

Employment Law on Fast Forward

A Speed Round Update

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Supreme Court Eliminates Heightened Threshold for Harm Under Title VII

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Legal Issue to Watch: Adverse Employment Action

- *Muldrow v. City of St. Louis*
- UNANIMOUS decision issued Wednesday, April 17, 2024
- Title VII still requires a showing of harm, just not “significant . . .”
- Impacts will be substantial
 - Summary judgment based on adverse action requirement more difficult
 - Litigation over what is “some harm”
 - Advice and counsel risk profile changes

Implications in the DEI Space

- Challenges to employer DEI programs on the rise, especially since *SFFA*
- *Hamilton* - 5th Circuit decision – Justice Ho concurrence a harbinger:
- “... if ‘a law firm is having a lunch to do CLEs and you have a policy that says we’re only going to invite women but not men to this CLE lunch, that’s of course actionable, and that’s of course a term, condition, or privilege of employment’ under Title VII. Audio of Oral Arg. 23:00–23:29.”
- Anticipate increased challenges to programming that does not result in an ultimate employer decision
- e.g., Diverse slate programs; mentorship programs; third party partnership participation/conferences next
- EEOC Commissioner Andrea Lucas told us she agrees with Judge Ho . . .

Pregnant Workers Fairness Act

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The Basics

- Requires reasonable accommodations for **known limitations** due to **pregnancy, childbirth, or related medical conditions**, unless it would cause an undue hardship
- Incorporates ADA meaning of reasonable accommodation and undue hardship
- Predictable Assessments
 - Carry and keep water nearby so employee can drink
 - Permit additional restroom breaks
 - Allow employee to sit or stand, as needed
 - Allow breaks to eat and drink as needed

Things to Know

- Expansive definition of “pregnancy, childbirth or related medical conditions”
- There is no severity threshold
- “Temporarily” excusing the performance of an essential job function
- Limits on requesting medical documentation
- Consider interim accommodations
- If employee is otherwise able to work - leave should be an accommodation of last resort
- Document, document, document
- Don't forget to consider other potential laws (i.e., FMLA, state or local laws)

Title IX Regulations by the U.S. Department of Education

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New Title IX Regulations: Significant Changes

- Broadens definition of sexual harassment
- Regulations apply to:
 - Sex based harassment and discrimination
 - Pregnancy and related conditions
 - Gender identity
 - Sexual orientation
 - Retaliation
- Conduct that occurs outside US may be considered in hostile environment harassment
- Interim suspension permitted without physical threat

New Title IX Regulations: Significant Changes

- No longer required
 - Written complaint
 - Live hearings with cross examination (postsecondary)
 - Mandatory dismissals
- K-12 Only
 - Member of Sec. 504/IDEA team must be consulted

DOL Issues Final Exemption Rule

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Agenda

- Final Rule
 - What are the new requirements?
 - When are they effective?
- Likelihood the Final Rule Will Be Enjoined
- What To Do Now
 - Strategies for compliance

Final Rule

1. Increases minimum salary levels for the standard “EAP” exemptions
2. Increases minimum salary for highly compensated exemption
3. Automatic salary adjustments every three years starting July 1, 2027
 - No change to the duties test
 - U.S territories not subject to increases

Standard Salary Level

Current

\$35,568

\$684 per week

July 1, 2024

\$43,888

\$844 per week

Jan. 1, 2025

\$58,656

\$1,128 per week

HCE Salary Level

Current

\$107,432

July 1, 2024

\$132,964

Jan. 1, 2025

\$151,164

Under HCE, employer can include commissions and other non-discretionary incentive compensation to satisfy annual compensation requirements above. But the annual compensation must include the minimum weekly salary level equal to the standard exemption without regard to commissions or other incentive compensation. If HCE paid only salary, weekly equivalent is \$2,557 per week for a 52-week period, beginning 7/1/24, and \$2,907 beginning 1/1/25.

Automatic Updates

- Salary levels to be adjusted (*increased*) automatically every 3 years (to reflect current wage data)
- Standard minimum salary adjustment: based on 35th percentile of full-time salaried earnings in lowest Census region
- HCE minimum salary adjustment: based on 85th percentile of full-time salaried employees *nationally*
- First scheduled increase: July 1, 2027

What Happens Next? It Depends.

