FELHABER LARSON

ATTORNEYS AT LAW

FLSA Legal Update

June 14, 2024

FELHABER LARSON

ATTORNEYS AT LAW

Grant T. Collins

Minnesota State Bar Association
Certified ▲ Specialist
Labor and Employment Law

(612) 373-8519
gcollins@felhaber.com

Sara Gullickson McGrane

Minnesota State Bar Association
Certified ▲ Specialist
Labor and Employment Law

(612) 373-8511
smcgrane@felhaber.com

Where Are We Headed?

- DOL's New OT Regulations
  - What is required?
- Preparing for the DOL's new regulations

Overtime under the FLSA

Key OT Concepts

- Exempt vs. Non-Exempt
- Hours Worked
- Overtime
  - Regular Rate

Common Misconceptions

- *"If I pay an employee a salary, then he's exempt."*
- *"This employee's job title is 'manager,' 'supervisor,' or 'administrator,' so he's exempt."*
- *"This employee is performing sales work from home, so he's exempt."*
- *"This employee doesn't want to punch a clock, so we're going to pay him a salary and he's exempt."*
- *"I don't let my employees work overtime, so it doesn't matter how I classify them."*

White Collar Exemption

- Three-part test:
  1) Salary level – the amount of salary paid.
  2) Salary basis – paying in accordance with FLSA salary rules.
  3) Duties test – meeting the duties of any particular white-collar exemption.

What are the "White Collar" Exemptions?

- Executive Exemption
- Administrative Exemption
- Professional Exemption
  - Learned & Creative Professionals
- Computer Employee Exemption
- Outside Sales Exemption
- Highly-Compensated Employees

DOL's 2024 Salary Rules

- Proposed Rules announced on September 23, 2023
- Comment period closed in November 2023
- Final Rules Issued on April 26, 2024
- Effective 60 days later

History of the FLSA Salary Levels

- Before 2004 – below the poverty level
- From 2004 to 2020, **$455 per week** (or $23,660 annually)(also below the poverty level).
- Effective January 1, 2020, increased to **$684 per week** ($35,568 annually).
- Effective **July 1, 2024**, increased to **$844 per week** ($43,888).
- Effective **January 1, 2025**, increased to **$1,128 per week** ($58,656).

DOL's 2024 Salary Rules

- Highly Compensated Employee exemption (HCE) threshold increased from **$107,432** to **$132,964** on 7/1/24, and to **$151,164** on 1/1/25
- Requires automatic updates every 3 years beginning 3 years after the Final Rule.

DOL's 2024 Salary Rules (cont.)

- If not paid a salary, "Computer Employees" must be paid an hourly basis of ***$27.63 per hour***.

DOL's 2024 Salary Rules (cont.)

- New rules allow nondiscretionary bonuses and incentive payments (including commissions) to count toward the salary level requirement.
- Capped at 10% and must be paid annually or more frequently.
- Examples include incentive bonuses and commission payments based on a fixed formula.

DOL's 2024 Salary Rules (cont.)

- "An employee who does not work a full 52-week period for the employer, either because the employee is newly hired after the beginning of this period or ends the employment before the end of this period, may qualify for exemption if the employee receives a pro rata portion of the minimum amount established in paragraph (a)(3) of this section, based upon the number of weeks that the employee will be or has been employed.
- An employer may make one final payment as under paragraph (a)(3)(i) of this section within one pay period after the end of employment."

10% Rule Does Not Apply To HCEs

- For Highly Compensated Employees, employee must continue to receive at least the minimum salary ($844 and then $1,059 per week) paid on a salary basis.
  - Employees qualifying for exemption under the HCE test must receive at least the standard salary level per week on a salary or fee basis, while the remainder of the employee's total annual compensation may include commissions, nondiscretionary bonuses, and other nondiscretionary compensation.
  - Although § 541.602(a)(3) allows employers to use nondiscretionary bonuses, incentives, and commissions to satisfy up to 10 percent of the weekly standard salary level when applying the standard salary and duties tests, the Department's regulation at § 541.601(b)(1) does not permit employers to use such payments to satisfy the weekly standard salary level requirement for HCE workers.

Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39 (2023)

- Oil-rig employees was paid at least **$963 per day** (i.e., a "daily rate"), but no overtime pay, even though he routinely worked 84 hours per week.
- Court concluded that because the plaintiff's predetermined amount (i.e., his daily rate) was calculated with respect to a daily unit of time, his pay did not satisfy the salary-basis test.
- The Court suggested in several footnotes that the outcome may have been different if the plaintiff was paid a base salary in addition to a daily rate.

Minimum Guarantee Plus Extras

- Employers are permitted to pay base salary plus extras
  - Commission
  - Percentage of sales or profits
  - Additional compensation based on hours worked
- The trick is that the employee must also receive no less than the amount of salary required by the rules.

DOL's 2024 Salary Rules (cont.)

- If not paid the new salary amounts, an employee will be eligible for overtime.
- Important note: there is no proration of the salary amount.
  - Full-time, part-time, every salaried employee is entitled to the full salary every week.
- DOL estimates that approx. ***11.7 million*** workers would be eligible for OT.

DOL's 2024 Salary Rules (cont.)

- The Proposed Rule does **not** . . .
  - Change FLSA duties tests.
  - Change the limitation on the performance of "nonexempt work".
  - Change the definition of payment "on a salary basis" (i.e., permissible vs. impermissible deductions).

Test #2 – Salary Basis

- Must receive full salary (i.e., $844 and then $1,128) in any week where work is performed.
  - Need not be paid for any workweek when no work is performed.
- Cannot be reduced based on quality or quantity of work or the operating requirements of employer.
- Exception for **full-day** absences for "personal reasons," disciplinary suspensions, and pursuant to bona fide PTO plan.

