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2024 LABOR & EMPLOYMENT LAW SEMINAR

HR Madness and March Hoopla: Similar Game,
but Different Court and Rules


MARCH 27, 2024


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RULES OF THE GAME: 2024 LABOR & EMPLOYMENT LAW UPDATE

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MARCH 27, 2024


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“Your circumstances are not the
reason you can’t succeed;
they are the reality in which you
must succeed.”

-Cy Wakeman

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SUPREME COURT UPDATE

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2023 SUPREME COURT DECISIONS

- o **Students for Fair Admissions v. President and Fellows of Harvard College**
 - Affirmative Action in College Admissions
 - **Holding:** The Supreme Court reversed the longstanding rule that race could be considered as a plus factor, among many others, when making higher education admissions decisions, effectively ending affirmative action in college and university admissions
- o Impact on your game
 - Legally Required Affirmative Action Program
 - Voluntary Diversity, Equity, Inclusion, and Accessibility Programs



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2023 SUPREME COURT DECISIONS

- o **Groff v. DeJoy**
 - Religious Accommodation Requests
 - **Holding:** The Court clarified the meaning of "undue hardship" for religious accommodation requests, requiring employers to show "substantial increased costs in relation to the conduct of its particular business"
- o Impact on your game
 - Increased requests for accommodation, charges of discrimination alleging a failure to accommodate religious practices, and risk for litigation



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2023 SUPREME COURT DECISIONS

- **Helix Energy Solutions Group, Inc. v. Hewitt**
 - Fair Labor Standards Act (FLSA)—Salary Basis and Highly Compensated Employees
 - **Holding:** The Supreme Court held that, while the “highly compensated employee” rule relaxes the duties test, the salary-basis test must still be met and requires employers to compensate employees at a guaranteed fixed weekly amount regardless of the number of hours worked
- **Impact on your game**
 - Daily-rate workers, at any income level, will not qualify for the white-collar exemptions under the FLSA



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2024 SUPREME COURT CASES

- **Muldrow v. City of St. Louis, Missouri**
 - Whether discriminatory transfer decisions violate Title VII of the Civil Rights Act
 - The Supreme Court heard arguments on December 6, 2023



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FEDERAL LEGISLATIVE UPDATES

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FEDERAL LEGISLATIVE UPDATES

- o **Pregnant Workers Fairness Act (PWFA)**
 - Covered employers must provide reasonable accommodations due to an employee's pregnancy, childbirth, or related medical conditions, unless undue hardship would occur
 - PWFA also prohibits employers from:
 - Requiring an employee to accept an accommodation without engaging in the interactive process;
 - Denying a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
 - Requiring an employee to take leave if another reasonable accommodation is available;
 - Retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding; or
 - Interfering with any individual's rights under the PWFA.
 - State and local laws may provide greater protections

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FEDERAL LEGISLATIVE UPDATES

- o **Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP)**
 - Expands rights and protections for breastfeeding mothers
 - Employers must provide reasonable time and a private space (other than a bathroom) to express milk for up to one-year following the birth of a child
 - Exception for small employers (less than 50 employees) if they can establish undue hardship




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FEDERAL LEGISLATIVE UPDATES

- o **The Speak Out Act**
 - Invalidates nondisclosure and nondisparagement agreements leveraged to keep employees from discussing instances of sexual harassment and assault
 - Applies only to nondisclosure and nondisparagement agreements signed *before* a dispute arises, not after




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AGENCY UPDATES


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DEPARTMENT OF LABOR UPDATE

- o Field Assistant Bulletins
 - Telework Under the FLSA and Family and Medical Leave Act
 - Breaks of twenty minutes or less must be counted as hours worked
 - Bona fide meal breaks in which an employee is completely relieved from duty are not considered worktime
 - When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made
 - Enforcement of Protections for Employees to Pump Breast Milk at Work
 - DOL explained PUMP Act's requirements for reasonable break time, compensation, and space requirements (applies at all worksites)

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DEPARTMENT OF LABOR UPDATE

- o Field Assistant Bulletins
 - Hot Goods
 - Goods that were produced in an establishment in or about which oppressive child labor occurred
 - Hot goods are barred from being shipped in interstate commerce, including preventing subsequent downstream shipment of such goods were produced within 30 days following a child labor violation
 - Child Labor Civil Money Penalty
 - DOL will assess CL CMPs on a per violation basis, as opposed to previous per child basis
 - Current statutory maximum is \$15,138 per violation

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DEPARTMENT OF LABOR UPDATE

- o DOL released two Opinion Letters in 2023, holding:
 - An eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement
 - For FMLA leave of less than a full week, holidays occurring in the week generally do not count against an employee's FMLA leave entitlement, unless the employee was otherwise scheduled and expected to work

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DEPARTMENT OF LABOR UPDATE

- o DOL released a proposed rule to increase the salary threshold for white collar exemptions:
 - Current: \$684 per week / \$35,568 per year
 - Proposed Increase: \$1,059 per week / \$55,068 per year
 - The proposed rule would not change the existing job duties tests for any exemption
 - The proposed rule would include a new mechanism that would automatically increase the salary threshold every three years
 - The proposed rule is expected to take effect sometime in 2024
 - Likely will be challenged in court

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DEPARTMENT OF LABOR UPDATE

- o On January 10, 2024, DOL released a new independent contractor rule
- o DOL will focus on six factors in determining whether a worker is an independent contractor or employee:
 1. Opportunity for profit or loss depending on managerial skill;
 2. Investments by the worker and the potential employer;
 3. Degree of permanence of the work relationship;
 4. Nature and degree of control;
 5. Extent to which the work performed is an integral part of the potential employer's business; and
 6. Skill and initiative.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

- o Charge Statistics for Fiscal Year 2022
 - **Retaliation** — 51.6% (37,898)
 - **Disability** — 34% (25,004)
 - **Race** — 28.6% (20,992)
 - **Sex** — 27.0% (19,805)
 - **Religion** — 18.8% (13,814)
 - **Age** — 15.6% (11,500)
 - **National Origin** — 7.5% (5,500)
 - **Color** — 5.6% (4,088)

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

- o Annual Performance Report for Fiscal Year 2023
 - Recovered \$665 million in monetary relief for victims of discrimination (nearly 30% increase over FY 2022)
 - Received more than 81,055 new discrimination charges (10% increase*)
 - Filed 143 lawsuits (50% increase over FY2022)
 - Nearly 500 new positions within EEOC – mostly investigators, investigative support assistants, mediators, and attorneys
- o Draft Strategic Enforcement Plan for Fiscal Years 2024-2028
 - Establishes the EEOC’s substantive area priorities
 - First Priority is “Eliminating Barriers in Recruitment and Hiring”
 - Another was preventing and remedying systemic harassment and protecting vulnerable workers
 - On September 29, 2023, EEOC published “Proposed Enforcement Guidance on Harassment in the Workplace” (if finalized, would be first update since 1999)

