

# First & Foremosts

## Legal Update February 1, 2023

Presented by:

**Julie A. Reddig and Nicole M. Behrman**

*Employment Attorneys*

Lerch, Early & Brewer, Chtd

# Non-Competes

## FTC Finds Three Firms Engaged in Illegal Non-compete Agreements

- On January 4<sup>th</sup> the FTC issued determinations that three employers had used non-compete agreements as an unfair method of competition in violation of Section 5 of the FTC Act.
- One employer was a Security Services Provider who had noncompete agreements with security guards earning hourly wages at or near minimum wage and prohibited work for competitors in a 100-mile radius for two years. \$100,000 penalty for any alleged violations
- Other 2 employers were glass container manufacturers, a highly concentrated industry. Combined 1700 employees in the two companies covered by non-compete restrictions which banned workers for one and two years respectively from performing the same or similar services to any business in US and US Canada or Mexico respectively. Bound employees included those working at the plant furnaces and forming equipment as well as employees in production, engineering and quality assurance roles.

## FTC Proposes a Ban on Non-Compete Agreements for Employees

- On January 5, 2023 the FTC issued a proposed rule that would make it illegal unfair competition for an employer to enter into, attempt to enter into, or maintain a non-compete restriction with a worker.
- Non-compete restrictions with unpaid workers and independent contractors would also be nullified.
- Non-compete defined broadly to include any contractual term that has the **effect** of prohibiting the worker from seeking or accepting employment or operating a business after the conclusion of the worker's employment
- [FTC Fact Sheet](#); [FTC Proposed Rule](#)

### In light of the proposed rule, what should employers do now?

- If this impacts your business, participate in providing comments to the FTC independently or through your trade association.
- Ensure that your current Non-compete, Non-solicitation and/or Non-disclosure agreement(s) is/are compliant with state / local law and narrowly tailored to comply with common law.
- Take steps to ensure that what your company considers to be “trade secrets” qualify as such under state law.

# Ex COO Accused of Stealing Trade Secrets Hit With Injunction

- Former Law Firm COO allegedly downloaded and directed his subordinates to assist him in downloading electronic files relating to the firm's financials, practice information and billing rates on an external thumb drive.
- He also allegedly stole a hard copy of a binder containing financial records on compensation and allocation of profits.
- Former employer argued the stolen information was trade secrets because they included "proprietary methodologies" that helped the company maintain and enhance its position in the highly competitive market.
- Court granted temporary restraining order the next day and preliminary injunction within a few weeks thereafter.

# New Federal Laws For Pregnant and Nursing Workers

## New Federal Law requires Reasonable Accommodations for Pregnant Workers

- Applies to employers with 15 or more employees
- Requires employers to make reasonable accommodations to **known limitations** related to pregnancy, childbirth, or related medical conditions of a **qualified employee**, unless the accommodation would impose an undue hardship
  - “Known limitation”- physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions
  - “Qualified employees”- employees or applicants who:
    - with or without reasonable accommodations, can perform the essential functions of the employment position; or
    - are **temporarily unable** to perform essential functions, but will be able to in the near future, and inability can be reasonably accommodated.



# PUMP Act provides All Nursing Employees with Reasonable Time and Private Space to Express Breast Milk

- Requires employers to provide **all** nursing employees with reasonable time and private space to express breast milk for two years following:
  - the birth of a child; or
  - when the employee begins providing breast milk for a nursing child.
- Certain exceptions for crew members of an air carrier
- Employers with less than 50 employees not subject to requirement if would pose an undue hardship

# Legal Update: Americans with Disabilities Act

## EEOC Sues for Failure to Hire and Provide Accommodations to Qualified Deaf Applicant

- *Equal Employment Opportunity Commission v. North Memorial Health*, Civil Action No. 22-cv-777 (NEB/TNL)
- Applicant applied for “greeter position”
- Wore hearing aids, could hear people speaking without any difficulty, and could communicate verbally and with sign language
- Could perform essential functions of the position
- Was not selected
- EEOC sued, settled for \$180,000

## EEOC Updates Guidance Document on Individuals with Hearing Disabilities in the Workplace

- EEOC guidance document covers:
  - when an employer may ask an applicant or employee questions about a hearing condition and how it should treat voluntary disclosures;
  - what types of reasonable accommodations applicants or employees with hearing disabilities may need;
  - how an employer should handle safety concerns about applicants and employees with hearing disabilities; and
  - how an employer can ensure that no employee is harassed because of a hearing disability or any other disability.

