Hot Topics in Employment & Labor Law

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ACC Association of Corporate Counsel NORTHEAST

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Agenda

- DEI Is Not Dead
- Pregnant Workers Fairness Act
- Hot Issues in Wage Hour

DEI Is Not Dead

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The Decision Was About Student Admissions

- SFFA alleged Harvard's admissions policy intentionally discriminates against Asian-American applicants
- SFFA alleged that UNC's admissions process unfairly uses race to prefer underrepresented minority applicants to the detriment of White/Caucasian and Asian American applicants
- Oral arguments were in October, decision issued June 29, 2023

The Holding

- SFFA alleged Harvard's admissions policy intentionally discriminates against Asian-American applicants
- SFFA alleged that UNC's admissions process unfairly uses race to prefer underrepresented minority applicants to the detriment of White/Caucasian and Asian American applicants
- Oral arguments were in October, decision issued June 29, 2023

Private Employer Rubric Is Different

- Private Employer Rubric is Different
- Title VII of the Civil Rights Act of 1964 and other federal and state laws prohibit discrimination on the basis of protected characteristics, including race
- Executive Order 11246 applies to covered federal contractors and subcontractors and prohibits discrimination against employees on the basis of protected characteristics, including race
- Section 1981 prohibits race discrimination in contracting

The Law Next Door

"If this exposition sounds familiar, it should. Just next door, in Title VII, Congress made it 'unlawful . . . for an employer . . to discriminate against any individual . .. because of such individual's race, color, religion, sex or national origin.'"

-- Justice Gorsuch Concurrence

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Push For DEI Programs

- Discrimination against the under-represented remains an issue
- Particularly when there is statistically-demonstrable underrepresentation, increasing representation remains a business imperative for talent, effective business decision-making
- Traditional discrimination claims by the underrepresented continue to carry financial and reputational risk

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The Pull Against DEI Programs

- Challenges come from various places
- July 13, 2023 – 13 AGs sent Fortune 100 CEO letters
- Individual plaintiffs, but mostly organizations
- Students for Fair Admissions, Alliance for Fair Board Recruitment – Edward Blum
- American Alliance for Equal Rights (AAER) – Stephen Miller

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The Trends

- Trend of using DEI initiatives themselves as evidence of discrimination started several years ago, has intensified since the decision, and will continue
- Initial phase was to attack DEI measures that had race-based criteria
- Next phase is to attack race-neutral DEI measures based on a backdrop of the employer's general, DEI programming – even without evidence of metrics, quotas, or performance-based incentives

Duvall v. Novant Healthcare – 4th Circuit (March 12, 2024)

- White hospital executive claimed he was terminated as part of a diversity push
- Plaintiff cited employer's efforts to bring more underrepresented groups into leadership
- Employer pointed to "no binding employment targets or compensation initiatives" that would have led to the plaintiff's termination
- Employer said its "aspirational" efforts simply included "applying a diversity 'lens' in decision-making" and monitoring its workforce demographics to reflect the communities it serves.
- The 4th Circuit described Novant's DEI efforts as "substantial" and concluded that they provided "more than sufficient evidence for a reasonable jury to determine that Duvall's race, sex, or both motivated Novant Health's decision to fire him."
- *OMITTED PUNITIVE DAMAGE AWARD - $10M to $300K to $0,* despite liability

Employers Face Simultaneous Reverse/Non-reverse Allegations

- Trend is for companies to face simultaneous allegations that they discriminate both against and in favor of women/POC, etc.
- February 14, 2024, AFL filed a complaint urging the EEOC to investigate a company based on allegations that its employment practices "deprive or tend to deprive white, male, or heterosexual individuals of employment, training, or promotions because of their race, color, sex, or national origin . . ."
- This was 2 months after a CA state court certified an equal pay class action in another case against the same company alleging it pays less than men for performing substantially similar work
- A different company simultaneously defended itself in a class action lawsuit alleging unequal pay for women and a separate action that it discriminates against White men

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Legal Issue To Watch: Adverse Employment Action

- *Muldrow v. City of St. Louis*
- Oral arguments December 8, 2023
- Does Title VII require a showing of harm
- *Hamilton v. Dallas County* (and Justice Ho's Concurrence)

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Legal Issue To Watch: Is It More Difficult Tor Majority Plaintiffs To Win?