What Does "Salary Basis" Mean?

- Federal law allows some additional partial-day salary deductions for missed hours due to FMLA leave, illness or disability.
  - Minnesota law does **not** allow these same salary deductions.

Salary Basis (cont.)

- **Impermissible Wage Deductions**:
  - Performance
  - Discipline
  - Partial Day absence
  - Work is unavailable for employee
- **Safe Harbor Rule:**
  - If an inadvertent deduction is made, employer does not lose exemption status if employee is promptly reimbursed.

Test #3 – Duties Test

- An employee who meets the salary level tests and the salary basis tests is exempt only if the employee also performs exempt job duties.
- "Primary duty" (principal, main, major or most important duty) of employee must fall under category of exempt duties.

Exemption	Salary Level	Salary Basis	Duties Test
Executive	Effective 7/1/24 at least $844 and then $1,128 by 1/1/25 each week.	At least 90% of the salary level must be paid on a “salary basis”. Up to 10% may be satisfied with nondiscretionary bonuses or incentive payments.	The employee’s “primary duty” must be that of an exempt executive employee.

Exemption	Salary Level	Salary Basis	Duties Test
Administrative	Effective 7/1/24 at least $844 and then $1,128 by 1/1/25 each week.	At least 90% of the salary level must be paid on a “salary basis”. Up to 10% may be satisfied with nondiscretionary bonuses or incentive payments.	The employee’s “primary duty” must be that of an exempt administrative employee.

Exemption	Salary Level	Salary Basis	Duties Test
Professional	Effective 7/1/24 at least $844 and then $1,128 by 1/1/25 each week. Does NOT apply to doctors, lawyers, or teachers.	At least 90% of the salary level must be paid on a “salary basis”. Up to 10% may be satisfied with nondiscretionary bonuses or incentive payments. Does NOT apply to doctors, lawyers, or teachers.	The employee’s “primary duty” must be that of an exempt professional employee.

Exemption	Salary Level	Salary Basis	Duties Test
Outside Sales	Not applicable	Not applicable	The employee's "primary duty" must be that of an exempt outside sales employee.

Exemption	Salary Level	Salary Basis	Duties Test
Outside Sales	Not applicable.	Not applicable.	The employee's "primary duty" must be that of an exempt outside sales employee.

Exemption	Salary Level	Salary Basis	Duties Test
Highly-Compensated	$151,164 per year in total compensation. **AND** Effective 7/1/24 at least $844 and then $1,128 by 1/1/25 **each week.**	100% of the salary level must be paid on a "salary basis" or "fee basis". The remainder of the total annual compensation requirement may be paid in nondiscretionary bonuses or incentive payments (including commissions).	The employee's "primary duty" must be office or non-manual work. Must "customarily and regularly" perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.

Preparing for the New OT Rules

Implementing the OT Rules

- **Step #1** – Target "At Risk" Job Classifications.
  - Target current exempt employees earning less than ***$60,000*** (or, at least ***$55,068***).
  - Consider conducting a full FLSA audit of all exempt classifications.
- **Step #2** – Double-check Duties Test.
  - Remember, exempt status requires three elements (duties, salary level, and salary basis).

Implementing the OT Rules (cont.)

- **Step #3** – Developing a Decision-Making Tool
  - Option #1 – Increase Salary (or add bonus)
    - Consider salary surveys, legal risk.
  - Option #2 – Re-Classify to Non-exempt
    - Consider financial and practical costs (travel, etc.).
    - Consider use of FWW or salary plus OT, and job restructuring.

Implementing the OT Rules (cont.)

- **Step #4** – Make Final Determination and Implement Change
  - Consider trainings, meetings, etc. to help any affected employees understand the transition and what is expected of them in terms of recording their hours, checking email after hours, etc.

Adjusting to New Increases

- **Option #1**—increase the employee's salary to at least $844 and then $1,059 **per week**
  - Consider utilizing the 10% non-discretionary bonus.
- Consider all the Costs
  - Addition administrative costs for recordkeeping (e.g., travel time, breaks, etc.)
  - Additional overtime premium payments.

Adjusting to New Increases (cont.)

- **Option #2**—Reclassify to Non-Exempt
  - Hourly Wage
  - Salaried Exempt Workers
  - Fluctuating Workweek (FWW)

Adjusting to New Increases (cont.)

- Convert Annual Salary to a Hourly Wage
  - Divide annual salary by 2080 hours (40 hours x 52 weeks).
  - To avoid unexpected labor costs, if the employee frequently works more than 40 hours per week, divide by a higher multiple.
  - Don’t forget the additional recordkeeping obligations.

Adjusting to New Increases (cont.)

- Salaried Non-Exempt Employees
  - If a nonexempt employee is paid on a salaried basis, you still have to figure out the hourly rate in order to calculate the amount of overtime pay owed.
  - Divide the amount of the employee's weekly salary by the number of hours the salary is intended to compensate.

Example

Kyle is a nonexempt employee who is paid a salary of $400 per week. He is scheduled to work 40 hours each week. In Week 1, he works 40 hours. In Week 2, he works 45 hours. How much is he owed?

- In Week 1, no OT, so Kyle receives his $400 salary.
- In Week 2,
  - Regular Rate: $10 per hour ($400 ÷ 40)
  - OT Rate: $15 per hour ($10 x 1.5)
  - Total pay: $475 ($400 salary + $75 in OT)

DOL FAQs

Q: What if a State has its own overtime laws about who is entitled to overtime pay?

