

# DELAWARE AND FEDERAL EMPLOYMENT LAW UPDATES

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# OVERVIEW

- Unemployment benefits
- Anti-Discrimination laws
- Non-Medical Marijuana
- Paid Family Medical Leave
- *Stericycle* and employee handbooks
- US DOL Rules - FLSA

Nothing in this presentation is legal advice. For specific questions, please feel free to contact me.

# HB 433 – UNEMPLOYMENT COMPENSATION

- ▶ Revises experience rating methodology for assigning unemployment assessment rates
- ▶ New methodology goes into effect calendar year 2027 – meant to be more responsive to changes in economy over time, considers employer size and industry
- ▶ Temporary relief for calendar years 2025 and 2026 by reducing new employer tax rates, among other things
- ▶ For calendar year 2024 – HB 236: This Act will continue for calendar year 2024 the temporary relief provided in calendar year 2023 to employers who pay unemployment tax assessments

# HB 176 – UNEMPLOYMENT COMPENSATION

- ▶ Clarifies that the term “days” in Chapter 33 of the Delaware Unemployment Compensation statute (19 Del. C. §§ 3301-3392) means “calendar days” unless otherwise specified.
- ▶ Amends § 3318 related to appeals
- ▶ Complainants have 15 days to file an appeal from a decision by a Claims Deputy, Unemployment Insurance Appeals referee, and from UIAB to the Superior Court. 15-day period begins from the date the decision was mailed to the parties’ last known address or otherwise delivered.

# HS 1 FOR HB 73 – UNEMPLOYMENT COMPENSATION

- ▶ Expands statute of limitations for Department of Labor to bring a civil action to recover non-fraud-based overpayments to 5 years; sets no limitations period for recovering overpayments due to fraud
- ▶ Gives Department authority to waive non-fraud overpayments resulting from either Department error or claimants receiving low-income public assistance
- ▶ Appeals process for waiver

# SB 145 – ANTI-DISCRIMINATION LAW

- ▶ Amends 19 *Del. C.* § 715 of the DDEA related to damages in employment discrimination claims
- ▶ Damages amounts that the Delaware Superior Court may award are no longer tied to the damage caps in Title VII
- ▶ Note: ADEA and Equal Pay Act damages do not include compensatory or punitive damages, but liquidated damages equal to the amount of back pay may be awarded

## DDEA damage caps for compensatory and punitive damages:

1. For an employer with 4 through 14 employees, \$50,000.
2. For an employer with 15 through 100 employees, \$75,000.
3. For an employer with 101 through 200 employees, \$175,000.
4. For an employer with 201 through 500 employees, \$300,000.
5. For an employer with more than 500 employees, \$500,000.

The Court may also award special damages including back pay and interest on back pay, front pay, and any other equitable relief available under Tit. VII.

# IMPLICATIONS FOR FUTURE DDEA CLAIMS

- ▶ There may be an increase in claims filed in the Delaware Superior Court as opposed to the District of Delaware (federal court)
- ▶ Compensatory and punitive damages awards for plaintiffs who were employed by the smallest employers (4-14 employees) were generally higher.



# SB 146 – ANTI-DISCRIMINATION LAW

- ▶ This bill amends 19 *Del. C.* § 712 to provide that a verified charge of discrimination is deemed to be filed on the date it is sent to the Department
- ▶ Attorneys can electronically submit charges on behalf of their clients

# HB 275 – ANTI-DISCRIMINATION LAW

- ▶ Updates the definition of “sexual orientation” throughout the Delaware Code by adding asexuality and pansexuality
  - ▶ 19 *Del. C.* Section 710(28) “Sexual orientation” includes heterosexuality, homosexuality, bisexuality, asexuality, or pansexuality
- ▶ Passed on 6/27/24; not yet signed by Governor

# HB 184 – ANTI-DISCRIMINATION LAW

- ▶ Expands the class of persons who may qualify as a victim of domestic violence, a sexual offense, or stalking.
  - ▶ “Domestic Violence” is any action that would constitute a violation of 10 *Del. C.* § 1041.
  - ▶ “Sexual Offense” encompasses any act that would constitute a violation of 11 *Del. C.* § 761.
  - ▶ “Stalking” encompasses any act that would constitute a violation of 11 *Del. C.* § 1312.

