



Exploring Labor Law Developments & Challenges in 2024

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Agenda

- Updates at the EEOC
- The Pregnant Workers Fairness Act and The Pump Act
- Remote Work — Accommodations, Taxes, Expenses, and More
- Developments in Religious Accommodation Law
- Inclusion, Equity, and Diversity Programs
- Expanding Scope of Discrimination Claims
- FMLA Reminder
- NLRB and the State of the Union, on Unions
- Wage and Hour Highlights
- Pay Transparency and Salary History Bans
- The Continued Attack on Non-Competes

The EEOC and the Laws it Enforces



Source: Adobe Stock Photos

EEOC Annual Performance Report for FY 2023

FY 2023

(Increases are over FY 22)



Demand for services



Significant remedies for workers who suffered discrimination

10%

Receipts of private sector charges of discrimination

\$665m⁺

Secured for victims of discrimination 29.5% ▲

Receiving 81,055 new discrimination charges

10.3% ▲



233,704 inquiries in field offices

6.9% ▲



522,000 calls from the public through the agency contact center

10% ▲



Over 86,000 emails

25% ▲



Suits on individual's behalf

86

Non-systemic, multiple victims

32

Systemic suits, multiple victims or discriminatory policies

25

Filing new lawsuits

143

50% ▲

Source: Littler Law

EEOC Priorities for FY 2024

- 2024 is the 60th anniversary of Civil Rights Act of 1964
- Priorities from 2023 Strategic Enforcement Plan: vulnerable workers; addressing emerging issues; advancing equal pay; preserving access to the legal system; systemic harassment
- New priorities: robustly attacking discrimination (unfinished business from #MeToo); prioritizing PWFA enforcement; tech-based employment discrimination; DEI and inclusive workplaces; religious biases; closely watching new patterns within harassment claims, such as anti-Semitism and anti-Muslim bias.

EEOC Enforcement Guidance on Harassment



Source: Powerpoint Stock Photos

- Update expected in 2024 – first time since 1999

Proposal includes:

- Recognition of harassment based on sexual orientation and gender identity
- Context matters – neutral references may be discriminatory in context
- Stereotyping – even “positive” stereotypes – can be harassing
- Single incidents can be sufficient if “severe”
- No “crude environment” exception
- Detailed description of “prompt and adequate” investigation/corrective action

Pregnancy – Accommodations & Lactation



Source: Powerpoint Stock Photos

The Pregnant Workers Fairness Act (PWFA)

- New regulations and interpretive guidance released just last week by the EEOC (published April 19, 2024, take effect June 18, 2024) — **but the law is already in effect**
- Requires accommodation of “pregnancy, childbirth, and related medical conditions” – read expansively to cover physical and mental conditions arising before, during, and after pregnancy, including abortion (and the fight over whether that is what Congress intended)
- Interactive process required, ADA’s reasonableness and undue hardship analyses apply ... except:
 - No level of severity required
 - Temporary elimination of essential functions for 40+ weeks (which deviates substantially from the ADA)
 - “Predictable Assessments” are automatic (water, restroom breaks, sit/stand, breaks to eat/drink)
 - Minimal documentation requirements — your regular ADA paperwork probably won’t cut it — and even then, only in certain instances
- What you should be doing now

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) Act

- Expands the Fair Labor Standards Act (FLSA) to provide additional workplace protections for lactating employees by requiring employers to provide all employees who are nursing with reasonable time and private space, other than a bathroom, to express breast milk.
 - Employees are entitled to a reasonable break time **each time** there is a need to pump
 - An appropriate, private space functional for nursing (per DOL) = must contain a place for the nursing employee to sit and a flat surface, other than the floor, on which to place the pump. Employees must be able to safely store milk while at work, such as in an insulated food container, personal cooler, or refrigerator.
 - The DOL also recommends that the space provide access to electricity, since it generally takes more time to use a battery-operated pump than an electric one. It also recommends that employers provide a location close to a sink to make it easier for employees to wash their hands and clean pump parts – all of which are part of the reasonable break time provided by the PUMP Act.
 - Employer and employee can agree to create a break schedule based on the nursing employee's needs to pump but the schedule cannot be static – the schedule may need to be adjusted over time as the nursing employee's needs change
 - Employees working remotely or offsite are eligible to take lactation breaks on the same basis as those working onsite

Remote Work- Accommodations, Taxes, Choice of Law, And More

The ADA: WFH as an Accommodation

- The situation: Your organization has a general policy of onsite work (some or all of the time). Leadership wants people onsite to perform their duties, for collaboration, to enhance organizational culture, etc.
 - Is that permissible? Absolutely, yes.
 - Might you have to make exceptions to that for individuals with disabilities? Absolutely, yes, like any other policy.
- The ADA case law thus far is mixed, and not all that great for employers —particularly in certain types of jobs

What To Do Now?

