

2024 Employment Law Midyear Update

Thursday, May 30, 2024

PIERCE ATWOOD 

AGENDA

12:30 – 2:00: **Pay Equity and Pay Disclosure Laws**

2:00 – 2:15: ***Break***

2:15 – 3:45: **Protecting Against Unfair Competition by Departing Employees**

3:45 – 4:30: **Legal update and Q&A**

- New salary threshold
- Pregnant Worker's Fairness Act Regulations
- New EEOC guidance on harassment
- Maine paid family leave regulations
- Adverse employment action standard clarified

4:30: **Cocktail hour**

Pay Equity and Pay Disclosure Laws

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Legal Landscape

Federal laws that prohibit discrimination in pay:

- The Equal Pay Act of 1963 (EPA)
- Title VII of the 1964 Civil Rights Act
- The Age Discrimination in Employment Act (ADEA)
- The Americans with Disabilities Act (ADA)

Many **state laws** also prohibit discrimination in pay. Currently, more than 21 states have passed pay equity laws prohibiting pay discrimination (including all New England States and New York) and more states are likely to follow.

Federal Equal Pay Act

Employers are required to provide **equal pay** for men and women for jobs within the same establishment that:

- Require **equal** skill, effort and responsibility, and
- Are performed under similar working conditions
- Disparity permissible if based on following factors:
 - › Seniority System
 - › Merit System
 - › System that measures earnings by the quantity or quality of production
 - › Any factor other than sex

New England States & New York State

	Equal Pay For	Non-discrimination
Connecticut	comparable work on a job, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions	sex
Maine	comparable work on jobs that have comparable requirements relating to skill, effort and responsibility	sex, race
Massachusetts	comparable work, which means work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions	sex
New Hampshire	equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions	sex
New York State	(a) equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions, or (b) substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions	sex and any other characteristics protected by NYS Human Rights Law
Rhode Island	comparable work, which means work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions	sex, sexual orientation, gender identity or expression, race, color, religion, disability, age, and country of ancestral origin
Vermont	equal work that requires equal skill, effort, and responsibility and is performed under similar working conditions	sex

MA “Comparable Work” Standard

- “Comparable work” means “work” that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions, however, that a job title or job description alone shall not determine comparability.” (M.G.L. ch. 149, section 105A)
- MA courts have used a two-step analysis for determining what constitutes comparable work. (See *Gu v. Boston Police Dept.*, 312 F. 3d 6 (1st Cir. 2002), citing *Jancey v., Sch. Comm. Of Everett*, 421 Mass. 482 (1995))
 - › First, the factfinder “must determine whether the substantive content of the jobs is comparable, that is, whether the duties of the jobs have ‘important common characteristics.’ ”
 - › If the factfinder determines that the jobs are comparable in terms of their substantive content, then the second question becomes “whether the two positions entail comparable skill, effort, responsibility, and working conditions.”

Pay Equity in a Nutshell

Are the jobs comparable/equal?

A flowchart consisting of three teal-colored rounded rectangular boxes arranged vertically. Each box contains a question. A light blue arrow points downwards from the bottom of the first box to the top of the second box, and another light blue arrow points downwards from the bottom of the second box to the top of the third box.

Is the pay equal?

If not, can the disparity be explained by one or more of the statutorily permissible factors?

Permissible Pay Disparities

Pay disparity is permitted if based on the following factors if such factors are reasonably related to the job.

Federal	CT	ME	MA	NH	NY	RI	VT
Seniority system	Seniority system	Seniority system	Seniority system	Seniority system	Seniority system	Seniority system	Seniority system
Merit system	Merit system	Merit system	Merit system	Merit/performance-based system	Merit system	Merit system	Merit system
System that measures earnings by quantity or quality of production	System that measures earnings by quantity or quality of production	N/A	System based on quality or quantity of production or sales	System that measures earnings by quantity or quality of production	System that measures earnings by quantity or quality of production	System that measures earnings by quantity or quality of production	System that measures earnings by quantity or quality of production
Any factor other than sex	A bona fide factor other than sex	N/A	N/A	A demonstrable factor other than sex	A bona fide factor other than protected characteristics	A bona fide factor other than protected characteristics	A bona fide factor other than sex
N/A	Geographic location (if bona fide other than sex)	N/A	Geographic location	N/A	N/A	Geographic location	N/A
N/A	Education, training, credential, skills or experience ((if bona fide other than sex)	N/A	Education, training or experience	Expertise; education, training or experience (if demonstrably other than sex)	Education, training, or experience (if bona fide other than protected characteristics)	Experience, training, skills or ability	N/A
N/A	N/A	N/A	Travel, if a regular and necessary condition of job	N/A	N/A	Work-related travel	N/A
N/A	N/A	Difference in the shift or time of the day worked	N/A	Shift differentials	N/A	Reasonable shift differentials	N/A

Seniority or Merit “System”

“They must be bona fide systems. This means that the system was not adopted with discriminatory intent; is an established system containing predetermined criteria for measuring seniority, merit, or productivity; has been communicated to employees; and has been consistently and even-handedly applied to employees of both sexes. And of course the system must in fact be the basis for the compensation differential.”

