WEBINAR SERIES

Essential Insights on Regulatory Compliance for the Southeast

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Today's Presenters

Megan Siegel
Corporate Counsel
PrestigePEO

Carrie Lambeth Pilon
Associate General Counsel/Human Resources Consultant
PrestigePEO

Today's Agenda

- Federal Employment Law Updates
- Case Law Updates
- State Law Updates
- Employment Law Trends and Hot Topics for 2024

Webinar Forum

All participants are muted.

Please type questions in the side navigation panel and we will try to address most questions during today's session.

Today's presentation will be posted online at prestigepeo.com/webinars

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Federal Employment Law Updates

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US DOL Overtime Rule Update

- Last updated in 2019 with a prior effective date of January 1, 2020.
- New rule was proposed on August 30, 2023.
- Sets the minimum salary threshold for overtime exemptions under the FLSA from **$35,568** (or $684/week) to **$55,068** ($1,059/week).
- Increases the threshold for highly compensated individuals from $107,432 per year to $143,988 per year.
- Rule has a mechanism to periodically increase the salary threshold going forward.
- Proposed rule does not make any changes to the executive, administrative, or professional (EAP or white-collar exemptions) duties test or the salary basis requirement, the two other prongs required under the regulation for the exemption to apply.
- Comment period closed on November 7, 2023. DOL received over 33,000 comments in response to its notice of the proposed rule.

US DOL Overtime Rule Update

- Final rule slated for April 2024 release.
- Would go into effect 60 days after the release of the final rule, if adopted.
- Reminders/Takeaways:
  - Employers should plan now for these changes.
  - While some states (e.g. NY, CA) already have higher minimum salary thresholds for exempt employees, many states follow the federal overtime rule.

US DOL Independent Contractor Rule Update

- On January 9, 2024, US DOL released its final rule for independent contractors.
- New rule is effective March 11, 2024.
- It restores a six-factor totality of the circumstances analysis:
  (1) Opportunity for profit or loss depending on managerial skill;
  (2) Investments by the worker and the potential employer;
  (3) Degree of permanence of the work relationship;
  (4) Nature and degree of control;
  (5) Extent to which the work performed is an integral part of the potential employer's business; and
  (6) Skill and initiative.
- Prior rule did not provide equal weight to the above factors.

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Partnership with other Agencies

- The Department of Labor (DOL) has entered into a formal agreement with the Equal Employment Opportunity Commission (EEOC) to collaborate and share information with the intention improving both agencies' enforcement efforts.
- Based on the Memorandum of Understanding (MOU) that was signed by agency officials on September 13, 2023, the DOL and EEOC are "forming this partnership to encourage greater coordination between them through information sharing, joint investigations, training, and outreach."
- This means that some typical DOL audits and investigations could lead to investigations by the EEOC under, for example the Equal Pay Act, Title VII of the Civil Rights Act, and Title I of the American with Disabilities Act.
- This will include sharing of information regarding suspected violations as well as advising the employee who brought the charge or complaint that the employee may be able to file a charge or complaint with the other agency.
- It also signals that the agencies are gearing up for more enforcement activity.

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PUMP Act guidance

- The PUMP Act was adopted along with the Pregnant Workers Fairness Act in December 2022.
- The DOL has finally issued internal guidance for agency officials responsible for enforcing the FLSA's "pump at work" provisions, including those enacted under the 2022 Providing Urgent Maternal Protections for Nursing Mother's Act (PUMP Act).
- These guidelines provide a glimpse into how the Wage and Hour Division (WHD) understands and will enforce the rights available to employees under the FLSA, which requires reasonable break time and a place to express breast milk at work for a year after a child's birth.
- Employees are entitled to breaks every time they need to pump.
- The length and frequency of breaks will vary by employee.
- ER's and EE's may agree to a schedule based on the EE's need to pump, but the agency advises that ER's cannot require EE's to comply with a fixed schedule.
- Time for pump breaks may be unpaid, unless otherwise required by federal, state, or local law.

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CDC may be reconsidering its COVID isolation guidance

- The Centers for Disease Control and Prevention may soon drop its isolation guidance for people with COVID-19.
- Currently, those who test positive are advised to stay home for at least five days to reduce the chances of spreading COVID to others.
- This shift may now advise those who test positive to rely on symptoms instead.
- This means that if a person does not have a fever and the symptoms are mild or resolving, they could still go to work or school.
- These new guidelines could come as soon as April 2024.

