

Work**Smarts** Half-Day Seminar

The Wild Ride of 2023: New Year, New Laws

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Welcome



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The Legal and Administrative Stuff

- This presentation is not legal advice.
- Information presented as of February 15, 2023.
- Laws, regulations, and guidance continuously evolving.
- Will try to field questions as we go; submit them in Chat or Q&A.
- Presentation materials and recording will be emailed later today.
- HRCI and SHRM credits available.
- CLE credits pending in Arizona, Colorado, Florida, Kansas, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Tennessee, and Texas.

Agenda

- **New Federal Legislation**

- Speak Out Act
- Pregnancy Workers Fairness Act
- Pump Act
- Ending Forced Arbitrations of Sexual Assault & Sexual Harassment Act

- **New Federal Regulations & Agency Priorities**

- FTC: Proposed Ban on Non-Competes
- DOL: Independent Contractor Rule, Recent FLSA/FMLA Guidance
- EEOC: Workplace Discrimination Poster; Strategic Enforcement Plan
- NLRB: Electronic Monitoring



NEW FEDERAL LEGISLATION

Speak Out Act

- Effective December 7, 2022
- Prohibits ***predispute*** non-disclosure and non-disparagement clauses in employment or severance agreements extending to claims or allegations of sexual assault or sexual harassment.
- Non-disclosure and non-disparagement clauses still allowed in agreements that *resolve* claims of sexual assault or harassment.

Speak Out Act/Tax Deductions

- Section 162(q) of IRC prohibits businesses deducting payments (including attorneys' fees) for sexual harassment or sexual abuse settlements **IF** the settlement is subject to a non-disclosure requirement.

Speak Out Act Takeaways

- Check and revise, if needed, current employment agreements
 - Pay attention to severability clauses
- For ordinary severance agreements with non-disclosure or non-disparagement clauses, include representation that employee has not been subjected to sexual harassment or assault in the workplace
- If employee says they have been (but that's not what is prompting the agreement) include carve-outs to any non-disclosure or non-disparagement clause for sexual harassment or assault
- Consider state laws
- At-will employees? Think about it now, not later...

Pregnant Workers Fairness Act

- Effective December 29, 2022
- *Young v. UPS* (SCOTUS 2015): Employers must provide reasonable accommodations to pregnant workers to the extent they provided similar accommodations to non-pregnant workers

Pregnant Workers Fairness Act

- PWFA codifies Young, but also (for covered employers (more than 15 employees)):
 - Requires reasonable accommodations using the ADA process (but also carries forward undue hardship defense)
 - Prohibits employer from denying employment opportunities to pregnant women based on their need for reasonable accommodations
 - Prohibits employer from forcing employee to take paid or unpaid leave during pregnancy if another reasonable accommodation (such as light duty) can be provided

PUMP Act

- Effective December 29, 2022
- Background: ACA amended FLSA to require employers to provide nursing mothers reasonable break time to express breast milk after the birth of her child. But:
 - Applied only to non-exempt employees
 - Applied to all employers (except that employers with less than 50 employees could raise an undue hardship defense)
 - Provided protection for up to 1 year following birth of the child

PUMP Act

- Providing Urgent Maternal Protections for Nursing Mothers Act:
 - Applies to nearly all exempt and non-exempt employees (airlines mostly exempt)
 - Expands protection for up to 2 years following birth of the child
 - If employer provides paid breaks, employee who uses break time to pump breast milk must be compensated in the same way as other employees are during those breaks
- PUMP Act continues requirement that the employer provide a place (other than a bathroom) that is shielded from view and free from intrusion from coworkers and the public that can be used to express breast milk.
 - Adds safe harbor: Employee must give employer 10 days' advance notice of non-compliance; employer who complies within 10 days is not liable

Ending Forced Arbitrations of Sexual Assault and Sexual Harassment Act

- Effective March 3, 2022
- Plaintiffs asserting sexual harassment and/or sexual assault claims can opt out of previously signed arbitration agreements.
- Court decides arbitrability even if arbitration agreement gives that power to arbitrator.
- Unclear whether an opt-out would apply to only the sexual harassment and/or assault claims in a case



