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# L&E Year in Review — and What a Year It Was!

December 11, 2023

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# Presenters



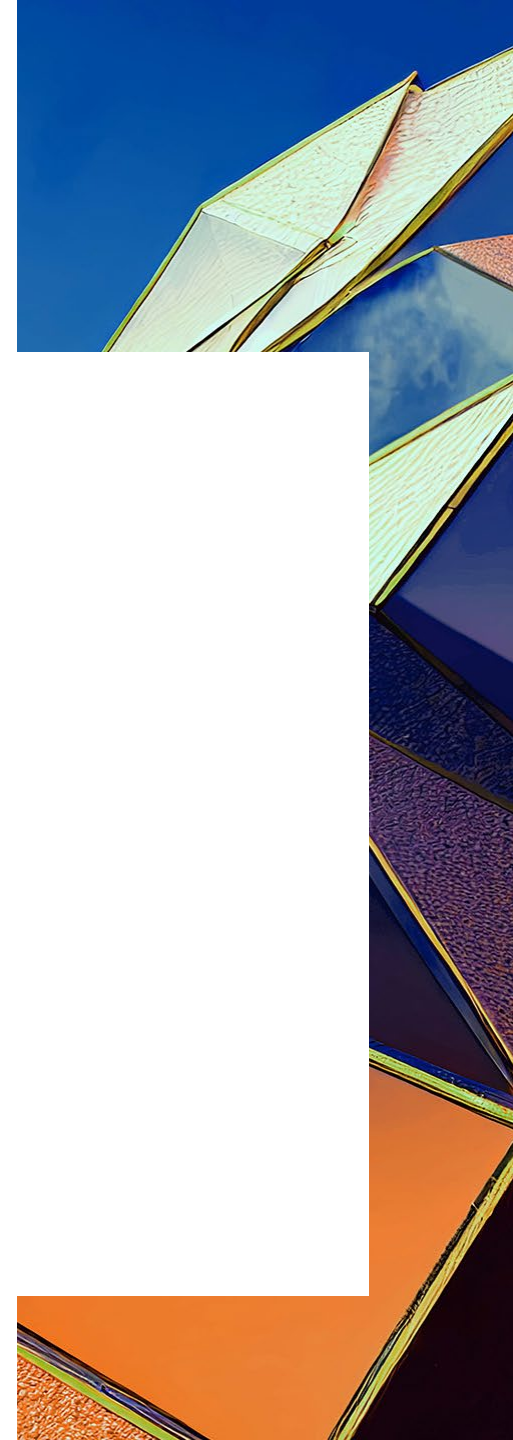
**Carrie Hoffman**  
Partner | Dallas

**T: 214.999.4262**  
**E: [choffman@foley.com](mailto:choffman@foley.com)**



**Mark J. Neuberger**  
Of Counsel | Miami

**T: 305.482.8408**  
**E: [mneuberger@foley.com](mailto:mneuberger@foley.com)**



# FTC's Federal Ban on Employee Non-Competes

- The FTC proposed a regulation that essentially abolishes employee non-competes across the United States
  - Proposal came on January 5, 2023
  - The proposal comes after President Biden signed an Executive Order in 2021 calling on the FTC to exercise its statutory authority to curtail non-competes
- Key provisions of the FTC's proposal include:
  - Banning employee non-competes in almost all circumstances
    - Non-employment-related non-competes (such as business-to-business non-competes) would appear to be unaffected by the proposed regulation
  - Prohibiting employee non-competes retroactively
    - Employers would be required to rescind preexisting agreements and inform employees and ex-employees that the agreements are no longer in effect
  - Preempting inconsistent state laws

# FTC's Proposal

- The proposed rule would broadly declare employee non-competes to be an “unfair method of competition”
  - Bans explicit and “de facto” non-compete agreements
  - Extends beyond “employees” to include similar agreements with independent contractors, interns, and volunteers
- Current Status
  - FTC held a public forum where any concerned parties could share comments
  - Received 27,000 comments
  - Vote postponed to April 2024