- *The FLSA provides minimum standards and does not preempt a state from establishing more protective standards. If a state establishes a more protective standard than the provisions of the FLSA, the higher standard applies in that state. This would include, for example, exemption criteria for EAP employees under state law with higher earnings thresholds than those provided in the Department's federal regulations.*

Communicating with Employees

- Employees may view the change as a “demotion.”
- Consider rollout of the change that includes training regarding new administrative requirements.
  - E.g., recording hours, recording PTO usage, consider use of salary (fixed or FWW) to reduce anxiety regarding fluctuations in pay.
  - Be sure to outline the new rules, including recording of time, overtime payments, meal breaks, etc.

QUESTIONS?

Thank you.

FELHABER LARSON

ATTORNEYS AT LAW

The FTC's Rule Banning Non-Compete Agreements And What To Do About It

Ryan A. Olson

Overview

- Current state of traditional non-competes
- Final Non-Compete Clause Rule: The Process
- What is the new Rule?
- Will the Rule go into effect?
- What should employers do now?

Current Non-compete Landscape

Old statutory non-compete bans:

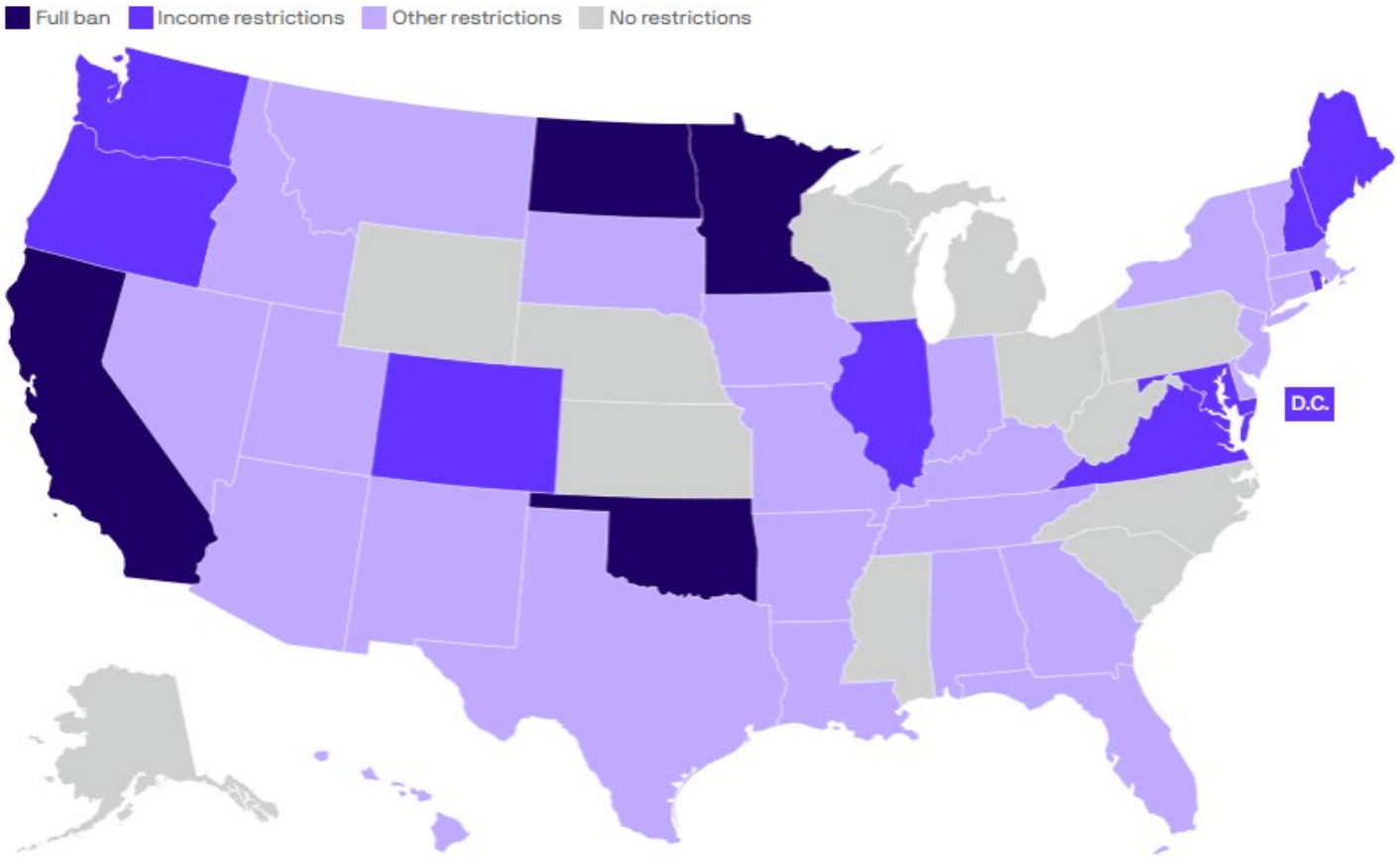
- California
- North Dakota
- Oklahoma

Case Law

State and City Legislation

Minnesota (2023)

2023 NLRB GC Memorandum 23-08



Reproduced from Economic Innovation Group; Note: Income restrictions refer to states where noncompetes are enforceable depending on an employee's income level. Other restrictions include noncompetes for certain types of workers, duration, etc.; Map: Axios Visuals

FTC Rule: The Process

- July 9, 2021: Executive Order 14036 entitled, “Promoting Competition in the American Economy” encouraged the FTC to crack down on the “unfair use” of non-competes and examine “other clauses or agreements that may unfairly limit worker mobility” (*e.g.*, nondisclosures, non-solicitation and no-poaching agreements)

- January 2023: Published proposed rule
    - 90-day review and comment period
    - FTC received 26,000 comments, with more than 25,000 in support of the ban

- April 23, 2024: The FTC voted 3-2 to finalize the rule

- May 7, 2024: Final rule published

- September 4, 2024: Effective date (pending current litigation)

Key Provisions

An employer violates the final rule if, regarding a worker, it:

- enters into or attempts to enter into a non-compete clause;
- enforces or attempts to enforce a non-compete clause; **or**
- represents that a worker is subject to a non-compete clause.

