

2024 EXECUTIVE HEALTHCARE LABOR & EMPLOYMENT LAW CONFERENCE




Inside the Beltway – An Update on Federal Legislation and Executive Agency Action Affecting Hospital Employers


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FEBRUARY 29 AND MARCH 1, 2024 | JW MARRIOTT BUCKHEAD | ATLANTA, GA


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1

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Closely Divided Congress




Chuck Schumer (D-NY)
Senate Majority Leader


Senate Balance of Power

<p>Democrats</p> <p>51</p>	<p>Republicans</p> <p>49</p>
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Yellow indicates independents who caucus with Democrats. Bloomberg Government



Mitch McConnell (R-KY)
Senate Minority Leader




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2




3

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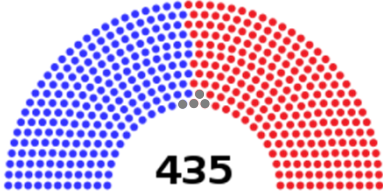


Closely Divided Congress

U.S. HOUSE OF REPRESENTATIVES




Rep. Hakeem Jeffries
(D-NY)
House Minority Leader




435

212 DEMOCRATS | 219 REPUBLICANS

*4 Vacancies



Rep. Mike Johnson
(R-LA)
Speaker of the House



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4

4



New Laws/Nominations?

- Slim House Republican majority and ideological differences between members makes House agenda uncertain
- The Senate - state of the filibuster
 - 60 votes needed to cut off debate (cloture)
 - Rule can be changed by majority vote
 - Potential modification: “talking filibuster” or “selective filibuster”
 - Democratic Senator Joe Manchin (WV) and Independent Kyrsten Sinema (AZ) opposed
- Presidential nominations not subject to the filibuster - majority vote for nominee – Vice President can break ties of Senate votes
 - Use of reconciliation – must get past Byrd Rule – importance of Senate parliamentarian
 - For legislation to proceed under the budget reconciliation process, it must have a “nexus” to the federal budget and not be a major policy change initiative.
 - If the proposed legislation meets those tests, it can be approved on a majority vote.

5



2024 Political Outlook

- The Senate: 34 seats up for election – 22 Democrat, 1 Independent, and 11 Republican
 - 3 incumbent Democrat Senators up for election in Red states – Ohio, Montana, and West Virginia
 - Potential close races in Arizona, Michigan, Pennsylvania, Nevada, and Wisconsin
- The House: Will Republicans be able to hold their slim majority?
- National issues: inflation, immigration, school governance, classroom agenda, government spending, Ukraine, Israel...

6



The Richard Trumka PRO Act

- The PRO Act is not expected to pass the House in this Congress or the Senate because of the filibuster rule.
- All 49 Republican Senators are opposed, and it is questionable whether all 48 Senate Democrats and 3 Independents would support all parts of the legislation
 - Senators Sinema (I-AZ) and Warner (D-VA) have expressed certain concerns about parts of the PRO Act proposal

7



New Anti-arbitration Statutes

- Two significant limitations on Arbitration were passed by the last Congress
 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act
 - Makes predispute arbitration agreements unenforceable in any case related to an allegation of sexual harassment or assault
 - Unclear whether unenforceability would be extended to other claims within a case that involves sexual harassment/assault
 - Two recent district court cases reached opposite conclusions:
 - *Johnson v. Everyrealm, Inc.* 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023), *Yost v. Everyrealm, Inc.* 2023 WL 2224450 (S.D.N.Y. Feb. 24, 2023) – arbitration clause invalidated with respect to entire case
 - *Mera v. SA Hospitality Grp. LLC* 2023 WL 3791712 (S.D.N.Y. Jun 3, 2023) – arbitration clause invalidated only with respect to sexual harassment claim
 - Arbitration clause unenforceable only to extent that case “relates to” to sexual harassment dispute

8



New Anti-arbitration Statutes

- The Speak Out Act
 - The last Congress passed the Speak Out Act, which makes unenforceable any pre dispute nondisclosure and nondisparagement clauses entered into before a sexual assault or harassment dispute arose.
- PUMP Act (29 USC 218d)
 - Requires employers to provide reasonable break times (and space to do so) for nursing employees to express milk up to a year after a child's birth
 - No maximum number of breaks



Employee Rights Act (ERA)

- Senator Tim Scott (R-SC) has reintroduced the Employee Rights Act (S.567). This legislative proposal is a new version of a similar legislative proposal introduced a number of years ago by former Senator Orrin Hatch (R-UT).
- Representative Rick Allen (R-GA) has introduced the same bill in the House (H.R.2700).
- The ERA contains a number of important proposed changes in federal labor law long-sought by employers, including the following:
 - NLRB secret ballot election protection
 - Prohibits card check elections and requires a majority vote of all employees who are part of the voting unit before a union can be certified
 - Political protection
 - Requires unions to receive opt-in permission from each member to use their union dues for purposes other than collective bargaining



