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HR FORUM: Updates on Three Distinct Employment Law Issues

August 2023

Seyfarth Shaw LLP

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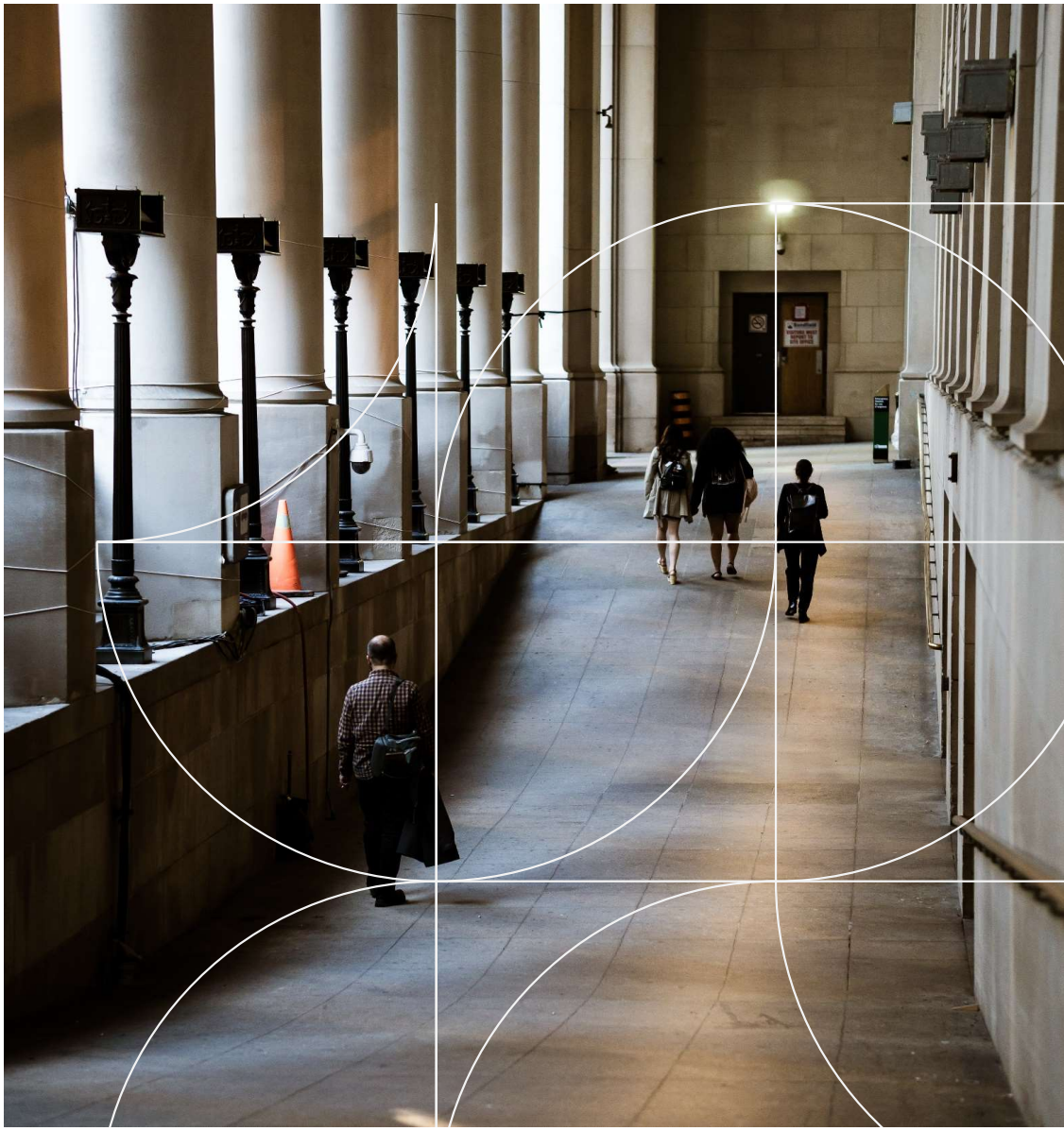
Pending bill in NY that would ban non-compete clauses in employment contracts



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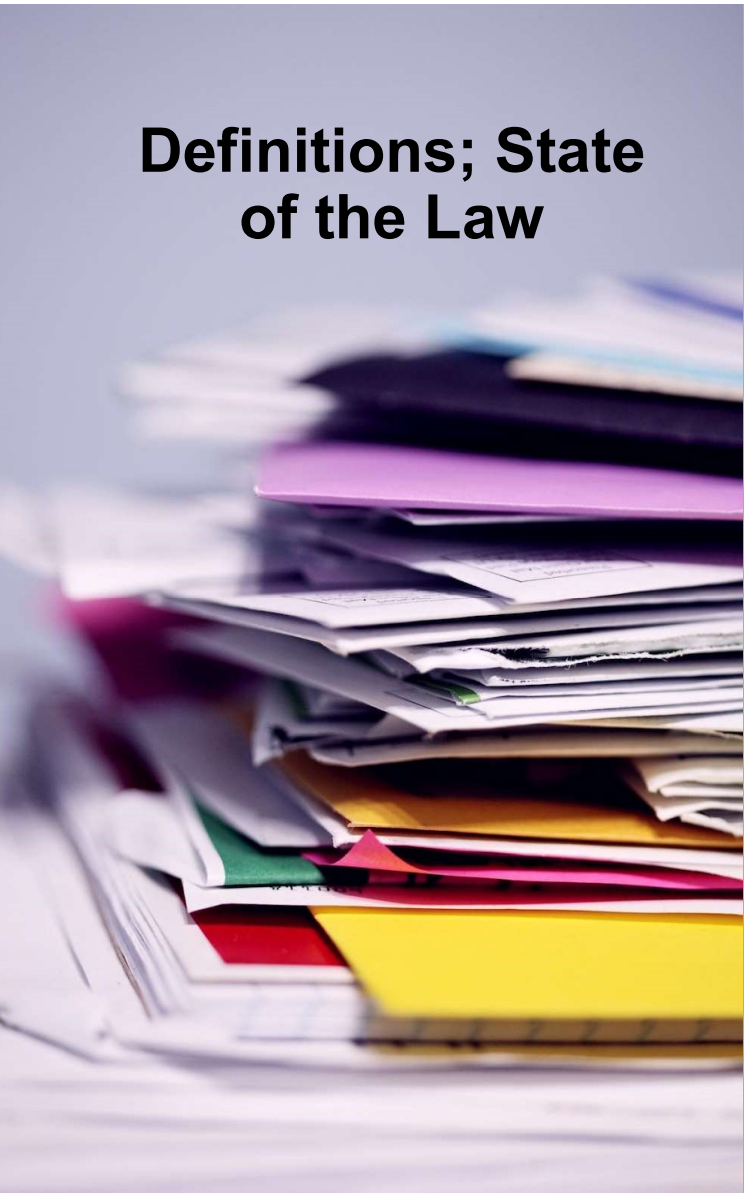
Status: Passed Legislature; Pending Before Governor

