

# **LABOR AND EMPLOYMENT LAW UPDATES IN 2022 (AND 2023)**

**PATRICK E. SEBESTA II, J.D.**



F&B Law Firm, P.C.

213 Greene Street  
Huntsville, Alabama 35801  
Telephone: 256.536.0095  
Facsimile: 256.536.4440  
[www.fb-pc.com](http://www.fb-pc.com)

# THE IMPACT OF *DOBBBS*



## *Dobbs v. Jackson Women's Health Organization*

---

- The United States Constitution provides no basis for abortion rights.
- *Roe v. Wade* is not “settled” law after 49 years.
- Importantly, makes regulation of abortion a state function.

# Employer Responses

- Many employers have opted to include abortion-related coverage following *Dobbs*, including travel expenses for abortion procedures:

Zillow	Disney
Comcast	Meta
Dick's Sporting Goods	JP Morgan Chase

# Considerations

---

- Emotional issue with unsettled consequences.
- Many states have laws outlawing the “aiding and abetting” of an abortion, including TX and OK.
  - TX SB 8 expressly defines “aiding and abetting” to include “paying for or reimbursing the costs of an abortion through insurance or otherwise.”

# Considerations

 **CNN** **US** [Crime + Justice](#) [Energy + Environment](#) [Extreme Weather](#) [Space + Science](#)

**HAPPENING NOW**  
[Mourners pay tribute to the Queen at St. Giles' Cathedral in Scotland](#)

## Indiana attorney general is investigating the doctor who provided abortion services for a 10-year-old Ohio rape victim, doctor's lawyer says

 By Sarah Boxer, Andi Babineau and [Rob Frehse](#), CNN  
Updated 7:44 AM EDT, Wed July 27, 2022

# NEW OVERTIME RULES



# Proposed Overtime Rule

---

- Proposed rule will recommend how to implement the exemption of bona fide executive, administrative and professional employees (“white collar exemption”) from the Fair Labor Standards Act’s (FLSA’s) minimum wage and overtime requirements.
- The current salary threshold is \$35,568 per year.
- Originally intended for October 2022 . . . but, we’re still waiting.



# Proposed Overtime Rule

---

- Experts are predicting that DOL will recommend higher salary level thresholds for the white-collar exemptions to the rule.
  - Meaning -- more people will be eligible for overtime pay.

# What to Expect?

---

- In 2016, federal judge halted a proposed overtime rule, which would have doubled the FLSA's salary threshold, just 10 days before its implementation date.
- Expect a similar proposal to formerly proposed rule -- proposed minimum salary level for the FLSA's exemptions could be \$913 per week or \$47,476 per year, if not more.

# Considerations

---

- In preparation:
  - Review salaries, particularly for employees whose salaries are between the current and expected pending threshold.
  - Be prepared to adjust pay practices and payroll to timely conform to the rule to the extent necessary.
  - Reviewing employees' duties and job descriptions to make sure employees are properly classified as exempt or non-exempt.

# CONSIDERATIONS FOR EVOLVING GUN LAWS



# New Concealed Carry Law

---

- Ala. HB272 = “permitless” or “constitutional” concealed carry.
- Removes legal requirement for Alabama citizens to obtain a permit for concealed carry of pistols.
- Went into effect on January 1, 2023.

# Can Still Restrict or Prohibit Guns

---

- “[A] public or private employer may restrict or prohibit its employees. . . from carrying firearms while on the employer’s property or while engaged in the duties of the person’s employment.”
- **BUT** there are revisions to the “parking lot exception” and “hunter’s exception.”

# Parking Lot Exception

---

- Codified at section 13A-11-90 of the *Alabama Code*.
- “A public or private employer may not restrict or prohibit the transportation or storage of a lawfully possessed pistol or ammunition for that pistol in an employee’s privately owned motor vehicle while parked or operated in a public or private parking area” **IF** . . .

# Parking Lot Exception

(b) (1) A public or private employer may not restrict or prohibit the transportation or storage of a lawfully possessed ~~firearm~~ pistol or ammunition for that pistol in an employee's privately owned motor vehicle while parked or operated in a public or private parking area ~~if~~ ; provided, that the employee satisfies all of the following conditions :

~~(1) The employee either:~~

~~a. Has a valid concealed weapon permit; or~~ The motor vehicle is operated or parked in a location where it is otherwise permitted to be.

b. The pistol is either of the following:

1. In a motor vehicle attended by the employee, kept from ordinary observation within the person's motor vehicle.

2. In a motor vehicle unattended by the employee, kept from ordinary observation and locked within a compartment, container, or in the interior of the person's privately owned motor vehicle or in a compartment or container securely affixed to the motor vehicle.