- Will the final rule take effect?
- *Mayfield v. U.S. Department of Labor*
 - Pending in Fifth Circuit
 - Does DOL even have authority to impose a “salary minimum test”?
 - Will the U.S. Supreme Court ultimately decide?
- Additional litigation likely
 - Final Rule violates APA
 - Automatic updates beyond DOL authority

What To Do Now?

- ✓ Identify all exempt employees and current salary levels.
- ✓ Identify employees in each job title below the new minimum salary level.
- ✓ Identify total cost to raise salaries to minimum level.
- ✓ Evaluate the options.
- ✓ Consider the downstream effects.
- ✓ Keep state laws in mind.

What Are the Options?

Increase salary level so affected employees retain exempt status*

Reclassify affected employees as non-exempt (overtime-eligible)

*assuming employees satisfy the duties test

Reclassifying: Cost-Neutral Approaches

- Adjust hourly pay rate to account for anticipated overtime
- Use fluctuating workweek method of pay
- Reduce hours to avoid overtime
- Hire more part-time employees
- Alternatives to absorbing related additional costs
 - Reduce variable compensation
 - Reduce fringe benefits
 - Provide less frequent, smaller wage increases for non-exempt employees and delay promotions

Arbitration Agreements

Recent Expansion of the FAA's Transportation Worker Exemption

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Federal Arbitration Act's Exemption for "Transportation Workers"

- What is it?
 - FAA does not apply to agreements with "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
- Why does it matter?
 - May not be able to enforce arbitration agreement using FAA
 - Arbitration agreement may need back-up clause to enforce under state law and may need more nuanced review for state law compliance

Recent Cases on Transportation Worker Exemption

- Supreme Court: The FAA's transportation worker exemption is **not** limited to workers who work for a company in the transportation industry. (April 12, 2024)
- Ninth Circuit: A warehouse worker was a "transportation worker" even though his job duties merely involved local movement of goods at a warehouse. (March 12, 2024)

Potential Blind Spots and Litigation Hot Spots

- Employees at warehouses and distribution centers
- Employees at retail or manufacturing companies who are involved in shipping, receiving, or loading/unloading goods
- Local drivers
- Supervisors of transportation workers and other "transportation adjacent" roles

Restrictive Covenants

What You Need to Know As an Employer

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FTC Final Rule Bans True Non-Competes

- **Effective Sept. 4, 2024** (120 days after publication in the Federal Register)
- **Definition of Non-Compete:** A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from either seeking or accepting work after the conclusion of employment, or operating a business after the conclusion of employment.
- **Exceptions**
 - Current non-competes for senior executives are still valid, but new non-competes prohibited (C-Suite executives or other executives who have final policy-making authority)
 - Bona fide sale of a business entity, ownership interest in a business entity, or substantially all assets
 - Where a cause of action related to a non-compete clause accrued prior to effective date of rule
- **FTC's Limited Jurisdiction**
 - Not-for-profit entities
 - Banks; Savings and loan institutions; Federal credit unions; Common carriers; Air carriers and foreign air carriers; Persons and businesses subject to the Packers and Stockyards Act, 1921
- **Notice:** Employers must give written notice that non-competes are unenforceable, but no rescission requirement

Now What?

- **Significant Legal Challenges Pending**

- *Ryan, LLC v. FTC*, No. 3:24-cv-986, N.D. Tex. (April 23, 2024)
- *Chamber of Commerce of the United States of America v. FTC*, No. 6:24-cv-00148, E.D. Tex. (April 24, 2024)
- *ATS Tree Services, LLC v. FTC*, No. 2:24-cv-1743, E.D. Pa. (April 25, 2024)

- **Takeaways for Employers**

- Don't panic!
- Hope for the best and prepare for the worst:
 - Do your senior executives meet the definition for an exception from the ban?
 - Do your agreements “function” to prevent or penalize a worker from taking another job?
 - Who will need to receive notice?
- As always:
 - Draft narrowly
 - Draft for severability
 - Avoid non-competes for lower-level workers



Thank You!

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