HAND ARENDALL HARRISON SALE

EMPLOYMENT Alert

Employment Law Developments

April 2024

There are a number of critical recent updates that have significant implications for employers.

DOL Increases Overtime Exemption Salary Threshold in Final Rule

On April 23, 2024, the Department of Labor (DOL) announced its Final Rule increasing the Fair Labor Standards Act (FLSA) salary thresholds for the overtime exemptions for executive, administrative, and professional employees. The new rule will begin to take effect on July 1, 2024 and is expected to impact millions of American workers.

The FLSA requires employers to provide minimum wage and overtime pay to each employee unless the employee qualifies for an exemption. Executive, administrative, and professional (EAP) employees who perform specific job duties and are paid a salary that is at least the amount specified in regulations, may qualify for the EAP or "white collar" exemption. Employees may also be exempt if they are highly compensated (HCE), paid a salary, and satisfy a minimal duties test.

The following table provided by the DOL sets forth the new salary levels for the standard EAP and the HCE exemptions, which will first go into effect on July 1 but will increase again on January 1, 2025, and then adjust again on January 1, 2027 and every three years after based on available data:

DATE	STANDARD SALARY LEVEL	HIGHLY COMPENSATED EMPLOYEE TOTAL ANNUAL COMPENSATION THRESHOLD
Before July 1, 2024	$684 per week (equivalent to $35,568 per year)	$107,432 per year, including at least $684 per week paid on a salary or fee basis.
July 1, 2024	$844 per week (equivalent to $43,888 per year)	$132,964 per year, including at least $844 per week paid on a salary or fee basis.
January 1, 2025	$1,128 per week (equivalent to $58,656 per year)	$151,164 per year, including at least $1,128 per week paid on a salary or fee basis.
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

Source: https://tinyurl.com/FLSAfinalrule

Employers need to prepare by considering budgetary constraints and compensation strategies for those currently exempt employees whose salaries fall below the new thresholds. After thorough analysis, employers may decide to increase current employees' salaries to meet the new thresholds for exemption or maintain their compensation level and change their status to nonexempt so those employees are entitled to overtime pay. Employee training may be needed as employers take this opportunity to review company policies and procedures related to job duties, timekeeping, and overtime approval. Take note, however, that as in the past with proposed salary threshold adjustments, legal challenges are expected. Our employment team is committed to keeping you up to date on the developments.

FTC Votes on Final Rule Banning Non-compete Agreements

Also on April 23, 2024, the Federal Trade Commission (FTC) voted by a 3-2 margin to issue its Final Rule banning non-compete agreements nationwide. This is expected to go into effect in 120 days after publication of the Final Rule in the Federal Register, however litigation is already underway which could stay implementation.

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The Final Rule will prohibit all non-compete agreements with limited exceptions. Existing non-competes for senior executives earning more than $151,164 annually and that are in a policy-making position can remain in force. In addition, any cause of action related to a non-compete agreement that accrued prior to the effective date will remain enforceable. However, after the effective date, employers cannot enter any new non-compete agreements.

Under the Final Rule, it is an unfair method of competition for a person (defined as a natural person, partnership, corporation, association, legal entity within the FTC's jurisdiction, or any person acting under color of State law) to enter into or attempt to enter into a non-compete agreement with a worker, to enforce or attempt to enforce a non-compete agreement with a worker, or to represent that a worker is subject to a non-compete agreement. This means that a term or a condition of employment cannot prohibit, penalize or prevent a worker from seeking or accepting work elsewhere in the United States or operating their own business in the United States, after the conclusion of their employment that is the subject of the agreement.

"Worker" is defined as an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor. It does not apply to a franchisee or franchisor, but it does apply to a person who works for such an entity. Non-compete agreements that are part of a bona fide sale of a business entity or of all or substantially all of a business entity's operating assets are exempt from this Final Rule.

Employers will be required to provide notice to workers bound by an existing non-compete that the non-compete will not be enforced against them in the future. The FTC has provided model notices in several languages that can be provided to employees and are considered a safe harbor for compliance with the notice requirement.

Note that the Final Rule does not explicitly ban non-disclosure or non-solicitation agreements. The FTC advised in their comments to the Final Rule that so long as those terms are not so broad and onerous that they effectively prohibit or penalize a worker for seeking or accepting other work or starting a business, they are not prohibited.

This Rule is one to watch as litigation could very likely delay or halt implementation. We will keep you up to date.

EEOC Releases Pregnant Workers Fairness Act (PWFA) Regulations

The EEOC recently released its final regulations for the PWFA, which go into effect on June 18, 2024. The new rules are broad, covering a wide range of pregnancy-related conditions, and requiring accommodations greater than those provided under the Americans with Disabilities Act (ADA). The PWFA applies to all state and local government employers and to private employers with at least 15 employees.