(EEOC, Q&A Compliance Manual Section on Compensation Discrimination)

Other Restrictions Worth Noting: Ban on Pay Secrecy and Salary History Inquiries

State Pay Equity Laws

- Pay Secrecy Prohibited
 - › Unlawful to prohibit employees from talking about their own wages
- Salary History Ban
 - › Unlawful to seek the wage or salary history of a prospective employee, with certain exceptions (e.g., voluntary disclosure by the applicant)
 - › E.g., CT, MA, ME, NY, RI, and VT

Mundell v. Acadia Hosp. Corp. (1st Cir. 2024)

- *Facts*: Pool of 5 psychologists at a hospital – 3 females paid \$50 per hour while 2 men paid \$90 and \$95 per hour, respectively. Dr. Mundell complained to management about the pay disparity and ultimately resigned and brought a lawsuit when the parties could not agree to a remedy.
- *Issues*: (1) did Dr. Mundell need to show that the hospital intentionally discriminated against her in setting her pay; and (2) could the hospital assert a defense that the pay disparity was justified by “reasonable factors other than sex”

Mundell v. Acadia Hosp. Corp. **(1st Cir. 2024)**

- *Holding*: First Circuit affirmed the Maine District Court's decision: "[T]he only reasonable construction of the MEPL is that liability attaches with proof that employees of one sex are being paid less than employees of another sex for comparable work in comparable jobs, *regardless of intent*, unless an employer can demonstrate that the disparity stems from the second sentence's three listed exceptions - - and, even then, only if those excepted practices are not traceable to purposeful sex-based discrimination."
- *Note*: treble damages an attorney's fees and costs are available for violation of MEPL

Employer Pay Disclosure Obligations

- At least 10 states, DC, and a few cities have **pay disclosure** requirements:
 - › CA, CO, CT, DC, HI, IL, MD, NV, NY, RI and WA
 - › Jersey City (NJ), Ithaca (NY), NYC (NY), Westchester County (NY), Cincinnati (OH), and Toledo (OH)
- Significant number of states have pay disclosure bill under consideration:
 - › AK, KY, MA, ME, MI, MO, MT, NJ, OR, SD, VT, VA, WV

Pay Disclosure

	CT	RI	NYS
Covered employers	Employers within CT employing 1 or more employees (regardless of where the employees work) Out-of-state employers not located in CT are not covered	Employers with one or more employees	Employers with four or more employees
What to disclose	Wage range, including reference to any applicable pay scale, any previously determined range of wages for the position, actual range of wages for current employees holding comparable positions, or the amount budgeted for the position	Wage range, including reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for those currently holding equivalent positions, or budgeted amount for the position	The compensation or range of compensation for the job, meaning the minimum and maximum annual salary or hourly range of compensation for a job, promotion, or transfer opportunity
To whom or when to disclose	Applicants upon request, or prior to or at the time of an offer of compensation Employees upon hire, a change of position, or upon request	Applicants upon request Employees at the time of hire, a change of position, or upon request	When advertising a job, promotion, or transfer opportunity that can or will be performed, at least in part, in NYS

MA Pay Disclosure Bill

If signed into law by the Governor, it would go into effect one year from the date it is signed.

Employers with 25 or more employees in MA would be required to

- Post the “pay range” for a particular position on job postings,
- Disclose the pay range for a position to employees who are offered a promotion or a transfer to a new position with different job responsibilities, and
- Provide the pay range for a particular position to an employee holding the position or to an applicant for the position upon request.

Pay range is defined as “the salary range or hourly wage range that the covered employer reasonably and in good faith expects to pay” at the time of posting.

ME Pay Disclosure Bill

- Maine introduced a bill in 2023, but it did not pass . . . yet.
- If passed, the bill would require:
 - › Employers with 10 or more employees to ensure that any posting of an employment opening includes a statement that lists the range of pay the employer will offer to a successful applicant.
 - › Employers with fewer than 10 employees to disclose, on request, to an applicant for an employment opening the range of pay the employer will offer to a successful applicant.
 - › All employers to disclose, at the request of an employee, the range of pay the employer offers for the position the employee holds.
- The bill does not define “range of pay.”

