# National Native American Human Resources Association
# 2024 Annual Conference

# LEGAL Update

## Contents

NOTES

## A. FLSA Exempt Classifications (FLSA)

**Background:**

On April 23, 2024, the U.S. Department of Labor (Department) announced a final rule increasing the minimum salary required to properly classify employees as exempt from federal minimum wage and overtime. The first change outlined in the rule went into effect on **July 1, 2024**, with a subsequent change effective **January 1, 2025**.

Under the federal Fair Labor Standards Act (FLSA), which is silent regarding its applicability to Tribal Nations and their enterprises, covered employers are required to pay employees minimum wage for every hour worked and overtime for every hour worked in excess of, usually, 40 hours in a work week, except for employees that the employer can properly classify as "exempt" from these rules. The most commonly utilized exemptions are sometimes referred to as the "white collar" or "EAP" exemptions and apply to employees who perform exempt executive, administrative, professional, outside sales, and computer duties and, who generally receive a guaranteed salary of at least the minimum required amount (currently, $684/week under federal law). The FLSA also provides a special exemption for certain "highly compensated employees," the "HCE" exemption, who make above a certain amount (currently, $107,432 in total annual compensation under federal law) and meet a less stringent duties test.

The Department's new final rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, increases the federal minimum salary threshold required for most EAP exemptions and the HCE exemption. Of note, the final rule does *not* modify the exempt duties, which are also required to properly classify an employee as exempt under the FLSA's EAP and HCE exemptions. The final rule:

- Increases the federal minimum required guaranteed salary level for the EAP exemption in two steps (as outlined below):

| Date | Minimum Exempt Salary Level |
|---|---|
| Before July 1, 2024 | $684 per week ($35,568 per year) |
| July 1, 2024 | $844 per week ($43,888 per year) |
| January 1, 2025 | $1,128 per week ($58,656 per year) |

NOTES

- Increases the federal total annual compensation threshold for the HCE exemption in two steps (as outlined below):

| Date | HCE Minimum Exempt Total Annual Compensation Threshold |
|---|---|
| Before July 1, 2024 | $107,432 total annual compensation |
| July 1, 2024 | $132,964 total annual compensation |
| January 1, 2025 | $151,164 total annual compensation |

- Adds a mechanism that will provide an automatic update to these federal minimum salary and compensation thresholds every three years beginning on July 1, 2027.

When the second stage of the rule goes into effect in January 2025, the federal minimum salary level for EAP exempt employees will have increased by 65%, a percentage increase that will have a significant financial impact on many employers.

In the past, modifications to the FLSA's EAP exemptions' salary thresholds have drawn legal challenges that resulted in an injunction preventing the implementation of the changes. While several challenges have been filed, none of them have yet broadly invalidated the implementation of the final rule.

**What Needs To Be Done:**

In preparation for the implementation of the second stage of the final rule, Tribes and enterprises that conform to the requirements of the FLSA should review the salaries/compensation thresholds of their exempt employees to assess which, if any, employees' salaries/compensation are below the January 1, 2025 thresholds outlined in the final rule. In that event, the employer will need to decide whether to raise the pay of such exempt employees or reclassify such employees as non-exempt and overtime eligible. Where some classifications may be changing, it may also be prudent for such employers to perform a broader classification audit at this time to ensure that all employees that are classified as exempt are performing exempt duties.

NOTES

## B. Tipped Employees under the FLSA

**Background:**

On August 23, 2024, in *Restaurant Law Center v. USDOL*, the United States Court of Appeals for the Fifth Circuit, with jurisdiction over Texas, Louisiana, and Mississippi, vacated a United States Department of Labor regulation (29 C.F.R. sec. 531.56(f)) limiting when employers could utilize a tip credit.

As background, the FLSA permits covered employers to directly pay employees less than the federal minimum wage ($7.25/hour) for each hour worked only under very limited circumstances. One of those circumstances is for "tipped employees," which are defined as "any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips." In brief, the FLSA permits employers to pay tipped employee's only $2.13/hour for every hour worked, so long as the tips they receive from customers are sufficient to increase the employees' functional hourly rate to at least the federal minimum wage – referred to as the "tip credit."

