



HR (NATIONAL FOCUS)

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ROADMAP

- **New Federal Laws**
- **National Labor Relations Board**
- **EEOC and Artificial Intelligence**
- **What is on the Horizon**



PUMP ACT

PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS



PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers

- Signed into law December 29, 2022 as part of Consolidated Appropriations Act, 2023
- Effective April 28, 2023
- Applies to nearly all ERs covered by the Fair Labor Standards Act (FLSA)
- Extends protections for the right to express breast milk in the workplace for most employees



PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers

- ERs must provide “reasonable break time” and private space, other than a bathroom, to express breast milk
- Private space defined –
 - Cannot be a bathroom
 - Must be shielded from view, and
 - Free from intrusion from co-workers and the public



PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers

- Reasonable amount of break time each time the EE has the need to pump breast milk
 - Frequency, duration and timing of breaks will vary
 - This applies to telework employees!
- Compensation – is this paid time off?
 - Does not require that EE be compensated for break time unless otherwise required by federal or state law or municipal ordinance
 - If EE is not completely relieved from duty, time used to pump breast milk at work **MUST** be paid

PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers

- What about small employers (<50)?
 - Exemption for small employers if compliance would impose an “undue hardship”
 - High burden for the ER to show undue hardship
 - Will be subject to review by the Wage & Hour Division of the DOL



PUMP ACT

Providing Urgent Maternal Protections for Nursing Mothers

- Penalties for violations
 - Reinstatement
 - Promotion
 - Lost wages
 - Liquidated damages, attorneys' fees
- Prohibition on Retaliation – employees may not be discharged or discriminated against for seeking rights under PUMP Act



PREGNANT WORKERS FAIRNESS ACT (PWFA)



PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Effective June 27, 2023
- Applies to ERs with 15 or more employees
- Requires covered entity to provide “reasonable accommodation” for a *known limitation of a qualified employee* or applicant related to pregnancy, childbirth, or related medical conditions, absent undue hardship.”
- Similar to rights under the Americans with Disabilities Act (ADA)



PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Reasonable accommodation for “known limitations”
 - “New” standard with no level of severity
 - Does not need to be a “disability” per ADA
- “Qualified employee” under current ADA means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position.
 - PWFA has adopted this standard.
 - And, imposed a new additional standard for a “qualified employee”



PREGNANT WORKERS FAIRNESS ACT (PWFA)

- “Qualified employee” expands to include employees who cannot perform one or more essential job functions if:
 - Limitation is for a temporary period
 - The essential job function can be resumed “in the near future” and
 - The inability to perform the job function can be reasonably accommodated
- *under the current proposed regulations, “in the near future” means 40 weeks

PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Examples of reasonable accommodations include:
 - Frequent breaks
 - Sitting/standing
 - Schedule changes
 - Telework
- Interactive dialogue is required
- Notice posting requirement



PREGNANT WORKERS FAIRNESS ACT (PWFA)

- If leave is granted, employee is entitled to return to their same position unless the employer demonstrates that holding open the position would impose an *undue hardship*.
- Health insurance during a leave of absence?
 - An employer must continue an employee's health insurance benefits during their leave to the extent that it does so for other employees in a similar leave status



NATIONAL LABOR RELATIONS BOARD



THE NLRB IS OUR NEW REGULATOR!

- Very active
- Pursuing extraordinary rights for employees – even beyond CBA
- What are they looking at?
 - “Concerted activity” and discussion of wages or work conditions
 - Limits on employer discipline for threatening, rude or offensive behavior by employees
 - Confidentiality and non-disparagement clauses in separation agreements



THE NLRB IS OUR NEW REGULATOR!

- What is protected concerted activity (PCA)?
 - Typically, two or more employees acting together regarding their terms and conditions of employment
 - Purpose is for mutual aid or protection
 - Employees are protected against retaliation when they join together and complain
 - Applies equally to unionized and union-free workplaces



THE NLRB IS OUR NEW REGULATOR!

- What does your management team need to know about PCA?
 - Employees have a right to criticize or protest an employer's policies
 - Workplace policies that prohibit criticism of the employer are unlawful
 - Rules that prohibit employees from engaging in disrespectful, negative, inappropriate, or rude behavior are usually unlawful
 - Unions, social groups and more are showing and encouraging employees to speak up and take action against employer policies that limit PCA
 - Key for employers – who in your organization will lean into and know this area?



