So, It's 2025… What Now?

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National Update

- State Legislative Trends
- Trump Administration – first month
- Federal Minimum Wage/Overtime Exemption
- EEOC Trends
  - Pregnant Workers Fairness Act
  - AI
- OSHA Updates
- Non-Compete Status
- Chevron & other notable case law
- CA Updates

State Legislative Trends

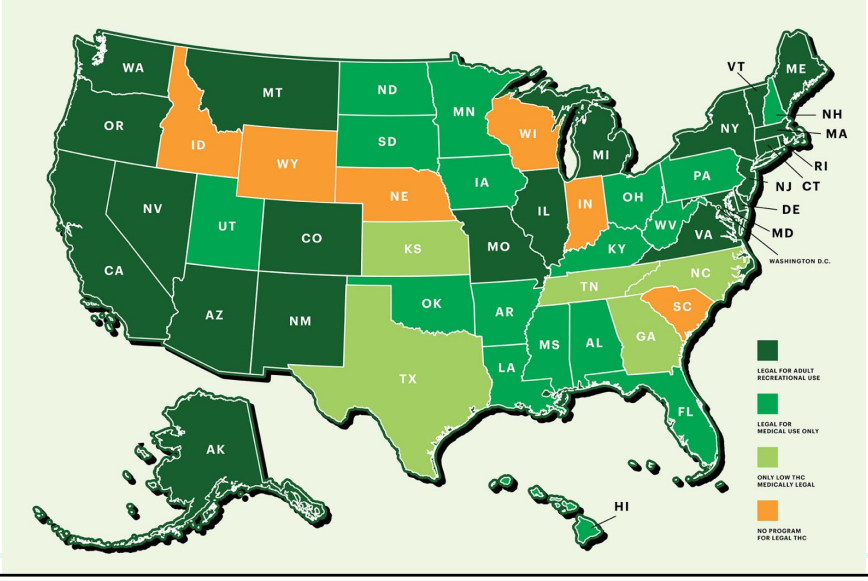
- 76,756 bills introduced in state legislatures (1,599 average)
- Enacted the fewest bills—Alaska, Ohio, Missouri, North Carolina, and Pennsylvania
- Enacted less than 1% of bills—Minnesota, Illinois, Ohio, Missouri, and New York
- Enacted 98% of bills—Arkansas

State Legislative Trends

Key State Issues—

- Artificial Intelligence (45 states)—446 bills with 69 enacted
- Inflation Related—1,070 bills with 145 enacted
- Mental Health—5,280 bills with 859 enacted
- Electric Vehicles—729 bills

State Legislative Trends



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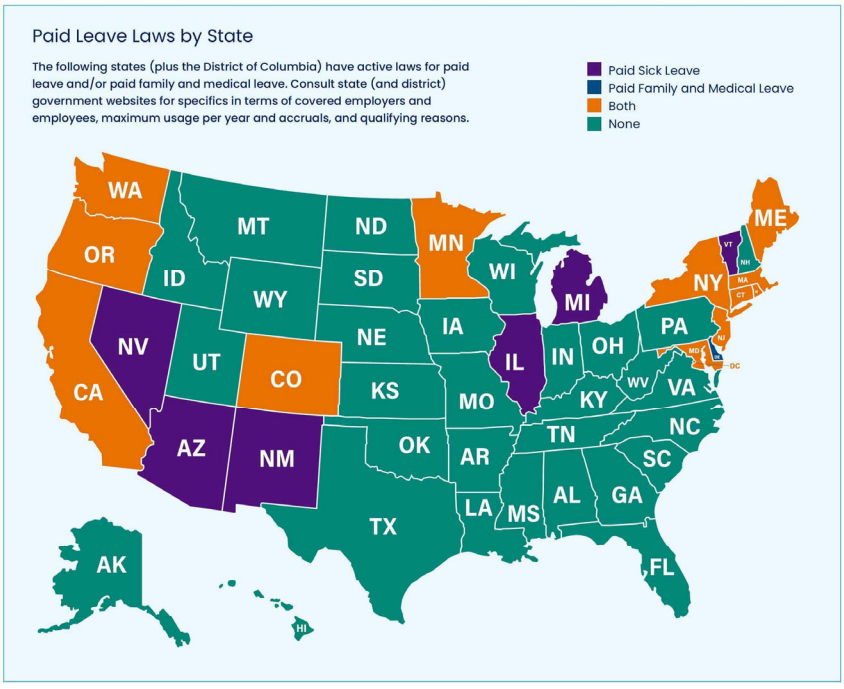

