

Employment Law Update

Trending Topics and Workplace Challenges

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Employment practices are regulated by what seems like a maze of overlapping state and federal laws

Like any other risk, employment law risks such as:



Lawsuits



Charges of discrimination




Agency complaints



Union organizing

Are heightened when “landmines” are *unknown* or *ignored*



As a manager, you need to know enough about a broad range of employment laws to be alert to possible legal risk in managing employees, know how to handle sensitive situations, and know when to involve others or legal counsel

Trending Topics

Employee
Engagement

Non-Compete
Ban

Wage/Hour
Update

Workplace
Privacy

Employee
Activism

Employee Engagement Hits an 11 year low

A 2023 Gallup survey found U.S. employees were increasingly detached from their employers.

Employees reported:

- less role clarity,
- lower satisfaction with their organizations,
- less connection to their companies' mission or purpose.

The drop in these elements of employee engagement was particularly acute in remote, hybrid and younger workers.

WORKPLACE APRIL 10, 2024

U.S. Engagement Hits 11-Year Low

4.8 million fewer U.S. employees are engaged in early 2024

BY JIM HARTER

The first quarter of 2024 saw a continued decline, with engagement dropping from 33% to 30%.

This marks the lowest reported level of engagement since 2013.

The FTC's Non-Compete Rule

On April 23, 2024, the Federal Trade Commission voted to impose a national prohibition on all existing non-competition agreements, subject to minor exceptions.

All existing non-compete agreements for workers other than “senior executives” are invalidated and unenforceable within 120 days of publication in the Federal Register - which is Sept. 4th.

Existing non-compete agreements with “senior executives” shall remain in effect, but once the final Rule is effective, any new non-competes for “senior executives” will be illegal.

Employers must provide “notice” to current and former employees that their non-competes are now invalidated, but employers do not need to formally “rescind” them.

FTC Bans Noncompete Agreements That Restrict Job Switching

Move sets up high-stakes legal clash with business groups over the agency's power

What the FTC's Ban on Noncompete Clauses Means for Workers, Companies

A ban on noncompete clauses could raise workers' wages by an estimated \$400 billion, according to the FTC. But employers argue it could put trade secrets at risk. WSJ explains the ban, and why it already faces challenges.

By Wall Street Journal

April 24, 2024 © 4:01

The FTC's Ban on Non-Competes

Challenges to the FTC Ban

- Several lawsuits challenged the ban claiming that the FTC does not have authority to void all non-compete agreements.
- It was highly anticipated the court would issue a nation-wide injunction blocking the new rule... and it still is, but....
- A federal court in Texas issued a LIMITED injunction on July 3rd that applies only to the parties in the pending Texas case.

Where this Stands Now

- It's likely the district court will issue a nation-wide injunction before Sept 4th. However, as things currently stand the non-compete ban is still set to go into effect on Sept. 4th.

What you need to do now:

- ✓ Consider all options for protecting business & assets.
- ✓ Gather names of employees/former employees covered by non-compete.
- ✓ Continue to monitor status of court case to determine whether injunctions have been issued.

Business / Success
FTC is sued by business owners to enforce noncompetes
By Jeanne Sahadi
© 3 minute read

BUSINESS
Federal judge partially blocks noncompetes
2024 · 6:55 PM ET

FLSA Salary Level Increase

Exempt Salary Level Increase

On April 23, 2024, the DOL issued a new rule that raised the annual salary-level threshold for exempt salary status from \$35,568 to \$58,656 in a TWO step process by Jan. 1, 2025.

- As of July 1, 2024: salary level to **\$43,888**
- As of Jan. 1, 2025: salary level to **\$58,656**

Starting July 1, 2027, the DOL will automatically increase the salary level threshold every three years.

What You Need to Know

Challenges were also filed to the new salary level requirement.

Once again, a federal court in Texas halted the new rule, BUT only for state employees in Texas.

The bottom line: The new salary requirement is in effect and employers need to comply.


Action Items: Review current salary levels and consider whether changes will be required in Jan. 2025.