NLRB Joint Employer Rule

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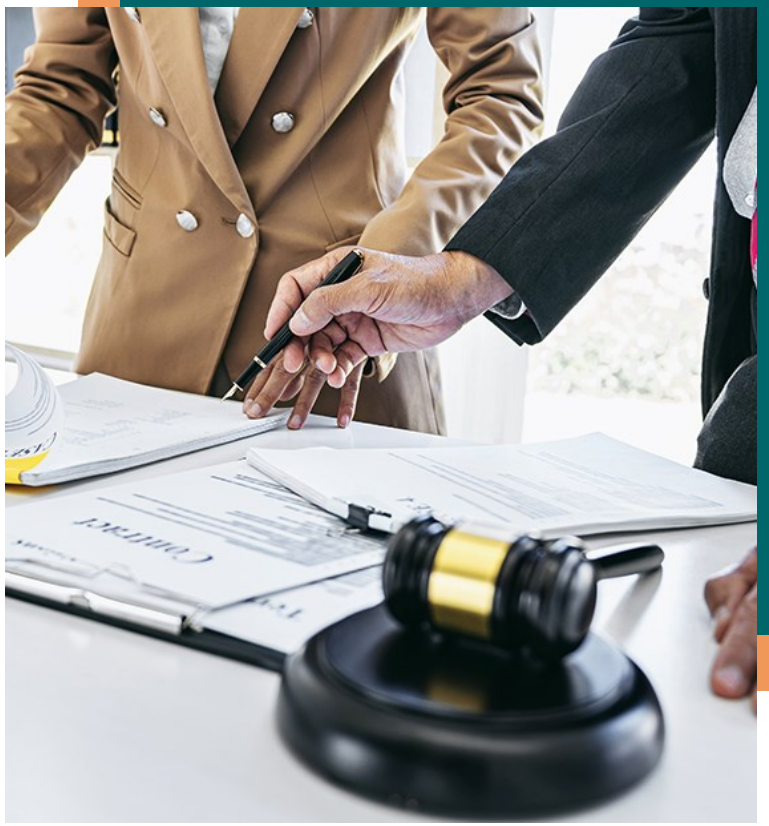
NLRB Joint Employer Rule

- NLRB issued a new joint employer rule with an effective date of February 26, 2024.
- NLRB is made up of political appointees who serve for a few years.
- Current NLRB is more employee friendly.
- New joint employer rule replaces the rule that was issued in 2020, which was more employer friendly.
- Primarily impacts employers that are franchisors/franchisees; however, other employers need to be aware of the possible impact of this rule on their businesses.



NLRB Joint Employer Rule

- New rule: an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine **one or more of the employees' essential terms and conditions of employment**,
- Terms and Conditions of Employment:

  (1) wages, benefits, and other compensation;

  (2) hours of work and scheduling;

  (3) the assignment of duties to be performed;

  (4) the supervision of the performance of duties;

  (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

  (6) the tenure of employment, including hiring and discharge; and

  (7) working conditions related to the safety and health of employees.
- NLRB released a fact sheet about the new rule, which can be found here.

Case Law Update

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Muldrow v. City of St. Louis

Case Synopsis

- Issue was whether Title VII prohibits job transfers that don't cause "significant disadvantage" to workers can be considered discrimination in violation of Title VII.
  - Does Title VII require a showing of harm to the employee for a discrimination claim to prevail?
- Why are we talking about this?
  - At the District Court level and Court of Appeals, the employer prevailed.
  - However, the case was appealed to the Supreme Court, who heard oral arguments on December 6, 2023
  - SC Justices seemed sympathetic to employee.
  - If the Court rules in favor of the employee, it will open the door for additional claims
- Written decision is likely to be released in June 2024.

Eisenhauer v. Culinary Institute of America

- Federal Case about both the Federal Equal Pay Act and New York's Equal Pay Act.
- Plaintiff alleged its employer violated both laws by paying her less than male colleagues.
- Court noted that
  - Federal EPA allows for inequal pay if it is based on "any other factor other than sex."
  - NY law, however, adds the additional requirement that the factor other than sex must be job-related for the position in question.
- While Defendant prevailed under the Federal EPA, the Appellate Court clarified that these statutes were very different and they remanded the matter to state court under the state's Equal Pay Act, which had a higher standard.
- This case serves as a reminder that often state laws have more protections for employees than federal laws.