# Exceptions to the FTC's Proposals

- The proposal would not apply to the following:
  - Employee non-competes made in connection with the sale of a business or a business unit
    - For the narrow exception to apply, the restricted party must be a 25% (or greater) owner of the business or business unit being sold
  - Some kinds of businesses “may not be subject” to the proposed regulation if “they are exempted from coverage under the FTC Act”
    - This exception is highly ambiguous, and it should be considered carefully before being relied on
  - Concurrent employment restraints

# FTC's Purported Authority

- The FTC's authority to make such a proposal is unclear
  - The FTC has never tried anything of this scope before
  - It will be litigated
- The FTC has the authority to promulgate “substantive rules” about what constitutes unfair methods of competition
  - A holding from the 1973 D.C. Circuit Court of Appeals case
    - Although, the case involved a narrow rule surrounding gasoline pumps
    - Since this case, Congress has narrowed the FTC's scope of authority on similar matters
  - One FTC Commissioner notes the proposal may well prove “futile” after almost certain litigation and constitutionality concerns

# Penalties for Non-Compliance

- The FTC has the authority to impose civil penalties of up to \$50,120 (adjusted annually) for each day of a violation of the proposed rule
  - To impose these penalties, the FTC must:
    - Clearly decide that the practice at issue is unfair; and
    - Provide actual notice to the violator of the FTC's decision
- The FTC Act can only be enforced by the FTC, not by private persons
  - The proposed rule could not be enforced through individual or class-action lawsuits under the FTC Act
    - Some states allow private parties to bring lawsuits under state consumer protection laws

# Outlook Following the FTC's Proposal

- Once the FTC adopts a final rule, litigation that seeks to invalidate or delay the implementation of the rule is likely
  - A court might order an injunction to delay or prevent the implementation of the rule while the litigation is pending
- The FTC anticipates allowing 180 days from the date of publication before any prohibition would go into effect
  - Provides businesses a “compliance period” to identify any non-competes implicated under the rule
- **The U.S. Chamber of Commerce has voiced an intention to challenge any rulemaking in this subject matter**





# Considerations Relevant to FTC's Proposals

- Antitrust risks
- Stronger confidentiality provisions in employment agreements, severance agreements, etc.
- Maintaining company confidentiality and trade secret policies
  - Be sure to distribute these and collect signed acknowledgments
  - Policies should limit the sharing of information with third parties in the course of employment and should be enforced
- Make sure data is password-protected and tangible files are under lock and key and take steps to limit which employees have access to data
- Take steps to monitor, capture, and save external emails

# Providing Urgent Maternal Protections for Nursing Mothers Act (the “PUMP Act”)

- Effective December 29, 2022, employers must provide:
  - Reasonable break time for employees to express breast milk each time an employee has a need to do so “for the two-year period beginning on the date on which the circumstances related to such need arise” and;
  - A place — other than a bathroom — that is “shielded from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”
- Breaks generally can be unpaid (non-exempt employees)
  - Unless the employee is not completely relieved from work for the entire break



# PUMP Act

- Employees must be provided with “reasonable break time” to express milk.
  - But what is reasonable (in terms of frequency, duration, and timing) will vary on factors related to nursing employee, child, and pump setup.
- Employer and employee can agree to a regular schedule, **but** employees must be allowed to pump whenever they need to, and the schedule must be adjusted over time if need be.
- Applies to remote workers as well.
- Time for pump breaks may be unpaid unless otherwise required by federal, state, or local law (or company policy).
- Employees must be paid for any time spent pumping when they are not fully relieved from duty or when pumping during an otherwise paid break.

# PUMP Act

- Pumping space must meet two requirements: privacy and functionality.
- **Privacy:**
  - Locked area or area with a sign on the door.
  - Employee must be free from forms of employee surveillance (computer cameras, security, cameras, etc.).
- **Functionality:**
  - Space must contain a place for employees to sit.
  - Space should ideally have access to electricity to use for an electric breast pump.
  - If possible, space should have a sink nearby.
  - Bathrooms are **not** acceptable places to pump (hygiene and health/safety concerns).