Data Security & Privacy

- State data privacy legislation is gaining steam
 - Currently, 17 states have passed broad data privacy laws, including: California, Virginia, Colorado, Connecticut, Utah, Iowa, Indiana, Tennessee, Texas, Florida, Montana, Oregon, Delaware, NJ, KY, Neb.
- Of those, thirteen including California, Colorado, Connecticut, and Virginia's laws are currently effective.
- Federal agencies are also stepping up efforts, which will lead to more guidance and likely regulations.
- Proposed legislation at the federal level.

OCTOBER 30, 2023

Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

 BRIEFING ROOM | PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Purpose. Artificial intelligence (AI) holds extraordinary potential for both promise and peril. Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security. Harnessing AI for good and realizing its myriad benefits requires mitigating its substantial risks. This endeavor demands a society-wide effort that includes government, the private sector, academia, and civil society.

The EEOC released a technical assistance document in May 2023

Use of AI could violate Title VII

- An improper application of AI could violate Title VII when used for recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, or dismissal.
- AI that could trigger violations: resume scanners, “virtual assistants,” video interviewing; testing software.
- The EEOC’s guidance also indicates that an employer may still be responsible if the AI procedure discriminates on protected status even if the decision-making tool was developed by an outside vendor.

EEOC takes action against AI activity

Last year, the EEOC filed its first claim involving a company's use of AI to make employment decisions.

The EEOC alleged that iTutorGroup programmed AI recruitment software to screen out women aged 55 or older and men who were 60 or older.

To settle the lawsuit, iTutorGroup agreed to pay **\$365,000** to more than 200 job applicants passed over for jobs.

Handling Employee Activism

Political Speech, Conduct & Activity

Know the laws

- NLRA protects certain concerted activity by employees related to the terms and conditions of employment
- State laws regarding political expression and off duty conduct

Set expectations for maintaining a civil environment

- Ensure that policies establish expectations for civility and conduct and enforce those policies – without overreacting
- Manage debates and tension in the workplace by increasing focus on civility and respect training

Follow through on commitments

- For employee morale and employer credibility, employers must follow through on statements and promises related to DEI and social justice



THE WALL STREET JOURNAL.

LIFESTYLE | WORKPLACE

Company Bosses Draw a Red Line on Office Activists

Google's dismissal of protesting workers is the latest example of employers pushing back on pressure tactics by staff

Managing a Divided Workplace Challenges

Employers face challenges addressing employee conflict over social, political, and religious issues

Challenges



Political, economic, and social tensions have spilled into the workplace and are impacting how employees work together



Differing opinions over hot-button issues have also created an atmosphere of heightened workplace tension



Workplace tensions impact productivity and performance, but can also stray into the area of protected classes, such as gender, race, religion, disability, and sexual orientation, leading to legal risks for employers

Response



Ensure that employees know and understand policies on harassment, discrimination and respectful conduct



Ensure that workplace policies are consistently enforced without bias or performance for particular viewpoints



To limit legal risk, ensure that managers and supervisors understand their role in diffusing situations despite personal religious and political beliefs

Workplace Challenges

McDonald Hopkins®

Michigan
Legislation

Pregnant
Workers
Fairness
Act

Leaves and
Accommodations

Employee
Handbooks

At-will
Employment &
Terminations



Michigan Legislation

With both Houses of the Legislature now controlled by Democrats, Gov. Whitmer has had more latitude to pursue a more progressive employment agenda.

While various progressive bills have been proposed, we have not seen much movement.

Right to Work Act - Repealed

Michigan's repeal of the Right-to-Work Act became effective on March 30, 2024.

Elliott-Larsen Civil Rights Act - Amended

In March 2023, Gov. Whitmer signed legislation amending the state civil rights law to prohibit discrimination on the basis of sexual orientation or gender identity.

Crown Act

In June 2023, the CROWN Act also amended the Elliot-Larsen Civil Rights Act to clarify that it includes "traits historically associated with race" and prohibits discrimination on the basis of hairstyles commonly associated with race.

