Legislative Updates

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Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Anthony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters.

Anthony is an AV® Preeminent™rated attorney based on Martindale-Hubbell's peer review ratings, has been selected for inclusion in *Super Lawyers in America®* ten times and has been selected for inclusion since 2016 in the *Best Lawyers® in America* publication. *Best Lawyers in America®* recognized him "Lawyer of the Year," Fort Wayne in 2017 and 2018 in the area of Employment Law - Management and in 2020 and 2023 in the area of Litigation- Labor and Employment and in 2023 for Labor Law- Management. He has presented over 250 speeches and/or seminars locally and nationwide. He is a member of the Allen County (Indiana) and Ohio Bar associations, as well as the Indiana State Bar Association.

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Rachel Steinhofer represents clients in the employment arena, defending employers against claims involving Title VII, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Indiana Wage Payment Statute, the Indiana Wage Claims Statute, and the Indiana Workers' Compensation Act. In addition, Rachel interacts with administrative agencies, including the Equal Employment Opportunity Commission (EEOC), on behalf of clients.

Rachel serves on the boards of directors for Mental Health America of Northeast Indiana and the Fort Wayne Children's Zoo. She has given presentations on multiple legal topics, including the "Workplace Survival Guide" and "Finding Free Legal Research Sites and Free Case Law," and she was a contributor to a publication about medical malpractice claims. Since 2015, she has been selected a "Rising Star" by the *Indiana Super Lawyers*© publication and was selected in 2023 for inclusion in *The Best Lawyers in America*® in the area of Litigation-Labor and Employment.

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Biden Administration

- **At a June 17 political rally organized by Unions to announce reelection campaign, President Biden said he was proud to be "reelected the most pro-union president in history."**
- **There has been impact with the NLRB and organized labor**
  - February 4, 2021 – PRO Act reintroduced
  - March 9, 2021 – Passed House
  - March 11, 2021 – Received in Senate
  - April 26, 2021 – Task Force on Worker Organizing and Empowerment to "increase union density"
  - February 7, 2022 – Task Force's initial report with 70 recommendations
- **First modern president to visit a picket line**
- **Continued encouragement of unionization and collective bargaining**

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National Labor Relations Board (NLRB)

- **Memorandum GC 21-04 (August 12, 2021)**
  - Targeted 53 issues for change, including employer handbook rules, confidentiality provisions and instructions, what constitutes protected activity, employer duty to recognize and/or bargain
- **Memorandum GC 22-02 (February 1, 2022)**
  - Section 10(j) of NLRA
  - NLRB authorized to seek injunctions where workers have been subject to threats or other coercive conduct during an organizing campaign where normal pace of Board processes would be inadequate to protect employer rights
  - "[S]eek prompt Section 10(j) relief [. . .] where the facts demonstrate that employer threats or other coercion may lead to irreparable harm to employees' Section 7 rights."
- **Memorandum GC 23-08 (May 30, 2023)**
  - GC's take on non-competes
  - Could be reasonably construed to deny employees the ability to quit or change jobs
  - Chills certain types of Section 7 activity

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FTC Final Rule Banning Non-Competes

- **FTC issues final rule on April 23, 2024.**
- FTC's final rule, bans employers from entering into or attempting to enforce any new non-competes after the effective date- 120 days after publication in the Federal Register.
- Existing non-competes for workers will no longer be enforceable after the final rule's effective date- 120 days after publication in the Federal Register
- However, **existing** non-competes for senior executives can remain in force under the FTC's final rule. The final rule defines senior executives as workers earning more than $151,164.00 annually and who are in policy making positions.
- Employers will be required to provide notice to workers other than senior executives who are bound by existing non-competes that they will not be enforcing any non-competes against them.

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FTC <u>Final Rule</u> Banning Non-Competes

- The final rule defines "non-compete clause" as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:
  - (i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of employment; or
  - (ii) operating a business in the United States after the conclusion of the employment.
- The final rule does not apply to non-compete clauses entered into by a person pursuant to a bona fide sale of a business entity.
- There have already been at least 3 lawsuits filed challenging the legality or validity of the rule.s

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DOL Final Rule on Salary Thresholds