- As of August 2023: Bill passed both houses of the Legislature. Pending before Governor for signature.
- December 31, 2023: Deadline by which Governor must "call up" bill for action, or for Legislature to transmit bill to Governor for signature or veto.
  - Once bill transmitted: Governor has 10 days to act on it. If Governor does not take action, bill **becomes law**.
  - No "pocket veto" available here.

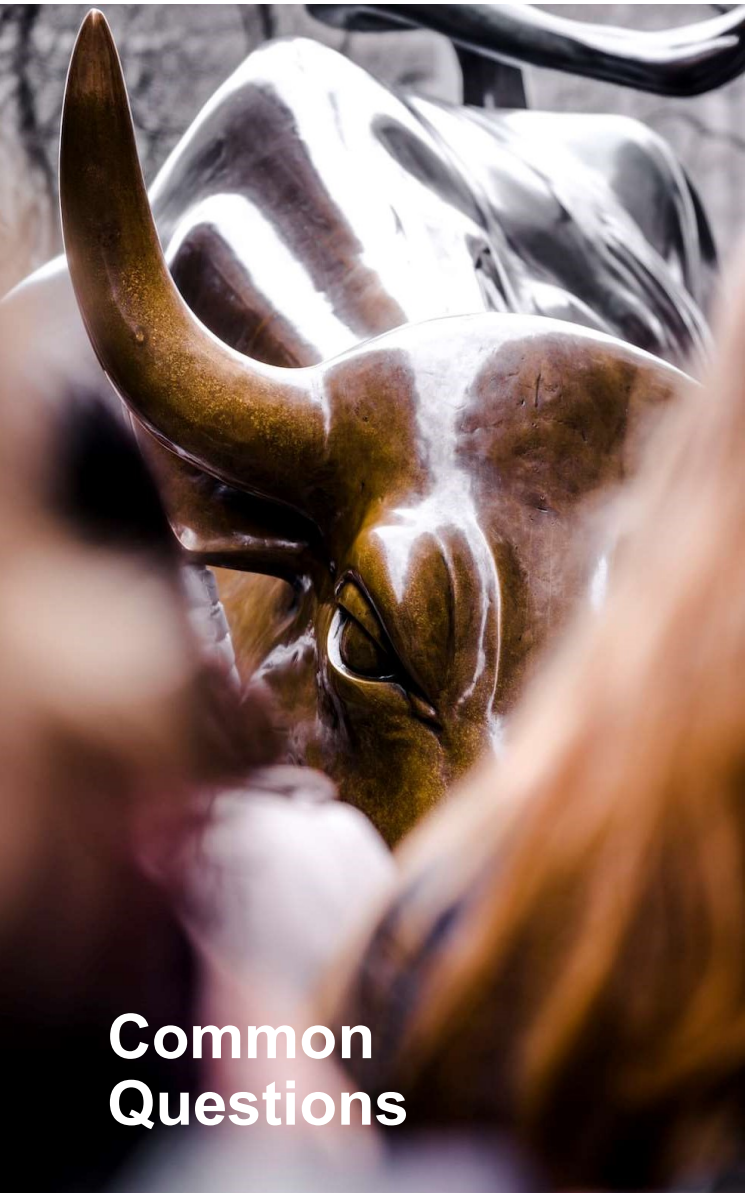


Broad Definitions of Agreements, Coverage

- “Non-compete agreements”: “any agreement, or clause contained in any agreement, between an employer and a covered individual that prohibits or restricts such covered individual from obtaining employment, after the conclusion of employment with the employer included as a party to the agreement.”
- Similarly broad definition of “covered individuals.”

Private Right of Action

- Private right of action and liquidated damages of up to $10,000.



Financial Services; Carve-Outs

- Because of the currently broad definition of “non-compete agreements,” it doesn’t look promising for those in the financial services industry. If the current definition remains, companies might want to choose Connecticut law or another state that’s defensible and favorable.

- California carves out financial services from the covered industries. New York could do the same in the final version signed by the Governor.