State Law Updates

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Virginia- Subminimum Wage for Employees with Disabilities Eliminated

- On April 12, 2023, Virginia Governor Youngkin signed legislation that will eliminate the subminimum wage for individuals with disabilities, with one exception.
- Employers will now be required to pay individuals with disabilities the standard minimum wage rate, under the Virginia Minimum Wage Act.
- The only exception applies to employers that employed individuals with disabilities prior to July 1, 2023, and were authorized to pay a subminimum wage to those employees prior to July 1, 2023, under an FLSA certificate exemption.
- The FLSA certificate exemption will remain in effect through July 1, 2030.
- After July 1, 2030, no carve outs or exceptions will remain and all employers will be required to pay individuals with disabilities the standard minimum wage rate.

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Alabama- Temporary tax exemption regarding no withholding for overtime

- The Alabama tax code is temporarily modified to provide that all overtime pay received by full-time hourly wage-paid employees for hours worked above 40 in a workweek are excluded from gross income, and therefore are exempt from Alabama **state** income tax and not subject to withholding.
- The exemption will not apply to salaried FLSA-exempt employees or workers paid under alternate payment methods, such as piece-rate.
- Commission and bonuses paid in addition to an hourly wage are not exempt.
- Only hours actually worked will qualify.
- Paid time off and holiday pay do not count toward hours worked for purposes of determining 40 hours per week.
- Temporary tax exemption applies for tax years beginning on or after January 1, 2024 through June 30, 2025.

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North Carolina – Prohibitions against Local Ordinances that differ from NCWHA

- In September 2023, the North Carolina General Assembly included in the most recently passed budget, a prohibition of any local ordinances adopted by counties or municipalities that establish minimum wage, overtime, or leave laws that are different from the North Carolina Wage and Hour Act (NCWHA).
- Any such wage and hour ordinances adopted by counties, municipalities, or other local governments that apply to private-sector employees and employers are now unenforceable.
- The budget passed by the North Carolina General Assembly took effect on October 2, 2023, and runs through June 30, 2025.

North Carolina – Changes to OSHANC Statute of Limitation

- Effective October 1, 2023, the North Carolina Department of Labor (NCDOL) will only have six months following the occurrence of any Occupational Safety and Health Act of North Carolina (OSHANC) violation to issue a citation to employers.
- With the modification, the statute of limitation will revert back to the timeframe established prior to last year's budget implementation.
- Prior to this most recent change, the NCDOL was authorized to cite violations that occurred at ANY previous time so long as the citation was issued within six months "following the initiation of an inspection" by the NCDOL.
- Had this modification not occurred, NCDOL could have issued a citation to an employer for any violation going back to the 1970's when NC adopted its own OSHA-approved state plan, so long as the citation was issued within six months after the NCDOL opened it inspection.

South Carolina – Notice of Wage Deductions

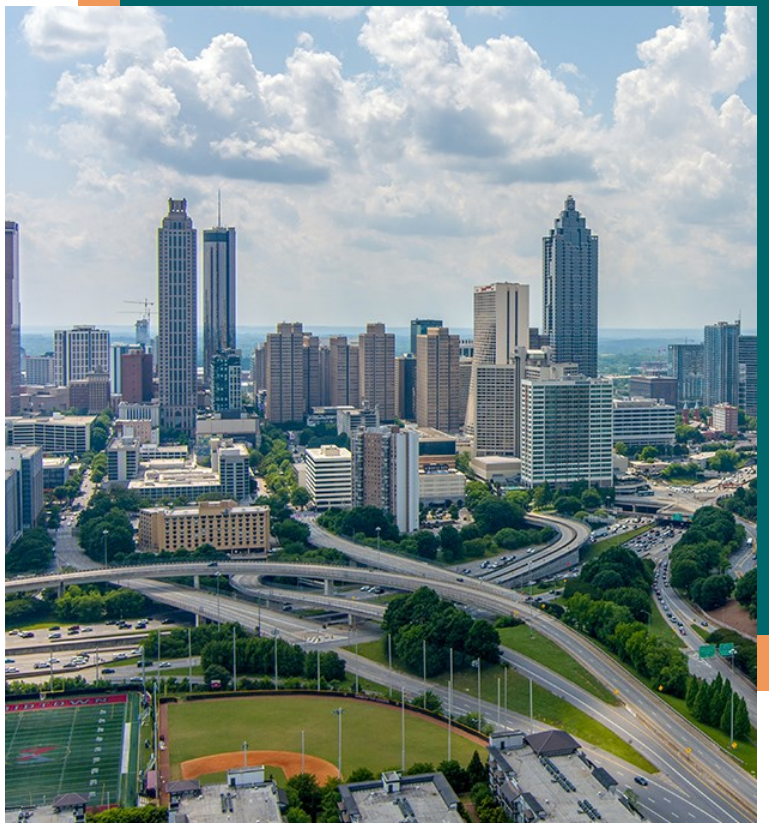
Recent court ruling held:

- South Carolina Payment of Wages Act (SCPWA) does not require an employer to provide detailed advance notice of the amount of wage deduction to satisfy the statutory notice requirements for taking deductions from pay.
- This case involved a registered nurse who upon hire, agreed to the hospital's Wage Deduction Policy and was subsequently terminated.
- Court held that generic notice provided to EE's at the time of hire that the ER reserves the right to deduct certain financial obligations from the EE's final pay was sufficient, even if the debt for which the deduction was taken had not yet been incurred at the time of notice.