Since the late 1980s, the DOL has interpreted the FLSA's tip credit as being available only to tipped employees who devote at least 80% of their time to tip-producing activities. In 2021, the so-called "80/20" rule was formally added to the DOL's FLSA regulations in 29 C.F.R. sec. 561.56(f), but with some additional limitations. Specifically, the regulation established the concept of a "tipped occupation" and established that the tip credit could only be utilized when a tipped employee was performing work that is part of their tipped occupation, meaning:

- work that directly produces tips; and.
- work that directly supports tip producing work, but only if performed for no more than 30 minutes at any one time and only if such work does not exceed 20% of the employee's work in any workweek.

Under this rule, an employer was obligated to pay an employee at least the full minimum wage for any work that is not part of the employee's "tipped occupation."

In *Restaurant Law Center*, the Fifth Circuit held that the DOL's "tipped occupation" rule was both inconsistent with the language of the FLSA and

NOTES

was otherwise arbitrary and capricious. Following the United States Supreme Court's decision from earlier this year in *Loper Bright Enterprises v. Raimondo*, which overturned longstanding precedent instructing lower courts to defer to reasonable agency interpretations of their governing statutes (referred to as "*Chevron* deference"), the Fifth Circuit noted that it was now in the position to freshly assess the DOL's "tipped occupation" rule. From that perspective, the Fifth Circuit found that the rule impermissibly replaced the FLSA's focus on whether the employee's job is a tip-producing job with an assessment of whether the employee is, throughout their work day, performing tip-producing tasks. Having reached this conclusion, the Fifth Circuit vacated – i.e., rendered unenforceable – the "tipped occupation" rule, as well as the preceding 80/20 guidance.

**What Needs To Be Done:**

For Tribes and enterprises located within Texas, Louisiana, and Mississippi, it is clear that the "tipped occupation" rule does not apply and cannot be enforced (absent an appeal and contrary holding by the United States Supreme Court). For Tribes and enterprises located elsewhere around the country, the DOL has not yet announced whether it will take an enforcement position given the Fifth Circuit's holding. While the Fifth Circuit's decision purports to have nationwide impact, the other federal circuit courts are not obligated to reach the same conclusion and subsequent challenges could result in inconsistent holdings.

If the Fifth Circuit's holding stands, it will once again be simpler for employers to utilize the tip credit for tipped employees – i.e., if an employee is employed in a position that earns at least $30/month in tips, then the employer can take the tip credit (so long as they inform the employee in advance). Of note, the holding does *not* impact the DOL's "dual jobs" regulation, which states that, if an employee has two jobs for an employer – one that is tip-producing and one that is not tip-producing – then the employer can only take the tip credit for hours spent in the tip-producing position. Additionally, the holding does *not* change the baseline rule that managers and supervisors cannot keep employees' tips or participate in tip pools.

Tribes and Tribal enterprises that conform to the requirements of the FLSA and that utilize a tip credit for tipped employees should review their policies related to tipped employees in light of the Fifth Circuit's decision.

NOTES

## C. Civil Rights in the Workplace

**Background:**

Since the 1960's, the United States has protected the civil rights of employees in the workplace. For example, Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin. Despite what might have appeared to be a clear and simple law protecting employees, to this day there are lawsuits and disagreements about who is protected by these laws and what the terms of protection really mean. For example, in the United States Supreme Court decision in Bostock, the Supreme Court determined that Title VII's prohibition against discrimination based on sex includes a prohibition against discrimination based on sexual orientation. Cases have also had to define who is protected against age discrimination, race, gender, gender identity, and national origin. Even the Americans with Disability Act has been subject to many questions about the scope and nature of its protection of individuals with disability – even after the ADA itself was re-written and update by the ADAAA in 2009. Most tribal employers have an equal opportunity in employment policy that provides protection for characteristics such as race, religion, national origin, sex, and other things. That list looks clear in a policy, but do employees, managers, directors, and Tribal Council really know what these terms mean when faced with real employment circumstances?

