13TH ANNUAL UTAH FALL EMPLOYMENT LAW SEMINAR

November 13, 2024

Ballard Spahr LLP

NAVIGATING THE COMPLEXITIES OF ARBITRATION AGREEMENTS: RECENT DEVELOPMENTS AND CHALLENGES

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INTRODUCTION

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3 TRAINING MODULES

1. How courts are interpreting and applying the transportation worker exemption under the Federal Arbitration Act (FAA).

2. Key provisions and implications of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.

3. The unique challenges presented by arbitration in California.

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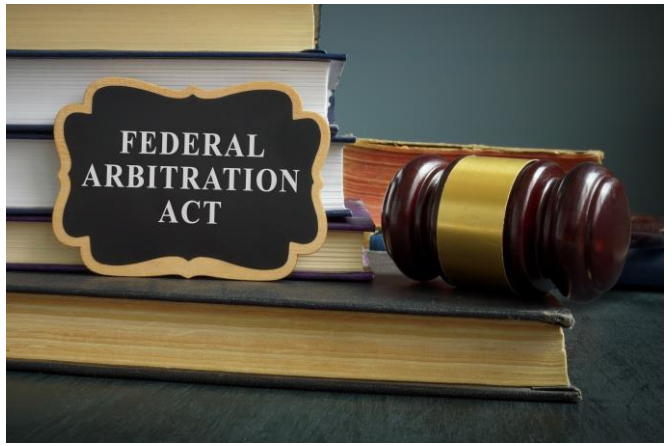
MODULE 1:
HOW COURTS ARE INTERPRETING AND APPLYING TRANSPORTATION WORKER EXEMPTION UNDER FEDERAL ARBITRATION ACT (FAA).

WHEN DOES THE FAA APPLY?

- The FAA applies to arbitration agreements involving interstate or foreign commerce.
- The parties to an arbitration contract may also elect to have the FAA govern the agreement.
- If the FAA applies, and a state law conflicts with it, the FAA preempts that state law.



WHAT DOES "INVOLVING COMMERCE" MEAN?

- The United States Supreme Court has interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce" – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause Power.
    - *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)

- In practice, this is a broad standard, and can be demonstrated in various ways:
    - Employer with employees who work in, or travel to, multiple states.
    - Employer selling products in different states.
    - Employer with customers/clients/patients from other states.

EXEMPTIONS TO ARBITRATION UNDER THE FAA

- Under section 1 of the FAA, "seamen, railroad employees, ***or any other class of workers engaged in foreign or interstate commerce" are exempt from the FAA's coverage***. *See* 9 U.S.C.A. section 1.

- What does "any other class of workers engaged in foreign or interstate commerce" mean?

TRANSPORTATION WORKERS

- Supreme Court has held that section 1 of the FAA exempts from the FAA only employment contract of **transportation workers.**
  - *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 106 (2001)

- What constitutes a transportation worker?
  - Most obvious example is employee who directly transports goods in interstate, such as an interstate truck driver.

RECENT SUPREME COURT RULINGS

- In 2022, Supreme Court held that airline employees who physically load and unload cargo on and off planes that travel across the country are "transportation workers."
    - *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)

- Supreme Court *rejected* the argument that Section 1 of the FAA only applies to workers who physically move goods or people.

RECENT SUPREME COURT RULINGS

- In April 2024, Supreme Court held that a "transportation worker" does not need to work in the transportation industry to fall within Section 1 of the FAA.
  - *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024)

- Key takeaways from *Bissonnette:*
  - An employer in *any* industry can potentially have "transportation workers." The individuals at issue in *Bissonnette* worked in the baking industry.
  - But Supreme Court reiterated that in order for a worker to be deemed as a "transportation worker," the worker must "at least play a direct and 'necessary role in the free flow of goods' across borders."

WHO IS A TRANSPORTATION WORKER?

- Does a car salesperson, who sells and delivers cars across state lines, meet the transportation worker exemption?

WHO IS A TRANSPORTATION WORKER?

- **No.**

- On August 6, 2024, the District Court of Kansas held that the transportation-worker exemption did **not** apply to a car salesperson, even if she did sell and deliver vehicles to out of-state customers.

- This is because "[a]ctive engagement with transportation of goods using interstate commercial channels must be a defining feature of the class of workers to which the plaintiff belongs... Plaintiff's own experience selling vehicles to customers out-of-state does not situate her work for Defendant among the various classes of transportation workers covered by this section."
  - *Snyder v. Kansas City Auto. Co., L.P.*, No. 2:23-CV-02564-HLT-GEB, 2024 WL 3677499 (D. Kan. Aug. 6, 2024)

WHO IS A TRANSPORTATION WORKER?

- Does a local delivery driver, who make “last-mile” deliveries of shipments all within the same state, meet the transportation worker exemption?

WHO IS A TRANSPORTATION WORKER?

- **Yes.**

- On September 30, 2024, the District Court of Colorado held that the transportation-worker exception **applied** to local delivery workers contracted by Amazon to make deliveries exclusively within the state of Colorado because "last-mile delivery of interstate Amazon shipments is 'part of an integrated interstate journey[.]'"
  - *Cross v. Amazon.com, Inc.,* No. 23-CV-02099-NYW-SBP, 2024 WL 4346414 (D. Colo. Sept. 30, 2024)

WHO IS A TRANSPORTATION WORKER?

- Does a customer service representative, for a transportation company, meet the transportation worker exemption?

WHO IS A TRANSPORTATION WORKER?

- **No.**

- There is legal authority from both the 8th and 9th Circuit supporting the proposition that customer service representatives are **not** covered by the transportation-worker exemption.
  - *Rittmann v. Amazon.com, Inc*., 971 F.3d 904 (9th Cir. 2020)
  - Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005)
  - *Veliz v. Cintas Corp.,* 2004 WL 2452851 (N.D. Cal., Apr. 5, 2004, No. C 03-1180 SBA)

KEY TAKEAWAY FOR EMPLOYERS

- Employers – even if they are not in the transportation industry – may be prevented from enforcing arbitration agreements if their employees are "actively engaged" in the transportation of goods pursuant to Section 1 of the FAA.

- Even if employees are only moving goods *within the same state*, the exemption may still apply if the employees are moving goods as part of an "integrated interstate journey."

MODULE 2:
KEY PROVISIONS AND IMPLICATIONS OF THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

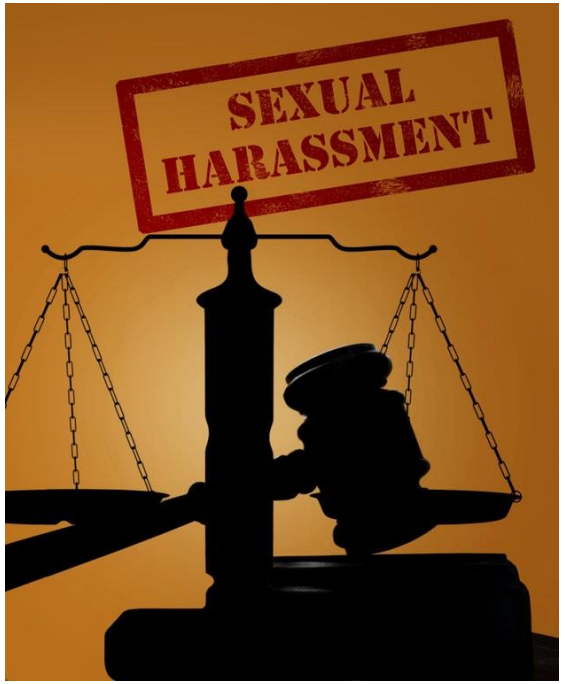
- On March 3, 2022, President Biden signed Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Act") into law.