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Spotting Key Traditional Labor Issues in Employment Litigation

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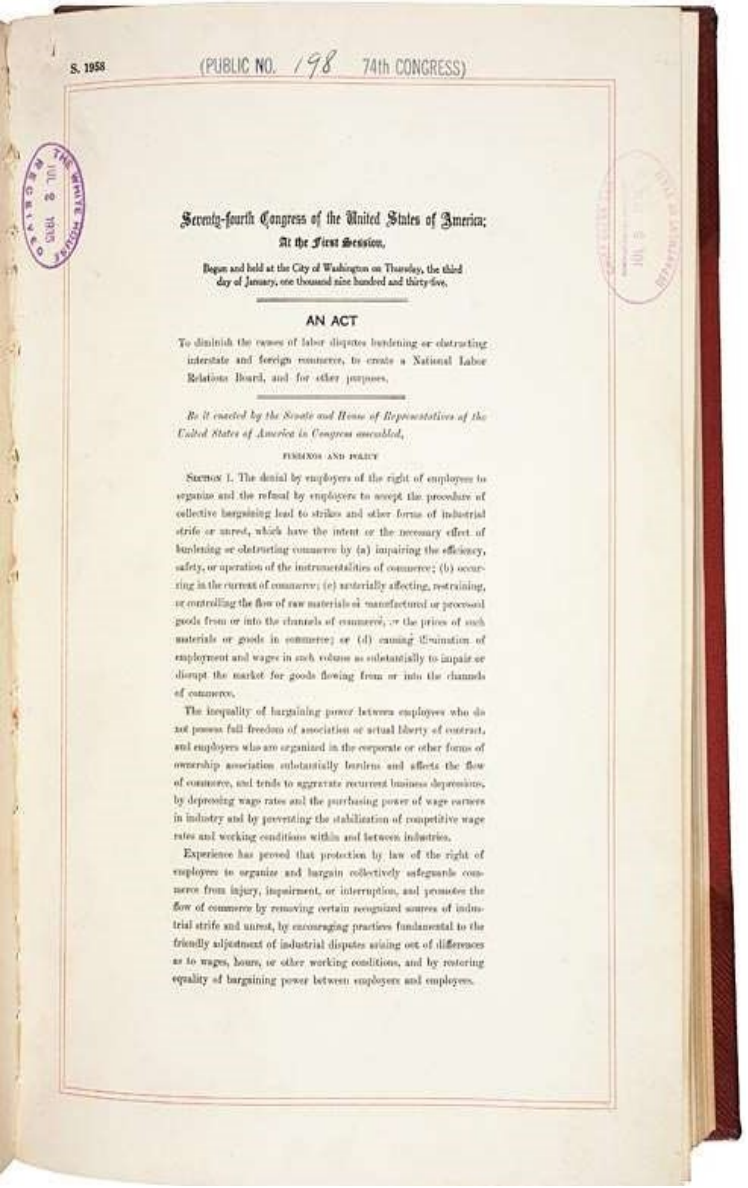


S. 1958 (PUBLIC NO. 198 74th CONGRESS)

Seventy-fourth Congress of the United States of America;
At the First Session,

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and thirty-five,

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

The Basic Laws

- The NLRA (also, “the Act”) prescribes the rules governing workplace-related interactions between employers, employees, and unions, including employee associations as defined under the Act.
- Employees enjoy the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing for the purpose of collective bargaining, and to engage in other concerted activities for the purpose of collective bargaining and other mutual protection
- Violations of these and other rights may constitute unfair labor practices. Some examples include
  - (1) threatening employees with consequences if they support or participate in a union or union activities,
  - (2) retaliation for supporting or being associated with union activities,
  - (3) spying on employees’ union efforts,
  - (4) discipling employees who engage in protected activities, and so on.

The Basic Laws (continued)

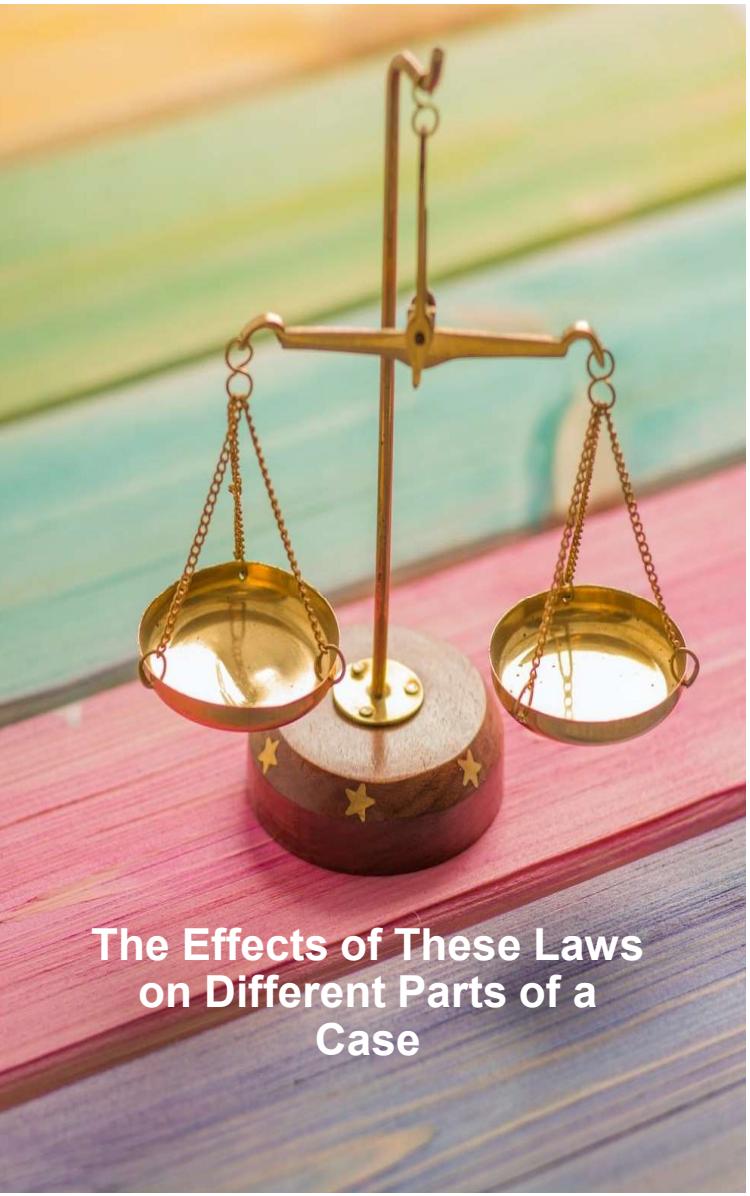
- The LMRA amended the NLRA, including providing certain limitations to Section 7 rights, such as by giving employees the right to refrain from union activities, and it also cemented the preeminence of federal law over the traditional labor field.
- In application, Section 301 “provides for federal jurisdiction over disputes regarding collective bargaining agreements and mandates the application of uniform federal law to resolve disputes.” *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 228 (3d Cir. 1995).
- Federal courts have developed common law to govern labor disputes and have concluded that under 301 it is the arbitrator under a collective bargaining agreement’s grievance process, not the court, who has the responsibility to interpret the labor contract in the first instance. *Allis-Chalmers Corp. v. Lueck*, 471 US 202, 220 (1985)

