WorkSmarts Virtual Seminar

Looking Back, Looking Forward

November 13, 2024

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Agenda

Case law and regulatory updates regarding discrimination, harassment, retaliation prevention, and workplace fairness

Wage and hour updates relating to independent contractor and exempt/non-exempt employee classifications and the joint employer standard

Developments with respect to restrictive covenants and confidentiality, including updates regarding the Federal Trade Commission's non-compete ban

Key national developments with respect to employee data, monitoring, and privacy

Impact of recent OSHA health and safety mandates on business operations

Discrimination, Harassment, Retaliation, and Workplace Fairness

United States Supreme Court Updates

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."
  - Whistleblower must show only that the employer discharged him "because of" his whistleblowing. Motive behind retaliation does not matter.

Whistleblowers Do Not Have to Show Retaliatory Intent

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.

Lowered Threshold for “Adverse Employment Action”

Muldrow v. City of St. Louis, Missouri, 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, perks, 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 holding of harm, that harm need not be “significant.”

Employees challenging job transfers under Title VII must show that the transfer brought about some harm, but that harm need not be significant.

To “discriminate” means to treat worse.

Effects of *Muldrow*

Broadens scope of Title VII.

More lawsuits will survive initial stages of litigation.

Lower burden for employees to establish *prima facie* case of discrimination.

More litigation for forced transfer because employee does not have to show a significant harm from the transfer.

What does *Muldrow* mean for employers?

Employers need to be able to explain the reason(s) for transfer decisions that are not based on protected characteristics.

Issues with corporate diversity programs.

Likely additional litigation is necessary to fully understand implications.

Aftermath of *Muldrow*: What can employers do?

Evaluate whether transfer negatively impacts employees even if pay or job classification level remains the same.

Document legitimate business reason for job transfers and assess whether any potential bias was involved with transfer.

Non-discrimination and equal employment training.

Promptly investigate any complaints about discrimination.

Consider privileged review of DEI programs to evaluate any potential risks in light of *Muldrow.*

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.

Regulatory & Agency Updates

PWFA – Pregnancy Accommodations

- The Pregnant Workers Fairness Act (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.

PWFA – Pregnancy Accommodations

Covered entities: Public and private employers, regardless of the industry, with 15 or more employees, unions, government agencies, and the Federal Government.

Employees are covered even if they have not worked for a specific employer for a specific length of time.

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 apply under the PWFA.

PWFA – Pregnancy Accommodations

The PWFA requires covered entities to provide “reasonable accommodations,” or changes at work, for a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

Examples of reasonable accommodations: a stool to sit on while working; frequent breaks; time off for health care appointments; temporary reassignment; temporary suspension of certain job duties; telework; or time off to recover from childbirth or a miscarriage, among others to be made on a case-by-case basis.

An accommodation must remove a work-related barrier and provide the employee with equal employment opportunity.

Undue hardship means significant difficulty or expense incurred by a covered entity resulting from, the provision of the accommodation.

EEOC Enforcement Guidance on Harassment in the Workplace

On April 29, 2024, the EEOC published final guidance on harassment in the workplace, which "updates, consolidates, and replaces the agency's five guidance documents issued between 1987 and 1999, and serves as a single, unified agency resource on EEOC-enforced workplace harassment law."

Guidance addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced statutes and the analysis for determining whether employer liability is established.

Guidance focuses on the three components of a harassment claim: (1) covered bases and causation; (2) discrimination with respect to a term, condition, or privilege of employment; and (3) liability.

Wage and Hour Updates

Department of Labor – Independent Contractor Status

On January 10, 2024, the DOL announced is Final Rule revising the agency's approach to evaluating independent contractor status under the FLSA.

89 Fed. Reg. 1638 (Jan. 10, 2024)

Final Rule went into effect on March 11, 2024

Department of Labor – Independent Contractor Status

"Independent Contractors"
Workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves.

6 Factors of the Economic Reality Test
1) the opportunity for profit or loss a worker might have; 2) the financial stake and nature of any resources a worker has invested in the work; 3) the degree of permanence of the work relationship; 4) the degree of control an employer has over the person's work; 5) whether the work the person does is essential to the employer's business; and 6) worker's skill and initiative

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.