NEW FEDERAL REGULATIONS & AGENCY PRIORITIES

FTC: Proposed Ban on Non-Competes

- Announced January 5, 2023
- Who: - Nearly all employers regardless of size
- Most workers covered (employees + independent contractors)
- What: Proposed rule prohibiting use of non-competes
- When: To be determined
- Where: Nationwide
- Why: Depressed wages, competition, freedom of movement in labor markets
- How: Federal Trade Commission Act

FTC Non-Compete Ban: Why (per the FTC)

- 1 in 5 workers (30 million people) bound by non-competes
- Prevent workers from leaving jobs
- Decrease competition for workers
- Lower wages
- Prevent new business formation
- Stifle entrepreneurship and innovation
- FTC estimates earnings will increase between \$250-296 billion/year

FTC Non-Compete Ban: How

- FTC Act – Section 5:
 - Over 100 years old
 - Prohibits “unfair or deceptive acts or practices in or affecting commerce”
- Section 5 never before used to regulate use of non-competes
- Only enforceable by the FTC; no private cause of action

FTC Non-Compete Ban: Who

- “Employer”: Any **person** that hires or contracts with a **worker** to work for the person.
- “Person”: Any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.
- “Worker”: A **natural** person who works, when paid or unpaid, for an employer. Includes:
 - Employees
 - Independent contractors
 - Interns, externs
 - Volunteers
 - Sole Proprietors providing services to clients and customers

FTC Non-Compete Ban: Who (continued)

- “Employer”: May not include certain industries not covered by Section 5 of the FTC Act, including:
 - Banks, savings and loan institutions, and federal credit institutions
 - Common carriers and air carriers
 - Most entities subject to the Packers and Stockyards Act (meat and poultry industries)
 - Non-profits?

FTC Non-Compete Ban: Who (continued)

- “Worker”: Does not include:
 - Legal entities other than sole proprietorships (e.g., business-to-business*)
 - Franchisees in the context of a franchisee-franchisor relationship
- * Be wary of separate laws restricting certain types of business-to-business non-competes.
 - Antitrust laws
 - DOJ/FTC focus on “no poach” agreements

FTC Non-Compete Ban: What's Covered

- Prohibits ***non-compete clauses*** for new and existing workers.
- “Non-compete clause”: A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, ***after*** the conclusion of the worker’s employment with the employer.
 - Examples: “You agree not to provide medical services anywhere within 15 miles of our clinic for two years after your employment ends.”

“You agree not to work for a company that sells any competing products for 18 months following your separation.”

FTC Non-Compete Ban: What's Not Covered

- ***Non-disclosure & non-solicitation clauses*** still permitted unless written so broadly to effectively preclude the worker from working in the same field after the conclusion of the relationship (a “***de facto***” non-compete).
 - Examples: Don't use or disclose our confidential information.
Don't solicit or service our existing customers for 18 months.
 - But what about: Don't solicit any of our **prospective** customers for 18 months?

FTC Non-Compete Ban: What's Not Covered (cont.)

- ***Non-competes in connection with sale of business or ownership interest*** if the individual subject to the non-compete is a **substantial owner** at the time the person enters into the non-compete.
- “Substantial owner”: Owner, member, or partner holding at least a 25% interest.

FTC Non-Compete Ban: When

- 60-day public comment period on proposed rule ends March 20, 2023.
- Stakeholders have requested this period be extended.
- Approximately 11,000 comments received to date.

FTC Non-Compete Ban: When (continued)



Comment ID

FTC-2023-0007-2197

Comment

Noncompete agreements are a drain on the economy and a downward force on worker wages.

Comment

Non competes stifle competition and should be illegal. This should absolutely include physician contracts as well. Medical institutions require leaving physician to go across town, often uprooting their families, to stifle competition and this should be an outlawed practice as it forces a physician to leave the community. Including physicians in this non compete allows them to continue serving their community.

