



Labor & Employment 2024 Symposium

Legislative & Regulatory Update: Where We've Been . . .

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Dorsey Speakers



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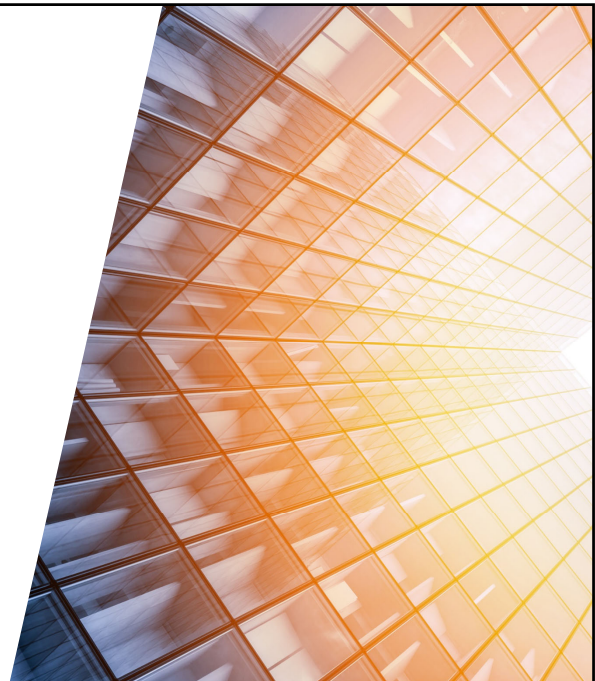
2

Agenda

- Noncompetes in the crosshairs
- EEOC's new harassment guidelines
- Joint employer risks
- Salary history bans and pay transparency requirements
- Enhanced pregnancy and nursing protections
- Paid sick & safe time and paid family medical leave
- DOL's new overtime threshold
- DOL's test for independent contractor status
- Other developments

Overarching Themes

- **Critical to know federal, state, *and* local law.**
 - One-size-fits-all solutions are harder to come by.
 - Federal courts have and will throw curve balls, but no effect on state law.
- **By the time you think you've figured out the law, it's probably changed!**
- **Employers are facing an across-the-board pro-employee pendulum swing . . . but elections matter!**



Noncompetes in the Crosshairs

- **FTC Final Rule banning noncompetes**
 - Effective September 4, 2024 . . . but litigation.
 - Noncompete = any provision that “prohibits a worker from, penalizes a worker for, or functions to prevent a worker from” seeking or accepting work after termination of employment or operating a business after termination of employment.
 - Bans current and future non-compete provisions for most workers.
 - Bans future non-compete provisions for certain “senior executives” with “policy-making authority”
 - Requires notice to affected employees
 - Limited exceptions for sale of business or existing litigation
 - Many open questions regarding scope and effect.
- **Trend toward state-level restrictions**
- **Trend toward greater judicial skepticism of noncompetes?**

Noncompetes in the Crosshairs

- **Action item: Don't jettison your noncompetes yet, but be prepared.**
 - No one-size-fits-all solution
 - Reconsider your legitimate business interests and how best to protect them
 - Goodwill
 - Confidential information & trade secrets
 - Reconsider which employees require which restrictions
 - Reconsider the temporal and geographic scope of your restrictions

Noncompetes in the Crosshairs

- Consider alternative protections
 - Business opportunities provisions
 - Agreement not to prepare to compete
 - Customer non-solicits
 - Employee non-solicits
 - Vendor non-interference
 - Non-use and non-disclosure
- Review protocols and procedures to protect trade secrets
- Consider carrots rather than sticks
 - Retention incentives
 - Forfeiture provisions
 - Overall employee satisfaction



EEOC Harassment Guidelines

- EEOC released updated harassment guidelines on April 29, 2024.
 - Effective immediately
 - Supersedes several prior EEOC guidance documents.
- Comes almost 25 years after EEOC last published guidance on this topic.
- Guidance does not have the force of law, and “do[es] not obviate the need for the EEOC ... to consider the facts of each case and applicable legal principles when exercising their enforcement discretion.”
 - But represents EEOC’s views on actionable harassment, and will inform EEOC actions, including with respect to investigative and enforcement decision-making.