Department of Labor – EAP Annual Salary Thresholds

On April 23, 2024, the DOL announced its Final Rule, which is scheduled to increase the annual salary threshold for the executive, administrative, and professional (EAP) exemptions.

Effective January 1, 2025, the EAP annual salary threshold will increase from $43,888 ($844 a week) to $58,656 ($1,128 a week).

Effective July 1, 2024, the EAP annual salary threshold increased from $35,568 ($684 a week) to $43,888 ($844 a week).

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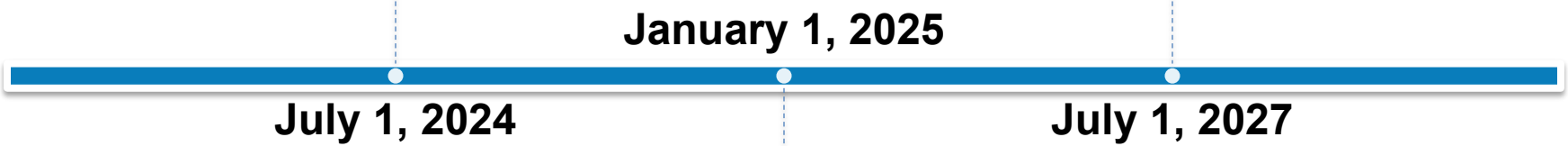
Department of Labor – HCE Annual Salary Thresholds

Effective July 1, 2024, the highly compensated employee (HCE) exemption annual salary threshold increased from $107,432 to $132,964.

Beginning July 1, 2027, the salary threshold and minimum annual compensation are scheduled to update every three years, based on current wage data.



Effective January 1, 2025, the HCE exemption annual salary threshold will increase from $132,964 to $151,164.

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)

Labor Law: NLRB's Joint-Employer Rule

The NLRB issued a Final Rule which went into effect on December 26, 2023.

Rule replaced the Final Rule entitled "Joint Employer Status Under the National Labor Relations Act," which took effect on April 27, 2020.

2023 Final Rule established a new standard for determining whether two employers are joint employers of particular employees within the meaning of the Act.

Labor Law: NLRB's Joint-Employer Rule

- On March 8, 2024, the U.S. District Court for the Eastern District of Texas granted the Chamber of Commerce's motion for summary judgment and issued a declaratory judgment vacating the NLRB's 2023 Joint-Employer Rule.
- ***Held:***
  - Rule "exceeds the bounds of the common law" because it allows for a finding of joint employment based solely on indirect or reserved control over an employee;
  - The NLRB's justification for rescinding its 2020 Rule is arbitrary and capricious, rejecting the NLRB's argument that the 2020 Rule was unlawful.
- The NLRB eventually dismissed its appeal, meaning the 2020 Rule currently remains the operative rule for determining joint employer status under the NLRA.

Restrictive Covenants, Confidentiality & Intellectual Property

FTC's Proposed Rule on Non-Competes

On January 5, 2023, the FTC published a proposed rule calling for the absolute ban of non-compete agreements.

- The Proposed Rule would also require employers to rescind existing noncompete agreements and notify current and former employees that their non-competes are no longer in effect.
- As we saw last year, the NLRB similarly released Memorandum 23-08, commenting that *"Non-compete provisions … reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."* Also sought to invalidate nearly all non-compete agreements.

FTC's Non-Compete Rule

On April 23, 2024, FTC voted 3-2 to finalize a new rule prohibiting employers from enforcing new non-compete clauses nationwide and invalidating the majority of existing non-competes in industries governed by the FTC. ***The rule was set to go into effect on September 4, 2024***.

The rule prohibits employers from: (1) entering into non-competes with workers after the September 4, 2024 effective date; and (2) enforcing previously executed non-competes with workers other than senior executives.

This term "workers" includes employees, independent contractors, externs, interns, apprentices, volunteers, and sole proprietors who provide a service.

FTC's Nationwide Non-Compete Rule

Notice Requirements: Employers were expected to have to notify current and former employees that their non-competes were invalid.

- Employers must notify ex-workers that their executed non-competes are no longer enforceable.

Preempts inconsistent state laws, but not those state laws that are consistent with the rule, i.e. California's statute against non-competes.

FTC's Non-Compete Rule

The rule bans nearly all **new** non-competes, with very narrow exceptions.