- Reverse discrimination standard of proof – ripe for Supreme Court review
  - DC. Circuit, 6th, 7th, 8th, 10th Circuits: "background circumstances" showing plaintiff worked for "that unusual employer who discriminates against the majority"
  - 3rd and 11th Circuit rejected the "background circumstances"
  - 6th Circuit case:
- *Ames v. Ohio Dep't of Youth Services* - 6th Circuit (KY, MI, OH, TN) upheld dismissal of a reverse discrimination lawsuit because heterosexual plaintiff alleged discrimination in favor of LGBTQ+ did not demonstrate "background circumstances" establishing that employer is the "unusual" one who discriminates against the majority.
- "a deep scratch across [the] surface of Title VII that "treats some 'individuals' worse than others – in other words it discriminates – on the very grounds the statute prohibits"

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Legal Issue to Watch: Does Section 1981 apply to grants, scholarships, fellowship programs?

- Section 1981 prohibits race discrimination in contracting
- 11th circuit reviewing AAER's challenge to a grant program available only to Black women-owned businesses after the district court found the program lawful – *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 23-13138 (11th Cir. 2023).
- Progressive Insurance – defending AFL's challenge to a grant program that helps Black-owned businesses buy business vehicles

Grants, Scholarships, Fellowship Programs

- Seeing removal of race/protected characteristic-based eligibility criteria
- BUT, EEOC and Groupon, Inc. reached agreement to resolve an investigation into recruiting and hiring practices
- Groupon will establish a scholarship program with eligibility limited to Black students pursuing advanced degrees in STEM

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Securities Law Challenges

- National Center for Public Policy Research challenge alleged backlash to DEI programs negatively affected shareholders in violation of the Securities Exchange Act
- Court rejected argument, instructing plaintiffs to “seek other investment opportunities rather than wasting this court’s time.”
- AFL brought a similar suit in Florida

Securities Law Challenges

- Bank challenged for “failure to implement a reasonable reporting and monitoring system concerning . . . compliance risks relating to . . . DEI . . . Policy resulting in, inter alia, sham interviews of diverse candidates for jobs that were already filled.”
- The dispute has been brewing and continues to be litigated.

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Legal Issue to Watch: STANDING

- Do organizational plaintiffs have standing to sue?
- Do No Harm; Fearless Fund cases – issue being litigated
- *FDA v. Alliance for Hippocratic Medicine* – US Supreme Court – oral argument March 2024 -- case about abortion drug presage what's to happen in DEI cases

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What Can We Do?

- Ensure DEI/Legal reviews external communications, investor relations, etc. documents – those are the plaintiffs' first stop
- Centralize DEI initiatives, where possible
- Institute consistent guidelines, policies, guardrails
- Conduct annual survey of all DEI initiatives
- Consider evaluating selection processes for Board of Directors
- Training of TA/HR professionals, relevant leaders

What Can We Do?

- Expand outreach
- Conduct diagnostics to evaluate policies, practices, programs
- Review barriers to entry and advancement in job descriptions, policies, practices
- Focus on inclusion and wellness
- Listen to employees and address concerns
- Train on bias and implement structural changes to interrupt it
- Become active in situation management . . . So it does not require crisis management

Communications

- Do not let HR, DEI offices, Managers think that a DEI measure *means* they are to make decisions based on protected characteristics
- Ensure that race, other protected characteristics are not “in the mix,” a “tipping point,” a “plus factor,” or used as a preference
- Get BETTER AT SITUATION AND CRISIS MANAGEMENT
- THIS IS NOT NEW

Key Take-Aways

- DEI is not DEAD
- Focus on ways to promote a more inclusive workplace
- Reduce barriers to inclusion
- Understand organizational risk tolerance
- Train on legal guardrails

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PFWA)

- Creates nationwide rights to accommodation for pregnant workers at ERs with 15 or more EEs.
- The obligations under the PWFA become effective on 6/27/23.
- EEOC was required to finalize regulations by 12/31/23
  - The EEOC sent final regulations to White House on 12/22/23.
  - They are being reviewed and revised.
  - EEOC says they will be released “soon” (perhaps by May)