Proposed Federal Pay Disclosure Bill

If passed into law, the proposed Salary Transparency Act would:

- Apply to all employers covered by the FLSA
- Require all job postings to include the wage or wage range for the position
- Require all employers to provide the wage range to an applicant prior to discussing compensation and also upon request
- **Require all employers to provide employees with the wage range for their position at the time of hire, annually thereafter, and at any time upon request**

Federal Contractor Proposed Rule

- If adopted, the proposed rule would:
- Apply to contractors with federal contracts/subcontracts for commercial products or commercial services valued in excess of \$10,000
- Prohibit federal contractors from seeking or considering an applicant's compensation history.
 - › Unlike certain state laws, there is no "employee voluntary disclosure" exception.
 - › "Applicant" is defined to include a prospective employee or current employee applying for a position to perform work on or in connection with the contract.
- Require federal contractors to disclose in job advertisements the compensation the contractor in good faith believes that it will pay for the advertised position
 - › "Compensation" means "any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement."

Action Items – Pay Equity, Generally

- Document basis for pay determinations
- Maintain records to support pay determinations
- Does your merit system help or hurt you?
- Ensure employee handbooks, policies, and other relevant documents do not prohibit employees from disclosing or discussing their own or other employees' salary information
- Ensure no questions regarding current or past salary on application forms (asking for salary expectations is acceptable)
 - › Train hiring managers not to ask for current salary information!
- Consider conducting self-audit and adjusting pay practices as necessary
- Train managers!!

Basic Steps in Self-Audit

Conduct under attorney-client privilege

Step 1: Gather relevant information

Step 2: Identify comparable/equal jobs

Step 3: Calculate whether men and women are paid equally (or other protected characteristics if applicable)

Step 4: Assess whether differences in pay are justified under the law

Step 5: Remediate any gender-based pay differentials (or other protected characteristics if applicable)

Step 6: Adjust pay practices if necessary



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Protecting Against Unfair Competition by Departing Employees

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Identify the Interests / Assets Requiring Protection

Information

Physical assets

Customer / client
relationships
("good will")

Vendor / supplier
relationships

Employees

Valuable Information

Recipes

Processes,
methods,
know-how

Computer
programs
(*e.g.*, source
code)

Unpublished
patent
applications

Methods of
calculating

Collections of
data (*e.g.*,
customer or
supplier lists)

Financial
information

Marketing
strategies

Exercise

- If an employee were to leave your company today and begin working for a competitor, how could they harm your business?
 - › Put to the side general competition (*i.e.* harm to the company when anyone, not previously employed by the company, competes).
 - › Question is how this individual's status as a former employee of the company might give them an unfair advantage or uniquely position them to harm the company.

Sources of Protection

- Common law duty of loyalty – likely limited, but relevant
- Statutes – protecting trade secrets
- Contracts – use increasingly regulated / limited by federal and state laws

Duty of Loyalty

- Common law duty to act in the best interests of the employer
 - › Not stealing or converting corporate opportunities
 - › Not using company assets or resources to compete or otherwise harm employer
- Generally attaches only to directors or others occupying positions of trust and confidence
- Generally will not prohibit an employee from preparing to leave and compete while employed

Statutory Trade Secret Protections

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Trade Secret Statutes

- Federal and state statutes prohibit “misappropriation” of “trade secrets”
- Aggrieved company / individual can file suit, seeking injunctive relief, damages, and attorneys’ fees
 - › State law – Uniform Trade Secrets Act in effect in Maine, New Hampshire, Rhode Island, and (with some tweaks) Massachusetts.
 - › Federal law – Defend Trade Secrets Act

DTSA

“An **owner** of a **trade secret** that is **misappropriated** may bring a civil action . . . if the trade secret is related to a product or serviced used in, or intended for use in, interstate or foreign commerce.”

What is a “trade secret”?

Anything!

- “all forms and types of ... business ... information” regardless of how stored

So long as:

- “Owner” has taken “reasonable measures” to keep information secret

And

- Info “derives independent economic value” from its secrecy

What is “misappropriation”?

“Acquisition”

- Acquisition if acquirer “knows or has reason to know” trade secret was obtained by “improper means”

“Disclosure” or “Use”

- Disclosure by one who acquires by improper means
- Disclosure by subsequent parties with knowledge
- Use, if with knowledge that trade secret was obtained by accident

“Threatened misappropriation” v. “Inevitable disclosure”

What are “improper means”?

