WorkSmarts Virtual Seminar

The Court Rejects Your Reality and Substitutes its Own (2024 Legal Updates)

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Agenda

- Regulatory & Agency Updates
- United States Supreme Court Updates
- Other Case and Labor Law Updates
- Legislative Trends

Regulatory & Agency Updates

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FLSA – New Minimum Salary Requirements

- The Final Rule was issued on April 23, 2024 and raises the minimum salaries to qualify for certain FLSA overtime exemptions.
- The initial threshold increase took effect on July 1, 2024, and the full increase is set to take full effect by January 1, 2025.
- The Final Rule provides for updates to the earnings thresholds every three years based on up-to-date wage data.

Earnings Threshold	Minimum Salary Amount Before July 1, 2024	Minimum Salary Amount Beginning July 1, 2024	Minimum Salary Amount Beginning January 1, 2025
Standard Salary Level	$684 per week (equivalent to a $35,568 annual salary)	$844 per week (equivalent to a $43,888 annual salary)	$1,128 per week (equivalent to a $58,656 annual salary)
Total Annual Compensation Requirement for Highly Compensated Employees (HCEs)	$107,432 per year, including at least $684 per week paid on a salary or fee basis	$132,964 per year, including at least $844 per week paid on a salary or fee basis	$151,164 per year, including at least $1,128 per week paid on a salary or fee basis
Special Salary Level for Employees in Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI)	$455 per week (equivalent to a $23,660 annual salary)	$455 per week (equivalent to a $23,660 annual salary)	$455 per week (equivalent to a $23,660 annual salary)
Special Salary Level for Employees in American Samoa	$380 per week (equivalent to a $19,760 annual salary)	$380 per week (equivalent to a $19,760 annual salary)	$380 per week (equivalent to a $19,760 annual salary)
Special Base Rate for Employees in the Motion Picture Industry	$1,043 per week (or a proportionate amount based on the number of days worked)	$1,043 per week (or a proportionate amount based on the number of days worked)	$1,043 per week (or a proportionate amount based on the number of days worked)
Compensation Required for Computer Employees Paid on an Hourly Basis	$27.63 per hour	$27.63 per hour	$27.63 per hour

Note: These earnings thresholds do not apply to certain types of employees, including doctors, lawyers, teachers, and outside sales employees.

U.S. Department of Labor, *Earnings thresholds for the Executive, Administrative, and Professional exemption from minimum wage and overtime protections under the FLSA*, https://www.dol.gov/agencies/whd/overtime/salary-levels.

FLSA – New Minimum Salary Requirements

- Potential Implications: The new rule will likely increase the number of nonexempt employees, potentially expanding the types of jobs that will be entitled to overtime pay under the FLSA.
- Legal Challenges:
  - *Mayfield v. United States Dep't of Lab.* (Case No. 23-50724)
  - *Texas v. United States Dep't of Lab.* (Case No. 4:24-CV-499-SDJ) and *Plano Chamber of Commerce, et al., v. U.S. Dep't of Lab.* (Case No. 4:24-CV-00468) (consolidated).
  - *Flint Avenue, LLC v. United States Dep't of Lab.* (Case No. 5:24-CV-00130)