**What Needs To Be Done:**

These cases and legal changes, which are ongoing, provide the following incite – civil rights protections are complicated and need thought, planning, and training. While Title VII and the ADA do not apply in most Tribal contexts, the lesson of these cases and law changes should inform Tribal HR that Tribal policies prohibiting discrimination in employment necessarily will leave questions unanswered. What ages are protected by Tribal policy? Does a Tribal law or policy prohibiting discrimination on the basis of sex include gender, gender identity, sexual orientation, etc.? How can HR fulfill its responsibility of complying with Tribal Council laws or a Tribal employer's policies if HR does not know what these terms mean or how they should be applied. What do our front-line supervisors or directors know? What needs to be done is to assess these policies and laws to determine where things are unclear, to obtain clarity where we can, and to teach supervisors and directors.

NOTES

## D. Workplace Accommodations

**Background:**

In the world of workplace accommodations, much has stayed the same, but there have been a few notable changes worth mentioning. As background, under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act, certain disabilities and religious beliefs may entitle an employee or applicant to an accommodation that would allow them to perform the essential functions of the job, so long as that accommodation does not pose an undue hardship on the employer. In June 2023, the Supreme Court issued a decision in *Groff v. Dejoy* which modified the standard for "undue hardship" in religious accommodation cases to require a showing that the accommodation would entail "substantial" cost or resources from the employer.

On June 27, 2023, the Pregnant Worker Fairness Act ("PWFA") went into effect, but the full scope of PWFA was not clear until final regulations for the PWFA were issued by the Equal Employment Opportunity Commission ("EEOC") on April 15, 2024.

The regulations clarified that under the PWFA, individuals are entitled to accommodations for the employee or applicant's "known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an 'undue hardship.'" The regulations defined this "pregnancy and childbirth related conditions" very broadly to include conditions like migraines, infertility, and even menstruation.

Also new under the PWFA regulations, the EEOC made clear that certain requests for pregnancy related accommodations, including requests for additional breaks to eat, drink, or use the restroom, are considered to speak to "obvious" limitations of pregnancy, and a doctor's note cannot be required for such requests. Similarly, a note cannot be requested for lactation and related conditions such as low supply.

Finally, and notably, while under the ADA and Title VII an inability to perform the essential functions of the position, even temporarily, may disqualify an employee or applicant from receiving an accommodation, that is not the case under the PWFA according to the regulations. Instead, if the inability to perform an essential function is "temporary," the employee may still be qualified for accommodations. "Temporary" is

NOTES

later clarified in the regulations to refer to a suspension of the function for up to 40 weeks.

**What Needs To Be Done:**

The PWFA uses the same definition of "employer" as Title VII of the Civil Rights Act. This means that "Indian tribes" are excluded, and the law only applies employers with 15 or more employees. As a result, Tribal governments and wholly owned Tribal enterprises are not subject to the PWFA. Other employers operating on Tribal land or who are not wholly owned by a Tribe may need to do a more in-depth analysis to determine whether these laws are applicable.

Even if not applicable, Tribal employers will want to keep in mind that many Tribes have used court cases and EEOC guidance on the ADA and Title VII to determine how to interpret their own laws, ordinances, policies and procedures regarding non-discrimination and accommodations. Similarly, if a Tribal employer has a law, ordinance, policy or procedure regarding the protection of pregnant employees, Tribes may consider, at times, looking to the new PWFA regulations for guidance.

Finally, Tribes should keep in mind that an average employee searching for answers about workplace accommodations for pregnancy is likely to find information about the PWFA without finding substantial information regarding the nuanced application of this law.

NOTES

## E. NLRB Joint Employer Standard

**Background:**

On October 27, 2023, the National Labor Relations Board (Board) issued a final rule on the standard for determining joint employer status. The new rule rescinded and replaced the previous standard which was issues on February 26, 2020. Under the previous rule, the standard was focused on control-based restrictions where the entity must possess and exercise substantial direct and immediate control over one or more essential terms or conditions of employment. Substantial direct and immediate control means control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. This rule has an exhaustive list of essential terms and conditions of employment comprised of wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

The new standard states that an entity may be considered a joint employer of another employer's employees if the two share or codetermine the employees' essential terms and conditions of employment. The Board believes that the new rule is a return to the common law agency principles that were incorporated into the National Labor Relations Act (Act) when it was adopted.