“Improper means”

- “theft, bribery, misrepresentation, **breach or inducement of a breach of duty to maintain secrecy**, or espionage”
- but not “reverse engineering, independent derivation, or any other means of lawful acquisition”

What are “reasonable measures”?

- Measures that are not applied equally to all information
- Confidentiality agreement / NDA probably necessary, but standing alone may be insufficient
- Specific measures:
 - › Promptly cutting off departing employee’s access and wiping their devices
 - › Marking / designating as confidential so employee is on notice
 - › Using technological protections (passwords, encryption) to limit access
 - › Employing physical protects (locked cabinets, file rooms, etc.)

Reasonable Measures Include Policies

Confidentiality Policy

- Define trade secrets
- Specify obligation to maintain secrecy of trade secrets during and following employment
- Identify consequences for improper use or disclosure
- Prohibit use of third-party (e.g., former employer) trade secrets
- Include whistleblower immunity language

Electronic Communications Policy

- Require strict adherence to all technological controls
- Address personal devices
- Address (prohibit?) use of personal email for work purposes
- Address (prohibit?) personal cloud storage for work purposes
- Prohibit sharing passwords

Return of Employer Property

- Include all forms of property, including electronic
- Insist on return no later than last day of employment
- For employer-provided portable devices, state that device will be remotely wiped

DTSA - Injunctions

- Court may grant an injunction to prevent actual or threatened misappropriation
- Cannot prevent a person from entering into an employment relationship **and** conditions placed on employment must be based on evidence of threatened misappropriation
- Cannot otherwise conflict with State laws prohibiting restraints on practice of lawful profession, trade, or business

DTSA - Damages

- Actual damages – lost profits
- Unjust enrichment separate from actual damages
- OR a reasonable royalty
- Treble damages and attorney's fees available for willful and malicious misappropriation
- Attorney's fees also available for misappropriation claims brought in bad faith (which can be proven circumstantially) or motion to terminate injunction brought or opposed in bad faith

DTSA - Whistleblower Immunity

- Immunity from civil and criminal liability for employee's disclosing trade secret to government or an attorney solely for the purpose of reporting a suspected violation of law
- Employers are required to provide notice of immunity in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.
 - › Employee includes contractors and consultants
 - › Consequence of noncompliance is inability to recover treble damages or attorney's fees

Contractual Restrictive Covenants

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Menu of Restrictive Covenants

Non-Competition

- Prevents employee from working in industry

Non-Solicitation / Anti-Raiding

- Prevents employee from soliciting customers, clients, or employees

Non-Acceptance

- Prevents employee from accepting business from customers / clients or from hiring employees (even if approached by the customer or employee)

Confidentiality / Non-Disclosure

- Prevents employee from disclosing or using trade secrets or confidential information

Non-Disclosure Agreements

- Handbook policy likely inoperative post-termination
- If employee has access to information that, if disclosed or used, would harm the employer, they should be required to sign an NDA as a condition of employment
- Identify requirement in offer letter

NDA – Drafting Tips

- Agreement should
 - › Define “confidential information” and “trade secret” – specificity will help avoid disputes
 - › Clearly state what isn’t covered (*i.e.* information in the public domain)
 - › Prohibit disclosure or use during and after employment
 - › Include required notice of whistleblower immunity

Legal Limitations on NDAs - NLRB

- NLRB's position:
 - › NDAs / non-disparagement provisions may interfere with or restrain Section 7 rights
 - › Even proffering certain NDAs / non-disparagement agreements is an unfair labor practice
- Theory is that even former employees have the right to protest the employer's use or terms of severance agreement and/or to disparage employer in context of aiding current employees' quest to change terms and conditions of employment

NLRB GC Memo

- Clauses cannot prohibit employees from communicating with NLRB, union, media, or other third parties about terms and conditions of employment (including existence of agreement)
- Probably can prohibit disclosure of financial terms
- NLRB will generally seek to void only unlawful provisions, not entire agreement
- Disclaimer language helpful if includes a statement of rights (not just a broad reference to Section 7)
- NLRB's position extends to other restrictive covenants

Federal “Speak Out Act”

- Effective 12/7/22, prohibits enforcement of pre-dispute NDAs / non-disparagement provisions related to allegations of sexual assault or harassment
- “Pre-dispute” means before the allegation has been made
- Law therefore doesn’t prohibit such clauses in the context of settlement of a sexual abuse or harassment claim

Maine Statutory Limit - NDAs

- 26 M.R.S. sec. 599-C
 - › Employer cannot enter into a separation / severance / settlement agreement that prevents disclosure of “factual information relating to a claim of unlawful employment discrimination” unless
 - Separate monetary consideration
 - Mutuality
 - Statement that employee can report, testify, provide info to MHRC / EEOC or in court
 - Employer retains copy of the agreement for 6 years