The final rule defines a "noncompete clause" as a term or condition of employment that prohibits a worker from, penalizes a worker for, **or** functions to prevent a worker from:

- seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; **or**
- operating a business in the United States after the conclusion of the employment that includes the term or condition.

Key Provisions (cont.)

- *Existing* non-compete clauses continue to be enforceable against senior executives. Senior executives are workers who:
  - Are/Were in a policy-making position (CEO/President and other company officers or their equivalent); and
  - Are/Were paid total annual compensation of at least $151,164 (annualized, if applicable).
- A policy-making position must have policy-making authority, which is defined to mean "final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to *advising or exerting influence over such policy* decisions or *having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise*.
- Total annual compensation = salary, commissions, and nondiscretionary bonuses and other compensation. It does not include payments for benefits or contributions to retirement plans.

Key Provisions (cont.)

- Exceptions:
  - Bona fide sale of a business entity **or** ownership interest
  - Existing causes of action
- Notice requirement:
  - Notice that the non-compete clause will not be, and cannot legally be, enforced.
  - Model language
  - Delivery: Hand/Mail/Email/Text

Enforcement

FTC Action

- Administrative proceeding or injunction
- Unlikely to seek monetary relief

Civil Litigation

- No direct private cause of action
- Declaratory relief: Plaintiffs will seek to have non-compete clauses declared unenforceable

Will the Rule go into effect?
Ryan LLC v. Federal Trade Commission

- Plaintiff-Intervenors, Chamber of Commerce of the USA, Business Roundtable, Texas Association of Business and Longview Chamber of Commerce, have moved the Northern District Texas court to stay the effective date and asked the court to issue a preliminary injunction
- The suit challenges the noncompete ban on two primary grounds:
  - The Rule exceeds the Commission's Statutory Authority
    - No authority to prohibit unfair methods of competition through rule making (essentially, neither the FTC Act nor any other Act authorizes unfair competition regulations)
    - Commission has improperly classified all non-competes as "unfair Methods of Competition" contrary to Section 5 of the FTC Act
    - Unlawfully retroactive
  - The Rule is a product of flawed decision making
    - Broad ban is not supported by its purported limited evidence
    - Cost-benefit analysis is deeply flawed
- Yesterday, the Court issued an Order advising that it will decide the Motion ***without*** oral argument

What Should Employers Do Now?

- Inventory existing agreements
- Wait-and-see (July 3)
- Focus on other restrictive covenants in new agreements
    - Customer non-solicitation provision
    - Non-disclosure/confidentiality

FELHABER LARSON

ATTORNEYS AT LAW

Questions?

FELHABER LARSON

ATTORNEYS AT LAW

Minnesota Legislative Update

Scott D. Blake

Agenda

1. Earned Safe and Sick Time Changes
2. Salary Ranges in Job Postings
3. Employee Misclassification Penalties and Liability
4. Restrictive Covenants in Service Contracts
5. Pregnancy-Related Leave and Parenting Leave
6. MHRA: Definitions and Remedies
7. DATWA Changes
8. Paid FMLA Leave
9. Right to Review Personnel Record

Earned Safe and Sick Time Changes

ESST CHANGES

- **ESST Balance on Paystubs No Longer Required** (Immediate)
  - Must provide amount of ESST earned and used at the end of each pay period
  - In writing or electronically
  - Methods: On paystub, attached to paystub, electronic system that employee can access
  - Records must be kept for 3 years and be readily available for inspection by the commissioner

- **"Employee" Definition** (Immediate)

Subd. 5. **Employee.** "Employee" means any person who is employed by an employer, including temporary and part-time employees, who ~~performs~~ is anticipated by the employer to perform work for at least 80 hours in a year for that employer in Minnesota. Employee does not include:

ESST CHANGES

- **"Base Rate"** (Immediate)
  - If multiple hourly rates, ESST paid at rate for shift missed
  - If employee paid solely on commission, piecework, or any other basis other than hourly or salary, a rate no less than applicable minimum wage.

ESST CHANGES

- **"Base Rate"** (Immediate)
  - "Base Rate" does not include:
    - Commissions
    - Shift Differential
    - Premium payments for overtime work
    - Premium payments for weekends, holiday, or scheduled days off
    - Bonuses
    - Gratuities/Tips
  - Potential conflict with Minneapolis, St. Paul, and Bloomington ordinances (TBD, stay tuned!)

ESST CHANGES

- **ESST "Eligible Use" Now Includes:** (Immediate)
  - An employee who "need[s] to make arrangements for or attend funeral services or a memorial, or address financial or legal matters that arise after the death of a family member"
  - Important to:
    - Revise ESST policy
    - Review and revise bereavement policy (contemporaneous?)
- **Increment of Time Used** (Immediate)
  - "not required to provide leave in less than 15-minute increments…"

ESST CHANGES

- **ESST Damages and Penalties** (Immediate)
  - If an employer does not provide ESST, employer liable to employee in amount of all ESST that should have been provided plus same amount as liquidated damages.
  - If employer doesn't have records sufficient to determine ESST an employee should have received, then employer liable for 48 hours for each year that ESST was not provided, plus liquidated damages.

ESST CHANGES

- **ESST and More Generous PTO Policies** (1/1/25)
  - "All paid time off and other paid leave made available to an employee by an employer in excess of the minimum amount required in section 181.9446 for absences from work due to personal illness or injury, but not including short-term or long-term disability or other salary continuation benefits, must meet or exceed the minimum standards and requirements provided in sections 181.9445 to 181.9448, except for section 181.9446."