# Hunter's Exception

---

~~b. If the weapon is any~~ (2) A public or private employer may not restrict or prohibit the transportation or storage of a lawfully possessed firearm legal for use for hunting in Alabama other than a pistol , or ammunition for that firearm, in an employee's privately owned motor vehicle while parked or operated in a public or private parking area if the employee satisfies all of the following :

# Hunter's Exception

---

- Employee possesses a hunting license.
- **NOT** a pistol.
- Weapon is unloaded.
- During season is which hunting is permitted by Alabama law or regulation.

# Hunter's Exception

---

- Employee has not been convicted of a “crime of violence.”
- Vehicle is where its supposed to be.
- Concealed.
- **REMOVED** cross-reference to section 13A-11-75(a)(1) (mental disability).

# Employee Posing Risk of Harm

---

- If employer reasonably believes an employee presents a risk of harm to himself, herself, or to others, the employer may inquire if employee possesses a firearm in his or her vehicle.
- If **YES**, employer may make additional inquiry to establish that employee is in compliance with the law.
- If **NOT** in compliance, employer may take adverse employment action.

# Employee Posing Risk of Harm

---

- If the employer takes adverse action and employee is compliant, employer must pay:
  - Lost wages or benefits.
  - Other lost the remuneration caused by the termination, demotion, or other adverse action.
  - Employee may sue, but only after employer has not met the demand for recovery within 45 calendar days.

# Other Employment Action by Employer

---

- Nothing in this section shall prohibit an employer from reporting to law enforcement, credible evidence:
  - That the employee's motor vehicle contains stolen property, or a prohibited or illegal item other than a firearm.
  - Of any threat made by an employee to cause bodily harm to self or others.

# Employer Protections

---

- An employer, owner and/or lawful possessor of the property on which the employer is situated shall be **ABSOLUTELY IMMUNE** from any claim, by any person seeking any damages that are alleged to arise, directly or indirectly, as a result of any firearm brought onto the property of the employer, owner and/or lawful possessor by an employee, including a firearm that is transported in an employee's privately owned motor vehicle.
- (except wrongful adverse employment action)

# Employer Protections

---

- Employer has **NO** duty to:
  - Patrol, inspect, or secure any parking lot or parking area, or privately owned motor vehicles located in a parking lot that employer provides to employees.
  - To investigate, confirm, or determine an employee's compliance with the laws related to possession and ownership of a firearm or ammunition, or the transportation or storage of a firearm or ammunition.



# Employer Protections

---

- However, employer, business entity, or property owner has **NO** immunity for his or her own **AFFIRMATIVE** wrongful acts that cause damage, harm, or injury to another.

# Considerations

---

- Have clear policies on firearms on company premises
- Include topic in new employee orientation
- Work cooperatively with employees to uniformly enforce company policy
- Background checks
- Train employees and supervisors regarding policies and company expectations

# THE REVITALIZATION OF UNIONS



# President Biden

- “I intend to be the most **pro-union** president leading the most **pro-union** administration in American history.”
  - Sep. 2021



# Union Popularity

- Union petitions filed by workers rose by 58% from October 2021 to June 2022.
- Percentage of Americans who view unions favorably has gone from 48% in 2009 to 68% in 2021.
  - Highest its been since 1965.





# NLRB General Counsel



- Jennifer A. Abruzzo
  - previously -- counsel for largest media and communications union in the U.S.
- Former G.C., Peter B. Robb, fired by Pres. Biden shortly after confirmation.
- Confirmed 51-50 vote, with V.P. Harris breaking the tie.

# Notable Abruzzo Positions

---

- Eliminate employer's right to demand secret ballot election for union representation -- reinstate "*Joy Silk*" doctrine.
- Find "captive audience meetings" to be unlawful.

# Eliminating Union Elections

---

- Presently, employers can request secret-ballot election and pre-election campaign after being presented with signed authorization cards indicating majority employee union support.
- **BUT**, on April 11, 2022, Abruzzo filed a brief in pending case requesting *Joy Silk* doctrine be revitalized.
  - Theoretically -- employers may be required to accept unions without having the opportunity to require an NLRB sanctioned election.