FTC Non-Compete Rule

- Effective September 4
- Currently subject of legal challenge
- If not enjoined, will render **non-competition agreements** unenforceable except as to agreements **entered into before effective date of the rule** with **senior executives**
- **Senior executives** defined - a worker who
 - › (1) was in a policy-making position; and
 - › (2) received total annual compensation of at least \$151,164 in the preceding year

Scope of FTC Non-Compete Rule

- **Non-Competition Agreement** broadly defined to include any agreement that has a practical effect of precluding employee from working in their field
 - › Non-Disclosure Agreements banned “where they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job.”
 - › Non-Solicitation Agreements banned “where they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends.”

FTC Non-Compete Rule

Non-Preemption of State Law

- Rule will apply to non-competes in states and circumstances where presently permitted (*i.e.* will render non-competes presently enforceable under state law unenforceable)
- But Rule will not preempt more restrictive state laws

FTC Non-Compete Rule Sale of Business Exception

- Rule does not prohibit non-compete agreements that are entered into “by a person pursuant to a bona fide sale of a business entity, of a person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.”
- Open question: extent to which exception will apply in context of stock grants to employees

FTC Non-Compete Rule Non-Profits

- In most cases, charitable and other 501(c)(3) organizations, including tax-exempt hospitals, will be exempt from the Rule
- But FTC has taken the position that a nonprofit corporation will be subject to the FTC's jurisdiction if it is a "corporation," defined, in part, under the Rule as an entity that is "organized to carry on business for its own profit or that of its members."

FTC Non-Compete Rule Notice Requirement

- Employers required to provide clear and conspicuous notice to workers subject to a prohibited non-compete
 - › In an individualized communication
 - › Stating worker's non-compete clause will not be, and cannot legally be, enforced against the worker
- Employer must provide notice by hand-delivery, by mail at the worker's last known street address, by email, or by text message

State Law Common Denominators

- All require adequate consideration, and some (MA) require consideration beyond employment / continued employment
- All require legitimate business interest
 - › Trade secrets
 - › Confidential information
 - › Good will
- All require restriction to be as narrow as necessary to protect interest
 - › Temporally
 - › Geographically

NH Law – Non-Competes

- After 9/8/19, non-competes prohibited with low wage earners (defined as equal to or less than 2x federal MW)
- Employers required to provide a copy of any required non-compete or non-solicitation agreement
 - › Prior to / at the time of offer
 - › At the time of any change in job classification
- Failure to provide required notice renders agreement unenforceable

RI Law – Non-Competes

- Unenforceable against
 - › Low wage earners (those earning 250% of federal poverty level or less)
 - › Non-Exempt workers
 - › Undergraduate or graduation students working while enrolled in school
 - › Those under age 18
- Statute doesn't apply outside employment context (including independent contractor context)

Maine Law – Non-Competes

- Relatively recent statute (26 M.R.S. sec. 599-A) restricts use
- Applies to non-competes entered into on / after 9/18/19
- Bans non-competes for low wage earners (person earning at or below 400% of federal poverty level) and veterinarians that do not own business

Maine Law – Notice Requirement

- Employer must disclose that non-compete will be required, prior to extending offer
- Employer must provide a copy of the non-compete 3 or more days before it must be signed
- Except in the case of certain physicians, non-compete agreements are not enforceable until employee's one-year anniversary or 6 months after signed, whichever is later.

MA Law – Non-Competes

- Agreement provided to employee before offer or 10 days prior to start date (whichever is earlier) and/or 10 days before agreement must be signed
- Not enforceable against:
 - › Physicians, nurses, psychologist, social workers, broadcasting industry, lawyers
 - › Non-exempt workers
 - › Undergraduate or graduation students in an internship or short-term employment relationship
 - › Employees terminated without cause or laid off;
 - › Employees under 18

MA Law – Non-Competes (*cont.*)

- Consideration beyond continued employment required and must be specified
 - › Garden leave (50% of employee's highest salary within last 2 years of employment, for restricted period; relieved if employee breaches)
 - › Other mutually agreed upon consideration
- Restricted period cannot exceed 12 months unless employee has breached fiduciary duty or stolen property, in which case, max of 2 years

MA Law Presumptions re Reasonableness

- Geographic reach presumptively reasonable if limited to area where employee provided services or had material presence or influence in prior 2 years
- Restriction on only the specific types of activities provided by employee during last 2 years of employment is presumptively reasonable

