



2022 HR Policy Outlook

HR public policy issues in play & the Association's advocacy and practice agenda

2022 HR POLICY OUTLOOK



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Less Congressional Action = More Agency Regulation

- Abbreviated legislative schedule and mid-term elections on the horizon
 - Must-pass legislation before year end
 - Expect more agency regulation, whole of government approach
 - White House Task Force on Union Organizing and Worker Empowerment
 - Action from agencies with limited knowledge/interaction with employer issues

Implications for Member Companies

- Policy actions—from a broader array of agencies—may require updates to internal practices and policies

The Equal Employment Opportunity Commission



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TERM ENDS JULY 1, 2023



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Employer Reporting Requirements Gaining Traction

- EEOC-commissioned National Academies Study examined EEO-1 Component 2 2018 pay data collection and concluded:
 - Pay data “may be used effectively” in enforcement; outdated job categories; overly wide pay bands; total compensation only partially reflected
- EEOC may pursue collection of pay data with or without a rulemaking
- Association to consider advocating for EEOC to pursue pilot
- SEC to draft prescriptive HCM disclosure requirements potentially including workforce composition; turnover; skills and development training; compensation and benefits; and diversity (possibly including independent contractors)

Implications for Member Companies

- Confusion with the SEC diversity disclosure mandate and the EEO-1 Component 2 Pay Data

Pending Regulations on Executive Compensation

- **Final Pay for Performance Rule:** 2023 proxy (for calendar filers) must have:
 - Summary Compensation Table pay and “Compensation Actually Paid” for CEO and average NEO
 - Cumulative TSR for company and peer group
 - Company net income and one company-selected metric
 - Narrative or graphical description of relationship of pay to each measure, company to peer TSR
 - List of 3-7 “most important” financial or non-financial metrics
- Other regulations: SEC will issue final clawback rules in October; FTC perusing ban on non-competes

Implications for Member Companies

- New P4P disclosures must be included in 2023 proxies, while modifications to clawback policies and new human capital metrics disclosures will likely be effective in 2024 or beyond

Regulation on HR Data is Here

- California consumer data law to apply to HR data on January 1
 - Employees, applicants, and contractors will have the right to know, correct, and delete their personal information held by an employer, or employer's vendor on employer's behalf
- FTC Advanced Notice of Proposed Rulemaking on privacy and AI
 - Targets worker data, citing concerns regarding privacy (worker monitoring) and discrimination
 - HR Policy will submit formal comments

Implications for Member Companies

- The HR function will become more technical, cross-functional with IT
- California development assures future HR privacy policymaking
- Employers could be subject to multiple, overlapping, and potentially conflicting requirements.

DOL Overtime and Independent Contractor Rules Imminent

- The Wage and Hour Division to pursue:
 - A proposal to amend the regulations for the Fair Labor Standards Act's minimum wage and overtime requirements, targeted date is October
- Rulemaking on determining employee or independent contractor status under the FLSA
 - The proposal is currently at OIRA for review and has been since July 5. Review could finish any day, and the rulemaking will be published in the *Federal Register* shortly afterwards

Implications for Member Companies

- Employers may have to reclassify employees, be subject to additional reporting requirements and could see an increase in litigation from employees for backpay for overtime worked
- Companies will have to reevaluate worker classification, business structure and benefits, including costs, if IC status under FLSA is changed

National Labor Relations Board (NLRB)

Board Members

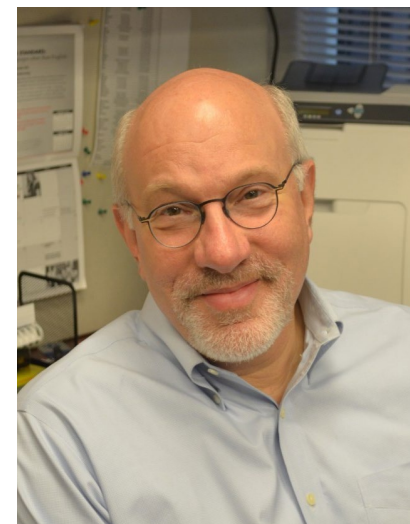
General Counsel



Gwynne Wilcox (D)
Member
Term Expiration – August 28, 2023



Lauren McFerran (D)
Chairman
Term Expiration – December 16, 2024



David Prouty (D)
Member
Term Expiration – August 2026



Jennifer Abruzzo (D)
General Counsel
Term expiration – July 22, 2025



Marvin Kaplan (R)
Member
Term Expiration – August 27, 2025



John Ring (R)
Member
Term Expiration - December 16, 2022



NLRB – Significant Decisions Coming Soon

- **Workplace rules and policies**
 - Heavy scrutiny of employee handbooks/employer workplace rules and policies
- **Independent contractor status**
 - More covered employees (and more employees for unions to organize), fewer independent contractors (under the NLRA)
- **Bargaining unit sizes**
 - Increase in micro units and fractured workplaces – smaller units means more union election wins
- **Consequential damages**
 - Employers on the hook for more than just lost wages
- **Arbitration agreements, confidentiality agreements**
 - Limits on the use of arbitration and/or confidentiality agreements under the NLRA

NLRB to Expand Joint Employer Liability

- Proposed rule issued Sept. 6th

Implications for Member Companies

- Companies could be responsible for the labor law violations of suppliers, contractors, franchisees, or other third-party relationships
 - Even where a company has only **indirect and/or potential control** over the employees of such third parties' employees
- Parent companies, franchisors, and others could be forced to negotiate CBAs and terms and conditions of employment for the employees of subsidiary companies, franchisees, and others

Court Decisions Impacting L&E Law and Policy

- ***West Virginia v. EPA***
 - “Major questions doctrine” – increased scrutiny of administrative agency authority and regulatory actions that have great “economic and political significance”
 - Where Congress has not explicitly delegated such authority

Implications for Member Companies

- Opens the door for the conservative Supreme Court to invalidate future regulatory action and reflects the Court’s general skepticism towards federal agency actions
- This approach could serve as a firewall against the Biden administration’s all-of-government approach to L&E policy

Court Decisions Impacting Diversity Initiatives

- ***Students for Fair Admissions v. Harvard/UNC***
 - Issue: constitutionality of race-conscious college admissions programs
 - The Association filed an *amicus* brief stressing the importance of diversity-conscious college admissions programs to ongoing workplace DE&I efforts

Implications for Member Companies

- Should the Supreme Court invalidate diversity-conscious college admissions programs, company DEI initiatives could be the next to receive Court scrutiny

Court Decisions Impacting Health Care Benefits

- ***Dobbs v. Jackson Women's Health Org.***
 - Patchwork of state abortion laws already subject of widespread litigation
 - State "aiding and abetting" laws (TX, OK, AL, potential for others)
 - ERISA preemption?

Implications for Member Companies?

- Opens the door to state laws that could create liability for employers that offer health and travel benefits or reimbursements related to abortion
- For self-insured plans, such laws may be preempted by ERISA; this question will ultimately be resolved by the courts

Health Care Prices Likely to Increase

- Key regulatory actions that will impact employer plans: mental health parity, transparency in coverage, and surprise medical billing
- Inflation Reduction Act excluded private plans, leaving employers at risk of drug price increases and making pharmacy supply-chain transparency even more important
- Bipartisan mental health and telehealth legislation may be passed during the lame duck session including expanded telehealth and collaborative care model offerings

Implications for Member Companies

- Reputational risks for companies that DOL determines violated their mental health parity obligations
- Employer drug prices will likely increase as a result of the Inflation Reduction Act