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

- o Proposed Regulations on PWFA
 - Expansive definition of “pregnancy, childbirth, or related medical conditions”
 - Require employers to consider eliminating one or more essential functions of a job for up to 40 weeks (during and after an individual’s pregnancy)
 - Require employers to engage in the interactive process and expeditious response to an employee’s request for reasonable accommodation
 - Adopts 4 *de facto* reasonable accommodations with presumption of no undue hardship
 - Require partially granting requests for accommodation (e.g., eliminating essential function for several weeks vs. months)
 - Restricts when employers may ask for documentation to support a request for reasonable accommodation and what information they may request

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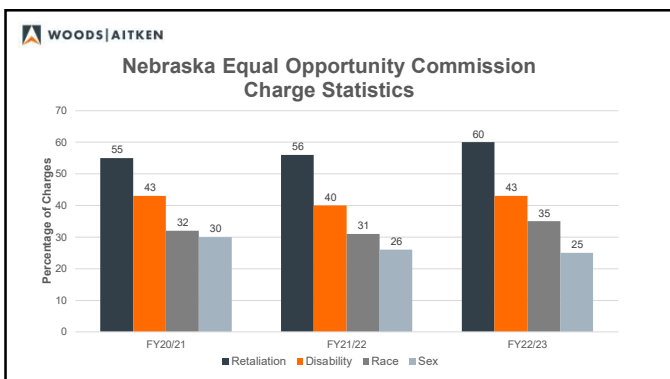
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STATE LAW UPDATES & TRENDS

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- ## STATE LAW UPDATES & TRENDS
- Nebraska Minimum Wage Increase
 - January 1, 2024: \$12.00/hour
 - January 1, 2025: \$13.50/hour
 - Nebraska Supreme Court Cases
 - *Dutcher v. Neb. Dep't of Correctional Services*
 - Nebraska Workers' Compensation Act
 - *Pinnacle Bancorp, Inc. v. Moritz*
 - Social Media Policies & Unemployment Benefits

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LEGAL TRENDS

- o Limitation on Restrictive Covenants
- o Pay Transparency
- o Marijuana
 - 21 states and the District of Columbia have legalized recreational use of marijuana; and
 - 38 states and DC have legalized the medical use of cannabis in some form.
 - How do you handle an employee's use of CBD products?

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WHAT'S NEXT FOR LABOR & EMPLOYMENT

- o DOL Salary Level Threshold Increase for FLSA Exempt Employees (Final)
- o Potential Reclassification of Marijuana under Federal Controlled Substances Act
- o Increased Efforts to Regulate Automated Systems and AI in Employment
- o OSHA Worker Walkaround Designation Process (Final)

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AVOID TURNOVERS: NLRB UPDATES THAT PROMOTE UNIONIZATION

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NLRB REINSTATES "QUICKIE" ELECTION RULES

- 2014 – NLRB implemented "quickie" election rules
- 2019 – NLRB rescinded some of the 2014 changes
 - Provided additional time between filing representation petition and election
- 2020 – Federal Court enjoined NLRB from implementing portions of the 2019 rules

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NLRB REINSTATES "QUICKIE" ELECTION RULES

- 2023 – NLRB reinstated 2014 "quickie" election rules, effective December 26, 2023
- GC Memo 24-02 reinforces shorter timelines and quicker elections under new election rules

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TAKEAWAYS

- o Review workforce and prepare unit analyses on potential appropriate bargaining units
- o Determine unit inclusions and exclusions (supervisors) and who may be able to convey employer’s campaign message
- o Eight calendar days from the filing of petition to hearing

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TAKEAWAYS

- o Prepare and train on expedited timeline to ensure no deadlines are missed or defenses waived
- o New timelines limit employer’s opportunities for lawful campaign speech during pre-election period

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NLRB SETS LANDMINES IN UNION REPRESENTATION PROCESS

Cemex Construction Materials Pacific, LLC – 372 NLRB No. 130 (2023)

- o NLRB overruled prior decision upheld by U.S. Supreme Court which had been the governing precedent for 52 years
- o For 50+ years, if a union demanded recognition based on signed union authorization cards, the employer could deny recognition and the union would file a representation election petition with the NLRB

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CEMEX CONSTRUCTION

- Now a majority of the NLRB declared an employer presented with a request for recognition from a card-majority union must either grant the request or “promptly” file an election petition (RM Petition)
- If the employer fails to do one or the other, its employees will lose their right to vote in a secret ballot election, the employer will be in violation of Section 8(a)(5) of the NLRA, and will be ordered to recognize and bargain with the union

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OUTCOME AS A RESULT OF CEMEX DECISION

- Employers filing election petition within 14 days of union’s claim of majority support
- **2014-2022** – 45 RM Petitions filed annually
- **2024** – 70 RM Petitions
 - Extrapolated to 443 RM petitions – a **884%** increase in annual filings

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TAKEAWAYS

- Early detection of card signing and countering union messaging is critical
- Impact of potential unlawful conduct by managers and supervisors (i.e., a bargaining order) requires front-line supervisors to know what they can say and cannot say during a union election campaign

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SUGGESTIONS TO SUSTAIN UNION-FREE STATUS

Assess your workplace culture

- Will employees feel the need to take a workplace issue to a union?
- Consider how a decision affecting pay, benefits, or job security will be received
- Who will communicate bad news, and how is it communicated?

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SUGGESTIONS TO SUSTAIN UNION-FREE STATUS

- Do you discuss why union-free is important to the organization's commitment to a culture that sustains union-free status?
- Do you know the signals of potential union activity and how to react to them?
- Do employees know you welcome discussing the importance of remaining union-free and why a union is not necessary at the employee's location?

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SUGGESTIONS TO SUSTAIN UNION-FREE STATUS

- Do employees walk through open doors because there is an open mind behind the desk?
- Do you look for opportunities to change your mind based on employee feedback?
- Does leadership – down to front-line supervisors – understand the business case for remaining union-free and how to communicate that to employees?