EEOC Harassment Guidelines

- Guidance takes into account notable changes in the law, including *Bostock v. Clayton County* SCOTUS decision.
- Guidance addresses emerging workplace issues, such as:
 - Online and virtual harassment
 - Harassment based on sex, including medical conditions related to pregnancy, sexual orientation, and gender identity
 - Interplay between harassment claims and religion-based rights
- Includes over 70 examples of harassment.

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9



EEOC Harassment Guidelines

- EEOC also issued:
 - Summary of its key provisions;
 - FAQs; and
 - Fact sheet for small businesses.
- 19 states sued to enjoin the guidance:
 - Alabama, Alaska, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia.

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10

Joint Employer Risks

- Increasing regulatory attention:
 - 2023 NLRB joint employer rule (vacated March 8, 2024)
 - 2021 Biden DOL rescinded Trump DOL rule
 - Effective presumption of joint employer status in agency investigations
- Consider ‘horizontal’ and ‘vertical’ joint employment

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Salary History Bans and Pay Transparency Laws

- **Salary history bans** – Prohibit employers from inquiring about a candidate's current or prior compensation in the hiring process.
- **Pay transparency** – Generally requires posting of salary ranges, bonus/incentive opportunities and benefits for open positions.

Salary History Bans and Pay Transparency Laws

- **States with some form of salary history ban:** Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington
- **States with some form of pay disclosure or transparency requirement:** California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Nevada, New York, Rhode Island, and Washington.
 - **New MN law takes effect on 1/1/2025**
- **Plus local ordinances!**

Enhanced Pregnancy and Nursing Protections

- **Pregnant Workers Fairness Act**
 - Effective June 27, 2023
 - Expands federal protections for pregnant and nursing workers.
 - Requires covered employers to provide “reasonable accommodations” to workers with “known limitations” related to pregnancy, childbirth, or related medical conditions *unless* the accommodation will cause the employer an “undue hardship.”
 - EEOC issued its final rule and interpretive guidance on April 19, 2024; went into effect June 18, 2024.
- **PUMP Act**
 - Requires employers to provide reasonable break time to nursing employees *each time* employee needs to pump for up to 1 year after child’s birth
 - Space to pump must be:
 - Shielded from view;
 - Free from intrusion from others;
 - Available each time employee needs it; and
 - Not a bathroom.

Enhanced Pregnancy and Nursing Protections

- **At least 30 states, Washington, D.C., and a handful of localities have their own laws that offer similar protections to the federal PWFA.**
- **States are trending toward expanding leave rights and accommodation requirements for employees who are pregnant, with or without related medical conditions, and providing expanded nursing protections.**
 - E.g., Minnesota passed legislation last year (May 2023) expanding protections for nursing and pregnant employees. Amendments to the law went into effect August 1, 2024.



Paid Sick & Safe Time / Paid Family Medical Leave

- ***Paid sick & safe time:*** Usually lower hours entitlement but broader use entitlements; usually employer-paid.
- No federally mandated paid sick leave law.
- States with paid sick leave laws:
 - Arizona, California, Colorado, Connecticut, DC, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

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17



Paid Sick & Safe Time / Paid Family Medical Leave

- ***Paid FML:*** Higher hours entitlement, but usually narrower use; often insured.
- No federally mandated paid FML law.
- States with paid FML laws:
 - California, Colorado, Connecticut, DC, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Washington.
- Developing trends – know your state and local laws!

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18

DOL's New Overtime Thresholds

- **Effective July 1, 2024**
 - Standard salary threshold increased from \$35,568 to \$43,888 (or \$684/week to \$844/week)
 - Highly compensated threshold increased from \$107,432 to \$132,964
- **Effective January 1, 2025**
 - Standard salary threshold will increase to \$58,656 (or \$1,128/week)
 - Highly compensated threshold will increase to \$151,164.
- **Thresholds will be updated again July 1, 2027, and will be updated every 3 years thereafter.**
- **Remember state laws!**

DOL's Economic Dependence Test for Independent Contractor Status

- **Final rule effective March 11, 2024**
- **Focus on “economic dependence” as the ultimate inquiry:**
 - “A worker is an independent contractor, as distinguished from an ‘employee’ under the Act, if the worker is, as a matter of economic reality, in business for themselves. Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams.”
- **Six key factors, but “totality of the circumstances” test:**
 - Worker’s opportunity for profit or loss;
 - Investments by the parties;
 - Degree of permanence of the work relationship;
 - Nature and degree of control over performance of the work and working relationship;
 - Whether the work is an integral part of the business; and
 - The worker’s skill and initiative.

