

Navigating the Latest for Employers in Labor and Employment Law

John Linker john.linker@akerman.com

Ryan Krone ryan.krone@akerman.com

April 16, 2024

A large field of red poppies stretches towards a horizon where the sun is setting, creating a warm, golden glow. The sky is filled with soft, white clouds. The foreground is dominated by the vibrant red petals of the poppies, some in full bloom and others as buds. The overall scene is peaceful and scenic.
akerman

Employment Law – What Employer’s Should be Paying Attention To In 2024



EEOC Statistics 2023

The EEOC received 81,055 discrimination charges in fiscal year 2023 (10% increase from 2022).

Biden administration approved record enforcement budget for 2023-2024 (increase of 10%)

2023

2023

2024

EEOC obtained more than \$665 million in monetary benefits for employees in 2023.



EEOC Strategic Enforcement Plan 2024- 2028

The EEOC identified six subject matter priorities for the EEOC in the Strategic Enforcement Plan.



Pregnant Workers Fairness Act

- **Covered employers** must provide **reasonable accommodations** to a worker's "**known limitations related to pregnancy, childbirth, or related medical conditions**", unless the employer can prove an "**undue hardship.**"
- **Covered employers** are any public or private employer with 15 or more employees
- The PWFA follows the basic requirements of the ADA with **Interactive Process**
- Definition of what is covered is very broad: "**known limitations related to pregnancy, childbirth, or related medical conditions**"
 - Current, potential, or past pregnancy
 - Lactation
 - Use of birth control
 - Menstruation
 - Infertility and fertility treatments
 - Mental health issues, including post-partum depression
 - Termination of pregnancy

Pay Transparency Update

Be sure to comply with each jurisdiction's requirements on pay transparency, including any disclosure requirements.

- In January, a federal government agency called the Federal Acquisition Regulatory (FAR) Council issued proposed rules regarding pay transparency and compensation history as part of the White House's effort to "reduce pay secrecy, help workers negotiate, and reduce pay gaps."
- If adopted, the proposed rules would generally apply only to **applicants for positions that perform work on or in connection with any federal government contract exceeding \$10,000.**
- Aside from the FAR proposed rule, it is important to be aware of **state law requirements** for pay transparency and ensure that all job postings comply with applicable law.



Workforce Verification and Child Labor

- Stepped up federal enforcement including coordinated DOL and DHS joint initiative, as well as a DOL and OSHA alliance
- DOL nearly doubled civil fines for child labor violations in FY 2023 – up to \$8.0 million
- A few weeks ago, a Tennessee manufacturer was hit with a \$296,951 civil penalty and the DOL secured a federal court consent judgment requiring employer to set aside \$1.5 million – a month of profits – for the benefit of the children it exploited
- Continue best practices such as training, setting up anonymous tip line and strong policies

Title VII Religious Accommodation

- In *Groff v. DeJoy*, the Supreme Court modified the “undue hardship” standard for religious accommodations
- Old “undue hardship” – more than *de minimis*
- New “undue hardship” – burden imposed is “substantial in the overall context of an employer’s business.”
- Procedures are still the same for employers, but the analysis is different



Paid Leave Laws Update

- The following jurisdictions have enacted paid leave laws that will take effect in 2024:
 1. California
 2. Minnesota
 3. Illinois
 4. Bloomington, MN
 5. Chicago, IL



Minimum Wage Increases

- 25 states have raised their minimum wage for 2024, as have many cities and counties. A few examples:
 - California
 - Illinois
 - New York
- Check your jurisdiction for mandated increases and effective dates to ensure compliance.



OSHA Expansion of Workplace Injury and Illness Reporting Requirements

- Covered employers with 100 or more employees in “high-risk industries” (everyone in this room) are required to electronically submit both OSHA forms 300 and 301 on an annual basis, as well as 300A Summaries.
- The new rule gives OSHA much more information in the short term to prepare for onsite inspections and target employers under existing national emphasis programs.



OSHA Walkaround Rule

- Employees can select another employee or non-employee third party to serve as their representative present during health and safety inspections
- The third party does not have to have safety credentials or related background
- Employers have no mechanism to object to the selection of third party
- Develop written procedures now
- Effective May 31, 2024



NLRB Update

- Over the last year, NLRB has issued several precedent-shifting decisions in the following areas:
 - Restricting employer policies that infringe on employee organizing rights
 - Creating a new framework for union representation proceedings
 - Returning to the Quickie Election timetables
 - Expanding remedies for unfair labor practices



The NLRB Is Still Labor-Friendly

The Board

- Chair Lauren McFerran (D)
- David M. Prouty (D)
- Marvin E. Kaplan (R)
- Gwynne A. Wilcox (D)

General Counsel's Office

- Jennifer A. Abruzzo, General Counsel
- Peter Sung Ohr, Deputy General Counsel
- Jessica Rutter, Associate General Counsel