Blue Penciling

A court may reform or revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interest



When On Notice of Potential Unfair Competition

- Secure / limit access to the employee's company-issued electronic devices, networks, email
- If a current employee, place on administrative leave while investigating – strict admonition of no customer / employee contact
- Secure customer relationships
- Review evidence and consider need for computer forensics expert (and quickly)
- Assess potential harm against drawbacks of litigation, including
 - › Negative customer fallout
 - › Court ruling regarding restrictive covenant's validity
 - › Negative reputation / effect on recruiting
 - › Time and resources
 - › Need for consistency
 - › Need to demonstrate willingness to enforce

Takeaways

- Courts will not protect information that the employer doesn't take reasonable steps to protect
- When it comes to contracts, one size doesn't fit all
- Employer should utilize the least restrictive covenant(s) necessary to protect its interests
- Legal landscape is changing rapidly, and compliance is particularly challenging for multi-state employers
 - › Don't rely on templates or internet forms
 - › Regular review with counsel

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Legal Update

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DOL's New Salary Threshold for Exempt Employees

- The minimum salary required for the executive, administrative, or professional exemption will increase from the current \$684 per week (\$35,568, annualized) to:
 - › **\$844 per week** (\$43,888, annualized) effective **July 1, 2024**.
 - › **\$1,128 per week** (\$58,656, annualized) effective **January 1, 2025**.
 - › Automatic adjustments to the salary threshold will be made **every three years** beginning on July 1, 2027.
- The minimum annual salary required for an employee to qualify for the “highly compensated employee” exemption will jump from the current \$107,432 to \$132,964 on July 1, 2024 and to \$151,164 on January 1, 2025. The highly compensated employee salary threshold will also be updated every three years.
- Notably, the final rule does not change any of the current job duty requirements for the overtime exemptions.

Maine DOL Announcement

- Maine's minimum salary currently exceeds the federal rate, so the amount now being enforced is minimum wage ($\$14.15$) \times 3000 hours \div 52 weeks = $\$816.35$ per week/ $\$42,450.20$ per year
- On May 10, 2024, the Maine DOL announced that it will enforce the new federal salary threshold for exemption, starting July 1, 2024.
- ME law does not recognize highly compensated employee exemption.

New Salary Threshold: Practical Consideration

- On May 22, 2024, a group of businesses filed suit to block the DOL from implementing its final rule. (See *Plano Chamber of Commerce, et al. v. Su, et al.* (Docket No. 4:24-cv-00468, E.D. Tex. May 22, 2024))
 - › So far, no nationwide injunction blocking the rule from going into effect on July 1, 2024
- Monitor further developments.
- In the meantime, consider reviewing current exempt salaries to determine how the new rule may affect your workforce.

EEOC Final Pregnancy Accommodation Rule

- Effective June 18, 2024
- Broad Coverage of Conditions: pregnancy, childbirth, or related medical conditions, regardless of the levels of severity
 - › E.g., conditions may include infertility, menstruation, endometriosis, fertility treatments, miscarriages and abortions
 - › No requirement that a condition rise to the level of disability applied under ADA
- Predictable Assessments and Documentation Requests
 - › Employers can't request supporting documentation for certain "predictable assessments" related to pregnancy (e.g., breaks, sitting/standing, etc.)
 - › Employers should request supporting documentation where reasonable under circumstances (e.g., the need for the requested accommodation is not typical or apparent)

Key Difference Between Pregnancy v. ADA Accommodation

- Temporary Suspension of Essential Job Functions
 - › Significantly material departure from ADA's approach
 - › Qualified individuals include those who cannot perform essential functions for a "temporary period" **if the functions can be resumed "in the near future" and the inability to perform the essential functions can be reasonably accommodated without an undue hardship.**
 - The final rule defines "in the near future" as generally 40 weeks from the start of the temporary suspension of an essential function.
 - › The length of the temporary suspension of the essential functions depends on what the employee requires and what would cause an undue hardship on the employer.
- Undue Hardship
 - › When an employee can perform all their essential job functions, undue hardship has the same meaning as under ADA and generally means significant difficulty or expenses for the employer's operation.
 - › If an employee cannot perform all essential functions and the accommodation is temporary suspension of an essential job function, the employer needs to consider ADA definition of undue hardship and certain factors (e.g. length of inability to perform essential functions; transferability to a different position, etc.)