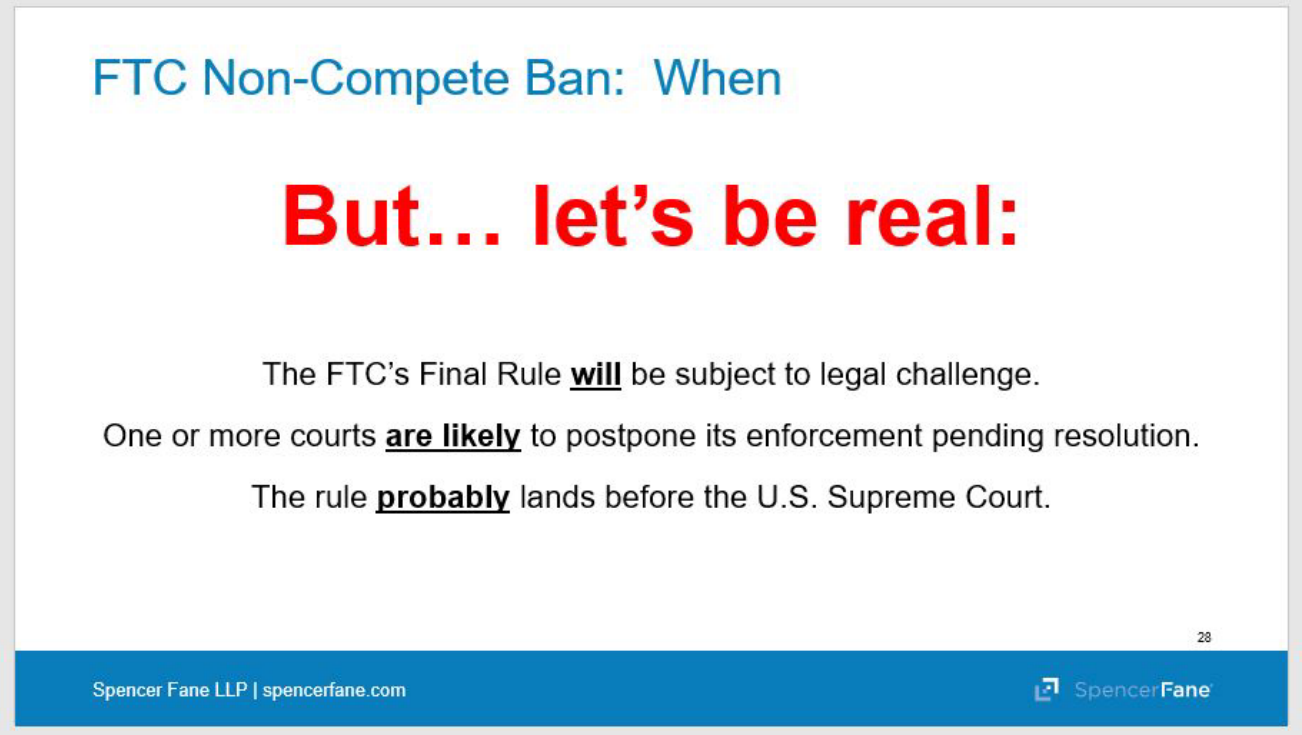
FTC – Nationwide Prohibition on Noncompetes

- FTC announced proposed regulations to ban noncompetes for most workers nationwide on January 5, 2023.
- Lengthy public comment period ensued.
- Spencer Fane first presented on the proposed regulations one month later in February 2023, and here's what we predicted….

FTC – Nationwide Prohibition on Noncompetes

Spencer Fane WorkSmarts Prediction:

Feb. 2023



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FTC – Nationwide Prohibition on Noncompetes

- FTC's Final Rule banning most noncompetes nationwide was set to go into effect on Sept. 4, 2024.
- Employers were expected to have to notify current and former employees that their noncompetes were invalid.
- On Aug. 20, 2024, a Texas federal court held the FTC does not have authority to ban noncompetes by regulation, and that its Final Rule was arbitrary and capricious.
- The ruling conflicts with preliminary rulings upholding the FTC's noncompete ban issued by other courts.
- The FTC will undoubtedly appeal the ruling to the Fifth Circuit.

PWFA – Pregnancy Accommodations

- The PWFA went into effect on June 27, 2023.
- The EEOC issued its final regulation on April 15, 2024, which went into effect on June 18, 2024.
- On June 27, 2023, the EEOC began accepting charges alleging violations of the PWFA.
- The procedures for filing a charge or claim under the PWFA, as well as the available remedies, including the ability to obtain damages, are the same as under (1) Title VII; (2) Congressional Accountability Act of 1995 and 3 U.S.C § 411(c); (3) GERA; and (4) section 717 of Title VII, for the employees covered by the respective statutes. Limitations regarding available remedies under these statutes likewise apply under the PWFA.

