2021	YEAR 2022
Total	67,448	61,331	73,485
Race	22,064	20,908	22,992
Color	3,562	3,516	4,088
Sex	21,398	18,762	19,805
National Origin	6,377	6,213	5,500
Religion	2,404	2,111	13,814
Retaliation-All	37,632	34,322	37,898
Retaliation Title VII	27,997	25,121	28,462
Age	14,183	12,965	11,500
Disability	24,324	22,843	25,004
Equal Pay Act	980	885	955
GINA	440	242	444

Judicial Case Filings

Twelve-Month Period	# of Employment Discrimination Cases Filed
2016	14,109 (including ADA employment cases)
2017	14,406 (including ADA employment cases)
2018	15,203 (including ADA employment cases)
2019	15,119 (including ADA employment cases)
2020	13,712 (including ADA employment cases)

Wage and Hour Update

Proposed Overtime Rule

On September 8, 2023, the U.S. Department of Labor's ("DOL") Wage and Hour Division published a Notice of Proposed Rulemaking in the Federal Register.

The Notice outlines an updated salary level which was last raised in a 2019 Rule to $684/week.

Prior to the 2019 Rule, the salary level was set at $455/week.

Proposed Overtime Rule

The new Rule proposes revisions including increasing the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).

The proposed level is$1,059/week or $55,068 per year. **A footnote in the Rule says salary figure could be closer to $60,209 in the Final Rule.

The Office of Management and Budget (“OMB”) received the Rule on March 1, 2024. Rule must be approved by OMB before it becomes final.

Proposed Overtime Rule -- Context

The Fair Labor Standards Act (FLSA) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay.

Section 13(a)(1) of the FLSA exempts from the minimum wage and overtime pay requirements “any employee employed in a bona fide executive, administrative, or professional capacity.”

Proposed Overtime Rule

THE EXEMPTION IS COMMONLY REFERRED TO AS THE “WHITE-COLLAR” OR EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL (EAP) EXEMPTION.

THE STATUTE DELEGATES TO THE SECRETARY OF LABOR (SECRETARY) THE AUTHORITY TO DEFINE AND DELIMIT THE TERMS OF THE EXEMPTION.

THE OVERTIME RULE HAS BEEN MODIFIED FROM TIME TO TIME OVER THE YEARS, TYPICALLY BY ADMINISTRATION.

Proposed Overtime Rule – The Tests

The regs implementing the EAP exemption have generally required that each of the following three tests must be met:

(1) The employee must be paid a fixed salary that is not reduced because of variations in the quality or quantity of work performed (the salary basis test);

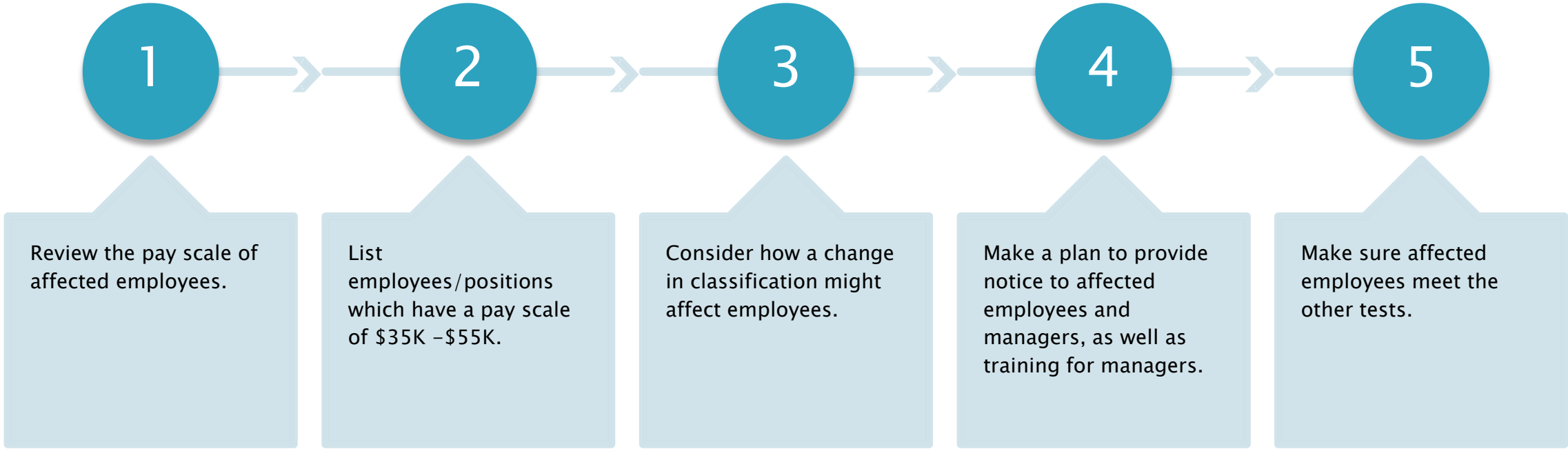
(2) The amount of salary paid must meet a minimum specified amount (the salary level test found in the Rule); and