Exception 1: **existing** non-competes with senior executives with "policy making authority."

- Policy-making authority" is defined as "final authority to make policy decisions that control significant aspects of a business entity or a common enterprise."

Exception 2: non-competes between seller and buyer of a business.

Exception 3: Does not apply where a cause of action related to a noncompete accrued prior to September 4, 2024.

When Are Non-Competes Agreement Acceptable?

Senior highly compensated executives have knowledge, bargaining power, and access to counsel

Business Sale: Hard assets + Intellectual Property + *Goodwill*

- Goodwill is amorphous, hard to transfer, hard to value.
- Goodwill is generally measured as the difference between the purchase price and value of the assets of the sold business.
  - Transfer of trademarks, trade dress, customer information
  - But also, may require owners/operators to commit not to compete, including solicitation of customers and employees to give the buyer benefit of its bargain.
  - Lower risk of abuse because B2B generally reduces imbalance in negotiations between buyer and seller.

Legitimate Purposes of Non-Competes?

Employees have **no legitimate interests** in being able to use a former employer's **trade secrets** in another business.

But Employers have **no legitimate interests** in:

Inhibiting movement of Employees…	Reducing competition for Employees…	Protecting public information …(e.g. customers)	Raising barriers to enter into a market…

State Legal Challenges to the FTC's Rule

U.S. Chamber of Comm. V. Fed Trade Comm'n, (E..D. Tex. May 3, 2024): non-compete rule challenged; case stayed.

Ryan, LLC v. Federal Trade Commission (N.D.T.X 2024): court set aside FTC rule, opening up appeal to Fifth Circuit.

ATS Tree Servs., LLC v. Fed Trade Comm'n (E.D. Pa. July 23, 2024): *ATS* court ruled that FTC has clear authority to issue "procedural and substantive rules as is necessary to prevent unfair methods of competition."

Properties of the Villages, Inc. v. FTC (M.D. Fla. 2024): granted plaintiff's motion for stay of FTC non-compete rule's effective date, noting injunction was limited to plaintiff and did not have nationwide application.

FTC Non-Compete Rule: A Look Ahead

Regardless of the decision on the FTC ban, non-competes are under fire.

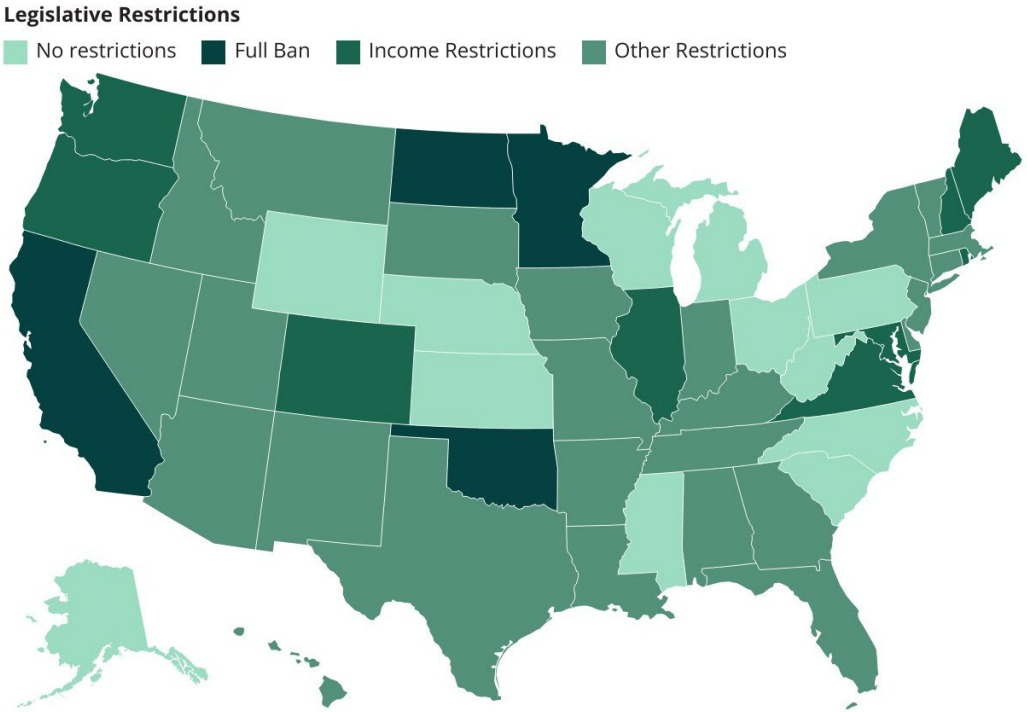
Trend in state legislatures is to bar or restrict non-competes