OSHA – Proposed Heat Rule

- On July 2, 2024, OSHA released a proposed rule on “Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings.” The rule would apply to all employers and be triggered when employees are exposed to temperatures of 80ºF for more than 15 minutes in any given 60-minute period.
- The proposed standard would require employers with more than 10 employees to create a written heat injury and illness prevention plan (HIIPP) to evaluate, monitor, and control heat hazards in their workplace.
- The proposed standard includes additional provisions that would apply at the “high heat trigger” of a heat index of 90ºF.
- The proposal includes an extensive list of heat injury prevention measures that employers are required to implement.

United States Supreme Court Updates

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Lowered threshold for “adverse employment action”

- *Muldrow v. City of St. Louis*, SCOTUS (Apr. 17, 2024)
- Police officer alleged her transfer to a different division was based on sex discrimination in violation of Title VII.
- The lateral transfer did not reduce her pay, but it did change her schedule, uniform, vehicle, and responsibilities.
- Lower courts dismissed her case, reasoning that a lateral transfer is not “adverse employment action”

Lowered threshold for “adverse employment action”

- SCOTUS reversed the lower courts, holding that while Title VII requires *some* showing of harm, that harm need not be “significant.”
- To “discriminate” means to treat worse (this theme follows into another SCOTUS decision we will discuss later).
- While lateral transfers were the issue in *Muldrow*, it’s impact will be wider.
- Could preference based on DEI initiatives be at risk as a form of reverse discrimination?

Chevron Deference Overturned – What does it mean?

- *Loper Bright Enterprises v. Raimondo*, SCOTUS (June 28, 2024).
- For 40+ years, federal agencies enjoyed deference when the regulations they issued were challenged.
- Under the "*Chevron* doctrine," an agency's interpretation of the law providing its authority was presumptively valid when the law was silent or ambiguous.

Chevron Deference Overturned – What does it mean?

- A federal law requires commercial fisherman to permit federal agents to board their vessels to collect data and prevent overfishing. The law identified three categories of fisherman who were required to pay the salaries of those federal agents on their boats.
- But the federal agency charged with enforcing the law required a fourth group of fisheries to also pay those agents' salaries. That fourth group challenged the agency's interpretation of its law.
- SCOTUS sided with the fishermen, overturning 40 years of precedent under the *Chevron* doctrine.

Chevron Deference Overturned – What does it mean?

- SCOTUS rejected a presumption of agency expertise, explaining that courts should be resolving ambiguous laws, not the agencies charged with enforcing those laws.
- The decision split on party lines, with Justices Kagan, Jackson, and Sotomayor dissenting.
- This ruling will lead to a significant increase in challenges to other federal agencies' interpretations of various federal laws.

Labor Law: NLRB Faces Higher Standard of Proof

- *Starbucks Corp. v. McKinney*, SCOTUS (June 13, 2014)
- 8 to 1 decision (partial dissent by Justice Jackson)
- Starbucks fired Tennessee employees attempting to organize a union after they invited a television crew to visit their store after hours.
- NLRB brought a lawsuit, arguing this was an unfair labor practice.
- NLRB sought a court order ("injunction") to reinstate the employees while the case was pending.
- The lower courts said the NLRB was entitled to great deference and only needs to show (1) "reasonable cause" a violation occurred, and (2) injunctive relief is "just and proper."

Labor Law: NLRB Faces Higher Standard of Proof

- SCOTUS says the lower courts were mistaken. The NLRB is subject to the same standard of proof as any other party seeking an injunction.
- The NLRB, like other litigants, must show:
  1) 1) Likelihood of success on the merits;
  2) 2) Likelihood of irreparable harm;
  3) 3) Balance of equities tips in its favor; and
  4) 4) An injunction is in the public's interest.
- This decision will impact requests for injunctions by other federal agencies, such as the DOL and the EEOC.

