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2024 Legal Update
What's New & Trending?

SBSHRM
South Brevard Society for Human Resource Management

January 2024

www.fordharrison.com

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SBSHRM

2024 Legal Update - What's New &Trending?

- Have you made your New Year's "To Do"/Resolutions List?
- Latest from DC - Executive Branch
  - EEOC
  - DOL
  - NLRB
- Latest from DC - Supreme Court
- Tallahassee - Session started Monday (January)

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Ice Breakers!

- Introduce yourself to table:
  - **Name/where currently work/study/spend the day**
  - **Years of experience in HR field**
  - **Favorite hobby or free time activity**
  - **Either:**
    - **Key HR New Years Resolution for 2024 OR**
    - **Achievement from 2023**
- Pick a **table captain** to report out top **TWO (2)** best answers for table
- Review HR FL bills:
  - Least likely to support and MOST likely to support
  - What should I tell our reps?
  - What want to see change, go away, or get passed?

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Lou's Top 5 HR "To Do"/Resolutions for 2024 (Déjà vu All Over Again?!?)

1. **Check/Update Posters, Forms, Handbooks & Agreements**
   - Minimum Wage - Florida ($12/$8.98 for tip credit) and Federal Contractors ($17.21)
   - New EEOC & DOL Posters
   - New I-9s (required by November 2023)
   - Policy on AI, Religious Accommodation, Pregnancy Accommodations
   - New restrictions on what can have in contracts and arbitration agreements (sex harassment claims, non-disparagement and confidentiality)
   - Severance Agreements and Non-competes?
     - NLRB limits on non-disparagement & non competes?
     - FTC challenge/enforceable and properly tailored?

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HR "To Do"/Resolutions for 2024

2. **Train Managers & Employees**
   - Non-Discrimination, DEI & Sexual Harassment
     - New EEOC Guidance on Harassment
     - 3 to 2 Commissioners and new money last year = more investigators and litigation
     - What about the Stop WOKE Act?
   - HR Law for Managers - essential to avoid needless litigation (#1 on top 10)
   - Positive Employment Relations/Employee Engagement
     - Union organizing activity on rise
     - Great Resignation
     - Quiet Quitting
     - Generational changing of guard

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HR "To Do"/Resolutions for 2024

3. **Review Hiring & Onboarding Practices**
   - Good hires are hard to find
   - Guidance on AI – potential discriminatory impact
   - DEI changes
   - OFCCP seeking to expand data it requests…
   - Good new hire orientation = vital – to avoiding claims and as a defense
   - Fair Credit Reporting Act litigation continues
   - Patchwork of state laws

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HR "To Do"/Resolutions for 2024

4. **Do your own FLSA audit**
   - Are exempt people properly classified?
   - Am I ready if/when salary for exemptions increases?
   - How are my job descriptions?
   - Is that person really an independent contractor?
   - Am I calculating regular rate correctly?
   - Are people recording time while remote working or otherwise?
   - If I see an issue, contact legal counsel and get it right!

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HR "To Do"/Resolutions for 2023

5. **Make a plan for staying informed**
   - SBSHRM presentations & Joint Conference (**April 17 – Radisson at the Port**)
   - SHRM membership – has its privileges
   - EAF – Employers Association Form (in Longwood)
   - FordHarrison (https://www.fordharrison.com/subscribe) or other legal updates and webinars- they are FREE
   - Sign up for EEOC, NLRB and DOL e-mails/press releases

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  - EEOC
  - DOL
  - NLRB
- Latest from DC - Supreme Court
- Tallahassee - Session started Monday (January 9 to March 8, 2024)

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The Executive Branch

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The President & His Agencies

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U.S. Equal Employment Opportunity Commission

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EEOC- General Overview

- Present EEOC Commissioners
  - Charlotte A. Burrows - Chair (Democrat)
  - Jocelyn Samuels - Vice Chair (Democrat)
  - Kalpana Kotagal (Democrat)
  - Keith Sonderling (Republican)
  - Andrea Lucas (Republican)
- General Counsel Vacancy Filled
  - After Biden's second nomination of Karla Gilbride to be the agency's general counsel, she will fill the position on October 23, 2024.
    - Confirmed by the U.S. Senate on October 17, 2023, to a four-year term
    - This position has been vacant for two years
- Vacancies/Replacement:
  - Former Republican Chair Janet Dhillon left in November 2022 (Republican) - holdover from July 1 due to replacement not being confirmed

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The EEOC – 2024 Make-Up

Charlotte A. Burrows
Chair
Term ends July 1, 2028

Jocelyn Samuels
Vice Chair
Term Ends July 14, 2026

Kalpana Kotagal
Commissioner.
Term ends July 2027

Karla Gilbride
General Counsel
Term to Begin Oct. 23, 2024

Andrea Lucas
Commissioner
Term ends July 1, 2025

Keith Sonderling
Commissioner
Term Ends July 1, 2024

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EEOC- Expected Areas of Focus 2024

- EEOC approved it next **Strategic Enforcement Plan** (SEP) for FY 2022 to 2026 by a 3-2 vote in August (Kotagal deciding vote)
- Key priorities include (but are not limited to):
  - Impact of AI on Hiring and Ensuring Non-Discriminatory
  - Targeting "non-traditional employment arrangements," with focus on staffing firms for alleged bias - given increase in use of contingent workforce agreements
  - Promote racial justice and equality in the workplace, including combating systemic discrimination
  - Pay equity
  - LGBTQ rights and equality
  - Protection of Pregnant Workers

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Kotagal Effect

- The EEOC votes on issuing regulations and guidance, launching discrimination lawsuits, and filing friend-of-the-court briefs in cases it views as raising novel or important issues.
- The number of votes taken by the EEOC has increased drastically after the addition of Democratic Commissioner Kalpana Kotagal in August.
  - The commission voted on 27 issues in the 80 days prior arrival
  - The commission voted on 58 issues in the 80 days after.
  - Kotagal has sided consistently with her two fellow Democratic commissioners, resulting in 17 total 3-2 party-line votes from early August through October.
- EEOC is gearing up for a busy year of litigation and rulemaking.

