HAND ARENDALL HARRISON SALE

EMPLOYMENT Alert

Employment Law Developments for the New Year

2023 presents some significant developments in the employment law landscape making the new year an important time for employers to revisit policies and monitor for important changes. The federal level expansion of protections for workers, along with economic projections signaling a tough labor market, will give employers much to consider throughout the year. For now, there are four pressing issues to explore. Two are in final form and ready for implementation and two are proposed rules that will require further monitoring.

The Pregnant Workers Fairness Act (PWFA)

The Pregnant Workers Fairness Act (PWFA), taking effect on June 27, provides protections for pregnant workers and applicants like those provided to disabled workers under the Americans with Disabilities Act (ADA). Since pregnancy is not necessarily a disability under ADA, PWFA steps in and provides ADA level protections to ensure reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or related medical condition. Like ADA, PWFA requires an interactive process in determining appropriate workplace accommodations. Employers must make reasonable accommodations unless doing so would create an undue burden. The Act further provides that covered employees cannot be required to take leave, paid or unpaid, if there is another reasonable accommodation that can be made. Federal guidance and examples of appropriate accommodations can be expected soon. PWFA applies to private employers with 15 or more employees and all governmental employers.

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP)

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP), portions of which are immediately effective, expands an employer's obligation to provide accommodations to nursing employees who are exempt from overtime, in addition to nonexempt employees which were already covered by existing law. As a reminder, employees should be provided reasonable break time and privacy to express milk, in a location other than a bathroom that is shielded from view and free from intrusions. PUMP further clarifies that break time shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break. The remedies provided under the Fair Labor Standards Act (FLSA) are made available to nursing employees. Employers with less than 50 employees are not subject to PUMP if they can establish that complying would impose an undue hardship to the employer, causing significant difficulty or expense.

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Federal Trade Commission's Proposed "Ban" on Non-Compete Agreements

The Federal Trade Commission (FTC) is at a critical point of proposed rulemaking which could result in a practical ban on non-compete agreements. Because the FTC recognizes a potential for such agreements to lower worker wages and stifle competition, it designates as unfair the entering into, the attempt to enter, and the maintenance of a non-compete agreement with any worker, which it broadly considers to be any term that restricts a worker from seeking or accepting other employment. This rule could also impact non-solicitation agreements. The proposed rule would apply to employees, independent contractors, and even volunteers. If it becomes final, employers will be required to avoid such clauses in future contracts, to review and rescind non-compete provisions in existing employment contracts, and to provide individual notice of rescission to workers under previous contracts. The public comment period is still open, and the U.S. Chamber of Commerce has vowed to challenge the legality of the rule if adopted. This is one to watch.

Department of Labor Reconsiders Test for Independent Contractor Designation

The United States Department of Labor (DOL) has also published a far-reaching proposed rule that would alter the test for determining whether a worker is properly designated as an independent contractor for purposes of the FLSA. As a reminder, the FLSA imposes federal wage and hour requirements on employers with respect to their employees. However, these requirements do not apply to independent contractors. In recent years, independent contractor status was assessed under a simplified multi-factor test, stressing two primary considerations – a worker's control over their work and their opportunity for profit or loss. Under the proposed rule, there are six factors which must be considered in totality when determining worker classification. These factors are non-exhaustive and have no predetermined weight, and so there may be less predictability. And, after an extensive factual analysis, it is more likely that workers currently classified as independent contractors will be held misclassified. The comment period has closed and a final rule, if pursued, will likely be issued late in 2023, with legal challenges sure to follow.

Practically, this is a time for employers to review policies, procedures, and contracts to ensure compliance with current laws and to develop strategies for compliance with proposed laws. If you need further information or assistance with meeting the many employer challenges that 2023 may bring, please contact a member of our Employment team.