

First & Foremosts

Legal Update June 5, 2024

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FLSA & Wage and Hour Law

Final Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees

- Final Rule increases the salary basis for white collar exemptions to:
 - \$844 per week, beginning July 1, 2024.
 - \$1,128 per week, beginning January 1, 2025.
- Final Rule increases the highly compensated employee total annual compensation level to:
 - \$132,964 per year on July 1, 2024.
 - \$151,164 per year on January 1, 2025.
- Adopts a mechanism to update salary thresholds every three years beginning July 1, 2027.

DOL's Position Regarding AI in the Workplace: Field Assistance Bulletin (FAB) No. 2024-1, Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards

- Cautions employers on relying on automated timekeeping and monitoring systems to determine hours worked under the FLSA.
- Cautions employers that AI systems that process leave requests, track time off, determine eligibility for FMLA leave, and the like, could result in errors such as improperly denying a leave request, miscalculating a leave entitlement, or too frequently testing for eligibility.
- https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2024_1.pdf

DOL's AI Principles for Employers

- Centering Worker Empowerment
- Ethically Developing AI
- Establishing AI Governance and Human Oversight
- Ensuring Transparency in AI Use
- Protecting Labor and Employment Rights
- Using AI to Enable Workers
- Supporting Workers Impacted by AI
- Ensuring Responsible Use of Worker Data

TITLE VII AND GENERAL DISCRIMINATION PRINCIPLES

EEOC Releases Workplace Guidance to Prevent Harassment

Updates to sex-based harassment

- Including harassment based on sexual orientation or gender identity
- Including harassment based on pregnancy, childbirth, or related medical conditions

Updates to standard for retaliatory harassment

Resources and guidance for employers

https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_Toc164808058

Muldrow v. City of St Louis

- April 17 2024 - U.S. Supreme Court ***unanimous*** decision
- Police Sergeant claimed that transfer from Intelligence Division to supervisor of uniformed neighborhood patrol officers
- Supervisor stated that male police officer would be a “better fit” for the “very dangerous” role in the Intelligence Division.
- Following transfer, plaintiff’s rank and pay remained the same but her duties, schedule and position perks changed, the prestige and caliber of her responsibilities decreased
- Plaintiff claimed discrimination under Title VII.
- Lower courts dismissed claim because Plaintiff failed to show “significant” change in working conditions producing “material employment disadvantage.”
- Supreme Court held this standard was an incorrect interpretation of Title VII.
- Going forward, employees bringing discrimination claims under Title VII alleging discriminatory transfer only have to show “***some injury***” and do not need to meet any form of heightened standard to prove that the job transfer was disadvantageous.

Pregnant Workers Fairness Act New Regulations

- PWFA went into effect on June 27, 2023
- Newly issued final PWFA regulations effective June 18, 2024
- PSFA mandates that all US private sector employers, state and local governments with 15 or more employees provide reasonable accommodation to qualified employees and applicants with known limitations that are arising out of or affected by pregnancy, childbirth or related medical conditions unless accommodation will cause the employer undue hardship.
- Employer may not require an employee or applicant to accept an accommodation that is not a reasonable accommodation arrived at through the interactive process
- Leave is the accommodation of last resort
- PWFA accommodation requests should NOT be analyzed the same way as the request for accommodation under the ADA
- [Ten Steps Employers should follow to Comply with the Pregnant Workers Fairness Act's New Regulations](#)

10 Steps to analyze an accommodation under PWFA

Step 1 – Is there a “known limitation”?

“Known” = The employer’s duty to accommodate under the PWFA is triggered when the employee, applicant or their representative has communicated the limitation and requested an adjustment or change in their working conditions due to this limitation.

The request may be made by an employee, applicant, or their representative orally, in writing or by another effective means

The request must be made to a: manager, supervisor, someone with supervisory authority, someone who directs the employee’s tasks, a human resources representative, or anyone identified in the employer’s policy on requesting accommodation.

“Limitation” = a physical or mental condition that is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

TITLE VII AND GENERAL DISCRIMINATION PRINCIPLES

10 Steps to analyze an accommodation under PWFA

Step 2 – Is the known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions of the employee or applicant themselves?

Pregnancy and Childbirth:

- current pregnancy;
- past pregnancy;
- potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception);
- labor;
- childbirth (including vaginal and cesarean delivery).