The new rule states that "evidence showing that a putative joint employer wields indirect control over one or more of the essential terms and conditions of employment of another employer's employees can establish a joint-employer relationship."

The "essential" terms and conditions of employment include:

- Wages, benefits, and other compensation;
- Hours of work and scheduling;
- The assignment of duties to be performed;
- The supervision of the performance of duties;
- Work rules and directions governing the manner, means, and methods for the performance of duties and the grounds for discipline;
- The tenure of employment, including hiring and discharge; and
- Working conditions related to safety and health of employees.

Evidence that is immaterial to both the common-law employment relationship *and* an employer's control over employees' essential terms and

NOTES

conditions of employment is not relevant to the joint-employer inquiry. Joint employers are required to bargain collectively with employees that it possesses the authority to control or exercise the power to control.

The new rule was challenged in a Federal Court in Texas. *Chamber of Com. of United States v. Nat'l Lab. Rels. Bd*., No. 6:23-CV-00553 (E.D. Tex. Mar. 18, 2024). The Court ultimately found that the new rule was invalid and that the decision to rescind the previous rule was arbitrary and capricious. The Board is appealing this decision to the 5th Circuit.

**What Needs To Be Done:**

The previous rule is still controlling. Under the previous rule, an entity must possess and actually exercise substantial direct and immediate control over one or more essential terms or conditions of another employer's employees. Essential terms and conditions of employment means wages, benefits, hours or work, hiring, discharge, discipline, supervision, and direction.
Although the new rule is currently invalid, the 5th Circuit could reverse the district court's decision and implement the new rule, again. Further, the District Court's decision in Texas is persuasive to other districts. It is unlikely that the Board will be enforcing the new standard while the case is being litigated. Entities must keep apprised of the developments in this discussion to be compliant with the Act and the rules.

NOTES

## F. FTC Ban on Non-Competition Agreements

**Background:**

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to issue a sweeping nation-wide final rule (the Final Rule) banning virtually all non-compete clauses for for-profit employers. In brief, the Final Rule:

- Banned all *new* non-competition agreements (aside from limited exceptions such as agreements included with the sale of a business) between covered employers and workers, which was broadly defined to include employees, independent contractors, externs, interns, volunteers, apprentices, and sole providers who provide a service.

- Invalidated all *existing* non-competition agreements (except for the limited exceptions) between covered employers and workers, excluding senior executives, which is narrowly defined to highly compensated policy-making roles, such as presidents, chief executive officers, and similar roles, and required covered employers to notify impacted workers that their pre-existing non-competition agreement was no longer enforceable.

- defined non-compete clauses as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition."

Almost immediately after the Final Rule was adopted, several legal challenges were filed seeking to enjoin and vacate the Final Rule. On August 20, 2024, a federal district court judge in Texas issued a nationwide injunction barring implementation of the Final Rule. The court's rationale was that the FTC lacked statutory authority to enact the Final Rule and that the rule is arbitrary and therefore concluded that the Final Rule was "unlawful agency action" and set it aside in its entirety for all persons.

NOTES

The FTC may appeal the Texas court's decision, and litigation in other courts related to the Final Rule is ongoing. In the meantime, the FTC has indicated that it will continue to examine non-compete agreements on an as-applied basis.

**What Needs To Be Done:**

While the nationwide injunction remains in place, no specific action needs to be taken in response to the FTC Final Rule. However, the FTC has indicated that they may continue to pursue specific employers for anti-competitive conduct, including the use of non-competition agreements, under its general statutory authority to prevent "unfair or deceptive acts or practices in or affecting commerce."