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First Days in Office

- **President Trump signed numerous executive orders following his inauguration**
  - Eliminated government DEI policies
  - Directed civil rights agencies (DOL & EEOC) to recognize only two sexes—male and female—when enforcing anti-discrimination laws
  - Reversed Biden-era policies, including a measure to regulate artificial intelligence
  - Implemented hiring freeze
  - Ordered workers back to the office

The Federal Minimum Wage

- Trump has been unclear about raising the federal minimum wage
  - opposed increasing it in his first term as harmful to small businesses
  - opposed to increasing it in 2020 election
  - his 2024 campaign website said he supports raising the federal minimum wage, but $15 per hour is unlikely
  - likely to revoke Biden Executive Order 14026 setting the current federal contractor minimum wage at $17.20 per hour
    - assuming it survives court challenges.
- Raise in federal minimum wage may be irrelevant for some employers (depending on state or local minimum wages)

Federal Overtime Rule 3.0

- In April 2024, the DOL implemented a rule that raised the salary threshold for "white collar" exemptions to $44k on July 1 and $59k on January 1. Immediate court challenges followed in the E.D. of Texas.
- On November 15, 2024, Judge Sean Jordan ruled the DOL exceeded its authority:
  - The "white collar" exemptions turn on duties – not salary – and the new rule effectively displaced the duties test with a predominate salary-level test.
  - Court also cited to the SCOTUS opinion in *Loper Bright Enterprises*, which overturned *Chevron* deference in favor of judicial interpretation and enables courts to strike down agency rules more easily.
  - July 1, 2024, increase was vacated; January 1, 2025, increase did not take place.
- DOL appealed on November 26
  - Trump administration may not choose to maintain the appeal.

Less EEOC Litigation Going Forward?

- Fiscal Year 2024 EEOC Litigation Trends
  - 110 lawsuits filed for the year ending September 30, 2024, including:
    - 13 systemic cases involving a pattern, practice, or policy of discrimination
    - 48 cases under the Americans with Disability Act (ADA)
    - Over 40 cases alleging retaliation under statutes enforced by the EEOC
    - 5 cases under the Pregnant Workers Fairness Act (PWFA)
    - 5 sexual harassment cases on behalf of teenage workers under Title VII
    - 4 cases under Title VII alleging sex discrimination based on sexual orientation
    - 16 lawsuits alleging Title VII violations against covered employers who failed to file adequate EEO-1 Reports

EEOC Cases in the News

- **Disability Discrimination (***EEOC v. Federal Express Corporation***)**
- EEOC filed a Complaint against FedEx, alleging that it violated the ADA by ignoring dispatchers' requests for accommodations to continue teleworking
- Highlighted the experience of one employee
  - EEOC alleges she was forced to retire early after the company rejected her request to continue teleworking because her disability (Type II diabetes, asthma, hypertension, chronic kidney disease and diabetic neuropathy) impacted her ability to walk
  - Her office was relocated to Manhattan from Somerset, New Jersey, and would have required her to take several trains
- Suit alleges FedEx denied accommodation requests for other employees with disabilities preventing them from returning to work

Pregnant Workers Fairness Act (PWFA)

Effective June 2023 – It Prohibits:

- Failing to make reasonable accommodations to known limitations of qualified employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

Pregnant Workers Fairness Act (PWFA)

- The PWFA essentially requires employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions.
- Applies to employers with 15 or more employees
- The PWFA protects employees and applicants of such employers who have known limitations related to pregnancy, childbirth, or related medical conditions.
- One of the main litigation priorities for the EEOC in 2025.