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MCLAREN MACOMB, 372 NLRB NO. 58 (2023)

NLRB found two routine separation agreement provisions unlawful

- Confidentiality as to the agreement
- Non-Disparagement

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CONFIDENTIALITY AGREEMENT

- The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

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NON-DISCLOSURE/NON-DISPARAGEMENT

- At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

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GENERAL COUNSEL MEMORANDUM GC 23-05

- Expansive interpretation of McLaren Macomb decision
- No examples of lawful confidentiality and non-disparagement provisions
- Does not invalidate severance agreements
- Unlawful provision does not invalidate entire agreement

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GC MEMO (Continued)

- Aggressive enforcement posture
- Employment agreements including offer letters and “communications” containing such provisions covered
- Applies to overbroad agreements with supervisors

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GC MEMO (Continued)

- McLaren is retroactive
- Reinforces “narrowly tailored” standard, but without examples of enforceable provisions
- Overbroad provisions unlawful even if employee requests them

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GC MEMO (Continued)

- Savings clause does not necessarily cure overbroad provisions
- Non-competes, non-solicits, broad releases, and cooperation clauses may be covered

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TAKEAWAYS

- Savings clauses of NLRA Rights
- Seek counsel before enforcing prior agreements
- Determine how to use provisions
- McLaren may be overturned

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NON-COMPETE AGREEMENTS COULD VIOLATE NLRA MEMORANDUM GC 23-08

- Directions to NLRB's Regional Offices to investigate and prosecute unfair labor practice charges against employers
- Applies to private sector union, and non-union workplaces
- Does not apply to managers, supervisors, and independent contractors

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NARROW CIRCUMSTANCES WHERE NON-COMPETE PROVISIONS MAY BE LAWFUL

- o Provisions that clearly restrict only individuals' managerial or ownership interest in a competing business
- o True independent-contractor relationships
- o Provisions protecting employers' proprietary or trade secret information if addended in narrowly tailored agreements
- o Circumstances (not defined) that justify the infringement of employee rights

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TAKEAWAYS

- o Evaluate which employees should be covered with a non-compete provision
- o GC opined that it would be "unlikely" that the employer could provide a sufficient justification for low-wage and middle-wage workers

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Employee Handbook Policies

Purposeful Policymaking That Avoids "Technical Fouls"

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CHANGING THE RULES OF THE GAME

- o Natural tension: Employer & Employee Rights
- o New standard issued in Stericycle, Inc. NLRB decision issued August 2, 2023
- o Decision created a “flip, flop, flip”
 - Lutheran Heritage ➔ Boeing ➔ Stericycle (LH improved)

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STERICYCLE, INC.

- o Administrative Law Judge found the employer violated the Act through work rules addressing:
 - 1) “Personal Conduct”
 - 2) “Conflicts of Interest”
 - 3) “Confidentiality of Harassment Complaints”

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PERSONAL CONDUCT POLICY

Personal Conduct Policy

In order to protect everyone’s rights and safety, it is the Company’s policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.

- Possession, consumption, distribution or sale of alcohol, drugs or illegal substances while on premises, or reporting to work under the influence of the above mentioned items.
- Carrying or possessing firearms or weapons of any kind on the Company’s property or while engaged in Company assignments.
- Theft.
- Pilfering of waste.
- Use of profanity or inappropriate language while on Stericycle premises whether on duty or not.
- Gambling on Stericycle premises.
- Acts of violence.
- Engaging in behavior which is harmful to Stericycle’s reputation.
- Falsifying any Stericycle record or report, including but not limited to an application for employment, a time record, a customer record, manifest, invoices, receiving records, etc.
- Willfully defacing, damaging, or unauthorized use of Company property or another team member’s property.
- Sleeping on the job.
- Continued or excessive absenteeism or tardiness.
- Violation of safety and/or operating rules.
- Smoking or “Vaping” in “No Smoking” areas.
- Refusing to follow the directions of a supervisor or otherwise being insubordinate.
- Violation of the Sexual Harassment policy.
- Failure to punch/swipe in and out when appropriate or punching in/out for other team members.

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CONFLICTS OF INTEREST POLICY

Conflicts of Interest

Stericycle will not retain a team member who directly or indirectly engages in the following:

- An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.
- An activity in which a team member obtains financial gain due to his/her association with the Company.
- An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.

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CONFIDENTIALITY OF HARASSMENT COMPLAINTS

Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.

What action should you take if you feel you have been a victim of harassment or retaliation?

If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:

1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and
 2. Report the incident and the name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [Phone Number]. The Help Line accepts anonymous complaints of any kind.
- All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

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STERICYCLE, INC. 372 NLRB NO. 113 (2023)

- o Board sought briefs from the parties and interested amici to consider whether the Board should adopt a new legal standard for facially-neutral work rules
- o August 2, 2023 – Board decision (1 Republican member dissenting – 2nd Republican position vacant since December 2022)

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NEW RULES: WHO MAKES THE FIRST PLAY?

- General Counsel has the initial burden to prove the workplace rule is presumptively unlawful.
- If the General Counsel is successful, the employer may rebut the presumption by proving:
 - rule advances a legitimate and substantial business interest; AND
 - employer unable to advance that interest without a more narrowly tailored rule.
- If the employer falls short, the workplace rule is unlawful.

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CRITERIA FOR DETERMINATION:

- NLRB’s General Counsel will interpret the employer’s workplace rule from the perspective of:
 - An economically dependent employee
 - Who is a layperson, not a lawyer
 - Who contemplates engaging in Section 7 activity

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WHAT IS ECONOMICALLY DEPENDENT EMPLOYEE?

- Based on Supreme Court Case *NLRB v Gissel Packing Co.* 395 U.S. 575 (1969)
- Case Context: employer statements to employees prior to a union election
- Guidance: The Board must account for the employee’s “economic dependence” on their employers and the tendency of employees “to pick up intended implications of the employee’s speech that may be more readily dismissed by a more disinterested ear.” *Id.*

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STERICYCLE STANDARD

New Standard: A workplace rule should be interpreted from the perspective of:
 A reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in.

↓

General Counsel must prove whether the employee **could** reasonably interpret the rule to restrict or prohibit Section 7 activity.

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COULD?!?!?

- o Yes, could.
- o Even if the rule could also be interpreted *not* to restrict Section 7 rights.
- o Even if the employer did not intend to restrict Section 7 rights.

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STERICYCLE – PERSONAL CONDUCT

The “personal conduct” rule stated:
 In order to protect everyone’s rights and safety, it is the Company’s policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations.

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STERICYCLE – PERSONAL CONDUCT (Cont.)

Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however, this list is not all-inclusive . . .

Engaging in behavior which is harmful to Stericycle's reputation . . .

