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Critical Wage & Hour Developments for 2023

New Minimum Wage
Laws, Paying Day Rates,
and DOL Focus on Pay
Equity

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Today's Presenters



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Michael Ryan is a labor and employment senior counsel in Foley's Houston office. His practice involves counseling employers on a wide-range of employment matters, including unfair competition and trade secret laws, hiring and firing decisions, EEO and FLSA matters, enforcement of personnel policies, leave issues, classification of employees and other wage and hour matters, safety regulations, governmental investigations, and more. Michael has significant experience representing clients in prosecuting and defending non-competition agreements, trade secret theft claims, discrimination and retaliation claims, and wage-and-hour matters.



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Carrie Hoffman represents and counsels major employers nationwide in all areas of labor and employment law across a wide range of industries including retail and hospitality. Carrie is highly regarded for her experience with wage and hour issues, as well as employment discrimination and retaliation claims. She regularly reviews and drafts employment agreements — such as covenants not to compete — and advises clients on a wide variety of labor and employment issues. Carrie has defended clients throughout the United States in major employment litigation at both the federal and state court level including class and collective actions.



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Daniel A. Kaplan is a partner and litigation attorney with Foley & Lardner LLP and is co-chair of the firm's Labor & Employment Practice. Dan counsels employers in all aspects of the employer-employee relationship, including wage and hour, employment contracts, confidentiality and non-compete agreements, worker's and unemployment compensation, family and medical leave, disability accommodations and compliance with the Americans with Disability Act, and all state, federal and local discrimination laws. Dan has experience litigating before various state and federal agencies, various state courts, and federal courts throughout the country, including the Supreme Court.

2023 Minimum Wage Increases (and What's Ahead for 2024)

- July 1, 2022
 - Connecticut
- January 1, 2023
 - Michigan
 - Colorado
 - California
- June 1, 2023
 - Connecticut
- July 1, 2023
 - Nevada
 - Oregon
 - Chicago, Illinois

State Law Intricacies

- Minnesota
 - What is the employer's revenue?
- Nevada
 - Does the employer offer qualifying health benefits?

Local Laws

- California
 - Approximately 40 cities or counties with minimum wage laws
- Chicago
- Seattle
- Portland
- Flagstaff
- Tucson

Exempt Employee Threshold Increases 2023

- California
- Colorado
- Washington
- Pennsylvania?

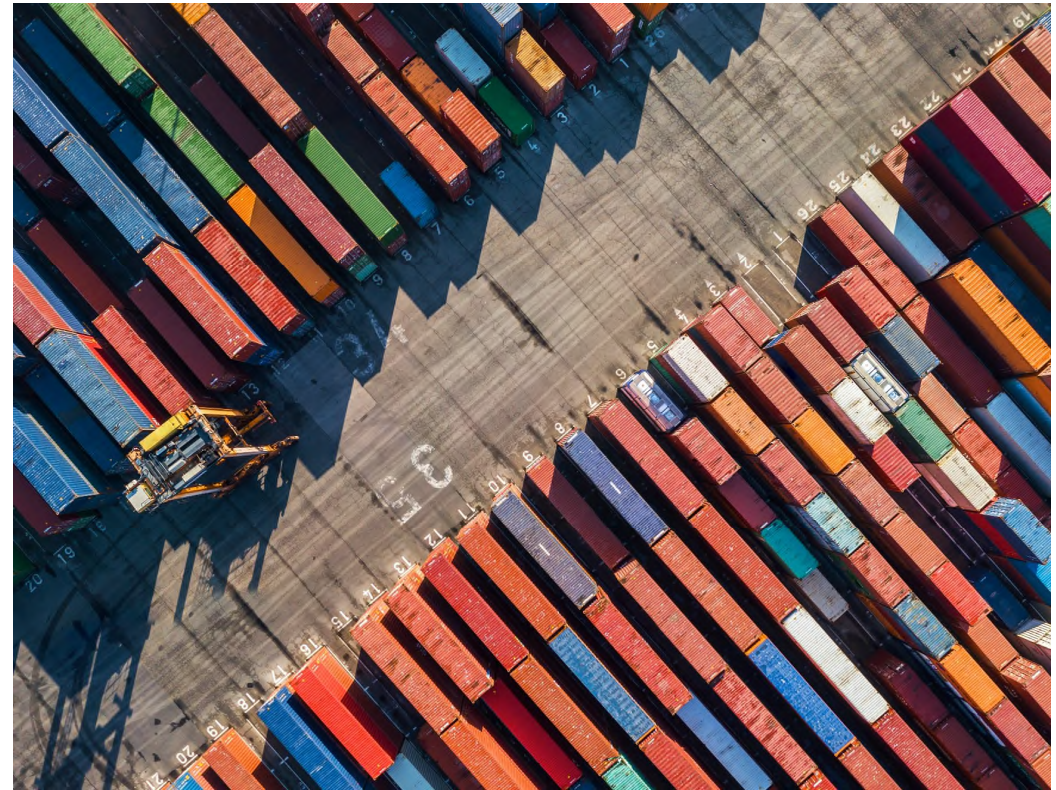
Wage and Hour Compliance

- Maintain updated information on employee locations
- Review minimum wage and exemption threshold increases, including notice requirements
- Review and update timekeeping and overtime policies



Wage and Hour Compliance

- Federal (FLSA)
 - Back wages
 - Civil penalty of up to \$1,000 per violation
 - Willful violations may be subject to criminal prosecution and up to a \$10,000 fine
- State
- Local



Helix Energy Sols. Grp. Inc. v. Hewitt (2.23.2023)

- Hewitt worked as a “toolpusher” on an oil rig.
 - One of the primary persons in charge of operations on location.
- Hewitt regularly worked 28-day “hitches.”
- Hewitt was paid on a day rate ranging from \$963 to \$1,341 on any day he worked (\$200k+/year).
- Helix classified Hewitt as an exempt employee (Executive and HCE Exemption).