- Back to the basics – ADA 101
- No rigid application of policy
- Evaluate on a case-by-case basis
- Consider whether you will need to temporarily allow it to gather data (pros and cons)
- Be prepared to show actual undue hardship if the job duties can be performed remotely
- Make sure your management team is trained on how to handle these requests

Other Remote Worker Issues

- How do we set up a remote worker in a different state? What are the income tax implications?
- Can we pay remote workers at a different rate from in-office workers?
- Which law applies when a claim is brought?
- How do we track expense reimbursement? (And what expenses do we have to reimburse for — home internet?!?)

Accommodation of Religious Beliefs and Practices

Groff v. DeJoy (U.S. Supreme Ct. 2023)

- Employee requests to be off on Sundays, employer's business needs change and Sundays required for all, employee resigned and sued — case made its way to the United States Supreme Court
- Prior standard under federal law: Religious accommodation required only if employer would “bear no more than a *de minimis* cost” — employer need not “incur substantial costs” to accommodate
- Supreme Court REVERSED lower court decisions, creating new, much higher standard for employers
- **Accommodation required unless it would create “substantial increased costs in relation to conduct of [employer’s] particular business”**

What Does This All Mean?

Requests for accommodation to “sincerely held religious beliefs” are likely to increase

Common requests:

- Modified schedules
- Exceptions to dress code, grooming requirements
- Exception from vaccinations
- Breaks for prayer

Inclusion, Equity, and Diversity



Source: Powerpoint Stock Photos

Supreme Court Ruling in Higher Education

The United States Supreme Court concludes that the University's policies violate the due process clause, effectively making it unlawful for a public university, or a private university which receives public funds, to directly consider a college applicant's race to achieve student diversity.

Students for Fair Admission v. Harvard
(S.Ct. 2023)

Meanwhile, Back at Your Workplace...

- In the private sector workplace, discrimination, including reverse discrimination, was already illegal before the Court's decision
- If you have an IED policy, it was not automatically made "unlawful" by the Supreme Court's decision
- **BUT EXERCISE CAUTION:** We are seeing new lawsuits filed against private sector employers alleging "reverse discrimination"

Practical Suggestions

- Be mindful of the tension between IED goals and employment discrimination laws
- Consider an attorney-client privileged review of your IED policies/programs
 - In that review, balance risk and reward
 - Modify policies and programs if desired
- **Avoid quotas**. Even “aspirational goals” may be suspect. Watch out for financial incentives for managers to meet goals
- Make employment decisions based on business-related criteria and not based on protected category status
- Train the hiring team

Paving the Way for More Discrimination Claims

- *Muldrow v. City of St. Louis* (U.S. Supreme Court, April 17, 2024)
 - Reversed the lower court decision in favor of the employer on the standard of harm required for a plaintiff to bring a discrimination claim under Title VII (and likely similar laws relying on Title VII jurisprudence)
 - Here, the disputed issue was an undesirable transfer with no change in pay
 - Resolved a circuit split
 - A plaintiff must only demonstrate they suffered “**some harm**,” not an ultimate harm like a termination, demotion, cut in pay, etc.

A Quick FMLA Reminder



Source: Adobe Stock Photos

Recognizing Lurking FMLA Issues—Not Everything is About Whether You Can “Accommodate” It

- Your employee brings a note from his doctor that he needs to work a part-time schedule (20 hours a week) while undergoing treatment for his medical condition.
 - Typical operational response: “We don’t have part-time jobs” or “We cannot accommodate part-time work right now — we are way too busy.”
 - **WAIT — This is a form of FMLA for an eligible employee**
- What if the employee’s doctor says he can never work overtime again, and overtime is an essential function of the job?
 - DOL Opinion Letter FMLA2023-1-A (Feb. 9, 2023), available in full at [2023_02_09_01_FMLA.pdf \(dol.gov\)](https://www.dol.gov/eis/whistleblower/FMLA2023-1-A.pdf)
- **Practical Point:** Full FMLA compliance sometimes means an employee works a reduced number of hours per day “for an indefinite period as long as the employee does not exhaust their FMLA leave entitlement.”



