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OAB Employment Law Update 2021

Ohio Association of Broadcasters

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Topics for Today

- General trends and forecasts for employment law at the state and federal level
- Non-compete agreements –Does a recent Executive Order put their enforceability in doubt?
- The overtime threshold – is it going up, and if so what will employers need to do to comply?
- Ohio's newly passed Employment Law Uniformity Act (ELUA) – reforming the statute of limitations for Ohio discrimination claims
- COVID - vaccines and mandates – brief overview

Trends/Themes in Employment Law 2021



2021: You're Not The Boss of Me

- Some workers: You're not the boss of me so I can decide for myself whether to follow public health recommendations
- Other workers: You're not the boss of me because I have more power now – good workers are hard to find and we want better pay and flexible work arrangements
- Government: We're the boss of the workplace, through OSHA (vaccine rules), FTA (non-competes) etc.



THE WALL STREET JOURNAL.

POLITICS

Biden Administration Moves to Tilt Pay and Power Toward Workers

Business groups object to the Labor Department's efforts to reshape rules governing employers

Minimum Wage and Overtime

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Minimum Wage

- Federal: \$7.25 an hour
- Ohio: \$8.80, increasing to \$9.30 January 2022
 - With lower (matching federal \$7.25) rate for minors 14-15 and for employers grossing less than \$323,000
- Varies significantly by state
 - Example: California (\$14/hour)

Changes to Minimum Wage – Government/ Government Contractors

- April; 26, 2021: Executive order raises the minimum wage for federal employees and federal contractors and tipped employees working on government contracts
- Effective January 2022 \$10.95 for federal contractors
- \$15/hour for federal employees
- Special rules for increasing base wage for tipped employees on federal contracts/federal government
- Builds on Obama EO for federal contractors

Minimum Wage – Private Sector

- \$15 minimum wage deleted from recent infrastructure bill
- Among other things, wages seem to be rising somewhat on their own, due to market forces

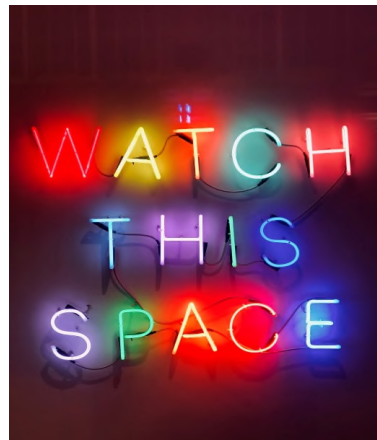


Overtime threshold

- Overtime threshold: Salary level below which employees are eligible to receive overtime pay when they work more than 40 hours in a single week.
- General rule: If you're paid below the threshold you're non-exempt from overtime and must be paid 1.5 times your regular rate for all hours over 40 in a week
- Sec. of Labor: Current threshold too low
- Currently: \$35,568/year or \$684/ week

Overtime Threshold – How High Will It Go?

- Currently: \$35,568/year or \$684/ week
- Reports: Could go as high as \$82,000/year or \$1,572/week – Sen Brown and others have suggested that number but phasing it in by 2026



Executive Action: Minimum Wage Push

- President Biden also issued Executive Order 14026, raising the minimum wage for federal contractors
 - Goes from \$10.95 / hour to \$15.00 / hour
 - Effective Date: January 30, 2022
- Other details
 - “Phased-in” approach
 - Indexed to inflation
 - Affects federal tipped minimum wage
 - Revokes a previous Trump administration EO

Executive Action: Minimum Wage Push

- Timeline:
 - November 24, 2021: DOL to issue the regulations that effectuate EO 14026
 - January 30, 2022: EO 14026 goes into effect
 - January 1, 2023: Inflation recalculation goes into effect
- Which employers will be covered by EO 14026?
 - EO purportedly covers only “federal contractors”

Non-Competes and Other Restrictive Covenants

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Executive Action: Restrictive Covenants/Non-Compete Agreements – Overview

- President Biden issued the Executive Order on Promoting Competition in the American Economy on July 9, 2021
 - The EO is heavy on policy goals; light on specifics
 - One initiative of the EO seeks to “make it easier to change jobs and help raise wages by banning or limiting non-compete agreements”
 - EO instructs FTC to “curtail the **unfair** use of non-compete clauses and other clauses or agreements that may **unfairly** limit worker mobility.”

Executive Order

- 72 initiatives for multiple federal agencies
- Very broad - designed to address competition issues that the administration has identified as contributing to the harmful trends associated with corporate consolidation, decreased competition, and ultimately harming America's consumers, workers, farmers, and small businesses.
- Does NOT make any new law – but is a “call to action” for federal agencies to do so through rule-making and/or enforcement of existing standards
- Expect some proposed rule by early 2022

Non-Compete Provisions: Section 5 G

In order to “address agreements that may unduly limit workers’ ability to change jobs,” the Chair of the FTC is **encouraged** to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to **curtail the unfair use of non-compete clauses and other clauses or agreements** that may **unfairly limit** worker mobility.”