[https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.eeoc.gov/laws/guidance/hearing-disabilities-workplace-and-americans-disabilities-act?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

## Guidance on ADA Accommodations and Medical Restrictions’ “Plain Meaning” From Federal Appeals Court

- *Tate v. Dart*, 51 F.4th 789 (7th Cir. 2022)
- Employee (Tate) had medical restrictions to “avoid situations in which there is a significant chance of violence or conflict.”
- Applied for promotion, not selected because position required “ab[ility] to manage and [defuse] regular, violent situations involving inmates.”
- Sued under ADA and Illinois Human Rights Act
- Trial court found in favor of employer, 7<sup>th</sup> circuit affirmed, holding:
  - Responding to inmate violate in emergencies was essential function; and
  - Employee could not perform it
- Key takeaway: employer can rely on plain meaning of a doctor’s note, even when an employee’s requested accommodation contradicts note

# Legal Update: FMLA

## Yes, you can fire an employee on intermittent FMLA who is abusing leave. You just have to be slow and steady.

- Long time employee of Drake University suffered from Multiple Sclerosis
- New supervisor at odds with employee, unhappy with performance and erratic attendance.
- Employee granted FMLA leave on intermittent basis.
- Performance issues continue; Employee continues to take unauthorized leave.
- Employer provides consistent feedback to employee on performance deficiencies and attendance, and keeps FMLA absences completely separate.
- Court found no evidence to support that termination on the basis of performance deficiencies and unexcused attendance was a pretext for discrimination or retaliation
- *Corkrean v. Drake University, No. 22-1554* (8<sup>th</sup> Cir. Dec 13, 2022).

## Beware-- there may still be jerks out there attacking your employees for taking parental leave

- Senior attorney sent a text message to an associate who had resigned during her maternity leave to take another job, stating:

“I had suspicions you were interviewing two months ago and I told Stephen then to ask you about it. I also told him to cut you loose at that time if confirmed. He was too nice of a guy to do so. What you did– collecting salary from the firm while sitting on your ass, except to find time to interview for another job– says everything one needs to know about your character. Karma’s a bitch. Rest assured regarding anyone who inquires, they will hear the truth from me about what a soul-less and morally bankrupt person you are.”



# Legal Update: Title VII & Discrimination Laws

# Jerry's Chevrolet and Jerry's Motor Cars Will Pay \$62,500 To Settle EEOC Equal Pay and Retaliation Suit

- A female employee working as a dispatcher was paid less than a male dispatcher who was performing equal work.
- Female employee complained to human resources.
- The following week she was fired purportedly for uttering profanity while on break. However a male employee who had engaged in more offensive conduct months earlier had only received a written warning.
- After the conciliation process failed, the EEOC filed Suit alleging discriminatory pay practices and retaliation under Title VII and the Equal Pay Act
- Employer entered into a consent decree to settle the case agreeing to provide monetary relief, adopting a policy creating channels for employees to report unequal pay and procedures for handling complaints; training managers on preventing sex based wage discrimination and retaliation of those requesting equal pay

# DEI Gone Sideways

- *Lutz v. Liquidity Servs., Inc.*, 2022 WL 17584348, at \*1 (D. Md. Dec. 12, 2022)
- Employee (Lutz) asked to retire because employer had “a diversity problem” and needed to “improve diversity profile of company”
- Replaced with African American woman
- The CEO announced Lutz’s retirement publicly and praised performance. CEO then terminated Lutz without cause
- Lutz sues, claiming discrimination based on race and gender
- Employer moves for summary judgment, court denies motion
- Key takeaway: taking **any** action based on a protected class, even if it is to promote DEI, can still be a violation of anti-discrimination laws

# Legal Update: Statutory Issues FLSA

## Limits of the Administrative Exemption to Overtime under the FLSA

- *Walsh v. Unitil Serv. Corp.*, 57 F.4th 353 (1st Cir. 2023)
- Dispatchers and controllers monitor gas and electric systems for automated alerts and respond to keep electricity or gas flowing safely
- Labor Department sued, said employees were misclassified as “exempt” under the administrative exemption
- Lower court disagreed, found in favor of employer
- DOL appealed, and 1<sup>st</sup> circuit reversed lower court
- For administrative exemption, must consider:
  - whether the primary duties of the controllers and dispatchers **were assisting with the running and servicing the business**, or **providing the very service offered**; and
  - what the scope or generality of the employee’s role was- is it more higher level, or was it more routine, day-to-day operations?