(3) The employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regs (the duties test).

Wage and Hour Update

- Employers need to know and review employee classifications, especially in nursing.
- Can nurses be paid a salary versus hourly? Hybrid situations?
- Considerations for 8/80 Rule.
- See EEOC v. Medical Staffing of America, LLC

Preparing for new OT Rule



OSHA Update

General Duties Clause reminder.

No need to record reaction to COVID vaccine through May 2023. No updates.

June 2021 Healthcare ETS.

Expired in December of 2021.

Recordkeeping duties remain.

A comment period on a proposed final standard closed on April 22, 2022 and a hearing was held on April 27th. OSHA targeted December of 2022 for release, but no release came.

Final Standard continues to be delayed, but OSHA continues to work on this. Necessary in light of lifting of COVID emergency?

Uptick in OSHA inspections in long-term care, generally. Could be additional focused inspection windows, such as last year's window.

FMLA Update

- DOL forms updated in Summer 2020 and valid through June 2023. Current form valid through June 2026.
  - We strongly recommend using the DOL forms versus an in-house form.
  - Be aware of the various notices and designations an employer must make.
  - When in doubt, give employees a Certification of Health Care Provider to be completed by their physician.
- Law continues to evolve to become less rigid and punish the mechanical application of standards; it's not black and white.
- February 9, 2023, Letter Guidance:
  - An employee may take intermittent leave indefinitely, as long as time is available.
  - Letter specifically addressed request for one-hour shorter schedule every day.
- See EEOC v. Groendyke Transport, Inc. case

NLRB Update

- Renewed focus on union activity.
- Although unions gained more workers in 2023, the PERCENTAGE of unionized workers fell to a record low.
- 2023 saw a new record low of 10%.
- Percentage of unionized employees has steadily dropped since 1985, when membership hit 20%.
- Despite the actual union membership data, 2023 saw record deals with the “big 3”, restaurant chains, and other employers.

NLRB Update

- NLRB Decision re: Provisions in Severance Agreements
  - McLaren Macomb case.
  - February 21, 2023.
  - Employers may not offer severance agreements with broad Confidentiality and Nondisparagement provisions because such provisions violate separated employees' Section 7 rights under the NLRA.
  - NLRB Counsel issued Guidance Memorandum on Marsh 22, 2023.
    - Supervisors generally not protected
    - Applied retroactively
    - Not all Confidentiality clauses violate NLRA
    - Overbroad provisions likely do not void the rest of the Agreement
  - How has McLaren Macomb been applied over the last year or so?

NLRB Update

On August 2, 2023, the National Labor Relations Board ("NLRB") overruled a prior 2017 decision (Boeing) that gave employers some flexibility in their employment policies governing employee conduct.

The case is called ***Stericycle*** and it remains to be seen exactly how broadly it will affect employers' policies.

NLRB stated that an employer's work rules should be narrowly tailored to "only promote its legitimate and substantial business interests while avoiding burdening employee rights."