- On April 23, 2024, the U.S. Department of Labor released a final rule that raises the salary threshold to qualify for certain overtime exemptions under the Fair Labor Standards Act.
- **FLSA: Exemptions – Employers required to pay employees OT for hours worked over 40 hours a week unless exception applies.** Employees who are employed in a bona fide executive, administrative, or professional capacity ("EAP" or "white-collar" exemption) are exempt from minimum wage and overtime protections.
- EAP Exemption: To fall within the EAP exemption, an employee must generally meet three tests:
  1. Be paid a salary;
  2. Be paid at least a specified weekly salary level; and
  3. Primarily perform executive, administrative, or professional duties, as provided in the DOL's regulations.
- The DOL's final overtime rule increases the standard salary level for white collar exempt employees in two stages:
  - On July 1, 2024, the standard level will increase from $684 to $844 per week ($43,888 annually).
  - On January 1, 2025, the standard level will increase to $1,128 per week ($58,656 annually).

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DOL Final Rule on Salary Thresholds (Cont'd.)

- Employees who are paid a salary, earn above a higher total annual compensation level, and satisfy a minimal duties test fall within the exemption for highly compensated employees ("HCE").
- The final rules also increases the annual total compensation for the HCE exemption from $107,432 to $151,164 in two stages:
  - On July 1, 2024, the HCE level will increase from $107,432 to $132,964 per year.
  - On January 1, 2025, the HCE level will increase to $151,164 per year.
- The final rule includes a mechanism for automatically updating these salary and compensation levels every three years based on then-current earnings data. The first automatic update will occur on July 1, 2027.
- The final rule does not change the current rule which allows employers to use non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard for special salary levels for the exemptions.

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Salary Thresholds- Employer Options

- Employers should consider adjusting compensation structures for exempt employees earning more than $35,564 per year but less than the new EAP exemption minimum of $58,656 per year.
- Employers may need to consider reclassifying employees who do not meet the new minimum salary thresholds.

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The Pregnant Workers Fairness Act

- Effective June 30, 2023; Final Rule Issued April 15, 2024
- Applies to employers with 15 or more employees; governs accommodations only
- Employers must provide temporary and reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an "undue hardship."
- Requires employer to engage in the interactive process and leave (paid or unpaid) is permitted ONLY if no other accommodations exists, or if the employees asks for leave as the accommodation.
- "Known limitation" defined as arising out of pregnancy, childbirth or related medical condition and communicated to the employer- even if the limitation would not be considered a disability under the Americans with Disabilities Act.
- "Reasonable accommodation" varies depending on the circumstances including the employee's job, the nature of the employer's business, the impact upon co-workers, and the employer's resources.

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The Pregnant Workers Fairness Act

- **Employer can:**
  - Ask for or request information to confirm the connection between a communicated limitation and the pregnancy, childbirth or related condition.

- **Employers must not:**
  - Require an employee to accept an accommodation without a discussion about the accommodation between the employee and employer;
  - Deny a job or other employment opportunity to a qualified employee or applicant based on the person's need for a reasonable accommodation;
  - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
  - Retaliate against an individual for reporting or opposing unlawful discrimination or interfere with an individuals' rights under the PWFA.

- The Act includes accommodations for or related to abortion and/or fertility treatment.

- As of the end of April, 17 states have filed a lawsuit challenging the rule entitling workers for time off and other accommodations for or related to abortion.

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NLRB's Joint Employer Standard

- **Issued October 26, 2023**
- **Replaced 2020 standard**
- **Departure from "substantial and immediate control"**
- **"Essential terms and conditions of employment" include:**
  1) wages, benefits, and other compensation;
  2) hours of work and scheduling;
  3) the assignment of duties to be performed;
  4) the supervision of the performance of duties;
  5) work rules and directions governing the manner, means, and methods of performance of duties and the grounds for discipline;
  6) the tenure of employment, including hiring and discharge; and
  7) working conditions related to the safety and health of employees.
- **Focus is on right to control, not control itself**
- **Applies to cases after effective date, February 26, 2024**

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NLRB Changes to Union Organizing Process

- Previously, if Union wanted to represent employer's workers it could: 1) demand to be recognized as the representative for bargaining; or 2) petition the Board to represent employees by way of election
- *Cemex Construction* case (NLRB decision of Aug. 25, 2023) created more lenient standard to determine when employers are required to bargain with union without a representation election
- Now, option 1, once futile, has a significant outcome. When Union requests voluntary recognition, employer must either:
  - Recognize union and bargain
  - Promptly file a petition for election

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FLSA Final Rule on Employee Classification – Employee v. Independent Contractor

- **Previously a two-part test:**
  1) Nature and degree of control over the work; and
  2) Opportunity for profit or loss as a result of personal investment
- **If both factors indicate the status as Independent Contractor, the analysis ends.**
- **If the status is not clear, other factors may be weighed**
  - Amount of skill required for position
  - Performance of the working relationship
  - How integrated the worker's role is to the organization's overall operation
- **Previous analysis: Is the worker more like a small business operator rather than an employee?**

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Employee v. Independent Contractor (Cont'd.)