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EEOC Overview – Charge / Litigation

- Employees filed **fewer** discrimination charges with EEOC over the past several years
- FY 2022 = showed an increase in the number of charges filed but still relatively low
  - The agency received 73,485 charges
- FY 2021 = lowest number of charges from workers in more than two decades
  - The agency received 61,331 charges, a 9.1 percent decrease from the 67,448 charges received in FY 2020

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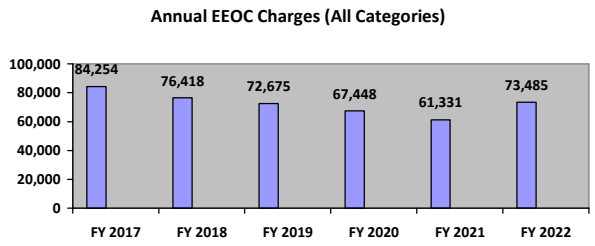
Total EEOC Charges (2017 - 2022)



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EEOC Overview – Charge / Litigation

- **Retaliation** continues to be the most frequently filed claim included in charges with the EEOC: 51.6 % of all charges filed in FY 2022 included a retaliation claim (Down from 65% in FY 2021)
- **Texas** most number of charges (6,508) while Florida came in second (4,941), and Pennsylvania third (3,960)
- **Wyoming** had fewest (33), followed by Maine (39) and Montana (40)

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EEOC Statistics on Charges For FY 2022

- **Retaliation – 51.6%**
- Disability - 34%
- Race – 28.6%
- Sex - 27%
- **Religion – 18.8 (up from 3.4%)**
- Age – 15.6%
- National Origin – 7.5%
- Color - 5.6%
- Equal Pay - 1.3%
- Genetic Information - 0.6%

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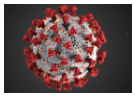
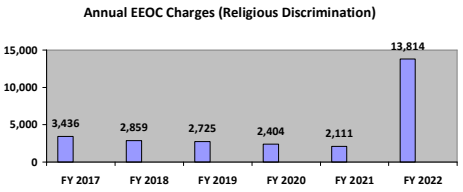
Religious Discrimination Charges (2017 - 2021)?





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Groff v. DeJoy, No. 22-174, 2023 WL 4239256 (U.S. June 29, 2023)

- Changed the standard of proof for religious accommodations.
- Title VII allegation that USPS failed to make **reasonable accommodations** for his Sunday Sabbath practice and disciplined employee for failing to work on Sundays.
- In a unanimous opinion, the Supreme Court held that to defend denial of a religious accommodation under Title VII, an employer must show that the burden of granting an accommodation would result in ***substantial*** increased costs in relation to the conduct of its particular business. (most cases applied a *de minimis* cost standard)

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New Guidance on Harassment in Workplace

- Released September 29, 2023 – on hold since 2016.
- Express recognition that sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including the expression of one's gender identity.
- An individual may establish harassment based on conduct that is not specifically directed at them.
- Conduct that occurs outside of the workplace (e.g., on social media) can still affect the terms and conditions of employment.

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Pregnant Workers Fairness Act (PWFA)

- Pregnant Workers Fairness Act passed in Dec. 2022 - Effective Jun. 27, 2023
  - Applies to employers with at least 15 employees.
  - Requires employers to provide **reasonable accommodations** to pregnant workers
  - Requires interactive process.
  - An employer may not require an employee to take paid leave if another reasonable accommodation is available (i.e., unpaid leave).
  - Protects employees from retaliation, coercion, intimidation, threats, or interference.
- EEOC began accepting charges under PWFA on June 27, 2023
- EEOC issued *proposed* regulations on August 7, 2023 (275+ page)

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Proposed Regulations On PWFA

- Regulations include protections for:
  - current, past, and potential pregnancy;
  - lactation;
  - use of birth control;
  - menstruation;
  - miscarriages; and
  - abortion.
- Additionally, they expand the definition of when an employee is "qualified" for leave as an accommodation, to fill in gaps left in the Family and Medical Leave Act.

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Who is entitled to an accommodation?

- An employee or applicant can meet the definition of "qualified" in one of two ways.
  - First, if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language used in the ADA.
  - Second, they can be qualified – **even if they cannot perform one or more essential functions of the job** – if: (a) the inability to perform an essential function is temporary; (b) the essential function could be performed in the near future; and (c) the inability to perform the essential function can be reasonably accommodated.

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Who is entitled to an accommodation?

- The proposed rule defines the terms "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future," and "in the near future" as **generally within forty weeks** from the start of the temporary suspension of an essential function.
- As long as the employee is "qualified," the employer must grant the requested accommodation or an equally effective accommodation, unless doing so imposes an undue hardship.

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What types of conditions/circumstances are included under the umbrella of "pregnancy, childbirth and related medical conditions"?

- "**Pregnancy**" and "**childbirth**" include current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth (including vaginal and cesarean delivery).
- "**Related medical conditions**" are conditions that "related to, are affected by, or arise out of pregnancy or childbirth." Examples include:
  - termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; **fertility treatment**; lactation and conditions related to lactation; **use of birth control**; **menstrual cycles**; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions.

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What types of conditions/circumstances are included under the umbrella of "pregnancy, childbirth and related medical conditions"?

- "**Related medical conditions**" Con't:
  - The proposed regulations also reference conditions that are not unique to pregnancy or childbirth, such as:
    - chronic migraine headaches;
    - nausea or vomiting;
    - high blood pressure;
    - Incontinence;
    - carpal tunnel syndrome; and
    - many other medical conditions.

These conditions are only covered under the PWFA if the condition relates to pregnancy or childbirth (although the ADA or other civil rights statutes may apply) or are exacerbated by pregnancy or childbirth.

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What is a "known limitation"?

- A mental or physical impediment or problem related to pregnancy, childbirth or related medical conditions, including common or minor conditions that has been communicated to the employer.
- While many of the concepts in the PWFA are modeled on the ADA, "known limitation" is a unique statutory term.
- Unlike the ADA, an employee does not have to show that a limitation meets a specific level of severity to be covered under the PWFA.
- The PWFA is intended to cover even uncomplicated and healthy pregnancies.

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What is a "known limitation"?

- The proposed rule says that a "limitation" means a modest, minor, or episodic impediment or problem.
  - In addition to "impediments or problems," the proposed definition includes "needs or problems related to maintaining the employee's health or the health or their pregnancy," as well as when the employee is seeking healthcare for a covered condition.
- According to the EEOC, an employee can also request accommodation to reduce increased pain or increased risk to the employee's health that is related to pregnancy, childbirth, or a related medical condition.

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What is a reasonable accommodation?

- The PWFA borrows the definition of "reasonable accommodation" from the ADA.
  - A modification or adjustment is reasonable if it "seems reasonable on its face, i.e., ordinarily or in the run of cases;" this means it is "reasonable" if it appears to be "feasible" or "plausible." An accommodation also must be effective in meeting the needs of the employee or applicant, meaning it removes a workplace barrier and provides the individual with equal opportunity.
- But unlike the ADA: The proposed regulations require employers excuse essential job functions for generally up to 40 weeks for each accommodation request, unless it would impose an undue hardship on the employer.

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What is a reasonable accommodation?

- There are four specific accommodations that the EEOC believes, "in virtually all cases," will be reasonable accommodations that do not impose undue hardship. The EEOC refers to these as "predictable assessments."
  - (1) allowing an employee to carry water and drink, as needed, in the employee's work area;
  - (2) allowing an employee additional restroom breaks;
  - (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and
  - (4) allowing an employee breaks, as needed, to eat and drink.

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What is a reasonable accommodation?

Additional examples of possible reasonable accommodations include, but are not limited to:

- job restructuring;
- part-time or modified work schedules;
- acquisition or modification of equipment, uniforms, or devices;
- appropriate adjustment or modification of examinations or policies;

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What is a reasonable accommodation?