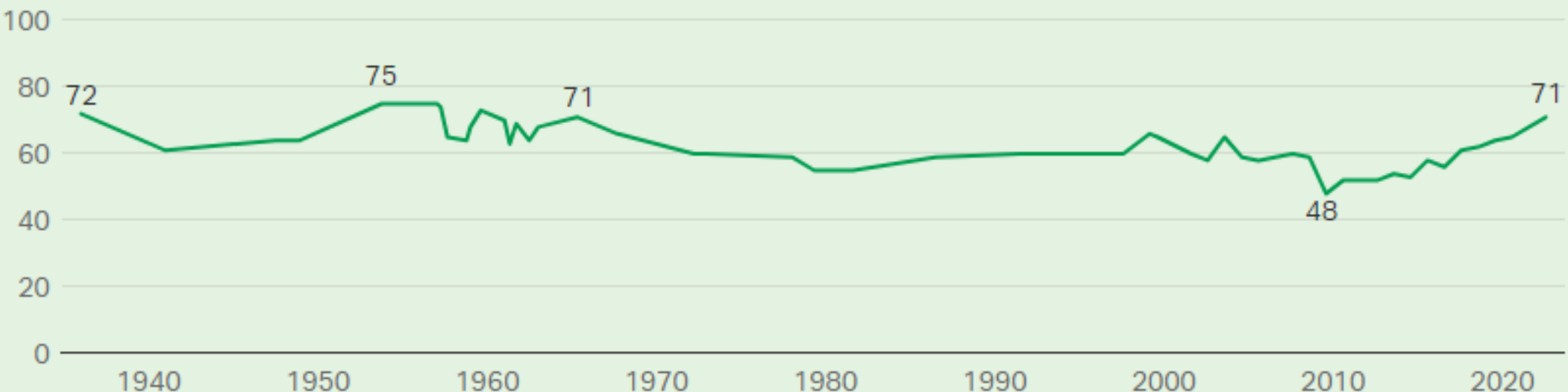
National Labor Relations Board (NLRB) Update

Public Support for Labor Unions at Historic Levels

Americans' Approval of Labor Unions, 1936-2022

Do you approve or disapprove of labor unions?

— % Approve

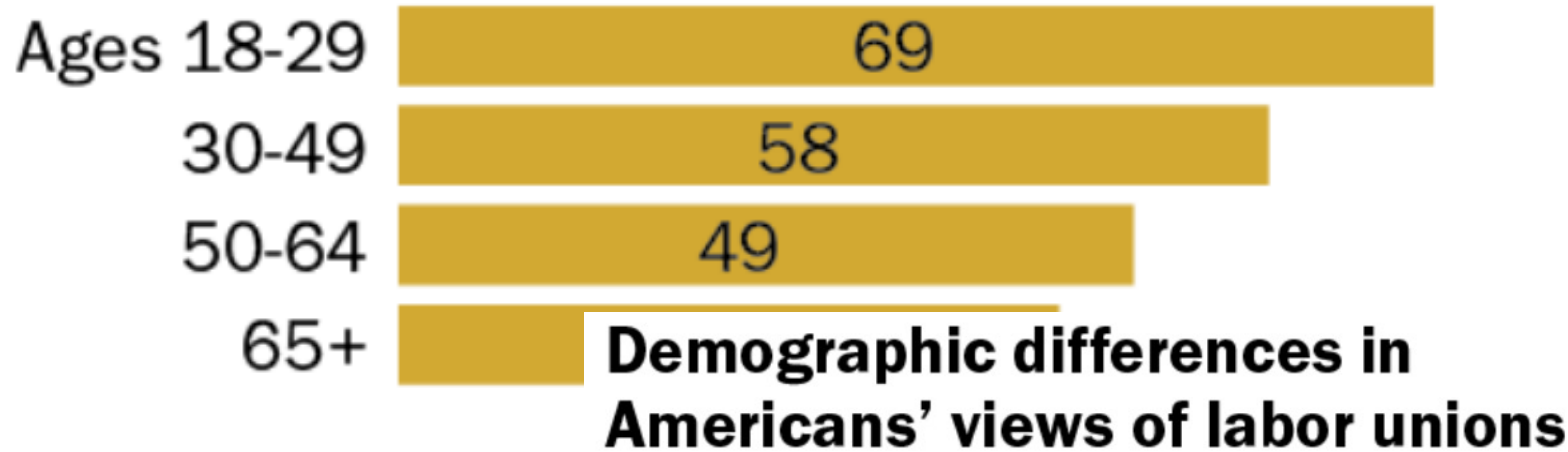


Get the data • Download image

GALLUP

2023: Slight dip to 67% (but we are back to approval ratings from the 1940s!)

Younger Workers Have the Most Positive View of Unions



*% who say labor unions have a **positive effect** on the way things are going in the country*

Source: Survey of U.S. adults conducted July 8-18, 2021.

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Why Has Public Perception of Unions Changed?



