

Employment Law Corner

Monthly Report



FOLEY & FOLEY^{PC}
ATTORNEYS AT LAW

September 2023

September Updates

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Employment Law Corner: Fall Back Into Compliance

It's been a hot summer for employment law! Federal agencies, state governments, Congress, and the Supreme Court have all been busy the past few months updating, adjusting, and creating rules for employers and employees. With fall around the corner, September is the perfect time to survey the landscape and check in with some new issues and familiar faces to ensure that your company is protected this winter and beyond. Remember, we have dozens of easy to use, **[fixed fee solutions](#)** to keep you in compliance.

NLRB – The drumbeat of pro-union, pro-employee decisions and rules from the National Labor Relations Board has continued apace throughout the summer of 2023. Highlights include:

- *Cemex Construction Materials Pacific, LLC*, where the Board announced that, if it determines that an employer committed an unfair labor practice during an election, the election will be waived and the NLRB will issue a bargaining order for the union;
- In *American Federation for Children, Inc.*, the Board determined that employee activity could be protected under the NLRA even when employees are advocating on behalf of non-employees; and
- *Atlanta Opera Inc.*, discussed below, under **Misclassification**.

- **BLOCKBUSTER DECISION:** *Stericycle, Inc.*, was the game changer:

- All employer handbook policies are subject to case-by-case review and can be deemed presumptively unlawful if the policy *could* be interpreted to limit an employee's right to protected, concerted activity under the NLRA.
- Under this new standard, a rule is illegally coercive if *any* employee might read it as limiting their NLRA rights, even if another reasonable interpretation of a workplace rule exists. This is a drastic shift in the law that undermines an employer's ability to impose rules in its workplace.
- The long-term effects of *Stericycle* and the NLRB's other actions this summer are still unfolding, but employers should not wait for an NLRB charge before they take proactive steps to review their handbook policies.

Pregnant Workers Fairness Act (PWFA) – The PWFA is a new federal law this summer that protects employees who need reasonable accommodations for known limitations relating to pregnancy, childbirth, or a related medical condition. In effect, the PWFA is a mini-ADA that specifically expands protections to pregnant workers:

- Like the ADA, the PWFA requires covered employers (for the PWFA, employers with 15+ employees) to engage in an interactive discussion with pregnant employees to find a reasonable accommodation for the employee’s needs.
- Unlike the ADA, the pregnancy-related limitation does not need to interfere with a daily life activity to qualify for protection.
- With PWFA regulations coming this winter, employers should be ready to update their policies, develop new forms and train their managers on the new law.

Religious Accommodations – The Supreme Court also got in on the action this summer, using the decision in the case *Groff v. DeJoy* to expand an employee’s right to religious accommodations by raising the bar on when an accommodation is considered an undue hardship for employers. The standard prior to *Groff* was the accommodation need only impose more than a trivial, minimal or de minimis cost on the employer. The Supreme Court now states that a religious accommodation is an undue hardship only if it creates a burden that is “substantial in the overall context” of the business, a higher standard than the old de minimis standard. Employers should take proactive steps to ensure that its decision makers are aware of the new standard for religious accommodation cases and that their policies are updated.

Misclassification – Worker misclassification remains a significant topic at both the federal and the state level. The NLRB weighed in on what separates an employee from an independent contractor in *Atlanta Opera Inc.*, which saw the Board once again redefine the test for independent contractors. In *Atlanta Opera*, the NLRB rolled back the more relaxed, pro-employer test that was announced in 2019’s *SuperShuttle* decision and returned to the traditional multi-factor common law test that requires employers to consider up to twelve factors in determining if a worker is an employee or an independent contractor.

Meanwhile, jurisdictions across the country have enacted heightened protections for independent contractors. Illinois, for example, passed the *Freelance Worker Protection Act*, which, among other things, regulates the payment of certain independent contractors. In addition, the Department of Labor has indicated this summer that a final rule reinstating the “economic realities” test for worker classification under the FLSA is coming by October 2023.

The bottom line: worker classification is, as always, a sensitive area full of pitfalls based on each worker’s responsibilities and their relationship to the employer’s business. Staying up to date with the ever-shifting landscape of who is an employee and who is a contractor, and the associated responsibilities to each group of workers, will continue to be a major challenge for employers, particularly those operating in multiple cities and states.

OSHA – OSHA continues to turn up the heat on employers who are out of step with workplace safety rules. OSHA announced that 2022 saw over 30% more inspections than 2021, and 2023 looks to keep pace. At the end of August,

OSHA proposed a rule that would allow community activists and union representatives to participate in OSHA inspections. Aside from the extra sets of eyes on potential workplace violations and the opportunity for activists to influence an inspection's findings, this could give union organizers an open door to access an employer's premises during business hours and participate in interviews with employees.

The takeaway: Employers should have a playbook ready for how to respond to OSHA inspections and ensure that their workplace safety rules are both in compliance with federal standards and are actually being implemented on the ground.

Looking forward – Going into the fall, employers are under pressure to ensure that their managers are trained on new state and federal laws, handbooks are up to date, workers are properly classified, and they're ready for any inspection or enforcement action that comes their way.

The good news is, we can help! We offer handbook reviews and updates, manager training, employee classification audits and OSHA and FLSA audits to ensure that your company is ready any challenges that come your way this winter and beyond.

Who We Are

We want to **introduce ourselves** to those we have not met:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That's easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **Foley & Foley PC attorneys specializes in Employment and Labor Law in the Public and Private Sectors (foleylawpractice.com)**

Meet Gregory Paal



We are happy that Attorney Gregory Paal has joined our team! Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet a variety of challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints!

For more info, check out his full bio [here!](#)

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