- The Act amended the FAA to preclude mandatory arbitration of sexual harassment and sexual assault cases.

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT CONT'D

- The Act gives individuals asserting sexual assault or sexual harassment claims under federal, state or tribal law the option to bring those claims in court even if they had agreed to arbitrate such disputes before the claims arose.

ISSUE NO. 1: WHEN DOES THE ACT APPLY?



- The Act states that it "shall apply with respect to any dispute or claim that arises or accrues ***on or after*** the date of enactment of this Act." *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, PUB. L. NO. 117-90, § 3, 136 Stat. 26, 28 (2022) (emphasis added).

WHEN DOES THE ACT APPLY?

- District Courts have also interpreted that the Act applies to any dispute that arises or claim that accrues after March 3, 2022.

  - *Snyder v. Kansas City Automotive Company, L.P.,* No. 2:23-CV-02564-HLT-GEB, 2024 WL 3677499, at *2 (D. Kan., Aug. 6, 2024) (finding that because any harassing conduct took place “before” enactment of the Act, the Act did not apply to Plaintiff, even if she plausibly alleged sexual harassment.).

  - *Marshall v. Human Servs. of Se. Tex.*, No. 1:21-CV-529, 2023 U.S. Dist. LEXIS 20910, at *6 (E.D. Tex. Feb. 7, 2023) (“The plain language of the EFA Act, however, explicitly states that it applies only "with respect to any dispute or claim that arises or accrues *on or after the date of enactment of this Act*.“) (emphasis in original).

  - *Famuyide v. Chipotle Mexican Grill, Inc.*, 111 F.4th 895, 897 (8th Cir. 2024) (“The law applies when a dispute or claim arises or accrues on or after the law's enactment date of March 3, 2022.”)

ISSUE NO. 2: INTERPRETING THE STATUTE'S USE OF THE TERM "CASE"

- What happens if an employee asserts claims for sexual harassment **and** other claims (*e.g.* retaliation, age discrimination, wrongful termination, etc.) in the same case?

MOST COURTS HAVE CONCLUDED THE ACT PRECLUDES ARBITRATION OF THE WHOLE CASE

- *Johnson v. Everyrealm, Inc*. 657 F.Supp.3d 535 (S.D.N.Y. 2023)
  - "[W]here a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to **the entire case** relating to that dispute."

- Numerous federal district courts have agreed with *Johnson's* analysis and have held that the Act applies to an entire case, not just a sexual harassment claim within a case.
  - *Delo v. Paul Taylor Dance Found*., 685 F.Supp.3d 173 (S.D. N.Y. 2023) (agreeing with *Johnson* and holding the same.)
  - *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917, 925 (N.D. Cal. 2023) ("*Johnson v. Everyrealm* is persuasive concerning its statutory interpretation of the [Act] and its result.")
  - *Williams v. Mastronardi Produce, Ltd.*, No. 23-13302, 2024 WL 3908718, at *1 (ED. Mich. Aug. 22, 2024) ("This Court shall follow the current majority view, that is based upon the statute's express language, and rules that the [Act] precludes arbitration of this whole case.")

BUT AT LEAST ONE DISTRICT COURT HAS HELD OTHERWISE…

- *Mera v. SA Hosp. Grp., LLC*, 675 F. Supp. 3d 442 (S.D.N.Y. 2023)
  - "Since Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires. Thus, the Court finds that Plaintiff is compelled to arbitrate his FLSA and NYLL claims (but not his NYSHRL and NYCHRL claims, which do relate to the sexual harassment dispute)."

- However, courts in other jurisdictions have declined to follow *Mera*, including California courts.
  - *Liu v. Miniso Depot CA, Inc.*, 105 Cal. App. 5th 791 (2024)
  - *Doe v. Second St. Corp.*, 105 Cal. App. 5th 552 (2024)
  - *Turner v. Tesla, Inc.*, 686 F. Supp. 3d 917 (N.D. Cal. 2023)

…AND THE DISTRICT COURT OF UTAH RECENTLY SPLIT CLAIMS TOO

- In *Silverman v. DiscGenics, Inc.*, No. 2:22-CV-00354-JNP-DAO, 2023 WL 2480054 (D. Utah Mar. 13, 2023), an employee asserted pre-termination claims (sex-based discrimination and retaliation) and post-termination claims (*e.g.* retaliating by spreading rumors and threatening to file counterclaims).

- The District Court of Utah concluded that because the pre-termination claims arose before March 3, 2022 (*i.e.* the date the Act when into effect), the pre-termination claims could be sent to arbitration.

- However, as to the post-termination claims, the District Court of Utah concluded that the Act bars enforcement of the claims, even though the post-termination claims did not directly relate to sexual harassment and assault.

- Thus, the pre-termination claims went to arbitration, while the post-termination claims stayed in court to be litigated.

ISSUE NO. 3: INADEQUATELY PLED CLAIMS

- Does the Act automatically apply to any sexual harassment/assault case, even if the allegations in the case are not actually plausible?

MOST COURTS REQUIRE THE EMPLOYEE TO SET FORTH A PLAUSIBLE SEXUAL HARASSMENT/ASSAULT CLAIM

- Several district courts have concluded that the Act only applies when an employee has alleged a **plausible sexual harassment/assault claim**.

AN EMPLOYEE MUST PLEAD A PLAUSIBLE CLAIM

- *Yost v. Everyrealm, Inc.* (S.D.N.Y., Feb. 24, 2023, No. 22 CIV. 6549 (PAE)) 2023 WL 2224450, at *18.
  - The Court held that the plaintiff must set forth a plausible sexual harassment claim under the law in order for the Act to have any bearing on the litigation, otherwise "**it would invite mischief, by incenting future litigants bound by arbitration agreements to append bogus, implausible claims of sexual harassment to their viable claims, in the hope of end-running these arguments**."
  - The Court concluded that the Act did not apply because the plaintiff did not allege a plausible claim for sexual harassment.

DISTRICT COURTS HAVE FOLLOWED *YOST*

- District courts that have considered this issue generally agree that the Act applies only when an employee states a plausible claim of sexual harassment, which requires that the claim be capable of surviving a Rule 12(b)(6) motion.