Georgia – Case law Updates

Employee Non-Solicitation Agreements:

- In June 2023, the Georgia Court of Appeals held that employee non-solicitation provisions must have territorial limitations to be enforceable.
- An employee non-solicitation provision is a contract tool employers may use to prevent former employees from recruiting current employees.
- This recent decision demonstrates the state's trend towards a more limited non-solicitation agreement for existing and future restrictive covenants.
- Also, under Georgia Law, independent contractors are considered employees. Therefore, employers should make certain that non-solicitation agreements with independent contractors are compliant with this court decision.



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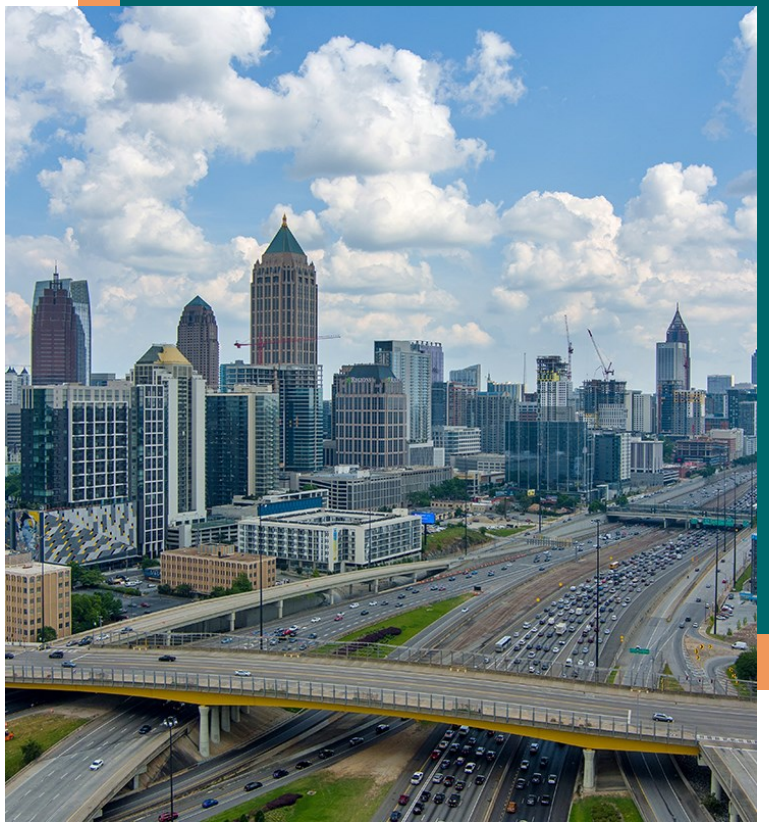
Georgia – Case law Updates

Employee Voting Leave Law:

- In July 2023, Georgia amended its voting leave law. The law now requires all employers to provide employees with up to two (2) hours of unpaid time off, on either election day or on a designated early voting day, to vote in primaries and other elections.
- This is different from the prior law that did not include early voting provisions.

Employee Sick Leave Law to Care for Family Members:

- Is here to stay.
- As of July 2023, GA's former temporary Family Care Act (FCA) is permanent.
- Since 2017, this law has required ER's who offer paid sick leave to allow EE's use of up to five (5) paid sick days to care for immediate family members.



Florida – COVID-19 related restrictions

New legislation broadens the restrictions on businesses based on individuals' COVID-19 related decisions:

- Under this new legislation, employers cannot require any person to provide proof of vaccination status or post-infection recovery, or submit to a COVID-19 test, in order to enter, access, or receive services from the business.
- Employers cannot require any person to wear a face mask or other facial covering extending over the nose and mouth, with limited exceptions such as with healthcare providers.
- Employers cannot hire, fire, or otherwise make employment decisions based on an employee or applicants' COVID-19 vaccination or post-infection-recovery status, or their refusal to take a COVID-19 test.
- Employers who fail to comply with these new rules may face an administrative fine of up to $5,000 per violation. Employers may be ordered to reinstate employees terminated in violation of these new rules.