# Creating a Respectful and Open World for Natural Hair — the “CROWN Act”

- CROWN Act aims to create an inclusive environment for Black women
  - Black women are more likely to be sent home due to hairstyles
- California was the first state to enact the law in 2019
- Since then, 22 additional states have enacted CROWN Act:
  - WA, OR, NE, NV, NM, CO, TX, LA, AR, MN, TN, IL, MD, MI, VA, NY, MA, CT, ME, DE, NJ, AK
- Some municipalities have also enacted the law

Creating  
a Respectful  
and Open  
World  
for Natural Hair



The **CROWN** Act

# NLRB and Severance Agreements

- Board Ruling – *McLaren McComb*
- Returns to longstanding precedent holding that employers may not offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act (NLRA).
- The decision involved severance agreements offered to furloughed employees that prohibited them from making statements that could disparage the employer and from disclosing the terms of the agreement itself.



# NLRB and Severance Agreements

- General Counsel of NLRB issued a memo
  - Clauses at issue are non-disparagement and confidentiality
  - Specifically applies ruling to supervisors
- Consider adding disclaimer language that the provisions are not intended to infringe on rights under the NLRA

# What is “Pay Transparency”?

- Pay transparency generally refers to disclosure of information regarding compensation for a particular job or group of jobs.
- Law has evolved over the years:
  - Pay secrecy laws — these prohibit employers from adopting policies or practices that restrict the employees’ ability to discuss wages with other employees
  - Salary history bans — these prohibit employers from requesting or considering a candidate’s salary history when making employment/compensation decisions
  - Pay disclosure requirements — these require employers to disclose a wage/salary or wage/salary range for a job to candidates and/or employees
  - Pay data reporting — formal reporting of aggregated compensation data for particular job groups by gender, race, or other demographics
    - California, Illinois, EEO-1 Component 2



# Why Do We Have Pay Transparency?

- Legal Reasons:
  - Counteract institutional/systematic sources of pay inequity and to close the wage gap
  - Eliminate gender, race, and other types of discrimination in compensation
- Business Reasons:
  - Competitive wages are used to attract talent
  - Fairness and efficiency in hiring negotiations
    - Up front disclosure of pay eliminates applications from candidates who will not accept the salary
    - Negotiations based on disclosed range for the position rather than on factors unrelated to job requirements or experience (e.g., candidate's prior salary)
  - Increased employee trust that compensation is fair and based on job



# Current State Laws

- New York and California again leading the way on new disclosures required to job applicants
  - But there are also requirements in several other states, including Colorado, Connecticut, Maryland, Nevada, Rhode Island, and Washington.
  - We are also seeing the emergence of local laws at the city and county level, including Cincinnati, OH; Ithaca, NY; Jersey City, NJ; NYC; and Westchester County, NY.
- Is pay range simply going to become standard everywhere?
  - The trends say yes.
  - Even if many jurisdictions do not require it, the most stringent jurisdictions (Colorado, Ithaca, New York, New York City, Washington, and Westchester County) require specific wage information be disclosed in all job postings for any position that could or will be performed in the applicable jurisdiction, including all **remote** positions.
  - Legislation pending in several places, including Oregon, Montana, South Dakota, Missouri, Illinois, Kentucky, West Virginia, Georgia, Virginia, Vermont, Maine, and New Jersey.

# The “How” of Compliance Measured Against the “Why” of Pay Transparency

- What compliance requires is still very much a moving target
  - Given the purpose behind pay equity rules, thinking about compliance from a “good faith” perspective is not a bad starting point
- How an employer relates to and addresses pay equity and transparency can say a lot about company culture
  - Another good place to think proactively and at an enterprise level
  - Consider the “why” as much as the “what” and “how” when it comes to pay transparency compliance requirements