Over 30 million Americans are bound by covenants not to compete

Over half of those are in low skilled/unskilled jobs

Legislators and regulators complain this is chilling employee movement and competition for their services…resulting in billions of lost wages

Non-Complete Map



Map: Economic Innovation Group

ECONOMIC INNOVATION GROUP

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New NLRB GC Memo – Stay or Pay Provisions

On October 7, 2024, the NLRB General Counsel issued a memorandum outlining specific remedies that the General Counsel intends to pursue in cases concerning unlawful non-compete provisions and announcing a new prosecutorial initiative targeting “stay-or-pay” provisions.

Employers have until December 7, 2024 to cure any preexisting stay-or-pay provisions that advance a legitimate business interest.

A “stay-or-pay” provision includes “any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, with a certain timeframe.”

New NLRB GC Memo – Stay or Pay Provisions

The NLRB will "find that any provision under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe is presumptively unlawful."

The employer may rebut the presumption by proving that the stay-or-pay provision advances a legitimate business interest and is narrowly tailored to minimize any infringement on Section 7 rights, that is, the provision:

(1) is voluntarily entered into in exchange for a benefit;	(2) has a reasonable and specific repayment amount;	(3) has a reasonable "stay" period; and	(4) does not require repayment if the employee is terminated for cause.

Remedying the Effects of Unlawful Stay-or-Pay Provisions

Where a stay-or-pay arrangement was voluntarily entered into, with informed consent, in exchange for a benefit, but the provision violates the Act because it is not otherwise narrowly tailored, the employer should be ordered only to rescind and replace it with a lawful provision, as well as undertake other remedies.

Where an employer proffers or maintains a stay-or-pay provision that is not voluntary, the NLRB will remedy the provision's harmful effects by requiring that the employer rescind the provision and notify employees that the "stay" obligation has been eliminated and that any debt has been nullified and will not be enforced against them.

Where an employer has attempted to enforce an unlawful stay-or-pay agreement, except in extenuating circumstances, the employer should be required to retract the enforcement action and make employees whole for any financial harms resulting from its attempted enforcement.

Employee Data, Monitoring & Privacy

EEOC EEO-1 Component 1 Data Collection

26 Feb. 2024

On February 26, 2024, the EEOC announced that the 2023 EEO-1 Component 1 data collection will open on April 30, 2024, and the 2023 EEO-1 Component 1 Instruction Booklet has been updated.

The deadline for submitting and certifying the 2023 EEO-1 Component 1 Reports was June 4, 2024.

4 June 2024

Department of Labor AI Principles

On May 16, 2024, the DOL announced the issuance of a set of principles providing employers and developers that create and deploy AI with guidance for designing and implementing these technologies.

These principles recognize the benefits as well as the risks of using AI an are aimed at protecting workers' rights and improving workplace quality as employers adopt new AI workplace systems.

The AI Principles address, among other things:

Meaningful worker engagement at all phases of AI system creation, and implementation;	Ethical development of AI systems;	Transparency to workers and applicants when using AI systems; and	Protecting worker rights.

Health & Safety

OSHA – Employee Representation During Inspection

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1903

[Docket No. OSHA–2023–0008]

RIN 1218–AD45

Worker Walkaround Representative Designation Process

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: In this final rule, OSHA is amending its Representatives of Employers and Employees regulation to clarify that the representative(s) authorized by employees may be an employee of the employer or a third party; such third-party employee representative(s) may accompany the OSHA Compliance Safety and Health Officer (CSHO) when, in the judgment of the CSHO, good cause has been shown why they are reasonably necessary to aid in the inspection. In the final rule, OSHA also clarified that a third party may be reasonably necessary because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills. OSHA concluded that these clarifications aid OSHA's workplace inspections by better enabling employees to select representative(s) of their choice to accompany the CSHO during a physical workplace inspection. Employee representation during the inspection is critically important to ensuring OSHA obtains the necessary information about worksite conditions and hazards.