Pregnancy Accommodation: Practical Consideration

- Monitor potential legal challenges against enforcement of the pregnancy accommodation regulations
- Meanwhile, employers may consider the following:
 - › Review applicable state and local pregnancy accommodation requirements
 - › Review policies and current accommodation practices
 - › Pay close attention to essential functions of job positions
 - Consider potential implication of “temporary suspension of essential job functions” under pregnancy accommodation v. ADA accommodation
 - › Train supervisors on how to handle pregnancy accommodation requests

EEOC Enforcement Guidance on Harassment

- Key highlights
 - › Recognizing harassment against LGBTQ+ individuals
 - › Addressing workplace protections for pregnancy, childbirth, or related medical conditions
 - › Clarifying legal standards for retaliation v. hostile work environment – retaliatory harassment may still be challenged as unlawful retaliation “even if it is not sufficiently severe or pervasive” as the anti-retaliation provisions proscribe a broader range of behaviors, namely, “anything that might deter a reasonable person from engaging in protected activity”
 - › Illustration of intraclass and intersectional harassment
- More than 70 hypothetical examples of potential unlawful harassment, including examples relating to hybrid and remote workers and use of electronic communication and social media

Harassment in Non-Work Related Context

- Employers may be liable for conduct that occurs in a non-work related context when:
 - › the conduct has consequences in the workplace and therefore contributes to a hostile environment
 - › the conduct (including electronic communications) impacts the workplace
- Non-consensual distribution of real or computer-generated images (e.g., through social media, messaging applications, or other electronic means) can contribute to a hostile work environment, if it impacts the workplace
- Harassment by a supervisor that occurs outside the workplace is more likely to contribute to a hostile work environment than similar conduct by coworkers, given the supervisor's ability to affect a subordinate's employment status.

Anti-Harassment Policy: Practical Consideration

- The EEOC Guidance takes effect immediately, although it can be expected to face legal challenges.
- Consider reviewing your harassment policy in light of the new Guidance and also generally.
 - › Have clearly written harassment policy
 - › Implement a safe and effective system for employees to report harassment
 - › Consider providing recurring training to all employees about your policy.

Maine Paid Family and Medical Leave (Overview)

- Covered employees: all employees who have earned at least six times the state average weekly wage in the first four calendar quarters immediately preceding the first day of an individual's benefit year are covered by the law (i.e., currently \$6,216).
- Leave: provides 12 weeks of **job-protected, paid** leave as follows:
 - › **Family Leave**:
 - To care for employee's **family member with a serious health** condition.
 - The **birth** of the employee's child or the employee's domestic partner's child.
 - To **bond** with the employee's child during the first 12 months after the child's birth, adoption or foster care placement.
 - Any reason set forth in **Maine's Family Medical Leave** Requirements.
 - › **Military leave**:
 - To attend to a **qualifying exigency** or need arising out of a family member's active duty military service.
 - For the **death or serious health conditions** of certain family members in the military who died or incurred a serious health condition while on active duty.
 - › **Safe leave**: otherwise known as sexual assault victim leave.
 - › **Medical leave**: provides 12 weeks of job-protected, paid medical leave for **employee's own serious health condition** (7-day waiting period).
 - › **Organ Donation**: For the donation of an organ of the employee for a human organ transplant.

Maine Paid Family and Medical Leave (Overview cont.)

- "Family Member": broad definition that includes. *individuals with significant personal bonds like a family relationship regardless of biological or legal relationship*
- Intermittent leave: permitted in increments of **not less than 8 hours** or on a reduced leave schedule agreed to by the employee and employer. Can also be taken as a continuous leave.
- Benefit Amount:
 - › Maximum weekly benefit capped at 100% of the state average weekly wage.
 - › Wage replacement calculated at: (a) a rate of 90% for portion of employee's average weekly wage equal to or less than 50% of the state average weekly wage and (b) a rate of 66% for the employee's average weekly wage that is more than 50% of the state average weekly wage up to cap.
- Funded by: Maine employers and employees –
 - › 1% payroll tax for employer with 15 or more employees.
 - › Exempts employers with 15 or fewer employees from paying into program but can pay into the program at a rate of .5% payroll tax.
 - › Self-employed individuals may elect to opt into the program and pay into it at a rate of .5%.

Maine Paid Family and Medical Leave (Overview cont.)

- Notice of Leave:
 - › Must give “reasonable notice” of leave absent an emergency, illness or sudden necessity and must be schedule to prevent undue hardship on the employer.
 - › No waiting period - may take MPFL immediately after they start employment.
- **No retaliation.**
- Effective dates: If enacted, **benefits available May 1, 2026** with employer/employee **contributions beginning on January 1, 2025.**
- Employer private plans: can be substituted for participation in the state plan provided:
 - › (a) the plan meets or exceeds the requirements of MPFL and
 - › (b) employer obtains Maine DOL approval of the private plan.
- Poster and notice: employers will be required to (a) post an MPFL poster once available and (b) provide employees notice of their rights under MPFL within 30 days of their start date.