ESST CHANGES

- **ESST and More Generous PTO Policies** (1/1/25)
  - "For paid leave accrued prior to January 1, 2024, for absences from work due to personal illness or injury, an employer may require an employee who uses such leave to follow the written notice and documentation requirements in the employer's applicable policy or applicable collective bargaining agreement as of December 31, 2023, in lieu of the requirements of section 181.9447, subdivisions 2 and 3, provided that an employer does not require an employee to use leave accrued on or after January 1, 2024, before using leave accrued prior to that date."

ESST CHANGES

- **ESST and More Generous PTO Policies** (1/1/25)
  - "must meet or exceed the minimum standards and requirements provided in sections 181.9445 to 181.9448, except for section 181.9446."
  - Minn. Stat. 181.9445 – Definitions
  - ~~Minn. Stat. 181.9446 – Accrual~~
  - Minn. Stat. 181.9447 – Eligible Use, Notice, Documentation, Replacement Worker, Increment of Time, Retaliation Prohibited, Pay and Benefits
  - Minn. Stat. 181.9448 – Termination, Separation, Transfer, Reinstatement

ESST CHANGES

- **ESST and More Generous PTO Policies** (1/1/25)
  - Does this convert all PTO to ESST?
    - No, only for “personal injury or illness”
  - Do I need to separately track ESST vs PTO use?
    - First 48/80 hours is ESST
    - Remaining amount PTO/Personal Illness and Injury
    - Can have separate notice and use rules for non-protected leave
  - Should employers maintain two separate buckets of ESST and PTO?
  - Vacation only policy?

Salary Ranges in Job Postings

January 1, 2025

Salary Ranges in Job Postings

- If employer posts job, must post "starting salary range" and "a general description of all of the benefits and other compensation (i.e., health, retirement benefits) to be offered to a hired applicant."
- "Starting salary range" = "the minimum and maximum annual salary or hourly range of compensation, based on the employer's good faith estimate" for the position.
- Salary range cannot be open ended ($75,000+)
- Only applies to employers with more than 30 employees in Minnesota.
- Does this apply to remote or out of state positions?

Employee Misclassification Penalties and Liability

July 1, 2024

Employee Misclassification

- If an “owner, partner, principal, member, officer, or agent” of a company “knowingly or repeatedly engaged” in misclassification of employees, then that person may be held personally liable.

- Available Damages: Compensatory damages, which include supplemental pay, overtime, shift differentials, vacation pay, sick pay, health insurance, life or disability insurance, retirement plans, Social Security and Medicare, and any other costs and expenses incurred by the individual resulting from the failure to have been classified correctly.

- $10,000 penalty for each individual misclassified, $10,000 for each statutory violation, and $1,000 per-day penalty for anyone who “delays, obstructs, or otherwise fails to cooperate with the commissioner’s investigation.”

Restrictive Covenants in Service Contracts

July 1, 2024

March 5, 2024 3:26 PM

Judiciary panel spotlights 'shadow' non-compete clauses, approves bill to close loophole

By Tim Walker

Sec. 53. **[181.9881] RESTRICTIVE EMPLOYMENT COVENANTS; VOID IN SERVICE CONTRACTS.**

Subdivision 1. **Definitions.** (a) "Customer" means an individual, partnership, association, corporation, business, trust, or group of persons hiring a service provider for services.

(b) "Employee," as used in this section, means any individual who performs services for a service provider, including independent contractors. "Independent contractor" has the meaning given in section 181.988, subdivision 1, paragraph (d).

(c) "Service provider" means any partnership, association, corporation, business, trust, or group of persons acting directly or indirectly as an employer or manager for work contracted or requested by a customer.

Subd. 2. **Restrictive employment covenants; void and unenforceable.** (a) No service provider may restrict, restrain, or prohibit in any way a customer from directly or indirectly soliciting or hiring an employee of a service provider.

(b) Any provision of an existing contract that violates paragraph (a) is void and unenforceable.

(c) When a provision in an existing contract violates this section, the service provider must provide notice to their employees of this section and the restrictive covenant in the existing contract that violates this section.

Subd. 3. **Exemptions.** This section does not apply to workers providing professional business consulting for computer software development and related services who are seeking employment through a service provider with the knowledge and intention of being considered for a permanent position of employment with the customer as their employer at a later date.

EFFECTIVE DATE. This section is effective July 1, 2024, and applies to contracts and agreements entered into on or after that date.

Pregnancy-Related Leave and Parenting Leave

August 1, 2024

Pregnancy-Related Leave and Parenting Leave

- Employer must maintain health insurance if employee is on a leave of absence as a form of pregnancy accommodation or parenting leave.
- Prenatal care appointments cannot be counted against twelve weeks of “pregnancy and parenting leave.”

MHRA: Definitions and Remedies

August 1, 2024

DEPARTMENT OF HUMAN RIGHTS

MHRA Definition Changes

Subd. 12. **Disability.** "Disability" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; ~~or~~ (3) is regarded as having such an impairment; or (4) has an impairment that is episodic or in remission and would materially limit a major life activity when active.

Subd. 13. **Discriminate.** The term "discriminate" includes segregate ~~or~~, separate ~~and, for purposes of discrimination based on sex, it includes sexual~~, or harassment.

MHRA Definition Changes

Subd. 18. **Familial status.** "Familial status" means the condition of one or more minors ~~being domiciled~~ having legal status or custody with (1) ~~their~~ the minor's parent or parents or the minor's legal guardian or guardians or (2) the designee of the parent or parents or guardian or guardians with the written permission of the parent or parents or guardian or guardians. Familial status also means residing with and caring for one or more individuals who lack the ability to meet essential requirements for physical health, safety, or self-care because the individual or individuals are unable to receive and evaluate information or make or communicate decisions. The protections afforded against discrimination on the basis of family status apply to any person who is pregnant or is in the process of securing legal custody of an individual who has not attained the age of majority.