Employee Rights Act (ERA)

- Employee privacy protections
 - Gives employees the right to opt-out of having their personal information shared with the union during organizing campaigns
- Employee benefits and advancement
 - Amends the NLRA to allow employers to give merit-based compensation increases to their employees even if these increases are not part of a collective bargaining agreement
- Benefits for gig economy workers
 - Permits employers to offer benefits such as retirement and health benefits without forcing them into employer-employee relationship
- The ERA is a good counter response to the union-oriented PRO Act. The House may pass the ERA in this Congress, but it is unlikely to get the necessary 60 votes in the Senate for passage.

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11

11



Senate Health, Education, Labor and Pension (HELP) Committee

- Chair: Senator Bernie Sanders (I-VT)
- Ranking Republican: Senator Bill Cassidy, M.D. (R-LA)
- Chair Sanders intends to engage in “corporate shaming” and criticize employers that oppose union campaigns and/or accused of an unfair labor practice charge
 - Hearing involving former Starbucks CEO, Howard Schultz
 - Other similar hearings are expected



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12

12

House Education and Workforce Committee

- Chairwoman: Virginia Foxx (R-NC)
- Ranking Minority Member: Bobby Scott (D-VA)
- Chairwoman Foxx is expected to hold a number of NLRB oversight hearings during the current Congress
- Chairwoman Foxx is also expected to be active in holding oversight hearings regarding the U.S. Department of Labor initiatives



Regulatory Corporate Campaign – “All of Government Approach”

- Non-traditional labor and employment Executive Branch departments/agencies now involved in labor and employment matters
- The Federal Trade Commissioner (FTC) and the Department of Justice (DOJ) have been focusing on expanding gig economy worker rights and targeting alleged worker misclassification
 - DOJ and FTC filed amicus briefs in a NLRB independent contract case arguing for the Board to restrict IC status under NLRA and redefine gig workers as employees
 - Push to give gig workers right to organize
 - FTC “policy” statement regarding competition in the workplace issues



Non-Compete Agreements

- President Biden’s Executive Order states non-compete agreements are a “barrier to competition” and includes a directive to the Federal Trade Commission to issue regulations to “limit or ban non-compete agreements.”
- Several states and localities have already banned non-competes, including CA, ND, OK, and DC, while others such as IL, MD, and MA have restrictions on their use for lower income employees
- The FTC has proposed a new rule that would prohibit virtually all types of noncompete clauses for all levels of employees, including executive level employees

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15

15



More All of Government Initiatives

- Pressure on recipients of federal money to undertake certain Biden Administration favored policy initiatives
 - CHIPS Act - U.S. Department of Commerce
 - Childcare requirements for recipients
 - Project labor agreements (PLAs) strongly encouraged for employer recipients of federal funding
- Inflation Reduction Act and infrastructure federal dollars
 - “Labor advisors” in all areas of government – Former NLRB General Counsel Lafe Solomon’s role



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16

16

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U.S. Department of Labor



Secretary of Labor



Director of OFCCP



Doug Parker
Assistant Secretary of OSHA





Jessica Looman
Confirmed by the Senate on October 25, 2023



Seema Nanda
Solicitor of Labor



Julie Su
Deputy Secretary of Labor – Nominated by President Biden to be Secretary of Labor – Currently Serving as Acting Secretary

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17

17

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USDOL - OMLS

- USDOL increased reporting requirements for employer’s use of “persuaders”
 - Should unions be required to file similar reports for use of SALTS?
 - Will the Advice exemption that shields employers from reporting advice received from their attorneys be shielded from reporting requirements?
 - New reporting requirements for employers to report all travel expenses for in-house employees who travel to company locations to discuss union organizing issues
 - This reporting requirement is being challenged in the courts
- New form LM-10 requiring reporting entities to indicate whether they are federal contractors or subcontractors
- Expanding reporting requirements for Item 12
 - Filers must provide “a full explanation identifying the purpose and circumstances of payments, promises or arrangements included in the report”

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18

18



Department of Labor – Regulatory Landscape

- Interest in increased staff hiring – OSHA and Wage and Hour inspection/audits to increase
- Overtime Rule
 - The DOL has issued a new overtime rule to update the salary threshold by which employees are automatically eligible for overtime.
 - Proposed rule, under the Fair Labor Standards Act, increases the minimum salary threshold for overtime eligibility to \$1,059/week or \$55,068/year.
 - Would increase current level of \$35,568/year set by Trump Administration in 2019 and surpass the \$47,476/year threshold that the Obama Administration attempted to set in 2016
 - Would increase total compensation requirements for highly compensated employees to \$143,988/year
 - Includes an automatic “escalator” or update salary threshold every 3 years
 - Proposal currently subject to comments - employer organizations expected to litigate the rule, including particularly the automatic escalator