Whistleblowers do not have to Show Retaliatory Intent

- *Murray v. UBS Securities, LLC*, SCOTUS (Feb. 8, 2024)
- Jury ruled in favor of employee alleging he was terminated in retaliation for whistleblowing on illegal trading activity by co-workers.
- 2nd Circuit reversed, holding he failed to present evidence that the decisionmakers acted with retaliatory intent.
- Unanimous Supreme Court says the 2nd Circuit was wrong. An employee does not have to show “ill will” or “animus.”

Whistleblowers do not have to Show Retaliatory Intent

- Instead, the whistleblower must show only that the employer discharged him “because of” his whistleblowing. The motive behind that retaliation does not matter.
- Claim was brought under the Sarbanes Oxley Act, but the holding likely extends to other federal whistleblower laws.
- A defending employer can still win by showing it would have made the same decision even if the employee had not engaged in whistleblowing.

Other Case & Labor Law Updates

FLSA Tip Credit Rule Struck Down

- *Restaurant Law Center v. U.S. Dep't of Labor*, 5th Circuit (Aug. 23, 2024).
- Court held the DOL's Final Rule on Tip Credits is unlawful.
- Tip Credit = Can pay employees $2.13/hour as long as their earnings exceed minimum wage with tips.
- The challenged Final Rule prohibited the Tip Credit for employees who spent > 20% of their time performing non-tip work (like setting and cleaning tables), among other disqualifying activities.
- Fifth Circuit relied on recent Supreme Court decision overturning *Chevron*.
- Separate dual-jobs regulation remains valid.

Plaintiffs Shouldn't Lie About New Employment

- *Deering v. Lockheed Martin*, 8th Circuit (Sept. 17, 2024).
- Fired in-house lawyer sued for discrimination and retaliation.
- During her deposition, she testified that she was "currently employed" by a new employer but didn't disclose she had just accepted a much more lucrative position with a second new employer.
- Case went on, and her retaliation claim survived summary judgment.
- Her lawyers incorrectly represented her employment and income in several confidential settlement letters.

Plaintiffs Shouldn’t Lie About New Employment

- Buried within her trial exhibits were her W-2 showing her income had almost doubled for the second new employer.
- The Defendant-Employer moved for sanctions, asking for her case to be dismissed.
- Trial court agreed, dismissing her case and awarding the employer nearly $100,000 in attorneys’ fees as punishment for her deception.
- Yesterday, the Eighth Circuit affirmed that decision.

The NLRB is… Unconstitutional?!

- *Aunt Bertha v. Nat'l Labor Relations Board*, N.D. Texas (Sept. 16, 2024)
- The National Labor Relations Board has existed since 1935.
- Responsible for ruling on allegations that employers engage in unfair labor practices in violation of the National Labor Relations Act.
- The NLRB prosecutes these cases itself before administrator law judges appointed by the NLRB board members.
- The plaintiff-employer, a social services referral platform, found itself on the receiving end of an unfair labor practices complaint.

The NLRB is… Unconstitutional?!

- Aunt Bertha brought an emergency motion in federal court to try to avoid the administrative law process.
- Relying on yet another 2024 SCOTUS decision we did not cover, *Jarkesy v. SEC*, the employer argued the ALJ process is unconstitutional.
- Two days ago, a federal judge—again in Texas—agreed.
- Rationale? POTUS is supposed to have "removal authority" over offices he has appointed. The federal judge says administrative law judges appointed by the NLRB are too insulated from that process.
- Don't expect the NLRB to suddenly dissolve and go quietly into the night…

