

2024 Legal Updates & Hot Topics

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HR Virginia Annual Conference

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Agenda

1. Virginia Legal Updates
2. Federal Cases & Legislation
3. EEOC & DOL
4. The New NLRB



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Virginia Legal Updates

Cannabis Control Authority

- VA transitioned cannabis oversight from Board of Pharmacy to Virginia Cannabis Control Authority
- No significant changes due to lack of state marijuana legislation
- Multiple bills introduced in General Assembly to set up regulated retail market
- Unclear if bills will advance and if they do, whether Gov. Youngkin will sign

Job Safety Poster

VA DOLI Revision

August 2023

- Mandatory penalties up to \$15,375 for each serious violation
- Willful or repeat violators may face penalties of up to \$153,742 for each violation

Proposed Penalty

The Law provides for mandatory penalties against private sector employers of up to \$15,375 for each serious violation and for optional penalties of up to \$15,375 for each other-than-serious violation. Penalties of up to \$15,375 per day may be proposed for failure to correct violations within the proposed time period. Also, any employer who willfully or repeatedly violates the Law may be assessed penalties of up to \$153,742 for each such violation.

Public Sector employers, all departments, agencies, institutions or other political subdivisions of the Commonwealth, are subject to the penalty provisions of 16VAC 25-60-260.

Criminal penalties are also provided for in the Law. Any willful violation resulting in the death of an employee is punishable, upon conviction, by a fine of not more than \$70,000 or by imprisonment for not more than six months, or by both. Subsequent conviction of an employer after a first conviction doubles these maximum penalties.

Pronoun Usage

Vlaming v. West Point School Board

12-14-2023

- Teacher refused to use masculine pronouns for trans male student on religious grounds
- Didn't use any 3rd-person pronouns at all
- Teacher terminated for discrimination and harassment
- Supreme Court of VA held teacher's claims regarding his religious liberties and constitutional rights should not have been dismissed
 - Note: did not rule that termination was wrongful
- Important - government ER, not private

Administrative Remedies

Shumate v. City of Lynchburg

9-5-2023

Hairston v. Nilit America Inc.

11-20-2023

- Judge allowed suit to proceed: plaintiff filed in court 2.5 weeks before receiving EEOC right-to-sue letter
- Def. requested EEOC forward complaint to VOCCR
 - Preserved her right to sue under VA and federal law
- Didn't matter that VOCCR kept poor records, never notified or investigated, and failed to issue its own right-to-sue

Defamation

Grover Gaming v. Huffman

12-27-2023

- Clifton Forge Moose Lodge intended to contract with Grover Gaming
- EE of a competitor told lodge "Please don't be BS'd by Grover. They are under a very serious state investigation in Virginia!!!!!"
- Lodge declined to contract with Grover
- Grover sued competitor for defamation - no investigation
- Judge allowing defamation case to proceed

New Bills in General Assembly

- Pay history/pay transparency bill
 - Would require salary ranges in job posts and prohibit salary history requests
- Bill to keep increasing minimum wage to \$13.50 in 2025 and \$15 in 2026
- Bill that requires ERs with 50+ EEs to provide annual interactive training regarding harassment and discrimination

Federal Case Law Updates

Whistleblower Retaliation (SCOTUS)

Murray v. UBS Securities

2-8-2024

- EE was terminated after he reported two leaders for illegal/unethical conduct
- District court instructed the jury that EE was required to show his protected activity was a contributing factor in his termination for whistleblower protections of Sarbanes-Oxley Act
- Second Circuit remanded, holding EE had to prove UBS' retaliatory intent
- The Supreme Court reversed; Second Circuit was wrong because the Act does not reference or include a "retaliatory intent" requirement
- Case only addressed Sarbanes-Oxley Act - other whistleblower statutes contain nearly identical standards

Religious Accommodation Policies

United Airlines (EEOC)

11-8-2022

- Buddhist pilot diagnosed with alcohol dependency; lost FAA medical cert.
- UA required AA attendance for recert.
- Pilot requested to attend a different group as an accommodation because of religious objections to AA content
- UA refused
- UA settled with EEOC for \$305,000

“Employers have the affirmative obligation to modify their policies to accommodate employees’ religious beliefs.”

