

2023
Northeast Indiana Human
Resources Association
Annual Conference



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Legal Updates

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Attorney Anthony Stites represents business entities in all facets of their employment matters. On a daily basis, he works with human resource personnel and in-house counsel to prevent or solve problems in the employment arena. Anthony has presented hundreds of supervisor training sessions throughout the U.S. He has extensive experience in strike activity and trial experience defending employers in all areas of employment matters.

Anthony is an AV[®] Preeminent[™] rated attorney based on Martindale-Hubbell's peer review ratings, has been selected for inclusion in *Super Lawyers in America*[®] ten times and has been selected for inclusion since 2016 in the *Best Lawyers*[®] in America publication. *Best Lawyers in America*[®] recognized him "Lawyer of the Year," Fort Wayne in 2017 and 2018 in the area of Employment Law - Management and in 2020 and 2023 in the area of Litigation- Labor and Employment and in 2023 for Labor Law- Management. He has presented over 250 speeches and/or seminars locally and nationwide. He is a member of the Allen County (Indiana) and Ohio Bar associations, as well as the Indiana State Bar Association.

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Pregnant Workers Fairness Act (PFWA)

- Enacted by Congress and expect to take effect on June 27, 2023.
- The Act will require employers with 15 or more employees to provide temporary and reasonable accommodations to employees for conditions related to pregnancy or childbirth.
- The provisions of the PWFA, which are similar to the Americans with Disabilities Act, require only those accommodations that are reasonable, do not impact the essential functions of an employee's job, and do not pose an undue hardship on the employer.
- This law requires employers to engage in the interactive process.

Pregnant Workers Fairness Act

- More than half of all states already have laws requiring employers to accommodate employees with conditions resulting from pregnancy or childbirth.
- Employers conducting business in states that lack such pregnancy-accommodation laws will need to make adjustments to their policies and their approaches to accommodating pregnant employees to ensure compliance.
- Generally, an employer should follow the same process required under the ADA.
- What constitutes a "reasonable accommodation" will vary depending on the circumstances, including the employee's job, the nature of the employer's business, the impact upon co-workers, and the employer's resources.
- However, reasonable accommodations may include a remote-work arrangement, permission to take frequent breaks, or limitations in physical activity.
- The U.S. Equal Employment Opportunity Commission is expected to issue guidance with illustrations of the reasonable accommodations in the near future.

Federal: Speak Out Act

- Signed into law by President Biden.
- In effect as of December 7, 2022
- Prohibits employers from enforcing **pre-dispute** non-disclosure and non-disparagement clauses in cases involving sexual harassment or assault.
- The law defines a non-disclosure clause as:
 - *A provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement.*
- The law defines a non-disparagement clause as:
 - *A provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case.*

Federal: Speak Out Act

- This law is not retroactive.
- It does not impact the enforceability of non-disclosure or non-disparagement agreements in disputes filed prior December 7, 2022.
- The law does not prohibit employers from using such provisions to protect trade secrets or other propriety information.
- This law does not impact non-disclosure or non-disparagement clauses in separation or settlement agreements entered into after allegations of sexual harassment are made. But remember that certain states also limit the use of such provisions in post-dispute agreements.

FTC Begins Process to Eliminate Non-Competes

- President Biden, in July 2021, issued an Executive Order requesting that the Federal Trade Commission (FTC) curtail the unfair use of noncompete clauses. The FTC did not move quickly, but on Jan. 5, 2023, the FTC proposed a new rule that would ban almost all noncompete clauses.
- The proposed rule would make it “an unfair method of competition” for an employer to enter into, attempt to enter into, or maintain, a noncompete clause with an employee.
- Thus, any new noncompete clause would be prohibited, and old clauses would be unenforceable.
- The proposed rule goes well beyond eliminating the use of non-competes. The proposed rule also eliminates even the discussion of non-competes.