The Basic Laws (continued)

- The general test in most circuits to determine if a state rule or claim is preempted under Section 301 is whether the cause of action asserts nonnegotiable state law rights relating to employers or employees independent of any right established by contract, or instead, whether evaluation of the state claim is inextricably intertwined with consideration of the terms of the contract. In the Ninth Circuit that test has been defined as a two-part test, with the essential inquiry being:
  - (1) Does the claim seek purely to vindicate a right or duty created by the CBA itself? If so, then the claim is preempted, and the analysis ends there.
  - (2) But, If not, we proceed to the second step and ask whether a plaintiff's state law right is substantially dependent on analysis of the CBA, which turns on whether the claim cannot be resolved by simply looking to versus interpreting the CBA.

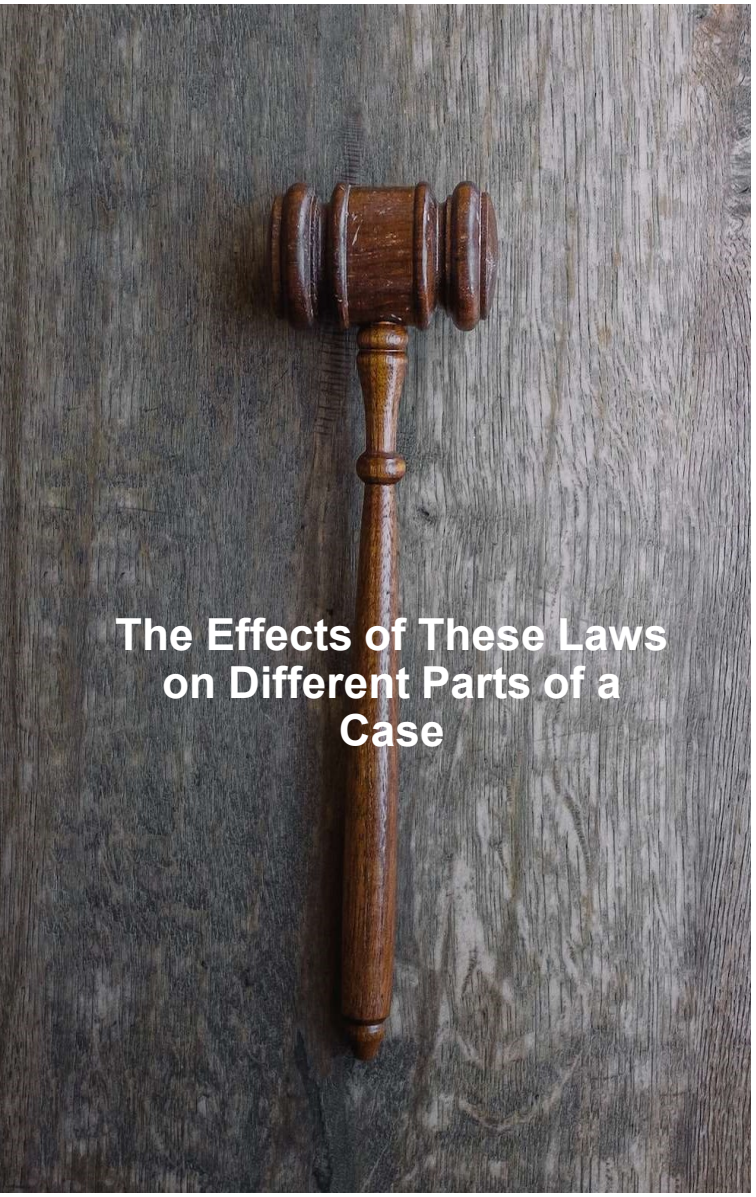
Pre-litigation

- EEO and other investigations
  - *Weingarten* Rights
    - Currently, non-unionized workplaces are not affected by *Weingarten*, but the Biden administration's General Counsel of the National Labor Relations Board, Jennifer Abruzzo, has signaled the intent to revisit the issue and reverse the rule yet again. *See* Advice Response Memo in *Starbucks Corporation*, 28-CA-293694 (May 24, 2022) (concluding the case was not the proper vehicle to overturn *IBM Corp.*).
  - *Johnnie's Poultry*
    - The *Johnnie's Poultry* doctrine provides that an employer or its agent may not interview an employee about a pending Board matter or arbitration without providing the employee with certain disclaimers before the interview takes place including: (1) participating is voluntary and (2) participation may cease at any time.
    - *Johnnie's Poultry* has been expanded to not only apply to Board complaints, but to pending arbitrations and other hearings. Be careful not to overstep into interrogation!