  - *Mitchell v. Raymond James & Assocs., Inc.*, No. 8:23-CV-2341-VMC-TGW, 2024 WL 4486565 (M.D. Fla. Aug. 23, 2024
  - *Holliday v. Wells Fargo Bank, N.A.,* No. 423CV00418SHLHCA, 2024 WL 194199 at *5 (S.D. Iowa Jan. 10, 2024)
  - *Michael v. Bravo Brio Restaurants LLC*, No. CV 23-3691 (RK) (DEA), 2024 WL 2923591 at *4 (D.N.J. June 10, 2024)
  - *Doe v. Saber Healthcare Grp*., No. 3:23CV1608, 2024 WL 2749156 at *3 (M.D. Pa. May 29, 2024)
  - *Mitura v. Finco Servs., Inc.*, No. 23-CV-2879 (VEC), 2024 WL 232323 at *3 (S.D.N.Y. Jan. 22, 2024)
  - *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 180 (S.D.N.Y. 2023)
  - *Johannessen v. Juul Labs, Inc.,* 2024 WL 3173286 at *4 (N. D. Cal. June 24, 2024).

KEY TAKEAWAY FOR EMPLOYERS

- Parties can still enter into enforceable arbitration agreements with respect to sexual harassment and sexual assault claims after such claims arise. The Act does not make arbitration agreements *per se* invalid.

- However, if an employee asserts a plausible sexual harassment/assault claim, and the claim arose after March 2022, the employee may elect to avoid arbitration, which in turn, could result in the *entire case* staying in court.

MODULE 3:
THE UNIQUE CHALLENGES PRESENTED BY ARBITRATION IN CALIFORNIA

INTERSECTION BETWEEN FEDERAL AND CALIFORNIA LAWS WHEN IT COMES TO ARBITRATING PAGA CLAIMS

- Employers with operations in California are likely familiar with California's Private Attorneys General Act, otherwise known as "PAGA."

- PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of the State of California for Labor Code violations. In other words, PAGA confers a private right of action to individuals to prosecute Labor Code violations.

- Although PAGA claims are similar to class actions in that both are representative actions brought on behalf of other employees, there are <u>significant differences</u>, especially when it comes to arbitration.

CAN PAGA CLAIMS BE ARBITRATED?

- The answer to this question continues to become more and more complicated in California.

- For now, the answer is “maybe.”

VIKING RIVER CRUISES, INC. V. MORIANA, 596 U.S. 639 (2022)

- In June 2022, the U.S. Supreme Court held in *Viking River v. Moriana* held that a PAGA action can be divided into individual and non-individual claims.

- The Supreme Court further held that that the "individual" PAGA claim can be compelled to arbitration if an agreement covered by the FAA so provides.

- As far as the "non-individual" or representative claim, the Supreme Court concluded that "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding."

- Thus, the Supreme Court concluded that the representative claim should be dismissed when the individual PAGA claim is compelled to arbitration.

ADOLPH V. UBER TECHNOLOGIES, INC., 14 CAL. 5TH 1104 (2023)

- In July 2023, the California Supreme Court essentially said “not so fast.”
- The California Supreme Court reminded that it is the “final arbiter” of what is state law (*i.e.* PAGA).
- The California Supreme Court held that while an individual PAGA claim may be compelled to arbitration, that individual does not lose standing to litigate their non-individual or representative PAGA claim.
- Instead, the California Supreme Court suggested that a trial court may “exercise its discretion” to stay the representative PAGA claim in court pending the outcome of the arbitration concerning the individual PAGA claim.

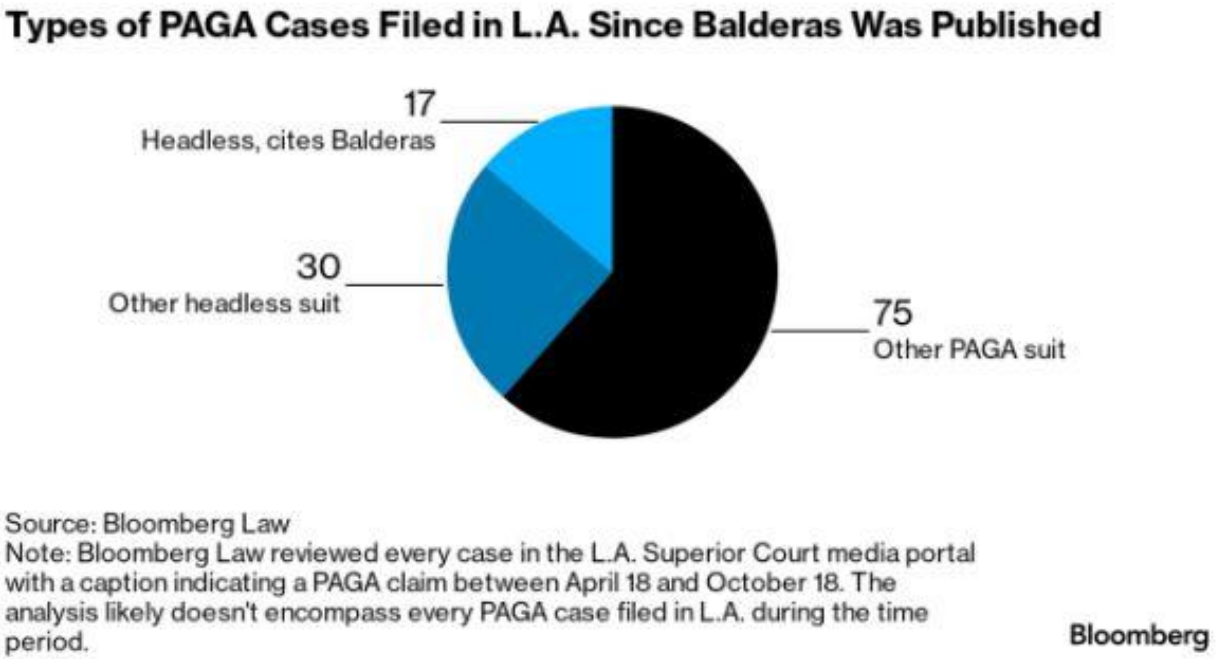
BALDERAS V. FRESH START HARVESTING, INC., 101 CAL. APP. 5TH 533 (2024)

- In April 2024, the California Court of Appeal for the Second District (which covers Los Angeles) cited *Adolph* in concluding that an employee who does not bring an individual PAGA claim against their employer may still bring a representative PAGA claim against their employer.

- In other words, according to *Balderas*, an employee can assert a non-individual/representative PAGA claim against their employer without needing to assert an individual PAGA claim too.

EFFECT OF *BALDERAS*

- Increase in “headless PAGA” cases.
- Bloomberg stated that more than a third of 122 PAGA cases filed in California Superior Court, Los Angeles County were “headless” and about 17/122 (14%) cited *Balderas*.



- Trial courts in CA have relied on *Balderas* in **denying** arbitration in PAGA cases without individual claims.

KEY TAKEAWAY FOR EMPLOYERS

- Whether PAGA claims may be compelled to arbitration is far from settled in California, as it now depends on whether the plaintiff has asserted “individual” claims, “representative claims,” or both.

- More and more plaintiffs are convincing California Courts to ignore arbitration agreements by virtue of filing PAGA actions as “representative actions only.”

QUESTIONS?

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PROGRAM BREAK

The next session will begin at 9:45 AM.