The PWFA covers any physical or mental condition related to pregnancy, childbirth, or related medical conditions, including menstruation and lactation. The degree of severity can vary from a significant medical impairment to something that is minor and/or sporadic. It also allows affected employees to be temporarily relieved from performing the essential functions of their position, which is a significant deviation from the ADA. If an employee is unable to perform their essential functions for a "temporary period," but they can perform those functions "in the near future," then the employer is required to accommodate the employee by relieving them of those essential functions during the temporary period. For pregnancy, "near future" is considered to be "within 40 weeks," corresponding to the typical length of a pregnancy. For other conditions, it depends on the specific circumstances. If an employee is unable to perform the essential functions of their position, the employee can be assigned to modified duties, including the functions of a different position, during the temporary suspension of their essential functions.

The type of accommodations that should be provided must be tailored to the individual employee's needs, except that the EEOC has identified specific accommodations that must be offered in "virtually all cases," including (i) allowing an employee to carry or keep water near and drink, as needed, (ii) allowing an employee to take additional restroom breaks, as needed, (iii) allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed, and (iv) allowing an employee to take breaks and eat and drink as needed. Employers need to move quickly in providing accommodations, even on an interim basis.

While leave or modified work schedules can be an effective accommodation, particularly when an employee needs time to receive medical treatment, interim accommodations must allow the employee to continue to work and leave can only be provided on an interim or longer-term basis if the employee requests or agrees to it, unless it would cause the employer an undue hardship. Leave can be paid or unpaid. Employees are not required to accept an accommodation unless such accommodation is necessary for the employee to perform an essential function.

Employees may request accommodations from a supervisor, manager, or someone who has authority over the employee or otherwise directs the employee's tasks, or any other appropriate person. The employee does not have to provide documentation of an obvious limitation, identify a specific medical condition, or use medical terms, but depending on the situation the employer may request additional information including documentation from a health care provider.

Employers are not required to accommodate employees if it is an undue hardship. Factors include the nature and net cost of the accommodation needed, the overall financial resources of the covered entity or the affected facility, the number of people employed, the type of operations, and the impact of the accommodation on the operations of the facility.

For lactating employees, reasonable accommodations may include but are not limited to appropriate breaks, a private space for lactation that is in reasonable proximity to the employee's usual work area that is regularly cleaned, a sitting area, electricity, a surface for a breast pump, and access in reasonable proximity to a sink, running water and a refrigerator for storing breastmilk. Employers may also accommodate a nursing employee who is able to nurse her child directly during the workday due to the child's proximity. Note that the EEOC's regulations for lactation under the PWFA are broader than those provided by the PUMP Act, but employers are still able to tailor the appropriate accommodations to the employee's needs and to what is reasonable for the workplace.

The PWFA has far-reaching effects and marks a major change in how employers need to treat employees who are pregnant or have related conditions. We are available to help advise you on specific issues as you transition to these new compliance standards.

U.S. Supreme Court Clarifies Title VII Discrimination Standard for Actionable Harm

On April 17, 2024, the United States Supreme Court issued a unanimous decision in *Muldrow v. City of St. Louis*, reviving a plaintiff's gender discrimination lawsuit on the basis that she sufficiently claimed that she suffered an adverse action when she was transferred to a different position without any change in pay.

Title VII prohibits an employer from discriminating against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), or national origin. Courts have varied on the threshold of harm that an employee was required to show, particularly in situations such as job transfers or reorganizations where there was no change in pay or rank.

The plaintiff was a sergeant in the police department's intelligence division when she was involuntarily transferred to a different division while her rank and pay remained the same. She claimed that she suffered injury from the transfer due to a change in responsibilities, perks, and work schedule. The Eighth Circuit held that the plaintiff failed to show that her transfer caused her to suffer a materially significant disadvantage.

The Supreme Court's majority opinion, authored by Justice Elena Kagan, acknowledged a circuit split on the issue. The Eleventh Circuit (Alabama, Florida, and Georgia) previously applied a standard for adverse action that required the plaintiff to show that there was a "serious and material change" to the terms and conditions of employment to pursue a Title VII discrimination claim. In this new decision, the Supreme Court held that only "some injury" to the terms and conditions of employment is required for an employee to assert a Title VII discrimination claim. "The transfer must have left her worse off, but need not left her significantly so." The Court remanded the case to the lower courts for further consideration.

This decision is a significant change for employers in the Eleventh Circuit, who have typically relied on the existing precedent to protect them from discrimination claims arising from involuntary job transfers or reorganizations where there is no change in pay or promotional opportunities. Going forward employers need to ensure that such decisions are not applied in a discriminatory fashion and need to evaluate whether employees will be disadvantaged, even superficially, by such decisions.