Hot Topics – Employment Law Legal Update

STEPTOE & JOHNSON PLLC

WVSHRM

Thursday, November 14, 2024

Presenters

Michael J. Moore

Steptoe & Johnson PLLC | Member
Bridgeport, WV
michael.moore@steptoe-johnson.com
(304) 933-8153

Anthony G. Caldera

Steptoe & Johnson PLLC | Member
Bridgeport, WV
anthony.caldera@steptoe-johnson.com
(304) 933-8141

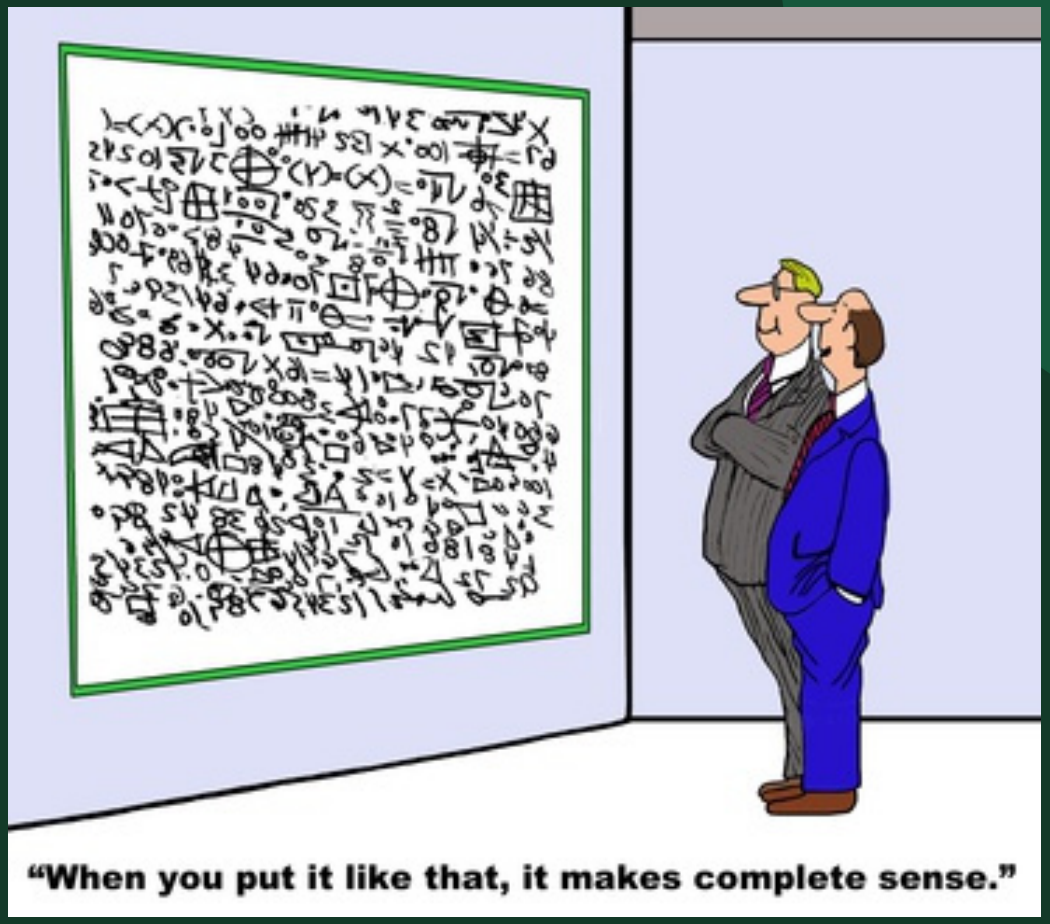
Agenda

- National Labor Relations Board (NLRB) Updates
- Department of Labor (DOL) Final Rule for Overtime Exemptions
- DOL Final Rule Regarding Independent Contractors
- Equal Employment Opportunity Commission (EEOC) Guidance Regarding Workplace Harassment
- Chevron Doctrine Overturned

STEPTOE & JOHNSON PLLC

Alphabet Soup:

- Americans with Disabilities Act (ADA)
- Equal Employment Opportunity Commission (EEOC)
- Federal Trade Commission (FTC)
- National Labor Relations Act (NLRA)
- Department of Labor (DOL)
- Fair Labor Standards Act (FLSA)
- National Labor Relations Board (NLRB)
- Pregnant Workers Fairness Act (PWFA)


“When you put it like that, it makes complete sense.”