Pregnant Workers Fairness Act

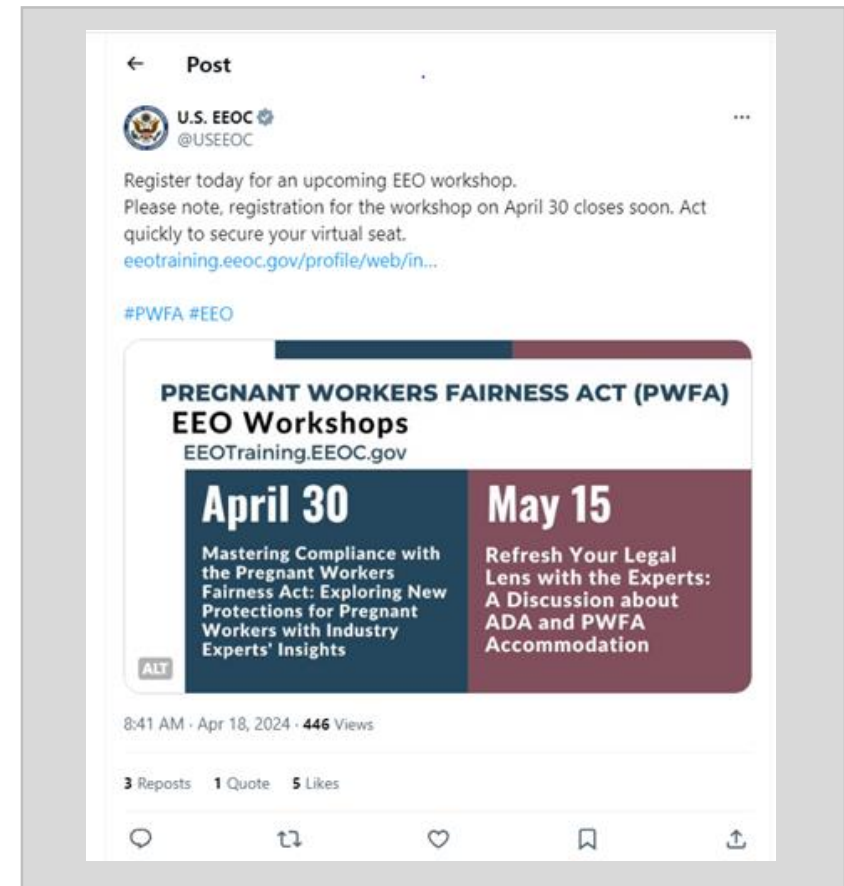
The PWFA requires covered employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions.

The PWFA became effective June 27, 2023, and the EEOC began accepting related charges beginning on that date

The rules went into effect on 4/19/24

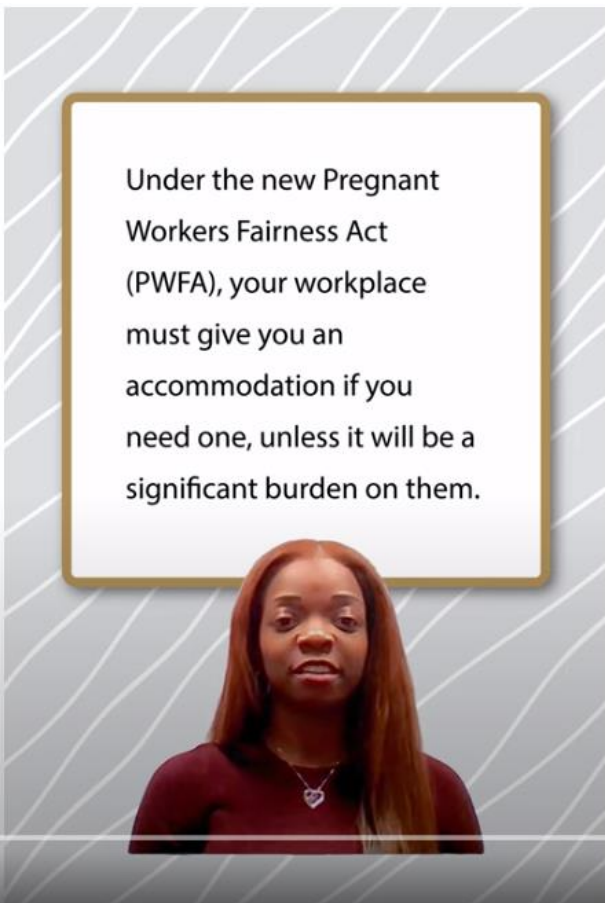
The PFWA rules have created some controversy by including provisions that employers are required to accommodate time off for abortion procedures and recovery