Executive Action: Restrictive Covenants

- Are all non-compete agreements instantly banned?
 - No
 - Rather, the Order directs the FTC to effectuate a general reduction in non-competes
 - Order does not provide a timeline for the FTC to do that
- Limitations
 - State law typically governs non-compete agreements
 - Obama Administration released a “call to action on non-compete agreements” that had substantial, but not overwhelming, state buy-in
 - Trend: Narrow scope of those who can be required to sign one

Restrictive Covenants/Non-Competes

- What are “restrictive covenants?”
 - Anything that restrains competition in business.
 - Anything that restrains solicitation of clients or customers.
- What’s not a covenant?
 - Nondisclosure agreements (pure contract law, don’t restrain trade)
 - Non-disparagement agreements (promises not to disparage another person or entity)

Restrictive Covenants: Overview

Different Types of Restrictive Covenants:

- Non-Competition

- Not working for a competitor

- Non-Solicitation

- Not soliciting or accepting business from customers
- Not soliciting or hiring current or former co-workers, nor interfering with the /employer relationship

- Non-Disclosure/Protection of Confidential Information

Non-Competes 101

- Approximately half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.
- Study: 1 in 5 workers without a college education has a non-compete
- Non-competes typically governed by state law, not federal
- 2016 Obama Administration Report, “Call to Action on Non-Compete Agreements” → More than 20 states revised their laws on non-competes
- Prediction: Any FTC regulation of non-competes will be challenged by states - however -

State Regulation of Non-Competes Varies Greatly

- California, Georgia, North Dakota, and Oklahoma: Non-competes banned entirely
- Illinois, Maine, Massachusetts, New Hampshire, Rhode Island, Virginia, and Washington: No non-competes for low wage workers
- Ohio: Non-competes presumptively enforceable as long as they are reasonable in scope and duration and meet legal requirements for a contract
 - Purpose: Prohibit unfair competition

Non-Competes in Broadcasting Industry: New York Example

- New York: broadcast employers are prohibited from requiring an employee or prospective employee to enter into an agreement that would restrict the employee's ability to obtain employment in a specified geographic area, for a specific period of time or with a particular employer or industry.
- “Broadcasting” includes “any ... entity that provides broadcasting services such as news, weather, traffic, sports, or entertainment reports or programming” & rule applies to on-air and off-air
- Similar rule in Massachusetts

Other Media-Specific Issues with Non-Competes

- Free speech issues?
 - US Supreme Court: No prior restraint of speech (think Pentagon Papers, for example)
 - Is a non-compete a form of prior restraint?
 - Probably not – it’s a contract, freely entered into
 - And it doesn’t prohibit “speech” – just prohibits employment with specific employers or platforms

Ohio law on Non-Competes: Summary

- Any non-compete must be “reasonable”
- A non-compete agreement is reasonable when its restrictions:
 - (1) are no greater than necessary to protect the business
 - (2) do not impose undue hardship on the employee, and
 - (3) do not injure the public
- Must also be supported by “consideration” as a contract –which for an at-will employee can simply be ongoing employment

Blue Pencil rule in Ohio and Elsewhere



Restrictive Covenants Going Forward

- What might this look like?
 - Total ban is unlikely
 - Ban on certain *types* is more likely and is more in line with recent state moves (e.g., Massachusetts)
 - Required garden leave
 - Prohibitions on non-competes for certain occupations or income levels
 - Void depending on reason for separation
 - Additional consideration needed in some instances
- Timeline: sometime in 2022?

Topic 3:
Changes to Ohio Statute of Limitations on
Discrimination Claims

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Ohio Discrimination Law Changes

- **Background**
 - Ohio's Civil Rights Law: O.R.C. § 4112.01 *et seq.*
 - Prohibits discrimination in a number of settings, including employment
- **On January 12, Ohio enacted the “Employment Law Uniformity Act”**
 - Helps align the employment law provisions of Ohio's Civil Rights Act with federal standards
 - Effective on April 15, 2021
 - Generally employer friendly

Ohio Changes (cont'd)

- Administrative exhaustion requirements
 - Old law: none before an individual may file suit on claims under Ohio's Civil Rights law
 - Change: individual must file a charge with the Ohio Civil Rights Commission ("OCRC") first
- Statute of Limitations for Employment Discrimination claims
 - Old Law: **2 years** to file a charge w/ the OCRC, and **6 years** to file a lawsuit
 - Change: **180 days** to file a charge w/ the OCRC, and **2 years** to file a lawsuit