Additional examples of possible reasonable accommodations include, but are not limited to:

- permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit) or providing unpaid leave, including to attend healthcare-related appointments and to recover from childbirth;
- assignment to light duty;
- telework; and,
- accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.

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How much leave must an employer provide?

- There is no bright line rule.
- The proposed regulations state that the employer must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies (including leave exhausted under the Family and Medical Leave Act or similar state or local laws).

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Can employers ask for medical documentation to support an accommodation request?

- **Not always.**
- The proposed regulations include several examples of when it would not be reasonable to request documentation:
  - (1) when both the limitation and the need for reasonable accommodation are obvious;
  - (2) when the employee or applicant has already provided sufficient information, i.e., the employee has already provided a medical note imposing lifting restrictions for a specific time period;
  - (3) when an employee states or confirms they are pregnant and requests one of the four common accommodations; and
  - (4) when the limitation is lactation or pumping.

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Can employers ask for medical documentation to support an accommodation request?

- The proposed regulation defines "reasonable documentation" as that which "describes or confirms
  - (1) the physical or mental condition;
  - (2) that it is related to, affected by, or arising out of pregnancy, childbirth or related medical conditions; and
  - (3) that a change or adjustment at work is needed for that reason."

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How do employers violate the PWFA?

- While not an exhaustive list, employers may violate the PWFA if they:
  - Unecessarily delay when responding to a request for an accommodation (interim accommodations will be evaluated as part of this analysis),
  - Failing to provide a reasonable accommodation when one is available,
  - Require an employee to accept an accommodation not arrived at through an interactive process;
  - Require an employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided;
  - Determine an employee is unqualified because they declined a reasonable accommodation (e.g., whether an essential function can be suspended must be considered); or
  - Take any adverse employment action because an employee requests or uses a reasonable accommodation provided under the PWFA.

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What should you do to prepare?

- While the proposed regulations may change in form and substance between now and the final enactment date, **the PWFA is currently in legal effect.**
  - The EEOC is facing significant pushback on these proposed regulations for their expansive approach to defining applicable medical conditions.
- It is critically important that your managers and human resource professionals are aware of this new law and its implications for pregnant workers.
- If you have an employee requesting accommodations to the workplace as a result of pregnancy, childbirth, or a related condition, it's important that you engage in an appropriate interactive conversation to determine the needed accommodation and document your conversations accordingly.

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Do You Need to Accommodate?

Scenario 1:

- Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should not lift more than 20 pounds. Lydia routinely has to lift 30–40 pounds as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

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Do You Need to Accommodate?

Scenario 1:

- **More than likely, Yes.** – According to the EEOC:
- 1. Known limitation: Lydia's lifting restriction is a physical condition related to pregnancy; she needs a change in work conditions; and she has communicated this information to the employer.
- 2. Qualified: Lydia needs the temporary suspension of an essential function.
  - a. Lydia's inability to perform the essential function is temporary.
  - b. Lydia could perform the essential functions of her job in the near future because Lydia needs an essential function suspended for less than forty weeks.
  - c. Lydia's need to temporarily suspend an essential function of her job may be reasonably accommodated through the existing light duty program. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

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Do You Need to Accommodate?

Scenario 2:

- One month into a pregnancy, Akira, a worker in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of the essential functions of this job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to switch duties with another worker whose job does not require the same exposure but otherwise involves the same functions. There are numerous other tasks that Akira could accomplish while not being exposed to the chemicals.

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Do You Need to Accommodate?

Scenario 2:

- **Yes, Absent Undue Hardship** – According to the EEOC:
- 1. Known limitation: Akira has a need or a problem relating to maintaining the health of her pregnancy, which is a physical condition related to pregnancy; Akira needs a change or adjustment at work; Akira has communicated this information to her employer.
- 2. Qualified: Akira needs the temporary suspension of an essential function.
  - a. Akira's inability to perform the essential function is **temporary**.
  - b. Akira **could perform the essential functions** of her job **in the near future** because Akira needs an essential function suspended for less than forty weeks.
  - c. Akira's inability to perform the essential function may be reasonably accommodated. The employer can suspend the essential function that requires her to work with the chemicals and have her do the remainder of her job. Alternatively, Akira can perform the other tasks that are referenced or switch duties with another worker. The employer must grant the accommodation (or another reasonable accommodation) absent undue hardship.

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Do You Need to Accommodate?

Scenario 3:

- Sofia, a custodian, is pregnant and will need six to eight weeks of leave to recover from childbirth. Sofia is nervous about asking for leave so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy but no policy for longer periods of leave. Sofia does not qualify for FMLA leave.

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Do You Need to Accommodate?

Scenario 3:

- **Yes**. According to EEOC:
- 1. Known limitation: Sofia's need to recover from childbirth is a physical condition; Sofia needs an adjustment or change at work; Sofia's representative has communicated this information to the employer.
- 2. Qualified: After the reasonable accommodation of leave, Sofia will be able to do the essential functions of the position.
- 3. The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent undue hardship.

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Breastfeeding Accommodation

- Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act
- Passed December 2022
- PUMP Act amends FLSA to give most nursing employees break time and space to express breast milk at work
- Prior to PUMP Act:
  - Only hourly employees had these rights previously

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Breastfeeding Accommodation

- What the PUMP Act changed:
  - Overtime exempt (salaried/professional) employees have same rights as hourly employees
- Details of requirements:
  - Must provide reasonable break time to pump breastmilk
  - Must provide space that is shielded from view, free from intrusion, and not a bathroom
  - Up to one year after childbirth

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Breastfeeding Accommodation

- Employers < 50 employees may be exempt if they can establish an **undue hardship**.
- If an employee chooses to file a private action, an employee may be required to **notify** their employer first and the employer would have **10 days** to comply (notification period may be waived under certain circumstances – e.g., termination).
- Field Assistance Bulletin No. 2023-2 provides additional information regarding break times, lactation spaces, and posting requirements.

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FREE ADA RESOURCE

- The Job Accommodation Network (JAN) Accommodation and Compliance Webcast Series returns in **January 2024**
- Series of eight webcasts featuring a range of disability employment topics.
  - Including the Pregnant Workers Fairness Act in July of 2024
- The series began today, Thursday, January 11, 2024, at 2:00 PM ET with "ADA & Beyond Compliance Considerations: Medical Documentation."
- Register: https://askjan.org/events/register/2024-Webcast-Series.cfm
- Webcasts are recorded - https://askjan.org/events/webinars/archive/index.cfm

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EEOC Regulation of Workplace AI

- EEOC May 18, 2023 guidance on when use of Artificial Intelligence may have a disparate impact
- Provides clarity on use of AI under existing law
- Addresses AI in "selection procedures" for applicant screening, hiring, promotions, terminations
  - **resume scanners** that prioritize applications using keywords
  - employee **monitoring software** that rates employees
  - **virtual assistants or chatbots** that ask candidates about qualifications and reject those who do not meet certain requirements
  - **video interviewing software** that evaluates candidates based on facial expressions and speech patterns
  - **testing software** that provides job fit scores for applicant or employee personalities, aptitudes, cognitive skills, or cultural fit based on test or game performance

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EEOC Regulation of Workplace AI

The EEOC has made its position clear: an improper application of AI could violate Title VII and other federal anti-discrimination laws.

