BV-SHRM Government Affairs/Legislative Update

May 2024

Pregnant Workers' Fairness Act: EEOC Proposed Regulations and Court Challenges

On April 15, 2024, the EEOC issued its final regulations under the Pregnant Workers' Fairness Act (PWFA), which requires employers to make reasonable accommodations to known limitations associated with pregnancy, childbirth and related conditions. The regulations take effect on June 18, 2024. Employers should familiarize themselves with the notable aspects of the final rule, which include:

- Employees are entitled to reasonable accommodation even for a limitation that is modest, minor or episodic, so long as the limitation is related to pregnancy, childbirth or a related condition.
- Requests for four common types of accommodation will, in virtually all cases, be found to be reasonable and not an undue hardship, absent unusual circumstances. These accommodations are: (1) allowing an employee to carry or keep water near and drink, as needed; (2) allowing an employee to take additional restroom breaks, as needed; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and (4) allowing an employee to take breaks to eat and drink, as needed.
- Employers may seek medical documentation from an employee requesting an accommodation only when reasonable under the circumstances to determine whether the employee has a physical or mental condition related to pregnancy, childbirth or related conditions. The interpretative guidance released with the final rule provides examples showing when requesting documentation is "reasonable under the circumstances."
- Employers must consider eliminating or transferring essential job functions, as an accommodation, for up to 40 weeks during an employee's pregnancy, absent undue hardship.

Employers will also want to watch for court challenges to the PWFA. In February, a Texas federal court **held** that the PWFA is invalid on the basis that it was enacted in violation of the Quorum Clause of the Constitution because House members who voted by proxy were counted toward the quorum requirement. The court issued a permanent injunction barring the EEOC from enforcing the statute against the state of Texas, its agencies and departments. The EEOC did not appeal. Following Texas' win, private employers or other states may challenge the PWFA on the same grounds and, if successful, further restrict the statute's reach.

What you should know about the PWFA link on EEOC website - https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act

Department of Labor Raises Salary Thresholds for Certain FLSA Overtime Exemptions

On April 23, the US Department of Labor released a final rule increasing the FLSA's salary threshold for the executive, administrative, and professional exemptions to overtime requirements. To qualify for one of these exemptions, employees must be paid on a salary basis, their salary must be at or above the threshold and their "primary duty" must meet certain criteria. Effective July 1, 2024, the salary threshold will increase from $684/week ($35,568/year) to $844/week ($43,888/year). On July 1, 2025, the salary threshold will increase to $1,128/week ($58,656/year). Starting July 1, 2027, the thresholds will automatically increase every three years.

The salary threshold increases are expected to impact 4 million workers. To meet the new requirements, employers will need to decide whether to give affected employees a pay raise or reclassify them as nonexempt and pay overtime if they work more than 40 hours in a workweek. While the rule is likely to be challenged in court and may be blocked, employers should nonetheless plan now for the new salary thresholds to take effect.

DOL Issues Independent Contractor Final Rule – effective March 11, 2024

The final rule rescinds a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. Under the new rule, employers would use a totality-of-the-circumstances analysis, in which none of the factors carry greater weight.

The new test includes six factors:

1. The degree to which the employer controls how the work is done.
2. The worker's opportunity for profit or loss.
3. The amount of skill and initiative required for the work.
4. The degree of permanence of the working relationship.
5. The worker's investment in equipment or materials required for the task.
6. The extent to which the service rendered is an integral part of the employer's business.

"No factor or set of factors has a predetermined weight, and a totality of the circumstances of the working relationship must be considered," Jessica Looman, administrator of the DOL's Wage and Hour Division, said in a Jan. 8 press briefing. "The six factors are not exhaustive, nor are any of them more important than any others."

Looman confirmed that work-related expenses imposed by the employer are not indicative of contractor status, and actions taken by the employer with the sole purpose of complying with the law do not indicate control exercised by the employer.

She noted that the final rule is meant to apply broadly to all types of workers, not specifically to certain industries or certain types of work.

The DOL intends to release more guidance to help employers comply with the final rule.

FTC Announces Rule Banning Noncompetes

April 23, 2024 - Today, the Federal Trade Commission issued a final rule to promote competition by banning noncompetes nationwide, protecting the fundamental freedom of workers to change jobs, increasing innovation, and fostering new business formation.

In January 2023, the FTC issued a proposed rule which was subject to a 90-day public comment period. The FTC received more than 26,000 comments on the proposed rule, with over 25,000 comments in support of the FTC's proposed ban on noncompetes. The comments informed the FTC's final rulemaking process, with the FTC carefully reviewing each comment and making changes to the proposed rule in response to the public's feedback.

In the final rule, the Commission has determined that it is an unfair method of competition, and therefore a violation of Section 5 of the FTC Act, for employers to enter into noncompetes with workers and to enforce certain noncompetes.

The Commission found that noncompetes tend to negatively affect competitive conditions in labor markets by inhibiting efficient matching between workers and employers. The Commission also found that noncompetes tend to negatively affect competitive conditions in product and service markets, inhibiting new business formation and innovation. There is also evidence that noncompetes lead to increased market concentration and higher prices for consumers.