DOL's Economic Dependence Test for Independent Contractor Status

- **Catch all:**
 - “Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”
- **Very little “new” in the DOL’s final rule. Largely reprioritizes existing consideration and aligns with other pro-employee tests.**
- **Remember state laws!**

Other Developments

- **Enhanced child labor enforcement**
- **Other wage & hour issues:**
 - Increased regular rate challenges.
 - Further pressure on rounding practices.
- **Protected bereavement leave**
- **Prohibitions on mandatory employer-sponsored meetings**
- **Cannabis testing**
- **Use of AI in employment decisions**

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Speaker Biographies



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Anabel is an Associate in Dorsey's Labor & Employment Group. She represents clients in all areas of employment litigation, including in actions alleging discrimination, harassment, and retaliation, wage and hour claims, and contract disputes. She also works with clients seeking advice on employment-related issues, including training for managers and HR professionals, policy creation and implementation, discipline and discharge decisions, and other general workplace best practices. Additionally, she regularly plans and executes effective internal investigations involving discrimination, harassment, and retaliation allegations.

Before law school, Anabel served as the operations and human resources director for a clean energy policy consultancy in San Francisco. Her prior experience as the operations and human resources director provides her with an intimate perspective of the challenges, limitations, and rewards facing management and employers.



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Drew is an Associate in Dorsey's Labor & Employment Group. Drew is a courtroom lawyer with a lengthy track record of success. Drew passionately represents his clients in all varieties of employment, education, civil rights, and business litigation in federal and state courts nationwide. He has tried and won cases to juries and judges, and his knack for identifying winning issues has resulted in many conclusive victories via motion practice without need for trial.

When a dispute is avoidable, clients praise Drew's approachability and practicality. He taps into his background as in-house counsel and works collaboratively with his clients to address issues before they erupt.

Drew also regularly advises educational institutions (including colleges, universities, high schools, and companies providing education services) on education-specific issues such as Title IX, FERPA, sexual assault and harassment matters, the PPRA, COPPA, state education laws, and other student and faculty issues. Drew is one of the rare lawyers to have tried and won a Title IX case – and he has done it multiple times.

Drew has also worked as in-house counsel for a financial services company, and he began his career as a criminal defense attorney.



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Jillian is a partner in Dorsey's Labor & Employment group, where she focuses her practice on employment litigation and advice, and independent investigations. Jillian assists employers in investigating and responding to internal complaints, agency charges, and lawsuits based on allegations of discrimination, harassment, retaliation, breach of contract, conversion, wage and leave statute violations, and whistleblower claims. In her advice practice, she helps clients avoid litigation and be in the best position possible if an employee does bring a claim. Jillian also helps employers navigate union grievances and unfair labor practice charges. Jillian has conducted a number of complex and sensitive investigations, using her clinical social work background to reach the heart of the matter in a way that leaves interviewees feeling respected during the process.

Before practicing law, Jillian spent six years in human resources management. In these roles, she advised managers on employee relations, recruiting, compensation, benefits, performance appraisals, and organizational development issues.



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Ryan is a Partner and co-leader in Dorsey's Labor & Employment Group. For two decades, Ryan has counseled corporate clients and HR professionals on wage & hour issues; non-competition, non-solicitation and other restrictive covenants; employee and independent contractor classification; hiring, discipline and termination; executive employment agreements; compensation plans; reductions in force; employee investigations; HR policies and M&A transactions.

Known for combining practical wisdom and efficiency with a vigorous approach to litigation, Ryan also has a successful track record of defending employers in complex and single plaintiff cases in federal and state courts, and arbitration. His litigation practice involves defense of Fair Labor Standards Act and state wage and hour actions; claims involving non-competition, non-solicitation, and confidentiality agreements; race, age, sex and disability discrimination suits; whistleblower and retaliation claims; and cases involving claims for breach of employment contracts and fiduciary duties. He has extensive experience representing clients in class and collective actions, as well as in appellate proceedings.

Ryan brings his expertise to bear for clients in many industries, including banks, food and agribusiness companies, technology companies, telecommunications companies, financial service firms, medical providers, manufacturers, distributors and retailers.



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