- EEOC Chair, Charlotte Burrows, recently called AI advancements **a "new civil rights frontier."**

How can employers monitor the effects of hidden layers of data-processing that may expedite time-sensitive personnel decisions but may also cause unintended "disparate impact" in employment-related decisions?

This is not a hypothetical problem.

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EEOC Regulation of Workplace AI

- Employers are likely liable for tools designed or administered by a vendor or third party
  - You're likely still on the hook for disparate impact no matter what the vendor says
- Employers should self-audit the tools they use
- If you identify potential disparate impact consider making an adjustment
- **EEOC is paying significant attention to this topic**
- Pay close attention to federal, state and local laws when auditing
- Educate your team on the risks associated with using AI

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EEOC Regulation of Workplace AI

What Should You Do About Vendors???

- 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.
- Ask 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.
- Check you vendor contracts for indemnification provisions.

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EEOC v. iTutorGroup Inc., E.D.N.Y., No. 22-cv-02565 (2022)..

In May 2022, the EEOC brought a lawsuit against the tutoring company, iTutorGroup, and its two integrated companies for violations of the Age Discrimination in Employment Act ("ADEA"), seeking back pay and liquidated damages.

- This suit was brought in response to more than 200 applicants that were denied jobs by the company in March and April 2020 after its AI-based hiring platform rejected all female applicants over 55 years old and all male applicants over 60.
- This was discovered when a female applicant applied and was initially rejected but was then accepted when she reapplied with the exact same application, aside from the inclusion of a more recent date of birth.

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EEOC v. iTutorGroup Inc., E.D.N.Y., No. 22-cv-02565 (2022)..

As a result of the settlement, filed with the court on August 9, 2023, iTutorGroup must pay **$365,000 in damages** to a group of rejected job seekers ages 40 and over.

Further, according to the consent decree, the company is prohibited from rejecting tutor applicants based on sex, must adopt anti-discrimination policies, must conduct anti-discrimination trainings, and must invite the improperly rejected applicants to reapply.

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Technology Company Identifies AI Bias

A large multinational technology company also tried to implement an A.I. tool that would learn from Amazon's past hires to review applicants' resumes and recommend the most promising candidates. However, the **AI tool displayed a prejudice against female candidates**.

- The AI engine was trained to vet applicants by observing patterns in resumes submitted to the company during the previous ten years, which in the male-dominated tech industry had been submitted largely by … male candidates.
- Understandably looked for promising traits, but the AI engine learned that male candidates were preferred.
- Was able to identify the troubling practice and stop it.

This illustrates that machine learning can be unpredictable and result in a disparate impact on an employee or prospective employee on the basis of race, color, religion, sex, or national origin.

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Preventing Antisemitism in the Workplace

- Reports of antisemitism in the workplace have increased following the attack on Israel by Hamas in October 2023, and Israel's declaration of war.
- The Biden Administration's National Strategy to Counter Antisemitism and the EEOC issued renewed guidance for employers on antisemitism, addressing Title VII's prohibitions on discrimination based on religion, race, ethnicity and/or national origin.
- There are religious accommodation considerations with regard to work hours, dress and grooming codes, etc. This is particularly true in light of the *Groff* decision.

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Diversity, Equity, and Inclusion Initiatives

- Following the Supreme Court's decision in *SFFA v. Harvard/UNC*, Attorneys General from 13 states and U.S. Senator Tom Cotton of Arkansas have sent letters to business leaders warning of potential legal risks associated with their DEI initiatives.
- The American Alliance for Equal Rights has sued a minority-focused venture capital fund and multiple national law firms for purportedly unlawful race discrimination stemming from their DEI programs.
- We expect to see more challenges in 2024.

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New Religious Accommodation Standard

- Supreme Court's June 29, 2023 decision (*Groff v. DeJoy*)
- Significantly broadens entitlements of workers seeking accommodations for religious practices
- Religious accommodations must granted unless they cause **undue hardship**
- Supreme Court rejected the **de minimis** test long used to determine whether a request created an undue hardship

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New Religious Accommodation Standard

- New undue hardship standard: whether accommodation results in **substantial increased costs** in relation to the conduct of the business
- What does that mean?
- Clue: SCOTUS does not think this ruling will affect EEOC religious accommodation regulations
- Expect a lot of uncertainty around this new standard
- Case-by-case analysis

71

High Earners May Still Be Entitled to Overtime Pay

- On February 22, 2023, the Supreme Court clarified in ***Helix Energy Solutions v. Hewitt*** that a highly compensated employee may be entitled to overtime pay under the Fair Labor Standards Act (FLSA) if he or she is not paid on a salary basis. However, the Court stated that an employee who is paid a daily rate may still satisfy the "salary basis" requirement for exemption, but only if (1) they are guaranteed at least $455 per week, and (2) the "guaranteed amount" bears a "reasonable relationship" to the "amount actually earned."

72

Potential Limits on Who Can Bring an ADA Accessibility Lawsuit

- The Supreme Court in ***Acheson Hotels v. Laufer*** has been asked by a Maine hotel to determine whether a self-appointed "accessibility tester" who goes from business to business looking for alleged violations of the Americans with Disabilities Act (ADA) has standing to sue for such alleged violations despite having no intent of actually visiting the business.
- Typically, a party has standing to bring a lawsuit only when they have suffered a particularized injury and not merely a generalized grievance shared widely by many other people.
- The basis of the plaintiff's lawsuit in Acheson Hotels was the hotels' alleged failure to detail on their website the accessible features in the hotel and guest rooms to allow individuals with disabilities to determine whether the hotel or guest rooms meet their accessibility needs.

73

Potential Limits on Who Can Bring an ADA Accessibility Lawsuit

- The hotel argued that this alone was insufficient to constitute an injury giving the plaintiff standing to sue.
- In reversing the district court's ruling in favor of the hotel, the U.S. Court of Appeals for the First Circuit held that the plaintiff suffered an injury sufficient to confer standing by the mere lack of accessible information on the hotel's website, notwithstanding that **plaintiff had no intent of staying at the hotel**.

74

Potential Limits on Who Can Bring an ADA Accessibility Lawsuit

- If the Court rules in favor of the hotel, "testers" may find themselves limited in the types of civil rights lawsuits they can bring.
- A ruling in favor of the plaintiff could have dangerous implications for long-standing principles of constitutional standing, potentially broadening the scope of who has a right to bring certain types of lawsuits.
- While Title III of the ADA (which covers public accommodations) does not allow recovery of monetary damages, the plaintiffs can obtain their attorneys fees from successful suits.