Severance Agreements, Confidentiality, and Non-Disparagement

- On February 21, 2023, the NLRB issued its decision in *McLaren Macomb*, finding that **confidentiality** and **non-disparagement clauses** in severance agreements may infringe upon employees' Section 7 rights
- On March 22, 2023, the NLRB's GC issued guidance to address questions raised in *McLaren Macomb*
  - Confirms retroactive application
  - Confidentiality clauses:
    - Must be narrowly tailored to restrict the dissemination of proprietary or trade secret information
    - Must be for a limited period and based on legitimate business justifications

Severance Agreements, Confidentiality, and Non-Disparagement

- **Non-Disparagement Clauses**
  - General bans are unlawful
  - Limit bans to statements that are "maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."
  - Clarifies that enforcement of McLaren decision is not limited to severance agreement – applies to "any employer communication" that unnecessarily infringes with Section 7 rights

Employment Policies: New Standard

- On August 2, 2023, In *Stericycle, Inc.,* the NLRB adopted an employee-friendly standard applicable to employment handbooks and work rules
  - Focuses on whether an employee could reasonably interpret the rule in question to have a "coercive meaning" (even if a contrary, non-coercive interpretation is also reasonable)

NLRB's Application of the Stericycle Standard

- *Starbucks Corp. N.L.R.B. A.L.J.*, Case No 04-CA-294636, 8/10/2023:
  - The company must nix its "How We Communicate Policy." The policy provided, in relevant part, that communications must be professional and respectful and that the use of vulgar and profane language is unacceptable
- ALJ determined that although Starbucks' interest in upholding basic standards of civility is a legitimate interest, the rule is overly broad, vague, and susceptible to application against legally protected activity, particularly when workers are off the clock
- ***The Company was ordered to notify all workers in the U.S., via text messages, social media postings, and other electronic means that its policy was illegal***

Employees' Section 7 Rights

- On May 1, 2023, the Board issued its decision in *Lion Elastomers LLC II,* making it more difficult for employers to discipline employees for misconduct and outbursts
  - Now employers must consider the context of a worker's outburst to determine if the worker exceeded the protections of the NRLA
- On August 25, 2023, in *Miller*, the NLRB held that an employee engaged in concerted activity when he voiced concerns about the company's COVID-19 protocols at a company meeting and in face-to-face interactions with management
- On August 26, 2023, in the *American Federation*, the NLRB held that a worker's insistence that her employer rehire a colleague was a protected activity

NLRB Protected Activity

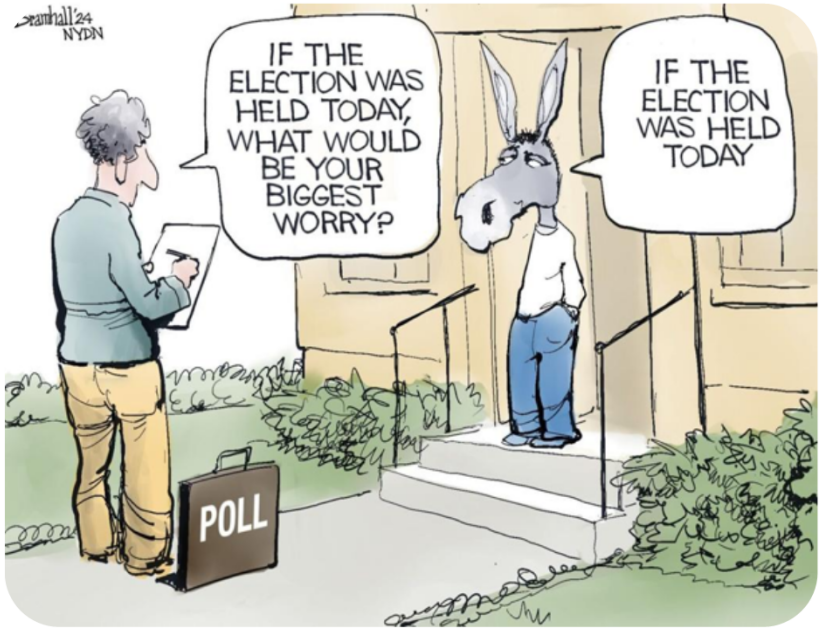
- On February 21, 2024, the NLRB ruled that a *Home Depot* employee engaged in protected concerted activity by wearing a Black Lives Matter (BLM) slogan on a company uniform
- The Board found that displaying the BLM slogan was a "logical outgrowth" of racial harassment concerns the employee later raised to management

