

Review of Connecticut Legislative Session & Developments at the Federal Level

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Agenda



Review of 2023 Connecticut Legislative Session



Significant Developments at the Federal Level

Connecticut Legislative Session

What passed?

- Expansion of paid sick leave
- Expansion of workers' compensation benefits for post-traumatic stress injuries
- Increased penalties for non-compliance with MyCTSA Savings Program
- Health insurance eligibility for striking employees

Notable bills that did not pass

- Significant restrictions on use of non-compete agreements
- Significant expansion of paid sick leave
- One Fair Wage
- Amendments to paid FMLA
- Unemployment benefits for striking workers
- Salary Disclosure

Summary of CT Paid Sick Leave Law

- Covers employers with 50 or more Connecticut employees (excludes manufacturers)
- “Service workers:”
 - Earn 1 hour of paid sick leave for every 40 hours worked (up to 40 hours per year)
 - Entitled to use accrued paid sick leave upon completion of 680 hours of employment
 - Service workers may carry over up to 40 unused accrued hours (but use may be capped at 40 hours per year)
- Service worker may use paid sick leave for:
 - Employee’s own—or their child’s or spouse’s—illness, injury or health condition; the medical diagnosis, care or treatment of their mental or physical illness, injury or health condition; or preventative care
 - Certain time off due to being a victim of family violence or sexual assault

Expansion of Paid Sick Leave

A service worker may use paid sick leave for a “mental health wellness day”, - a day which an employee attends to their emotional and psychological well-being.

A service worker may also use paid sick leave if the employee is a parent or guardian of a child who is a victim of family violence or sexual assault and needs time off for:

- medical care, psychological or other counseling for physical or psychological injury or disability,
 - obtaining services from a victim services organization,
 - relocating due to family violence or sexual assault, or
 - participating in any civil or criminal proceedings related to or resulting from family violence or sexual assault.
- Effective October 1, 2023
 - Employers should update their sick leave policy

Expansion of Workers' Compensation Coverage

**Effective
January 1
2024**



Currently, workers' compensation benefits for PTSD is limited to various first responders such as police, firefighters, emergency medical service personnel, and emergency 9-1-1 dispatchers due to certain tragic qualifying events



New law would allow all employees to be eligible to receive workers' compensation benefits for PTSD if the same qualifying events occur in the line of duty



Benefits duration capped at 52 weeks and prohibits the benefits from being awarded more than 4 years after the qualifying event

Expansion of Workers' Compensation Coverage

Qualifying event that arise out of and in the course of employment can include:

- Viewing a deceased minor;
- Witnessing the death of a person or an incident involving the death of a person;
- Witnessing an injury to a person who subsequently dies before or upon admission at a hospital as a result of the injury;
- Having physical contact with and treating an injured person who subsequently dies before or upon admission at a hospital as a result of the injury;
- Carrying an injured person who subsequently dies before or upon admission at a hospital as a result of the injury; or
- Witnessing a traumatic physical injury that results in the loss of a vital body part or a vital body function that results in permanent disfigurement of the victim.

Expansion of Workers' Compensation Coverage

- The qualifying event must be a substantial factor in causing the injury and
- The injury must not have resulted from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action



Health Insurance Eligibility for Striking Employees

A special enrollment period will allow employees whose health insurance coverage is terminated by an employer because of a labor dispute (e.g., a strike) to receive health insurance through Connecticut's health insurance exchange.

Effective October 1, 2023



access health CT 

MyCTSAavings Program

- Employers that already offer their employees one or more qualified retirement plans are exempt from the program, but must still opt out with the State

Covered Employers

Any business, including nonprofits, that had at least five (5) employees who received at least \$5,000 in wages in the prior calendar year

Eligible Employees

Individuals who have worked for a covered employer for at least 120 days and are at least 19 years of age

- Provides for an adjustable default employee payroll deduction of three percent (3%) of the employee's gross pay to a Roth IRA
- Effective October 1, 2023, employers who fail to comply will be subject to fines between \$500 and \$1500

Near Misses

- Significant Restrictions on the Use of Non-Compete Agreements
- Paid Sick Leave Law Expansion
- One Fair Wage
- Paid Family and Medical Leave
- Unemployment Benefits for Striking Workers
- Salary Disclosure



