



# LEGAL NEWS FOR YOUR BUSINESS

January 2024

## *Employment Alert*

# **EEOC TO EXPAND FOCUS ON MENTAL HEALTH RELATED DISABILITIES**

In September, the Equal Employment Opportunity Commission (EEOC) released their Strategic Enforcement Plan (SEP) for fiscal years 2024-2028, outlining their enforcement goals and focus for the new year and beyond. As part of the SEP, the EEOC announced an increased focus on protecting specific categories of workers, including those with mental health related disabilities.

### ***Why Does it Matter?***

In 2019, disability-related discrimination overtook race-related discrimination as the most commonly filed type of EEOC discrimination charge. Since then, the relative percentage of disability-related discrimination charges has continued to grow, marking a need for increased EEOC focus on disability discrimination issues. Additionally, the COVID-19 pandemic highlighted a huge shift in mental health trends: In March 2022, the World Health Organization (WHO) reported a 25% increase in global prevalence of depression and anxiety. As prevalence has increased, societal awareness of mental health related disabilities has also increased, especially for young adults who have recently entered or are getting ready to enter the workforce.

### ***How Does This Affect Employers?***

While the EEOC has not yet announced any specific steps it will take to combat mental health related disability discrimination, employers should take note of the increased focus. Mental health related disabilities include, but are not limited to, posttraumatic stress disorder (PTSD), depression, anxiety, attention deficit/hyperactivity disorder (ADHD), drug addiction, schizophrenia, and schizoaffective disorders. These disabilities may be harder for

employers to identify than physical disabilities, and may require more creativity during the interactive process to determine appropriate reasonable accommodations.

Additionally, employers should take care to fully engage in the interactive process with employees. In August 2023, a Maryland company entered into an \$85,000 settlement with the EEOC after firing an employee upon discovering she had schizoaffective disorder. Each employee should be individually considered for a reasonable accommodation. Additionally, the EEOC has stressed that mental health related disabilities should not be discounted because of mitigation measures, such as therapy or medication. Employers are also prohibited from asking about disabilities (including mental health related disabilities) during the job application process, prior to a conditional offer, and absent a voluntary disclosure. To prepare for any changes in the EEOC's enforcement on mental health related disability protections, employers should review their EEO and reasonable accommodation policies to identify areas of improvement.

*If you have questions or concerns about your EEO policies or procedures, please reach out to any member of Gardner Skelton's employment team.*

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## **UPDATES ON THE NLRB'S JOINT EMPLOYER RULE**

New year, new rules...maybe. On October 26, 2023, the National Labor Review Board (NLRB) issued a final rule for determining joint employer status. Entities that share employees with other entities, such as contractors and subcontractors, companies using temporary employees, and franchisors and franchisees may be significantly affected by the final rule and may face a greater risk of liability as a result.

The final rule overturned Trump administration regulations, and created a much stricter standard, greatly increasing the number of entities that could be considered employers for NLRB purposes. While the previous rule only considered whether an entity **exercises** control over an employee, the final rule assesses whether an entity at all **possesses** control over an employee in determining joint-employer status. For an in-depth look at the final rule, ***check out our article*** covering the changes and potential effects on employers.

The final rule was set to go into effect on December 26, 2023. However, the NLRB has issued an extension of the effective date to February 26, 2024. The NLRB cited a number of legal challenges as the reason for the extension. Because the final rule would be much more expansive, the NLRB is now facing a lawsuit from a collection of groups led by the U.S. Chamber of Commerce, challenging the validity and justification of the final rule. Similarly, the final rule is facing a Congressional Review Act resolution seeking to overturn the rule, due to concerns about its potential negative impact on the economy and extensive impact on companies around the country. On the other side of the spectrum, the Service Employees International Union (SEIU) has taken issue with the final rule, contending that it does not go far enough in protecting employees.

Because of the numerous legal challenges faced by the NLRB and its final rule, it is unclear whether the final rule will take effect even in February. However, the extension of the effective date gives employers more time to evaluate their current practices and employee relationships to determine whether they may qualify as a joint employer under the new final rule. Employers should continue to prepare for the implementation of the final rule by reviewing their policies, procedures, and agreements, especially with staffing agencies.

*If you have questions about your liability under the new joint employer rule, please reach out to any member of Gardner Skelton's employment team.*



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