

# Legal Updates & Hot Topics

## Issues Affecting Your Workforce

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# Agenda

1. Virginia Legal Updates
2. Federal Cases & Legislation
3. EEOC
4. DOL & OSHA
5. NLRB

# Virginia Legal Updates

# Cannabis Control Authority

- VA transitioned cannabis oversight from the Board of Pharmacy to Virginia Cannabis Control Authority
- No significant changes yet due to lack of state marijuana legislation
- Multiple bills introduced in General Assembly to set up a regulated retail market
- Unclear if bills will advance and if they do, whether Governor 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 a trans male student, didn't use any third-person pronouns at all on religious grounds
- Teacher terminated for discrimination and harassment
- Supreme Court of Virginia held teacher's claims regarding his religious liberties and Constitutional rights should not have been dismissed.
- Important - government employer, not private

# Administrative Remedies

**Shumate v. City of Lynchburg**

**9-5-2023**

**Hairston v. Nilit America Inc.**

**11-20-2023**

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- Judge allowed suit to proceed where plaintiff filed in court 2.5 weeks before receiving EEOC right-to-sue letter
- Def. requested that EEOC forward complaint to VOCCR, which preserved her right to sue under Virginia law as well as federal
- 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
- An employee 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 GA

- Proposed pay history/pay transparency bill that would require salary ranges in job posts and prohibit salary history requests
- Bill to keep increasing the minimum wage to \$13.50 in 2025 and \$15 in 2026
- Bill that would require employers with 50 or more employees to provide annual interactive training regarding harassment and discrimination

# Federal Case Law Updates

# 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 or more 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

# 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

# DEI in 2024

## Best practices around DEI trainings and programs

- **Higher Educations Cases - not necessarily applicable in the employment context**
- **Commit to seeking a diverse applicant pool**
  - Do not discriminate based upon protected class in any individual employment decision
- **Don't forget the "I" in DEI is Inclusion**
  - Train to make everyone feel welcome

# 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**



# HR's Use of Artificial Intelligence (AI)

## EEOC issues guidance

**5-18-2023**

- ER may be liable for discriminatory impact of AI tools
- Nondiscrimination burden is on the ER, not the AI vendor
- Includes selection of new EEs, performance monitoring, pay, promotions

**Are AI-driven decisions job-related and consistent with business necessity?**

# 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

# The Grudge

## EEOC v. Key Management Partners (D.Md.)

**7-5-2023**

- CEO asked co. contract attorney, McKenzie, to meet in private, called her many times trying to convince her to have sex
- McKenzie told him she was not interested, ended calls, notified supervisor
- Also emailed CEO that his phone calls were “not invited nor welcome” and made her uncomfortable
- CEO fired her for “poor performance” ~3 mos. later
  - Had received favorable performance evaluations for those 3 mos.
- KM denied unemployment because McKenzie terminated for “gross misconduct”
- KM provided negative reference leading to delayed start date for another job
- Court granted default judgment on retaliation claim

# Department of Labor

# Independent Contractor Final Rule

## DOL Announces Final Rule on IC v. EE

- 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 March 11, 2024

# New Overtime Rule Proposal

## **DOL Releases Proposed Rule**

**8-30-2023**

- Would raise OT threshold to \$55,068/yr (\$1,059/wk)
  - Currently \$35,568/yr (\$684/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

# **National Labor Relations Board**



# 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%**

# 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

# Restored Protection for Outbursts

**Lion Elastomers**

**5-1-2023**

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## **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



# 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

# Respond: Organizing Activity

## Know the facts:

- **Train supervisors: TIPS**
- **Educate about what collective bargaining means**
- **Know why you don't want a union**
- **Analysis of unit issues, vulnerabilities and current comp**
- **Hire a pro**



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