Dear Chair Khan:

I object to and OPPOSE the proposed rule (hereinafter "this Rule" or the "Rule") for the following reasons:

1. This Rule is OVERLY BROAD.
2. This Rule VIOLATES CONSTITUTIONAL FEDERALISM PRINCIPLES and OBLITERATES THE HEALTHY DIVERSITY OF EXISTING STATE LAWS.
3. This Rule VIOLATES THE "MAJOR QUESTIONS DOCTRINE" of West Virginia v. EPA, 142 S. Ct. 2587 (2022)
4. This Rule, if implemented, SHOULD PROTECT ONLY INDIVIDUALS BEING PAID WAGES AND SALARY BELOW THE AVERAGE OR MEDIAN PER CAPITA PERSONAL INCOME FOR THE STATE IN WHICH THEY RESIDE.*
5. This Rule DISADVANTAGE SMALL BUSINESS IN COMPETING WITH LARGE BUSINESS.
6. This Rule DISADVANTAGES US BUSINESS IN COMPETING WITH FOREIGN BUSINESS.
7. This Rule USES A SLEDGEHAMMER WHEN A SCALPEL WOULD BE ADEQUATE.

FTC Non-Compete Ban: When

- FTC may revise the proposed rule based on public comments.
- FTC will then issue a “Final Rule” addressing comments.
- Effective Date (unless FTC modifies): **60 days** after Final Rule issued.
- Compliance Date (same): **180 days** after Final Rule issued

FTC Non-Compete Ban: When

- What does compliance look like?
- **Future non-competes clauses:** Don't require them.
- **Existing non-competes clauses:** Must be rescinded by no later than the compliance date with notice to the worker.
- **Notice requirement:**
 - Individualized communication
 - Written (printed, e-mail, or text message ok)
 - Within 45 days of rescission
 - Current and former workers if contact information “readily available”
 - Proposed Rule includes model language.

FTC Non-Compete Ban: When

But... let's be real:

The FTC's Final Rule will be subject to legal challenge.

One or more courts are likely to postpone its enforcement pending resolution.

The rule probably lands before the U.S. Supreme Court.

FTC Non-Compete Ban: When

- What steps should employers utilizing restrictive covenants take now?
- Option 1: Sit tight but consider what happens if the ban goes into effect.
 - Even if prohibited clauses are rescinded, broader agreements may remain in effect.
 - Employment and severance agreements, confidentiality agreements, etc.
- Option 2: Carefully review existing covenants
 - Do they meet the Proposed Rule's definition of "non-compete clause"?
 - Do they effectively prevent a worker from competing, if not explicitly, then implicitly?
- Option 3: Start considering alternatives
 - Non-solicitation clauses
 - Non-disclosure clauses

DOL: Independent Contractor Rule

- Proposed Rule issued in October 2022
- DOL “seeks to return to longstanding judicial precedent”
- Economic realities test
- Replaces two-factor test adopted under Trump administration
- Comment Deadline Passed – 55,000 comments received

Economic Realities Test

- Opportunity for profit or loss depending on managerial skill
 - Can the worker determine or negotiate the charge for the work provided?
 - Can the worker accept or decline jobs?
 - Can the worker choose the time for the job?
 - Does the worker engage in marketing or advertising?
- Relative investments by the company and the worker in materials and equipment
- Degree of permanency of the work

Economic Realities Test

- Nature and degree of control over the performance of the work
 - How is the schedule set?
 - Is there a limit on the ability of the worker to work for others?
 - How is the work supervised?
 - Is there a disciplinary process?
- Whether the worker's service is integral part of the company's business
- Degree of skill and initiative required

DOL: Telework Guidance for FLSA/FMLA


- Field Assistance Bulletin issued February 9, 2023.
- 20-minute break rule applies to remote workers.
- Same for “bona fide” meal and other breaks lasting 30 or more minutes if completely relieved from duty.
 - Example: Teleworker works from 8-9, then pauses to take kids to school from 9-10, then resumes work.
- Break time and privacy to pump.
- FMLA Eligibility: Hours worked remotely count toward 1,250 threshold; personal residence is not a worksite.