NLRB: Recognition Procedures

- On August 25, 2023, the NLRB decided *Cemex Construction Materials Pacific, LLC*
- Pre-Cemex rule: An employer can, with a good faith basis, refuse a demand for recognition based on assertion of majority status. The Union then has the burden to seek an election with the NLRB. Only egregious unfair labor practices will result in an Order that the employer must bargain with the Union even without an election
- New Rule: If a Union demands recognition based on an assertion of majority status, the employer has two options: (1) grant the petition, or (2) promptly file an RM petition with the NLRB seeking an election. Any unfair labor practice will result in an Order that the employer must bargain with the Union

NLRB Final Rule Governing Representation Elections

- Effective December 26, 2023. Highlights of the new rule's changes include:
    1. Allowing pre-election hearings to begin more quickly;
    2. Ensuring that election information is disseminated to employees more quickly;
    3. Making pre- and post-election hearings more efficient; and
    4. Ensuring that elections are held more quickly.



Combined Impact of Cemex, Stericycle, and Other NLRB Decisions

- The NLRB can find violations in policies and handbooks even if:
  - Language is neutral and does not reference Section 7 rights
  - Employer never intended the language to infringe on protected concerted activity
  - Employer never enforced the language
  - There's no evidence that the provision harmed employees or impacted the election
- Like other types of ULPs under Section 8(a)(1), the NLRB will overturn any election and issue a remedial bargaining order unless violations under *Stericycle*, *McLaren Macomb,* or other recent cases are so minimal or isolated that it is virtually impossible the misconduct could affect election results

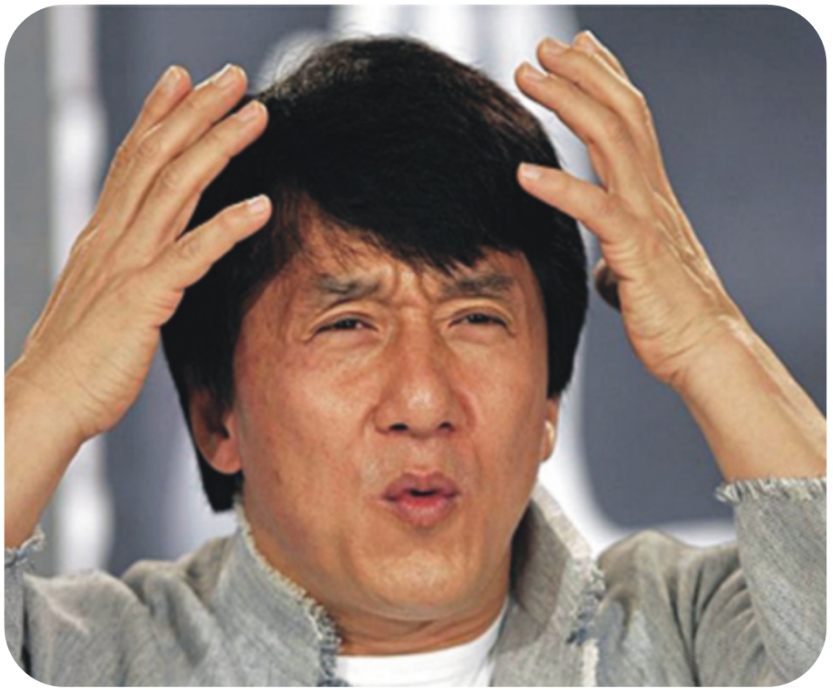
NLRB: 10(j) Injunctions

Starbucks v. McKinney

- June 13, 2024: The Supreme Court ruled that the NLRB must satisfy the traditional, four-factor test for injunctions
  - Plaintiff must make a clear showing that:
  1. it is likely to succeed on the merits;
  2. it is likely to suffer irreparable harm in the absence of preliminary relief;
  3. the balance of equities tips in its favor; and
  4. an injunction is in the public interest.
- Outcome: it will be more difficult for the NLRB to obtain a preliminary injunction

Chevron Doctrine Overturned

- **Old Method**: Courts deferred to administrative agencies to interpret ambiguous statutes
  - This allowed agencies to refine the meaning of the statutes they enforced
- **New Method**: Now, Courts must exercise their independent judgment in interpreting a statute and reviewing the agency's interpretation of the statute
  - What's the impact of this?



DOL Final Rule Employee or Independent Contractor Classification

- January 10, 2024: DOL published final rule to revise previous guidance on analyzing employee or independent contractor status under the Fair Labor Standards Act
  - ✓ Effective March 11, 2024
- Worker not an independent contractor if economically dependent on an employer. Consider:
  (1) Worker's opportunity for profit or loss depending on managerial skill;
  (2) Investments by the worker and potential employer;
  (3) Degree of permanence of the working relationship;
  (4) Nature and degree of control;
  (5) Extent to which work performed is an integral part of potential employer's business; and
  (6) Use of a worker's skill and initiative.