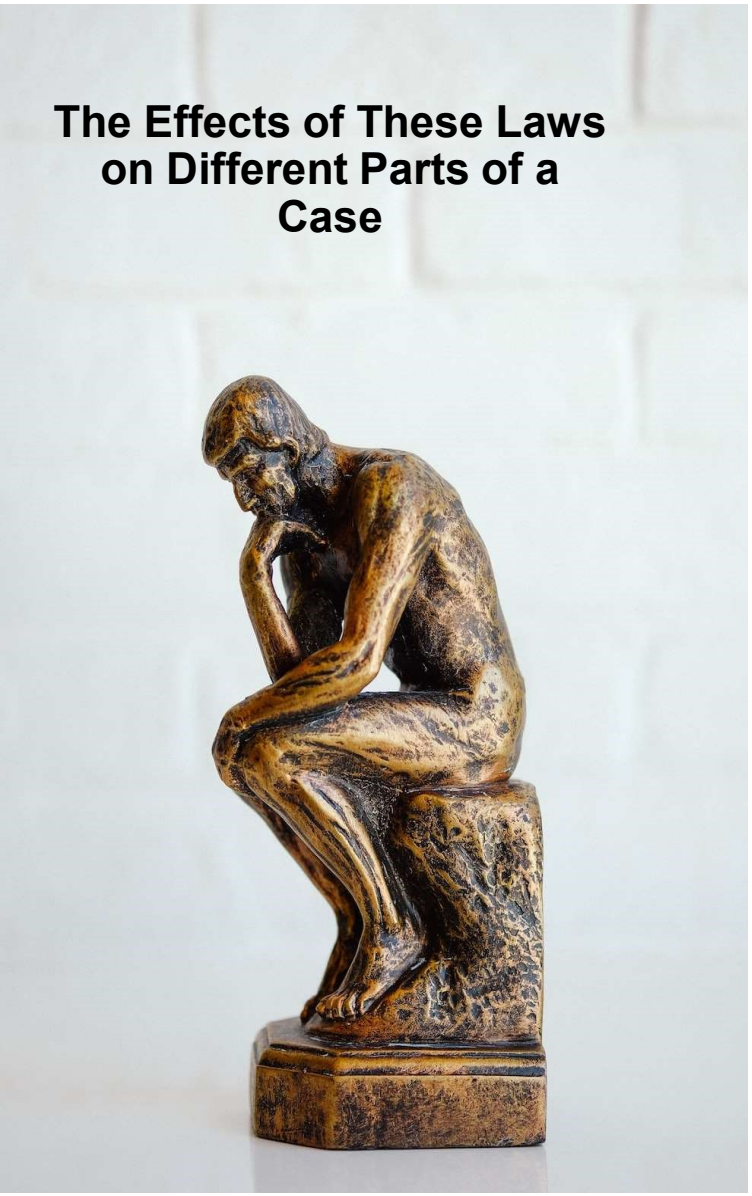
Pre-litigation

- In *Guess?, Inc.*, 339 N.L.R.B. 432, 434 (2003),the Board set forth a three-part test for determining whether an employer's deposition questions in a separate civil proceeding could violate the Act.
  - First, the questions must be relevant as determined by the law of the forum state;
  - Second, the question must not have an illegal objective; and
  - Third, the employer's interest in obtaining the information must outweigh the employee's confidentiality interests under Section 7 of the Act.
- In *Guess*, the employer was deemed to have violated the Act during a deposition in a workers compensation case by asking the deponent to reveal the identities of which employees attended a union meeting. 339 N.L.R.B. at 435.



Litigation Procedural Issues

- *Garmon* Preemption of State Law Claims (a post-mortem?)
  - Since the 1950s courts across the country, including the Supreme Court, have held that the NLRA preempts certain state laws that would otherwise impact implementation of the NLRA. In a famous the Supreme Court held in *Garmon* that state and federal courts may not resolve claims based on conduct that is actually or "arguably protected" by the NLRA.
  - In a case referred to as *Glacier*, the Supreme Court held that strikers may be liable for economic damage they cause to employer property if they fail to take reasonable precautions to avoid that damage. Some consider it a limited holding; others see it as an opening.
- Separate, but related to the preemption issue, is the potential defense of waiver. In simple terms, a union may under certain circumstances waive the rights of individual union members to pursue civil litigation in the courts by agreeing to arbitration for employment discrimination or employment claims.



Concluding the Case

- Settlement and Release Issues
  - *McLaren*
  - NLRB General Counsel Memorandum 23-05 (March 22, 2023)
  - Problematic Agreements
    - Mnemonic: **N**aughty **D**ogs **C**hase **B**irds, **S**ome **P**refer **C**atching **C**ats
      - **N**oncompetition Agreement
      - Non-**D**isparagement Agreements
      - **C**ooperation Agreements
      - **B**road Liability Releases
      - **S**olicitation Agreements
      - **P**oaching Agreement
      - **C**ovenant Not to Sue
      - **C**onfidentiality Agreement

