First & Foremosts

Legal Update
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FLSA & Wage and Hour Law

Department of Labor Issues Final Independent Contractor Rule

- 6 Factor Test to determine Independent Contractor status:
  1. Opportunity for profit or loss depending on managerial skill;
  2. Investments by the worker and potential employer (are investments by worker capital or entrepreneurial in nature?);
  3. Degree of permanence of work relationship;
  4. Nature and degree of control over performance of the work and working relationship;
  5. The extent to which the work performed is an integral part of the potential employer's business; and
  6. The skill and initiative of the worker.

Department of Labor Overtime Rule Near Release

- Department of Labor issued a proposed rule that would:
  - Increase the salary basis to $1,059 per week;
  - Increase the total annual compensation requirement for highly compensated employees to $143,988 per year; and
  - Update salary thresholds every 3 years.

- Proposed rule currently under review at White House Budget Office.

Department of Labor Issued Final Rule on Nondisplacement of Service Contract Workers

- Applies to service contracts and subcontracts covered by the Service Contract Act.
- Before filling positions for a follow-on service contract, successor contractors must extend “good faith offers of employment” to employees that were employed by the predecessor contractor and whose employment will be terminated as a result of the award of a successor contract
- Exceptions:
  - Predecessor contractor will retain employee;
  - Predecessor employer would have just cause to terminate the employee;
  - Employee is not a “service employee”;
  - The employee had worked, in whole or in part, on nonfederal contracts.

National Labor Relations Act

NLRB's Joint Employer Rule VACATED by Texas Federal Court

- National Labor Relations Board final rule used to determine whether two companies are "JOINT EMPLOYERS" For purposes of the National Labor Relations Act was set to go into effect on February 26, 2024.
- The rule was challenged in the courts nearly immediately as it would result in more employers being determined to be joint employers. The court stayed enforcement of the rule until March 11, 2024.
- On March 9, 2024, the court held that the Proposed Rule was unlawfully broad because an entity that could be deemed a joint employer, simply by having the right to exercise indirect control over one essential term.
- NLRB unlikely to let this go without further attempts to change the existing law.
- *Chamber of Commerce of the United States of America et al., v. National Labor Relations Board et al, No 6:23-cv-00553 (U.S.D.C TX March 9, 2024).*

NLRB General Counsel Announces Belief that Policies Prohibiting Outside Employment Violate the NLRA

- NLRB General Counsel issued a memo that she intends to encourage the NLRB to issue a decision that an employer's policy that prohibits outside employment violates the NLRA.
- At issue was an Agreement that included a provision requiring an employee to "devote their full time to the conduct of the business of the Employer" and agree not to "engage in any activity competitive with or adverse to the Corporation's business or welfare."
- Because this provision prevented employees from being an employee of another entity, the General Counsel concluded that it would be unlawful as it implicitly prohibited "salting;" and could prohibit union organizing or speaking out publicly about terms and conditions of employment in violation of Section 7 of the NLRA
- *Promotional Concepts,* NLRB 07-CA-322063 (General Counsel case closing email).

Firing a Worker for Expressing Covid Concerns Violates the NLRA

- An NLRB judge ruled that a marketing firm illegally fired a worker for discussing Covid-19 safety concerns.
- The employee expressed concerns to management and contacted the NLRB to ask about the right to discuss COVID safety issues at work. Management dismissed the employee's concerns and threatened termination before ultimately separating the employee.
- The NLRB submitted the case to the 5th Circuit for an entry of its January 10, 2024 judgment.
- The 5th Circuit entered judgement.
- A reminder that non-supervisory employees have the right to raise concerns regarding the terms and conditions of employment
- *NLRB v. iLEAD WORLDWIDE, INC. D/B/A LEGACY ONEWAY CONSULTING, No. 24-60041 (5th Cir. February 28, 2024).*

COSTCO's Response to a Successful Union Organizing Campaign

- Late last year COSTCO gave an interesting response to the unionization of its operation in Norfolk
- The CEO's of COSTCO issued a letter to all US employees that included the following:

> "To be honest, we're disappointed by the result in Norfolk. We're not disappointed in our employees. We're disappointed in ourselves as managers and leaders. The fact that a majority of Norfolk employees felt that they wanted or needed a union constitutes a failure on our part."

NLRB's "BLM" Ruling Changes the Way Dress Code Policy Can Be Enforced

- Late last month the Board ruled that an employer must allow customer-facing employees to write "Black Lives Matter" on their uniforms.
- Employee of a large retailer began wearing "BLM" on his uniform to show support for coworkers he believed were being treated unfairly by the employer.
- Employer's dress code prohibited workers from wearing political messages unrelated to the workplace.
- The employer stated that the employee could not return to work until the messaging was removed from the uniform. The employee resigned.
- Political and social messaging can be protected conduct when there is a connection between the messaging and the terms and conditions of employment.
- The NLRB held that the employee's wearing BLM was protected because it was a "logical outgrowth" of the employee's prior conduct in opposing discriminatory treatment in the workplace.
- *Home Depot USA, Inc.,* Case 18–CA–273796 (Feb 21, 2024).

Update on Pregnant Workers Fairness Act

Pregnant Workers Fairness Act Update

- PWFA requires employers with 15 or more employees to provide reasonable accommodation to employees for known limitations related to pregnancy, childbirth, or related medical conditions, unless doing so would cause the employer undue hardship.