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STERICYCLE – CONFLICT OF INTEREST

The “conflicts of interest” rule provides in relevant part:

Stericycle will not retain a team member who directly or indirectly engages in the following:

- An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management.

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STERICYCLE – CONFIDENTIALITY POLICY

The “confidentiality of harassment complaints” rule provides in relevant part:

All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

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TAKEAWAYS:
DON'T COMMIT A TECHNICAL FOUL

- Review your policies for possible Section 7 implications
- Policies ripe for consideration include:
 - Confidentiality policies
 - Non-disparagement policies
 - Social media policies
 - Policies surrounding an employee's ability to video or audio record in the workplace

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Joint Employer Rule:
How many are on our team?

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JOINT EMPLOYER RULE – A QUICK NOD



The NLRB issued a Final Rule on Joint-Employer Status on October 26, 2023.



New Rule States: Two or more employers are joint employers if they share or codetermine one or more of the employees' essential terms and conditions of employment.



The new rule was stayed in a ruling issued on March 8, 2024, by a U.S. District Court in Texas in the case of *Chamber of Commerce of the United States of America v NLRB*. The 2020 joint employer rule remains in effect.

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ESSENTIAL TERMS AND CONDITIONS OF EMPLOYMENT:

- Wages, benefits, and other compensation
- Hours of work and scheduling
- The assignment of duties to be performed
- The supervision of the performance of duties
- Work rules and directions governing the manner, means, and methods of the performance of duties and grounds for discipline
- The tenure of employment, including hiring and discharge
- Working conditions related to the safety and health of employees

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CONCERNS WITH THE NEW RULE

- o Overly broad – goes beyond the common law
- o Upends years of precedent limiting joint employers to relationships of actual and substantial control
- o Abandons meaningful collective bargaining principles
- o Replaces a clear standard with an arbitrary, capricious, and chaotic standard. It's confusing!

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Updated NLRB Independent Contractor Rule

Are you sure we're not on the same team?

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**UPDATED NLRB
INDEPENDENT CONTRACTOR RULE**

- NLRB: The Board issued a decision in *The Atlanta Opera House, Inc.* 372 NLRB 95 (June 13, 2023) reinstating the Board’s standard set forth in *FedEx Home Delivery*, 361 NLRB 610 (2014). Also known as *FedEx II*.
- Employee friendly
- Pro-union

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NLRB PERSPECTIVE: INDEPENDENT CONTRACTOR

- Moving forward the NLRB will:
 - Evaluate entrepreneurial opportunity – whether the work is part of an independent business
 - Give weight to:
 - Exercised or seized entrepreneurial opportunities (specifically actual opportunities)
 - Constraints imposed by a company on the worker’s ability to pursue an entrepreneurial opportunity; and
 - Disregard unexercised or unseized entrepreneurial opportunities deeming them simply theoretical opportunities

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ENTREPRENEURIAL OPPORTUNITY

- The NLRB considers “entrepreneurial opportunity” using the following principles for evaluation:
 - All common law factors must be assessed and weighed
 - No one factor is determinative
 - Other relevant factors may be considered
 - The weight to be given a particular factor is fact dependent in each case

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TAKEAWAYS: KNOWING WHO CAN CLAIM TO BE ON YOUR TEAM IS MORE UNCERTAIN

- The new ruling makes it significantly easier to classify independent contractors as employees
- Businesses need to review contracts, policies, and procedures to eliminate or modify language tending to suggest an employer/employee relationship

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BREAK

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Slam Dunk for Employees: Employers Obligations under the Secure 2.0 Act

Julia Vander Weele
March 27, 2024




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Agenda

- **This Year's 401(k)/403(b) "Hot Topic" – SECURE Act 2.0**
 - Background
 - Overview – Optional and Required Changes
 - Amendment Deadlines
- **Key Provisions**
 - Rerouting of matching and profit-sharing contributions
 - Required Minimum Distributions
 - Small Financial Incentives for Participation
 - Hardship Withdrawal Self-Certification
 - Catch-Up Contribution Changes
 - Student Loan Matching Contributions
- **Action Steps and Recommendations**

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How Did We Get Here?

- Bipartisan legislation included as Division T of Consolidated Appropriations Act of 2023, passed December 29, 2022
- Follow up to the Setting Every Community Up for Retirement Enhancement ("SECURE") Act passed December 20, 2019
- Intent is to modernize retirement system, encourage retirement savings, and ease administrative burdens
- Comprehensive retirement reform affecting nearly every employer and plan
- Some provisions effective upon enactment or in 2023
- Both optional and required changes affecting plan documents and administration

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Plan Amendments

- Generally last day of first plan year beginning on/after January 1, 2026
- For collectively bargained plans, last day of first plan year beginning on/after January 1, 2028
- For governmental plans, last day of first plan year beginning on/after January 1, 2029
- Must administer plan in accordance with required and any optional changes adopted in interim
- Earlier coordination with record keepers, guidelines, and communication to participants

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Roth Treatment of Matching and Profit-Sharing Contributions

- Plans may permit participants to elect Roth treatment of employer matching and nonelective contributions
- Contributions are included in participants' gross income
- Must be treated as fully vested at time received

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Roth Treatment of Matching and Profit-Sharing Contributions

- **Compliance Strategies**
 - Optional provision
 - 401(k), 403(b), and governmental 457(b) plans
 - Effective immediately upon enactment (*i.e.*, now)
 - Record keepers may not be ready to implement
 - Plan amendments and notices (if adopted)
 - Payroll withholding and income tax treatment of contributions unclear


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Required Minimum Distribution Rules


- A plethora of RMD changes
- Most are required, with varying effective dates
- These changes are largely revenue-negative for the government, and are offset by Roth treatment of certain catch-up contributions

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Required Minimum Distribution Rules


- **Increase in Required Beginning Date from Age 72 to 75**
 - SECURE Act (1.0) increased age from 70½ to 72
 - Further, phased increase to age 75 by 2033
 - Age 73 for participants who turn 72 after 12/31/2022 and 73 before 1/1/2033
 - Age 75 for participants who turn 74 after 12/31/2032
 - Effective for distributions after 12/31/2022, for participants attaining age 72 after that date
 - Required change

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Required Minimum Distribution Rules

- **Roth Account RMD Rules**
 - Aligns RMD rules for Roth accounts in DC plans with Roth IRA rules
 - Roth accounts in employer plans no longer subject to predeath RMD rules
 - But plans must still pay predeath RMDs from Roth accounts for tax years prior to effective date (i.e., 2023 RMD due April 1, 2024)
 - Required change
 - Effective for tax years beginning on/after 1/1/2024

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Required Minimum Distribution Rules

