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STATES REEVALUATE CHILD LABOR LAWS IN 2024

Against a backdrop of high-profile violations of child labor laws, the first half of 2024 has brought an unprecedented volume of legislation either rolling back or strengthening protections against the exploitation of children in the workforce. The Fair Labor Standards Act ("FLSA") generally establishes a minimum working age of sixteen (16) in nonhazardous occupations and eighteen (18) in occupations deemed by the Secretary of Labor to be hazardous to minors' health or well-being, such as meat processing, coal mining, and certain jobs requiring the operation of heavy machinery or motor vehicles. Fourteen- and fifteen-year-olds may also work, but only outside of school hours and within limitations on the total number of hours worked per day per week.

Outside of these and other federal parameters, states are establishing their own child labor laws. In 2024, eight (8) states have successfully enacted bills weakening child labor laws. In Florida, for example, lawmakers passed a bill allowing parents and school superintendents to waive a state limitation of thirty (30) hours of work per week for minors aged sixteen and seventeen and allowing those minors to work more than eight (8) hours on Sundays and holidays, regardless of whether there is school the next day. Florida also passed a law easing restrictions against hiring sixteen- and seventeen-year-olds on home construction sites, excluding roofing or scaffolding jobs at over six feet, despite FLSA standards restricting minors of all ages from performing roofing work. Other states rolling back child labor protections include Indiana (allowing fourteen-, fifteen-, and sixteen-year-olds to work past 7 PM on school nights); Kentucky (allowing nonprofit employers to hire children twelve years and older); West Virginia (allowing teenagers in apprenticeship programs to perform hazardous work); Alabama (no longer requiring youth work permits for fourteen- and fifteen-year-olds); and Iowa (allowing children as young as fourteen to obtain drivers licenses to drive themselves up to 25 miles to and from work). Iowa has already been in hot water over a 2023 law loosening restrictions on teenage workers' hours in direct conflict with FLSA standards, exposing employers, mainly restaurants, to hefty fines from the Department of Labor ("DOL"). Federal law still controls when states loosen federal minimum labor standards; accordingly, businesses in states like Iowa risk incurring DOL fines when they comply with conflicting state laws.

On the other hand, some states have introduced and/or passed bills that would strengthen weak or outdated child labor protections, many by incentivizing compliance. Illinois, for example, revamped its youth work permit process, which requires informed

consent and eases enforcement of child labor protections, and updated its list of hazardous occupations. Colorado has proposed legislation that would increase civil and criminal penalties for child labor law violations, allow victims to collect statutory damages, establish protections for whistleblowers, and make child labor law violations public. Alabama, Nebraska, Oregon, and Virginia have also passed laws either increasing penalties for child labor law violations or allowing the states to impose penalties on violating employers on top of federal penalties.

THE INTERPLAY BETWEEN RAMADAN DRUG TESTING & RELIGIOUS ACCOMMODATIONS

Jeremi Taylor, a practicing Muslim and construction equipment operator for the Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleged that SEPTA violated his First Amendment rights and subjected him to workplace religious discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act ("PHRA") when it compelled him to drink water for federally mandated drug testing in 2022 and follow-up drug testing in 2023 during Ramadan. A federal district court agreed, notwithstanding a federal transportation rule requiring random testing. *Taylor v. The Se. Pa. Transp. Auth. (SEPTA)*, Civil Action 23-2140-KSM (E.D. Pa. Jun. 27, 2024).

SEPTA, a public transportation provider that receives federal funding, is required by the U.S. Department of Transportation's Federal Transit Administration to routinely drug test employees performing safety-sensitive functions pursuant to a written testing plan. 49 C.F.R. Part 40 § 40.1(a) and (b) ("Part 40") (Part 40 was updated in June 2023. The current version of Part 40 may be accessed here). Under SEPTA's written testing plan, randomly selected employees are summoned for weekly testing where they must provide a urine sample of 45 milliliters. If they fail to do so, the collector must proceed with shy bladder procedures which involve encouraging the employee to drink water so they can successfully provide the requisite urine sample the second time around. Part 40 § 40.63(d) and 40.65(a). If the employee cannot successfully provide the urine sample on their second try, the collector marks the failure as a refusal to test. A refusal means the employee cannot return to work until they submit to an evaluation with a substance abuse professional and complete any education courses or treatment requirements they require. Part 40 § 40.25(j). Upon returning to work, the employee must take a drug test and may be subject to increased follow-up testing. Part 40 § 40.25(b)(5).

Taylor could not produce a sufficient urine sample during his 2022 drug test and was encouraged to drink water by collectors on site who warned him that failure to provide a second sample could cost him his job. Taylor faced the binary choice to either break his fast or jeopardize his employment and ultimately drank water, breaking his Ramadan fast. Before he was subject to follow-up testing in 2023, his attorneys prepared and delivered a letter to SEPTA which advised SEPTA that testing Taylor during Ramadan again would further violate his rights. Taylor was nevertheless faced with the same choice he had faced a year earlier: break Ramadan or lose his job.