Accordingly, to the extent a Tribal Nation or enterprise utilizes non-competition agreements, it would be prudent for them to assess whether the FTC Act likely applies to them. The FTC Act is *silent* regarding its specific application to Tribal Nations and their enterprises. It applies to "persons, partnerships, and corporations" and broadly defines corporation to include any company "which is organized to carry on business for its own profit or that of its members." At least one federal district court has held that Tribal enterprises are not categorically exempted from the scope of the FTC Act, although the court did not specifically reach the issue of whether the enterprise met the definition of "corporation" under the law.

NOTES

## G. Data Breaches & Privacy

**Background:**

Cyberattacks and data breaches are on the rise. Between November of 2023 and April of 2024 2,741 publicly disclosed data breaches in the United States resulted in the disclosure of 6,845,908,997 records.[1] The industry reporting the most breaches was the health care industry, but all industries and employers (especially those possessing personally identifiable information about people, such as employee W2 information) are potential targets. Indeed, the number of reported data breaches in the U.S. across industries increased by more than 150% between 2021 and 2023.[2]

A cyberattack is, generally, any intentional effort to steal, expose, alter, disable, or destroy data, applications, or other assets through unauthorized access. A data breach is generally defined as the unauthorized access to personal or sensitive information or data. Often, this information/data is stored in electronic form.

The most common forms of data breaches include:

- Stolen information
- Ransomware
- Password Guessing/Hacking
- Keystroke Recording
- Phishing
- Malware or Viruses
- Distributed Denial of Service (DDoS) Attacks

And no organization, regardless of how strong or sophisticated their technical data security measures are, is immune from cyberattacks and breaches, because the human factor plays such a large role in determining if cyberattacks are successful. Additionally, with more and more functions outsourced to vendors who often maintain sensitive data on behalf of other organizations and/or have access to their customer's sensitive information and/or systems the likelihood that a vendor's breach will impact its customer's business is also on the rise.

[1] See https://www.itgovernanceusa.com/blog/data-breaches-and-cyber-attacks-in-2024-in-the-usa.
[2] See https://www.wsj.com/tech/cybersecurity/why-are-cybersecurity-data-breaches-still-rising-2f08866c.

**<u>What Needs To Be Done</u>:**

There are several things Tribal Nations and enterprises can and should do to help protect against, and be ready for, cyberattacks. They include:

- Developing (and following/enforcing) written information security plans, cyber incident response plans, business continuity plans, security-related employment and other policies, and similar documents to help minimize the likelihood of successful cyberattacks and ensure that plans are in place in the event that an attack is successful.
    - This includes establishing a data incident response team, which is responsible for taking point on any data incidents.
- Conduct at least annual cyber security trainings for all staff so they are aware of the most common forms of cyber attacks and how to avoid them.
- Conduct annual tabletop exercises so that when an attack happens the data incident response team is ready to respond and isn't doing so in the moment for the first time.
- Implement appropriate technical, administrative, and physical security measures.
- Appropriately vet vendors (especially those with access to sensitive information and/or systems) and negotiate appropriate cybersecurity terms into their agreements.
- Appropriately managing insider threats by, among other things, conducting appropriate background checks (when necessary), monitoring behavioral indicators, helping to define appropriate roles and access controls, and playing a significant role in helping to handle insider incidents.
- Have a system to stay informed of emerging threats and industry best practices.
- Finally, for Tribal Nations, consider adopting a privacy law or code, which could help with the complex and evolving nature of the data privacy legal landscape at the state and federal levels as it relates to Tribal Nations and enterprises.

NOTES

## H. Q&A (Expanded)

NOTES

## Presenters

**Anna Cole**
*Drummond Woodsum*
ACole@dwmlaw.com | 603.792.7412

**Dan Rose**
*Drummond Woodsum*
acdrose@dwmlaw.com | 207.253.0537

**Kathleen Landis Wade**
*Drummond Woodsum*
kwade@dwmlaw.com | 207.772.1941

**Elek Miller**
*Drummond Woodsum*
emiller@dwmlaw.com | 207.772.1941

**Richard McGee**
*Law Office of Richard McGee*
richard@richardmcgeelaw.com | 612.812.9673