# What is *Joy Silk*?

---

- Antiquated rule that forces employers to bargain with the union once they receive union cards signed by a majority of their employees.
- Employer can refuse to bargain with a union that claimed a majority of authorization cards **ONLY** if the employer had a “**GOOD FAITH DOUBT**” about the union’s claimed majority status.

# “Good-Faith Doubt”

---

- Demonstrable evidence that union does not have majority support of employer’s workers at the time the cards are presented.
- Employers **cannot** rely merely on an “instinct” or conversations with a minority of employees.

# Captive Audience Meetings

---

- Meetings in which employers meet with groups of employees, or occasionally just with an individual employee, to discuss the employers' opinion on whether unionization is in employees' best interest.
- Meetings can be mandatory.
- Consistently held lawful since 1946.

# Captive Audience Meetings

---

- On April 7, 2022, Abruzzo issued memo advising that she seeking to ban any employer-initiated meeting concerning unionization where employees have a reasonable perception that they will be subject to reprisal if they do not attend.
- On April 11, 2022, filed a brief in pending case asking the NLRB to find, among other things, that “captive audience” meetings violate the NLRA.

# Considerations

---

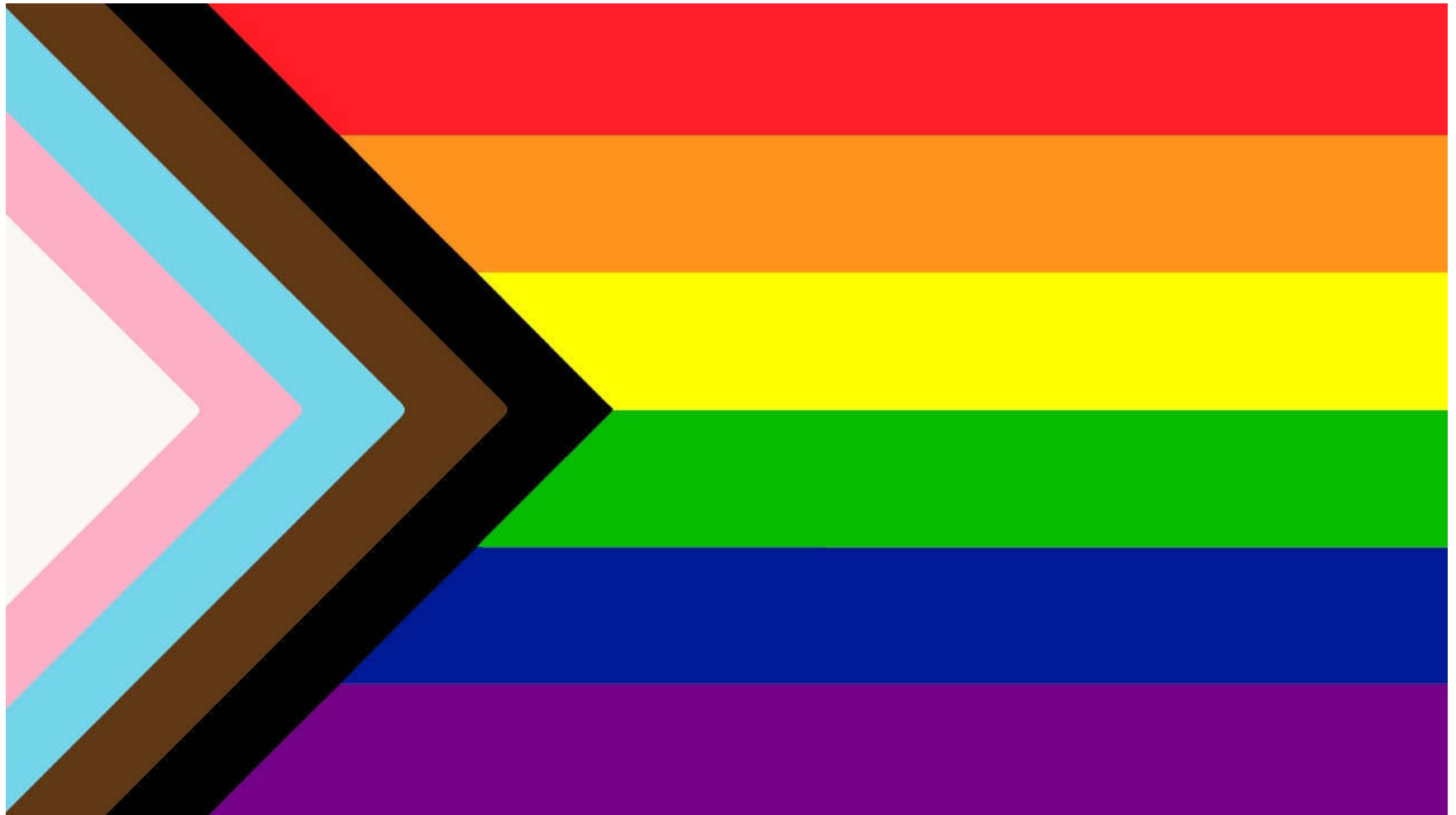
- Just understand that:
  - Unions are storming back in popularity;
  - That the Biden administration is intent on making big pro-union moves in this space;
  - You should be prepared to be nimble in the event decades-old precedent changes.
    - But, in general, express clear, immediate, unequivocal doubt about majority status from the onset, *Joy Silk* or not.

