



Labor, Employment & Immigration Update:

What Changed in 2023, and What to Expect in 2024

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Today's Panelists



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Agenda

1	2023 Legal Developments (Federal & MA)
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2	2023 Legal Developments (NY)
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3	Updates: Business Immigration
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2023 Legal Developments (Federal & MA)

Chris Feudo, Partner, Co-Chair, Labor & Employment

Christian A. Garcia, Associate





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Employment Agreements

Non-Competes in Crosshairs

- FTC released proposed rule on Jan. 5, 2023, banning most non-competes.
 - Finds non-competes are unfair method of competition.
 - Applies to employees and other workers.
 - Includes broad definition of non-competes.
 - Requires rescission of existing non-competes.

- NLRB GC issues memo on May 30, 2023, arguing non-competes violate NLRA.
 - Non-competes “chill” employees’ rights to self-organize or engage in protected conduct.
 - Proposes new standard to measure enforceability of non-competes.



Use of Confidentiality and Non-Disparagement Clauses Restricted

- NLRB ruled most non-disparagement and confidentiality provisions violate federal labor law. *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023).
 - Found clauses forced employees to release rights under NLRA.
 - New standard → whether provision has reasonable tendency to interfere, restrain, or coerce employees.
- NLRB GC issued memo on Mar. 22, 2023, warning employers who seek to enforce broad confidentiality and non-disparagement provisions.
 - “Narrowly tailored” provisions may be considered lawful.
 - Mere proffer of agreements unlawful.





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SCOTUS Toughens Religious Accommodation Standard



- *Groff v. DeJoy* concerned whether USPS violated Title VII by failing to provide an employee with an accommodation from working on Sundays.
- Trial court concluded that because accommodation imposed effort or cost upon USPS that was more than “*de minimis*,” USPS did not violate Title VII by failing to provide accommodation.
- SCOTUS reversed.
 - Employer must show that the burden of granting the accommodation would result in substantial increased costs to justify failure to accommodate.
 - “Fact-specific inquiry” focusing on accommodations at issue and their practical impact on employer.

SFFA Decisions Call into Question DEI Programs



- On June 29, 2023, SCOTUS held Harvard's and UNC's admissions policies violate the Equal Protection Clause.
- Justice Gorsuch's concurring opinion drew parallels between college admission policies and employer DEI programs.
 - Justice Gorsuch found that the admissions policies violated both the Constitution and Title VI, which he characterized as the statute "next door" to Title VII.
 - He wrote that Title VI contains "materially identical language" to Title VII, opening the door to litigants challenging affirmative action policies in the employment context under Title VII.
- Attorneys General of 13 states and Arkansas Senator Tom Cotton warned Fortune 100 companies and 51 law firms that DEI programs might violate Title VII soon after *SFFA* decisions.



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Labor Law

NLRB Shifts Burden to Employers to Show that a Proposed Bargaining Unit is too Narrow



- Employer must demonstrate that workers outside of proposed unit have “overwhelming” common interest with those inside unit. American Steel Construction, Inc., 372 NLRB No. 23 (Dec. 14, 2022).
- Overturned Trump-era decision requiring unions to show proposed unit had sufficiently distinct interests.
- Should promote establishment of smaller bargaining units.

Employers Required to Deduct Union Dues After Expiration of CBA

- NLRB held that dues checkoff provisions survive expiration of collective bargaining contracts. *Valley Hospital Medical Center*, 371 NLRB No. 160 (Sept. 30, 2022).
- Restored Obama-era Board decision.



NLRB Publishes Final Rule on Joint Employer Standard

- Old rule → joint employer status where putative employer possessed and actually exercised substantial direct and immediate control over employees' essential terms and conditions of employment.
- New rule → joint employer status where putative employer reserves joint control, possesses indirect control, or exercises control that is limited and routine over terms and conditions.
 - “Essential terms and conditions of employment” include (i) compensation, (ii) work hours, (iii) work assignments, (iv) supervision, (v) work rules and directions relating to performance of duties and discipline, (vi) tenure of employment, and (vii) working conditions relating to employee health and safety.
 - Reserved control includes employers who maintain authority to control terms and conditions but have not yet exercised such control.
 - Indirect control includes employers who exercise control over terms and conditions through intermediaries.



NLRB Establishes New Standard for Evaluating Employer Policies



- NLRB issued its decision in *Stericycle, Inc.*, 372 NLRB No. 113, on Aug. 2, 2023.
 - Decision impacts both unionized and non-unionized workplaces.
 - New standard → whether workplace policy or rule has a reasonable tendency to dissuade, or chill, employees from exercising their rights under Section 7 of the NLRA.
 - If an employee could reasonably interpret the policy or rule as coercive, the policy or rule is presumptively unlawful.
 - Employer may refute presumption by demonstrating policy or rule advances a legitimate, substantial business interest and employer cannot advance interest with more narrowly tailored policy or rule.
 - Overturned 2017 decision which categorized certain policies or rules as *per se* lawful.