MHRA Remedies

- Court may order:
  - Civil penalty to state
  - Trebled compensatory damages
  - Punitive damages (no longer capped at $25,000)
  - Reinstatement, hiring, or other equitable relief.

DATWA Changes

Effective Immediately

DATWA Changes

- "Oral fluid tests" (saliva tests) allowed for pre-employment cannabis and drug screens.
  - Can be administered at employer worksite/office.
  - Not allowed for other testing situations

- "Reasonable suspicion testing" allowed if employer has reasonable belief that an employee "is under the influence of drugs, cannabis, or alcohol."

Paid FMLA Leave

November 1, 2025

Paid FMLA

- DEED is required to notify all employers within five business days if an employee has submitted a claim for benefits.
- Intermittent use of paid FMLA "must be taken in increments consistent with the established policy of the employer" provided that the policy permits minimum increments of at most one calendar day.
- If an employer provides an employee with "wage replacement during an absence," and if those supplemental benefits and paid FMLA leave benefits exceed the employee's usual salary, then the employee will be required to return the excess to the employer.

Paid FMLA

- For employees who are eligible for both disability benefits and paid FMLA, the disability insurance benefits "may be offset by family and medical leave benefits paid to the employee" by the State.
  - However, such offset must be "pursuant to the terms" of the disability policy.
  - Review disability policy to make sure there is language that allows offset.
- The original version of the statute states that an applicant is not eligible to receive paid FMLA benefits if they are receiving severance pay. That provision has been deleted from the statute.

Paid FMLA – Wage Reporting

Frequently asked questions for employers

These are the questions we're hearing most from employers. Do you have a question that you don't see answered here? Please reach out to us.

What are key dates for employers?

When are the first wage detail reports due?

The first wage detail reports will be due on October 31, 2024, and will be based on wages paid between July 1, 2024, and September 30, 2024.

Paid FMLA – Wage Reporting

How will employers submit wage detail reports for Paid Leave?

The Paid Leave division will leverage the existing Unemployment Insurance (UI) UI Online system to collect wage detail reports for the program. If an employer is covered by the UI program, they will be able to submit a single wage detail file for both programs when they pay their UI taxes. The data used in the UI filing will be used to report wages directly to the Paid Leave program.

If an employer is not covered by the Unemployment Insurance program, they will need to set up a "Paid Leave Only" account. This account will be available in the spring 2024.

Paid FMLA – Wage Reporting

My organization is covered by the Unemployment Insurance program, what do I need to do for wage detail reporting?

Nothing! Your UI employer account will be automatically converted into a joint UI/Paid Leave account to allow you to submit your wage detail report using the same process you use today.

My organization is not covered by the Unemployment Insurance program, what do I need to do for wage detail reporting?

During summer 2024, you will need to register for a Paid Leave Only account through the UI Online system. We will post instructions on our website as soon as Paid Leave Only accounts are available.

When are the first wage detail reports due?

The first wage detail reports will be due on October 31, 2024, and will be based on wages paid between July 1, 2024, and September 30, 2024.

Right to Review Personnel Record

August 1, 2024

Subd. 3. **Employer.** "Employer" means a person who has ~~20~~ one or more employees. Employer does not include a state agency, statewide system, political subdivision, or advisory board or commission that is subject to chapter 13.

QUESTIONS?

FELHABER LARSON

ATTORNEYS AT LAW

Navigating Pregnancy Accommodation Under New Federal Regulations And Their Relationship To Minnesota State Law

June 14, 2024

Penny Phillips and Brian Benkstein

Federal Protections for Pregnant Workers and Nursing Mothers

- On December 29, 2022, President Biden signed the Consolidated Appropriations Act of 2023 into law, which included two federal protections for pregnant workers and nursing mothers originally part of
    - Pregnant Workers Fairness Act (PWFA)
    - Nursing Mothers Act (PUMP Act)
- Relevant portions of the act as to pregnant workers went into effect on **June 27, 2023.**
- **Note**, as to Minnesota employers, the PWFA and PUMP Act requirements are **not** new.
    - Federal protections are in addition to, not in lieu of, state and local laws that provide greater protections for pregnant workers and nursing mothers.

Pregnant Workers

- PWFA requires employers to provide **reasonable accommodations** absent **undue hardship** to a **qualified employee or applicant** with a **known limitation** related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.
- Who is a qualified employee?
    - The EEOC Regulations, qualified employees include:
        - An employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position.
        - ***Unlike the ADA,*** however, under PWFA, an employee or applicant can be "qualified" even if they cannot perform one or more essential functions of the job, if the inability to perform the essential function(s) is:
            - The inability to perform the essential function(s) is "temporary";
            - The worker could perform the essential function(s) in "the near future"; and
            - The inability to perform the essential function(s) can be reasonably accommodated.
                - Temporary = lasting for a limited time, not permanent and may extend beyond "in the near future."
                - Near Future = generally within 40 weeks.

Pregnant Workers

- What is a “known limitation”?
  - The EEOC Regulations: A physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee’s representative has communicated to the employer ***whether or not such condition meets the definition of disability under the ADA***.
    - The limitation may include:
      - A “modest, minor, and/or episodic impediment or problem.”
      - Affected by pregnancy, childbirth or related medical conditions, has a need or problem related to maintaining their health or the health of their pregnancy.
      - When a worker is seeking health care related to pregnancy, childbirth, or a related medical condition itself.

Pregnant Workers

- What is a “reasonable accommodation” under PWFA?
    - A “reasonable accommodation” under PWFA has the same meaning as under the ADA.
        - A change in work environment or how things are usually done.
- What is an “undue hardship” under PWFA?
    - Per EEOC Regulations, an “undue hardship” has the same meaning as under the ADA.
        - A significant difficulty or expense for the operation of the employer.