NLRB Update

- Under the new Stericycle standard, when the NLRB reviews a challenged work rule:
  - NLRB General Counsel ("GC") must first show that the challenged rule has a reasonable tendency to chill employees from exercising their rights.
  - If proven, the rule is presumed to be unlawful.

  - The employer then must:
    - Prove that the rule advances a legitimate and substantial business interest; AND
    - The employer is unable to do the same thing with a more narrowly tailored rule.

NLRB Update

What does *Stericycle* mean for employers?

Effectively, employers must ensure that handbook and other employee policies cannot be read to chill or discourage concerted activities. Policies that may need review include:

Non-Disparagement

Social Media

Civility/Insubordination

Cell phone/Camera/Recording policies

Policies regarding speaking to the media or other outside persons

Additionally, there are no longer policies that are presumed to be lawful such as policies relating to the confidentiality of investigations, rules prohibiting outside employment, and non-disparagement rules.

Medical Marijuana in PA

- Medical Marijuana Act ("MMA") passed in 2016.
- An employer cannot discriminate against applicants or employees "solely on the basis of such employee's status as an individual who is certified to use medical marijuana."
- Recreational use still illegal in PA, as is smoking medical marijuana.
- Philadelphia ordinance regarding job applicant testing.
- Palmiter Case in PA – use of medical marijuana is NOT a disability under ADA.

Marijuana

- The following states have or soon will authorize recreational marijuana:
  - Alaska, Arizona, California, Colorado, Connecticut, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Nevada, Ohio, Oregon, Rhode Island, Vermont, Virginia, Washington, Washington, D.C.
- What does this mean for PA employers?
- At the federal level, marijuana is still listed as a Schedule I drug under the Controlled Substances Act.

Non-Compete

- On January 5, 2023 the Federal Trade Commission (“FTC”) proposed a new rule that would ban non-compete agreements between employers and employees.
- Rule would rescind all existing non-compete agreements on the Rule’s compliance date (no date yet).
- Compels employers to provide notice that the non-competes are no longer valid.
- Rule would also apply to independent contractors.
- During its extended comment period, FTC received over 27,000 comments.
- FTC already issuing complaints against employers.
- FTC may vote on a Final Rule or some other version of the proposed rule in April 2024.

Non-Compete

PA Health Care Facilities Act Chapter 8-B: Temporary Health Care Services Agencies.

" A temporary health care services agency . . . may not restrict in any manner the employment opportunities of Health Care Personnel. This requirement shall also apply to a health care facility."

Grandfather provision?

What does this mean for "placement fees?"

Non-Compete

Section 807-B. Sanctions.

1. Grounds for sanctions. - -The department may sanction a temporary health care services agency or a controlling person of the temporary health care services agency or refuse to issue a registration to the person that owns or operates the temporary health care services agency, as applicable, for any of the following reasons:

(9) For a temporary health care services agency operation in this Commonwealth on the effective date of this section, continuing operations without complying with the provisions of this chapter on or after the date when the provisions of this chapter are applicable to the temporary health services agency.

- Effective Dates:
  - For a Staffing Agency in operation as of 11/3/2022, effective date is May 2, 2023 (180 days).
  - Immediately applicable to newly-opened Staffing Agencies.
- Grandfather Provision?
  - There is no explicit “Grandfather Provision,” which raises the question of whether non-competes in existing contracts are invalidated.
  - However, the statute states:

Non-Compete

- What effect, if any, does this new language have on placement fees?
- Example of Language:

HIRING OF EMPLOYEES BY PROVIDER AND PLACEMENT FEE

1. Provider may wish to employ directly an Employee who has been supplied by Agency. In the event of such a placement to the employ of Provider or to any other employer to which Provider refers such Employee, Provider agrees to pay a placement fee. The placement fee is $0.00 for an RN, $0.00 for an LPN, $0.00 for a CNA and $0.00 for a HHA or NA. The placement fee will be reduced by $00.00 for each 40 hours of weekly services performed while on assignment to the Provider, however in no event will there be any less than a $0.00 placement fee for any position.

