



Your Irreplaceable Workforce Management Partner

Today's Presenter:

Anne M. Lavelle
CTR Compliance Specialist

Federal Agencies in Action!

Regulations on the Horizon

OVERVIEW OF TOPICS:

- Federal Trade Commission (FTC)
 - Upcoming Vote
 - What does this mean for noncompetes?
- Department of Labor (DOL)
 - Independent Contractors
 - FLSA Changes
- Equal Employment Opportunity Commission (EEOC)
 - Pregnant Workers' Fairness Act
 - AI and recruiting
 - Enforcement priorities involving underserved communities and low wage earners

Federal Trade Commission:

- Long-standing issues/controversy – both at state and Federal level – regarding noncompetes. Why?
 - Used indiscriminately. From owners selling businesses to folks making minimum wage.
 - Blanket requirement for all employees at some businesses.
 - May suppress wages
 - May suppress entrepreneurs
 - May suppress innovation
 - Abused (?) by employers.
 - Extremely expensive to enforce/defend. Generally, resources are more readily available to employers.
- Some states and professions already prohibit noncompetes
 - California
 - Attorneys
- Have not been able to eliminate on a national level via legislation

FTC con't:

- FTC steps in
 - Proposed regulations to “ban employers from imposing noncompetes on their workers, a widespread and often exploitative practice...”
 - Took the position that noncompetes are unfair trade practices (which is within their realm of jurisdiction)
 - Took the position that elimination of noncompetes will increase employee wages by more than \$300 billion per year and expand opportunities for 30 million workers.
 - As required by law, the FTC proposed regulation was subject to public comment before it could become final
 - FTC is inundated with comments.
 - FTC was to vote on regulation last year. Due to vast number of comments, vote delayed until April 2024
- What does this mean for employers?
 - Clean up your practices
 - Focus on what you can enforce and enhance those clauses/items
 - Nonsolicitation
 - Trade secrets/confidentiality provisions.
 - Protect intellectual property

Depart of Labor – Independent Contractors:

- This issue is like a pendulum, depending on which party is in office.
- Current view is that very few workers are independent contractors.
- Courts apply many different tests to determine whether a worker is an independent contractor.
- Red Flags
 - Everyone in your workforce is an IC
 - Control over workers (noncompetes, handbook, etc.)
 - Only work for one company
 - Worker has no investment in work (tools, location, education, etc.)
- Parade of Evils
 - Tax
 - Workers' Compensation
 - Employment claims
 - DOL investigations
 - Benefit Claims
 - Wage Claims
- DOL looking to streamline test and make it more worker-friendly.

DOL – Independent Contractors:

- Proposed/"Final" Six Factor Test:
 - The worker's opportunity for profit or loss;
 - Investments by the worker and potential employer;
 - The degree of permanence of the relationship;
 - The nature and degree of the potential employer's control over the work;
 - The extent to which the work is "integral" to the potential employer's business; and
 - The worker's skill or initiative
- Legal challenges but likely that the DOL will use this new regulation when analyzing workers.

DOL - FLSA:

- To be exempt from the payment of overtime, employee must meet both the “duties” test and the guaranteed “salary basis” test.
- Current Salary Basis Test is \$684/week; roughly \$35,568/year
- Proposed Regulations (October 2023)
 - \$1,059 (with three-year inflation metric); roughly \$55,068/year
 - DOL projection for first quarter of 2024 is \$1,158/week; roughly \$60,209/year
 - Highly compensated employees \$107,432 to \$143,988/year
- Public comments being reviewed; then regulation will be finalized; then litigation ensues
- What should employers do?
 - Look at who falls into the “gap” between \$684 and \$1,059 (\$1,158)
 - Decide economic impact of raising salary vs. paying overtime vs. hiring more individuals
 - Be ready to pivot as soon as court weighs in (historically, very short window for employers to react).

Equal Employment Opportunity Commission - PWFA :

- Pregnant Workers' Fairness Act (PWFA)
- Similar to ADA – but for temporary conditions related to pregnancy
- Proposed regulations defined certain terms in the law
 - “Limitation”
 - Limitation” means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The definition also includes when a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself.

EEOC – PWFA (con’t):

- “Related Medical Conditions”
 - Includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions. The Commission emphasizes that the list in the regulation is non-exhaustive, and to receive an accommodation an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition.
- “Temporary” or “Near Future”
 - The Commission proposes using “generally forty weeks”
 - Possibly an additional 12 weeks (comments sought)
 - Also seeking comments on how to “count” intermittent need for accommodations

EEOC – PWFA (con't):

Covered employers cannot:

- Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
- Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
- Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfere with any individual's rights under the PWFA.

EEOC – AI and recruiting:

- Concern that job posting sites use AI to help cull down the number of candidates for a job or match candidates.
- Concern that AI may inadvertently discriminate against protected classes.
 - Remember discrimination can be overt
 - OR it can be reflected in a disparate impact analysis
- EEOC has issued guidance warning employers about using AI that might inadvertently be discriminatory
 - Doesn't matter that AI is controlled by job posting site – employer is liable
- Enforcement priority

EEOC – Underserved Communities/Low Wage Workers:

- Underserved Communities/Low Wage Enforcement Priorities
- Based on Presidential Executive Order 13985 which required the head of each Federal agency to develop a comprehensive approach to this issue.
- Make the EEOC more accessible to workers with inflexible schedules or who live at a distance.
- Recognize that low-wage earners often cannot obtain private representation. EEOC should step in.
- Make the EEOC more accessible to workers whose first language is not English.
- Education and joint initiatives in these communities.

Allegheny County/Pittsburgh Leave Laws:

- They've been in effect for a couple of years, but penalties were delayed a year.
- Now fully in effect – with penalties, investigations and “strict” enforcement.
- Join us January 18 for this discussion!

Thank you for attending!