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HR COLLABORATION – THE BUSINESS AND THE LAW

13TH ANNUAL UTAH FALL EMPLOYMENT LAW SEMINAR
WEDNESDAY, NOVEMBER 13, 2024

Ballard Spahr LLP

AGENDA

- Supreme Court of the United States/ 10th Circuit Court of Appeals
- National Labor Relations Act
- Department of Labor Overtime Rule
- Independent Contractor Classification
- Federal Trade Commission’s Non-Compete Rule
- Captive Audience Meetings
- Paid Leave Laws
- Minimum Wage Laws
- Pay Transparency Laws

DEVELOPMENTS AT THE SUPREME COURT/TENTH CIRCUIT COURT OF APPEALS

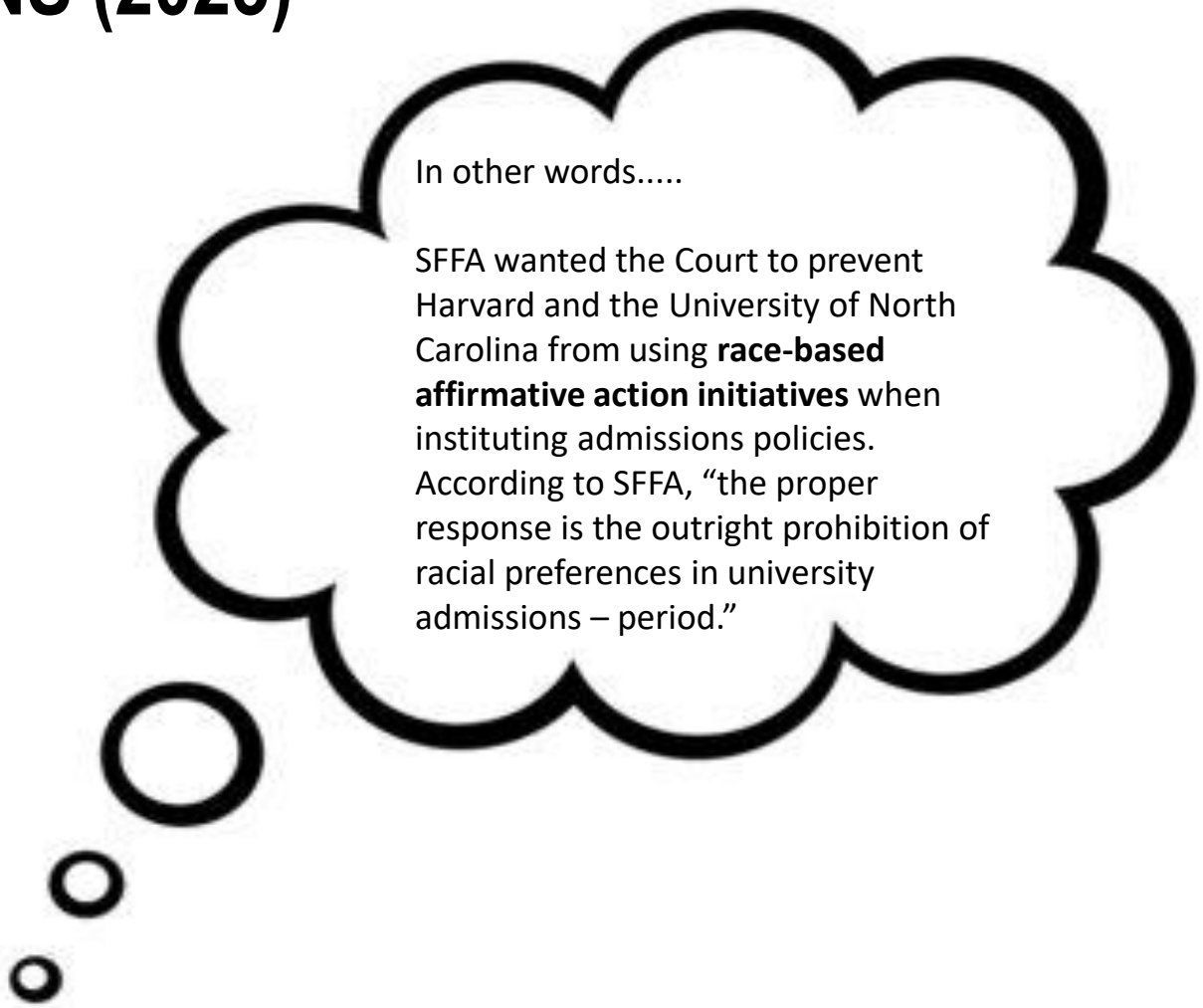
SUPREME COURT OF THE UNITED STATES ("SCOTUS")

NOTABLE RULINGS AFFECTING EMPLOYMENT LAW

1. *Students For Fair Admissions v. Harvard*, 600 U.S. 181 (2023)
2. *Muldrow v. City of St. Louis, Missouri*, et al., No. 22-193 (2024)
3. *Starbucks Corporation v. McKinney, No. 23-367 (2024)*
4. *Loper Bright Enterprises v. Raimondo*, 603 U.S. _____ (2024)

STUDENTS FOR FAIR ADMISSIONS (2023)

- SFFA challenged admissions practices and policies of Harvard and University of North Carolina as racially discriminatory under the **Equal Protection Clause** of the US Constitution and **Title VI** of the Civil Rights Act.
- The Court agreed (6-3).



STUDENTS FOR FAIR ADMISSIONS

What Does This Mean For Employers?

Broad language of decision suggests that reasoning may apply to employment practices under Title VII and/or Section 1981.

Key Statements in US Supreme Court Ruling:

- Eliminating racial discrimination means eliminating all of it.
- Ameliorating past societal discrimination does not constitute a compelling interest that justifies race-based action.
- Discrimination on the basis of race – even when packaged as affirmative action or equity programs – is still illegal.
- Under Title VI, it is always unlawful to discriminate among persons even in part because of race, color, or national origin.
- Nothing in Title VI endorses racial discrimination to any degree or for any purpose.

MULDROW V. CITY OF ST. LOUIS, MISSOURI (2024)

- Court held that an employee challenging a job transfer under Title VII must show that the transfer brought **about some harm with respect to an identifiable term or condition of employment** -- but the harm does not need to be significant.
- In other words, this means that an individual alleging discrimination under Title VII does not need to prove that the alleged adverse action was significant.
- Rather, only that ***some*** **injury was caused with respect to the terms and conditions of employment** – even if the adverse action does not result in a significant harm (e.g., firing, demotion, salary reduction).

Lowering the Bar on DEI Challenges?

Muldrow and *SFFA* together broaden scope of DEI initiatives that can come under scrutiny.

Only some harm is needed – not termination, discipline, lost pay, or demotion.

For example, is there sufficient harm in denial of participation in developmental program designed specifically to advance women or people of color?

One EEOC Commissioner (Andrea Lucas) has said that this case is likely to impact DEI initiatives.