- The Biden administration's pro-union stance
- Pandemic-related fears and uncertainty (still ...)
- The Great Resignation / Quiet Quitting
- Union alignment with social justice movements
 - Gen-Z strong affiliation for movements
 - Millennials and Xers who are supportive of these movements have little to no experience with unions
- Inflation / economic uncertainty

But Remember:

The NLRA Applies To All Private Businesses, Not Just To
Those Whose Employees Have Decided to Be
Represented By A Union

Areas of NLRB Attack/Enforcement

- Separation agreement terms (confidentiality and non-disparagement)
- Employer policies/handbooks — even “Be Nice” policies!?!
- Employee engagement in protected, concerted activities



Source: Adobr Stock Photos

Salary Threshold & Independent Contractor Updates



Source: Powerpoint Stock Photos

FLSA “White Collar” Overtime Exemptions

- The Department of Labor’s Regulations concerning who can be classified as exempt and what they have to be paid to maintain such an exemption (duties and minimum salary thresholds)
- As of today (April 23, 2024), the anticipated final rule from the Department of Labor for changes to the minimum salary for exempt workers has cleared OMB – so we expect the release any time
- Anticipated minimum salary increase for exempt workers from \$684/week (\$35,568 per year) to \$1,059/week **(\$55,068 per year)** — a 55% increase from the current level
- Anticipated increase in highly compensated employee (HCE) from \$107,432 to \$143,988
- Automatic updates to these numbers every three years
- Will likely be legal challenges to the Rule, which could result in injunctions ...

Who is an “employee” vs. an “independent contractor” under FLSA?

- New Rule Effective March 11, 2024 (rescinds rule from January 2021)
- Prior Rule focused on two “core factors” — control and opportunity for profit/loss
- New Rule: Multifactor “economic reality” test —
 - Opportunity for profit or loss depending on managerial skill;
 - Investments by the worker and the potential employer;
 - Degree of permanence of the work relationship;
 - Nature and degree of control;
 - Extent to which the work performed is an integral part of the potential employer’s business; and
 - Skill and initiative.

Pay Transparency Laws



Source: Powerpoint Stock Photos

- Some jurisdictions are now **requiring** employers to report pay data
 - California
 - Illinois
 - Minnesota (state contractors only)
- Many more locations are requiring compliance with “wage transparency laws”
 - California, Colorado, Connecticut, Illinois, Maryland, Nevada, New York, Rhode Island, Washington
 - Some cities have ordinances as well (Cincinnati, Toledo, New York City)
- The laws vary in their requirements
 - Provided to all applicants, but not posted (CT, NV, RI)
 - Upon request only when employees change roles (WA)

Pay Transparency Laws

- Illinois
 - Law goes into effect January 1, 2025
 - Will require posting to include pay scale and benefits
 - Will apply to job performed at least partly in Illinois and where employees report to a supervisor, office, or other work site in Illinois
 - Also requires employers to notify current employees of all “opportunities for promotion” with only limited exceptions
- A similar bill has been introduced in Congress, so this type of law may ultimately become a nationwide requirement



Source: Powerpoint Stock Photos

Salary History Bans



Source: Adobe Stock Photos

- **Salary Inquiry** – Many states now regulate salary history inquiries for private employers (AL, CA, CO, CT, DE, HI, ME, MD, MA, MO, NV, NJ, NY, OH, OR, PA, RI, VT, WA, + Puerto Rico)
- Prohibit asking about salary history
- Prohibit retaliation (refusal to hire, interview) if applicant refuses to disclose salary history
- Prohibit setting salary based on salary history, **even if volunteered**
- Prohibit disciplining employees who discuss/disclose salary information

The (Continued) Attack on Non-Competes

The Federal Trade Commission (FTC) Rule

- Issued January 5, 2023
- Broadly Bans Non-Competes
 - “a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.”
- Generally, does not include other types of restrictive employment covenants
 - Non-disclosure agreements (NDAs)
 - Client or customer non-solicitation agreements

About an hour ago, FTC held a special Open Commission Meeting (Tuesday, April 23 at 2 p.m. EST) to vote on whether to issue the proposed, final rule banning the use of non-compete agreements by employers.

In the Meantime, States Continue to Legislate Against Non-Competes

- Continuing a recent trend, we see legislation and court decisions in multiple jurisdictions restricting the use of non-competes
- Example restrictions include
 - Minimum income requirements
 - Notice requirements
 - Industry-specific restrictions
 - Eliminating blue-pencil requirements

- The FTC Rule will be challenged in court
 - Does the FTC even have the authority to promulgate such a rule?
- States and other jurisdictions will continue to focus on non-competes
- Recommendation – review your agreements
 - What's the real/true purpose of your agreements?
 - Are trade secrets really your biggest concern?
 - Can a narrower agreement suffice?

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