NLRB Boosts Scrutiny of Employer Handbook Rules - *Stericycle*

- Workplace rules will be evaluated by determining whether an employee would “reasonably construe” the workplace rule as chilling protected conduct under Section 7.
- Assumes coercion based on presumption of “economic dependency” in the workplace.
- If an employee could reasonably interpret a rule to restrict or prohibit protected activity, the Board has met this burden.
- If this burden is met, the rule is presumptively unlawful.
- Social Media Restriction Policies
- Workplace Civility/Conduct Policies
- Confidentiality of Workplace Investigations (Including Sexual Harassment Investigations) Policies
- Conflict of Interest and Outside Employment Policies
- Media Contact Policies
- Confidentiality/Non-Disclosure Policies
- Non-Disparagement Policies

Practical Approach to *Stericycle*

- There are two questions employers need to ask themselves when it comes to work rules after *Stericycle*:
 1. *What is the legitimate interest that this rule advances for the company; and*
 2. *is this rule narrowly tailored to protect that legitimate interest.*
- For example, if an employer wants to protect confidential information, specifically identify what confidential information the employer wants to protect.



NLRB's Cemex Decision - Not Exactly Card Check, but Close

- *Cemex Construction Materials Pacific, LLC*, August 25, 2023
 - Abandons 50 years of established law and creates an easier way for unions to establish representation by potentially bypassing secret ballot elections
 - Puts greater pressure on employers when faced with union organizing
 - **Key Takeaways from Cemex decision**
 1. A union can demand recognition based on a *claim* of majority support
 2. If claim made, employer must immediately grant recognition; or,
 3. *Promptly* file its own NLRB petition seeking an election
- ** Failure to take either step--NLRB will order mandatory union recognition

More About Cemex

- What does “Promptly” mean? within 2 weeks
- After a petition for an election is filed, if employer subsequently commits an unfair labor practice, the petition will be dismissed, and the employer will be subject to a bargaining order
- If the employer neither recognizes the union nor promptly files a petition, the union may file a failure to bargain unfair labor practice charge against the employer
- Under new standard, a single unlawful statement or action could result in a bargaining order and no redo of the election even if union lost by a wide margin

Action Items in the Wake of Cemex

- Proactively educate employees about authorization cards and the importance of understanding the consequences of signing them
- Have a plan in place to challenge claims of majority status and recognition demands by a union
- Conduct up-to-date union awareness training for your managers and supervisors
- Review workplace rules and policies to avoid claim of ULP that would void an election

Quickie Elections



Rule Topic	Current NLRB Rule (Applicable until December 25, 2023)	New NLRB Rule (Effective on December 26, 2023)
Scheduling of Pre-Election Hearings	14 business days from when an employer receives a Notice of Hearing	<u>8 business days</u> from when an employer receives a Notice of Hearing
Postponement of Pre-Election Hearing and Employer’s Position Statement	Regional Directors had discretion to postpone a hearing for an unlimited amount of time	<u>2 business days</u> if a party demonstrates “special circumstances” and more than 2 business if a party demonstrates “extraordinary circumstances”
Submission of Employer’s Statement of Position	By noon 8 business days (or 10 calendar days) after employer receives a Notice of Hearing	<u>By noon the day before the hearing (i.e., usually 7 calendar days after being served a Notice of Hearing)</u>
Responsive Statement of Position	3 business days before the pre-election hearing	<u>Orally at the start of the hearing</u>
Posting of Notice of Petition For Election	5 business days after employer receives a Notice of Hearing	<u>2 business days</u> after receiving a Notice of Hearing
Post-Hearing Briefs	Up to 5 business days after the hearing, with an extension of 10 additional business days upon a showing of good cause	<u>Only with the regional director’s special permission</u>
Timing Between Decision and Direction of Election (“DDE”) and Notice of Election	Regional Directors had <u>discretion</u> to convey election details in a DDE or in a later-issued when Notice of Election	Regional Directors <u>should</u> specify the election details in the DDE and simultaneously transmit the Notice of Election with the DDE
Scheduling of an Election	Elections had to be scheduled for “the earliest date practicable” but there had to be a <u>20-business day waiting period between a DDE and the election</u>	<u>No 20 business-day waiting period</u> and elections must now be scheduled for “the earliest date practicable”

Joint Employer Standard

- Under the NLRB’s new joint employer rule, a company can be deemed a “joint employer” of another entity’s employees if it “possesses the authority to control (whether directly, indirectly, or both), or exercises the power to control ... one or more of the employee’s essential terms and conditions of employment,” even if such control is NEVER actually exercised.
- The final rule is only related to the Board finding a company is a joint employer under the NLRA and does not implicate other federal laws.
- Texas federal judge has temporarily struck down the new standard.



Questions?