75

Potential Limits on Who Can Bring an ADA Accessibility Lawsuit

- The U.S. Supreme Court dismissed its review of a case, however, on December 5, 2023.
- The court concluded that the matter was moot because the plaintiff had voluntarily dismissed the claim after her lawyer was sanctioned by a lower court.
- In the dismissal order, Justice Amy Coney Barrett noted that the Supreme Court may revisit this issue in a future matter.

76

77

Federal Trade Commissions Non-Compete Ban

- The Federal Trade Commission's vote on the final version of its proposed rule that, if enacted, would amount to a nearly complete nationwide **ban on employers' use of non-compete agreements, is delayed until April 2024** because of the volume of public comments received following an extension of the comments period from March 20, 2023 to April 19, 2023.

78

What Constitutes An Adverse Employment Action

- The Supreme Court in ***Muldrow v. St. Louis*** will decide whether an employee's forced lateral transfer to a different job rises to the level of an adverse employment action in violation of Title VII, regardless of whether the transfer negatively alters the employee's compensation, terms, conditions, or privileges of employment.
- The district court and the Eighth Circuit Court of Appeals ruled in favor of the St. Louis Police Department and held that Title VII bars only adverse employment actions that result in "a material employment disadvantage" for the employee.
- In dismissing the plaintiff's claims of discrimination based on gender bias, the lower courts concluded that the forced transfer was not actionable under Title VII because plaintiff's rank, pay, and responsibilities in her new position were similar to those of her old one.

79

What Constitutes An Adverse Employment Action

- The district court and Eighth Circuit found it immaterial that the transfer resulted in minor changes in the conditions of the plaintiff's employment.
- Argument was held on December 6, 2023.
- The Court's decision is expected to resolve a circuit court split concerning whether a forced transfer alone rises to the level of an adverse employment action under Title VII.
- The Court's decision should also provide clarity on the types of actionable employment decisions that violate Title VII and the standard for bringing a Title VII action.

80

Chevron Deference to Agencies – Still Deference?

- The Supreme Court in *Loper Bright Enterprises v. Raimondo* will consider whether to overrule, or at least clarify, the long-standing Chevron doctrine that courts should defer to agencies' reasonable interpretations of ambiguous laws.
- Under Chevron, the federal agency that administers and enforces a law typically has the power to interpret any ambiguities in that law, and courts should defer to reasonable interpretations by the agency. Such deference has received considerable criticism as affording administrative agencies inappropriate power.

81

Chevron Deference to Agencies – Still Deference?

- In *Loper*, a group of commercial fishing companies challenged a rule issued by the National Marine Fisheries Service (NMFS) that requires the fishing industry to pay for monitors. At issue was whether the federal law permitting NMFS to require monitors to collect fishery conservation and management data was ambiguous as to who is required to pay for the monitors where the law did not explicitly state the responsible party.
- Applying *Chevron*, the Court of Appeals for the D.C. Circuit held that the law was ambiguous and deferred to the agency on this issue, finding the agency's decision was reasonable.

82

Chevron Deference to Agencies – Still Deference?

- If the Court overrules *Chevron*, it could have far-reaching implications for employers that deal with administrative agencies.
  - For example, regulations and rules issued by administrative agencies could come under greater legal scrutiny, potentially invalidating clarity previously afforded to ambiguous laws.

83

Whistleblowers May Be Required to Prove Retaliatory Intent

- Under the Sarbanes-Oxley Act, whistleblowers are protected from discrimination and retaliation when they report financial wrongdoing.
- In ***Murray v. UBS Securities, LLC***, the Supreme Court is expected to decide the standard employees must meet to prove retaliation under Sarbanes-Oxley: specifically, whether a whistleblower must prove retaliatory intent.
- The applicable standard for these claims differs among the federal appeals courts, with some applying a higher "retaliatory intent" standard and others applying a lower standard requiring whistleblowers to show only that their activity was a contributing factor in the adverse employment action taken against them.

84

Whistleblowers May Be Required to Prove Retaliatory Intent

- The Court's decision in *Murray* could resolve the differing standards applied by federal appeals courts.
- While this decision will be limited to whistleblower retaliation claims under the Sarbanes-Oxley Act, the Court's decision could eventually reach further into other areas of law that provide protections to whistleblowers – including Florida's whistleblower statutes.

85

Department of Labor

86

Changes to DOL's Overtime Regulations

Finally Happened!

87

Quick FLSA Refresher

- The employee must meet:
  1. **The Salary Basis Test (*);**
  2. **The Salary Level Test; and**
  3. **The Duties Test.**
- The fact that employees are paid a salary does **not** automatically make them exempt.
- Resource: Chapter 22 of DOL Filed Operations Handbook: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch22.pdf

(*) Certain professionals, such as teachers and lawyers, do not need to meet this salary test - but the vast majority of employees do.

88

Summary of Last Overtime Rule Change:

- In September 2019, the DOL finalized a rule that boosts the salary threshold for exempt status to $684/week (roughly $35,568/year) – 20th percentile of weekly earnings of full-time salaried workers in the lowest-wage region (vs. 40th percentile sought by President Obama in 2016 ($913/wk))
- The previous salary threshold for exempt employees was $455/week or $23,660/year
- On hold since 2022 - impact of inflation/risk of recession?

89

Proposed Overtime Rule Change:

- August 30, 2023 - DOL released a Notice of Proposed Rulemaking to Define and Delimit the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees
- Increases standard salary level for white color exception from $684 per week ($35,568 annually) to $1,059 per week ($55,068 annually) - **35th percentile** of weekly earnings of full-time salaried workers in the lowest-wage region (South)
- Increases the "highly compensated" exemption under the FLSA from $107,432 to $143,988 annually (**85th percentile**).
- Ten percent of the minimum salary can be met with nondiscretionary bonuses and incentives (as before).
- Automatic updates – every 3 years.

90

Proposed Overtime Rule Change:

- Public comment period for this proposal ended November 7, 2023.
- Likely April 2024 with 60 to 90 transition period?
- Could be updated to 35% as of April 2024 ($60k?)
- May be changes to help avoid legal challenges?

91

What should employers do now?

- It is important to conduct an **audit** to ensure employees are properly classified.
- This is also a good time to **analyze job descriptions** and take a close look at an employee's **actual job duties** in comparison to DOL guidelines.

92

What should employers do now?

- Determine whether to **re-classify** employees, increase salaries, or consider **alternative compensation methods**.
- Budget for pay changes?
- Develop **talking points**, **training and policies** aimed at the re-classified employee population.

93

Will there be legal challenges?

- Texas court in 2016 found that DOL:
  - did not have the authority to set a salary threshold so high that it effectively eliminated the duties test, and
  - no authority to provide for automatic updates (not provided for under the FLSA)
- "Major questions doctrine"
- Does current Acting Secretary of DOL (**Julie A. Su**) have authority to promulgate such rules or regulations?

94

Major Questions Doctrine?