DOL Final Rule for Overtime Exemption

- July 1, 2024: The final rule increased the standard salary level and the highly compensated employee's total annual compensation threshold
- On January 1, 2025, changes in the methodologies used to calculate these levels become applicable
- The final rule also provides for future updates of these levels every three years to reflect current earnings data

Salary Level Increases

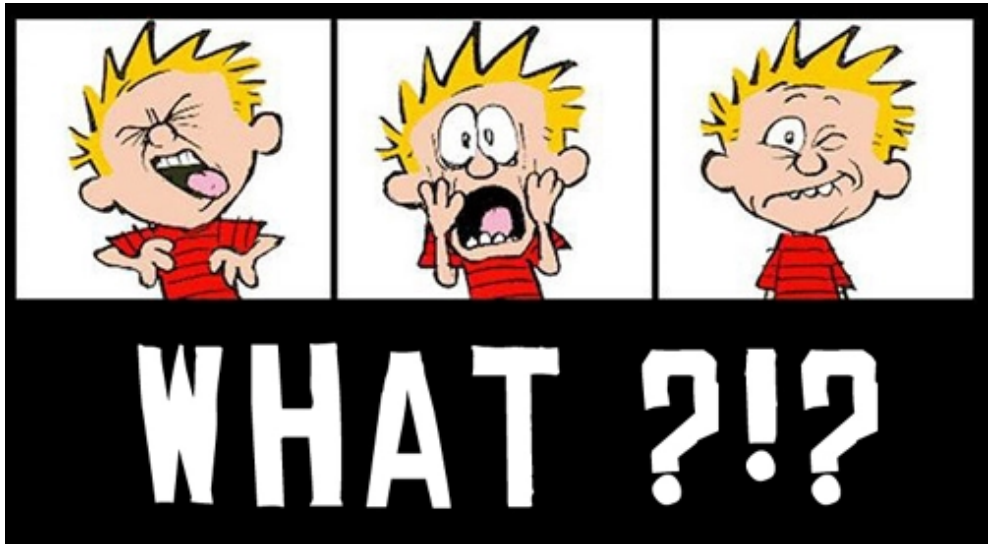
DATE	STANDARD SALARY LEVEL	HIGHLY COMPENSATED EMPLOYEE LEVEL
Before July 1, 2024	$684 per week (equivalent to $35,568 per year)	$107,432 per year, including at least $684 per week paid on a salary or fee basis.
July 1, 2024	$844 per week (equivalent to $43,888 per year)	$132,964 per year, including at least $844 per week paid on a salary or fee basis.
January 1, 2025	$1,128 per week (equivalent to $58,656 per year)	$151,164 per year, including at least $1,128 per week paid on a salary or fee basis.
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

Helix Energy Solutions v. Hewitt

- U.S. Supreme Court determined whether highly compensated employees paid on a daily-rate basis were entitled to overtime compensation pursuant to the FLSA
- Is an individual who makes over $200,000 annually, calculated on a daily basis, entitled to overtime pay?

598 U.S. 39 * | 143 S. Ct. 677 ** | 214 L. Ed. 2d 409 *** | 2023 U.S. LEXIS 944 **** | 29 Fla. L. Weekly Fed. S 678

Yes, highly compensated employees paid on a daily basis without at least the minimum weekly salary amount on a salary or fee basis **MUST** receive overtime pay.



EEOC Guidance: Workplace Harassment

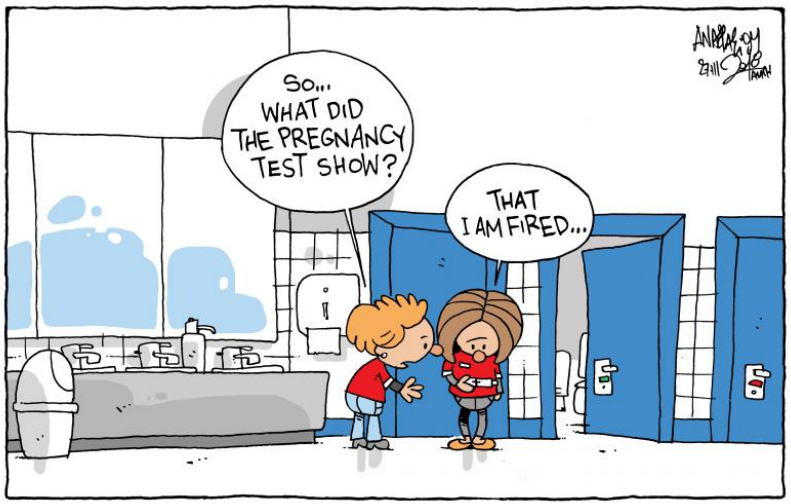
- April 29, 2024: New guidance on changes in workplace and employment case law
- Current examples of harassment, including the use of online content
- Offensive conduct, even if not directed to the complainant, **can be actionable**
- **Employers**:
  - Consider protocols for addressing and reporting virtual harassment