- **Surviving Spouse RMD Election**
 - Allows surviving spouse to elect to be treated as deceased employee for RMDs
 - Required change
 - Effective for calendar years on/after 1/1/2024
- **Reduction in Excise Tax for RMD Failures**
 - Reduces excise tax for failure to take RMD from 50% to 25%
 - Tax further reduced to 10% if failure fixed during specified window
 - Effective immediately

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Required Minimum Distribution Rules

- **Compliance Strategies**
 - Changes generally mandatory
 - Affect DC and DB plans
 - Record keepers will administer, but fiduciaries should verify RK awareness and monitor compliance
 - Notices and forms must be updated (e.g., Special Tax Notice, rollover forms) long before amendment deadline

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Small Financial Incentives for Participation


- Allows plan sponsors to give *de minimis* financial incentives (e.g., gift cards) to employees as incentive for making contributions
 - “De minimis” is not defined
 - Cannot be funded with plan assets
- 401(k) and 403(b) plans
- Exception to Tax Code’s contingent benefit rule

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Small Financial Incentives for Participation


- **Compliance Strategies**
 - Optional provision
 - Effective immediately
 - Financial incentives themselves are probably taxable income for employees
 - Employers responsible for tax treatment and reporting

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Hardship Withdrawal Self-Certification

- Plans may rely on participant self-certification regarding amount required to satisfy need and absence of alternative means to satisfy need
- Adds to current self-certification of existence of hardship
- 401(k), 403(b), and 457(b) plans (unforeseeable emergency)
- Self-certification not allowed if administrator has contrary actual knowledge

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Hardship Withdrawal Self-Certification


- **Compliance Strategies**
 - Optional provision
 - Effective immediately
 - Record keepers likely to encourage adoption
 - Note need for participant notices of change to self-certification

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Limited Notices to Unenrolled Employees


- Employers no longer required to issue ERISA and Code notices to unenrolled participants
 - “Unenrolled” means employee is not participating and has no account balance in plan
- Must still provide annual notice of participant’s eligibility and identify applicable deadlines
- Must still provide any document requested by participant

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Limited Notices to Unenrolled Employees


- **Compliance Strategies**
 - Optional provision
 - Effective for plan years beginning on/after January 1, 2023
 - Defined contribution plans
 - Should ease burden and cost on employers
 - Previously, eligible non-participating employees entitled to same plan communications as active participants

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Catch-Up Contribution Changes


- **Roth-Only Catch-Ups for High Earners**
 - Catch-up contributions must be characterized as Roth (*i.e.*, after-tax) for highly paid participants
 - Affects participants whose prior-year compensation with the sponsor exceeded \$145,000 (indexed after 2024)
 - Other participants must be given option to make Roth catch-ups if any participant is limited to Roth catch-ups

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Catch-Up Contribution Changes


- **Roth-Only Catch-Ups for High Earners**
 - Compliance Strategies
 - Required provision
 - Originally effective for tax years beginning on/after January 1, 2024, but Notice 2023-62 provides two-year transition period to update systems
 - 401(k), 403(b), governmental 457(b) plans
 - Plans that do not currently offer Roth contributions likely will need to add that option/source in order to permit catch-up contributions, if any participant will exceed the compensation threshold
 - Notices to affected employees will be critical

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Catch-Up Contribution Changes


- **Higher Catch-Up Limits for Participants Age 60+**
 - Current: Participants age 50+ . . . \$7,500
 - 2025: Participants age 60-63 . . . Greater of:
 - \$10,000, or
 - 150% of 2024 catch-up limit for others
 - Both amounts will be indexed after 2025
 - Different amounts apply to SIMPLE plans

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Catch-Up Contribution Changes

- **Higher Catch-Up Limits for Participants Age 60+**
 - Compliance Strategies
 - Optional provision
 - But participants are likely to demand it
 - Effective for tax years beginning on/after 1/1/2025

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Involuntary Cash-Out Limit

- Cash-out limit may be increased from \$5,000 to \$7,000 for defined contribution or defined benefit plans
- Plans may involuntarily cash out former participants whose plan account balance is at least \$1,000 and no more than \$7,000
- Automatic rollover to IRA permitted

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Involuntary Cash-Out Limit

- **Compliance Strategies**
 - Optional provision
 - Applicable to defined benefit and defined contribution plans
 - Effective for distributions made on/after January 1, 2024
 - Administrators must issue updated notices *prior to cash-out* at higher amount
 - Important to administer plan and timely adopt conforming amendment to avoid cut-back violation

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Enhanced In-Service Withdrawal Options

- Adding in-service and emergency withdrawal options seen as key to increasing participation and savings rates
- SECURE 2.0 expanded ability to access DC accounts for:
 - Terminal illnesses (in-service withdrawal without 10% early distribution penalty)
 - Federally declared disasters (in-service withdrawal up to \$22,000, no 10% penalty)
 - Domestic abuse (in-service withdrawals up to \$10,000 or 50% of vested balance, no 10% penalty)
 - Long-term care (in-service withdrawals up to \$2,500, no 10% penalty)
 - Emergency expenses (in-service withdrawals up to \$1,000, no 10% penalty)
 - In-plan emergency savings accounts
- Must modify Special Tax Notice

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Enhanced In-Service Withdrawal Options

- **Terminal Illness Withdrawals**
 - SECURE 2.0 eliminates 10% penalty for distributions to terminally ill participants
 - Participant must furnish "sufficient evidence" of terminal illness to administrator
 - Physician must certify participant has condition reasonably expected to result in death within 84 months
 - Statute does not limit amount of withdrawal or number of distributions
 - Distributions may be repaid within 3 years
 - Optional
 - Effective for distributions after December 29, 2022 (i.e., now)

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Enhanced In-Service Withdrawal Options

- **Disaster Relief Distributions**
 - Available to participants affected by federally declared disasters
 - Distributions up to \$22,000 per disaster, with no 10% penalty
 - Option to repay within 3 years
 - Optional provision
 - Effective for disasters declared on/after January 26, 2021

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Enhanced In-Service Withdrawal Options


- **Domestic Abuse Victim Withdrawals**
 - Option available for plans that are not subject to QJSA rules
 - Victims of domestic abuse by spouse or domestic partner eligible
 - Distributions cannot exceed lesser of \$10,000 (indexed) or 50% of vested benefit
 - Administrator can rely on participant's self-certification of eligibility
 - No 10% penalty
 - Participants have option to repay within 3 years
 - Effective for distributions made after December 31, 2023

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Enhanced In-Service Withdrawal Options