FTC Begins Process to Eliminate Non-Competes

- The rule prohibits employers from representing to workers that they are subject to noncompete clauses when there's no good faith basis to believe an enforceable noncompete clause exists.
- The proposed rule requires employers to notify workers through individualized communications that the employee is no longer subject to any noncompete clauses.
- This notice requirement applies to current and former employees. The proposed rule has a carve-out for noncompete clauses executed by individuals selling businesses.
- Three of the four FTC commissioners voted in favor of the proposed rule.

Eliminate Non-Competes: Expect Legal Challenges

- One entity that will likely enter the litigation fray is the US Chamber of Commerce. Senior Vice President of the organization, Sean Heather, said that the proposed rule “is blatantly unlawful”.
- If the proposed rule becomes a final rule, its legality will likely be decided by the U.S. Supreme Court. Previously, the Court’s conservative majority has said that broad legislative language in any enabling statute is not enough to authorize regulations on significant national issues because such language doesn’t establish clear Congressional consent.
- The legislative language used by the FTC to support the proposed rule is Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” This puts into question whether the proposed rule is truly supported by this enabling language given the significant impact across the country this rule would have.

Public Comment on the Non-Compete Ban

- The FTC will not issue a FINAL rule until after the public has had an opportunity to comment. The FTC requested comments on the following issues:
 - Whether franchisees should be covered by the rule.
 - Whether senior executives should be exempted from the rule or subject to a rebuttable presumption rather than a ban.
 - Whether low- and high-wage workers should be treated differently under the rule.

The deadline to submit comments was March 10, 2023.