Undue Hardship

Groff v. DeJoy (USPS)

6-29-2023

- Christian EE requested religious accommodation for Sundays off after USPS began delivering Amazon packages in 2013
- Request denied; EE quit after being disciplined for missing work on Sundays
- Previous case law said ERs don't need to accommodate if it would impose a "de minimis" burden

SCOTUS imposed new threshold of "undue hardship"

- Substantial increased costs

Religious Accommodations When Hiring

Trinity Health Grand Rapids

1-19-2024

- Rescinded a job offer for applicant who refused to receive a flu vaccine for religious reasons
- Hospital's policy required annual flu shot
- Unlawful discrimination to not allow a religious exemption from vaccination; EEOC said "could have been easily accommodated"
- Hospital paid \$50,000 to settle suit

How Should You Respond?

Prepare for possible increase in religious accommodation requests

- Train HR staff and frontline managers about new accommodation standard
- Ensure interactions with EEs are **interactive** and **respectful**
- Review and revise policies on religious accommodation

Contact an attorney for advice!

Federal Legislation

PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act, effective 12-29-2022

- Extends FLSA pumping/nursing protections to exempt workers (previously only applied to non-exempt).
- Exception for ERs with fewer than 50 EEs if “undue hardship.”
- For one year after child’s birth, ER must provide reasonable break time and a private place to pump.
- For wages, treated like other breaks.

PUMP Act Violation

Spa failed to comply with pumping protections 9-18-2023

- EE asked for private place to pump breast milk
- Supervisors took nearly 4 months to ID a space
- Manager's office lacked privacy; other workers entered
- Gave EE a written counseling for leaving without permission when EE advised she needed to leave to pump
- Also found ER allowed eight 14- and 15-year-olds to work shifts longer than permitted by law
- Paid \$6,810 in civil penalties

Pregnant Workers Fairness Act

Effective 6-27-2023

- Applies to ERs with 15+ EEs
- Requires reasonable accommodations for EEs with temp. limitations due to pregnancy, childbirth, or related medical conditions
- Closely modeled after ADA
- Does NOT require condition to meet ADA definition of disability
- Does require interactive process

Compare VA's Existing Protections

Virginia Human Rights Act (VHRA)

- Provides similar protections for pregnancy, childbirth and nursing EEs
- Applies to ERs with 5+ EEs
- ERs must give notice of the law, post it, and update handbooks

EEOC

Litigation Levels



Filed 50% more lawsuits in 2023 than prev. year



Filed largest # of systemic lawsuits in past 5 years

- Systemic lawsuits: broad effect on industry, profession, location
- Targeted industries:
 - Hospitality
 - Retail
 - Healthcare
 - Construction

EEOC Annual Reports

“During fiscal year 2023, the agency experienced a **surge in public demand** for the EEOC’s services, including a **10% increase in calls** to the agency’s contact center and a **25% increase in emails** compared to the prior fiscal year.”

“Agency recovers **record \$665 million** for workers; a nearly **30% increase**...over fiscal year 2022”

Strategic Enforcement Plan (2024-28)

1. Eliminating barriers in recruitment, hiring
2. Protecting vulnerable workers from employment discrimination
3. Addressing emerging issues
 - Disability and pregnancy discrimination, COVID-19, technology-related discrimination, etc.
4. Advancing equal pay for all workers
5. Preserving access to legal system
6. Preventing and remedying systemic harassment

EEOC & DOL Join Forces!