Department of Labor – Regulatory Landscape

- Independent Contractor Classification
 - The DOL repealed a Trump rule that made it easier for employers to determine the proper classification of workers. A federal district court in Texas reinstated the Trump independent contractor rule. This rule remains in effect at present.
 - The Biden DOL has proposed its own rule
 - It reinstates the traditional economic realities test using 7 factors
 - No factor is weighted more than another and any analysis of IC status will rely on the “totality of the circumstances”
 - The rule explains DOL’s view of each factor, which includes many open-ended statements
 - The DOL proposed rule incorporates the “Integral to the Business” factor, which is essentially Prong B of California’s ABC test
 - Legal challenges pending



Department of Labor – Regulatory Landscape

- Joint Employer Liability
 - The DOL has also repealed a Trump-era rule on joint employer liability, which limited employers' liability to situations in which it exercised direct and continuous control over another employer's employees' terms and conditions of employment
 - A Biden DOL joint employer rule would likely expand liability to companies who only have potential or limited control over another employer's employees' terms and conditions of employments
 - The potential impact of this proposal could be considerable for contractors, franchisees, suppliers, etc.
 - Litigation pending

21



Office of Federal Contract Compliance Programs (OFCCP)

- Pressure on government contractors through LM-10 reporting requirements
- Reporting requirements regarding pay transparency and pay data
- New scheduling letter initiative
 - Proposal would considerably expand information federal contractor would need to provide to OFCCP in audit process, including information regarding independent contractors
- Increased scrutiny of employer affirmative action programs and utilization of attorney-client privilege and employer self-assessment
- Potential challenges to affirmative action program requirements under Executive Order 11246 as a result in the holding in the Harvard/UNC case

22

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National Labor Relations Board (NLRB)



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



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



Gwynne Wilcox (D)
Member
Term Expiration – August 27, 2028





David Prouty (D)
Member
Term Expiration – August 2026




Vacant Republican
Member Seat



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

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23

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The Biden NLRB

- Board has a 3-1 Democratic majority as of December 16, 2022, and a Democratic majority is likely for foreseeable future
- Fifth and Ninth Circuit Court of Appeals recently ruled that Former NLRB General Counsel Peter Robb's termination was lawful
 - Will a change in the political party occupying the White House lead to immediate termination of General Counsel Abruzzo in January 2025?
- Board's budget
 - Where/when are NLRB employees working?
 - Recent Board press release states "in the past two decades, staffing in field offices has shrunk by 50%"
 - Board outreach initiatives
- NLRB Member Gwynne Wilcox was renominated by the President and reconfirmed by the Senate within 14 days
- The need to have vacant Republican seat filled

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24



NLRB Issues to Watch

- Bargaining unit appropriateness – return to the “overwhelming community of interest” test – return of micro and “fractured” units?
- Increased scrutiny of employer workplace rules, regulations, and policies (especially employee handbooks)
- Union access to employer property
- Joint employer liability
- Misclassification issues, including independent contractor status
- Future of mail ballots/electronic voting (which is prohibited by an appropriations rider)



NLRB Issues to Watch

- Restrictions on employer speech in campaign settings
 - Prohibiting “captive audience” speeches – see memorandum of General Counsel Abruzzo indicating an initiative by her to make captive audience speeches unlawful
- Card check union recognition
 - The *Joy Silk* Doctrine and application of the Board’s new *Cemex* case options/requirements
 - The FMCS announced that it is available to conduct card checks if mutually agreed upon by the parties.
- Increased scrutiny of class action waivers in arbitration agreements/mandatory arbitration agreements



NLRB Issues to Watch

- Increased remedies for employer unfair labor practices – a reexamination of the Board’s decision in *Ex-Cello*
 - General Counsel’s theory to potentially recover wages and benefits that workers should have received if the employer had bargained in “good faith”
 - New damage theories for losses regarding mortgage, rent, and car payments, job training, and other “direct and foreseeable” damages
 - Apparently, no such damage recovery for employers – see *United Mine Workers Union* case
- Challenge to employer “surveillance” and “monitoring” mechanisms in the workplace
- Are college athletes covered under the NLRA?
 - See General Counsel’s recent complaint against USC, the PAC 10, and the NCAA
- Employers’ proffer of noncompete agreements to NLRA-covered employees unlawful?