NLRB Narrows Employer Options for Secret Ballot Elections in *Cemex* Decision

- Typical bargaining paradigm:
 - Union asserts that majority of employees have signed authorization cards.
 - Employers not required to recognize union; may seek secret ballot election.
 - Unions that lose election typically challenge results by alleging that employer committed unfair labor practices.
 - If NLRB finds employer engaged in ULP, NLRB might issue a bargaining order (requiring employer to recognize union) or order a second election.
- NLRB's decision in *Cemex* disrupts paradigm.
 - Employer may challenge union by “promptly” filing petition for election (usually within 2 weeks).
 - If NLRB finds ULP, the NLRB will issue a bargaining order and will not conduct second election.



NLRB Issues Final Rule Speeding Up Election Procedures

- Pre-election hearing will now be held 8 calendar days from service of a Notice of Hearing (down from 14 calendar days).
- Regional directors may postpone a pre-election hearing for 2 business days upon a showing of “extraordinary circumstances” (changes rule permitting indefinite postponement upon a showing of “good cause”).
- Statement of Position generally due 7 calendar days from service of a Notice of Hearing (down from 8 business days).
- Petitioning party need not respond in writing to Statement of Position.
- Employer must post Notice of Petition for Election within 2 business days of service (down from 5 business days).
- Disputes related to bargaining unit and/or eligibility to vote will be litigated after election.
- Permission of regional director or hearing officer required to file post-hearing briefs.
- Elections to be scheduled for “earliest date practicable.”



NLRB Expands “Protected Concerted Activity” to include Solo Worker Protests

- NLRB released its decision in *Miller Plastics Products, Inc. and Ronald Vincer*, 372 NLRB No. 134, on Aug. 31, 2023.
- NLRB found that plastics products manufacturer violated NLRA when it terminated an employee after he raised concerns regarding company’s COVID-19 protocols.
 - Board found that employee’s conduct was protected under Section 7 because it was both concerted and engaged in for the purpose of mutual aid and protection.
 - Board reversed 2019 decision narrowing the circumstances in which solo worker protests were protected under the NLRA.
 - Board will now engage in a fact-specific examination to determine whether a particular solo worker protest sought to initiate, induce, or prepare for group action.





Massachusetts Developments

SJC Explains “Cat’s Paw” and “Stray Remarks” Doctrines



- *Mark A. Adams v. Schneider Electric USA, Inc.* concerned MA age discrimination claims brought by employee who was laid off in connection with reduction in force.
 - Trial court granted employer summary judgment where decisionmaker harbored no discriminatory animus.
- “Cat’s Paw” → employer may be held liable for discrimination where decisionmaker furthered discriminatory corporate policy without knowingly doing so.
 - SJC’s decision clarifies that trial courts may consider any evidence showing discriminatory animus within the corporation, not just that of the decisionmaker.
- “Stray Remarks” → discriminatory remarks made by others outside of the decision-making process may be probative of discrimination.
 - Trial court may properly consider remarks when they are made by people with power to make employment decisions.



2023 Legal Developments (NY)

Robert Haney, Jr., Partner



DCWP Publishes Regulations Prohibiting AEDTs



- On April 6, 2023, the New York City Department of Consumer and Worker Protection (“DCWP”) published regulations implementing NYC Local Law 144, which limits the use of automated employment decision tools or AEDTs.
 - This law became effective on July 5, 2023.
- An AEDT includes “any computational process, derived from machine learning . . . that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making” in employment decisions.
 - Employers cannot use an AEDT unless three requirements are met: (1) the AEDT has been the subject of a bias audit before its use; (2) a summary of the bias audit and the distribution date of the AEDT have been shared online; and (3) employees and job candidates are notified of the AEDT’s use.
- Accordingly, employers have begun to assess their AI tools, by determining which tools are covered under this law and how they will audit those tools.