EEOC's Examples of Reasonable Accommodations Under the PWFA

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom;
- Changing food or drink policies to allow for a water bottle or food;
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing;
- Changing a uniform or dress code or providing safety equipment that fits;
- Changing a work schedule, such as having shorter hours, part-time work, or a later start time;
- Telework;
- Temporary reassignment;
- Temporary suspension of one or more essential functions of a job;
- Leave for health care appointments;
- Light duty or help with lifting or other manual labor; or
- Leave to recover from childbirth or other medical conditions related to pregnancy or childbirth.

EEOC Begins Enforcement – September 2024

EEOC v. Wabash National Corporation, U.S. District Court for the W.D. Kentucky

- Manufacturing company denied pregnant employee's request to transfer to a role that did not require lying on her stomach. Instead, forced her to take unpaid leave.
- When leave time expired, employee resigned rather than return to same position without modification at eight months pregnant.
- The company also unlawfully required medical documentation

EEOC Begins Enforcement – September 2024

EEOC v. Polaris Industries, Inc., U.S. District Court for the N.D. Alabama

- Manufacturing company refused to excuse employee's absences for pregnancy-related medical appointments and required her to work overtime in violation of doctor's restriction from working over 40 hours per week during her pregnancy.
- Received points under the company's no-fault attendance policy and resigned to avoid termination and to protect her pregnancy.

EEOC v. Urologic Specialists of Oklahoma, Inc., U.S. District Court for the N.D. Oklahoma

- Medical practice would not allow pregnant medical assistant to sit, take breaks, or work part-time at the direction of her treating physician. Instead, forced her to take unpaid leave.
- Employee refused to return to work absent guarantee she would be permitted lactation breaks as needed and was fired for refusing to return to work.

Artificial intelligence guidance from the EEOC

- The EEOC has outlined instances of where the use of AI during the hiring process may trigger Title VII violations:
  - resume scanners that prioritize applications using certain keywords;
  - "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
  - video interviewing software that evaluates candidates based on their facial expressions and speech patterns;
  - testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test; and
  - employee monitoring software that rates employees on the basis of their keystrokes or other factors

Employers cannot blame AI vendors

- The EEOC recommends that you may want to specifically ask any vendor you are considering to develop or administer an algorithmic decision-making tool whether steps have been taken to evaluate whether that tool might cause an adverse disparate impact.
- The EEOC also recommends asking the vendor whether it relied on the four-fifths rule of thumb or whether it relied on a standard such as statistical significance that is often used by courts when examining employer actions for potential Title VII violations.

How does this look in practice?

- An applicant rejected from a position at iTutorGroup thought something was fishy when they allegedly submitted their same resume again but this time included a younger birthdate – and this time secured an interview. They took their complaint to the EEOC, which filed a lawsuit against the employer on behalf of more than 200 applicants alleging age and gender discrimination. The lawsuit alleged that the company illegally screened out women applicants over 55 and men over 60.
- iTutor denied the allegations and continues to deny any wrongdoing despite entering into a voluntary Consent Decree settlement with the EEOC last week. Besides paying out $365,000 to the group of over 200 rejected applicants, iTutor agreed to adopt anti-discrimination policies and conduct trainings to ensure compliance with equal employment opportunity laws. The company must also consider anew all applicants that were purportedly rejected because of their age.

OSHA/Workplace Safety Updates

What Did Trump Do During His First Term?

- Cut inspections to lowest number in OSHA's history
- Declined to issue COVID-specific protections
- Rescinded key electronic recordkeeping requirements

OSHA Updates

Walkaround Inspections Rule- OSHA issued a final rule which took effect on May 31, 2024. The final rule amends OSHA's existing "walkaround" rule after a long history led to this rulemaking.

- The new rule expands employees' rights to authorize the presence of a third-party (nonemployee) representative during an inspection. The CSHO in charge of an inspection has discretion to determine whether a third-party representative is reasonably necessary to conduct an effective and thorough inspection.
- The U.S. Chamber of Commerce, along with a coalition of business groups, has a pending lawsuit against OSHA in the U.S. District Court for the Western District of Texas over the legality of the new walkaround rule.

OSHA Updates (continued)

Proposed Heat Safety Rule - OSHA's proposed standard would apply to all employers conducting outdoor and indoor work in all general industry, construction, maritime, and agricultural sectors where OSHA has jurisdiction over workplace safety.