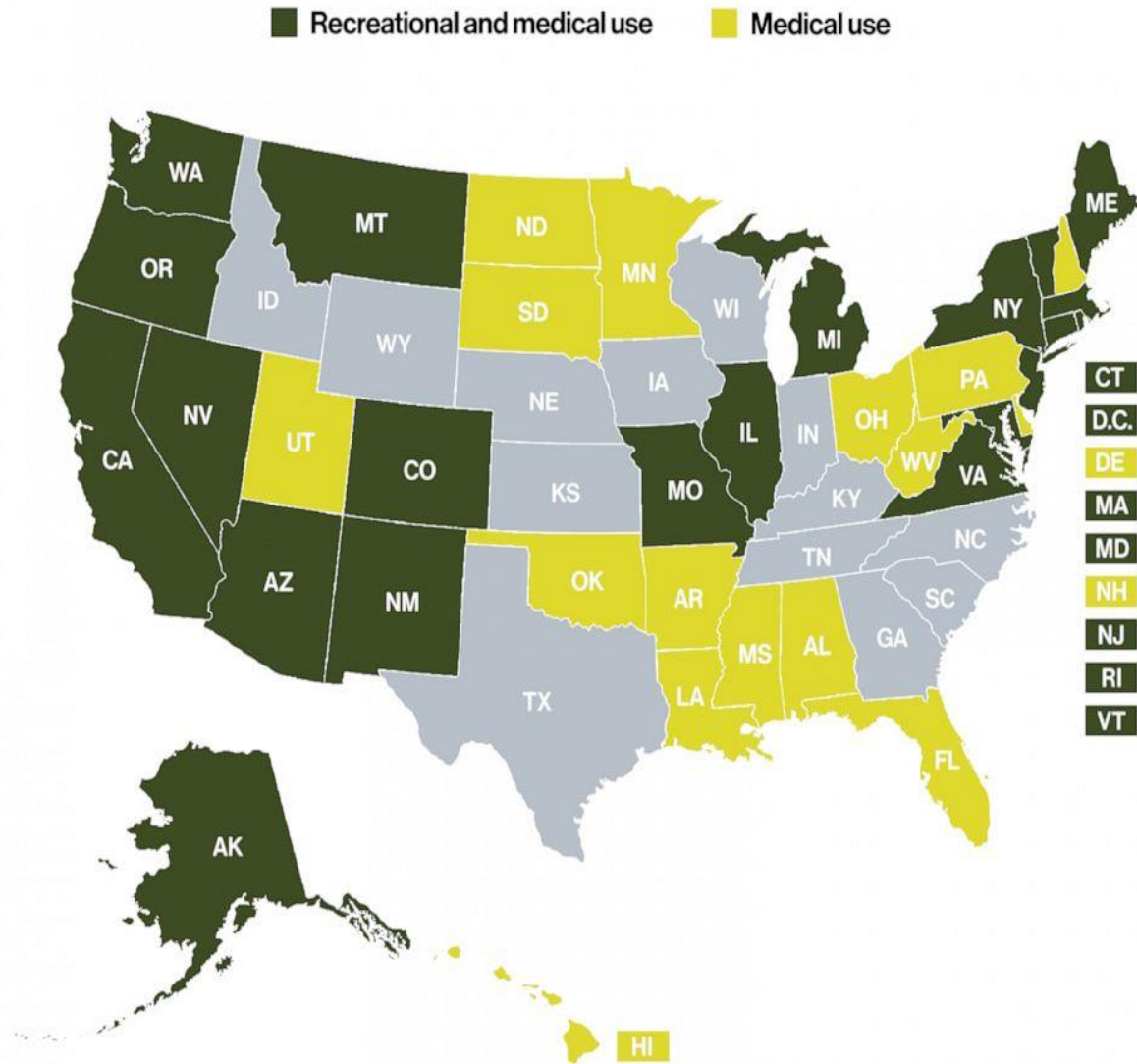
Cannabis Use in the Workplace

- Cannabis use is gaining acceptance, with nine in ten individuals polled supporting the legalization of marijuana, [[Pew Research](#)].
- There are 21 states that have legalized cannabis for recreational purposes and 37 states have legalized cannabis for medical purposes.
- Three states have provided for employee protection from discharge for use of marijuana.
 - Two of the three have however, carved out safety sensitive jobs. Virginia has NOT made such a carve out. Virginia carves out federal contracts and “impairment” at work.
- The primary difficulty for employers is the seemingly conflicting federal laws.

Cannabis Use in the Workplace

- In October 2022, President Joe Biden asked the Secretary of Health and Human Services as well as the U.S. Attorney General to initiate a review as to whether marijuana should continue to be listed as a Schedule I drug under the Controlled Substances Act.
- The Federal Workplace Drug Free Act also requires the absence of marijuana in the workplace of contracts covered by the law.
- This conflicting handling of marijuana in the workplace may be resolved by federal action. However, until that happens you must do your best to balance the federal laws with your local state laws.

Where Marijuana is Legal in the U.S.



SOURCE: STATE LEGISLATURES

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Paid Family Leave Laws

- Paid leave under the Family Medical and Leave Act (FMLA) continues to be a hot topic and a discussion at the federal and state levels. Some states are also redefining who is considered a family member under the law.
- The FMLA covers only immediate family members [children, spouses, and parents] for almost all types of FMLA leave. The lone exception is for FMLA caregiver leave for injured family member while on active duty and in the line of duty which expands to include “next of kin”. Next of kin includes any blood relative.
- Domestic partners, step-children, or grandparents do not fall under the FMLA’s immediate family member definition.
- For 2023:
 - New York, will expand the list of family members to include siblings with a serious health condition. This includes biological, adopted, half, and step-siblings.
 - California has also expanded family leave laws, with employees now having the right to appoint a “designated person” for family medical leave purposes.
- This type of expansion is likely to spread to other states.

Independent Contractors vs. Employees

- On October 11, 2022, the Department of Labor (DOL) proposed a new independent contractor test under the Fair Labor Standards Act (FLSA), which would “[r]estore the multifactor, totality-of-the-circumstances analysis to determine whether a worker is an employee or an independent contractor under the FLSA.”
- The proposed rule would rescind the "Independent Contractor Status Under the Fair Labor Standards Act" ("IC 2021 Rule"), which the DOL issued on January 7, 2021.

Independent Contractors vs. Employees

- The IC 2021 Rule identifies a five-factor inquiry to guide the analysis on worker classification and assigns more weight to certain factors than others.
- Specifically, it designates the nature and degree of control and the worker's opportunity for profit or loss as "core factors."
- This framework deviates from longstanding judicial interpretation of the Fair Labor Standards Act ("FLSA"). Courts interpreting the FLSA have historically used the "economic realities" test when analyzing questions of worker classification, which is much more flexible than the IC 2021 Rule. It allows for the consideration of multiple factors, does not assign more weight to any factor over another, and looks to the totality of the circumstances.