State of Texas v. Merrick Garland, et al., No. 5:23-cv-00034-H(N.D. Texas 2/27/2024)

- Texas challenged the PWFA on the grounds that its enactment was unconstitutional because the House of Representatives did not have a quorum under the Quorum Clause of the Constitution when it approved the Consolidated Appropriations Act of 2023 (CAA of 2023), of which the PWFA and other laws and appropriations were parts.
- During COVID, the House started accepting proxies. When CAA of 2023 was passed by the House, there were only 205 representatives physically present but a "quorum" required 218 to be present.
- The court entered a final judgment permanently enjoining the EEOC and the DOJ from enforcing the PWFA against the State of Texas and its divisions and agencies, as an employer.
- The injunction does not cover any other employers in Texas or other laws.

The PWFA Fills Large Gaps in Prior Federal Law

Why was the PWFA necessary? Because there were huge gaps in protection for pregnant women under federal law

- Americans with Disabilities Act: "routine pregnancy" is not a disability though a pregnancy with complications may rise to the level of a disability.
  - Recent 11th Circuit Court of Appeal case: pregnancy with complications including two blood transfusions was not a disability under the ADA, and the claim for failure to permit telework was dismissed (EE worked in Georgia – no pregnancy accommodation law)
- Pregnancy Discrimination Act: PDA does not require ER to accommodate pregnant women.
  - SCOTUS ruled that PDA only prohibits negative action against pregnant women and, therefore, if accommodations are made for others and there is not a nondiscriminatory reason for excluding pregnant women, not unlawful.
  - Recent 7th Circuit Case concluding that Walmart did not violate PDA when it provided light duty to those injured at work but not pregnant women.

More On Why the PWFA Was Needed

- Family and Medical Leave Act (FMLA) considers pregnancy a "serious health condition". Therefore, FMLA leave is available for pregnancy-related conditions, including recovery from childbirth.
  - However, FMLA has high eligibility requirements:
    - Only 12 weeks allotment per year
    - Must have worked for that ER for at least 12 months at time of leave
    - Must have worked at least 1,250 hours in the 12 months before the leave
    - Must work at a worksite that has 50 or more EEs w/in 75 miles.

Review of PWFA Law and PWFA Proposed Rule

The PWFA requires a covered entity to provide reasonable accommodations to a qualified EE or applicant with a known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship.

Is the PWFA Exactly the Same as the ADA?

No! It is broader and arguably gives pregnant women, or women affected by pregnancy/childbirth, greater rights than EEs covered only by the ADA.

- Must grant accommodations for a "limitation" – *no need to prove disability*
- Expressly requires ERs to grant accommodations that relieve an EE from performing an essential job function if it is just temporary.
- ERs are expressly prohibited from requiring leave if another reasonable accommodation is available.
- ER are expressly prohibited from imposing an accommodation unless it was arrived at through the interactive process.

PWFA Law– Qualified EE or Applicant

Under the PWFA, an EE who cannot do one or more essential functions of a job will also be considered qualified if:

- Any inability to perform an essential function is for a temporary period;
- The essential function could be performed in the near future; and
- The inability to perform the essential function can be reasonably accommodated.

PWFA Proposed Regulations: Qualified EE or Applicant

In the proposed rule, the EEOC proposed the following definitions for the terms in the second definition of qualified:

Temporary: lasting for a limited time, not permanent, and may extend beyond "in the near future."

In the near future: generally 40 weeks per accommodation.