EEOC Guidance: Workplace Harassment

- Employers are strongly encouraged to:
  1. Have a clear, easy-to-understand anti-harassment policy;
  2. Have a safe and effective procedure that employees can use to report harassment, including more than one option for reporting;
  3. Provide recurring training to all employees about the company's anti-harassment policy and complaint process; and
  4. Take steps to make sure the anti-harassment policy is being followed and the complaint process is working.

Pregnant Workers Fairness Act (PWFA)

- On April 15, 2024, the EEOC issued its final rule to implement the PWFA, which was passed on June 27, 2023
- It requires public and private employers with 15 or more employees to provide reasonable accommodations for known limitations related to:
  - "pregnancy, childbirth, or related medical conditions," unless the requested accommodation will cause the employer an undue hardship



WVSHRM STEPTOE & JOHNSON PLLC

EEOC Final Rule Implementing Pregnant Workers Fairness Act (PWFA)

- The final rule modified the definition of "reasonable documentation" so that it now means the minimum documentation that is sufficient to:

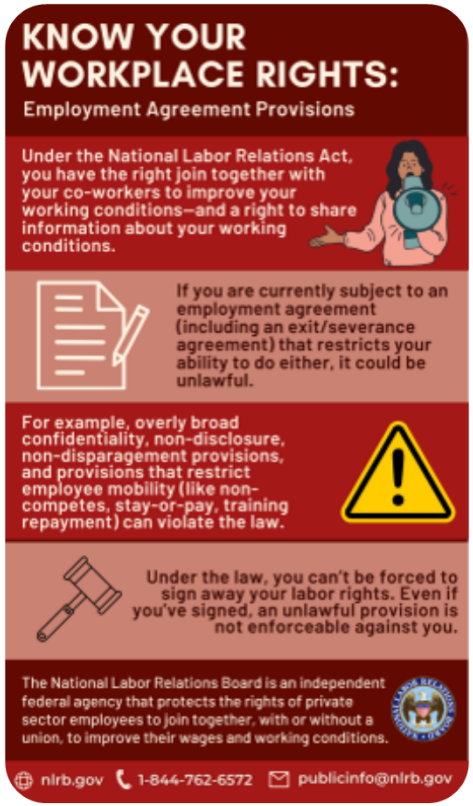
1. Confirm the physical or mental condition;
2. Confirm the physical or mental condition is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (together with "a limitation"); and
3. Describe the change or adjustment at work needed due to the limitation.

Federal Trade Commission's Proposed Restrictions

- April 23, 2024 — FTC adopts a rule prohibiting "non-compete clauses" in employment relationships
- Final Rule published in Federal Register on 05/07/2024, effective 09/04/2024
- FTC concludes that non-compete clauses restrain competition
- Competing trains of thought:
  - Protect legitimate employer interests in confidential information and goodwill
  - Restraints of trade that limit competition in the marketplace and depress compensation
- *Ryan LLC v. Federal Trade Commission*, 2024-cv-00986 (N.D. Tex. 2024)

UPDATE: Non-Compete and Stay-or-Pay Provisions

- October 7, 2024: General Counsel Abruzzo issued a memo regarding non-compete agreements and stay-or-pay provisions
- NLRB plans to prosecute employers who require employees to sign non-competes and stay-or-pay provisions
- Stated intent to remedy the harmful monetary effects employees experience as a result of these provisions



WVSHRM

STEPTOE & JOHNSON PLLC

Questions?

Presenters

Michael J. Moore

Steptoe & Johnson PLLC | Member
Bridgeport, WV
michael.moore@steptoe-johnson.com
(304) 933-8153

Anthony G. Caldera

Steptoe & Johnson PLLC | Member
Bridgeport, WV
anthony.caldera@steptoe-johnson.com
(304) 933-8141

Disclaimer

These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case and/or matter is fact-specific, and that the appropriate solution in any case and/or matter will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the presenter and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.


SJ
STEPTOE
&JOHNSON
PLLC


WVSHRM