# 2023 Was the Year Organized Labor Caught Fire

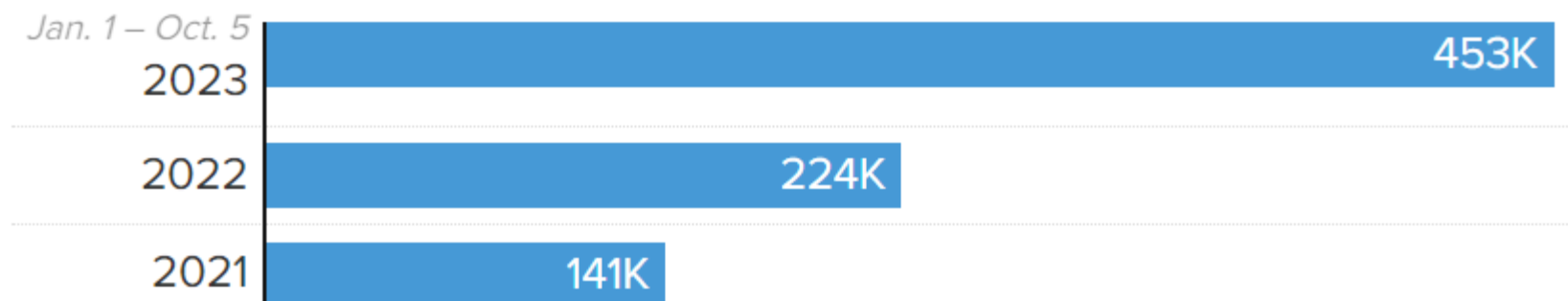
- According to Cornell University's Labor Action Tracker, as of October 2023, 453,000 workers have participated in 312 strikes this year vs. 180 in 2022
  - Screen Actors Guild-American Federation of Television and Radio Artists
  - Writer's Guild of America
  - UAW-Big Three Autoworkers and Mack Truck
  - Kaiser Permanente 75,000 healthcare workers
  - Southern California Hotel workers
  - Various teacher unions
  - Various Starbucks locations, including a walkout on Red Cup Day



# 2023 Was the Year Organized Labor Caught Fire

## U.S. labor strikes take off in 2023

Number of workers



Note: Strike counts for 2021 and 2022 are for the full calendar year.

Source: Cornell University School of Industrial and Labor Relations' [Labor Action Tracker](#)

Data as of October 2023

# What is Driving This?

- The tight labor market continues with a 3.9% unemployment rate nationwide, and job growth continues in healthcare and construction while slowing in manufacturing, transportation, and warehousing
- The Biden administration's pro-union labor policies
- Public sentiment favors striking workers — Recent polls showed that 3 out of 4 people favored the autoworkers, and 7 out of 10 people favored the healthcare workers in their strikes
- Unions are getting creative and adopting new strategies
  - UAW went after all three Big Auto companies but only stuck selected plants
  - UAW got President Biden and Sen. Sanders to show up at the picket line
  - Effective use of social media, including YouTube

# What are the Issues?

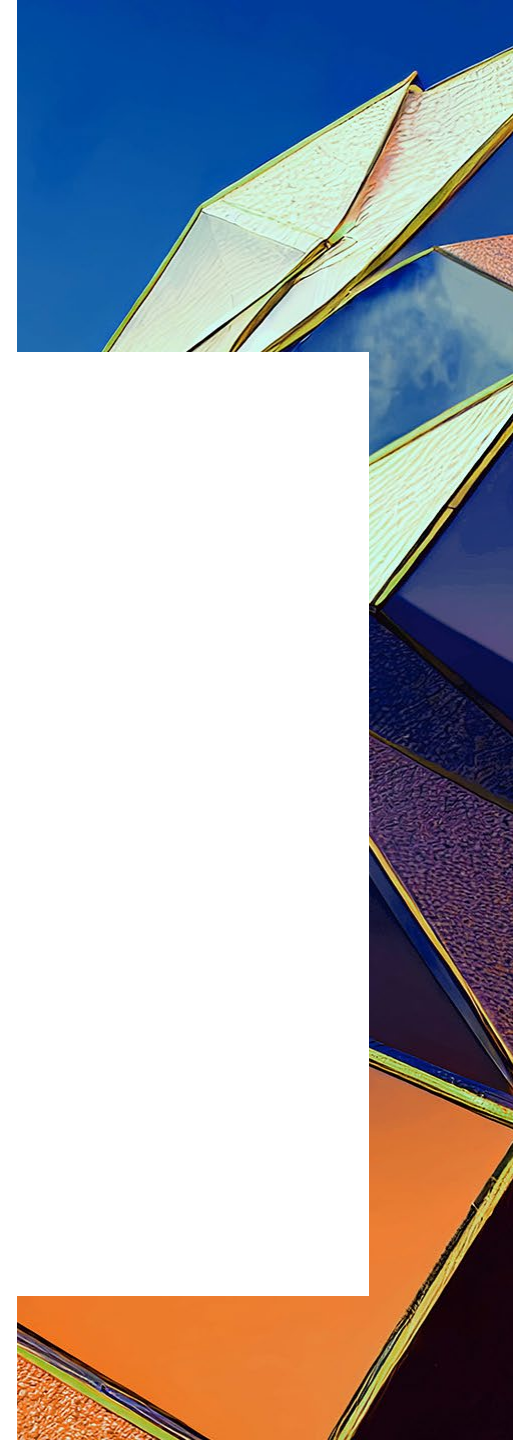
- Money, money, money, especially in light of inflation
- Job security and the threat posed by technology in the form of artificial intelligence
  - Prime issue in the Hollywood industry strikes
  - Electrification in the auto industry
- Staffing and scheduling, especially in healthcare
- Following the lead of many politicians, unions are becoming more effective in tapping into people's consciousness about perceived social grievances



