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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W&L

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FEDERAL AGENCIES ISSUE REGULATORY AGENDA FOR NEW EMPLOYMENT RULES

Several labor agencies, including the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), the Occupational Safety and Health Administration (OSHA), and the National Labor Relations Board (NLRB), published their regulatory agenda for 2024. EEOC's regulatory agenda includes the following priorities:

- Regulations to implement the Pregnant Workers Fairness Act.
- Note that on September 29, 2023, the EEOC published new draft enforcement guidance on workplace harassment.
- Notably excluded from the agenda are rules addressing worker incentives for company-sponsored wellness programs that have been frozen by the current Administration.

The DOL produced its own set of plans for new rules:

- Wage-Hour rule that would make over three million salaried workers newly eligible for overtime pay is scheduled for April.
- The agency set a November goal to issue a final rule on classifying workers as independent contractors or employees under the Wage-Hour laws.

OSHA plans the following new rulemaking:

- OSHA has a December 2023 release date for new rules to protect healthcare workers from COVID-19.
- It has also a plan for release in April on silica dust.
- It should be noted that OSHA is accepting comment on a proposed rule that would let workers designate someone who doesn't work for their employer to represent them during an OSHA "walk around" inspection. The prepublished version of the proposed rule was announced on August 29, and indicates that person could be from a union or other organization, if the compliance officer determines the third party is reasonably necessary to conduct an effective and thorough inspection.

The NLRB has a single item on its agenda, setting a March target date for its final rule to change parts of its framework for union elections, continuing its efforts to remove the changes that the prior Republican administration instituted. Note that the already issued NLRB rule on joint employment is set to go into effect February 26, 2024.

IN SPITE OF GOVERNMENT EFFORTS TO LIMIT INDEPENDENT CONTRACTORS, RECORD NUMBERS TURN TO GIG WORK

It is well known that numerous government agencies have an agenda to classify all workers as employees, instead of as independent contractors. There are numerous reasons for this approach, one being that independent contractors do not have the protections of the employment laws, and cannot form unions, and the government may feel it has more difficulties collecting taxes from independent contractors. In any event, in spite of these government efforts, 2023 surveys indicate that more than one-third of America's workers, an all-time high of sixty-four million people, do freelance or gig work. A press release by Up Work stated that: "An increasing number of Americans are seeking greater flexibility, autonomy and earning power."

DOES YOUR EMPLOYER HAVE ILLEGAL RULES ON THE BOOKS?

The above heading actually comes from a union publication urging employees to review all company rules and policies and challenge them with the NLRB. In August, the NLRB in its *Stericycle* ruling set forth a new, game-changing standard, in determining whether company rules are illegal, because they "chill" worker activity for unions and other concerted activities to improve working conditions. The lone Republican on the Board dissented, complaining that the new standard returns the NLRB to "a bygone era . . . when the Board rarely saw a rule it did not find unlawful."

According to *Stericycle*, if a reasonable employee could read a rule as limiting union or other concerted protected activity, it is illegal and must be withdrawn or re-written to clarify that it does not apply to protected activities. More worrisome is the possibility that discipline pursuant to an overbroad rule is itself illegal. An overbroad rule is illegal even if there is some legitimate purpose for it and even if it has never been enforced against union or other protected activity.

Among the rules likely to be deemed to be illegal under the *Stericycle* doctrine are the following examples:

- No taking pictures of employer facilities
- No recording conversations with managers
- No sharing information with outside media
- No discussing wage rates with fellow employees
- No failing to work "harmoniously" with fellow workers or managers
- No disclosing company investigations
- No communicating with employees or supervisors in an unprofessional or disrespectful manner
- No taking part in activities that "adversely reflect" on the integrity of the company
- No behaving in ways that "damage" the company's reputation
- No harassment of fellow employees.

As workforce activists have been increasing across the country, unions are leading efforts in all workplaces to stir up such activism. Employers can expect increased challenges to their work rules, and we believe that almost every U.S. employer has some policy in violation of *Stericycle*. Another danger is that under the new NLRB *Cemex* standard, an employer committing any objectionable unfair labor practices can be ordered to bargain with the union from a "card-check."

Competent labor counsel should be sought to review employer rules and policies to limit the danger. Most rules can be revised in a manner to accomplish their intended purposes without violating the law.