2. The placement fee above is payable if Provider hires, employs or enters into a contract with the Agency-supplied Employee, regardless of the employment classification, on either a permanent, temporary, or consulting basis within ---- months after the last day of the assignment. Provider also agrees to pay a placement fee if the Agency Employee assigned to Provider is hired by or enters into a contract with any other related entity or individual as a result of referral of the Employee by Provider.

Non-Compete

- What positions can we take?
  - Aggressive position: The new language effectively bans placement fees from the Temporary Staffing Agreement and relieves a provider from having to pay them. Hire away!!!
  - Conservative position: The new language has no effect on a provider's contractual duty to pay the placement fees because it's not a direct restriction on the agency staff.
  - Middle-Of-The-Road position: Take the position that placement fees are not owed once provisions take effect, communicate that with the Temporary Staffing Agency, and make hiring decisions on a case-by-case basis.

Non-Compete

- What positions can we take?
  - Wait and See: Maintain the status quo until we have written regulatory guidance (2 years), oral guidance from the Department, or guidance from the courts.

PA Workers' Compensation Update

No **reported** COVID-19 cases to date.	• Oral report from WCJ at conference suggests COVID cases to number in the hundreds so far, most of which have resolved. • However, DLI's "Pennsylvania Workers' Compensation Workplace Safety Annual Report" suggests there were far more. • We are aware of a few unreported cases which did not settle, but details are sparse.
Two avenues to pursue COVID WC claim:	• Infectious Disease. • Disease as Injury.
Tough standard to prove COVID-19 contracted at work and to the exclusion of other sources, which requires a medical expert.	• What can employers do prior to and after the claim is made?
What is the pragmatic approach for employers: to settle or not to settle?	

Statutes, Rules, Regulations, Case Law, and Guidance

Pregnant Workers Fairness Act ("PWFA")

- Provisions:
  - Requires "covered employers" to provide "reasonable accommodations" to an employee's known limitations related to pregnancy, childbirth, or related conditions unless the accommodation will cause the employer an "undue hardship."
  - Applies only to accommodations. Other laws, such as the Americans with Disabilities Act ("ADA") and Pregnancy Discrimination Act ("PDA") make it illegal to terminate or otherwise discriminate on the basis of pregnancy, childbirth or related medical conditions.

Pregnant Workers Fairness Act ("PWFA")

PWFA went into effect on June 27, 2023, and employers are required to comply immediately.

EEOC is required to issue proposed regulations interpreting and implementing the PWFA, which will be subject to a comment period prior to finalization.

EEOC began accepting charges under the PWFA as of 6/27.

Pregnant Workers Fairness Act ("PWFA")

- For purposes of the PWFA, a "covered employer" is a private or public employer with at least fifteen (15) employees.

Pregnant Workers Fairness Act ("PWFA")

"Reasonable Accommodation" under the PWFA:

Same definition as ADA.

A "reasonable accommodation" is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process.

The FAQs to the PWFA provide some examples of a "reasonable accommodation":

- The ability to sit or drink water;
- Receive closer parking;
- Have flexible hours;
- Receive appropriately sized uniforms and safety apparel;
- Receive additional break time to use the bathroom, eat, and rest;
- Take leave/time off to recover from childbirth; and,
- Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

Pregnant Workers Fairness Act ("PWFA")

- Employers are also prohibited from:
  - Requiring an employee to accept an accommodation without a discussion with the employee (interactive process;
  - Denying a job or employment opportunity to a qualified employee based on the individual's need/request for a reasonable accommodation (retaliation);
  - Requiring an employee to take leave if another reasonable accommodation is possible;
  - Retaliating against an individual for reporting or opposing discrimination or participating in an investigation into such behavior; or,
  - Interfering with an individual's rights under the PWFA.

Pregnant Workers Fairness Act ("PWFA")

- How does PWFA differ from PDA and ADA?
- Unlike ADA, pregnancy-related medical restrictions no longer need to rise to the level of a disability in order to require accommodation.
- Unlike PDA, the duty to accommodate a pregnant employee does not depend on whether or how an employer accommodates other individuals who are "similar in their ability to work."