- Agency must be able to point to clear congressional authorization before engaging in action that courts conclude has broad-reaching economic and/or political significance (like OSHA and vaccine)
- Doctrine applies when:
  - An agency claims the power to resolve a matter of great political significance
  - A significant portion of the American economy will be regulated, in which case there must be clear congressional authorization for the regulation
  - An agency seeks to regulate in an area that is the domain of state law
- *West Virginia v. Environmental Protection Agency* (6-3 striking down EPA's Clean Power Plan (CPP) (June 2022)).

95

Final Independent Contractor Rule

- Establishes a six-factor test for determining whether a worker is an employee or independent contractor – each to be considered equally.
- Cancels rule that gave greater weight to how much control workers have over their job duties and opportunities for profit or loss.

96

Final Independent Contractor Rule

1. Opportunity for profit or loss a worker might have;
2. The financial state and nature of any resources a worker has invested in the work;
3. Degree of permanence of the work relationship;
4. The degree of control an employer has over the person's work;
5. Whether the work the person does is essential to the employer's business; and
6. The worker's skill and initiative.

97

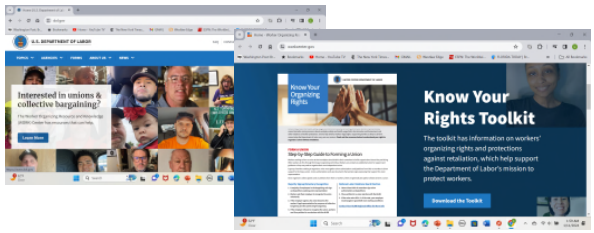
Final Independent Contractor Rule

Could have been worse?

- ABC test – CA and IL: employer has to PROVE:
  - Absence of control (free from direction or control of hiring organization)
  - Business of the worker (unusual to the employer's business/trade)
  - Customarily engaged (as independent contractors on per job basis)

98

Little Help for NLRB?



99

National Labor Relations Board

100

Test Your Knowledge

TRUE OR FALSE?

The National Labor Relations Act covers only unionized employees, and the National Labor Relations Board (NLRB) only polices unionized workplaces – so I don't have to worry about any of this stuff if we have no unions.

101

Protected Concerted Activity

Action by 2+ employees, re wages, hours, working conditions

» Examples: a strike
a walkout

Action or speech by one employee on behalf of a group

» Example: one employee complains about working conditions, and the complaint may or does lead to group action

NOT Protected: personal gripes, threats of violence, destructive acts

NLRB v. Washington Aluminum, 1962

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Discipline for Offensive Conduct at Workplace

***Lion Elastomers LLC II* – May 2023 - Takeaways:**

BOTTOM LINE:

New ruling may complicate disciplining or discharging workers for offensive or abusive outbursts in the context of NLRA-protected activity.

Depending on the circumstances, employers may be forced to continue employing individuals who have committed abusive or threatening conduct that would have resulted in termination absent protected Section 7 activity.

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Discipline for Offensive Conduct at Workplace

Lion Elastomers LLC II – May 2023

- If an employee is voicing comments on working conditions or other concerted activities, discipline for insubordination may be unlawful under the NLRA, dependent upon:
  - Place of discussion;
  - Subject matter of the discussion;
  - Nature of the employee's outburst; and
  - Whether the outburst was provoked, in any way, by an employer's unfair labor practice
- Profane, disrespectful language directed at management when discussing terms and conditions of employment = usually protected

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NLRB General Counsel

New Agenda

- Expansive reading of Section 7 rights (protected concerted activity/mutual aid)
- Aggressive approach to "unlawful terminations," proactive enforcement and broader remedies (compensatory damages, fines, consequential damages, repeat offenders)
- Revisit 40 Trump-era decisions (including handbooks/*Boeing*, confidentiality provisions) - **mandatory submission to advice – since relaxed and narrowed**

105

Enforcement of the NLRA

- Five Members - split 3/2 by party in power (generally)
- Quasi-judicial body in deciding cases in administrative proceedings
- Nominated by the President to 5-year terms (the term of one Member expiring each year)
- Down 1 Republican since December 2022 (John Ring term expired)


Lauren McFerran
Jul 2020-Dec 2024


Gwynne Wilcox
Aug 2023- Aug 2028


David Prouty
Aug 2021-Aug 2026


Marvin Kaplan
Jul 2020-Aug 2025

106

Trends Showing Some Success?

- During the first six months of Fiscal Year 2023 (October 1–March 31), unfair labor practice (ULP) charges filed across the NLRB's 48 field offices have **increased 16%**—from 8,275 to 9,592.
- After a substantial increase last Fiscal Year, union representation petitions filed at the NLRB for the first six months of Fiscal Year 2023 continue to increase—**up to 1,200 from 1,174**.
- In total, 10,792 cases have been filed with the NLRB's 48 field offices across the country, up 14% over the same period in Fiscal Year 2022.
- In FY 2022, 2,510 union representation petitions were filed—a **53% increase** from the 1,638 petitions field in FY 2021 (highest since FY 2016).

107

Heightened Scrutiny of Handbooks/Rules

Stericycle, Inc. (August 2023)

- Stricter (and more nebulous) standard for evaluating employee handbooks/rules:
  - Does rule/provision have a reasonable tendency to "chill" employees' exercise of their Section 7 rights
- 2 Step Analysis:
  - Could employee "reasonably interpret" the provision to have a meaning that could lead to chilling effect"?
  - If so, employer must:
    - Establish and be able to show what value or interest the rule serves; and
    - That the rule can't be replaced with narrower, lawful rule and still serve the same purpose.

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Heightened Scrutiny of Handbooks/Rules

Stericycle, Inc. (August 2023) - ACTION ITEMS:
- Review all handbooks/rules/policies to look for "chilling effect"
- Consider the purpose and value of any questionable rule/policy, and whether it could be narrowed or eliminated

- Some targets:
  - Confidentiality rules
  - Social Media policies
  - Disciplinary rules

See rescinded GC Memo 15-04 (Mar. 18, 2015): https://apps.nlrb.gov/link/document.aspx/09031d4581b37135

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Do you have rules against any of following?

- Discussing work-related information?
- Making negative remarks about the company or its employees?
- Disrespect for others?
- Identifying yourself as employee of the company?
- Using company logo?
- Conflicts of interest?
- Using company e-mail during non-working time?
- Taking photographs or making recordings?
- Walking off the job?

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Examples

- Prohibit conduct that "impedes harmonious interactions and relationships"
- Prohibit "behavior that is counter to promoting teamwork"
- Require employees to "maintain a positive work environment by communicating in a manner that is conducive to effective working relationships"
- Prohibit "arguing"

111

Examples

- Prohibit conduct that is "offensive to fellow employees"
- Prohibit disclosure of "information concerning customers, vendors or employees"
- Prohibit disclosure of "administrative information such as salaries ... staff addresses ..."
- "[Employer's] business shall not be discussed with anyone who does not work for [Employer] ..."

112

Ask Starbucks!?!

- Partners = employees
- "Partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable."