Pregnant Workers

- PWFA provides that the following are “unlawful employment practices”:
    - Not making reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions absent an undue hardship.
    - Requiring an employee affected by pregnancy, childbirth, or related medical condition to accept an accommodation other than a reasonable accommodation arrived at through the interactive process.
    - Denying employment opportunities to an employee if the denial is based on the need to make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions.

Pregnant Workers

- PWFA provides that the following are “unlawful employment practices”, cont’d:
    - Requiring an employee to take leave (paid or unpaid) if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medication conditions.
    - Taking adverse action in terms, conditions, or privileges of employment against an employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions.
- PWFA applies to employers employing **15 or more employees.**

EEOC Guidance on PWFA

- Final rules issued Monday, April 15, 2024
- **Effective Date: June 18, 2024**

- The proposed rules are ***expansive***, including, among other things:
    - Employers to consider eliminating 1 or more essential function of a job when the inability to perform the job is "temporary."
    - Expeditiously responding to accommodation requests and permitting requests on interim basis even if additional information is required.
    - Restrictions on when an employer may ask for documentation to support a request for reasonable accommodation and what information can be requested.
    - Mandates the interactive process.
- Does not require accommodation based on an individual's association with someone else who may have a PWFA limitation.

EEOC Guidance on PWFA - Request for Documentation

- Employer may request documentation **only** when reasonable under the circumstances.

- EEOC provides four instances where request for documentation is **not reasonable, i.e., prohibited:**

1. When limitation and need for accommodation is obvious.

   Example: When employee is visibly pregnant and asks for different size uniform.

2. When employee has already provided sufficient information and needs a change or adjustment.

   Example: When employee has already provided documentation to support lifting restriction post c-section for a certain amount of time, employer may not request additional documents during that time.

EEOC Guidance on PWFA - Request for Documentation

3. When employee informs employer of pregnancy and seeks one of the following accommodations:

   (1) carrying water and drinking as needed;

   (2) taking additional restroom breaks;

   (3) sitting for those standing and standing for those sitting; and

   (4) breaks, as needed, to eat and drink.

4. When limitation for which accommodation is needed involves lactation.

EEOC Guidance on PWFA – Recognized Accommodations

- EEOC believes the following four accommodations are reasonable "**in virtually all cases**":

1. Allowing an employee to carry water and drink, as needed, in employee's work area.

2. Allowing an employee additional restroom breaks.

3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand.

4. Allowing an employee breaks, as needed, to eat and drink.

EEOC Guidance on PWFA – Common Accommodations

- EEOC provided examples of reasonable accommodations for known conditions related to pregnancy, childbirth, and related medical conditions:
  - Frequent breaks
  - Sitting/standing
  - Schedule changes, part-time work, and paid and unpaid leave
  - Telework
  - Reserved parking
  - Light duty
  - Making existing facilities accessible or modifying work environment
  - Job restructuring
  - Temporarily suspending one or more essential functions
  - Acquiring or modifying equipment, uniforms, and/or devices
  - Adjusting or modifying examinations or policies

Examples

- Nisha, a nurse assistant working in a large elder care facility, is advised in the fourth month of her pregnancy to stop lifting more than 25 pounds for the remainder of the pregnancy. One of the essential functions of the job is to assist patients in dressing, bathing, and moving from and to their beds, tasks that typically require lifting more than 25 pounds. Nisha sends an email to human resources asking that she not be required to lift more than 25 pounds for the remainder of her pregnancy and requesting a place in the established light duty program under which employees who are hurt on the job take on different duties while coworkers take on their temporarily suspended duties.

The EEOC Says ….

- The employer must grant the reasonable accommodation of temporarily suspending the essential function (or another reasonable accommodation) absent undue hardship. As part of the temporary suspension, the employer may assign Nisha to the light duty program

Changed Facts

- In the Nisha example above, the employer establishes that the light duty program is limited to 10 slots and all 10 slots are filled for the next 6 months.

The EEOC Says ….

- In these circumstances, the employer should consider other possible reasonable accommodations, such as the temporary suspension of an essential function without assigning Nisha to the light duty program, or job restructuring outside of the established light duty program. If such accommodations cannot be provided without undue hardship, then the employer should consider providing a temporary reassignment to a vacant position for which Nisha is qualified, with or without reasonable accommodation. For example, if the employer has a vacant position that does not require lifting patients which Nisha could perform with or without a reasonable accommodation, the employer must offer her the temporary reassignment as a reasonable accommodation, absent undue hardship.

Other Considerations

- When a reasonable accommodation involves a pause in work—such as a break, a part-time or other reduced work schedule, or leave—a qualified employee cannot be penalized, or threatened with a penalty, for failing to perform work during that non-work period, including through actions like the assessment of penalty points for time off or discipline for failing to meet a production quota. For example, if a call center employee with a known limitation requests and is granted 2 hours of unpaid leave in the afternoon for rest, the employee's required number of calls may need to be reduced proportionately. Alternatively, the accommodation could allow for the qualified employee to make up the time at a different time during the day so that the employee's production standards and pay would not be reduced, as long as this would not make the accommodation ineffective.

Minnesota – Women's Economic Security Act (WESA)

- WESA provides numerous protections for employees, including:
    - Pregnancy accommodations under Minn. Stat. § 181.9414;
    - Pregnancy and parenting leave under Minn. Stat. § 181.941; and
    - Nursing Mothers protections under Minn. Stat. § 181.939.
- Certain provisions of WESA were amended in 2023.
    - Nursing Mother and Pregnancy Accommodations previously applied to all employers with 15 or more employees (prior to 2023 Amendments).