How does the PWFA differ from the PDA and ADA?

The PWFA prohibits an employer from requiring an employee "to take paid or unpaid leave if another reasonable accommodation can be provided." Leave can only be required as a last resort. ADA guidance says the same thing, but ADA itself does not.

The PWFA takes accommodations for a pregnant employee further than the ADA since employers must provide an accommodation even when the employee CANNOT perform the essential functions of her job if it's only for a "temporary period" and she will be able to perform the essential job functions "in the near future."

FLSA Independent Contractor Final Rule

- DOL issued Independent Contractor Final Rule under the Fair Labor Standards Act , which adopts a 6-factor test.
- Final Rule published: 1/10/24; Effective date: 3/11/24.
- The Rule helps an employer determine who is an employee vs. independent contractor under the FLSA.
- The Rule addresses six factors that guide the analysis of a worker's relationship with an employer, including:
- Any opportunity for profit or loss a worker might have;
- Financial stake and nature of any resources a worker has invested in the work;
- The degree of permanence of the work relationship;
- The degree of control an employer has over the person's work;
- Whether the work the person does is essential to the employer's business; and
- A factor regarding the worker's skill and initiative.

PHRC Regulations

- PHRC released new regulations in summer of 2023 that more clearly define “sex,” “religious creed,” and “race.”
- “Sex” includes pregnancy status, childbirth status, breastfeeding status, sex assigned at birth, gender identity or expression, affectional or sexual orientation, and differences in sex development.
- “Race” includes traits associated with race, including hair texture and protective hairstyles.
- “Religious Creed” includes all aspects of religious observance and practice, as well as belief.

Misc. Statutes

- Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act
  - Passed in the U.S. House of Representatives 4/1/22; Currently before the Senate.
  - Removes marijuana from the list of scheduled substances under the Controlled Substances Act, also eliminating criminal penalties for individuals who manufacture, distribute, or possess marijuana.
- Creating a Respectful and Open World for Natural Hair (“CROWN”) Act of 2022
  - Passed in the House on 3/18/22; Did not pass in the Senate; may be reintroduced in the current Congress.
  - Prohibits discrimination based on an individual's hair texture or hairstyle if that texture or style is commonly associated with a particular race or national origin.
  - PA version is HB 1394, which passed the PA House and is currently before the PA Senate.
  - Philadelphia and Pittsburgh have city ordinances with similar provisions.

Recent Title VII Cases

EEOC v. Houchens Food Group, Inc. d/b/a Hometown IGA

Job applicant is a Spiritualist Rastafarian who wears his hair long and in dreadlocks.

Applicant's stated religious belief is that his hair connects him to God.

IGA allegedly said applicant would need to cut his hair; interview ended with no job offer.

EEOC filed suit.

Recent EEOC Guidance

EEOC issued online guidance on religious discrimination and accommodation, which clarifies the definition of religion, the scope of the employer's duty to accommodate, and the factors to consider when assessing undue hardship.

Additionally, EEOC released its Strategic Enforcement Plan for 2024-2028, which focuses on targeting discrimination against religious minorities (including antisemitism and Islamophobia), racial or ethnic groups, and LGBTQI+ individuals.

Recent EEOC Guidance

EEOC created a new webpage with guidance regarding discrimination based on sexual orientation and gender identity.

The guidance states, among other things, that consistent, intentional use of names or pronouns inconsistent with a transgender individual's preferred gender (misgendering) could result in liability for a hostile work environment.

However, unintentional use of the same does not arise to such a level.

Recent EEOC Guidance

New EEOC Guidance released on 1/24/23.

"Hearing Disabilities in the Workplace and the Americans with Disabilities Act"

The guidance explains:

- When an employer may ask an applicant or employee questions about a hearing condition;
- How to treat voluntary disclosures;
- What types of accommodations applicants may need; and,
- How an employer can ensure that no employee is harassed because of a hearing disability.

Conclusions/Questions

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