Taylor subsequently filed suit against SEPTA in Pennsylvania Eastern District Court where both parties filed cross-motions for summary judgment, which were respectively denied in part and granted in part. Notably, SEPTA's motion for summary judgment was denied as to Taylor's Title VII claims. The court ruled that while Taylor had failed to meet his burden as to the 2022 initial drug test, he had successfully stated a *prima facie* case for failure to provide a religious accommodation in connection with the 2023 follow-up drug tests. The court's ruling that SEPTA violated Taylor's religious rights by subjecting him to follow-up drug testing during Ramadan, while seemingly narrow in scope, has implications for religious accommodations in the workplace for all.

Employers must provide reasonable religious accommodations to their workers so long as doing so would not burden the employer's regular business conduct with undue hardship; failing to reasonably accommodate an employee constitutes religious discrimination under Title VII. Here, Title VII and Part 40 seem to be at odds, since providing Taylor with a reasonable accommodation would have undermined the requisite random nature of workplace drug testing. While the court reconciled Title VII's bar on religious discrimination in the workplace with Part 40's testing requirements for Taylor's follow-up testing, finding that SEPTA had notice and opportunity to reasonably accommodate Taylor during his 2023 follow-up tests, questions remain. Will Part 40's randomness requirement be more flexible and yield to all requests for religious accommodations moving forward? Will the employee requesting accommodations have to approach their employer with an attorney's letter to successfully state a *prima facie* case of religious workplace discrimination? Will Congress pen a written religious exception to the randomness requirement to be enshrined in Part 40? This remains to be seen, but thanks to this Court for recognizing the sort of damage this type of Hobson's choice presents, employees now appear to be a step more secure in obtaining religious accommodations against workplace religious discrimination.

FEDERAL COURTS IN TEXAS CONTINUE TO MESS WITH AGENCIES: COURT PARTIALLY BLOCKS FTC'S NON-COMPETE BAN

On Wednesday July 3, 2024, Judge Ada Brown of the United States District Court for the Northern District of Texas ("Judge Brown" or "Court") granted the United States Chamber of Commerce, Texas trade groups and a tax firm's ("Plaintiffs") request for a preliminary injunction against the Federal Trade Commission ("FTC"). The case is *Ryan, LLC, et. al. v. FTC.*, No. 3:24-CV-00986-E (N.D.Tex. July 3, 2024).

The FTC was established by the Federal Trade Commission Act ("FCT Act") in 1914 to protect consumers and promote competition. Congress vested it with the power to prevent unfair methods of competition and prevent unfair deceptive acts or practices. Finding that non-compete agreements were "unfair methods of competition," the FCT proposed the Non-Compete Rule which prohibited employers from entering or enforcing non-complete clauses with some exceptions for senior executives.

Plaintiffs sought a preliminary injunction to stop the Non-Compete Rule before it goes into effect on September 4, 2024. To do so, Plaintiffs had to establish: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction serves the public interest." The Court ruled that Plaintiffs were entitled to the injunction.

For likely success on the merits, the Court found that the Non-Compete Rule went beyond the FTC's statutory authority and was arbitrary and capricious. The FCT Act does give the FTC "some authority to promulgate rules to preclude unfair methods of competition" the Court held. But, the FCT Act did not grant the FCT authority to make substantive rules regarding unfair methods of competition but instead "housekeeping rules" for agency procedure or practice. The Court also found that the Non-Compete Rule was "arbitrary and capricious" under the Administrative Procedure Act ("APA") and so, unlawful. Here, the Court found the Non-Compete Rule "imposes a one-size-fits-all approach with no end date, which fails to establish a rational connection between the facts found and the choice made." The FCT also did not consider alternatives according to the Court, but instead "dismissed any possible alternatives, merely concluding that either the pro-competitive justifications outweighed the harms, or that employers had other avenues to protect their interests."

As for irreparable harm, the Court found that the Plaintiffs would suffer financial injury if the Non-Compete Rule were to take effect, including nonrecoverable costs to comply with the Rule and the risk of departing employees taking intellectual property and proprietary information with them. For the balance of equities and public interest requirements, the Court found that "it is evident that if the requested injunctive relief is not granted, the injury to both Plaintiffs and the public interest would be great. Granting the preliminary injunction serves the public interest by maintaining the *status quo* and preventing the substantial economic impact of the [Non-Compete] Rule, while simultaneously inflicting no harm on the FTC."

The Court did deny the Plaintiff's request for a nationwide injunction, instead limiting the scope of relief to the tax firm and plaintiff Ryan LLC, and the intervenors, Chamber of Commerce of the United States of America; Business Roundtable; Texas Association of Business; and Longview Chamber of Commerce.

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