Be Aware of Scrutiny of Non-Compete Agreements

- Federal Trade Commission (FTC) proposed ban on non-compete agreements
 - FTC won't take a formal vote until April 2024
- Increasing number of states are banning or limiting the use of non-compete agreements
- Only require key employees to sign non-compete and non-solicitation covenants
- Make the restrictions reasonable
 - Time
 - Geography
 - Scope

...and at the federal level

Pregnant Workers Fairness Act (PWFA)

Employers with 15 or more employees must make reasonable accommodations for workers or applicants due to *limitations* caused by pregnancy, childbirth, or related medical conditions unless it would pose an undue hardship

- “Limitation” is a lower threshold than a “disability”
- Ex. pregnant employee says, “I’m having trouble getting to work on time due to morning sickness”

Prohibits employers from:

- Denying opportunities based on woman’s need for reasonable accommodations;
- Forcing qualified employees to accept an accommodation other than a reasonable accommodation arrived at through an interactive process; and
- Requiring an employee to take leave (unpaid or paid) if another reasonable accommodation can be provided

Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

Must allow reasonable break time to all employees (exempt and non-exempt) who need to express breast milk for up to one year after childbirth

- Exception for employers with fewer than 50 employees if compliance would impose an undue hardship causing the employer “*significant difficulty or expense*” considering the size, financial resources, nature, or structure of the business

For non-exempt employees, lactation breaks can be unpaid provided employee is fully relieved of duties

- Employee can elect to use existing paid time off
- Employers must provide lactating employees with a private location (other than a bathroom) to express breast milk

Before an employee can bring a lawsuit under the Act, they must provide notice of the non-compliance and wait 10 days for the employer to remedy the situation.

- Damages are the same as those under the FLSA

EEOC Strategic Enforcement Plan (SEP)

The SEP establishes the agency's top priorities for 2024-2028:

- Recruitment and Hiring Practices
- Discrimination and Vulnerable Workers
- Addressing Emerging and Developing Issues
- Pay Discrimination
- Preserving Access to the Legal System
- Preventing and Remediating Systemic Harassment

EEOC Proposed Guidance on Harassment

- Express recognition that sex-based harassment includes harassment based on sexual orientation, gender identity and gender expression
- Alleged harassment must be evaluated in the context in which it arises
- An individual may establish harassment based on conduct that is not directed at them
- An individual who was not subjected to harassment based on their protected characteristic can nevertheless file a harassment claim if they were harmed by the unlawful harassment of a third party
- Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment
- Express recognition that harassment can occur in virtual workplaces and can occur outside the workplace or through emerging technology and media

EEOC Guidance on Artificial Intelligence

Improper use or application of AI could violate Title VII when used for recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, or dismissal.

- If use of AI results in adverse discriminatory impact, employers are liable
- Reliance on vendor's assurances is not a defense

EEOC outlined instances where the use of AI could result in Title VII violations:

- Resume scanners that prioritize applications using certain keywords;
- “Virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
- Video interviewing software that evaluates candidates based on facial expressions and speech patterns;
- Testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test; and
- Employee monitoring software that rates employees on the basis of their keystrokes or other factors.

DOL Proposes Increase to Salary Level for Exempt Employees

- Would increase minimum salary level from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year)
 - 35th percentile of weekly earnings of full-time salary workers in the lowest-wage Census Region
- Would increase the total annual compensation requirement for highly compensated employees from \$107,432 per year to \$143,988 per year.
 - 85th percentile of full-time salaried workers nationally
- Would automatically update the salary thresholds every 3 years to maintain 35th and 85th percentiles
- The US DOL stated that it is not proposing any changes to the salary basis or duties tests

What Should Employers Do?

1

Determine whether any exempt employees have a salary level lower than the new proposed levels

2

Decide whether to increase the salary levels to meet or exceed the proposed level

3

Decide whether to convert to hourly

- If so, how?
- Be prepared for employee morale issues

4

Use this opportunity to evaluate and address any other wage and hour issues

Union Activity Continues to Increase

2,072 petitions filed in FY22

- 63% increase from FY 2021

Union election win rate 80% through 6/30/23

- Highest first-half win rate ever

662 union election wins through 6/30/23

- Highest first-half win total since 2005

58,543 workers organized through 6/30/23

- Approximately 38% increase from FY 2022



Work Stoppages Continue to Increase

Days of work lost due to work stoppages:

- January – June 2023: 1 million days
- July 2023: 2.3 million days
- August 2023: 4.1 million days
- YTD total: 7.4 million days
- Comparison: Only 636 days during same period in 2022



New (old) “Quickie” Election Rules



- Effective: December 26, 2023
- Will ***again*** significantly shorten time between filing of petition and election
 - From about 42 days to 21 days
- Will limit regional directors’ discretion in election procedure matters
- Will limit time for employers to consider and contest bargaining unit composition and election details

Impact: Will make it more difficult for employers to mount effective campaign in representation election

New Union-Friendly Recognition Standard

Cemex Construction Materials Pacific, LLC (August 2023)

- Will require an employer to recognize and collectively bargain with a union that has demonstrated majority status (e.g., card check)... unless employer “promptly” requests that an election be held
- Request must be made within 2 weeks of demand for recognition
- If employer commits certain ULPs during election process, the Board will order the employer to immediately recognize and bargain with the union

Impact: Significant risk of unionization without a representation election



Section 7 of the NLRA provides employees

"the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

Expansion of “Protected Activity”

Miller Plastic Products, Inc. (August 2023):

- Expanded definition of “concerted activity:” Actions by a **single employee** may be deemed “concerted” when the “employee’s conduct sought to initiate, induce or prepare for group action, or was related to group action”

Lion Elastomers LLC II (May 2023):

- Provided broader protections to employees who engage in **offensive conduct** when exercising Section 7 rights

Impact:

- May be more difficult to discipline employees who have outbursts in the workplace, violate employer policies or otherwise harm the workplace

New (old) Standard on Handbook Policies & Workplace Rules

Stericycle, Inc. (August 2023)

- NLRB will determine whether a workplace rule has a **reasonable tendency** to dissuade (i.e., “chill”) employees from exercising rights under Section 7
- NLRB will assess the employer’s workplace rule from the perspective of an employee who is subject to it, economically dependent on the employer, and who also contemplates engaging in protected concerted activity
 - The employer’s intent in maintaining a rule is “immaterial”
 - If an employee could reasonably interpret the rule to have a coercive meaning, it will be found presumptively unlawful

New (old) Standard on Handbook Policies & Workplace Rules

If NLRB meets its burden, employer may rebut by proving “that the rule advances a legitimate and substantial business interest **and** that the employer is **unable** to advance that interest with a more narrowly tailored rule

Some policies to pay particular attention:

- Restricting employee’s ability to criticize/disparage employer (privately or publicly)
- Workplace civility policies
- Restricting use of cameras and recording devices
- Restricting use of social media
- Prohibiting insubordination
- Confidentiality of investigations



EMPLOYEE
HANDBOOK

Limits on Use of Confidentiality and Non-Disparagement Provisions

McLaren Macomb (February 2023)

- Case involved a severance agreement that broadly prohibited employees from:
 1. disparaging or harming the image of the employer, and
 2. disclosing the terms of the severance agreement to any third party
- Board determined that such provisions have a “reasonable tendency to interfere with, restrain, or coerce the exercise of” employee’s Section 7 rights because provisions could prohibit efforts to assist fellow employees

Limits on Use of Confidentiality and Non-Disparagement Provisions

Impact:

- Decision applies retroactively
- Review and revise severance agreements – merely proffering overly broad provisions in a severance agreement may be unlawful
- Non-disparagement and confidentiality clauses must be limited and narrowly tailored
- Consider using savings and severability clauses
- Beware that in limited circumstances, this decision could also apply to supervisors who are generally not covered by NLRA



Other Notable Developments

New (old) Joint Employer Standard

- Indirect or the reserved right of control (even if never exercised) standing alone establishes joint-employer status

New (old) Employee vs. Independent Contractor Standard

- Return to multi-factor, common law agency test that will result in more workers being classified as employees rather than contractors

Non-compete Agreements

- GC Abruzzo recently announced position that many non-competes and non-solicitation agreements (generally for non-supervisors) unlawfully interfere with Section 7 rights where “the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access” to subsequent employment

What Should Employers Do to Prepare?

- Don't be a target for unionization
- But be prepared for unionization activity
- Monitor developments
- Educate and train managers
- Review handbook rules/policies
- Conduct internal audit of employee classification



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