DATES:

Effective date: This final rule is effective on May 31, 2024.

Docket: To read or download comments or other information in the docket, go to Docket No. OSHA–2023–0008 at *https://www.regulations.gov*. All comments and submissions are listed in the *https://www.regulations.gov* index; however, some information (*e.g.*, copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TDY number 877–889–5627) for assistance in locating docket submissions.

When citing exhibits in the docket in this final rule, OSHA includes the term "Document ID" followed by the last four digits of the Document ID number. Citations also include, if applicable, page numbers (designated "p."), and in a limited number of cases a footnote number (designated "Fn."). In a citation that contains two or more Document ID numbers, the Document ID numbers are separated by semi-colons (*e.g.*, 0001; 0002).

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

Since the Occupational Safety and Health Act of 1970 (OSH Act or Act) was passed in 1970, section 8(e) of the OSH Act has required that, subject to regulations issued by the Secretary of Labor (via OSHA), a representative of the employer and a representative authorized by employees "shall" each have the opportunity to accompany OSHA during the physical inspection of the workplace (*i.e.*, "the walkaround") for the purpose of aiding OSHA's inspection. One of section 8(e)'s implementing regulations, at 29 CFR 1903.8(c), provided that a representative authorized by employees "shall be an employee(s) of the employer." However, that regulation also created an exception for "a third party who is not an employee of the employer" when, "in the judgment of the Compliance Safety and Health Officer, good cause has been shown" why the third party was "reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. . . ." 29 CFR 1903.8(c) (1971). The regulation pointed to two non-exhaustive examples—a safety engineer and an industrial hygienist.

While OSHA has long permitted employee representatives to be third parties pursuant to 29 CFR 1903.8(c), in

- New Final Rule - 89 Fed. Reg. 22558
- Issued April 1, 2024 - Effective May 31, 2024
- Amends 29 CFR 1903.8
- The rule's broad language allows employees to designate a union representative as their walkaround representative in both unionized and non-unionized workplaces.

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OSHA – Employee Representation During Inspection

Previous 29 CFR 1903.8(c)

The representative(s) authorized by employees shall be an employee(s) of the employer. However, if in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the Compliance Safety and Health Officer during the inspection.

New 29 CFR 1903.8(c)

The representative(s) authorized by employees may be an employee of the employer or a third party. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills).

“Good Cause” and “Reasonably Necessary”

- Union representative(s) at non-Union worksite
- Interviews of employees?
- Records review?

them. Further, the CSHO must find good cause has been shown that a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace. This requirement ensures that the representative will aid the inspection. Additionally, if a third party engages in conduct that is unrelated to the inspection, the CSHO has the authority to terminate the third party's accompaniment.

OSHA – High-Hazard Industries

88 Fed. Reg. 47254 (July 21, 2023).

OSHA's Final Rule amending its regulations to require certain employes in designated high-hazard industries to electronically submit injury and illness information to OSHA became effective on January 1, 2024.

Among the amendments is a new requirement that employers with 100 or more employees in certain high-hazard industries must electronically submit information from their Form 300-Log of Work-Related Injuries and Illnesses, and Form 301-Injury and Illness Incident Report to OSHA once a year.

These submissions are in addition to submission of Form 300A-Sumary of Work-Related Injuries and Illnesses.

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.

OSHA – Other Updates

OSHA has increased its civil and criminal enforcement in recent years, with maximum penalties for serious violations rising to $16,131 per violation and for willful or repeated violations rising to $161,323 per violation

State Law Considerations

Specific Legislative Trends

- Laws Banning Captive Audience Meetings
- Pay Transparency Laws
- Protection of Employee Biometrics
- Consumer Data Privacy Laws

Thank You!

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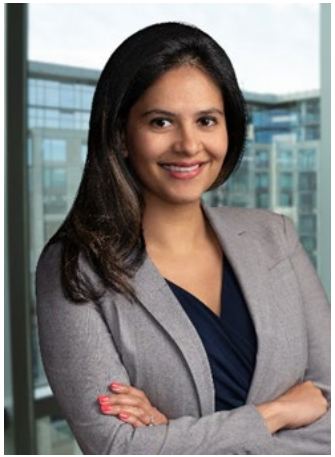

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