- **Long-Term Care Distributions**
 - Option to allow in-service withdrawal under DC plan for certain long-term care premium payments
 - Up to \$2,500 per year (or 10% of vested account, if less)
 - No 10% penalty
 - Effective for plan years beginning on/after January 1, 2026

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Enhanced In-Service Withdrawal Options


- **Emergency Expenses**
 - Allows in-service withdrawals for personal/family emergency expenses that are unforeseeable or create immediate financial need
 - Optional
 - Cannot exceed \$1,000
 - Limited to one distribution per calendar year
 - 10% penalty does not apply
 - Participant may self-certify eligibility
 - Participant may repay within 3 years
 - Additional emergency distributions prohibited during 3-year repayment period
 - Effective for distributions after December 31, 2023

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Enhanced In-Service Withdrawal Options

- **In-Plan Emergency Savings Account Distributions**
 - Optional benefit for non-HCEs
 - Independent of penalty-free emergency withdrawal provision
 - Employee contributions only (Roth basis)
 - Auto-enrollment allowed, up to 3% of pay
 - Account cannot exceed \$2,500 (indexed) or lower limit set by sponsor
 - Contributions must be held in cash in interest-bearing deposit or similar account
 - Contributions treated as elective deferrals for matching purposes and contribution limits
 - Plan may impose restrictions to avoid abuse by participants to get match (i.e., round-trip limits)
 - Participants may take at least one withdrawal per month (no 10% penalty)
 - Effective for plan years beginning on/after January 1, 2024

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Student Loan Matching Contributions

- Employers may treat "qualified student loan payments" as elective deferrals for matching contribution purposes
- Exception to Code's contingent benefit rule
- Long-sought tax-favored incentive for employees with student loan debt to save for retirement through employer-sponsored plans
- Previous IRS guidance (Abbott Labs PLR) was limited and unworkable

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Student Loan Matching Contributions

- **Restrictions:**
 - Student loan debt must be for higher education expenses of employee, spouse, or dependent
 - Participant must certify loan payments at least annually
 - Match rate, eligibility, and vesting must be same as match on elective deferrals
 - Plan may apply ADP test separately to employees who receive student loan match
 - Loan repayments count towards annual deferral limit under Code § 402(g) but not to annual additions limit under § 415(c)

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Student Loan Matching Contributions

- **Compliance Strategies**
 - Optional provision
 - 401(k), 403(b), governmental 457(b), and SIMPLE plans
 - Effective for plan years beginning on/after January 1, 2024
 - Allows contributions to be treated as matching, and not nonelective
 - Treasury will issue regulations and model plan amendments
 - Student loan matching contributions may be made at different frequency than regular match, but must be made at least annually
 - Sponsors may establish procedures for participants to claim the match

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Action Steps for Employers


- Understand SECURE 2.0 and the options it makes available
- Be prepared to react to record keeper push-outs
- Verify that record keepers are implementing currently required changes (RMDs, QBAD repayments, recovery of overpayments)
- Adopt optional provisions that benefit your workforce

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Action Steps for Employers


- Coordinate elections and administrative practices with record keepers
 - Document election and implementation of optional provisions
 - System setup
 - Participant touchpoints (e.g., paperwork, forms, websites, and communications)
 - Notices (i.e., SPDs and Special Tax Notice)
- Watch for additional guidance
- Adopt plan amendments

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SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Reduction in Excise Tax for RMD Failures	N/A	Immediate
Small Incentives for Participation	Optional	Immediate
457(b) 1 st -Day Rule	Optional	Immediate
Qualified Birth/Adoption Repayment	Optional	Immediate

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SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Terminal Illness W/Ds	Optional	Immediate
Hardship Self-Certification	Optional	Immediate
Federal Disaster Distributions	Optional	Immediate
Roth Treatment of Match or Non-Elective Contributions	Optional	Immediate

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SECURE 2.0 Summary

SECURE 2.0 Provision	Required/Optional	Effective Date
Recovery of Overpayments	Required	Immediate
EPCRS Expansion	N/A	Immediate
Increased RMD Age	Required	Plan Years On/After 1/1/23
Notices to Unenrolled Ees	Optional	Plan Years On/After 1/1/23
403(b) MEPs	Optional	Plan Years On/After 1/1/23

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SECURE 2.0 Summary

SECURE 2.0 Provision	Required/Optional	Effective Date
Safe Harbor Correction for Elective Deferral Errors	Optional	Plan Years On/After 1/1/24
Student Loan Match	Optional	Plan Years On/After 1/1/24
Catch-Ups Treated as Roth for High Earners	Required	Plan Years On/After 1/1/24 (transition period until 1/1/26)
In-Service W/D and Emergency Savings A/Cs	Optional	Plan Years On/After 1/1/24

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SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Cash-Out Limit Increase	Optional	Plan Years On/After 1/1/24
Plan Amendments to Increase Benefits	Optional	Plan Years On/After 1/1/24
Surviving Spouse RMD Election	Required	Plan Years On/After 1/1/24
403(b) Hardship W/Ds	Optional	Plan Years On/After 1/1/24

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SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Roth RMD Rules	Required	Plan Years On/After 1/1/24
Mandatory Auto-Enrollment for New Plans	Required	Plan Years On/After 1/1/25
Higher Catch-Up Limit	Optional	Plan Years On/After 1/1/25
Long-Term Part-Time Eee Eligibility	Required	Plan Years On/After 1/1/25

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SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Long-Term Care Distributions	Optional	Plan Years On/After 1/1/26
Paper Statements	Required	Plan Years On/After 1/1/26

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For Help . . .



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FULL COURT PRESS

ARE YOU PREPARED FOR EMPLOYMENT-BASED INSPECTIONS?

Erin L. Ebeler
 Woods Aitken LLP

March 27, 2024

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THAT'S A REALLY BIG TOPIC, ERIN.



You're Not Wrong. But...

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COMMONALITIES

Key Factors for Successful Resolution: Know Your Game Plan

- Quick Reaction Time is Essential
- Established Policies/Protocols
- Employees Who Can Identify, Understand, and Follow Policies
- Documentation
- Right People Involved from the Beginning

Key Risks During Process: Penalties and Technical Fouls Await

- Lack of Training/Policies to Guide Response
- Government Investigators are at the Door
- Employees

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UNIVERSAL STEP 1: PLAN AHEAD

- **Establish Protocols for When:**
 - OSHA arrives at your jobsite; or
 - Employee reports an issue of discrimination or harassment.
 - Etc.
- **Train Your Managers on the Policies:**
 - Nerves (and other emotions) are real.
 - People may not remember everything in the heat of the moment.



