

New Legal Changes Affecting Employers

What to Expect in 2024



Charles B. Baldwin

The Biden Administration's momentum continued to build into President Biden's third year and looks to culminate next year in advance of the presidential election. Since the Republicans took control of the U.S. House of Representatives after the midterms, Biden continued to use federal agencies to push his agenda. Below are four legal changes affecting employers in 2024.

1. Equal Employment Opportunity Commission (EEOC) likely to unleash litigation onslaught

Compared to other agencies like the National Labor Relations Board (NLRB), Department of Justice and Federal Trade Commission, which grabbed headlines through aggressive enforcement, the EEOC has been relatively quiet. In 2023, that changed. The Senate finally confirmed Kalpana Kotagal as a member of the EEOC, giving the Democrats majority control of the panel, and the EEOC received a 6% budget increase, which translates into \$26 million. Given those two factors, the EEOC filed 67 lawsuits in September 2023 alone. This boosted the EEOC's 2023 lawsuit filings to 143 – a 52% increase from just one year earlier.

Further, on August 22, 2023, the EEOC announced its approved strategic plan for the fiscal years 2022-26, which included the agency's stated focus on:

- increasing monitoring of conciliation agreements;
- using technology to reach more employees;
- conducting more investigations; and
- rooting out systemic discrimination.

The EEOC's intent to increase monitoring and enforcement of conciliation agreements signals the agency will engage in more proactive and/or aggressive tactics to verify employers are complying with the terms of conciliation agreements. The EEOC is back at full throttle, with no signs of slowing down, and employers should take heed.

2. NLRB likely to further restrict management

With the expiration of NLRB Member Gwynne Wilcox's term approaching at the end of this summer, the Democratic-led group used the event to release a slew of end-of-term decisions that continues its course of reversing or substantially modifying broad swaths of existing labor law.

On February 21, 2023, the NLRB issued its McLaren Macomb opinion in which it held employers commit an unfair labor practice merely by offering severance agreements to employees covered under Section 7 "with provisions that would restrict employees' exercise of their NLRA rights." The opinion changes the standard for determining whether an employer violates federal labor law by offering severance agreements to departing employees that include certain non-disparagement and confidentiality provisions. The decision has spawned significant concern and confusion among employers.

For example, to what type of agreements do these principles apply? How can an employer's legitimate business concerns in obtaining such clauses be addressed? Unfortunately, the Board's decision provides little to no guidance in these critical areas.

Further, on August 2, 2023, the NLRB issued its Stericycle, Inc. opinion in which it adopted a new burden-shifting standard for evaluating whether work rules infringe on employees' rights under Section 7. The new approach may require employers to significantly modify their existing work rules to ensure they are narrowly tailored and do not even arguably trench on employee rights.

Although NLRB Member Wilcox's term expired on August 27, 2023, she was not gone from the Board for long. The Senate approved her renomination to a second five-year term one week later. Since the White House has not yet submitted a nomination to the Senate for the other vacant seat on the five-member Board, the agency is now split 3-1 on ideological and political lines with Marvin Kaplan as the sole Republican member.

Expect more management restrictions in 2024.

3. Department of Labor (DOL) likely to increase salary thresholds for the Fair Labor Standards Act (FLSA) white-collar exemptions

On August 30, 2023, the DOL released a Notice of Proposed Rulemaking that would significantly raise the minimum weekly salary to qualify for one of the FLSA's three white-collar exemptions. If the changes go into effect, they could significantly impact how employers pay their employees and who is or is not entitled to overtime pay.

Specifically, the DOL proposes:

- raising the weekly salary by over 50% from \$684 per week to \$1,059 per week (which is equivalent to an annual salary of \$55,068);
- increasing the annualized salary threshold for the exemption for "highly compensated employees" from \$107,432 per year to \$143,988 per year; and
- automatically updating these earnings thresholds every three years.

The DOL encourages all interested parties, including employers, to submit written comments addressing the proposed rule. While the exact timeline for the DOL's publication of a final rule is unknown, the time between a similar 2019 proposed rule and final rule was approximately 10 months. Thus, a final rule may come into effect around July 1, 2024.



Kevin E. Roberts



Shantale Davis

4. ESG revolution in full swing

There is no question Environmental, Social and Governance, or ESG, practices are a hot topic in corporate circles. In fact, more than 90% of publicly traded companies reportedly are adopting ESG policies. In the last four years, ESG reporting mandates have grown by more than 74% and have garnered the U.S. Securities and Exchange Commission's (SEC) interest.

Employers should recognize that ESG practices and policies implicate numerous labor and employment matters, and, this year, employers face ESG challenges from a number of different angles – ESG litigation, legislation, shareholder proposals and derivative suits, as well as administrative actions from the EEOC and SEC. In fact, 22 states have adopted some form of ESG-related laws; 18 of these are anti-ESG measures.

Employers must be proactive in this area, which includes overseeing audits, evaluating and advising about doing too much (or not enough),

and identifying potential vulnerabilities and opportunities. Companies that analyze ESG's efforts on their workforce and act to control risks will be better positioned to improve long-term profitability.

2024 recommendations

In 2024, employers should prepare for an aggressive regulatory agenda by taking the following actions:

1. Learn the new rules and hot-button issues at the NLRB, EEOC, DOL and other agencies.
2. Ensure employment policies comply with new regulatory rules and issues.
3. Strategize treatment of exempt employees who may become non-exempt employees.
4. Conduct proactive privileged compliance audits of practices and policies to avoid costly future legal issues.

AUTHORS: Charles B. Baldwin is a shareholder, Kevin E. Roberts is an associate and Shantale Davis is an associate, not yet admitted for the Indianapolis office of Ogletree Deakins. Davis, a 2023 graduate of the University of Kentucky Law School, is not currently licensed to practice law and is in the process of seeking admission to the state bar of Indiana. They can be contacted at (317) 916-1300 or www.ogletreedeakins.com.



The graphic features the year '2024' in large, bold, yellow font. A gold medal with a blue ribbon is positioned over the '0'. The background is dark blue with gold and white bokeh effects. Text on the right includes 'Presented by: Ogletree Deakins' with the tagline 'Employers & Lawyers. Working Together.' and the 'INDIANA CHAMBER' logo with the tagline 'LEADING BUSINESS | ADVANCING INDIANA'.

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