Maine Paid Family and Medical Leave Proposed Rules

- Use: Leave can be used for (a) continuous leave; (b) intermittent leave; or (c) reduced schedule leave. Intermittent and reduced leave schedules must be taken in 8-hour increments unless the employer and employee **agree in writing** that they may take it in smaller increments (of not less than 1 hour).
- Coverage:
 - › Eligible employees must (a) be covered by the law and taking leave for one of the qualifying reasons under the Act and (b) submit an application for benefits **no more than 60 days before** the anticipated start date of leave and **no later than 90 days after the start of leave**.
 - › Does not apply to (a) students on work study; (b) any employee subject to the Railroad Unemployment Insurance Act; or (c) incarcerated persons earning wages at a Maine correctional facility or detention facility.
- Reasonable Notice: **30 days' written notice** unless leave is for an emergency, illness or other sudden necessity. Discusses the required contents of the notice.

Maine Paid Family and Medical Leave Proposed Rules (*cont.*)

- Undue Hardship Re: Scheduling of Foreseeable Leave:
 - › Means “a significant impact on the operation of the business or significant expense, considering the financial resources of the employer, the size of the workforce and the nature of the industry.”
 - › Established only if: (a) employer provides employee **written explanation** of the undue hardship; (b) employee retains ability to **take leave within a reasonable timeframe** relative to the proposed schedule; and (c) the employer has made a **good faith effort** to work out a leave schedule that meets both (i) the employee’s needs (subject to approval of employee’s health care provider, as applicable) and (ii) the employer’s needs (i.e., it does not unduly disrupt the employer’s operations).
- Process for Applying for Benefits: sets forth (a) a list of information and documents that may be requested by the Administrator; (b) process for notifying the employer of a PFML claim; (c) process for claiming undue hardship; and (d) process for reviewing the claim for benefit eligibility.
- Calculation and Payment of Benefits: (a) amount of benefits to be determined by the Administrator (DOL or assigned third party); (b) benefits paid by direct deposit or by debit card to employees; and (c) prorated for individuals taking leave for less than a full week.
- PFML Fraud: explains what it is and how it will be addressed.

Maine Paid Family and Medical Leave Proposed Rules (*cont.*)

- Payment of Employer Premiums: premium amounts and contribution reports must be remitted quarterly and sets forth related rules.
- Process for Elective Coverage: applies to self-employed individuals and tribal governments.
- Substitution of Private Employer Plans: sets forth the process to request approval of a “substantially equivalent private plan” and confirms an **approved plan is valid for 3 years**. Note: any material change to an approved plan needs to be approved by the DOL at least **60 days in advance** of the effective date of the proposed change.
- Returning from Leave: (a) employees working for their employer for 120 consecutive calendar days are entitled upon return from leave to job restoration; (b) employees who were on initial probation when they begin PFML, may have such probation tolled until they return from leave.
- Appeals: sets forth an appeal process for (a) benefits decisions; (b) undue hardship determinations; and (c) findings of fraud.
- **Note: rulemaking and opportunity for public comment on the rules will end on July 8, 2024.**

Adverse employment action standard clarified

- *Muldrow v. City of St. Louis*, 601 U.S. ____ (2024)
- Facts: Female officer in the local police department’s specialized Intelligence Division was transferred against her will to a different office position that was less “dangerous” but that had the same pay and rank. She was replaced with a male officer who “seemed a better fit for the Division’s ‘very dangerous’ work.” The transfer did involve the officer losing her FBI credentials, access to an unmarked take-home vehicle, a job in the field as a plainclothes officer (now it was a desk job) and a regular set schedule that did not involve working on the weekends.
- Issue: whether Title VII requires an employee challenging a transfer under Title VII to meet a heightened threshold of harm – i.e., that a transfer caused some “significant”, “serious” or similar harm against the employee.

Adverse Employment Action Standard Clarified (*cont.*)

- *Holding:* Imposing a heightened standard of harm ignores the plain language of Title VII, which does not require such a showing – “Muldrow need show only *some injury* respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so.”
- *Takeaway:* this will make it potentially easier for employees to plead the adverse action element of their prima facie Title VII cases as the “materiality adverse” and “significant harm” standards no longer apply.

Questions?





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SAVE THE DATE!

2024 Employment Law Wrap-Up

Thursday, November 7, 2024

12:00 pm – 4:30 pm (*happy hour to follow*)

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