# Unions are Filing More Petitions and Winning More Elections

Fiscal Year	Petitions Filed	Elections Held	Won by Union	Lost by Union
2023	2115	1391	1152	365
2022	2072	1363	1041	362
2021	1269	862	663	288
2020	1440	927	665	263
2019	1673	995	745	98
2018	1597	1120	790	330
2017	1854	1366	940	375
2016	2029	1396	1014	401

<https://www.nlr.gov/reports/nlr-case-activity-reports/representation-cases/intake/representation-petitions-rc>





# What Should Employers Who Want to Remain Non-union Be Doing?

- Pay attention to what unions are doing
  - e.g. <https://www.cnbc.com/2023/11/29/uaw-launches-union-campaigns-at-tesla-12-others.html>
- Pay competitive wages and benefits
- Communicate effectively with your employees before the campaign starts
- Understand the issues that concern your employees and attempt to address them
- First and second-level supervision is usually the weakest link — train them to be effective leaders



# The NLRB Issues its Long-Awaited Joint Employer Rule

- Issued on October 26, initially to be effective on December 26 but now extended to February 26, 2024
- Joint employment refers to situations in which two or more legal entities share control or influence over workers to the extent that each is deemed to be employers of the worker in question
- Employers in industries where it is common to contract out some or all of the operation, such as healthcare, hospitality, and construction just to name a few, will need to carefully review the New Rule and then scrutinize the agreements they have with such contractors



# Under the New Rule...

Joint Employment will attach when two or more legal entities share or co-determine any of these:

- Wages, benefits, and other conditions of employment;
- Hours of work and scheduling;
- The assignment of duties to be performed;
- The supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- The tenure of employment, including hiring and discharge; and
- Working conditions related to the safety and health of employees.

# Here is the Catch —

- So long as one entity has the indirect ability to impact one or more of these OR
- Reserves the power to control one or more of these factors, then the NLRB will likely determine there is Joint Employment

Arguably, this New Rule goes further than the NLRB's 2016 decision in the Browning-Ferris case

- Following that case, in 2020 the NLRB — under a majority of appointees by then President Trump — issued a rule which held that joint-employer status requires showing that the entity possesses and exercises “substantial direct and immediate control over one or more essential terms or conditions of employment”