The EEOC regulations do not count leave to recover from childbirth as part of the 40 weeks

Non-Exhaustive list of Related Medical Conditions in Proposed Regulations

Miscarriage	Stillbirth	Abortion	Infertility	Fertility treatment	Ectopic pregnancy	Pre-term labor
Maternal cardiometabolic disease	Gestational diabetes	Preeclampsia	Vaginal bleeding	Use of birth control	Anemia	Endometriosis
Chronic migraines	Dehydration	Hemorrhoids	Nausea or vomiting	Menstrual cycles	High Blood pressure	Infection
Cesarean or perineal wound infection	Postpartum depression, anxiety or psychosis	Antenatal (i.e. during pregnancy) anxiety, depression or psychosis	Changes in hormone levels	HELLP (hemolysis, elevated liver enzymes & low platelets	Edema (legs, ankles, feet, fingers)	Hypermesis gravidarum
Sciatica	Pelvic Prolapse	Nerve injuries	Loss of balance	Lumbar lordosis	Vision Changes	Varicose veins
Frequent urination of incontinence		Carpal tunnel syndrome		Lactation conditions (low milk supply, engorgement, plugged ducts, mastitis or fungal infections		

PWFA Proposed Regulations: Examples of Reasonable Accommodations in the Proposed Rule

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom
- Changing food or drink policies to allow a worker to have a water bottle or food
- Changing equipment, devices, or workstations such as providing a stool to sit on, or a way to do work while standing
- Changing a uniform or dress code or providing safety equipment that fits
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time
- Telework
- Temporary reassignment
- Leave for appointments with health care professionals
- Light duty or help with lifting or other manual labor
- Leave to recover from childbirth

PWFA Proposed Regulations Leave as a Reasonable Accommodation

May be needed for

- Appointments with health care professionals
- Recovery from childbirth
- Other reasons related to pregnancy, childbirth, or related medical conditions
- PWFA essentially guarantees leave to recover from childbirth – absent undue hardship.

PWFA Proposed Regulations

Additions to Undue Hardship: Predictable Assessments

The proposed rule identifies four simple modifications that will, in virtually all cases, be found to be reasonable accommodations that do not impose an undue hardship when requested by an EE due to pregnancy.

They include allowing an EE:

- to carry water and drink, as needed, in the EE's work area.
- additional restroom breaks.
- to stand or sit in jobs that typically require the other.
- breaks, as needed, to eat and drink.

What About Medical Documentation?

- EEOC has been very clear in saying that you should NOT use the medical documentation you use for an ADA accommodation.
- In the view of the EEOC, many of these accommodations are “common sense” and there is no need for medical
- EEOC also points out that time is of the essence with pregnancy and therefore a delay can be a denial.

What Will Happen to the State and Local Laws Requiring Pregnancy Accommodation?

- They still exist. To the extent they create greater rights for EEs, they are still in full force and effective.
- Some states laws prohibit ERs from requiring medical documentation for certain accommodations, such as:
  - Restroom breaks
  - A stool or other place to sit
  - Limits on lifting
  - Private spaces for lactation
- The PWFA is silent about medical documentation but this issue will probably be addressed in the EEOC regulations.
  - Under the ADA, ERs can require medical documentation unless both the disability and the need for an accommodation at work is “obvious”

State Laws Are Much Tougher for Employers and Protective of Pregnant and Lactating Employees