- Recently, a Texas federal court blocked enforcement of the PWFA against Texas state government employees.

- *Texas v. Dep't of Justice*, N.D. Tex., No. 5:23-cv-00034

Wage Disclosure

DC Council Passes Wage History Ban/Wage Transparency Bill

- Wage History
  - Employers are prohibited from:
    - Screening prospective employees based on their wage history;
    - Requiring a prospective employee's wage history satisfy any minimum or maximum criteria;
    - Requesting or requiring as a condition of being interviewed a prospective employee to disclose their wage history; or
    - Seeking the wage history of a prospective employee from their prior employer.

- Pay Disclosure Requirements
  - Employers are required to:
    - Provide the minimum and maximum salary or hourly wage in all job listings and position descriptions advertised. The wage range must be a range that the employer in good faith believes at the time of the posting it would pay for the position.
    - Disclose to prospective employees the existence of healthcare benefits that employees may receive before the first interview.
    - Post workplace notice.

Proposed Rule Requiring Federal Contractors and Subcontractors to Disclose Compensation Data in Job Posting and Prohibit Compensation History Inquiries

- Applies to federal contracts and subcontracts for commercial products or commercial services valued in excess of $10,000 and to be performed within the US and its outlying areas.
- Applies to the recruitment and hiring of positions that will perform work on or in connection with a federal contract or subcontract.
- Proposed rule includes:
  - Compensation history ban
  - Compensation disclosure requirement for job advertisements
  - Notice requirements
  - Contractual flow down obligations for subcontracts

Virginia Passes Minimum Wage and Pay Transparency/Salary History Ban Bill

- Minimum Wage
  - $13.50 an hour beginning January 1, 2025
  - $15.00 an hour beginning January 1, 2026

- Pay Transparency/Salary History Ban
  - Employers prohibited from asking for the wage or salary history of a prospective employee, relying on the wage or salary history of a prospective employee in considering whether to hire the employee, or refusing to interview or hire a prospective employee because they didn't share their wage or salary history.
  - Employer also can't rely on the wage or salary history of a prospective employee in determining how much to pay the prospective employee if hired, unless the employee voluntarily shares their wage or salary history and the employer:
    - relies on the history to support setting the employee's wages higher than the employer's initial offer and the higher wage does not create an unlawful pay difference, and
    - the employer seeks to confirm the history to support a wage higher than the wage offered by the employer only to the extent that this high wage does not create an unlawful pay difference.
  - Employers required to disclose in any public or internal job postings the minimum and maximum wages or salary for the position that are set in good faith.

Update on Paid Family Leave

Update on Maryland FAMLI

- Maryland Department of Labor taking steps toward implementation of FAMLI
- FAMLI will ensure Maryland workers are able to:
  - Take time away from work;
  - Receive job protection;
  - And earn 90% of compensation up to $1,000 per week
- For up to 12 weeks continuously or on an intermittent basis for paid family and medical leave; and an additional 12 weeks of paid parental leave.
- Contributions and Benefits currently scheduled to start in October 1, 2024 and January 1, 2026 respectively, but proposed legislation is to shift these to July 1, 2025 to July 1, 2026, respectively.
- “Draft regulations” issued: https://paidleave.maryland.gov/stakeholders/Documents/FAMLI%20Regs%20Draft.pdf
- Employer FAQ’s: https://paidleave.maryland.gov/employers/Documents/Frequently%20Asked%20Questions%20from%20Employers.pdf

VA General Assembly Passed a Paid Family Leave Bill

- If enacted, the legislation would require the Virginia Employment Commission to establish an insurance program to:
  - Cover up to 80% of a worker's weekly salary
  - During up to eight weeks of family and medical leave
- The program would be funded by both employers and employees.
- Virginia already has private-sector program in place that was established in 2022 that gives employers the ability to purchase insurance through the private marketplace that both meets the needs of employers and employees rather than mandating specific coverage benefits to all employers across the commonwealth.

State and Local Laws

DC Min Wage Law Expands to Those Working 2 Hours A Week in DC

- DC has revised its minimum wage law to expand application to more employees.
- Previously the wage and hour law covered employees who work more than 50% of the time in the District.
- Under the new law, minimum wage must be provided to employees who perform at least 2 hours of work in the District, for the same employer, in one work week.
- Beginning July 1st the minimum wage will increase to $17.50 for non-tipped workers and $10 for tipped workers.

DC Attorney General Enforcing Ban on Non-compete Agreements

- The Office of the Attorney General announced they had prosecuted and settled three investigations into employers suspected of violating the District's ban on non-compete agreements.
- DC ban on Non-compete Agreements went into effect on October 1, 2022. Non-competes are prohibited for DC workers who earn less than $150,00 per year.
- Three employers were found to have violated the non-compete law by entering into non-compete agreements with employees, and one employer also violated the DC Anti-Trust Act by including a "no-poach" clause in its contracts with franchisees.
- Under the terms of the settlement agreements the companies will have to pay fines to the District and the affected workers, damages to employee who was unable to work for several months due to the agreement, and inform employees existing non-compete agreements no longer in effect and unenforceable.

About the Presenter

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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.

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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.

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Thank You!

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