# What Should Employers Be Doing?

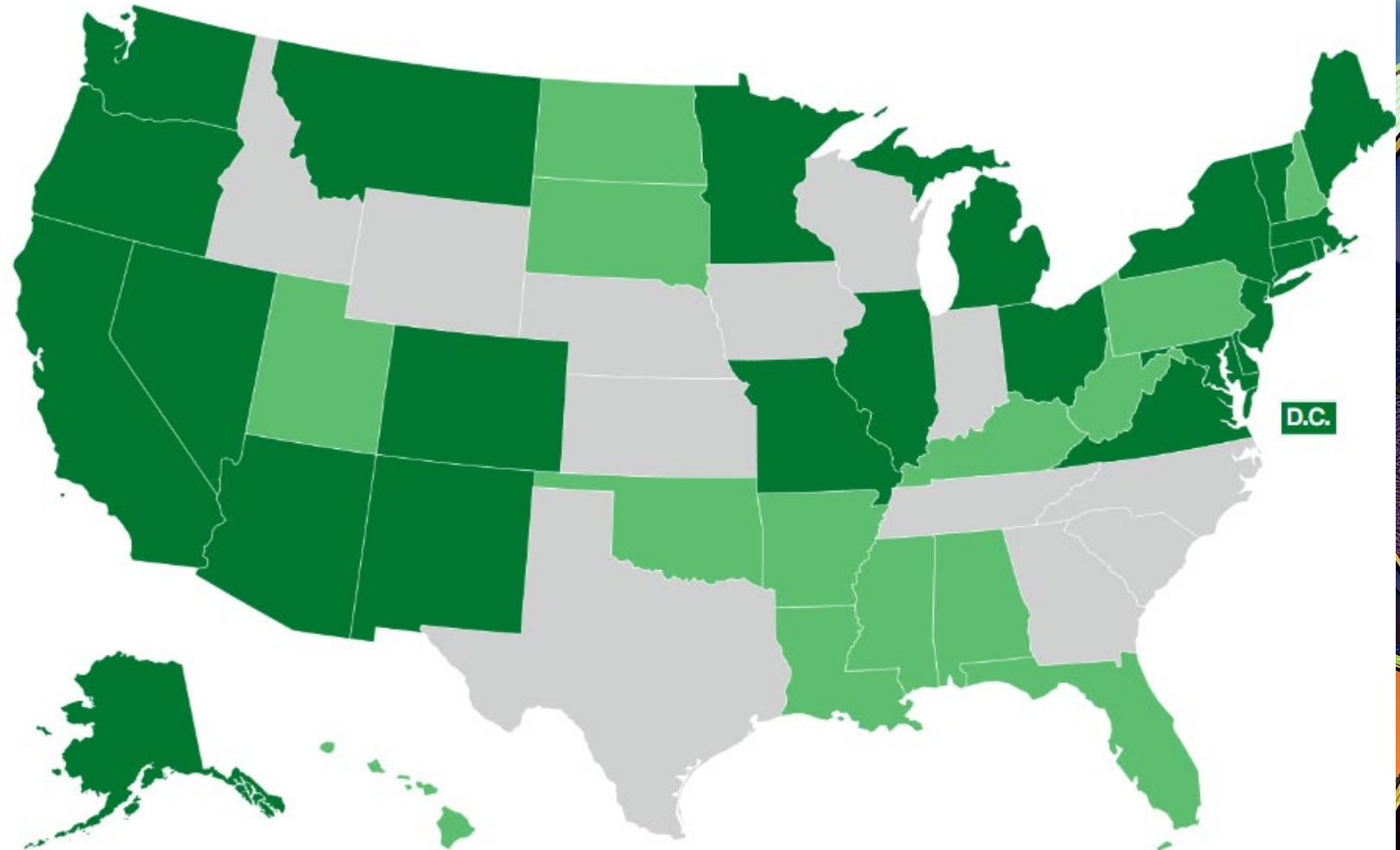
- Watch for the outcome of the litigation challenging the New Rule
- Review any contracts with vendors where the vendor is supplying manpower, including independent contractors and staffing agencies of any kind
- Watch what other federal agencies do, *i.e.*, the US Department of Labor and the EEOC on the federal level as well as companion agencies on the state and local level