- New Rule Requirements
  - Heat hazard identification and assessment (regular heat risk assessments and monitoring workplace temperatures)
  - Preventive measures (hydration, rest breaks, shade and cooling areas)
  - Training and education
  - Emergency planning and response (Heat Illness Prevention Plan and Emergency Medical Response)
  - Recordkeeping and reporting
  - Additional requirements for high-risk industries
    - Enhanced protections and special considerations for vulnerable workers

OSHA Updates (continued)

August 30, 2024: Proposed rule published in the Federal Register.

- Members of the public can **submit comments** for 120 days.

Early 2025: OSHA will take the comments into account and **publish** the rule in final form.

- Unclear what **new administration** will propose or if the rule will be on hold due to legal challenges.

OSHA Updates (continued)

Regardless of what happens with the new proposed heat stress rule, OSHA is **focusing on heat-related inspections** through its National Emphasis Program (NEP) related to heat illnesses and injuries for indoor and outdoor workers.

- NEPs are **temporary programs** that focus resources on particular hazards and high-hazard industries.
- The **heat stress NEP** is effective until April 2025, meaning OSHA will continue to target workplaces with a prevalence in these injuries.

OSHA Updates (continued)

Current Workplace Safety Environment

- Very aggressive enforcement - SVEP (Severe Violator Enforcement Program), Penalty Grouping, Instance-by-Instance Penalty Adjustments policy, use of Emphasis Programs.
  - Expect the new administration to rein in OSHA's exercise of discretion as to enforcement tools.
- Expect fewer new OSHA rules to go forward during Trump's second term.

FTC Non-Competes Rule Status

- In April 2024, the FTC issued a final rule which they stated would promote competition by banning non-competes nationwide
- The rule was set to go into effect in early September but on August 20, 2024, the US District Court for the Northern District of Texas issued an Order in the *Ryan LLC. v. FTC* case, that said the FTC's ban exceeded its legal authority
- In other preliminary rulings, a Pennsylvania court sided with the FTC and a Florida court sided with the challengers to the ban
- The FTC has appealed the Texas ruling
- Ultimate Supreme Court review will be a multi-year process
- **Trump FTC will likely drop legal fight and/or repeal rule entirely**

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (June 28, 2024)

- **What happened?**
  - In two separate cases, commercial fishing groups claimed that a federal agency exceeded its power by forcing their fishing vessels to pay the salaries of observers on board. After lower federal courts upheld the agency regulation based on the *Chevron* framework, the fishing companies asked the Supreme Court to overrule or at least limit *Chevron.*
- **What is the issue?**
  - A 1984 SCOTUS decision established what was known as the Chevron doctrine:
    - Provided a two-step framework for courts/agencies to interpret statutes
    - If the text spoke to a precise issue, then the agency was bound by the unambiguous expressed language
    - If it was silent or ambiguous, then the court should defer to the agency's interpretation of the statute
  - This policy of deference has provided stability throughout the years – but has given agencies outsized power to set regulations that govern the workplace

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (June 28, 2024)

- On June 28, 2024, SCOTUS overturned the decades-old *Chevron* doctrine
  - If an agency action is challenged in court, courts will continue to respect the agency's authority if it has been properly delegated by statute
  - However, courts may not defer to an agency's interpretation of the law just because it is ambiguous but instead "must exercise their independent judgment when deciding whether an agency has acted within its statutory authority."
- In its reasoning, the Court wrote:
  - *Chevron* is at odds with the requirements of the Administrative Procedure Act, because it allows agencies to change positions as they please without being authorized by Congress to do so.
  - *Chevron* "prevents judges from judging."

What does this mean for employers?

- Agencies and positions that might come under attack
- Court's decision gives employers new tools for pushing back when agency rulemakings are overly aggressive
  - Wage and Hour
  - Labor Law under the NLRB
  - EEOC and discrimination law
  - OSHA workplace safety
  - Non-competition and the FTC ruling
  - Pay equity
  - Immigration

Okonowsky v. Garland, 109 F.4th 1166 (2024)

- Lindsay Okonowsky, a former staff psychologist at the Federal Correctional Complex at Lompoc, discovered that a corrections lieutenant with whom she worked and who was responsible for overseeing the safety of guards, prison staff, and inmates had created an Instagram page containing multiple posts that were overtly sexist, racist, anti-Semitic, homophobic, and transphobic.
- Approximately 100 of Okonowsky's co-workers followed the page, which explicitly or impliedly referred to the prison, prison staff, and inmates. Additionally, some of the posts contained derogatory images resembling Okonowsky.

