

New Year, (Potentially) New Rules?

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Sometimes, the only constant is change. This New Year is no different.

In 2023, we saw several developments in labor and employment law, including federal and state court decisions, regulations, and administrative agency guidance decided, enacted, or issued. This article will summarize five proposed rules and guidance issued by the

Department of Labor ("DOL"), the National Labor Relations Board ("NLRB"), the United States Equal Employment Opportunity Commission ("EEOC"), and the Occupational Safety and Health Administration ("OSHA"), which will or may be enacted in 2024.

DOL's Proposed Rule to Update the Minimum Salary Threshold for Overtime Exemptions

In 2023, the DOL announced a Notice of Proposed Rulemaking ("NPRM") recommending significant changes to overtime and minimum wage exemptions. Key changes include:

- **Raising the minimum salary threshold:** increasing the minimum weekly salary for exempt executive, administrative, and professional employees from \$684 to \$1,059, impacting millions of workers;
- **Higher Highly Compensated Employee (HCE) compensation threshold:** increasing the total annual compensation requirement for the highly compensated employee exemption from \$107,432 to \$143,988; and
- **Automatic updates:** automatically updating earning thresholds every three years.

These proposed changes aim to expand overtime protections for more employees and update salaries to reflect current earnings data. The public comment period closed in November 2023, so brace yourselves for a final rule in the near future. For more information:

<https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>

DOL's Proposed Rule on Independent Contractor Classification under the Fair Labor Standards Act

Editor's note: The Department of Labor issued a final rule on January 10, 2024, to guide employers on how to classify workers as employees or independent contractors under FLSA. Find the new guidance [here](#).

The long-awaited new independent contractor rule under the Fair Labor Standards Act ("FLSA") may soon be on the horizon. The DOL proposed a new rule in 2022 on how to determine who is an employee or independent contractor under the FLSA. The new rule will replace the 2021 rule, which gives greater weight to two factors (nature and degree of control over work and opportunity for profit or loss), with a multifactor approach that does not elevate any one factor. The DOL intends this new rule to reduce the misclassification of employees as independent contractors and provide greater clarity to employers who engage (or wish to engage) with individuals who are in business for themselves.

The DOL is currently finalizing its independent contractor rule. It submitted a draft final rule to the Office of Management and Budget (OMB) for review in late 2023. While an exact date remains unknown, the final rule is likely to be announced in 2024. More information about the rule can be found here: <https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>

NLRB's Joint-Employer Standard

The NLRB has revamped its joint-employer standard under the National Labor Relations Act ("NLRA"). The NLRB replaced the 2020 standard for determining joint-employer status under the NLRA with a new rule that will likely lead to more joint-employer findings. Under the new standard, two or more entities may be considered joint employers of a group of employees if each entity: (1) has an employment relationship with the employees and (2) has the authority to control one or more of the employees' essential terms and conditions of employment. The NLRB has defined "essential terms and conditions of employment" as:

- 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 the grounds for discipline;
- The tenure of employment, including hiring and discharge; and
- Working conditions related to the safety and health of employees.

The new rule further clarifies that joint-employer status can be based on indirect control or reserved control that has never been exercised. This is a major departure from the 2020 rule, which required that joint employers have "substantial direct and immediate control" over essential terms and conditions of employment.

The new standard will take effect on February 26, 2024, and will not apply to cases filed before the effective date. For more information on the final rule: <https://www.federalregister.gov/documents/2023/10/27/2023-23573/standard-for-determining-joint-employer-status>

EEOC's Proposed Enforcement Guidance on Harassment

A fresh year brings fresh guidance! On October 2023, the EEOC published a notice of Proposed Enforcement Guidance on Harassment in the Workplace. The EEOC has not updated its enforcement guidance on workplace harassment since 1999. The updated proposed guidance explains the legal standards for harassment and employer liability applicable to claims of harassment. If finalized, the guidance will supersede several older documents:

- *Compliance Manual Section 615: Harassment* (1987);

- *Policy Guidance on Current Issues of Sexual Harassment*(1990);
- *Policy Guidance on Employer Liability under Title VII for Sexual Favoritism* (1990);
- *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (1994); and
- *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*(1999).

The EEOC accepted public comments through November 2023. After reviewing the public comments, the EEOC will decide whether to finalize the enforcement guidance. While not law itself, the enforcement guidance, if finalized, can be cited in court. For more information about the proposed guidance: <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>

OSHA's Proposed Rule to Amend Its Representatives of Employers and Employees Regulation

Be prepared to see changes in OSHA on-site inspections. Specifically, OSHA may reshape its Representatives of Employers and Employees regulation. In August 2023, OSHA published an NPRM titled "Worker Walkaround Representative Designation Process." The NPRM proposes to allow employees to authorize an employee or a non-employee third party as their representative to accompany an OSHA Compliance Safety and Health Officer ("CSHO") during a workplace inspection, provided the CSHO determines the third party is reasonably necessary to conduct the inspection. This change aims to increase employee participation during walkaround inspections. OSHA accepted public comments through November 2023. A final rule will likely be published in 2024.

For more information about the proposed rule to amend the Representatives of Employers and Employees regulation: <https://www.federalregister.gov/documents/2023/08/30/2023-18695/worker-walkaround-representative-designation-process>

Preparing for 2024

While 2023 proved to be a dynamic year for Labor and Employment law, 2024 could be either transformative or stagnant. Some of the proposed regulations mentioned above could turn into final rules, causing significant changes in employment law. On the other hand, given that 2024 is an election year, some of these proposed regulations could lose priority and wither on the vine. Either way, employers should stay informed of these ever-changing issues.

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