Memorandum of Understanding

9-13-2023

- Agencies will share information and conduct joint investigations, training, and outreach
- Field staff empowered to coordinate efforts on individual matters *and* larger investigations
- Will make complaint referrals to each other
- Will share complaint or investigative files, EEO-1 reports, FLSA records, and “statistical analyses or summaries”

This new power to gather information paired with 2024-2028 SEP gives teeth to EEOC priorities



Hearing and Visual Disabilities

EEOC updated guidance

1-24-2023 and 7-26-2023

- Outlines pre- and post-job offer questions.
- Examples of free or low-cost reasonable accommodations.
- Handling safety concerns.
- Anti-harassment and discrimination examples.

Exemption not Accepted

EEOC v. Werner Enterprises (D.NE)

09-01-2023

- ER failed to hire or accommodate deaf applicant for truck driving job after completing training at truck driving school and obtaining a CDL
- EE had exemption from hearing regulation from DOT
- VP of Safety told EE they would not hire him because he could not hear
- Jury awarded EE \$75,000 in compensatory damages, **\$36,000,000** in punitive damages

DOL

Independent Contractor Final Rule

DOL Announces Final Rule

- New test looks at “economic realities”
- Six-factors:
 - Opportunity for profit or loss dep. on managerial skill
 - Investments by worker and potential employer
 - Degree of permanent of work relationship
 - Nature and degree of control
 - Extent to which work performed is integral part of business
 - Skill and initiative
- **Effective 3-11-2024**



Reviewing Worker Status

Best Practices and Helpful Tips

- Look at all your independent contractors
- New test is highly fact-specific; has to be case-by-case assessment
- Misclassified worker could recover for a variety of damages and litigation is costly - when in doubt, classify an employee

Overtime Exemptions

Current Salary Level

**For most, minimum is
\$684 /week**

- Biweekly: \$1,368.00
- Semi-monthly: \$1,486.17
- Monthly: \$2,972.33
- Annual: \$35,668.00

Proposed Rule

- Would raise OT threshold to \$55,068/yr (\$1,059/wk)
- Highly compensated to \$143,998 (currently \$107,432)
- Includes automatic updates every 3 years based on current earnings data
- New rule likely to be released in April 2024

The New NRLB

It's more important than ever.

Let's Hear from You

Do you pay attention to the NLRB?

**No, the NLRB
is not on my
radar.**

**I'm starting to
pay more
attention.**

**Yes, I stay on
top of updates
and rulings.**

2023 NLRB

**Pro-labor political
and social attitudes
have led to a more
aggressive NLRB**

**Remember! NLRA
applies to you,
even if your
workplace is not
unionized**

FY2023

**Unfair Labor Practices Charge Filings Up 10%,
Union Petitions Up 3%**

The Law

A Brief History of Labor Law - NLRA/LMRA

The Wagner Act (1935)

- National Labor Relations Act
- Protect rights of employees to organize
- Created National Labor Relations Board (NLRB)

Taft-Hartley Act (1947)

- Labor Management Relations Act
- Extended penalties to unions
- Right to refrain from union organizing



Who are the players?

- Agency: NLRB or “The Board”
- Enforcers: NLRB General Counsel and regional offices