# Considerations

---

- Revisit and update your union-free policies.
- Train supervisors on recognizing signs of unionization.

# LGBTQIA+ UPDATES



## *Bostock v. Clayton County, Ga.*

---

- SCOTUS held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender.
- Court stated that it was **NOT** deciding the Title VII implications of sex-segregated facilities, such as bathrooms and locker rooms.



# Executive Order 13988

---

- EO 13988, Jan. 20, 2021, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”
- Directed regulators to promulgate new agency actions in order to complement sex discrimination prevention statutes such as Title VII.
- Expressly relied on *Bostock*.

# EEOC Guidance

---

- In reliance, the EEOC and Department of Education issued guidance for LGBTQIA+ in the workplace, including pertaining to separate, sex-segregated bathrooms, locker rooms, and showers.

# *State of Tennessee v. U.S. Dept. of Agriculture*

---

- Filed in Knoxville on behalf of 20 states.
- Judge **enjoined** EEOC and Dept. of Educ. guidance on July 15, 2022.
- Relied on narrow decision in *Bostock*.
- Injunction only applies to enforcement in the following: **AL**, AK, AZ, GA, IN, KS, KY, LA, MS, MO, NE, OH, OK, SC, SD, TX, UT, VA, and WV.

# Considerations

---

- Probably best not to change your policies, even given the enjoinderment of the EEOC guidance.
- EEOC will probably end up doing what it wants to anyway – its risk-averse.
- EEOC guidance essentially advised employers not to be policing sex-segregated facilities, which is probably the most-advisable course of action in any event.

# PROPOSED NON-COMPETE RULE



# Proposed Non-Compete Rule

---

- On January 5, 2023, the Federal Trade Commission (“FTC”) proposed a rule that would ban the use of non-compete provisions in employment contracts and require employers to nullify any existing non-compete clauses within six months.
  - Applies across the board to **all** employees and independent contractors, paid and unpaid workers, and businesses no matter their size or location.

# Proposed Non-Compete Rule

---

- Still has to go through the administrative process before becoming final.
  - Accept public comment on the proposed ban for 60 days and issue a final version after reviewing the comments.
  - Language will likely be modified after comment.
  - Final version will take effect 180 days after it is published.
- Legal challenges absolutely incoming.

# Considerations

---

- Employers should review employment contracts for non-compete provisions.
- Consider plans to adjust accordingly:
  - Drafting non-disclosure covenants to protect confidential information.
  - Reviewing hiring criteria and compensation packages.



# QUESTIONS?

---





**F&B Law Firm, P.C.  
213 Greene Street**

**Huntsville, Alabama 35801**

**Telephone (256) 536-0095**

**Facsimile (256) 536-4440**

**[www.fb-pc.com](http://www.fb-pc.com)**

**These materials should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. Anyone needing specific legal advice should consult an attorney.**

**Allen L. Anderson  
[anderson@fb-pc.com](mailto:anderson@fb-pc.com)**

**Jeffrey L. Roth  
[jroth@fb-pc.com](mailto:jroth@fb-pc.com)**

**Patrick E. Sebesta II  
[psebesta@fb-pc.com](mailto:psebesta@fb-pc.com)**

**Andrew B. Jett  
[ajett@fb-pc.com](mailto:ajett@fb-pc.com)**

### **Speakers**

**F&B Law Firm, P.C., provides speakers, programs, and seminars for various trade associations; business groups; and clients. For information regarding a program, contact us at [seminars@fb-pc.com](mailto:seminars@fb-pc.com).**

**“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”**