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UNIVERSAL STEP 2: DON'T PANIC

- Training minimizes panic.
- Emotions are transferrable.
 - If the employees involved are nervous/defensive, they make the people around them nervous/defensive.
- Set the right tone.

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OSHA

NEXT STEPS

SITUATION: OSHA ARRIVES UNANNOUNCED AT A JOBSITE.

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OSHA STEP 3: OBSERVE

- Note what OSHA is observing.
- Take pictures/video/measurements of what OSHA is observing.
 - Date Stamped
 - Scale / Measurements
 - Location Clearly Indicated

You may not have an opportunity to review OSHA's evidence until a hearing (no joke).

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OSHA STEP 4: IMMEDIATE ACTION STEPS

- If there's a known/observable safety issue, STOP the activity or IMMEDIATELY CORRECT the issue.
- Note OSHA's location.
 - If OSHA is on public property, then there may not be a need to engage.
 - If OSHA has entered private property, then stop them just as you would anyone else.

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OSHA STEP 4: IMMEDIATE ACTION STEPS

- o Contact designated management to inform them of OSHA's presence, but...
- o ...keep OSHA under observation **at all times**.
 - Do not go back to your office or job site trailer to make the notification.
 - Send someone else. Call, text, or email from phone.
- o **REMEMBER:** Anything you say can and will be used against you in a Court of Law (or the OSHA administrative law proceeding).
 - Avoid cursing.
 - Avoid calling out problematic conditions in writing.
 - Don't angrily blame a potential whistleblower.

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OSHA STEP 5: BE POLITE, BUT DO NOT CONSENT (AT FIRST)

- o If OSHA moves to enter the jobsite, the manager in charge should stop the investigator.
 - Greet them politely, and be respectful.
- Escort the person to a location to talk. Keys to consider:
 - Privacy
 - Limit OSHA's view of ongoing work
 - Limits OSHA's initial access to property/people

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OSHA STEP 5: BE POLITE, BUT DO NOT CONSENT (AT LEAST AT FIRST)

- o Absent the advice of legal counsel or upper management trained in safety-related matters:
 - Do NOT sign anything.
 - Do NOT consent to any search or inspection.
 - o Ask if they have a warrant or notice of inspection.
 - If yes, ask for a copy.
 - Send copy of warrant or inspection notice to designated person or company attorney.*
- * If you learn they have a warrant, please call an attorney ASAP.*

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OSHA STEP 6: CONTROL SITE AND SCOPE

- o If OSHA has a warrant, that will likely set the scope of the inspection. Hold them to it.
- o If there is no warrant, define the scope of the inspection during the Opening Conference.
- o This can get complicated quickly in a **multi-employer jobsite**.
 - Multiple investigations may be going on at once.
 - Cooperation is essential in multi-employer situations.
 - The blame game between project participants is not going to helpful at this moment.

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OSHA STEP 6: CONTROL SITE AND SCOPE

- o If scope is agreed to, an employer may choose to grant access after ensuring:
 - Designated employer's representative has been contacted; &
 - Appropriate people (including attorneys if warranted) are on site.
- o **Key Issue:** Who has the right to consent on a multi-employer jobsite?
 - OSHA FOM: "On multi-employer worksites, valid consent can be granted by the owner, or another employer with employees at the worksite, for site entry."
- o **Exception:** Plain View Hazards may expand scope of inspection.

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OSHA STEP 7: PARTICIPATE IN INSPECTION

- o **Stay involved.** OSHA should generally not be permitted to explore the jobsite alone.
 - **Exception:** Interviews of non-management employees. An employer will not be permitted to participate in those.
- o **Who.** Identify ahead of time who will participate on behalf of employer and clarify who is responsible for what.
 - Pros/Cons of senior level managers
 - Attorneys can be very useful here

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OSHA STEP 7: PARTICIPATE IN INSPECTION

- **CAUTION: Employees' Participation in OSHA Inspections / Investigations.**
 - Employers can **NOT**:
 - Interfere with employee participation in OSHA inspections or investigations. Don't even create the impression.
 - Participate in non-management employee meetings with OSHA reps (even if requested by the employee).

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OSHA STEP 7: PARTICIPATE IN INSPECTION

- **CAUTION: Employees' Participation in OSHA Inspections / Investigations.**
 - Employers **Can**:
 - Cease operations while OSHA is onsite.
 - Have legal counsel present at interviews of management personnel. (Be prepared for a fight on who's a manager.)
 - Truthfully prepare employees for a discussion with OSHA.*

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OSHA STEP 7: PARTICIPATE IN INSPECTION

- **Correcting Hazards During Inspection: Be Careful**
 - Citations **may** not be issued if correction is made, additional abatement certification **may** not be required, and/or penalties **may** be reduced...**but be careful** you've not admitted it's a violation.
 - Clear Violation: Correct it, and move on. Best you can do.
 - Everything Else: Get an agreement during the Opening Conference about how corrections will be viewed.
 - Document.

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OSHA STEP 8: PREPARE SITE (IF POSSIBLE)

- o **CAUTION: Don't modify the scene of an accident or other locations that OSHA has said it plans to inspect.**
- o Employers Can:
 - Walk the path the OSHA investigator is likely to walk, if known.
 - Identify and correct any hazards not specifically targeted for inspection.
 - Decide the "best" route ahead of time.
 - Shut down work in the area where the OSHA investigator is likely to be present.
 - Dismantle problematic equipment or scaffolding or red tag it if it can't be removed.
 - Ensure paperwork (MSDS binder & OSHA 300 logs) is up to date.

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OSHA STEP 9: FOLLOW-THROUGH

- o Take notes during the Closing Conference.
 - Write down the regulations cited and the conditions identified by OSHA.
 - Note any document or information requests.
- o Clarify who OSHA is to communicate with post-inspection.
- o Timely provide the information requested.
 - No privileged documents. (e.g., Attorney-client communications.)
 - Ensure a proper basis for request exists that is tied to proper scope.
- o Act early on necessary abatement (most cases). It shows good faith.
- o If a citation is received, act quickly.
 - 15 working day window to have informal conference.
 - Must submit a notice of contest before the expiration of that time.

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OSHA STEP 10: INVESTIGATE

- o Consider getting legal counsel involved early.
 - Attorney-client privilege isn't a shield of facts.
 - Attorneys can help ensure a proper process and that the company can demonstrate good faith.
- o Document, document, document (e.g., pics, videos, measurements, etc.)
- o Identify and interview witnesses
 - Notes v. Sworn Statements
- o Preserve evidence
- o Prepare Investigation Report (OSHA Form: https://www.osha.gov/sites/default/files/InclnvGuide4Empl_Dec2015.pdf)
 - Cause(s) of incident
 - Corrective actions
- o Follow Up to Confirm Corrective Actions are Continuing to be Taken
 - Document that you did it and what the findings were.