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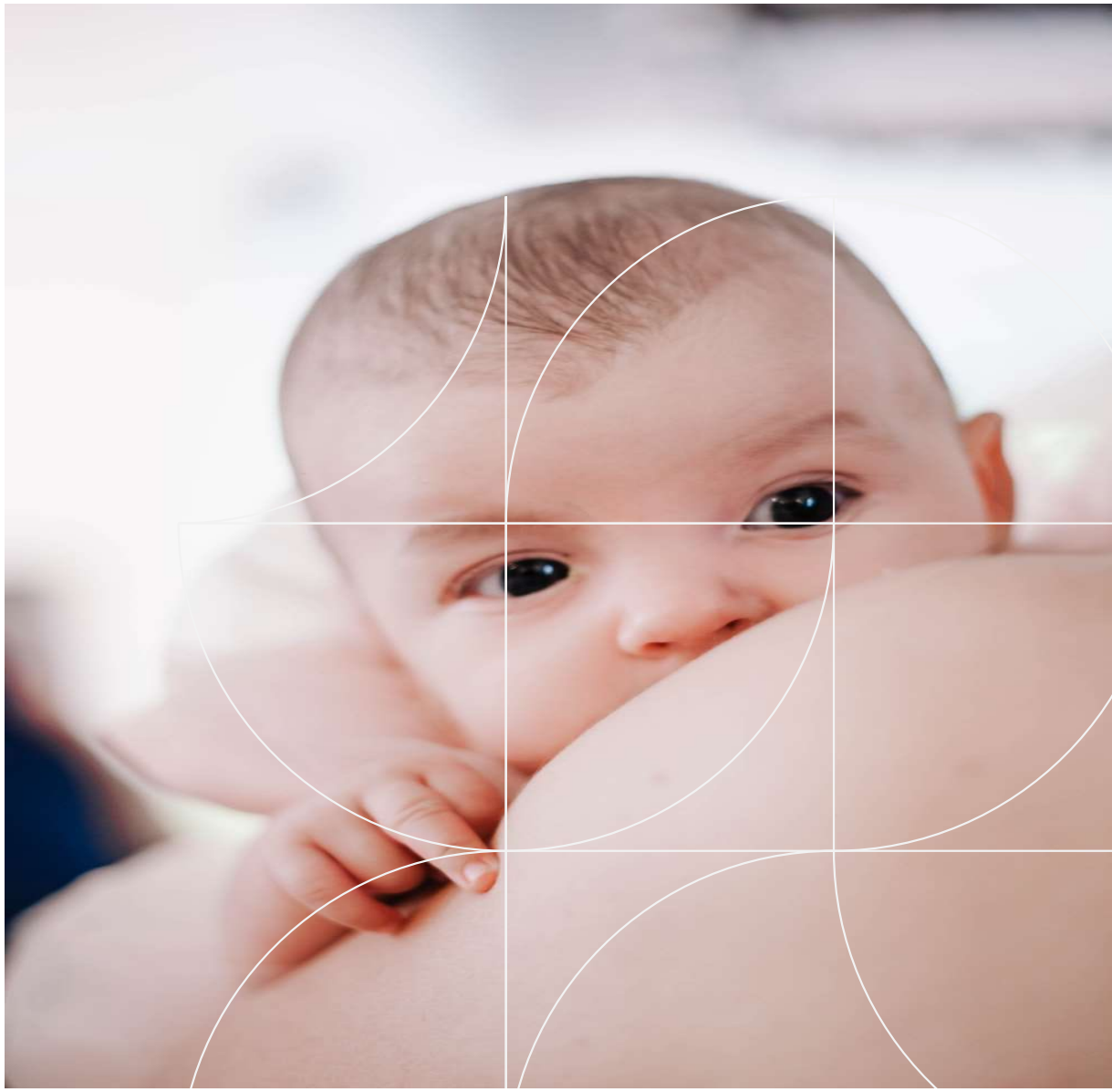
Pregnant Workers Fairness Act