- ▶ HB 184 amends the statute so that victims no longer required to provide verification of their victimization; however, an employer may:
  - ▶ With respect to domestic violence victims, request verification of domestic violence “by an official document from a sexual violence service provider, medical provider, mental health provider, law enforcement, court order, or family medical leave.”
  - ▶ With respect to victims of a sexual offense, request verification of domestic violence “by an official document from a sexual violence service provider, medical provider, mental health provider, law enforcement, court order, or family medical leave.”
  - ▶ With respect to victims of stalking, request verification “by an official document from a crime victim service provider, medical provider, mental health provider, law enforcement, court order, or family medical leave.”

# HB1 – NON-MEDICAL MARIJUANA

- ▶ HB 1 passed the House and Senate, and was enacted without the Governor's signature on April 23, 2023.
- ▶ Amends Tit. 16 of the Delaware Code relating to marijuana use and possession.
- ▶ Removes all penalties for use or possession of a personal use quantity of marijuana and marijuana accessories.
  - ▶ Definition of "personal use quantity" of marijuana is updated to include not only 1 ounce or less of leaf marijuana, but also equivalent amounts of marijuana product in other forms.

# NON-MEDICAL MARIJUANA

- ▶ Title 4, Chapter 13 of the Delaware Marijuana Control Act
  - ▶ Section 1304. Places of employment. Nothing in this chapter is intended to impact or impose any requirement or restriction on employers with respect to terms and conditions of employment including but not limited to accommodation, policies, or discipline.

# DELAWARE PAID FAMILY MEDICAL LEAVE

Next Steps for Employers

# WHICH EMPLOYERS MUST PARTICIPATE IN THE PROGRAM

- ▶ Employers with 10 or more eligible employees are required to participate.
  - ▶ Not all required employers need to fully participate. Requirements for lines of coverage and contribution amounts vary.
- ▶ Employers with less than 10 eligible employees are not required to participate in the program
- ▶ Federal agencies, seasonal businesses, and non-Delaware based businesses are not required to participate.



# REQUIRED COVERAGE BY SIZE OF EMPLOYER

<b>Employee Count</b>	<b>Required Coverages</b>
Fewer than 10 Employees	The employer is not required to provide any PFML coverage but may voluntarily enroll in some or all of the lines of PFML coverage.
Between 10 and 24 Employees	Only required to provide Parental Leave, but can voluntarily enroll in the Medical and/or Family Caregiver/QE lines of PFML coverage.
25 or more Employees	Employers must provide their employees with all the PFML coverages

# MAXIMUM BENEFITS AVAILABLE

<b>Parental Leave</b>		
Benefit Percent	80%	
Weekly Maximum Benefit	\$900	
Maximum Duration	12 weeks in a 12-month period	
<b>Medical Leave</b>		
Benefit Percent	80%	
Weekly Maximum Benefit	\$900	
Maximum Duration	6 weeks in a 24-month period	
<b>Family Caregiving Leave</b>		
Benefit Percent	80%	
Weekly Maximum Benefit	\$900	
Maximum Duration	6 weeks in a 24-month period	
<b>Qualified Exigency Leave</b>		
Benefit Percent	80%	
Weekly Maximum Benefit	\$900	
Maximum Duration	6 weeks in a 24-month period	
<b>Combined Maximum Duration</b>		
For any type of Leave, no more than 12 weeks in a 12-month period		

# NEXT STEPS FOR EMPLOYERS

## **On September 1, 2024:**

- ▶ Employer registration began.
  - ▶ Employers can set up an account using Delaware LaborFirst to manage Delaware Paid Leave

## **By December 1, 2024:**

- ▶ Deadline for employers to apply for approval of a private insurance plan as an alternative to the State plan.
- ▶ Deadline for employers with under 10 employees to voluntarily join the State plan.