113

NLRB has found precise language like this lawful:

Confidential Information refers to any information not generally known in the relevant trade or industry which was obtained from the Company, or which was learned, discovered, developed, conceived, originated, or prepared by me in the scope of my employment. Such Confidential Information includes, but is not limited to, software, technical, and business information relating to the Company inventions or products, research and development, production processes, manufacturing and engineering processes, machines and equipment, finances, customers, marketing, and production and future business plans and any other information which is identified as confidential by the Company.

114

NLRB - Disclaimers will NOT cure bad policy….

- "This code does not restrict any activity that is protected . . . by the National Labor Relations Act . . ."
- ". . . This policy will not be construed or applied in a manner that interferes with employees' right under federal law."

115

It Just Got Easier for Employees to Organize!

116

The *Cemex* Decision: New Framework

- On August 25, 2023, the Board issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), which fundamentally re-wrote the process by which private sector employees can unionize.
- The Board's holding in *Cemex* compels an entirely new dynamic for the process by which employees can unionize.
- Instead of filing a petition to have an election, when the union claims majority support it can demand recognition.

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The *Cemex* Decision: New Framework

In response to a demand to bargain, an employer has three options:

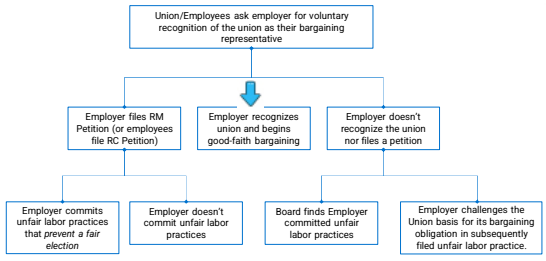
(1) Recognize the union and commence bargaining (without testing whether the union enjoys genuine majority support);

(2) File an RM Petition for an election within two weeks of the union's demand for recognition; or

(3) Take no action at all and defend against a refusal to bargain unfair labor practice (ULP) charge filed as a result of the employer's failure to accept the union's demand for recognition.

118

Cemex Organizing Process



119

The *Cemex* Decision: Some of the Issues with this Framework

- Prior legislative efforts to replace secret ballot elections with "card check" recognition failed (e.g., the Employee Free Choice Act and the Protecting the Right to Organize Act (PRO Act)).
- Fails to recognize that employees may sign union authorization cards due to coercion or intimidation, based on misrepresentations, or without full knowledge of ramifications.
- Ignores the legal and practical limitations on an employer's ability to confirm the union's claim of majority support, and the legal peril an employer faces if it recognizes a union that lacks majority support under the NLRA.

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The *Cemex* Decision: Some of the Issues with this Framework

Option two:

- Places burden on employer to file an RM petition/request election **within 2 weeks of demand**.
- If employer neglects to request timely or chooses not to do so, employees lose chance to vote.
- If the employer commits even just one violation of the NLRA during "critical period" leading up to election, and violation is enough to set aside the election, employees will lose their chance to make the decision whether to unionize via a vote.
  - In past, NLRB violations could set aside the results of an election, but the NLRB would almost always re-run the election to confirm the employees actually wanted union representation.
  - Now, NLRB will simply order union representation *without* re-running the election, relying only on union's original proof that a majority designated union as their representative.
- Option three (doing nothing and defending a ULP for refusing to bargain) has many risks. While employer can challenge majority support as an affirmative defense to ULP, it generally lacks the evidence and the means to obtain evidence necessary to sustain such a defense at that point in time.

121

But wait – there's more!

122

New (Old) Expedited Election Rules!

- Board (re)issued Obama-era regulations on August 24 to reduce amount of time between petition for election and election (went into effect Dec. 26, 2023). New rule:
- gives employers less opportunity to resolve disputes concerning voting unit scope and eligibility prior to an election (e.g., who is supervisor or in unit),
- ensures employees have less time to consider whether they desire union representation (by having election sooner),
- delays the resolution of objections to most questions concerning unit composition and scope until **after** the election, and
- shortens the time for an employer to submit its statement of position on contested issues while eliminating any requirement for a petitioning union to provide its position on such matters before the pre-election hearing.

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New (Old) Expedited Election Rules!

Compared to 2023 rules:

1. Pre-election hearings will now be open 10 days earlier
2. Regional Directors will have limited discretion to postpone pre-election hearings
3. Regional Directors will also have limited discretion to postpone the filing of a Statement of Position
4. Employers will be required to post and distribute notices to employees three days earlier
5. **The 20-business day waiting period between the decision issuance and the direction of election will be eliminated.** (Regional Directors will now be required to schedule elections at the earliest practical date, without adhering to the 20-business day waiting period imposed in 2019.)

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E-mail (*Garten Trucking* – pending case)

Current Rule: Employers may restrict use of employer email systems

Anticipated Change: Return to *Purple Communications* in which employees would be permitted to use the company's email system for union organizing, solicitation, etc. (Board looking at other technologies, like Zoom and Teams too…)

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Captive Audience

- **GC Memo in April 2022** – looking at whether Captive Audience meetings violate the Act – "license to coerce."
- Brief for *Garten Trucking*: If an employer convenes unionization meeting on paid time, it must satisfy the following steps to make the meeting voluntary:
  - First, the employer must explain the purpose of the discussion.
  - Second, the employer must assure employees:
    - that attendance is voluntary,
    - that if employees attend, they will be free to leave at any time,
    - that nonattendance will not result in reprisals (including loss of pay if the meeting occurs during their regularly scheduled working hours), and
    - that employee attendance will not result in rewards or benefits.

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Other Recent Developments – Dec 2022

Micro-units back: ***American Steel Construction***

- Burden on employer to show "overwhelming community of interest" to add to unit petitioned for by union
- Gives union's ability to organize portion of workforce – including sub-groups that might be more ripe for organizing
- Allows unions to more easily "get foot in door"
- Could end up with multiple CBAs at same job site

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Have a Plan!

- Strengthen employee relations - so hear and respond to employee concerns in real-time and employees know care.
- Establish an effective working group team to evaluate and respond to rapid demands for recognition, including evaluating a demand for recognition, whether the bargaining unit is valid, and whether to pursue a secret ballot election for employees to decide whether they want a union or not.

128

Have a Plan!

- Focus on education in advance, including providing information about what union authorization cards are and what it means to sign one (including the potential loss of any right to a secret ballot election).
- Inform employees about their rights.
- Focus on being prepared: have an action plan tailored to unique needs of specific workplace (including education for managers and supervisors regarding their legal obligations and their rights to communicate truthful information concerning the pros and cons of union representation).

129

HAD ENOUGH YET?