Changes to Ohio Civil Rights Law

- Reduction of Individual Supervisor Liability
 - Old Law: Individual supervisors and managers may be held liable for employment discrimination
 - Change: Ohio General Assembly expressly supersedes this doctrine; now this only applies in situations where:
 - The individuals are *actually* the employer, or
 - The claim involves retaliation, aiding a discriminatory practice, or obstruction from compliance with Ohio Civil Rights Law
- Age Discrimination
 - Clears up confusion in old law
 - Now a clear-cut cause of action for Plaintiffs

Changes to Ohio Civil Rights Law

- Addition of *Faragher/Ellerth* affirmative defense
 - Background:
 - Federal doctrine that applies to sexual harassment claims against employers
 - Gives employers a complete defense to liability if the employee did not utilize the employer's reporting procedures
 - Employer, not employee, is responsible for making this showing
 - ELUA codifies this into Ohio law
 - Bottom line: Good news for employers – IF you (1) train (2) have a policy (abide by it)

COVID Update

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Big Bird 
@BigBird



I got the COVID-19 vaccine today! My wing is feeling a little sore, but it'll give my body an extra protective boost that keeps me and others healthy.

Ms. [@EricaRHill](#) even said I've been getting vaccines since I was a little bird. I had no idea!

9:09 AM · Nov 6, 2021 · Twitter Web App

42.9K Retweets **16K** Quote Tweets **273.6K** Likes

OSHA Vaccine “Mandate” (Emergency Temporary Standard or ETS)

- Published last week as a safety rule
- Effective immediately
- Applicable to employers with 100+ employees (total)
- Not applicable to those who work at home or are otherwise isolated from co-workers or who work solely outdoors
- Enforcement set for January 4, 2022
- Fifth Circuit has already imposed a stay
- Is it really a “mandate?”

When is a Mandate Not a Mandate?

- OSHA Vaccine “Mandate”: Employers must either:
 - 1. Mandate* vaccines for covered employees; or
 - 2. Allow employees to choose between:
 - (a) Vaccine* or
 - (b) Weekly testing plus mask



- *Note: Even “mandatory” vaccine program would have to include accommodation analysis for religious or medical objections, which would likely end up in testing and masks

Covid, Vaccines, and Accommodations under the ADA (Americans with Disabilities Act)

- ADA prohibits discrimination based on disabilities and perceived disabilities.
- Test: Can the individual do the essential functions of the job with or without a “reasonable” accommodation
- “Direct threat” defense: it is always unreasonable to grant an accommodation that creates a safety risk/direct threat of harm for the employee or anyone else

Direct Threat (cont'd)

- A disabled person is not qualified for an employment position “if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation.”
- Determination must be based on an individual assessment.
- This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence

EEOC Guidance on Masks and Vaccines Requirements

- Guidance on implementing employer-driven mandates
 - Employers must offer reasonable accommodations to employees who decline due to 1) a disability or 2) a sincerely held religious belief
 - Employers not required to accommodate if it would pose an “undue hardship” – factors for this include:
 - The proportion of employees in the workplace who are vaccinated against COVID-19
 - Extent of employee contact with non-employees whose vaccination status is unknown
 - Direct threat analysis

Most Courts have dismissed disability-based challenges to Covid mask requirements – but not all agree

- Hernandez v. Sales, 2021 U.S. Dist. LEXIS 172567 (W.D. Tex. Aug. 19, 2021):
 - “[G]iven the indisputable risk to others, failure to wear a mask in a place of public accommodation during the COVID-19 pandemic is a direct threat as a matter of law. The ADA does not shield even the disabled from social responsibility.”
- Emmanuel v. Walt Disney Co., 2021 U.S. Dist. LEXIS 112536 (E.D. Pa. June 16, 2021)
 - Declining to grant motion to dismiss based on defense that permitting disabled customer to go unmasked presents a “direct threat”
- Circumstances and opinions change. Make sure you can support your decision!

Vaccine Legal Challenges Historically

- Federal Government can mandate some vaccinations – long-standing principle
- *Jacobson v. Massachusetts (1905)*
 - Smallpox was fatal in up to 30% of cases and had existed for at least 3,000 years.
 - Court upheld ordinance requiring all adult citizens be vaccinated against smallpox.
 - Notwithstanding the Constitution’s guarantee of liberty, every person may be subject to “manifold restraints” when needed “for the public good.”
 - Eradicated by World Health Organization vaccination program. Last case in 1977.

Likely Process for Vaccine Rule Compliance

1. Create process for determining each employee's vaccination status
2. Establish record-keeping protocols
3. Establish protocols for tracking vaccination on ongoing basis (though boosters not specifically addressed in the Rule)
4. Establish process for addressing requested accommodations
 1. ADA "interactive process"
 2. Applies to religious or medically based requests
 3. Sometimes can be accommodated; sometimes not

Thanks!

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