Minnesota – Pregnancy Accommodations

- Minnesota Pregnancy Accommodations
    - Prior to 2023 Amendments, required employers to make certain accommodations to pregnant employees without requesting a doctor's note or claiming an undue hardship, including:
        - More frequent restroom, food, and water breaks
        - Seating
        - Limits on lifting over 20 pounds

Minnesota Nursing Mothers, Pregnancy, and Parenting Leave – 2023 Amendments

- Effective July 1, 2023, there is an ***expanded*** definition of "employer" under Minnesota law.
    - Nursing Mothers and Pregnancy Accommodations now apply to any "employer" with ***one or more employees.***
- Nursing Mother Protections (2023 Amendments)
    - Removed limitation of 12 months following the birth of a child.
    - Removed limitation on breaks if they would "unduly disrupt the operations of the employer."

Minnesota Nursing Mothers, Pregnancy, and Parenting Leave – 2023 Amendments

- Pregnancy Accommodations (2023 Amendments)
  - Adds "more frequent *or longer* restroom, food, and water breaks"
  - Adds additional examples of reasonable accommodations, including:
    - Temporary leaves of absence
    - Modification in work schedule or job assignments
    - Seating
    - More frequent or longer break periods
    - Limits to heavy lifting

Minnesota Nursing Mothers, Pregnancy, and Parenting Leave – 2023 Amendments

- Notice Requirements (2023 Amendments)
    - Effective July 1, 2023, employers are required to provide notice to employees about their rights under Minn. Stat. § 181.939 "***at the time of hire and when an employee makes an inquiry about or requests parental leave.***"
    - Minnesota's Department of Labor has released a sample notice
- Reinstatement provisions from Minnesota's Parental Leave Act (MPLA) apply to Minn. Stat. § 181.939.
- Minnesota's Department of Labor has created a workplace poster that is ***informational only:***
    - Employers are encouraged, but not required to display the poster in the workplace
    - Available at https://www.dli.mn.gov/posters

DEPARTMENT OF LABOR AND INDUSTRY

Nursing Mothers, Lactating Employees, and Pregnancy Accommodations employee notice

Minnesota's Nursing Mothers, Lactating Employees, and Pregnancy Accommodations law (Minnesota Statutes § 181.939) gives pregnant and lactating employees certain legal rights.

Pregnant employees have the right to request and receive reasonable accommodations, which may include, but are not limited to, more frequent or longer breaks, seating, limits to heavy lifting, temporary transfer to another position, temporary leave of absence or modification in work schedule or tasks. An employer cannot require an employee to take a leave or accept an accommodation.

Lactating employees have the right to reasonable paid break times to express milk at work unless they are expressing milk during a break that is not usually paid, such as a meal break. Employers should provide a clean, private and secure room that is not a bathroom near the work area that includes access to an electrical outlet for employees to express milk.

It is against the law for an employer to retaliate, or to take negative action, against a pregnant or lactating employee for exercising their rights under this law.

Employees who believe their rights have been violated under this law can contact the Minnesota Department of Labor and Industry's Labor Standards Division at dli.laborstandards@state.mn.us or 651-284-5075 for help. Employees also have the right to file a civil lawsuit for relief. For more information about this law, visit dli.mn.gov/newparents.

Available at https://dli.mn.gov/newparents#milk

Minnesota Human Rights Act – Pregnancy Accommodations

- Under the Minnesota Human Rights Act, it is an unfair employment practice for a qualifying employer to discharge an employee because of "sex."
    - "Sex" is defined to include "pregnancy . . . and disabilities related to pregnancy."
- It is also an unfair employment practice for a qualified employer to not make reasonable accommodations to the known disability of a qualified disabled person.
    - A "qualified disabled person" is one who, with or without reasonable accommodation, can perform the essential functions required of all applicants for the job in question.
- The MHRA provides that reasonable accommodations include, *but are not limited to:*
    - Making facilities readily accessible to and usable by disabled persons; and
    - Job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devised, and the provision of aides on a temporary or periodic basis.

Minnesota Parental Leave Act

- Minnesota's Parental Leave Act (MPLA) is found in Minn. Stat. §§ 181.940 to 181.944 and (prior to 2023 Amendments):
    - Provided up to 12 weeks of unpaid leave to qualified employees.
    - Applied to "employers" with 21 or more employees.
    - To be qualified, employees must be employed for one year and work at least half time.
- MPLA requires continued insurance and reinstatement at the end of parental leave.
- MPLA also covers "school conferences and activities leave" and expanded use of "sick leave benefits."

Minnesota Parental Leave Act – 2023 Amendments

- Effective July 1, 2023, the MPLA now applies to any employer with ***one or more employees.***
- An employee is covered by MPLA ***immediately upon hire.***
    - No longer any requirement that the employee must work for at least one year for at least half time.
    - Note, definition of "employee" still does not include "independent contractors."
- Leave runs concurrently with FMLA leave taken for parental leave.
- Employee must begin the 12 weeks of parental leave within 12 months of the birth or adoption, with certain exceptions.
- Employee can take 12 weeks of leave consecutively, or intermittently in limited circumstances.
- *Note*, Minnesota's paid family and medical leave law (which provides paid time off during or following a pregnancy) goes into effect **January 1, 2026.**

Minnesota Parental Leave Act – 2024 Amendments

Section 181.939, subdivision 2; Section 181.941, subdivision 4 :

(f) During any leave for which an employee is entitled to benefits or leave under this subdivision, the employer must maintain coverage under any group insurance policy, group subscriber contract, or health care plan for the employee and any dependents as if the employee was not on leave, provided, however, that the employee must continue to pay any employee share of the cost of the benefits.

Section 181.943:

*** the length of leave provided under section 181.941 must not be reduced by any period of paid or unpaid leave taken for prenatal care medical appointments.

QUESTIONS?

Thank you.