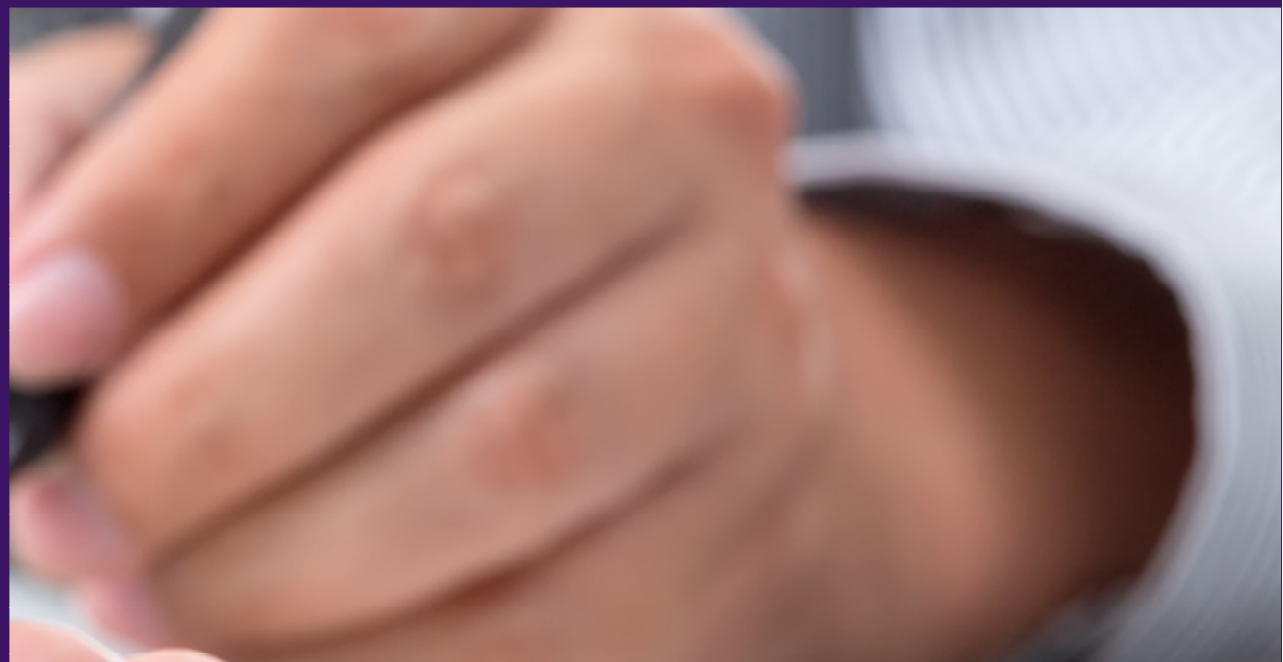
Arkansas	Kentucky	Nevada	Oklahoma	Tennessee
California	Louisiana	New Jersey	Philadelphia, PA	Utah
Colorado	Maine	New Mexico	Oregon	Vermont
Dist. Columbia	Maryland	New York	Rhode Island	Virginia
Hawaii	Massachusetts	New York City	Providence, RI	West Virginia
Illinois	Minnesota	North Carolina	Central Falls, RI	
Indiana	Nebraska	North Dakota	South Carolina	

PWFA Law: Relief

Relief under the PWFA is the same as under Title VII and the ADA and can include:

- Injunctive relief – getting an accommodation
- Back pay
- Front pay
- Compensatory or punitive damages
  - Damages are limited based on ER size.
  - Additionally, like the ADA, money damages can be limited if the claim involves a reasonable accommodation, and the ER shows good faith efforts, in consultation with the individual, to identify and provide a reasonable accommodation.

Hot Issues in Wage Hour



Application of the MA Wage Act to Out of State Employees

- No requirement that employee worked primarily or lived in Massachusetts
- Focus on the level of contacts and relationship with Massachusetts
  - travel to MA for work
  - service customers in MA
  - maintain regular communication with manager based in MA
  - Choice of state law governing employment agreement

Dow v. Casale, 83 Mass. App. Ct. 751 (2013); *Musachia v. Abiomed*, 2377CV00310-B (Mass. Sup. Ct., Essex Dec. 12, 2023)

Application of the MA Wage Act to Out of State Employees

- *Wilson v. Recorded Future, Inc.*, 2023 U.S. Dist. Lexis 72306 (D. Mass. 2023)
  - An employee located in Virginia brought claims of unpaid wages under Massachusetts law against his Massachusetts based employer
    - Did not service customers in MA
    - Employment agreement not governed by MA law
    - "time to time" attended trainings in MA
    - Often interacted with leadership and employees based in MA
  - Employee could bring claims under the Wage Act because Massachusetts "has the most significant relationship with his employment"
  - Employee could also bring claims under M.G.L. c.151B (discrimination) because unlawful actions took place, at least in part, in Massachusetts

When Does a Company Violate the MA Wage Act?