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Louisiana – Act No. 210

Employee Genetic Testing or Preventative Cancer Screenings Leave

- Act No. 210 is an amendment to the Louisiana Employment Discrimination law.
- Louisiana law allows employees a one-day unpaid leave for genetic testing or preventative cancer screenings.
- While this is an unpaid leave, if an employee requests to use vacation time or other available paid time off, if the employee has such paid time available, an employer must allow the employee to use it.
- **How do employees qualify for this leave**?
  - An employee must be seeking testing must be "medically necessary."
  - An employee must provide notice to the employer at least 15-days before the date the employee intends to take leave.

Note: Employers may request documentation to prove the appointment is for genetic testing or preventative cancer screening and employees are then required to provide such documentation. However, employers are NOT allowed to request documentation of the employee's test results.

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Washington D.C. – Pay Transparency Law Updates

Wage Transparency Omnibus Amendment Act of 2023:

- Amends the DC Wage Transparency Act of 2014.
- Effective June 30, 2024.
- This Amendment is applicable to employers with at least one employee in Washington D.C.
- D.C employers must disclose the pay range (from minimum to maximum potential amounts) on all job postings for open positions.
- Pay ranges must be disclosed on both public and internal job advertisements.
- The law also requires D.C. employers to disclose the availability of healthcare benefits prior to an applicant's first interview with a potential employer.

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Washington D.C. – Pay Transparency Law Updates (cont'd.)

Wage Transparency Act (cont'd.):

- Under this Amendment, D.C. employers are prohibited from requesting an applicant's wage history or using an applicant's wage history in the applicant screening process.
- D.C. Employers are also required to post a notice that informs employees of their rights under this law; lawmakers have not yet provided additional information for official posting notices.
- Those employers who violate the Act may incur fines ranging from $1,000 to $20,000 per occurrence.

Employment Law Trends and Hot Topics for 2024

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Pay Transparency

- States are pushing for pay transparency in job postings and to employees interested in internal job openings.
- Goal is to level the playing field for women and minorities.
- Employers posting for new jobs should review their job postings for compliance with applicable state law.

Data Privacy

- Data Privacy laws continue to trend across the country.
- Employers should review their internal processes to make sure they have a data privacy policy that complies with the laws in the states in which they do business.

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Non-Competes

- A non-compete is defined as any agreement or clause contained in an agreement between and employer and employee that restricts the employee from obtaining certain employment after the current employment has ended.
- Bloomberg had an interesting article on this that cited that 44% of New York workplaces use non-competes. Certain groups (law firms, banks, private equity) are looking for exceptions.
- Other groups, like the tech industry, is in favor of the ban.

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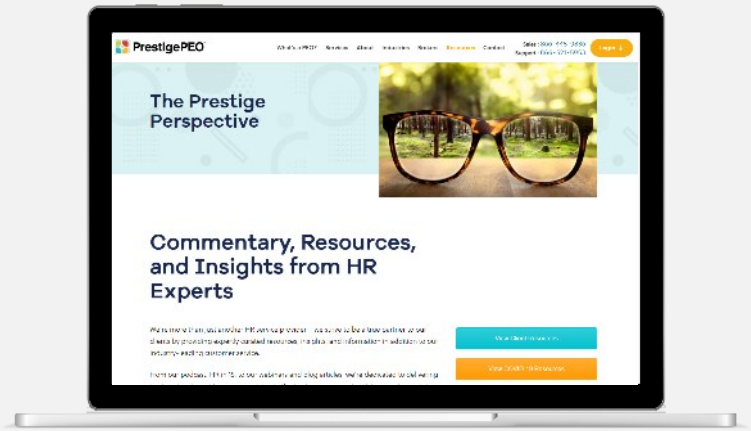
Non-Competes

- On both the federal and state levels, non-competes continue to face a high level of scrutiny.
- At the federal level, in April 2024 the Federal Trade Commission is scheduled to announce a decision on banning them. If it passes, it is likely to be challenged, however, there is an increase in state legislation banning or severely constraining non-compete agreements.
- These states include Colorado, Minnesota, North Dakota, California, and Oklahoma.
- Other regulatory and legislative bodies are challenging the legality and enforceability of these binding agreements.
- The government is concerned with the public policy aspects of non-competes which otherwise preclude the free movement of workers and the ability to maintain employment.

Paid Family Leave Funding

- We continue to see states enact paid family leave laws and fund paid family leave through employee and sometimes employer contributions.
- Employers entering into new states should carefully review the paid leave family laws of each state for compliance.

Questions / Comments / Discussion?



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