- **Effective March 11, 2024**
- **Rescinds IC status under FLSA 2021 Rule (published Jan. 2021)**
- **Returns to "totality of the circumstances" standard but more pro-employee**
- **6 Factor Test w/ additional factors that are relevant to question of economic dependence (no one factor presumed to carry more weight than another)**
  1) Opportunity for profit or loss depending on managerial skill
  2) Investments by the worker and employer
  3) Degree of permanence of the work relationship
  4) Nature and degree of control over performance of the work and working relationship
  5) Extent to which the work performed is integral part of the employer's business
  5) Skill and initiative of the worker
- **Not controlling but likely cited as persuasive authority for federal courts considering issue**

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Occupational Safety and Health Administration (OSHA) Reporting

- **Effective January 1, 2024**
- **OSHA Forms 300 and 301 - certain employers must submit injury and illness information to OHSA electronically**
- **“High Hazard” industries w/100+ employees**
  - Farming operations
  - Textile manufacturers
  - Construction material manufacturers
  - Motor vehicle manufacturers
  - Food and beverage wholesalers
  - Trucking and transportation operators
  - Medical care facilities
  - Sports and entertainment companies
- **Use legal company name on all electronic submissions to OSHA re injuries**

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OSHA Proposed Rule

- Proposed to amend 29 CFR §1903.8
- Notice of Proposed Rule Making – "Worker Walkaround Representative Designation Process"
- Proposes clarification as to the third party representative authorized by an employee to accompany the OSHA Compliance and Safety Officer during a workplace inspection
- Seeks to increase employee participation during walkaround inspections
- Could permit union representatives to participate in walkaround inspections even if the worksite is not unionized and the representative is not an employee of the employer

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EEOC Proposed Enforcement Guidance

- **October 2, 2023 - Proposed Enforcement Guidance on Harassment in the Workplace**
- **If issued in final would be first update to workplace harassment guidance since 1999**
- **Addresses various updates in the law, conduct in virtual environments (*e.g.* private phones, social media)**
- **Discusses:**
  - Covered bases and causation
  - Discrimination regarding a term, condition, privilege of employment
  - Basis for liability for employer
- **Even if final, will not have force of law but will provide clarity regarding requirements/standards under EEOC policies**

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Cannabis Use - Ohio

- **December 2023 – Ohio is the 24th State where recreational marijuana is legal**
  - 21 years of age and older may buy and possess 2.5 ounces of cannabis (and grow certain number of plants)
- **Employers may test for marijuana**
- **Update written policies accordingly to maintain control over workplace drug practices and procedures**
- **Employee termination for violation of workplace drug policy is considered just cause (defensible claim)**

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2024 Wage Increases

- **22 States put higher wages into effect as of January 2024**
- **Indiana Neighbors:**
  - Illinois increased from $13/hour to $14/hour
  - Michigan increased from $10.10/hour to $10.33/hour
  - Ohio increased from $10.10/hour to $10.45/hour

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Paid Leave for Two Neighboring States

- **Two neighboring states have paid leave laws effective January 2024**
- **Illinois**
  - Chicago Paid Leave and Paid Sick and Safe Leave Ordinance
    - Requires employers to provide 40 hours of paid sick leave and an additional 40 hours of paid leave per year to be used for any purpose (no documentation required)
  - Illinois Paid Leave for All Workers Act
    - If not already in a municipality w/pre-existing paid sick leave or paid leave, requires employers to provide up to 40 hours of paid leave that can be taken for any reason (no documentation required)
  - Bereavement Leave for violent crimes, sexual violence, loss of child to violent crime
- **Minnesota**
  - Minnesota Earned Sick and Safe Time ("ESST")
  - ESST can be used for the mental or physical illness, treatment, preventative care, which includes treatment for incidents of domestic abuse, sexual assault, of the employee or employee's family member
  - Accrue at least 1 hour of ESST for every 30 hours worked, up to 48 hours per year

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