DOL: FMLA Limited Workday

- Opinion letter issued February 9, 2023
- Hypothetical: Employee requests workday capped at 8 hours for medically-related serious health condition
- Permissible under the FMLA? Yes.
- No “reasonable accommodation” analysis permitted.
- Capped workday can continue for as long as employee remains eligible and has not exhausted FMLA leave entitlement.

EEOC: Replace Your Workplace Rights Poster!

- New poster published October 20, 2022
- No official compliance date announced
- Publication: Physical & Electronic
- Accessibility



Know Your Rights: Workplace Discrimination is Illegal

The U.S. Equal Employment Opportunity Commission (EEOC) enforces Federal laws that protect you from discrimination in employment. If you believe you've been discriminated against at work or in applying for a job, the EEOC may be able to help.

Who is Protected?

- Employees (current and former), including managers and temporary employees
- Job applicants
- Union members and applicants for membership in a union

What Organizations are Covered?

- Most private employers
- State and local governments (as employers)
- Educational institutions (as employers)
- Unions
- Staffing agencies

What Types of Employment Discrimination are Illegal?

Under the EEOC's laws, an employer may not discriminate against you, regardless of your immigration status, on the bases of:

- Race
- Color
- Religion
- National origin
- Sex (including pregnancy and related conditions, sexual orientation, or gender identity)
- Age (40 and older)
- Disability
- Genetic information (including employer requests for, or purchase, use, or disclosure of genetic tests, genetic services, or family medical history)
- Retaliation for filing a charge, reasonably opposing discrimination, or participating in a discrimination lawsuit, investigation, or proceeding.

What Employment Practices can be Challenged as Discriminatory?

All aspects of employment, including:

- Discharge, firing, or lay-off
- Harassment (including unwelcome verbal or physical conduct)
- Hiring or promotion
- Assignment
- Pay (unequal wages or compensation)
- Failure to provide reasonable accommodation for a disability or a sincerely-held religious belief, observance or practice
- Benefits
- Job training
- Classification
- Referral
- Obtaining or disclosing genetic information of employees
- Requesting or disclosing medical information of employees
- Conduct that might reasonably discourage someone from opposing discrimination, filing a charge, or participating in an investigation or proceeding.

What can You Do if You Believe Discrimination has Occurred?

Contact the EEOC promptly if you suspect discrimination. Do not delay, because there are strict time limits for filing a charge of discrimination (180 or 300 days, depending on where you live/work). You can reach the EEOC in any of the following ways:


Submit an inquiry through the EEOC's public portal:
<https://publicportal.eeoc.gov/Portal/Login.aspx>

Call 1-800-669-4000 (toll free)
1-800-669-6820 (TTY)
1-844-234-5122 (ASL video phone)

Visit an EEOC field office (information at www.eeoc.gov/field-office)

E-Mail info@eeoc.gov

Additional information about the EEOC, including information about filing a charge of discrimination, is available at www.eeoc.gov.



EEOC: Strategic Enforcement (a/k/a Priorities)

- Published January 10, 2023; covers 2023 to 2027
- Targeted enforcement for vulnerable populations
 - Intellectual and developmental disabilities
 - Criminal history
 - LGBTQI+
 - Temporary workers
 - Age
 - Limited literacy and English-proficiency
- Pay Equity
- Artificial Intelligence
- Electronic Monitoring

NLRB: Electronic Monitoring

- General Counsel Memo issued October 31, 2022.
- “Vigorous” enforcement of NLRB position restricting surveillance practices related to organizing activity.
- “Presumptive violations” for use of surveillance devices (tracking devices, dash cams, computer monitoring).
- Employer burden to show it’s monitoring practice is narrowly tailored to address a legitimate business need.
- “Balancing Test”
- Mandatory disclosure of monitoring practices to workforce.



Questions?



WorkSmarts

Top Tips

This year may be a wild ride...

- Federal government is cracking down on non-disclosure, non-disparagement, and non-compete agreements.
- Time to revisit your employee restrictive covenants in light of developing law, which remains in flux.
- Monitor agency priorities and consider areas where your organization can improve.

Thank you!



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