### **January 1, 2025**

- ▶ all employers with 10 or more employees must register through LaborFirst by this date.
  - ▶ *Employers who don't provide benefits through the state plan or an approved private plan will face penalties.*
- ▶ Employers who share the cost of the plan with their employees will begin deducting employee contributions from their employees' paychecks.
- ▶ Employers' quarterly contributions are collected retroactively, 30 days after each quarter ends, on the same schedule as Delaware Department of Labor Division of Unemployment Insurance.

### **April 30, 2025**

- ▶ Employers' first Hour & Wage Report is due to the Division of Paid Leave.
- ▶ The first contribution payment is also due to the Division of Paid Leave.

### **January 1, 2026**

- ▶ Employees can begin to submit claim applications for payment.

# GRANDFATHERED EMPLOYERS

- ▶ Grandfathered employers may opt out of that status on Jan. 1 of each year until Jan. 1, 2030.
- ▶ When employer exits grandfathered status, they default to state plan but can apply for new private plan through LaborFirst between Sept. 1 and Dec. 1 of each year through year 2029.
- ▶ Grandfathering expires Jan. 1, 2030. All grandfathered employers will be defaulted to state plan on this date (but may apply for private plan).

# NOTICE TO EMPLOYEES

- ▶ **Notice of Employee Rights must be provided to all eligible employees to inform them about the program at least 30 days prior to January 1, 2025.**
- ▶ Notice must also be given when:
  - ▶ A new employee is first hired
  - ▶ An employee requests leave
  - ▶ The employer believes that the employee might qualify for PFML leave due to an event in their life which might trigger one of the four types of coverage.

# NOTICE TO EMPLOYEES (CONT'D)

- ▶ An employers must provide notice to employees when that employer gains or loses a line of coverage within 30 days of the change in coverage
- ▶ Employers must notify employees if the employee will be contributing less than 50% of the cost of the program (the Act permits a 50/50 split)
- ▶ Notice of Coordination of Benefits – Employers must provide notice about how the PFML insurance program coordinates with other income-replacement benefits (Paid Time Off, Short Term & Long Term Disability, etc.) an employer offers and how these benefits may affect an employee's claim.

## NEXT STEPS FOR EMPLOYERS: NEW HIRES & WAIVERS OF CONTRIBUTION REQUIREMENT

- ▶ Determine whether new employee is short-term (i.e. will be employed for less than 1 year) or part-time (less than 25 hrs/wk)
- ▶ Short-term and part-time employees are not eligible for benefits
- ▶ Employers should apply for waivers for these employees to avoid paying contributions
- ▶ Both employer and employee need to sign the waiver



## NEW HIRES AND WAIVERS (CONT'D)

- ▶ Waiver form effective no later than date submitted
- ▶ Employer must still submit that employee's hours and wages as part of the employer's quarterly report
- ▶ Employers should remove an employee from waivers (Removal of Waiver Form) once that employee becomes eligible for coverage due to change in employment relationship, i.e. before 12-month/1,250-hour threshold is exceeded, otherwise employer may face penalties or interest on "due but unpaid" contributions

## NEW HIRES AND WAIVERS (CONT'D)

- ▶ Employers prohibited from deducting amounts from an employee's paycheck that ought to have been deducted in previous pay periods
  - ▶ The Removal of Waiver form only requires the employer's approval for this reason

# HB 438 – PAID FAMILY AND MEDICAL LEAVE INSURANCE PROGRAM

- ▶ 6/25/24 Assigned to Appropriations Committee in House
- ▶ Potential changes (if passed):
  - ▶ Employer not responsible for claim eligibility and benefits determinations – DDOL has this authority
  - ▶ DDOL would be permitted to enter into contracts with other entities to review and adjudicate claims
  - ▶ Schools not exempt
  - ▶ Removes ability of employers with fewer than 25 employees to elect to provide reduced parental leave
  - ▶ Removes provision allowing employers to require employees to use accrued paid time off before accessing PFML benefits and to count that accrued paid time off toward the total length of leave allowed

## ***STERICYCLE, INC.*, 372 NLRB NO. 113 (2023)**

- ▶ The *Stericycle* decision set a new legal standard for analyzing whether employer work rules/policies, including those that do not expressly restrict employees' protected concerted activity under the National Labor Relations Act (NLRA) are nevertheless unlawful on their face.