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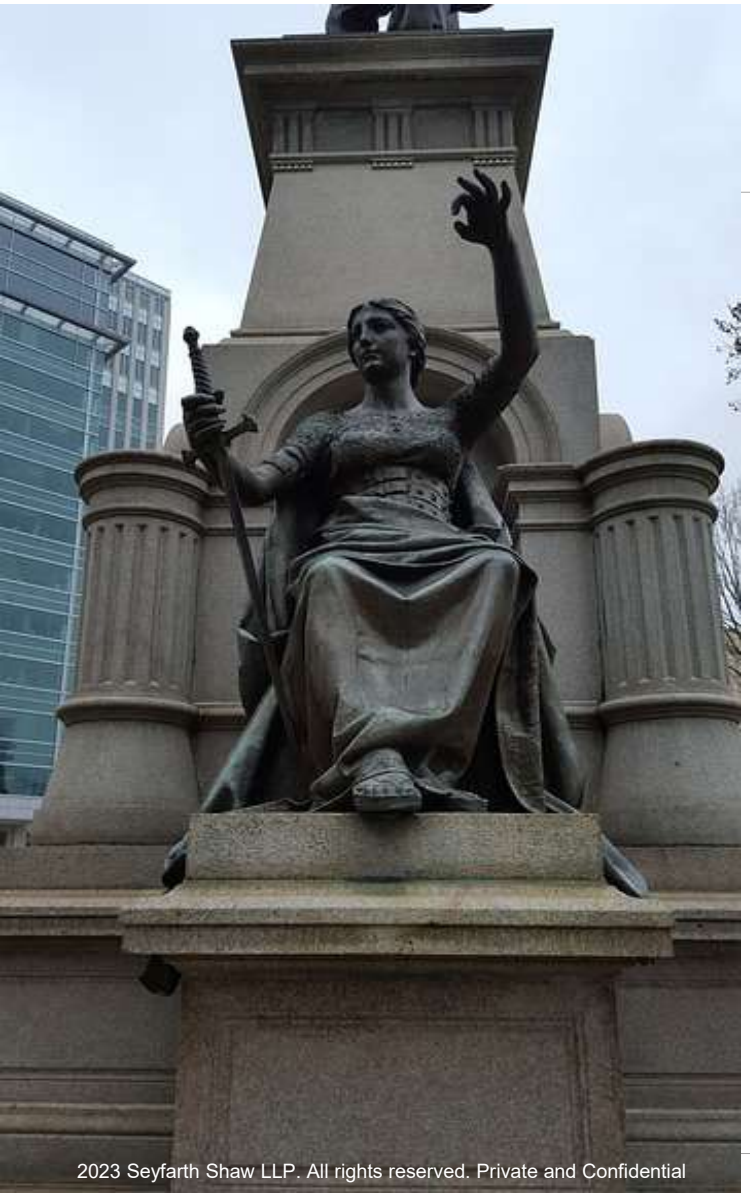
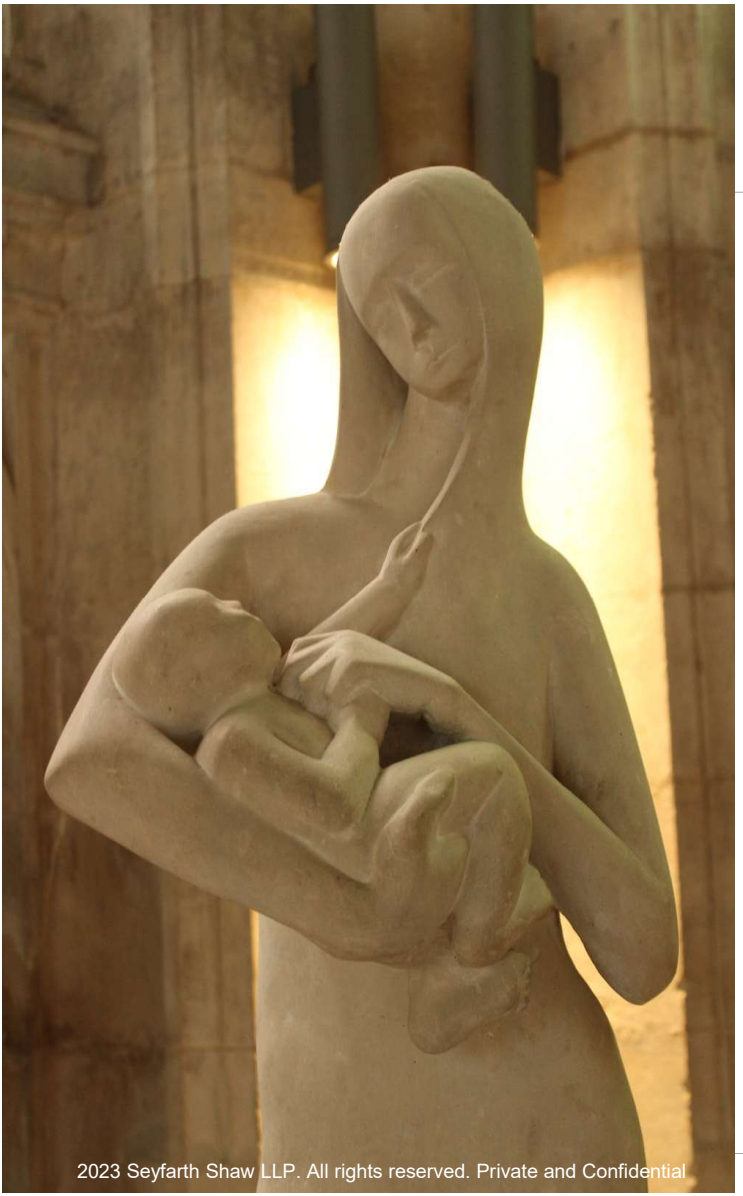
Pregnant Workers Fairness Act (PWFA) Overview

- **Effective Date:** June 27, 2023
- Requires employers to provide reasonable accommodations to employees for known limitations related to pregnancy, childbirth, or related medical conditions
- **Covered Employers:** employers with 15 or more employees (public and private)
- **Covered Employees:** all employees (including part-time, seasonal) and applicants
- **Defenses:**
  - Undue hardship
    - akin to the ADA (significant difficulty or expense for employer)
    - high legal threshold (especially larger employer)



Pregnant Workers Fairness Act (PWFA) Overview (cont.)

- **Prohibits:**
  - failure to provide reasonable accommodation (unless undue hardship)
  - requiring employee to accept an accommodation without interactive process
  - denial of equal employment opportunities
  - requiring leave if alternative reasonable accommodation available
  - adverse action with respect to terms/conditions/privileges of employment
- **Damages:**
  - front pay
  - backpay
  - compensatory
  - punitive
  - attorney's fees and costs
  - injunctive relief
  - * establishing good faith effort to accommodate and engaging in interactive process may help mitigate



PWFA: Comparison to Federal Laws

- **Pregnancy Discrimination Act (PDA):**
- prohibits discrimination vs. affirmative obligation
- **Americans with Disabilities Act (ADA):**
  - Disability Requirement –
    - ADA requires reasonable accommodation for a disability – physical or mental impairment that substantially limits a major life activity/major bodily function
    - Some (but not all) pregnancy-related conditions can constitute a disability (e.g. gestational diabetes) but pregnancy itself is not a disability
  - Qualified Individual –
    - ADA – employee must be able to perform the essential functions of their position, with or without accommodation
    - PWFA – employee can be unable to perform an essential function for a "temporary period" as long as it could be performed "in the near future" and as long as the inability to perform essential function can be "reasonably accommodated"

PWFA: EEOC's Proposed Regulations

- Released August 7, 2023
- 60-day period for comment
- Final regulations - December 29, 2023
- Broad Definition of Physical and Mental Conditions Arising Before, During, and After Pregnancy
  - includes current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions
  - pre-existing conditions that are exacerbated by pregnancy or childbirth may also qualify under the PWFA

PWFA: EEOC's Proposed Regulations (cont.)