STARBUCKS CORPORATION V. MCKINNEY (2024)

- This matter arose after several Starbucks employees announced **plans to unionize and invited a news crew** from a local television station to visit the store after hours to promote their unionizing efforts.
- **Starbucks fired the employees** for violating company policy. NLRB issued complaint and sought Section 10(j) in federal court to reinstate the workers.
- Issue before SCOTUS was what standard should apply for issuance of a **10(j) injunction**.
- In a unanimous decision, the Court rejected the Board's injunction-friendly test and held that **traditional injunction factors apply**:
  - likely to succeed on merits;
  - likely to suffer irreparable harm in the absence of injunction;
  - balance of equities tips in favor of injunction; and
  - injunction is in public interest.

LOPER BRIGHT (2024)

- Supreme Court overruled *Chevron* (6-3).
- Held that **federal courts may not defer to an agency's interpretation** of an ambiguous statute, finding that *Chevron* has proven to be "fundamentally misguided" in application.
- "Courts must exercise their **independent judgment** in deciding whether an agency has acted within its statutory authority, as the Administrative Procedure Act ("APA") requires."
- However, ruling in *Loper Bright* **only applies prospectively**, and will not retroactively invalidate agency interpretations prior to the issuance of the opinion.

Impact On Agencies:

Several industries will face disruption from the ruling, as agencies and offices will likely face challenges to the enforcement of regulations.

Regulations issued by agencies will not necessarily be resolved in favor of the agency's interpretation, and **courts can substitute their own legal interpretations** for regulations when provisions are unclear or ambiguous.

Potential Impact in HR World: EEOC, DOL, OSHA, NLRB, OFCCP.

10TH CIRCUIT

YOUNG V. COLORADO DEPARTMENT OF CORRECTIONS (MARCH 11, 2024)

- Former employee claimed that the Department of Corrections' training materials for its "Equity, Diversity, and Inclusion" programs subjected him to a hostile work environment by, among other things, "stating that all whites are racist [and] that white individuals created the concept of race in order to justify the oppression of people of color."
- Affirmed dismissal of case on basis that because training only occurred once during plaintiff's employment, it did not constitute severe or pervasive harassment.
- However, the court noted that "Mr. Young's objections to the contents of the DEI training are not unreasonable: the racial subject matter and ideological messaging in the training is troubling on many levels. As other courts have recognized, race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment. The rhetoric of these programs sets the stage for actionable misconduct by organizations that employ them."

SPAGNOLIA V. CHARTER COMMUNICATIONS (JULY 2, 2024)

SECRET RECORDED CONVERSATIONS

- Heather Spagnolia sued her former employer, Charter Communications, alleging, among other things, that she was fired in retaliation for making reasonable requests for lactation accommodation. Charter defended this claim by stating that Ms. Spagnolia was fired because she violated Charter's policy against surreptitious recordings. The trial court granted summary judgment in favor of Charter, finding that, based on the evidence gathered, no reasonable juror could find that Ms. Spagnolia's employment termination was in retaliation for her accommodation request. The Tenth Circuit affirmed this decision.

- Overall, the Tenth Circuit set a high bar for the sufficiency of evidence needed to overcome an employer's legitimate business interest in terminating an employee for violating a no-recording policy. This Tenth Circuit opinion, although unpublished and limited in precedent to the court's jurisdiction, offers valuable insights. Employers with a clearly written, consistently applied no-recording policy are better positioned to defend against retaliation claims. The case underscores the importance of documented policies and consistent enforcement in protecting employers from such legal challenges.

NORWOOD V. UPS

ADA ACCOMMODATIONS

- Employee requested accommodations due to disability. Employer denied her specific request, but offered others. Employee failed to respond to emails and questions about the accommodation.
- Court ruled that Employer need not always offer a specific accommodation. It stressed that the interactive process requires back and forth, and that an employer asking if a potential accommodation was suitable could meet the employer's ADA accommodation.

- Put accommodation discussions in writing (or send confirming email)
- Ask questions about what accommodations may work
- Coordinate between HR and supervisors as to what accommodations may work.
- Confirm with legal counsel.

OPPORTUNITIES FOR COLLABORATION

- **CDO / DEI Council / DEI Team**: Evaluate DEI programs in light of *SFFA/Muldrow* . Conduct self-assessment and make any necessary adjustments.
- **Procurement**: *SFFA/Muldrow* also implicate legal challenges under Section 1981, a federal law that prohibits race discrimination in contracting. Supplier diversity programs also may be vulnerable.
- **Law Department**: When defending actions under federal agency regulations or rulings, consider whether *Loper Bright* argument should be made.

NLRB DEVELOPMENTS

JOINT EMPLOYMENT STANDARD

- Two or more employers can be joint employers under NLRA if they "**share or codetermine those matters governing employees' essential terms and conditions** of employment." 29 CFR 103.40(b).
- NLRB Final Rule enumerates **7 categories of "essential" employment terms and conditions** that must be considered to determine joint employer status.

  (1) wages, benefits and other compensation;

  (2) hours of work and scheduling;

  (3) the assignment of duties;

  (4) the supervision of those duties;

  (5) work rules, directions related to job performance, disciplinary policies;

  (6) employment tenure; and

  (7) health and safety working conditions.

A company's control -- **or power to control, whether direct or indirect** -- in any one of these categories can establish a joint employer relationship.

LEGAL HURDLES FOR THE RULE

- The U.S. District Court for the Eastern District of Texas **vacated the NLRB's 2023 joint employer rule**; appealed by NLRB on May 7, 2024.
- On July 19, 2024, the NLRB voluntarily dismissed its appeal.
- In its Unopposed Motion for Voluntary Dismissal filed with the U.S. Court of Appeals for the Fifth Circuit, the NLRB reiterated its belief in the legality of its 2023 joint employer rule.
- NLRB stated that it **wishes to "further consider the issues** in the district court's opinion," noting that there were several joint employer rulemaking petitions on its docket.
- Given the NLRB's withdrawal of its appeal, for now, the more **employer-friendly 2020 joint employer rule**, and not the 2023 rule, is the applicable standard.

NLRB'S *STERICYCLE* DECISION

- August 2, 2023: NLRB announced in *Stericycle, Inc.* decision a new, more **union-friendly framework** for evaluating employer work rules under Section 7.
  - Covers work rules like use of social media, interactions with co-workers, confidentiality, recording in workplace, and use of employer's logos.
- Board abandoned Trump-era *Boeing Co.* framework.
- Moving forward, the Board will interpret the work rule from the perspective of a "**reasonable employee**"– a layperson – and not a lawyer.
- If the employee could reasonably interpret the work rule to prohibit employees from engaging in protected activities, the work rule is **presumptively unlawful**.

INTERTAPE POLYMER CORP.

- Applying its *Stericycle* standard, NLRB on August 23, 2024 **struck down** Intertape Polymer Corp.'s rules prohibiting workers from loitering on company property, being on the premises outside of their shift, distributing written material, and posting notices or signs.
- Rules were deemed overly broad, particularly given that right to post and distribute literature are **"fundamental elements"** of employee organizational rights.
- Notably, Board also held that discharge of employee for violating overly broad rule is unlawful, even if not protected concerted activity, if it **"touches the concerns animating Section 7**."