Non-Competes Also in Trouble in New York



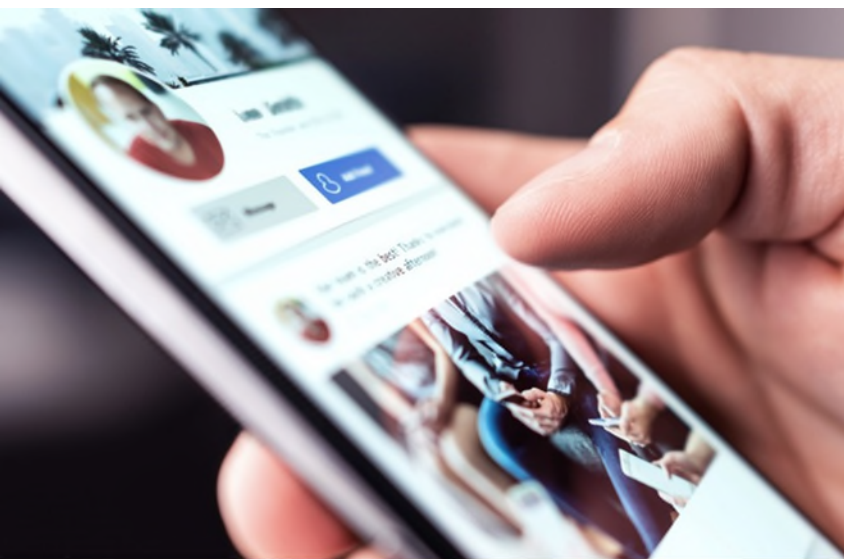
- The New York State Legislature passed a bill in June that would ban the use of new employee non-compete agreements in New York.
 - This bill amends the New York Labor Law prohibiting employers from accepting a non-compete agreement from a covered individual by expanding the definition of a covered individual.
 - This is part of a nationwide trend, as similar bills have been passed in California, North Dakota, Minnesota, etc.
- However, this bill remains in a precarious position because N.Y. Governor Kathy Hochul has not yet decided whether to sign or kill the bill.
 - Gov. Hochul has voiced support for a compromise of sorts, citing competition concerns – a compensation cap for such a ban: \$250,000, which would keep the ban in place for employees making over \$250,000.
- If this bill is eventually signed, New York employers may have to consider contractual tools such as garden leave provisions and non-solicitation clauses to protect their competitive interests.

Non-Competes Also in Trouble in New York



- Recent New York case law seems to reflect the legislative trend – in New York and other states – restricting the enforceability of non-compete agreements or banning them outright.
- In *Magtoles v. United Staffing Registry, Inc.*, the New York Eastern District Court sets forth the standard for examining non-compete clauses.
 - This examination, of the “totality of the circumstances,” considers whether the clause (1) protects a legitimate business interest; (2) is reasonable in geographic scope and temporal duration; (3) poses undue hardship on the party against whom the covenant is enforced; and (4) is harmful to the general public.
 - Any violation of one of these prongs renders the entire non-compete clause invalid.
- For example, the court in *Magtoles* found that a non-compete provision restricting plaintiffs’ employment within the entire United States to be too broad in scope and “baldly unreasonable.”

Employer Access to Social Media Accounts Restricted



- Effective March 12, 2024, New York employers will be prohibited from requiring employees or job applicants to disclose the log-in information to their personal social media accounts.
 - Accordingly, employers will not be able to retaliate against those who refuse to share this information.
 - A “personal account” is defined as an account or profile where users can create, share, and view user-generated content, which is used exclusively for personal reasons.
- There are exceptions to this law, however. Employers may require the disclosure of log-in information to comply with court orders, federal, state, or local law, and to access nonpersonal accounts, amongst other reasons.
- To make sure they are in compliance, employers must revise their hiring practices and policies on social media and inform their employees about the new law.

“Captive Audience” Meetings Curtailed



- Beginning September 6, 2023, New York employees are no longer required to attend meetings where management expresses its views on certain religious or political matters, which includes labor organization membership.
 - “Political matters” include topics related to elections, legislation, regulations, and labor organization membership.
 - “Religious matters” include topics related to religious affiliation and practice, as well as the decision to join or support any religious organization or association.
- These meetings, so-called “captive audience” meetings, have become a standard method for employers to communicate their views on union organizing since 1948.
- At present though, employers are still able to communicate information required by law to their employees, as well as information necessary for the performance of an employee’s job duties.
 - Certain casual conversations are also not prohibited.

The Expansion of Protected Characteristics: Height and Weight



- Most recently, New York City banned discrimination in employment, housing, and public accommodations based on height or weight.
 - Effective November 22, 2023, this law amends the New York City Human Rights Law, making height and weight protected characteristics.
- However, employers may still make decisions based on height and weight as required by law and as permitted by a NYC Commission on Human Rights regulation, which identifies certain jobs where height or weight can be considered.
 - Further, an employer will not be liable for violating this law when it can prove one of two affirmative defenses.
- New York City joins several state and local regions with similar laws in place. And similar legislation is pending in many states, such as New York, New Jersey, and Massachusetts.
 - Following the passage of this law, employers will want to review positions that have height or weight criteria.