Reuter v. City of Methuen, 489 Mass. 465 (2022)

- (I know its 2022, but this is important!)
- Violation of the Massachusetts Wage Act occurs at the time of the violation—a missed payment late payment, or no payment
- Triple damages/attorneys' fees for the violation accrue immediately
- Previously, paying the late wages before the lawsuit/AG complaint was filed avoided triple damages
- NO MORE—now, the violation is immediate (no cure)

Windfall Provisions in Commission Plans Can Be Lawful in Massachusetts

Klauber v. VMWare, Inc., 80 F.4th 1 (1st Cir. 2023)

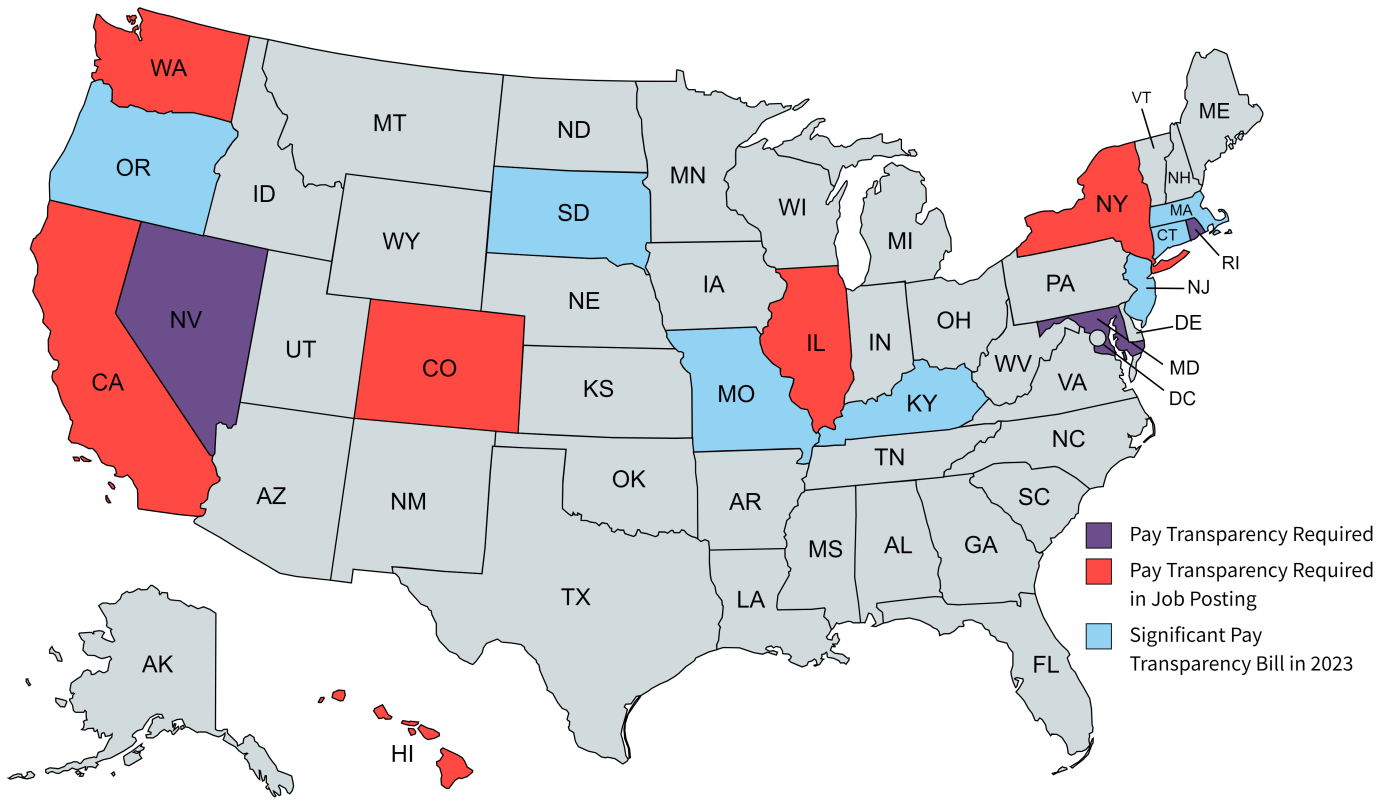
Green v. D2L LTD, 2023 US Dist. Lexis 164122 (D. Mass. September 15, 2023)