Independent Contractors vs. Employees

- The Proposed IC Rule would, among other things:
 - (a) align the DOL's approach with judicial interpretation of the FLSA and the "economic realities" test based on the "totality of the circumstances", and;
 - (b) rescind the IC 2021 Rule used to decide employee classification.
- The comment period closed on December 13, 2022, and employers should be on the lookout for the DOL's final rule.
- If finalized, the rule will provide more consistent guidance to employers on how to classify their workforce so as to avoid liability and will allow for more flexibility.
- Regardless of the ultimate formulation of the new rule, employers must still comply with state laws that provide a different or more stringent test for worker classification.

Dobbs v. Jackson Women's Health Organization Overturns Roe v. Wade

- The U.S. Supreme Court issued a 5-4 decision in *Dobbs v. Jackson Women's Health Organization* that effectively overturned the landmark cases *Roe v. Wade* and *Planned Parenthood v. Casey* by holding that the U.S. Constitution “does not prohibit the citizens of each State from regulating or prohibiting abortion.”
- As a result, the battle over abortion rights continues on a state-by-state basis, with roughly half of all U.S. states expected to ban or restrict access to abortions, either now or in the future.
- Indiana has enacted certain restrictions on abortions. Such laws create a myriad of challenging legal questions and difficult decisions for employers with self-funded group health plans.

Dobbs v. Jackson Women's Health Organization Overturns Roe v. Wade

- Title VII may protect women from being fired for having an abortion.
- Impact on Pregnancy Discrimination.
- Can you fire an employee who gets into an argument regarding abortion rights?

Health Insurance Changes in the Plans you Offer

- Employers should seek out information from their health insurance providers regarding details of:
 - emergency medical procedures,
 - contraceptive methods,
 - fertility treatments,
 - prescriptions, and;
 - treatment for miscarriages.
- Employers need to know what medical procedures, medicines, or treatments are still covered in all the states that you have employees in.
- Keep in mind that while you may have established a group plan in one state, policies may also be issued in other states, where the insurance vendor is headquartered. This location can affect your benefits and the vendor's intent to change their stance on reproductive health coverage. Further, each state you employ individuals in likely have varying rules on each of these issues.

Do you take a position on abortion?

- Some experts believe that employees want to work for employers with values aligned with theirs. While it may be hard to please all your employees or the communities you serve, keep in mind that if you don't offer an opinion on reproductive healthcare and abortion, your employees may make assumptions.
- SO, whatever position you land on, should be communicated to your current workforce and potential hires.

Some employers are providing a stipend to cover travel expenses.

- If, you elect to do so, draft a policy that considers:
 - Inclusive language.
 - Think about covered reasons (e.g., all medical emergencies or only reproductive health-related travel).
 - Determine under applicable tax laws whether the benefit will be taxable or nontaxable, and consider the implications of each one of those options.
 - Decide if you will make this stipend available every occurrence or specified times a year.
 - Make clear you will keep the information confidential.
 - What documentation, if any, you will be required to be submitted.
 - Whether the benefit will be available to dependents.
 - What will be the distance requirements (e.g., medical necessities beyond a XX-mile radius).

Other considerations

- **Additional legal protections:**
 - ADA,
 - FMLA, and;
 - Title VII.
- **Bereavement leave policy:**
 - Should explore adding miscarriages as a reason to use bereavement leave.
- **Remote/hybrid/in-office policies:**
 - Employees may consider relocating to other states due to any respective state's laws regarding abortions.
- **Indiana has banned most abortions effective September 15, 2022. This includes banning insurance coverage for illegal abortions.**

Speaking of Remote Work

- For the first time ever, U.S. worker productivity has declined for five consecutive quarters. This per the EY Parthenon consulting group.
- The group utilized U.S. Bureau of Labor Statistics data to calculate worker productivity. Some argue that the increase in remote working has adversely impacted worker production.
- However, the report does not reach any definitive conclusion as to the cause of the decline.