- Can Employers Request Documentation?
  - An employer may only obtain a medical documentation to support a request for an accommodation if it is reasonable under the circumstances
  - Requests for documentation that violate the proposed rule could be considered unlawful coercion or retaliation
  - "Reasonable Documentation":
    - (1) describes or confirms the physical or mental condition;
    - (2) confirms that it is related to, affected by, or arises out of pregnancy, childbirth or related medical conditions; and
    - (3) confirms that a change or adjustment is needed for that reason.
- "Temporary": lasting for a limited time, not permanent, and may extend beyond 'in the near future'
- "In the Near Future": generally forty weeks from the start of the temporary suspension of an essential function

PWFA: EEOC's Proposed Regulations (cont.)

- Examples of reasonable accommodations:
  - Frequent breaks;
  - Sitting/standing;
  - Schedule changes, part-time work, and paid and unpaid leave;
  - Telework;
  - Reserved parking;
  - Light duty;
  - Making existing facilities accessible or modifying work environment;
  - Job restructuring;
  - Temporarily suspending one or more essential functions;
  - Acquiring or modifying equipment, uniforms or devices;
  - Adjusting or modifying examinations or policies.

PWFA: Comparison to State Laws

New York State Human Rights Law (NYSHRL)		PFWA
Pregnancy-related condition does not have to meet definition of a disability		
Interactive process required		
Covered employers	All employers	15 or more employees
Qualified employees	employee must be able to, with or without accommodation, perform in a reasonable manner the activities involved in the job or occupation (satisfactorily perform the essential functions of the job or occupation)	employee can be unable to perform an essential function for a "temporary period" as long as it could be performed "in the near future" and as long as the inability to perform essential function can be "reasonably accommodated"
Medical Documentation	employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or pregnancy-related condition, or that is necessary for consideration of the accommodation	EEOC proposed regulation: employer may only obtain a medical documentation to support a request for an accommodation if it is reasonable under the circumstances
Venues	NYSDHR/state court	EEOC/federal court

New York City Human Rights Law (NYCHRL)		PFWA
Pregnancy-related condition does not have to meet definition of a disability		
Interactive process required		
Covered employers	Four or more employees	15 or more employees
Qualified employees	employee must be able to with or without accommodation, satisfy the essential requisites of the job	employee can be unable to perform an essential function for a "temporary period" as long as it could be performed "in the near future" and as long as the inability to perform essential function can be "reasonably accommodated"
Medical Documentation	employer may NOT require an employee to provide medical confirmation of pregnancy, childbirth, or related medical condition except for the following: (1) an employee is requesting time away from work, including for medical appointments, other than the presumptive six-to-eight-week period following childbirth for recovery from childbirth, and may do so only if the employer requests verification from other employees requesting leave-related accommodations for reasons other than pregnancy, childbirth, or related medical condition; or (2) an employee is requesting to work from home, either on an intermittent basis or a longer-term basis	EEOC proposed regulation: employer may only obtain a medical documentation to support a request for an accommodation if it is reasonable under the circumstances
Potential Venues	NYSDHR/NYCCHR/state court	EEOC/federal court

Lactation Accommodation Updates

- Amendment to New York Labor Law:

– Effective June 7, 2023

– New York State employers required to designate a room or location to allow employees to pump breast milk and to adopt a policy to be published by the Department of Labor ("DOL")

– designated pumping location must be:

1. in close proximity to the work area;
2. well lit;
3. shielded from view; and
4. free from intrusion from other persons in the workplace or public
5. must also include, at a minimum: (i) a chair, (ii) a small table, (iii) nearby access to running water, and (iv) an electrical outlet, if the workplace is supplied with electricity

– DOL issued model policy

1. informs employees of their rights under New York Labor Law § 206-c
2. specifies the means by which a request may be submitted to the employer for a room or other location for use by employees to express breast milk; and
3. requires the employer to respond to the request within a reasonable timeframe, but not to exceed five business days

▪ employers must adopt or prepare policy that meets or exceeds the requirements and distribute policy to employees

Lactation Accommodation Updates (cont.)

- PUMP for Nursing Mothers Act:

– amends the Fair Labor Standards Act ("FLSA") to provide employees with reasonable break time to express breast milk for a nursing child for one year after the child's birth each time the employee has a need to express

– employers are also required to provide a place, other than the bathroom, that is shielded from view and free from intrusion of coworkers and the public, in which an employee may express breast milk

– protections were previously available to non-exempt employees, the PUMP Act provides these protections to all employees, regardless of exemption status

– breaks are not required to be paid with the following exceptions:

  - if non-exempt workers are not completely relieved of their duties for the entire break period or if they express breast milk during an otherwise paid break period, then they must be paid for the entire break
  - exempt employees should not have their weekly salary reduced, regardless of whether they take breaks to express milk

New York Paid Family Leave – 2023 Updates

- **Covered Family Members:**
  - (a) child
  - (b) spouse
  - (c) domestic partner
  - (d) parent
  - (e) grandchild
  - (f) grandparent
  - (g) sibling (biological or adopted sibling, a half-sibling or stepsibling) (effective January 1, 2023)
- **Maximum Weekly Benefit:** For 2023, the SAWW is $1,688.19, which means the maximum weekly benefit is $1,131.08. This is $62.72 more than in 2022.
- **Employee Contribution % and Maximum:** 2022: 0.511% of gross wages per pay period, up to $423.71 annual max; 2023: 0.455%, up to $399.43 annual max.

thank you

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