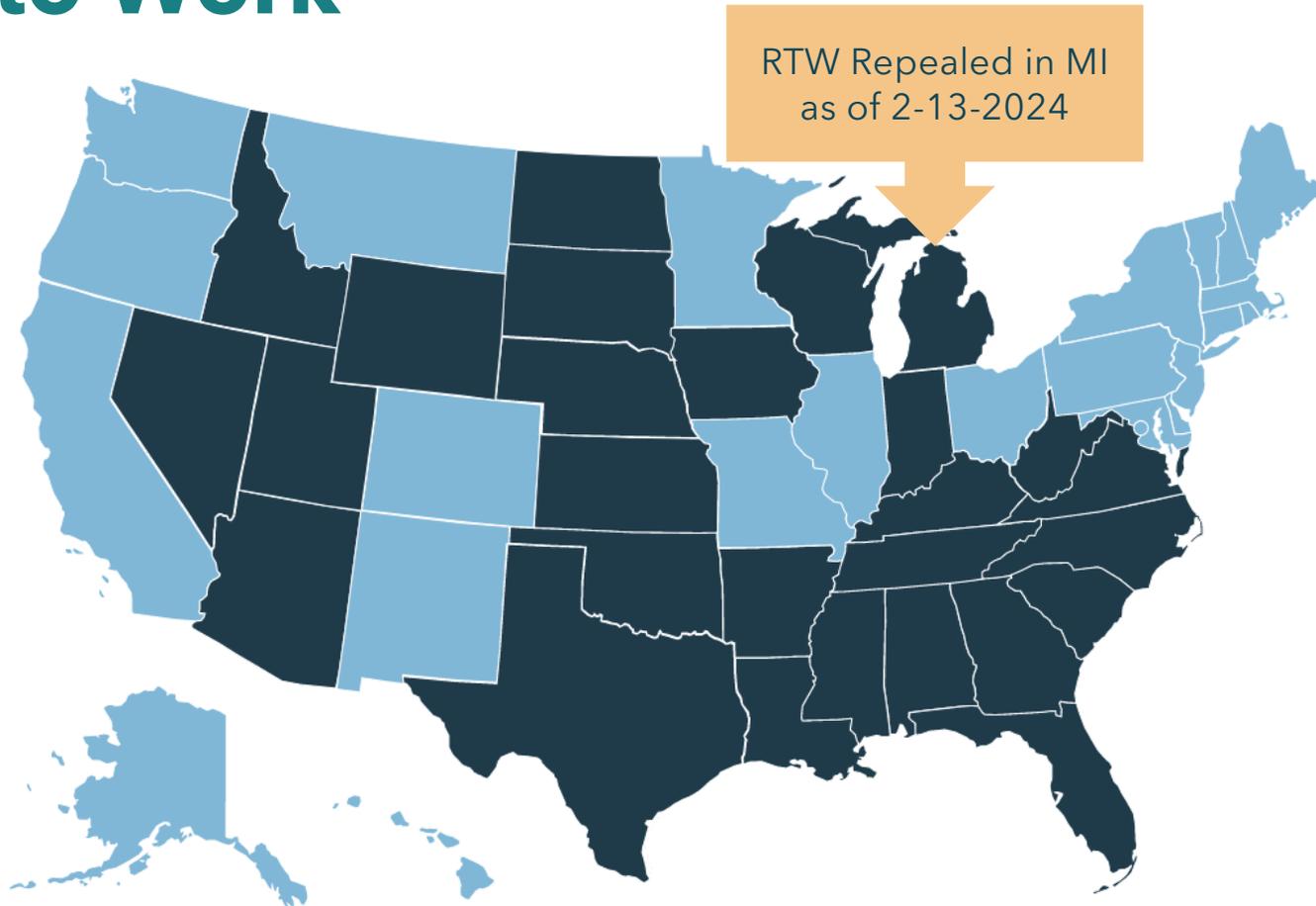


Protected Concerted Activity

Every EE, regardless of union status, has a right to engage in protected concerted activity and to collectively bargain

- Section 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”

Right to Work



RTW Repealed in MI
as of 2-13-2024

- Right to Work State
- Forced Unionism State

Updates

Joint Employer Final Rule

Effective date extended to Feb. 26, 2024

- Broadens the circumstances under which two entities may be considered joint employers of an employee
 - Joint employer = authority to control or to exercise the power to control one or more of the employees' essential terms and conditions of employment
 - Immaterial whether company actually exercises control; potential to control is sufficient
- Even if implementation ultimately delayed, NLRB taking broad view of joint employment

Automatic Bargaining Without an Election

Cemex Construction Materials Pacific

8-25-2023

- Eliminates requirement for unions to file NLRB election petition before ER may be required to recognize union
 - Union can demand recognition by claiming majority support
- If union claims majority support, ER must:
 - Immediately grant recognition without NLRB election
 - or file own NLRB election petition
- If ER fails to take either step, NLRB will order mandatory union recognition
- Any unlawful ER conduct preceding election will prompt board to issue mandatory bargaining order requiring union recognition

All Handbook Policies May Be Unlawful

Stericycle, Inc.