The EEOC's new social media approach is evident here: Videos with Pregnancy Playlist from EEOC & the DOL and the EEOC has a PWFA Social Media Toolkit



Pregnant Workers Fairness Act Final Rule

The EEOC's new rule provides important information for employers and workers including:



Under the new Pregnant Workers Fairness Act (PWFA), your workplace must give you an accommodation if you need one, unless it will be a significant burden on them.

Numerous examples of reasonable accommodations such as additional breaks to drink water, eat, or use the restroom; 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.

Guidance on limitations and medical conditions that an employee may seek reasonable accommodation for, including miscarriage or still birth; migraines; lactation; and “having or choosing not to have an abortion.”

Stating that an employer's request that an employee provide supporting documentation for certain "predictable assessments" related to pregnancy could be a violation of the PWFA.

The regulations make clear that employers may have to temporarily *excuse* workers from carrying out essential duties of their jobs. This is an obligation that doesn't exist under the ADA - which could catch an employer off guard.

What to Know Now

**Review and revise
accommodation policies**

**Train HR and
management on how to
handle accommodation
requests**

**Consider alternative
accommodations for
pregnant employees**

Accommodations and Leaves of Absence

Accommodations and leaves of absence continue to challenge employers

- **Family and Medical Leave Act:** Federal law that allows eligible employee up to 12 weeks off for their own or a family members serious health condition. Covers employers with 50 or more employees.
- **Americans with Disabilities Act:** Federal law that prohibits discrimination against individuals with disabilities and requires reasonable accommodations to allow employees to perform essential job functions. Reasonable accommodation may include a leave of absence
- **State Disability and Leave laws:** State law that provide similar protections as federal laws, but generally apply to smaller employees or provide an added level of protection or benefit

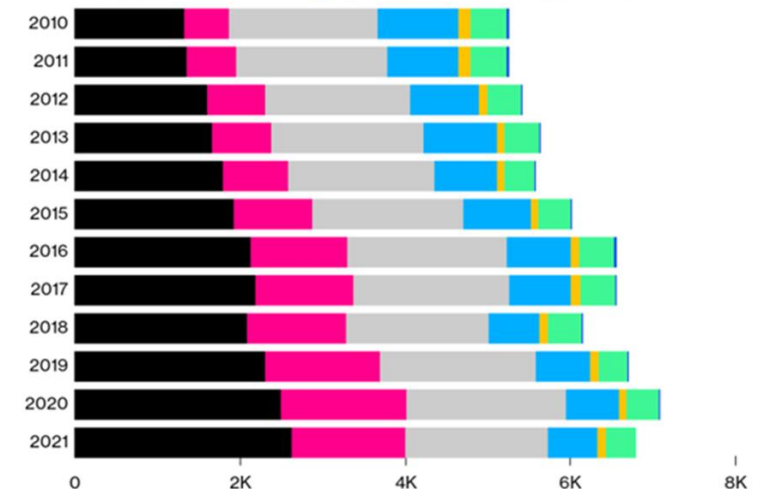
Mental Health Claims on the Rise

- The ADA covers physical *and* mental health conditions
- The EEOC identified a significant uptick in mental health claims beginning in 2016 and has issued specific guidance on accommodating employees with mental health conditions.

Mental Health Discrimination Charges

EEOC charges alleging bias against workers with anxiety, PTSD on the rise

■ Anxiety ■ PTSD ■ Depression ■ Bipolar ■ Schizophrenia ■ Other ■ CMT



Source: U.S. Equal Employment Opportunity Commission

Bloomberg Law

Case Study: Costly Assumptions

The Facts

CFO allegedly suffered from major, severe and recurring depression, which caused him to experience suicidal thoughts and mental impairments that affected his ability to work, sleep, concentrate and think. The CFO informed his employer of his mental health condition and took time off work to receive treatment. The CEO said “take as much time as you need.”