Helix Energy Sols. Grp. Inc. v. Hewitt (2.23.2023)

- The only dispute was whether Hewitt was paid on a salary basis.
- Helix argued exemption was proper because:
 - Hewitt was paid more than \$100k+ annually (now \$107,432 minimum salary);
 - Hewitt performed duties typical of exempt executive employees; and
 - Hewitt's daily rate of pay was greater than the minimum amount required for the executive exemption/salary basis requirement for a typical workweek.
- Hewitt argued that being paid a day rate did not meet the definition of being paid on a salary basis.
- The Supreme Court, interpreting the salary basis test, agreed with Hewitt.
 - Holding: the employee's salary must be predetermined and fixed irrespective of when the employee works in a given workweek, which was not true for Hewitt.

Helix Energy Sols. Grp. Inc. v. Hewitt (2.23.2023)

“Employees ... are not deprived of the benefits of [overtime compensation] simply because they are well paid.”



Helix Energy Sols. Grp. Inc. v. Hewitt (2.23.2023)

- Next Steps:
 - Evaluate exemption classifications for employees.
 - Evaluate pay practices.
 - Consider shifting to an hourly and overtime model that approximates compensation under a day rate.
 - Remember per diem, bonuses, and other compensation factors into the hourly rate.
 - Consider costs of providing benefits consistent with other hourly employers.
 - Analyze related issue of classification of independent contractors.

Pay Transparency Laws – A Growing Trend

- Legislative bodies target historical issues of inequitable pay for women and racial minorities
- Pay equity laws regarding salary history
- State/local transparency laws previously limited to pay information disclosure upon request — NV, MD, CT



Pay Transparency – Colorado Takes It a Step Further

- Colorado's Equal Pay for Equal Work Act (took effect January 1, 2021)
 - Salaries and benefits
 - Promotional opportunities
 - Remote positions
- Employer concerns regarding proprietary nature of compensation information

Pay Transparency in the Empire State

- New York City
 - Took effect on November 1, 2022
 - Applies to employers with four or more employees
 - No requirement to post benefits
- New York State
 - Takes effect on September 17, 2023
 - Applies to employers with four or more employees
 - General description of other types of compensation
 - Recordkeeping requirements



Pay Transparency – Other States Join the Trend

- Washington
 - Took effect on January 1, 2023; applies to employers with 15 or more employees
 - Must disclose wage scale or salary range and general description of all benefits and other compensation
 - Disclosure required for internal transfers and promotions
- California
 - Took effect on January 1, 2023; applies to employers with 15 or more employees
 - Must include pay scale in all job postings
 - Steep penalties of \$100 to \$10,000 per violation
 - Applies to remote positions

Pay Transparency – Other States Join the Trend

- Maryland
 - Provide applicants wage ranges upon request
- Nevada
 - Provide wage or salary range to interviewees
 - Provide wage or salary range for promotion/transfer for applicants to the promotion/transfer, or if they completed an interview for position and asked for it
- New Jersey
 - Employers with four or more employees **must include in job ads** the minimum and maximum annual salary/hourly wage
- Rhode Island
 - Provide wage range to applicant upon request
 - Wage range at time of hire

Pay Transparency – the Trend

- It is not a fad — it's the new normal
- Managers/HR should familiarize themselves with employer's pay policies
 - How are pay ranges established
 - Geographic considerations
 - What data is used to determine competitiveness
 - How are wages for remote positions set
 - Review of current compensation to determine no unjustified pay differences

EEOC Pay Data Reporting Requirements

- EEOC Pay Data Reporting
 - “Watch out, it is coming [back]”
 - Component 2 of EEO-1 report
- California’s Pay Data Reporting requirements
 - Private employers with 100 or more employees
 - Employers must submit pay data report to the Civil Rights Department (formerly the DFEH) on or before May 10, 2023, and the second Wednesday of May for each year thereafter
 - Michigan?

DOL's Focus on Pay Equity

- Fall of 2022: OFCCP issued a Directive
 - <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1>
- It is Guidance directed at how OFCCP will evaluate federal contractors' compliance with compensation analysis
- DOL announced that combatting pay discrimination is a top priority for OFCCP
- Recommends employers conduct internal review

DOL's Revised Directive

- Identifies the documentation OFCCP will require from contractors to demonstrate satisfaction of obligation to perform compensation analysis
- OFCCP will look at workforce broadly across titles, levels, etc. to identify patterns of segregation by race, ethnicity, and gender which may result from assignments, placement, or promotions that can drive pay disparities.

DOL Committed to Review of Pay Gaps

- <https://www.dol.gov/sites/dolgov/files/OFCCEP/pdf/EqualPayDayFactSheet.pdf>
- Risk Factors for Pay Inequity
 - Pay Secrecy Policies
 - Reliance on Salary History
 - Stereotyping and Steering of Women to Lower Paying Positions
 - Reliance on Subjective Factors
 - Failure to Proactively Review Compensation Systems
 - Bias against Mothers

Pay Attention — even if not a contractor

- With increased focus on these issues in the federal contractor sector, private plaintiffs attorneys will increase their focus
- In other words, this applies to all employers

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