8-2-2023

- Work rule presumed unlawful if reasonable EE could interpret any word/phrase to restrict exercise of Section 7 rights
- ERs must show rule advances legitimate and substantial business interest that can't be advanced by narrower rule
- With *Cemex*, even one work rule that EE believes chills rights can lead to bargaining order
- Ex: Stericycle decision overruled prior decisions that held rules requiring EEs to maintain confidentiality of workplace investigations were categorically lawful
- Applies retroactively

Severance for Silence

NLRB Ruling

2-21-2023

- Board ruled ERs can't offer severance agreements that prevent EEs from making disparaging remarks about company
- EEs can't be prevented from disclosing terms of severance packages
- Applies retroactively
- Ruling likely to be challenged in court

Have an attorney review confidentiality and non-disparagement clauses in your severance agreements.

Restored Protection for Outbursts

Lion Elastomers

5-1-2023

Overtaken 2020 General Motors Ruling

- Restores tests giving workers leeway for outbursts on the picket line, during confrontations with managers, and on social media
- Applies to protected concerted activity, not general workplace behavior
- Context-specific tests
 - “Conduct occurring during the course of protected activity must be evaluated as part of that activity – not as if it occurred separately from it and in the ordinary workplace context”

Button Bans Unlawful

NLRB Judge: Kroger Unlawfully Banned Buttons 5-3-2023

- Complaint alleged 2 Kroger subsidiaries violated NLRA by banning BLM buttons and masks
- Some EEs sent home without pay for not complying
- Administrative Law Judge determined actions were protected concerted activity
- Both ERs had written dress code policies, but they were not enforced
 - ER defense that buttons violated dress code therefore failed

Enforce your policies consistently

Non-Competes Unlawful

NLRB memo

5-30-2023

- Position: most non-compete agreements with non-managerial EEs are unlawful
- Argues non-competes limit EEs from engaging in “concerted activity” by
 - Limiting post-termination employment opportunities
 - Limiting prior workplace relationships

New Independent Contractor Standard

Atlanta Opera Ruling

6-13-2023

- Rejected ruling of 2019 board that entrepreneurial opportunity for gain or loss should be the “animating principle” of the independent-contractor test
- Test now relies on “common law” principals as determined in earlier rulings
- Evidence must show workers render services as part of their own independent businesses

New Standard for Behavior Policies

NLRB Ruling

8-2-2023

- Presumed unlawful if non-managerial EE could reasonably interpret rule to limit right to engage in “concerted activity”
- ER defense: substantial business justification and rule is as “narrow” as possible
- Applies to social media, workplace conduct, communication, confidentiality, and criticism
- ER must have documentary evidence of justification
- Applies retroactively

Non-Employees Protected

American Federation for Children

8-31-2023

- Protects workers who advocate for non-EEs, such as interns, applicants
- In this case, EE pushed ER to rehire an immigrant who reapplied for job after regaining work authorization
- Principle of “solidarity” says workers stand to benefit from making common cause with non-EE colleague because they can expect colleague’s help in future



Prevent: Foster a Respectful Culture

- Be responsive
- Fairness
- Follow the law
- Be consistent
- Reward good performers
- Discipline / manage poor performers

Treat EEs with dignity and respect!



Prepare: Review Policies

- EE Handbook
- Problem Solving/Grievances
- EEO and Wage-Hour issues
- Solicitation/Distribution
- Visitors/trespass
- Wages/benefits



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