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OSHA STEP 11: DO NOT RETALIATE

- o Do **not** make a manageable situation worse by retaliating against someone...
 - believed to have made a complaint to OSHA; or
 - who reports safety concerns to your company.
- o Do **not** "blow off steam," "say something in anger you didn't mean," etc....those are the types of comments that demonstrate intent to retaliate down the road.
- o **Do** continue to hold people accountable for legitimate, evenly-applied performance expectations.

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INVESTIGATING EMPLOYEE COMPLAINTS

DISCRIMINATION, HARASSMENT, AND MORE

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LEGAL STANDARDS AND LIABILITY

- o **General Requirements:**
 - Policies against Prohibited Conduct
 - Complaint Procedures
 - Regular Training of Supervisors and Employees
 - **Good Faith Investigation that is Objectively Reasonable**
 - Appropriate Remedial Action
- o **Impact of Failure to Meet these Requirements:**
 - Liability for Claim
 - Preclusion from Asserting Certain Affirmative Defenses
 - Employee Disengagement and Turnover

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LEGAL STANDARDS AND LIABILITY

- Good Faith & Objective Reasonableness in Investigation
 - Keys:
 - Competent Investigator
 - Prompt Action
 - Objective Process
 - Good Documentation
 - “Cat’s Paw” Theory

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INITIATING AN INVESTIGATION

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Universal Step 1

PLAN AHEAD: ESTABLISH A COMPLAINT PROCESS

- The complaint process should:
 - Be clear, responsive, and open with multiple reporting channels
 - Welcome questions, concerns, and complaints
 - Encourage employees to report potentially problematic conduct early
 - Treat all those involved with respect
- Employees should know, trust, and utilize the complaint system

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Universal Steps 2
DON'T PANIC

- Be Caring, but be Matter of Fact
And
Encourage Similar Behavior in Others
- Follow Your Protocols and Training

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COMPLAINT STEP 3: ACKNOWLEDGE COMPLAINT

- **Objectively Document the Complaint**
 - Date/time received
 - Information provided
- **Communicate with Complainant**
 - Acknowledge the complaint.
 - Confirm that an investigation will occur.
 - State the company's anti-retaliation policy and that issues should be reported immediately.
 - Provide contact information.

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COMPLAINT STEP 4: PREPARE FOR INVESTIGATION

- Identify Interim Action Steps
 - Is separation of accused / complainant required?
 - Is there ongoing activity that can be witnessed?
- Gather/Preserve and Review Evidence
 - E.g., schedules, payroll records, notes, email, text messages, etc.
 - Video surveillance footage – get it quickly
- Review Company Policies on Misconduct, Discrimination, Harassment, Etc.
- Consider Whether Law Enforcement Should be Notified
- Identify the Investigator(s)

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COMPLAINT STEP 5: ORGANIZE INTERVIEWS

- Structural Considerations: Identify...
 - Allegations to be investigated
 - How you will approach the questions to be asked
 - Witnesses
- Determine How You Will...
 - Ensure investigation integrity
 - Minimize disruption / gossip
 - Document

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COMPLAINT STEP 6: CONDUCT INTERVIEWS

- General Rules Applicable to All Interviews:**
- Be compassionate while minimizing bias and staying neutral.
 - Don't express opinions regarding truthfulness, legal implications, etc.
 - Appreciate that some topics can be difficult to talk about.
 - Do **not** promise confidentiality. Make clear that you intend to handle the process in a manner that respects all parties involved and expect the interviewee to do so as well.
 - **Considerations**
 - Ask open ended questions
 - Ask for clarifications if needed, but watch your tone
 - Request evidence (documents, notes, videos, audio recordings, etc.)
 - Request names of witnesses

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COMPLAINT STEP 7: INTERVIEW THE COMPLAINANT

- Discuss Company policies.
 - Complaint Procedure – If it has not been followed, ask why
 - Review Anti-Retaliation Policy
- Ask the complainant how they would like to see the matter resolved.
- Advise that an investigation will be conducted, but **don't** make promises regarding timing or outcomes.

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COMPLAINT STEP 8: INTERVIEWING THE ACCUSED

- o Explain:
 - The allegations (generally).
 - That a conclusion hasn't been reached on the merits.
 - That the Company is legally obligated to investigate the complaint.
 - That an objective investigation is in everyone's best interests, including the accused.
- o The Company has certain expectations of the accused:
 - Confidentiality (if appropriate)
 - Non-Interference with Investigation
 - No Retaliation

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COMPLAINT STEP 8: INTERVIEWING THE ACCUSED

- o Allow a fair opportunity to respond to the allegations made against the person.
- o If allegations are denied, ask why the Accused thinks the Complainant would make the claims.
- o Ask about current/prior relationship with Complainant.
- o Ask for rebuttal evidence / witnesses.
- o Explain interim actions during investigation (e.g., transfers, leaves, etc.)
- o Review policies/requirement (harassment, discrimination, anti-retaliation, non-interference, etc.)

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COMPLAINT STEP 9: INTERVIEWING WITNESSES

- o Work to minimize collusion, gossip, etc.
 - Move quickly
 - Overlapping interviews
 - Don't provide advance notice of interviewee list
 - Consider if there's a basis to request confidentiality
- o Consider a broader set of questions than just those relating to the specific complaint; only move to specific allegations if necessary to illicit comments.
- o Inquire into relationships and potential witnesses to key events.

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COMPLAINT STEP 10: ANNOUNCING CONCLUSION(S)

- Avoid black-and-white conclusions
 - "I find it more likely than not . . ."
- Determine who needs to know
- Determine if remedial training is appropriate
- Determine what other corrective measures need taken

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COMPLAINT STEP 11: FOLLOW UP

- Check back in with Complainant and key witnesses.
 - Document that you did so.
 - Address any reports of retaliation promptly.
- Confirm remedial training or identified corrective actions were taken.
- Confirm that behaviors have changed and/or not re-occurred.

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OVERARCHING THEMES

- Prepare in Advance
 - Draft policies/protocols that clarify roles / duties
 - Train employees on those policies/protocols
- React Promptly
- Follow your Policies Protocols unless Deviation is Warranted by Circumstances
- Be Objective and Stay Calm
- Document
- Take Appropriate Remedial Action
- Follow Up

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