The Claim

When the CFO sought to return to work after being cleared to do so by his doctor, the CEO said he could not trust the employee to perform his job duties and instead fired him.

The Settlement

The Company paid \$250,000 in monetary damages to the employee. The Company also agreed to reporting, monitoring, training, creation and distribution of ADA policies, and notice posting.

What advice do you have for this employer?

Although an employer may grapple with how to mitigate the risks associated with a current or prospective employee who has a mental disability, it is critical not to make assumptions and to work through the interactive process

Tips for managing leaves of absence

- Every leave situation is different and examine each situation on a case-by-case basis
- Do not automatically reject requests for accommodations—including leaves of absence
- Have policies in place that require that employees meet certain standards to receive pay
- Must: Call in, report status, provide medical documentation
- Document performance problems in a timely manner
- Document reorganization/staffing decisions in a timely manner
- Hold employees accountable for performance, but DO NOT tie performance to medical conditions or need for leave

**An effective handbook is an important tool for employers,
but if it is not followed or updated it can be a liability**

Tool for Employers

- Communicates policies and procedures to employees: at-will, EEO, accommodations
- Communicates your corporate culture, history, mission and values
- Ensures employees understand the company's expectations
- Provides guidance to managers for implementing policies and maintaining consistency
- Provides legally required notifications
- Provides protection and defense for legal action

Risks for Employers

- Failing to ensure handbook is tailored to your workplace
- Failing to ensure that written policies reflect the actual practices that are being followed
- Failing to apply handbook policies consistently, which can lead to claims of discrimination or retaliation
- Failing to update handbook to reflect new laws and guidance, including:
 - NLRB guidance on policies that limit protected concerted activity
 - Accommodations for pregnant workers
 - Lactation breaks

Termination Risks in the Age of Social Media

Terminations – whether a single employee or a RIF - always have some risk– but with remote employees and the ease of social media, employers face added challenges

Viral Terminations

Recently, employee, Brittany Pietsch, went viral after recording her layoff and posting it on TikTok.

Pietsch was laid off without her manager's knowledge, by two HR people who didn't seem to know her role at the company or her performance.

The video has become a master class in how HR departments **should not handle terminations**.

The incident ignited public discourse on the proper way to handle employee terminations and sparked a new trend among Gen-Z employees of recording and sharing their terminations on social media platforms.

Best Practices to Avoid Viral Terminations?

Avoid surprises with timely (and documented!) performance discussions. Even before an issue arises, employees should have a clear understanding of what is expected of them.

Do it in private and (when possible) in person. Carefully consider how to handle remote termination. If a termination does occur by video or phone, be able to explain the rationale for that and, assume, that you'll be recorded.

Keep your communication brief and non-argumentative. Prepare brief talking points to convey the termination and next steps.

Protect company confidential information. If an employee feels bitter about their termination, they might do much worse than embarrass your company on TikTok. Prepare in advance to protect information.

BUT, we're an at-will employer

What does “at-will” employment really mean?

An at-will employer can terminate an employee for any reason or no reason,
BUT not an *illegal reason*

What are *illegal reasons for termination*?

Termination based on an employee’s protected categories and/or protected activities, including:

- Race, sex, age, religion, national origin, & disability
- Taking a FMLA leave, whistleblower activity, making a complaint to a gov’t agency
- Retaliation for protected activity (e.g., taking a leave)

**If you have one takeaway today, this is it:
An employer must be able to establish a legitimate,
non-discriminatory reason for every termination**

Documentation = Risk Management

How does the employer establish legitimate non-discriminatory reasons to support termination? Documentation



- It gives the employer credibility
- It's how the employer shows the world that you did what you say you did
- It allows the employer the opportunity to consider decisions in black and white
- It demonstrates that the employer followed its policies, treated employees fairly, and acted consistently
- It's Exhibit "A" in response to a complaint



Remember: Documentation can take many forms. It may be a written memo or counseling, but it can also be an email summarizing a conversation.