27



Additional NLRB Issues

- GC Abruzzo memo re: strengthening interagency cooperation
 - Outlines the plan to use all regulatory agency resources towards regulation and oversight of companies – corporate regulatory campaign playbook
 - Particular emphasis on retaliation cases
 - Recent memorandum of understanding entered into with Consumer Financial and Protection Bureau
 - BUT
 - Failure to address friction between EEOC’s enforcement of Title VII and NLRB’s protected concerted activity doctrine regarding hostile workplace situations

28

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EEOC



CHARLOTTE A. BURROWS
CHAIR
TERM ENDED JULY 2028



JOCELYN SAMUELS
VICE CHAIR
TERM ENDS JULY 14, 2026



KALPANA KOTAGAL
COMMISSIONER
TERM ENDS JULY 1, 2027





KARLA GILBRIDE
GENERAL COUNSEL
TERMS ENDS OCTOBER 16, 2027



ANDREA LUCAS
COMMISSIONER
TERM ENDS JULY 1, 2025




KEITH SONDERLING
COMMISSIONER
TERM ENDS JULY 1, 2024


29

29

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EEOC Issues to Watch



- New 3-2 Democrat/Republican split at the Commission
 - Employers can expect an activist agenda from the new Democrat majority Commissioners
- Future of wellness rules?
- EEO-1 Component 2 pay data disclosure requirements and National Academy of Science study results
 - SEC also considering issuing Human Capital Metrics (HCM) reporting requirements for employers
- Increased investigation and enforcement efforts
- Pregnant Worker Fairness Act rules are pending before the Commission
 - Length of a reasonable accommodation for pregnancy-related issues and abortion coverage proposed in the pending rule have resulted in a considerable number of comments being filed

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30

30



ESG Issues

- ESG (Environment, Social and Governance) issues are receiving considerable attention, including potential regulations from the SEC.
- A number of shareholder proposals have surfaced in the labor and employment area, including requests for:
 - Employer neutrality in union organizing campaigns
 - Employers to conduct labor relations audits
 - Employers to perform employee safety audits
 - DE&I (Diversity, Equity and Inclusion) proposals
- Shareholder litigation has also surfaced in this area, including challenges to corporations ESG initiatives on the theory that such initiatives penalize shareholders and decrease the value of employer pension plans.
- Considerable congressional oversight and numerous legislative proposals are expected in this Congress.

31



DE&I Issues

- Shareholder proposals calling for labor audits will continue with potential opposition and litigation by shareholders that disapprove of these initiatives.
- Law firms are also a target with Morrison and Foerster, Perkins Coie, and Winston & Strawn, among other firms, being sued regarding their DE&I policies.

32



Composition of the Supreme Court



Justice Sonya Sotomayor, 69



Justice Clarence M. Thomas, 75



Chief Justice John G. Roberts, 69



Justice Ketanji Brown Jackson, Age 53



Justice Samuel A. Alito, Jr., 73



Justice Brett Kavanaugh, 59



Justice Elena Kagan, 63



Justice Neil Gorsuch, 56



Amy Coney Barrett, 51

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33

33



The Importance of the U.S. Supreme Court

- Will the federal courts serve as a “firewall” to Legislative and Executive Branch excesses?
- The Supreme Court’s decision in the OSHA ETS and *West Virginia v. EPA* (“Major Questions” Doctrine) cases would suggest the answer to this question is “yes.”
- Impact of the *Dobbs* decision in the the labor and employment area
- Potential impact of the Supreme Court’s decision in *Glacier Northwest*
 - The Court held the employers can bring tort actions for damages in state court against unions that engage in endangering employer operations and property.
- Potential of the *Chevron* deferral being reversed to agency decision-making doctrine – *Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. U.S. Department of Commerce*

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34

34



The Importance of the U.S. Supreme Court

- Importance of the *Harvard/UNC-Chapel Hill* college admissions decision and potential impact on labor and employment issues, including affirmative action plans
- Internal ethics rules?
- Pending *Starbucks* NLRA 10(j) case



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35

35



Composition of Federal Court of Appeals and U.S. District Courts

Court ▲	Authorized Judgeships ▲	Vacancies ▲	Nominees Pending ▲	Nominees Pending for Future Vacancies ▲
US Supreme Court	9	0	0	0
US District Courts (includes territorial courts*)	677	51	13	1
US Court of International Trade	9	2	2	0
US Court of Federal Claims*	16	1	1	0
US Court of Appeals	179	3	3	0
Total	890	57	19	1

Source: <http://www.uscourts.gov/judges-judgeships/judicial-vacancies>.

- The Trump administration was successful in having 234 judicial nominees confirmed by the Senate.
- The Biden administration is also active in submitting nominations to the U.S. Senate to fill federal court vacancies.

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36

36



QUESTIONS



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37