

BUSY INSIDE THE BELTWAY: RECENT ACTIVITY BY THE DOL, EEOC, NLRB AND FTC

June 6, 2023

Federal agencies responsible for employment-related matters have been busy in recent weeks issuing guidance, updated workplace posters, and more. Let's get caught up:

DEPARTMENT OF LABOR (DOL)

- **PUMP for Nursing Mothers Act (PUMP Act) Guidance:** On May 17, 2023, the DOL issued "[Field Assistance Bulletin No. 2023-02](#)" (FAB) to its field staff providing them with guidance regarding the enforcement of pump at work provisions of the Fair Labor Standards Act (FLSA). The PUMP Act requires employers to provide nearly all nursing employees with the right to reasonable break time and a place, other than a bathroom, that is shielded from view and free from intrusion, to express breast milk while at work for up to one year after the child's birth. The FAB notes, among other things, that each employee's pumping needs may be different and may change over time, and that the employer and employee may agree on, and adjust as needed, a pumping schedule. The FAB also provides guidance regarding compensation differences for non-exempt and exempt employees. The FAB further notes that the place provided to pump must not only be private but also "functional," and suggests that space which includes access to electricity and a sink would be "ideal."
- **FLSA Poster:** The DOL also issued an updated "[Minimum Wage](#)" poster in April 2023. The poster includes revised information concerning employees' rights under the PUMP Act. Employers should note that prior versions of this poster *do not* comply with the posting requirement, so steps should be taken to replace those posters.
- **Family and Medical Leave Act (FMLA) Poster:** The DOL issued an updated "[Your Employee Rights Under the Family and Medical Leave Act](#)" poster in April 2023. The information is essentially the same as in prior posters, but with a focus on actions that employees and employers "may" or "must" take in connection with requests for FMLA leave. The poster also includes a QR code that can be scanned to obtain additional information about how to file a complaint with the DOL. Unlike with respect to the Minimum Wage poster, prior versions of the FMLA poster (from April 2016 and February 2013) *do* still meet the posting requirement.

- **FMLA Opinion Letter:** On May 30, 2023, the DOL issued an opinion letter, [FMLA-2023-2A](#), on the subject of how to calculate FMLA usage when an employee uses FMLA leave during a week with a holiday. While the opinion letter is new, the guidance within it is not; instead, it essentially comes straight from previously-existing regulations and DOL guidance. The bottom line, as stated in the opinion letter:

If a holiday occurs during an employee's workweek, and the employee works for part of the week and uses FMLA leave for part of the week, the holiday does not reduce the amount of the employee's FMLA leave entitlement unless the employee was required to report for work on the holiday. Therefore, if the employee was not expected or scheduled to work on the holiday, the fraction of the workweek of leave used would be the amount of FMLA leave taken (which would not include the holiday) divided by the total workweek (which would include the holiday).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

- COVID-19: On May 15, 2023, the EEOC issued updates to its technical assistance, "[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.](#)" The updates acknowledge the end of the federal declaration of the COVID-19 public health emergency, but emphasizes that even though the emergency has ended, employers must consult with employees about reasonable accommodations granted during the emergency to determine whether the accommodations are still needed, rather than automatically terminating those accommodations. The updates also provide examples of reasonable accommodations that may assist those employees dealing with the challenges of "Long COVID."
- Artificial Intelligence (AI): On May 18, 2023, the EEOC provided additional commentary on the subject of AI and the workplace, providing "Q&A" within a publication titled "[Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.](#)" Among other things, the Q&A reminds employers that they may be held responsible for adverse impact caused by their use of algorithmic decision-making selection tools, even if the tools were designed or administered by a third-party such as a software vendor. The EEOC recommends that employers discuss adverse impact issues with vendors when selecting vendors and specific tools, but warns that even if the vendors provide inaccurate assessments of their tools, employers may still be liable if use of the tool results in discrimination.

NATIONAL LABOR RELATIONS BOARD (NLRB)

- Non-compete Agreements: The NLRB General Counsel, Jennifer Abruzzo, informed NLRB Directors and Officers in a May 30, 2023 [memo](#) that, in her view, non-compete provisions in both employment contracts and severance agreements violate Section 7 of the National Labor Relations Act (NLRA) in nearly all circumstances, based on their tendency to chill employees

from exercising their right to take collection action to improve their working conditions. Abruzzo suggested that non-compete agreements *may* be lawful: (a) if the provisions restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships; or (b) where a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances, such as a legitimate business interest in protecting proprietary or trade-secret information.

FEDERAL TRADE COMMISSION (FTC)

- **Biometric Privacy:** The FTC issued a [policy statement](#) on May 18, 2023, regarding biometric technology, signalling the FTC's intent to pursue enforcement actions against businesses using biometric technology in an "unfair" or "deceptive" way. Employers using finger-scanning or palm-scanning technology, such as for timekeeping purposes with respect to hourly workforces, should take note of the suggestion in the policy statement that failing to have conducted a "holistic" assessment of the biometric technology implemented will be considered unfair or deceptive. See BCLP's [Alert](#) for full details.

For additional information or assistance regarding any of these updates, please reach out to your BCLP contact.

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