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Employee Agreements

- Confidentiality/Separation/Severance/Settlement Agreements
- ***McLaren Macomb***: Any employee agreement may be held partially invalid if overly broad and *could* impact Section 7 rights, even if agreement not related to NLRA complaint.
- Review all employee agreements:
  - Should explicitly not restrict right to contact/cooperate with NLRB
  - Confidentiality provisions must not be overly broad re NLRA, or right to join with other employees in exercise of Section 7 rights
  - Non-disparagement provision should be limited to *defamatory* statements made with malicious intent

131

The NLRA And Non-Compete Agreements

NLRB GC believes they violate NLRA (May 2023 (23-08))

- Restricts employees' opportunity to work elsewhere so they lose leverage for better terms and conditions of employment
- Employees stuck accepting what employer offers
- NLRB's Cincinnati regional office just filed a complaint alleging medical clinic and spa violated the Act by, among other things, requiring employees to execute agreements containing non-compete and non-solicitation provisions, and training repayment requirements = in practice prevent an employee from being able to quit and leave their job as part of exercising Section 7 rights.
- No court has yet upheld GC's view – dozens of states allow and enforce non-compete/non-solicitation agreements.
- FTC pursuing similar restrictions (proposed rule January 2023)

132

So, what are we supposed to do about ALL OF this!?!

- Get your handbook in order!
- Document disciplinary issues and lawful reasons for it!
- Conduct assessment and pre-planning (have a plan)!
- Identify the "face" of each facility, operation, department, shift!
- Train supervisors to understand NLRA (including what is PCA) and nurture empathetic leadership (positive employee relations)!
- Responsive and collaborative HR interface with employees!

133

Latest from Tallahassee/Florida Workplace Laws

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Florida's Minimum Wage Changes

As of September 30, 2023, Florida's minimum wage increased from $11.00 to $12.00 ($8.98 if taking tip credit)

Effective Date	Florida Minimum Wage
September 30, 2024	$13.00
September 30, 2025	$14.00
September 30, 2026	$15.00

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New Florida E-Verify Law

- Private employers with 25+ employees required to use E-Verify for new hires beginning July 1, 2023
- Cannot "knowingly employ an unauthorized alien"
- No exceptions for employees in the process of obtaining a work visa or permanent status
- **Steep penalties for non-compliance, including potential revocation of licenses – beginning in July 2024 ($1,000/day if multiple violations over period of months).**
- Follow rules when status unclear… until confirmed/resolved

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Latest on HB7/Individual Freedom Act:
How Florida's "Stop WOKE Act" May Affect Your Business?

137

Overview of HB-7: "Individual Freedom Act" (a/k/a "Stop WOKE Act")

- Was supposed to go into effect July 1, 2022
- Applies to all employers with 15 or more employees in Florida
- Amends the Florida Civil Rights Act to make certain types of employee diversity trainings unlawful – if the trainings endorse or compel employees to believe certain prohibited concepts
- Modeled on "divisive concepts" of President Trump's 2020 Executive Order 13950 (Combating Race and Sex Stereotyping), which targeted trainings by federal contractors and governmental agencies (revoked by President Biden January 20, 2021)
- Currently on hold… pending at Eleventh Circuit ….

138

What is Prohibited

It is an **unlawful employment practice** to …

- Subject any employee, as a **condition of employment** …
- To training, instruction, or any other **required activity** …
- That "**espouses, promotes, advances, inculcates, or compels**" …
- The employee to believe any one of **eight prohibited concepts**.

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Potential grey areas….

- Unconscious bias?
- Male or white privilege?
- Existence of structural racism or sexism?
- Affirmative action is laudable or appropriate practice in certain circumstances?
- People feeling guilt or shame over things that happened in America's history – and are not widely acknowledged or discussed (e.g., Tulsa 1921, Trail of Tears, Emmett Till, Harry T. and Harriette Moore)?

140

Is the Stop WOKE Act Lawful?

- On August 18, 2022, U.S. District Court for the Northern District of Florida entered a preliminary injunction ordering state officials in Florida to take no steps to enforce the Act while the court considers merits of case (*Honeyfund.com, Inc. v. DeSantis*).
- Two private employers and a diversity, equity, and inclusion (DEI) consultant and training company argued that HB7 is unconstitutional because it **restricts free speech** and is **impermissibly vague**.
- Eleventh Circuit: Injunction kept in place pending appeal; oral argument held August 24, 2023

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Employer Considerations if Injunction Lifted

- Voluntary trainings and discussions are not affected.
- Mandatory diversity trainings are still allowed as long as they do not espouse, promote, advance, inculcate, or compel belief in the prohibited topics.
  - **Statue disclaimer**: Above concept restrictions "*may not be construed to prohibit discussion of the concepts listed therein as part of a course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts*."
- Review training materials and content to ensure compliance.
- Consider including disclaimers and acknowledgements that trainings do not violate HB7.
- Remember - There are also risks to not doing any diversity trainings!

in·cul·cate **– verb - instill (an attitude, idea, or habit) by persistent instruction**

142

Is Legal Weed Coming to Florida?

143

State of Legal Marijuana in 2023

- Recreational marijuana is now legal in **24 states plus the District of Columbia**.
- 2024 Amendment in Florida?
  - More than 1 million signatures (891,000 required)
  - Needs 60% to pass (medical marijuana passed with 71% of vote in 2016)
- AG Moody argued ballot language is vague and may confuse voters – court seemed skeptical of arguments – decision likely before April 1.

144

State of Medical Marijuana in Florida?

- Florida Department of Health 's Office of Medical Marijuana Use reports (as of **Jan 5, 2024**):
- Qualified Physicians: **2,748**
- Qualified Patients (Active Card): **867,072 (pop of 22.5m) (nearly 4% of population?)**
- **616** approved dispensing locations in the state
- **19** approved dispensing locations in Brevard

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Federal Law on Marijuana has NOT changed …

Federal Controlled Substances Act (CSA):

- Marijuana still categorized as a Schedule I controlled substance
- Treated the same as heroin, LSD, ecstasy, and other illegal/illicit drugs

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BUT – Are Changes to Marijuana Law Coming?

- In October 2022 President Biden directed Department of Health and Human Services (HHS) to look at re-scheduling as part of directing his administration to expedite a review of whether marijuana should continue to be listed as a **Schedule I** substance (= *high potential for abuse, with little or no accepted medical use*).
- August of 2023 – HHS recommended to the Drug Enforcement Administration (DEA) that marijuana be reclassified as a lower-risk, **Schedule III** controlled substance (= *moderate to low potential for dependence, and some medical value* - same category as anabolic steroids and ketamine, which can be obtained with a prescription).

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Day on the Hill – February 1!

» Session runs Jan 9 to March 8, 2024





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Day on the Hill – Employment Bills

» Marijuana employment protections-public sector (SB 166)
» Paid Parental Leave (public sector) (HB 127/ SB 128)
» Gender Identity Employment Practices (HB 599/ SB 1382)
» Hairstyles – in educational setting (students and employees) (HB 643/SB 686)
» Employment and Curfew of Minors (HB49/SB1596)
» Biological Sex (HB 1233)
» Leave for Crime Victims/Witnesses (HB 839)
» Review of Employment Contracts (SB 40)

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Oh Yeah – the Legal Stuff…

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