OPPORTUNITIES FOR COLLABORATION

- **Procurement:** Write staffing agreement to reduce likelihood of joint employment by placing essential terms and conditions under control of staffing agency.
- **Operations:** Ensure work rules governing operations, whether or not in employee handbook, comport with NLRB standards for Section 7 protected concerted activity. Both union and non-union employers!

DOL'S FINAL OVERTIME RULE

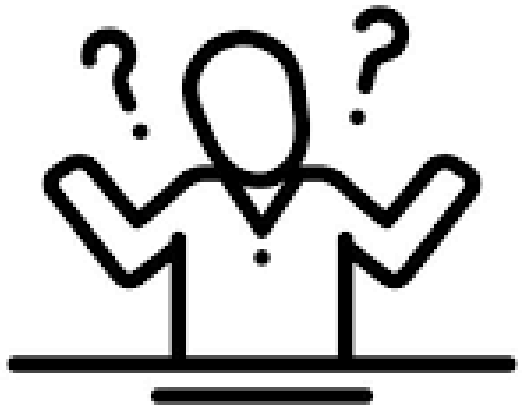
DOL OVERTIME RULES

- DOL issued final regulations in April 2024 that **modified salary thresholds** under FLSA.
- New Salary Thresholds:
  - July 1, 2024: $684/week to **$844** per week ($43,888 per year)
  - January 1, 2025: **$1,128** per week ($58,656 per year)
- **Triennial automatic adjustments** to occur every 3 years thereafter, starting July 1, 2027, based on US Bureau of Labor Statistics index.

OVERTIME SALARY THRESHOLDS

Options?

- Reclassify as non-exempt and pay overtime, or
- Increase salaries



OVERTIME SALARY THRESHOLDS

Legal Challenges

- Two Texas Lawsuits
  - **Limited injunction** enjoining rule but only for State of TX as employer
  - **Denied injunction** for lack of irreparabl harm (only impacted 1 employee)
- Fifth Circuit Appeals Court
  - 9/10/24: **Upheld DOL's right** to use salary thresholds under FLSA – ruling on Trump era adjustments.

OPPORTUNITIES FOR COLLABORATION

- **Finance**: Determine who is at and above the salary thresholds so that overtime can be properly disbursed. Consider a multi-year analysis given the increases will continue.
- **Managers and Supervisors**: If you opt to convert exempt employees to non-exempt status, ensure that managers and supervisors are aware of how to handle overtime.
  - Overtime must be paid if worked, regardless of the rules about approval.
  - Disciplinary action may be taken for working overtime without authorization.
  - Beware the “working through lunch” dilemma!

INDEPENDENT CONTRACTOR CLASSIFICATION

DOL: FINAL INDEPENDENT CONTRACTOR RULE

- 3/11/24: DOL's **final rule** on independent contractor classification took effect.
- Rule revised the agency's guidance on how to analyze who an employee or independent contract is under the FLSA.
- **Rescinds 2021 Independent Contractor Rule** and returns to the pre-2021 rule precedent.
- Multi-factor test with no one factor being determinative:
  1. Opportunity for **profit or loss** depending on managerial skill;
  2. **Investments** by the workers and the potential employer;
  3. **Degree of permanence** of the work relationship;
  4. Nature and degree of **control**;
  5. Extent to which the work performed is an **integral part** of the potential employer's business; and
  6. Worker's **skill and initiative**.
- Totality of circumstances approach makes application difficult.

DOL RULE

- Final rule is likely to result in classifying a **greater number of workers as employees**, not independent contractors.
- This classification would be significant, particularly in the **gig economy**, as it would afford more individuals FLSA rights and protections.
- DOL has released **guidance** to help employers comply with the Final Rule.
- Rule is **under challenge** in various courts.

NLRB: INDEPENDENT CONTRACTOR RULE

- June 2023: NLRB's ***Atlanta Opera* decision** reverted to independent-business analysis, concluding that focus on the entrepreneurial control cannot not be "reconciled" with the Board's prior precedent.
- The Board now looks at the following factors in another **multi-factor, totality of the circumstances** test:
  - Extent of **control** by employer
  - Whether or not individual is engaged in a **distinct occupation or business**
  - Whether the work is usually done under the direction of the employer or by a specialist without supervision
  - **Skill** required in the occupation
  - Whether the employer or individual supplies **instrumentalities, tools, and place of work**
  - **Length of time** for which individual is engaged
  - Method of **payment**
  - Whether or not work is part of the **regular business of the employer**
  - Whether or not the parties believe they are creating an IC relationship
  - Whether the principal is or is not in business
  - Whether the evidence tends to show that the individual is, in fact, rendering services as an **independent business**

OPPORTUNITIES FOR COLLABORATION

- **ELT:** Ensure ELT understands that is very real problem with potentially significant consequences – tax liability, benefits liability, wage and hour liability. Educate organizational leaders that the law drives the classification – it is not a "choice."
- **Procurement:** Consider means to audit and put in place controls for when ICs are to be engaged – are they actually ICs?
- **Department Managers**: Don't play the headcount game! Classification as IC requires justification.
- **Finance:** Assess the costs associated with misclassification.

FTC BAN ON NON-COMPETE AGREEMENTS

FTC NON-COMPETE BAN … NOT!

- FTC nationwide ban on non-competes scheduled to take effect **9/4/24**.
- Applied **prospectively and retroactively**!
- Limited exception for **pre-existing "senior executive"** agreements
- Even **non-disclosure and non-solicitation agreements** were in cross-hairs if so broad that they functioned as non-competes.

REQUIRED NOTIFICATIONS

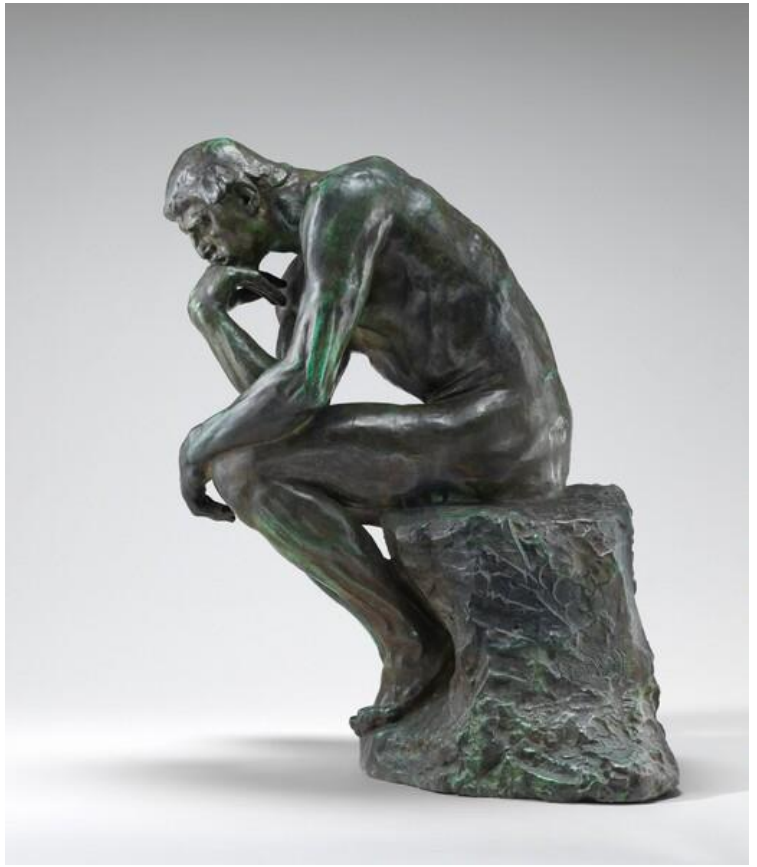
- FTC Rule required **clear and conspicuous notice** to workers, including former employees, that non-compete agreement will not, and cannot, be legally enforced.
- FTC issued "**safe harbor**" model notice.
- Hand delivered, mailed, emailed or texted.