Make a practice of finding ways to create documentation that works for you to PROTECT your organization.

Managing Employee Engagement

Re-setting on Employee Engagement

Feedback and Performance Focus

- Received meaningful feedback regularly
- Performance managed to motivate outstanding performance
- Manager keeps me informed on what is going on
- Pride in quality of products/services
- Freedom to make decisions needed to do my job well

Goals/Priorities

- Manager includes me in goal setting
- Feel prepared to do my job

Wellbeing

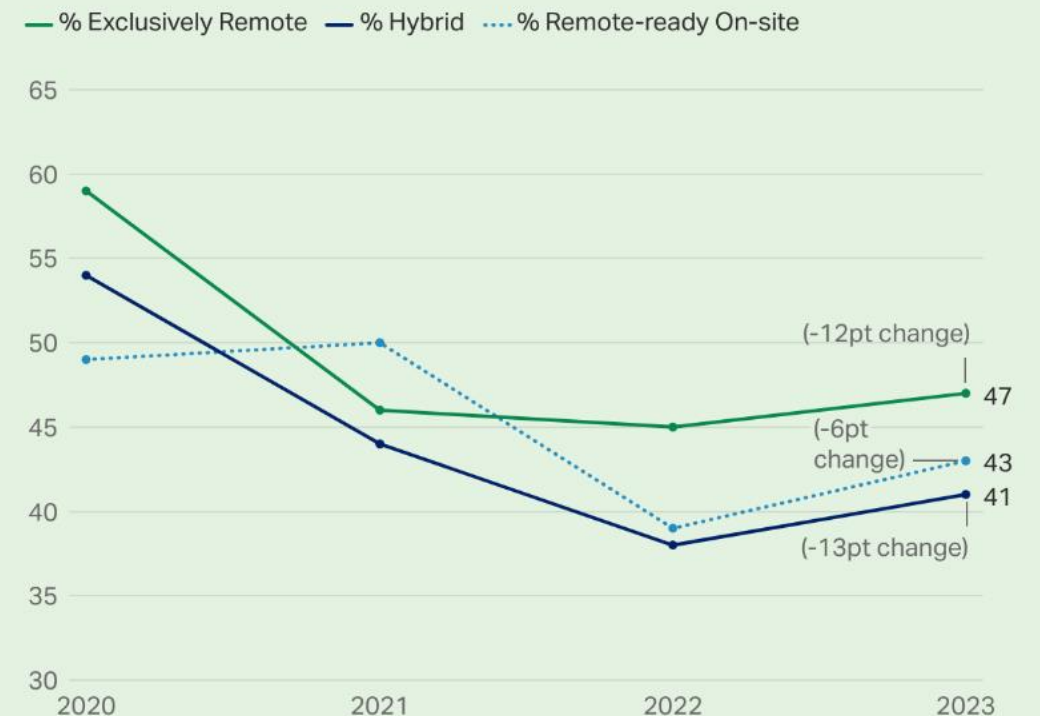
- Organization cares about my wellbeing
- Able to maintain a healthy balance between work/personal life

Team

- Feel like part of the team
- Know what my coworkers are expected to do
- Have partners I can always rely on at work
- Team takes time to reflect on and discuss what we might do better

Employees Losing Sight of What's Expected of Them in the New Workplace

I know what is expected of me at work.



Back to Basics: Regular and Meaningful Communications

Employer Challenges



Beyond managing performance and monitoring engagement at work, the evolving employment relationship requires employers to provide support for employees' health, well-being and growth outside the workplace as well



Managing the multigenerational workplaces can present challenges in managing diverse experiences, expectations, and expertise levels and preparing for succession

Legal Risks



Delving into employee well-being can present legal risks for employers. Learning details of personal circumstances implicates issues related to protected categories



Requires communications about objectives, clear expectations, and, of course, training

Employment Law Update



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Questions?

Thank you for attending!