# Legalization of Cannabis and Drug Testing

## Marijuana legalization by state

As of Nov. 8, 2023

Legal Medical Illegal



# More States Allow Adult Use

- On November 7, Ohio became the 24<sup>th</sup> state to legalize adult use when voters approved a referendum, with 57% voting yes
- Rhode Island and New York kicked off sales in December 2022. Connecticut, Maryland, and Missouri began sales this year
- Oklahoma voters rejected the legalization of recreational marijuana in March
- In 2024, watch for Florida, Nebraska, and South Dakota
- To get on the ballot in Florida, the Florida Supreme Court must approve the measure, and the referendum must pass by at least 60%



# As More States Legalize, More States Restrict Testing



- This is a rapidly evolving issue of state law
- Remember, no widely available tests measure **current** impairment from marijuana
- States to watch: New York, New Jersey, Connecticut, Nevada, and California (effective January 1, 2024)
- Many states have anti-retaliation provisions for authorized medical marijuana usage
- No jurisdiction permits usage while at work
- Many employers are choosing to drop testing for marijuana



# The Tension Between Federal and State Laws

- Federal Law classifies marijuana as a Schedule I narcotic — no useful/legal purpose
- Restricted banking and financing; failure of Congress to pass the SAFE Act
- In August, the Department of HHS requested that the FDA reschedule marijuana from I to III; the matter continues to be under review
- Recent Gallup poll says 70% of U.S. adults favor legalization, up from 68% in recent years
  - Majority support persists across all major demographic and party groups
  - Support for legalization the same in states where marijuana is legal versus not
- Will Biden do something in 2024 to garner votes?



# How Should Employers Respond?

- If you are testing for marijuana, carefully review the law in each state and stay on top of developments
- If you are in a state that permits medical marijuana, understand the legal framework, and let employees know usage in the workplace is not permitted
- Consider training managers how to accurately and legally observe employee impairment and have a plan when you find it



# Workplace Safety and Health

- OSHA NPRM 8/29/23 – would revise regulations regarding who can be authorized by employees to act as their representative to accompany Occupational Safety and Health Administration compliance officers during physical workplace inspections
- Specifically, the proposed rule clarifies that employees may authorize an employee, or they may authorize a non-employee third party if the compliance officer determines the third party is reasonably necessary to conduct an effective and thorough inspection
- Third-party representatives are not limited to industrial hygienists or safety engineers, two examples included in the existing regulation



# OSHA Hazard Communication Standard

- On February 16, 2021, OSHA published an NPRM to update the HazCom Standard by aligning it with Revision 7 of the UN's Globally Harmonized System of Classification and Labelling of Chemicals (GHS)
- The NPRM proposes major updates, including revised classifications for flammable gases, aerosols, and desensitized explosives, revised requirements for “small” and “very small” shipped containers, revised shipping requirements for “bulk shipments,” and requirements for classification of hazards under “normal conditions of use,” including those resulting from chemical reactions and physical changes
- Will the Rule be finalized in 2023?

# OSHA Recordkeeping Rule

- On July 21, 2023, OSHA published its long-awaited final rule updating electronic injury and illness reporting requirements in its Recordkeeping Standard.
- The final rule becomes effective on January 1, 2024, and the first reports under revised requirements are due March 2, 2024, which means that businesses will need to quickly prepare to meet updated requirements
- The final rule makes significant changes to electronic reporting requirements. It includes changes to the sizes of establishments (by employee number) that are required to submit injury and illness data to the ITA and adds information reporting requirements to include OSHA 300 and 301 form data, depending on both establishment size and industry sector

OSHA's Form 300 (rev. 01/2006) Log of Work-Related Injuries and Illnesses

Year: 2018

U.S. Department of Labor

Employer's Name: Case & Case Construction, LLC

OSHA ID #	State	Employment Status	Date	Description	Days Away	Job Transfer or Restriction	Medical Treatment

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# The Categories of Reporting Obligations

<b>Establishment Size (# of employees)</b>	<b>Industry Sector</b>	<b>Electronic Injury and Illness Reporting Requirements</b>
<20	All industries	No electronic reporting requirements
20-249	Listed in Appendix A of 29 CFR 1904	Electronic 300A reporting
100+	Listed in Appendix B of 29 CFR 1904	Electronic 300, 300A and 301 reporting
200+	All industries covered by Recordkeeping Standard	Electronic 300A reporting