# Legal Update: Statutory Issues NLRA

## NLRB Expands its Make Whole Remedy to Include “Direct or Foreseeable” Financial Harms

- In Thryv Inc., the National Labor Relations Board held that it will add compensation for all direct or foreseeable pecuniary harms to the remedies recoverable for an unfair labor practice charge.
- Such as out of pocket medical expenses, credit card debt or costs to “make ends meet”
- Recovery for Foreseeable Pecuniary Harm is in addition to the Back Pay that is also recoverable.

# Legal Update: New State and Local Laws



### Maryland proposes a 4-day Workweek

- New bill in the Generally Assembly proposes the establishment of a 4 day workweek **pilot program** in the Maryland Department of Labor
- Private employer to voluntarily apply to the Maryland Department of labor to participate in the program if:
  - 4 day workweek applies to at least 30 employees; and
  - employer did not have had a prior intention of adopting a 4 day workweek.
- No reduction in pay or benefits
- Tax credit for participants
- Only proposed law

### New York Employers' Job Ads to Require Pay Range

- Applies to employers with 4 or more employees
- “Employer” includes any entity connecting applicants with employers
- Employers must:
  - Disclose the compensation range in advertisements for job, promotion, or transfer opportunities ***that can or will be performed, at least in part***, in New York State; and
  - Include job description in advertisement if it exists
- Effective September 17, 2023

### Quick Update: Guidance on Washington State Pay Transparency Law

- Law became effective January 1, 2023
  - Guidance from Washington Department of Labor and Industries clarifies:
    - Covered employers include employers with 15 or more employees, but only one has to work in Washington
    - Wage scale/salary range cannot be open-ended
    - What information needs to be included in description of benefits
- <https://www.lni.wa.gov/workers-rights/docs/ese1.pdf>

## New Jersey Amends its mini-WARN ACT

- Three main amendments:
  - Covered employers required to give employees 90 days notice prior to any mass layoff, transfer of operations or plant closing
  - *All employees* are counted to determine whether an employer is covered under the law and whether an employer is required to provide the notice
  - Covered employers are required to **pay severance** to employees who are affected by the employment loss, equal to **one week per each full year of employment the employee has worked for the employer**, or severance required by a collective bargaining agreement, whichever is greater

### Illinois enacts law providing employees with paid leave for ANY reason

- Employees entitled to earn up to a *minimum* of 40 hours of paid leave during a 12 month period
- Leave can be used for any purpose
- Employees not required to provide a reason for the leave, or any documentation or certification in support for their need to take leave
- Employers are not required to pay out the leave upon separation of employment, unless the paid leave taken is charged or credited to an employee's paid time off bank or vacation leave bank
- Effective January 1, 2024

### NYC Bill Would Ban Firing Most Workers Without a Good Reason

- Bill introduced in the New York City Council would prohibit employers from discharging employees that have completed a 30 day probationary period **unless** they had **just cause** to do so, or a bona fide economic reason
- Employers would be required to utilize progressive discipline, unless termination for an egregious failure by the employee to perform their duties, or for egregious misconduct

### Five Guys Illegally Collected Employees' Fingerprints, Suit Says

- Clock in and clock out procedures require employees to scan fingerprint
- Illinois Biometric Information Privacy Act prohibits employers from collecting biometric information/identifies
- Under the law, “biometric information” includes retina or iris scan, fingerprint, voiceprint, or scan of the hand or face

# Thank You!

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## About the Presenter



**Julie A. Reddig**

*Employment & Labor Attorney*  
Lerch, Early & Brewer

T 301-961-6099

F 301-347-1788

[jareddig@lerchearly.com](mailto:jareddig@lerchearly.com)

Employment attorney **Julie Reddig** helps employers build and maintain productive workplaces by navigating the many federal, state, and local laws protecting employees in the workforce. She counsels management on avoiding and defending against employment claims before administrative agencies and local, state, and federal courts in Maryland and the District of Columbia.

## About the Presenter



**Nicole M. Behrman**

*Employment & Labor Attorney*

Lerch, Early & Brewer

T 301-657-0744

F 301-347-1763

[nmbehrman@lercheearly.com](mailto:nmbehrman@lercheearly.com)

Nicole Behrman has represented clients before the DC Superior Court, District Court for the District of Columbia, the EEOC, DC Office of Human Rights, and DC Office of Administrative Hearings. She has litigated cases involving claims of discrimination, harassment, retaliation, FMLA interference and retaliation, wage and hour violations, breach of contract, and wrongful termination in violation of public policy.