NLRB JUDGE ISSUES FIRST CEMEX BARGAINING ORDER

An NLRB administrative law judge (ALJ) in late September issued the first bargaining order under the Board's new *Cemex* standard. *Y.N.S.A., Inc. v. UFCW Local 1445*. While the ALJ ruling can be appealed to the Board, the case sends a clear message to management that a new doctrine has been implemented. The company had refused to recognize the union, which lost a secret ballot election 17-11. The ALJ said the demand for recognition represented a majority of the bargaining unit, that the signatures on the authorization cards were authenticated, and there was no evidence that any of the workers that had signed cards changed their mind. The ALJ further found that the company had committed unfair labor practices that would warrant setting the election aside.

Before the *Cemex* decision, the Labor Board only issued a bargaining order when unfair labor practices were so serious it was virtually impossible to have a fair re-vote. The *Cemex* decision changed and lowered the standard saying an employer will be ordered to bargain with the union if it commits any unfair labor practice that would require an election to be set aside.

EEOC ISSUES GUIDANCE ON NEW PREGNANT WORKERS FAIRNESS ACT

On August 11, 2023, the EEOC issued a Notice of Proposed Rulemaking to implement the Pregnant Workers Fairness Act (PWFA). The new law officially went into effect on June 27, 2023, for organizations with 15 or more workers. In general, employers will be expected to make reasonable accommodations for the "known limitations" of applicants and employees who are experiencing pregnancy and related conditions. There are a number of nuances to the guidance, however, which employers need to be familiar with.

First, the PWFA regulations require employers to grant reasonable accommodations to pregnant workers no matter how they treat similar workers, so long as doing so would not impose an undue hardship. However, pregnancy conditions need not rise to the level of a disability, and the definition of pregnancy, childbirth, or related medical conditions is quite broad, that require accommodation by employers. Conditions related to pregnancy include not only childbirth, breast feeding, miscarriages and abortions, but also limitations that are due to menstruation, infertility and fertility treatments, and endometriosis.

Employers may not unnecessarily delay the process for considering and providing accommodations under the PWFA, and may not require employees with such conditions to take leave - even if that employee's ability to do their job is limited - if they can reasonably accommodate the employee in another way. An individual may be considered a "qualified" applicant or employee even if they cannot perform the essential functions of their job, if their inability to perform essential functions is temporary, and could be resolved in the near future (generally meaning within 40 weeks), and the person could be reasonably accommodated during the period of time they cannot perform the essential functions. While the PWFA incorporates the Americans' with Disabilities Act's (ADA) definition of reasonable accommodation, which requires an individualized assessment, the EEOC also lists four specific accommodations it deems will be considered to be automatically reasonable. Typical documentation is not necessary for accommodations that can include carrying water and drinking as needed; taking additional restroom breaks; allowing an employee to sit or stand when necessary; and breaks as needed to eat and drink. These accommodations are expected to be provided in virtually all circumstances. Additional stated examples of possible accommodations include: (1) light-duty assignments; (2) providing an employee with different equipment; (3) closer parking; (4) schedule changes/flexible hours; (5) temporarily suspending one or more

essential functions; and (6) teleworking. A leave of absence is also a reasonable accommodation, but should only be offered as an accommodation if there is no other reasonable accommodation available.

There is a difference from current ADA procedures that employers would not be allowed to require that initial accommodation requests be made in writing or by filling out a form, although they would be able to make that later.

All a qualified employee must do is to identify the limitation with their employer, explain that the limitation relates to pregnancy, childbirth, or related medical condition, and indicate they need a change at work. The process requires the employer to engage in the interactive process with the employee to determine reasonable accommodation. Employers should also update their policies to include any aspects of the PFWA they may have omitted.

LARRY STINE INTERVIEWED ON NBC NEWS - SLAUGHTERHOUSE CHILDREN

NBC News premiered a new documentary on Monday, December 18, 2023, titled Slaughterhouse Children, featuring an interview with senior partner J. Larry Stine. Larry is first seen in the documentary 10 minutes into the video.

Here's a description of the NBC documentary: In towns across America, children working in dangerous jobs in slaughterhouses is an open secret. Data from the Labor Department says that children are illegally working at alarming rates. NBC News takes you inside these slaughterhouses in an investigation that spans six states, two countries, dozens of interviews, and thousands of pages of public records.

In the interview, Larry discusses the difficulty of slaughterhouse hiring, the pressures faced by immigrants who need the work, and the challenges of companies filtering out ineligible candidates.

The link for the interview is:

https://www.nbcnews.com/video/slaughterhouse-children-child-labor-exposed-in-america-s-food-industry-200320069879.

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