Okonowsky v. Garland

- Per the lower Court five IG posts relating to the plaintiff's sex "occurred entirely outside of the workplace" because the posts were made on a staff member's personal Instagram page and none of the five posts was ever sent to Okonowsky, displayed in the workplace, shown to Okonowsky in the workplace, or discussed with Okonowsky in the workplace without her consent. The lower court found in favor of the prison.
- The Ninth Circuit reversed, concluding that "offsite and third-party conduct [like the co-worker's Instagram page] can have the effect of altering the working environment in an objectively severe or pervasive manner."

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2023 CALIFORNIA Employment Law Update

Minimum Wage Increases on the Horizon

- The Department of Finance (DOF) has announced that the statewide minimum wage for all employers will increase to **$16.50** per hour on January 1, 2025
- Note that Proposition 32 (on November ballot) would have increased state minimum wage even more – but it failed.
- Industry specific and local minimum wages (higher) will still control.
  - **Industries:** Fast food, healthcare, hotels
  - **40 cities and counties currently have higher minimum wage**: San Diego, Oakland, Santa Clara, Los Angeles, West Hollywood (among others)

Minimum Wage Increases on the Horizon

- What is the impact of a $16.50 state minimum wage?
  - Minimum salary for exempt employees rises from $66,560 to $68,640.
  - Minimum hourly rate for inside sales exemption rises from $24 per hour to $24.75 per hour.
  - Tool rate increases from $32 per hour to $33 per hour.
  - Impact on employees currently making between $16.50 and $17.00 an hour who may ask for rate increase.
  - If you have employees with Collective Bargaining Agreements and you are relying on Labor Code section 514 for OT rules - ensure their pay is increased to $21.45 per hour.

AB 2288/SB 92 – PAGA Reform

- Legislation came after months' long negotiation between business community and labor leaders, and as part of a larger negotiation involving various propositions on the ballot.
- Multiple changes to PAGA that impacts how we prevent and respond to PAGA claims.
  - Penalty modification
  - Restricting scope of claims to those that the plaintiff suffered.
  - Implementing manageability standards in litigation.
  - Cure provisions

AB 2288/SB 92 – PAGA Reform

- Perhaps the greatest benefit is an employer's ability to reduce penalties by up to 85% percent to the extent it regularly takes "reasonable steps" to ensure wage-hour compliance. Reasonable steps include, but are not limited to, the following:
  - Conducting payroll audits;
  - Updating employee handbook and stand-alone policies and procedures;
  - Training managers on wage-hour requirements and consideration of extending it to non-managerial employees as well.
  - Taking corrective action against managers who violate policy/wage-hour law.

SB 988 – Freelance Worker Protection Act

- Applies to independent contractors hired to provide "professional services" (LC 2778) for $250 or more.
- "Professional services" includes marketing, human resources, travel agents, graphic designers, grant writers, fine artists, photographers, videographers, writers, editors, content creators, barbers, cosmetologists, and more.
- Contract must be in writing (and maintained for 4 years)
- Contract must state:
  - Name and address of each party
  - Itemized list of all services to be provided (including value of services and rate/method of compensation)
  - Date by which freelancer must submit list of service rendered

SB 988 – Freelance Worker Protection Act

- Freelancer must be paid by contract date (or 30 days after services rendered if not specified)
- **Private civil enforcement (lawsuit):**
  - If worker requests but is refused a written contract – **amount of compensation determined by rate the freelancer reasonably understood to apply to the work.**
  - If worker requests but is refused a written contract – **additional $1000.**
  - If fail to pay on time – **twice the amount of unpaid compensation at the time compensation was due.**
  - Any other violation – **damages equal to the value of the contract or work performed (whichever is greater).**
- **Plus attorney's fees and costs, injunctive relief**

Questions?

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Thank You!

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