Updates: Business Immigration

Amy Haberman, Partner



FY 2024 H1B Registration Updates

Cap Fiscal Year	Total Registrations	Eligible Registrations	Eligible Registrations for Beneficiaries with No Other Eligible Registrations	Eligible Registrations for Beneficiaries with Multiple Eligible Registrations	Selections
2021	274,237	269,424	241,299	28,125	124,415
2022	308,613	301,447	211,304	90,143	131,924
2023	483,927	474,421	309,241	165,180	127,600
2024	780,884	758,994	350,103	408,891	110,791

- 61% increase over FY2023 registrations
- 96,000 individuals responsible for 408,000 registrations
 - 147% increase over FY 2023 in number of individuals with multiple registrations
- USCIS will conduct extensive fraud investigations, deny and revoke petitions, and initiate referrals for criminal prosecution

USCIS Proposed Rule to Amend H-1B Regulations

- On October 23, 2023, DHS released a notice of proposed rulemaking (NPRM) to amend its current regulations to modernize the H-1B visa program. DHS accepting public comments until December 22, 2023.
 - Selection by beneficiary eliminating ability for related entities to submit multiple registrations on behalf of the same beneficiary
 - Revise the regulatory definition of “specialty occupation”
 - Degree fields must be directly related to the position’s duties
 - Attainment of general degree fields such as Business Administration or Liberal Arts without additional specialization is not sufficient
 - The position may require multiple degree fields provided that each of the qualifying degree fields are directly related to the position
 - Codify deference policy
 - confirms that when the request involves the same parties and facts, USCIS should defer to a prior determination



DOL Program Electronic Review Management (PERM) Program



- In 2019, the DOL introduced the Foreign Labor Application Gateway (FLAG) system, a cloud-based portal for Prevailing Wage and PERM applications. On June 2, 2023, system went live for PERMs.
 - Link wage determinations with Form 9089 PERM application (ensure consistency and identify defects/fraud)
 - Reduce delays caused by employer participation requirements
 - Issues:
 - New fields/questions and no guidance issued to the public or DOL officers
 - Slow down in PERM processing times as officers clear out pipeline and have to figure out new requirements
 - Potential for slew of unanticipated denials in 2024 once cases are adjudicated

DOL PERM Program - November 2023 Apple Settlement with DOJ

- DOJ investigation alleged that Apple violated the anti-discrimination provisions of the Immigration and Nationality Act (INA) because it deviated from its standard recruitment process when conducting PERM recruitment.
 - did not advertise PERM positions on its external job website as it does for non-PERM positions
 - required all PERM applicants to mail resumes or applications rather than submit electronic applications
 - did not consider some applications it received from Apple employees, if those applications were submitted electronically, rather than by mail.
- Recruitment resulted in zero or very few mailed applications for PERM positions.
- Apple was ordered to pay a fine of \$25 million and take other steps to ensure that its PERM recruitment more closely matches its standard recruitment practices.

Covid Form I-9 Flexibility Ends



- COVID-19 temporary flexibilities for Form I-9, Employment Eligibility Verification, ended on **July 31, 2023**.
- In-person inspection for employees whose documents were inspected remotely were to be completed by **August 30, 2023**.
- Alternative procedure for live video interaction if E-Verify enrolled at the time of original I-9 completion introduced **July 25, 2023**.
- Final rule broadening alternative procedures allowing remote document examination for Form I-9 anticipated in 2024
- New Form I-9 mandatory on **November 1, 2023**.

Derivative Benefit Improvements

- As a result of challenges re: H-4 and L-2 delays USCIS will adjudicate derivatives along with the principal beneficiary, when forms are “bundled”
 - EAD issued in four weeks down from seven to nine months
- L and E visa spouses now have automatic work authorization incident to status
 - EAD application no longer necessary



NIV Pilot Program

- On October 17, 2023, DOS sent for review a *Federal Register* notice entitled [Pilot Program to Resume Renewal of H-1B Nonimmigrant Visas in the United States for Certain Qualified Noncitizens](#).
- Goal is to reduce consular delays caused by Covid
 - Limited to H-1B principals only (India will be eligible to participate);
 - Requirements similar to interview waiver program;
 - Available for 20,000 applicants; and
 - Voluntary participation.



December 2023 Visa Bulletin

Employment-Based	All Chargeability Areas Except Those Listed	CHINA	INDIA	MEXICO	PHILIPPINES
1st	C	15FEB22	01JAN17	C	C
2nd	15JUL22	22OCT19	01JAN12	15JUL22	15JUL22
3rd	01DEC21	22JAN20	01MAY12	01DEC21	01DEC21

Comparison of Current and Proposed Fees

Immigration benefit request		Current fee	Proposed fee	Difference
	H-B registration fee	\$10	\$215	2050%
I-129	Petition for H-1B Nonimmigrant Worker	\$460	\$780	70%
I-765	Application for Employment Authorization	\$410	\$650	59%
I-485	Application to Adjust Status	\$1410	\$1540	35%
I-129	Petition for L Nonimmigrant Worker	\$460	\$1385	201%

- Premium processing fee of \$2500 unchanged but adjudication will move from 15 calendar days to business days
- Fee increases will go towards increased personnel, pay raises, technology refresh, Call Center operations

Thank You



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