# NATIONAL LABOR RELATIONS ACT, SECTION 7

- ▶ Employees have the right to engage in “concerted activities” including the right to discuss wages, working conditions, benefits, and unionization.
- ▶ Employees can file a claim with the NLRB if they feel that their employer has infringed upon these rights in the course of their employment.

# STERICYCLE TEST

- ▶ If an employee rule or policy can be interpreted as having a reasonable tendency to chill employees from exercising their rights, it will likely be held **presumptively** unlawful, even if it could be interpreted in a manner more consistent with employee rights.
  - ▶ Whether a rule implicitly limits protected activities will be considered from the viewpoint of an “economically dependent” employee who is considering engaging in protected activity.
  - ▶ The employer can then **rebut the presumption** 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.
  - ▶ If the NLRB finds a policy to be unlawful, employers must notify employees of the violation and provide information about their rights.

# THE *STERICYCLE* STANDARD IS A BREAK FROM PRIOR PRECEDENT

- ▶ Prior decisions held certain categories of rules or policies were either presumptively *lawful* or subject to a balancing test that weighed their tendency to restrict employee rights against the business needs justifying them.
- ▶ New standard requires a case-by-case review and places **greater scrutiny on employer policies and rules.**

# STERICYCLE'S IMPLICATIONS ON EMPLOYEE HANDBOOKS & BEST PRACTICES

- ▶ Employers should establish a regular, periodic review of their workplace rules with the *Stericycle* standard in mind, to ensure that they prevent misunderstandings, avoid unintended interference with protected activities, and tailor the foreseeable effects of the rules on employee rights to demonstrable, legitimate, and substantial business justifications.



# BEST PRACTICES (CONT'D)

- ▶ Examples of civility rules that likely run afoul of the new standard:
  - ▶ Expecting employees to be “positive,” or to maintain a “positive work environment”
  - ▶ Prohibiting false, profane, or malicious statements toward or concerning the employer or its employees
  - ▶ Requiring employees to behave in a “professional manner” to promote efficiency, productivity, and cooperation
  - ▶ Not tolerating conduct that may harm the business's reputation
  - ▶ Restricting video and/or cell phone recording
- ▶ Be mindful of the way you communicate and enforce workplace rules
- ▶ Employers should consider consulting with legal counsel to redraft their policies.

# US DOL RULE – FLSA SALARY THRESHOLD

- ▶ Beginning July 1, 2024, new DOL rule increased the salary threshold to \$43,888 annually (\$844 per week) up from \$35,568 (\$684 per week)
- ▶ Salary threshold only one of three requirements employees must meet for FLSA exemption:
  - ▶ Employee receives salary
  - ▶ Salary is not less than the FLSA salary threshold AND
  - ▶ Employee has executive, administrative, or professional job duties
- ▶ Changes annual compensation requirement for highly compensated employees from \$107,432 to \$132,964 annually

# US DOL – FLSA INDEPENDENT CONTRACTOR TEST

- ▶ Now the “Economic Reality test”
- ▶ The following factors, discussed more below, should guide the assessment of whether a worker is an employee under the FLSA or an independent contractor in business for themselves:
  - ▶ Opportunity for profit or loss depending on managerial skill,
  - ▶ Investments by the worker and the employer,
  - ▶ Permanence of the work relationship,
  - ▶ Nature and degree of control,
  - ▶ Whether the work performed is integral to the employer’s business, and
  - ▶ Skill and initiative.