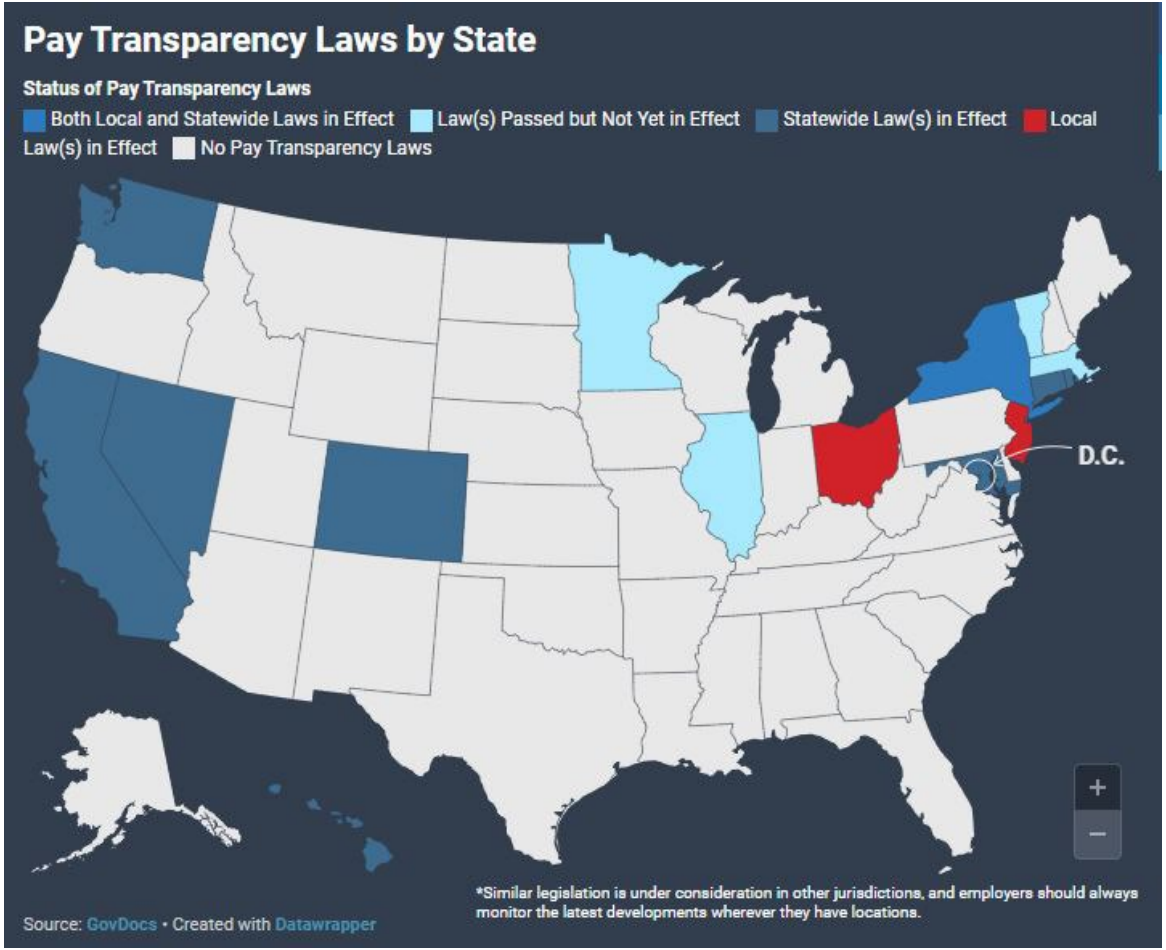
Legislative Trends

Laws Banning Captive Audience Meetings

- "Captive audience" meetings are mandatory meetings held by employers during work hours to address activities protected by Section 7 of the NLRA. Some employers hold these meetings to express their opposition to employees choosing to be represented by a union.
- The NLRB has held in *Babcock & Wilcox Co.* since 1948 that these "captive audience" meetings generally are lawful if their content is not coercive or threatening. Recently, states have been increasingly proposing legislation prohibiting captive audience meetings as infringements on employees' free speech rights.
- States that passed new laws in 2024: IL, HI, VT, WA. Almost: *CO (vetoed)*
- States with existing laws: CT, ME, MN (under challenge), NJ, NY, OR

Pay Transparency Laws

- States that passed new laws in 2024: IL, MA, MN, VT
- States with existing laws: CA, CO, CT, DC, HI, MD, NV, NY, RI, WA
- What if an employer without operations in these states posts a position online open to remote hires?