Related Medical Conditions:

- termination of pregnancy, including via miscarriage, stillbirth, or abortion;
- ectopic pregnancy;
- preterm labor;
- pelvic prolapse;
- nerve injuries;
- cesarean or perineal wound infection;
- maternal cardiometabolic disease;
- gestational diabetes;
- preeclampsia;
- HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome;
- hyperemesis gravidarum;
- anemia;
- endometriosis;
- sciatica;
- lumbar lordosis;
- carpal tunnel syndrome;
- chronic migraines;
- dehydration;
- hemorrhoids;
- nausea or vomiting;
- edema of the legs, ankles, feet, or fingers;
- high blood pressure;
- infection;
- antenatal (during pregnancy) anxiety, depression, or psychosis;
- postpartum depression, anxiety, or psychosis;
- frequent urination;
- incontinence;
- loss of balance;
- vision changes;
- varicose veins;
- changes in hormone levels;
- vaginal bleeding;
- menstruation;
- lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections.

10 Steps to analyze an accommodation under PWFA

Step 3 – Is the employee or applicant “qualified”?

Can the individual perform the essential functions of the position with or without a reasonable accommodation OR is the inability to perform the essential function only “temporary,” they will be able to perform the essential function “in the near future,” and the inability to perform the essential function can be reasonably accommodated.

Step 4 – Is the request for reasonable accommodation a “predictable assessment”?

- Allowing an employee to carry or keep water near and drink, as needed;
- Allowing an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- Allowing an employee to take breaks to eat and drink, as needed.

10 Steps to analyze an accommodation under PWFA

Step 5 – Does the employer need documentation from a healthcare provider to support the request for reasonable accommodation?

Limited to:

- *Confirm the employee or applicant's limitation(s)*
- *Confirm the limitation is related to affected by or arising out of pregnancy, childbirth or a related medical condition*
- *Describe the adjustment or change at work that is needed because of the limitation and the expected duration*

Step 6 – Can the employer provide an interim accommodation?

Step 7 – Identify reasonable accommodation(s) the employer can provide for the known limitation and engage in the interactive process with the employee regarding the proposed reasonable accommodation(s).

10 Steps to analyze an accommodation under PWFA

Step 8 – Assess whether the identified reasonable accommodation poses an undue hardship.

Step 9 – Only implement leave as an accommodation if the employee requested it or it is the accommodation of last resort.

Step 10 – Are there any other laws that are more protective that require a different result?

"Can an employee avoid workplace training on respect in the workplace based on a sincerely held religious belief?"

- No! according to the EEOC in *Barrett V., v. Vilsack*, Appeal No 2019005478 U.S. EEOC (March 7, 2024).
- Employee requested exemption from workplace Civil Rights Training based on his religion because the training would include "LGTB issues [that] contradicted [his] sincerely held religious beliefs which are protected beliefs expressly protected by federal law."
- Employer denied the request. Employee attended training and sued.
- EEOC concluded that employee failed to assert that his religious belief was in conflict with the workplace training and that it posed an undue hardship to the employer to not require the employee to attend the training because it interfered with the rights and interests of employees protected by the EEO laws and the employers efforts to meet its legal obligation to train employees on such laws.

EEOC Sues 15 for Failing to File the EEO-1

- Last week, the EEOC filed suit against 15 different employers in cases across the country due to the employer's failure to file EEO-1 reports
- Private Sector employers with 100 or more employees must annually file EEO-1 reports
- Deadline for this year's EEO-1 is June 4, 2024

7th Circuit sides with Employer in Case involving Harassment by Mentally Ill Third Parties

- EEOC filed suit on behalf of black employees of an assisted living facility who were subjected to racial harassment.
- At the trial court, the jury concluded that the employer was not liable for the harassment for all but one worker.
- On Appeal, the 7th Circuit held the employer was not liable for harassment because the “aspersions came from patients suffering severe mental impairment” and therefore weren’t severe or pervasive enough for a racial harassment claim under Title VII.
- *EEOC v. Vill. at Hamilton Pointe LLC* 2024 BL 159667 Case No. 22-2806, (7th Cir. May 9, 2024).