- "Windfall" provisions in commission plans allow companies to restrict the amount of commissions paid for certain unusual transactions, to prevent employee from receiving "windfall" payment
- Courts held that under the clear terms of a commission agreement, a "windfall" provision is lawful
  - Exception Transactions provision only applied to atypical deals, and the terms and conditions included examples of what those atypical deals could be. *Klauber*
  - "Windfall" was a deal that: "results in the aggregate of the Participant's Commissionable ACV and Commissionable Service Bookings for the individual deal or portion thereof exceeding 200% of the Participant's Quota for the year." *Green*
  - Terms and conditions explicitly defined when such commissions were due and payable – after plan reconciliation. *Klauber*
  - Plan defined process for company to invoke windfall clause. *Green*

Current Landscape of Salary Transparency Laws

- We continue to see developments in state pay transparency laws, with new or revamped legislation
- No state law is the same, so challenging for national employers
  - Some require employers to disclose salary information to employees when (1) applying to a new role, (2) when being offered a new role, or (3) on request
  - Some require employers to disclose salary information to applicants (1) in job postings, (2) after the interview, (3) with offer of compensation, or (4) on request
  - Some states only apply the law to employers of a certain size
    - E.g., New York applies their law to employers with 4 or more employees; Washington law applies to employers with 15 or more employees; Colorado law applies to all employers
- Some cities have enacted or are looking to enact salary transparency laws
  - E.g., New York City; Jersey City, New Jersey; Toledo, Ohio; Ithaca, New York.

Salary Transparency as of October 2023



Created with mapchart.net

MA Pay Transparency

Massachusetts House and Senate have passed overlapping bills that would:

- require employers with 25 or more employees to
  - include pay range information in job postings and advertisements
  - Disclose pay range when offering promotion and transfers
  - provide pay range information about particular position directly to employees and applicants, upon request.
- require employers with 100 or more employees to submit EEO data
  - workforce demographic and pay data categorized by race, ethnicity, sex, and job category

Federal Independent Contractor Rule

2021 Rule: "Core" factors

Two factors have greatest weight:

1. Nature and degree of control
2. Opportunity for profit or loss

Consider others factors only if 1 and 2 aren't conclusive.

- the amount of skill required for the work;
- the working relationship's degree of permanence; and
- whether the work is part of an integrated unit of production

2024 Rule: "Totality of the circumstances"

Six factors (non-exhaustive):

1. Nature and degree of control
2. Opportunity for profit or loss
3. Investments by worker and employer
4. Degree of permanence of relationship
5. Is work integral part of employer's business
6. Skill and initiative

No single factor or subset of factors controls, consider "holistically," sometimes one or more factors will be more probative

Potential Impact

Where the rule doesn't apply...

- Where employee status is at issue under other employment laws
  - National Labor Relations Board
  - Title VII discrimination
  - Unemployment insurance claims
  - Workers' compensation
- When a state test is more employee-protective (i.e., more likely to find "employee" status, like the ABC test)

The ABC Test

The hiring entity has the burden of proving ALL THREE of the following elements:

A

The work must be free from the control and direction of the company in connection with the performance of the work, both under the contract for performance of the work and in fact.

B

The worker performs work that is **outside the usual course of the company's business**.

(Alternate formulation includes "outside usual places of business.")

C

The worker is customarily engaged in an **independently established trade, occupation or business** of the same nature as that involved in the work performed.

ABC Test

ABC test applied in more than one-half of the states to determine *unemployment insurance benefits* eligibility (and employer contributions), but is less commonly applied in the wage & hour, employee-vs.-independent contractor analysis

In the wage hour context, ABC is used in these jurisdictions:

- California
- Connecticut
- District of Columbia (construction industry only)
- Illinois (Illinois Wage Payment Collection Act claims and construction industry)
- Maryland (construction and landscaping industries only)
- Massachusetts
- Nebraska
- New Jersey
- New York (construction and commercial transportation industries only)
- Vermont

What to Do Now

- Review independent contractor agreements/policies; revise where necessary.
  - Eliminate provisions indicative of control over their work.
  - Do you eliminate independent contractors' expenses? (They are in business for themselves!)
- Evaluate in tandem with joint employment issues; staffing/temp agencies (responsible for payroll, workers comp, unemp comp, etc.)
- Seek an opinion letter from counsel (to show good-faith reliance and avoid potential litigated damages).
- Consider rolling out an arbitration agreement with a class/collective action waiver (minimize the risk of class wide exposure).

Questions?

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Thank you.

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