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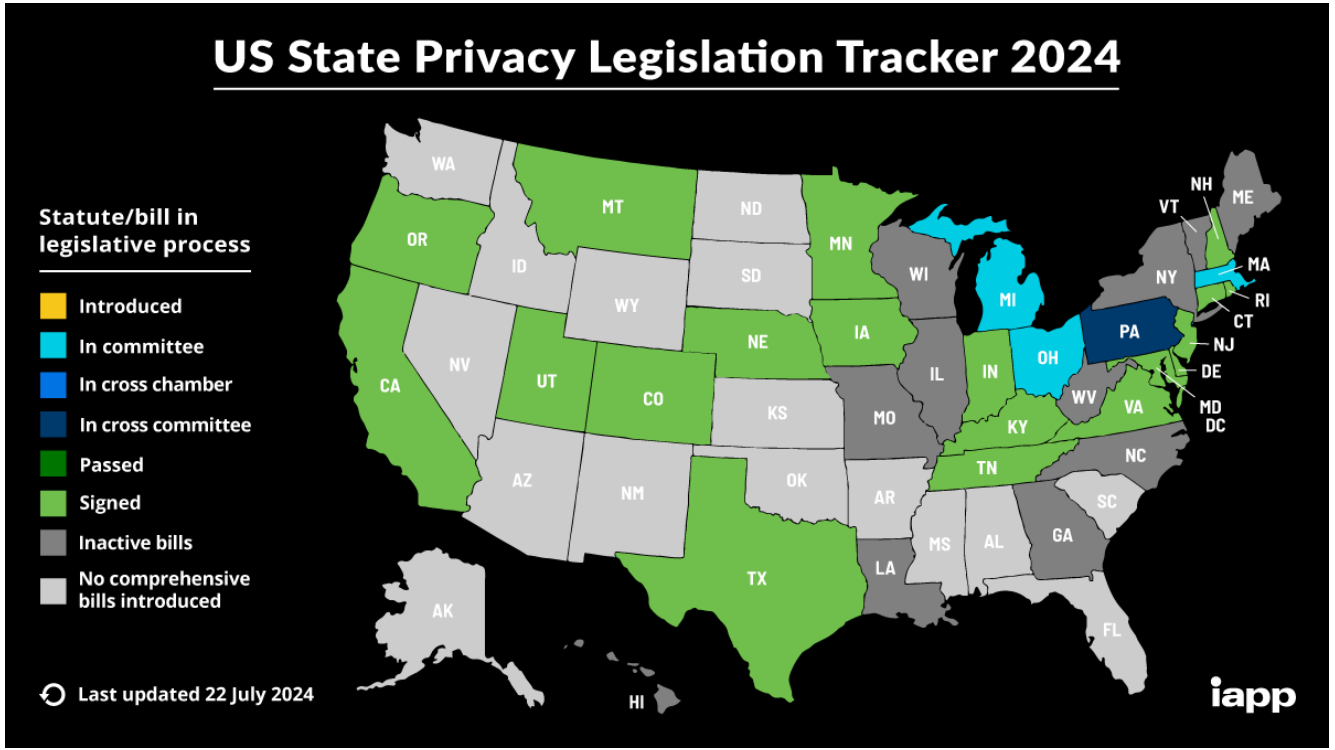
Protection of Employee Biometrics

- Illinois, Texas, and Washington already have biometric privacy laws on the books.
- More states with proposed legislation in 2023 and 2024
- Employers that use fingerprinting, eye scans, or other biometric measurements in connection with access, time tracking, etc., should have these laws on their radar!
- Boon for class action plaintiffs law firms.
- Aug. 2, 2024: Amendments to Illinois's law to limit damages.

Consumer Data Privacy Laws

- No comprehensive federal law exists.
- Increased state legislation continues.
- Why does it matter for employers? Some states' laws extend to employee and applicant data!
- States that passed new laws in 2024: KY, MD, MN, NE, NH, NJ, OR, RI, TN
- Some of the new laws are effective as early as January 1, 2025.

Consumer Data Privacy Laws



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