# More to Come

- Heat illness prevention in outdoor and indoor work settings
- Occupational exposure to Crystalline Silica
- Infectious Diseases — workplaces where such control measures might be necessary include health care, emergency response, prisons, homeless shelters, drug treatment program facilities, and other occupational settings where employees can be at increased risk of exposure to infectious disease hazards

## OSHA Can Help You Prevent Heat Illness at Work

We provide tips, guidance, and resources for employers to:

- ☑ Plan for heat hazards.
- ☑ Train workers on heat hazards.
- ☑ Recognize signs of heat illness.
- ☑ Find first aid procedures.
- ☑ Understand how to protect new workers.

The OSHA On-Site Consultation Program can help small- and medium-sized businesses to identify and mitigate workplace hazards, including heat.

[osha.gov/heat](https://www.osha.gov/heat)

OSHA

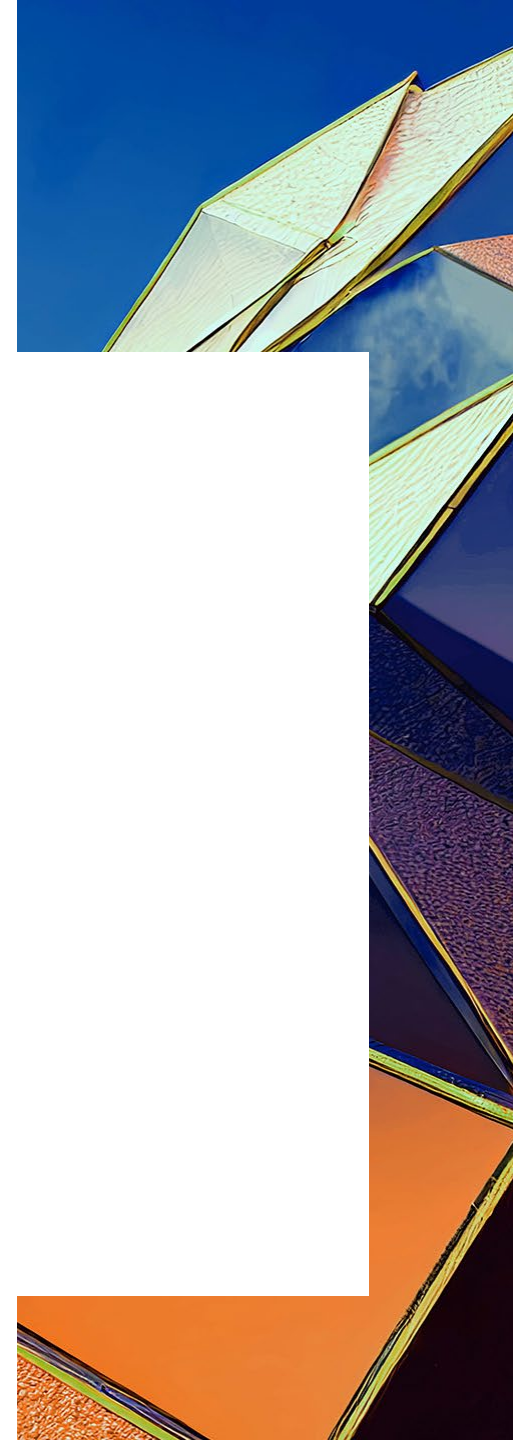
# But Wait... **THERE'S MORE!**

- On October 13, 2022, the U.S. Department of Labor published an NPRM that proposed to revise the Department's guidance on how to determine who is an employee or independent contractor under the Fair Labor Standards Act (FLSA)
- The DOL issued an NPRM that would increase the minimum salary level for white-collar exemptions to apply from the current \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year). The annual compensation level for highly compensated employees would increase from the current \$107,432 per year to \$143,988 per year
- The NPRM proposes automatic updates every three years
- On November 4, 2022, the NLRB issued an NPRM to speed up and modify elections by returning to the use of "Blocking Charges," speeding up the process for voluntary recognition by eliminating a 45-day posting rule and making it harder to challenge the position of incumbent unions in the construction industry



# Thank You

- Questions?



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