CONFIDENTIALITY AND NON-DISPARAGEMENT RESTRICTIONS

McClaren Macomb decision

- NLRB decision restricting employer's right to include "overly broad" confidentiality and non-disparagement provision within a severance & release agreement
- NLRB found that these are unlawful if they interfere with, restrain, or coerce employees' Section 7 rights
- What was the "unlawful" language in the *McClaren Macomb* case?

CONFIDENTIALITY AND NON-DISPARAGEMENT RESTRICTIONS

McClaren Macomb decision

“The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.”

This was unlawful according to the NLRB



CONFIDENTIALITY AND NON-DISPARAGEMENT RESTRICTIONS

- NLRB General Counsel Abrizzo issued memorandum after decision and expanding on restrictions
- Takeaway for employers
 - Management/supervisory employee or not?
 - Narrow confidentiality as to financial terms only (e.g., amount paid)
 - Limit non-disparagement to maliciously untrue statements



CONFIDENTIALITY AND NON-DISPARAGEMENT RESTRICTIONS

- Takeaway for employers
 - Carve-out for statements or claims allowed under NLRA Section 7 (among others)
 - Severability clause
 - Do not rely on template agreements from prior years



NON-COMPETE AGREEMENTS



NON-COMPETE AGREEMENTS

- In January 2023, Federal Trade Commission (FTC) proposed a rule that would bar all employers in the US from enforcing non-competes
- Growing number of states have enacted or proposed rules restricting or banning non-compete agreements with employees
- NLRB GC Abruzzo issued memorandum stated that non-compete agreements violate NLRA
- Generally applies to post-employment work



NON-COMPETE AGREEMENTS

- What can an employer do?
 - Must look at state laws – there are significant legal variations from state to state
 - Are non-solicitation of customers/members allowed?
 - What about non-solicitation of current employees to come over to new place of work of a former employee? (varies by state, but the growing trend seems to prohibit this)



NON-COMPETE AGREEMENTS

- **Trade Secret Protection** – carefully craft agreements to focus on trade secret protections
 - What is a trade secret?
 - Information that is not disclosed outside of an obligation of confidentiality
 - It has commercial value due to its secret nature
 - *credit unions have a unique opportunity to enforce trade secret protections due to field of membership restrictions



NON-COMPETE AGREEMENTS

- Will require reasonable efforts by the employer to actively protect customer/member information
 - Limit access to the files/information to only those who need it
 - Implement agreements for those who have access, including third parties (mortgage and commercial loan officers and investment advisors)
 - Leveraging existing policies on protection of NPI and confidential information will be key to support enforcement of NDAs and non-solicitation restrictions



ARTIFICIAL INTELLIGENCE – KEEPING THE “HUMAN” IN HUMAN RESOURCES



ARTIFICIAL INTELLIGENCE

- What is the use of AI in recruiting, interviewing, onboarding, performance management, etc.
- US Equal Employment Opportunity Commission (EEOC) has been active in this area:
 - 2021 – launched Artificial Intelligence and Algorithmic Fairness Initiative
 - 2022 – guidance on AI and ADA “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees”
 - 2023 – guidance on AI in selection “Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964”



ARTIFICIAL INTELLIGENCE

- EEOC – employers use of AI could violate workplace laws (aka “algorithmic discrimination”)
 - Resumé scanners that prioritize applications use of certain keywords
 - “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements
 - Video interviewing software that evaluates candidates based on their facial expressions and speech patterns
 - Testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test



ARTIFICIAL INTELLIGENCE

- EEOC encourages employers to self-audit
 - Employers should test all employment-related AI tools “early and often to make sure they aren’t causing legal harm” (EEOC Chair, Charlotte Burrows)
 - Consult with legal counsel prior to engaging in self-audits
- Employers are “on the hook” for problems caused by AI vendors!
- Keep an eye on state laws addressing AI and employment

CALIFORNIA “GRAB BAG”

WHAT IS GOING ON IN THE GOLDEN STATE AND
WHAT MAY BE COMING TO YOUR STATE?



CALIFORNIA “GRAB BAG”

- Workplace Violence Prevention Standards – new California law effective July 1, 2024
- Increased paid sick leave
- Increase to minimum wage – based on certain industries
- Breaking for 2025 – Bill proposed that would require employers to have naloxone (Narcan) in workplace first aid kits



CONTACT US



550 N. Brand Blvd., Ste. #550
Glendale, CA 91203



cristina.miller@swmlp.com



(818) 241-0103



<https://swmlp.com>



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