FUTURE OF THE FTC'S RULE?

- 8/20/24. Dallas District Court Judge Ada Brown, in *Ryan v. Federal Trade Commission*, struck down the FTC Rule.
  - The Court stated that the **FTC did not have "authority** to promulgate substantive rules regarding unfair methods of competition."
  - The Court also concluded that the Rule was arbitrary and capricious because it is "**unreasonably overbroad** without a reasonable explanation."
- Court issued **nationwide injunction**, so FTC Rule did not take effect on 9/4/24, as scheduled.
- FTC appeal to US Court of Appeals for the Fifth Circuit seems likely.

WHAT IS NEXT FOR NON-COMPETES?

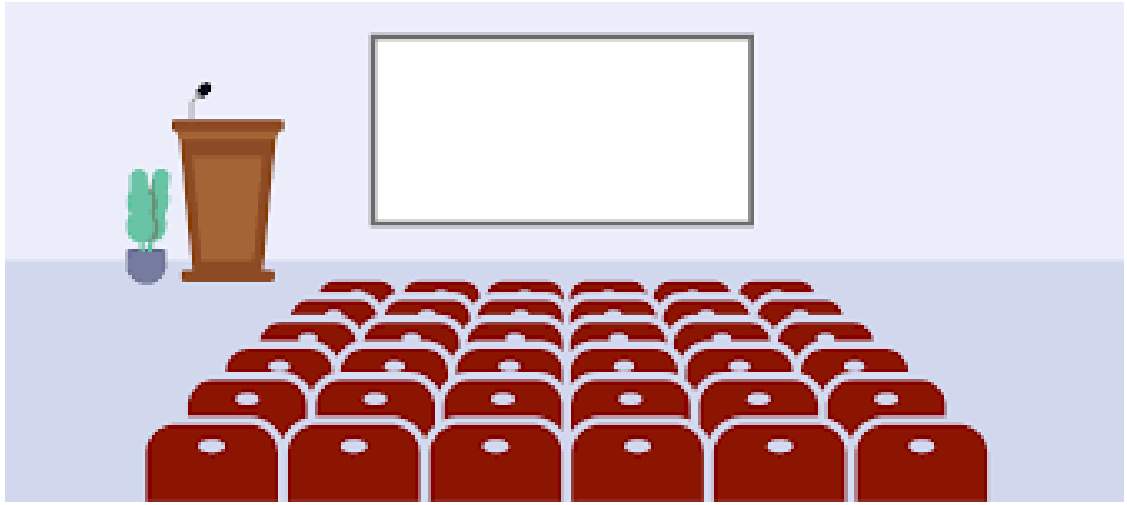
- State regulation and judicial intolerance to non-competes is still there.
- Employers have **opportunity to reconsider approach** to non-compete agreements.
- **Be selective** – who should have them and who should not? What should scope of non-compete be?
- Would **other covenants** suffice instead – non-solicitation, non-disclosure, intellectual property?
- Is there a way to make them more tolerable – **garden leave**?



OPPORTUNITIES TO COLLABORATE

- **Key Divisions**: Open dialogue about use of non-competes with divisions of organization that rely most heavily on employee good will (e.g., relationships) and confidentiality of business information – ELT, sales, IT, etc.
- **Legal Department**: Can you re-write non-competes for most important employees and limit scope to what is absolutely essential?
- **Finance:** Discuss possible alternatives to creation of enforceable non-competes – consider use of “garden leave.”

CAPTIVE AUDIENCE MEETINGS



CAPTIVE AUDIENCE BANS

- **GC Memorandum 22-04 (4/7/22):** NLRB General Counsel Jennifer Abruzzo spoke out against captive audience meetings that include discussions about employees' statutory labor rights. Since then, NLRB has taken view they are unlawful.
- **Free Speech Rights?** Captive audience meetings have been upheld as a lawful exercise of employer **free speech rights** under Section 8(c) of the National Labor Relations Act (NLRA).
    - This stems from the NLRB's 1948 decision in *Babcock & Wilcox*, which held that mandatory group meetings are lawful in the absence of other prohibited conduct (*i.e.* conduct that coerces employees in the exercise of their rights) under Section 7 of the NLRA.
- **Lawsuit:** Business groups have sued over measures enacted in **Connecticut and Minnesota**, arguing the bans violate employers' freedom of speech and are preempted by federal labor law.

CAPTIVE AUDIENCE BANS

- In 2024, numerous states have passed or introduced legislation to bar employers from requiring employees to attend “captive audience” meetings on **religious or political matters**. Political means union!
- Laws prohibit employers from **coercing employees** into attending or participating in such meetings when sponsored by the employer.
- So far, **10 states** have passed legislation allowing employees to opt out of such captive audience meetings:
  - Connecticut
  - Hawaii
  - Illinois
  - Maine
  - Minnesota
  - New Jersey
  - New York
  - Oregon
  - Vermont
  - Washington
- Other state legislatures – **Alaska, California, Massachusetts, New Mexico, and Rhode Island** -- have introduced similar laws.

LEGAL CHALLENGES

- **Minnesota**
  - Lawsuit filed 2/20/24 by Minnesota Chapter of Associated Builders and Contractors, the National Federation of Independent Business and Laketown Electric Corporation.
  - Arguing MN law violates the U.S. Constitution's protections of **free speech and equal protection**.
- **Wisconsin**
  - Lawsuit filed against Wisconsin Governor on grounds that **NLRA preempts** state captive audience law.
  - Court enjoined enforcement. Parties eventually stipulated to preemption of law.
- **Connecticut**
  - Connecticut law banning captive audience meetings was challenged in a federal lawsuit filed by the U.S. Chamber of Commerce.
  - Suit alleged Connecticut law is preempted by the NLRA. The court denied the state commissioner's motion to dismiss.

OPPORTUNITIES TO COLLABORATE

- **Labor Relations:** Ensure that Labor Relations personnel understand risks with captive audience meetings. Think creatively about how you can encourage attendance at otherwise voluntary meetings (food almost always works!).
- **Communications Team**: How can you get out the "Vote No" message other than through captive audience meetings? Consider the audience and how best to communicate with them.
- **ELT:** Ensure the ELT understands the risks associated with captive audience meetings. The CEO won't like hearing that they cannot mandate an employee meeting! How about a voluntary Town Hall via video message?