FTC Rule

FTC Final Rule Bans Most Non-Competes with Workers Across US

- Under the FTC's final rule, an employer cannot:
 - Enter into a new non-compete agreement with any worker, or
 - Enforce an existing non-compete agreement with any worker, except for certain "senior executives."
Senior executive means a worker who:
 - (1) Was in a policy-making position; and
 - (2) Received from a person for the employment:
 - (i) Total annual compensation of at least \$151,164 in the preceding year; or
 - (ii) Total compensation of at least \$151,164 when annualized if the worker was employed during only part of the preceding year; or
 - (iii) Total compensation of at least \$151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.
- Exceptions for bona fide sale of a business
- Affirmative notice requirement. [FTC provided model notices](#).
- Effective date for rule: September 4, 2024

National Labor Relations Act

Starbucks Store Civility Rule Violated Law, NLRB Judge Says

- Starbucks Corp., N.L.R.B. A.L.J., No. 07-CA-302784, 5/21/24
- Starbucks fired an employee after she had multiple confrontations with the store and district managers discussing terms and conditions of employment.
- Management claimed that she had violated Starbucks' policy regarding communicating respectfully.
- Policy stated that workers must “communicate with other partners and customers in a professional and respectful manner at all times” and “[w]e treat each other with dignity and respect and connect with transparency.”
- Policy found to be unlawful under NLRA.

State and Local Laws

Revisions to Maryland FMLI

New Amendments alter administrative deadlines, definitions, components of the program:

- Start for employer and employee contributions pushed from October 1, 2024 to July 1, 2025
- Start of benefit payments to covered employees pushed from January 1, 2026 to July 1, 2026
- To be covered - employees must have worked 680 hours in Maryland in the most recently completed four quarters of employment prior to taking leave
- Previously announced total rate of contribution of .90% may change due to the delayed start date and is scheduled to be set by the MDOL February 1, 2025
- Amendment removes employer option to use combined plans if not participating in the FMLI Program. Now the only exception to the State plan is through a state-approved employer provided program or an authorized insurance plan.
- Appeal process established for an adverse decision under the private employer plan and if an employee prevails the employer or insurer may be required to pay costs to the employee.
- MDOL may disclose information to the employer about an employee's application for FMLI benefits for claims administration purposes
- Regulations will be issued by January 1, 2025.

New Maryland Pay Transparency/Salary Posting Law

The Maryland Wage Transparency Law requires employers, both public and private, to disclose in any public or internal job posting the “wage range” for an open position, as well as provide a general description of any other benefits or offered compensation.

- Job “posting” = any “solicitation intended to recruit applicants for a specific available position” including recruiting directly by the employer or indirectly through third-party, internal postings, public postings,
- “Wage Range” = the minimum and maximum hourly rate or salary for the position set in good faith by reference to:
 - Any applicable pay scale;
 - Any previously determined minimum/maximum for the position;
 - The minimum/maximum of an individual holding a comparable position at the time; or
 - The budgeted amount for the position
- Applies only to positions physically performed, at least in part, in Maryland
- 3-year record-keeping requirement from date of initial posting or the job being filled

New Maryland Paycheck Stub Law

Starting on October 1, 2024, pay stubs issued to employees working in Maryland must include the following information for each pay period:

- (1) the employer's name (as registered with the State), address, and phone number;
- (2) the date of the payment and the beginning and end dates of the applicable pay period;
- (3) the total number of hours worked during the pay period (for employees that are not exempt from overtime laws);
- (4) the rate of pay;
- (5) the gross and net pay earned in the pay period;
- (6) the amount and name of all deductions;
- (7) a list of all additional pay included in the paycheck (bonuses, commissions, etc.); and
- (8) for employees paid at a piece rate, the applicable piece rate and the number of pieces completed.

- Amends the Wage Payment and Collection Law

Expansion of Equal Pay for Equal Work Act

Under new amendment, employers may not offer less pay or provide less favorable employment opportunities to employees based on race, religious beliefs, sexual orientation, or disability, in addition to the existing protection for sex and gender identity.

Discrimination Protections for Military Status and Hiring preference for Military spouses

- First law amends Maryland's antidiscrimination law to add military status as a protected class
 - "Military Status" –
 - A member of the uniformed services set for under federal law
 - A member of a reserved component of the armed forces as defined under federal law
 - A dependent of a uniformed services member or reservist
- Second law adds the spouse of a full-time active member of the uniformed services to the list of those who may be granted a preference in hiring or promotion

New Montgomery County Maryland Laws – Health Care Privacy

- Amends Human Rights Laws, Chapter 27 of the Montgomery County Code by adding Section 27-86 – Health Care Privacy
 - Limits inquiries by employers regarding certain health information of prospective employees
 - Limits consideration by employers of certain health information of prospective employees
 - Prohibits inquiries by employers regarding certain sexual and reproductive health information of prospective employees

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