PAID SICK LEAVE LAWS

JOE BIDEN

- Biden explained his intention to institute **paid family leave** in his final State of the Union address in March 2024.
- He wanted to establish a national paid family and medical leave program in his 2025 budget proposal.
- The program would provide eligible employees up to **12 weeks of leave:**
  - Care for and bond with a new child;
  - Care for a seriously-ill loved one;
  - Heal from their own serious illness;
  - Address circumstances arising from a loved one's military deployment; or
  - Find safety from domestic violence, sexual assault, or stalking.
- In addition, Biden wants to require employers to provide **7 job-protected paid sick days each year** to all workers.

PAID SICK LEAVE LAWS

- In the absence of federal legislation, states and municipalities have enacted a **patchwork of mandated paid leave benefits**.
- Currently, nearly **one-third of states** (and the District of Columbia) has passed their own paid sick leave laws.
- Trend continued in 2024, as paid sick leave laws were enacted or expanded in a number of states and municipalities, including: **Connecticut, Minnesota, Chicago, New York City, and Washington**.

OPPORTUNITIES TO COLLABORATE

- **Departmental Leaders**: If a paid leave law is enacted, assist in calculating the likely impact on attendance. Do staffing levels need to be adjusted?
- **Finance:** Calculate costs associated with expanded paid leave, including both absenteeism (productivity) and potential need for added staffing.
- **Supervisor and Managers:** Need to understand the concept of "protected leave"; what is protected and what is not; and how protected leave cannot be part of the attendance equation.

MINIMUM WAGE LAWS

MINIMUM WAGE INCREASES

- All employers must pay covered employees a minimum wage of at least **$7.25 per hour** under the FLSA.
- While the federal minimum wage has remained unchanged since 2009, a significant number of **states and municipalities** have imposed higher minimum wage rates over the years.
- Plus, **federal contractors** have separate rule.

MINIMUM WAGE INCREASES

- Federal contractors are subject to **$15 mandatory minimum wage** under 2021 Biden Executive Order pursuant to the Federal Property and Administrative Services Act.
- EO remains under **legal challenge**.
  - 10th Circuit in April 2024 upheld the President's authority.
  - Plaintiffs in that case now are **seeking US Supreme Court review**.

MINIMUM WAGE INCREASES

- In 2024 alone, **over 20 states** have increased their minimum wages.
- There is a growing trend among states to increase the minimum wage to **$15.00 an hour**.
- Currently **eight states** have adopted a minimum wage of $15.00 per hour or more:
  - CA ($16)
  - CT ($15.69)
  - MD
  - MA
  - NJ ($15.13 for large employers)
  - NY (multiple rates based on locale – all over $15)
  - WA ($16.28)
  - DC ($16.10)
- **More states** will join this list in 2025: DE, FL, HI, IL, NE, RI, VA/
- Fewer than half the states (20, including PA) still rely on the **federal minimum wage rate**.

WHAT ABOUT REMOTE WORKERS?

- **What if the company is in one state but the remote workers are in another?**
- Different minimum wage rates may apply.
- In many cases, minimum wage is determined by the **jurisdiction in which employees perform the work**.
- If more than one law covers a worker, such as a **hybrid worker** who crosses state lines, the wage rate covering the situs of work generally will apply.
- But ... check the law in question!

OPPORTUNITIES TO COLLABORATE

- **Finance/Payroll Department**: Finance should assist in tracking and projecting increases in minimum wage – both to ensure compliance and also for budgeting purposes.
- **Departmental Managers**: Ensure managers understand the consequences of remote or hybrid work – it may impact the minimum wage rate.

PAY TRANSPARENCY LAWS

PAY TRANSPARENCY LAWS

- States and municipalities have continued to pass and introduce pay transparency legislation in 2024, even since our last presentation where we discussed the same topic.
- These pay transparency laws vary in their requirements, but often require employers to **post salary ranges in job postings or disclose salary information to existing employees and job applicants**.
- Colorado started the trend of pay transparency laws when it enacted the **first legislation of its kind in 2021**.
- Between 2021 and 2024, **additional pay transparency laws** took effect in Maryland, Connecticut, Nevada, Rhode Island, California, New York, and a number of municipalities.
- More states continue the trend in 2024, with new pay transparency legislation taking effect in **Hawaii** and the **District of Columbia**, along with expanded requirements in **Maryland**.
- In 2025, **Illinois, Minnesota, and Vermont** laws will take effect (all on January 1).

OPPORTUNITIES FOR COLLABORATION

- **Third-Party Recruiters**: Ensure compliance with applicable pay transparency laws.
- **Procurement**: Include compliance obligations in recruiting agreements.
- **Finance**: Need to have a pay ranges for all positions.
- **Recruiting**: Adopt a “correction policy” for violations brought to your attention. Many laws allow a grace period to fix a violation.

QUESTIONS?

PROGRAM BREAK

The next session will begin at 11:00 AM.

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WHAT'S NEW (AND WORRISOME) AT THE EEOC?

13TH ANNUAL UTAH FALL EMPLOYMENT LAW SEMINAR
BALLARD SPAHR
NOVEMBER 13, 2024

Ballard Spahr LLP

YOUR PRESENTER

Charles Frohman
Labor and Employment Group
Ballard Spahr LLP
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AGENDA

1. The Commission
2. 2024-2028 Strategic Enforcement Plan
3. Enforcement Guidance on Harassment in the Workplace
4. Final Pregnant Workers Fairness Act Regulations
5. Pay Data Collection
6. Recent EEOC Activity
7. The Trump Administration / New Priorities

THE COMMISSION

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2024-2028 STRATEGIC ENFORCEMENT PLAN

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ENFORCEMENT PRIORITIES

- The 2024-2028 Strategic Enforcement Plan ("SEP") identifies the EEOC's subject matter priorities for the next five fiscal years.
- These priorities include:
  1. Recruitment and hiring practices
  2. Protecting vulnerable workers
  3. Emerging and developing issues such as discrimination associated with "long COVID"
  4. Advancing equal pay
  5. Preserving access to the legal system
  6. Preventing and remedying systemic harassment

PRIORITY 1: ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

- Focus on practices such as:
  - Use of technology, including **AI and machine learning**, to recruit/screen applicants, or assist in hiring decisions.
  - Policies that limit employees to **temporary work** when permanent positions are available.
  - **Restrictive application processes**, e.g., online systems difficult for individuals with disabilities to access.

PRIORITY 2: PROTECTING VULNERABLE WORKERS

- The EEOC will focus on practices that impact particularly vulnerable workers and those from underserved communities, including:
  - Immigrant, migrant, and temporary workers;
  - Workers with developmental, intellectual, or mental health-related disabilities;
  - Individuals with arrest or conviction records;
  - LGBTQI+ individuals;

PRIORITY 2: PROTECTING VULNERABLE WORKERS (*cont'd*)

- Older workers;
- Individuals employed in low-wage jobs, including teenage workers;
- Survivors of gender-based violence;
- Native Americans/Alaska Natives; and
- Persons with limited literacy or English proficiency.

PRIORITY 3: ADDRESSING SELECTED EMERGING AND DEVELOPING ISSUES

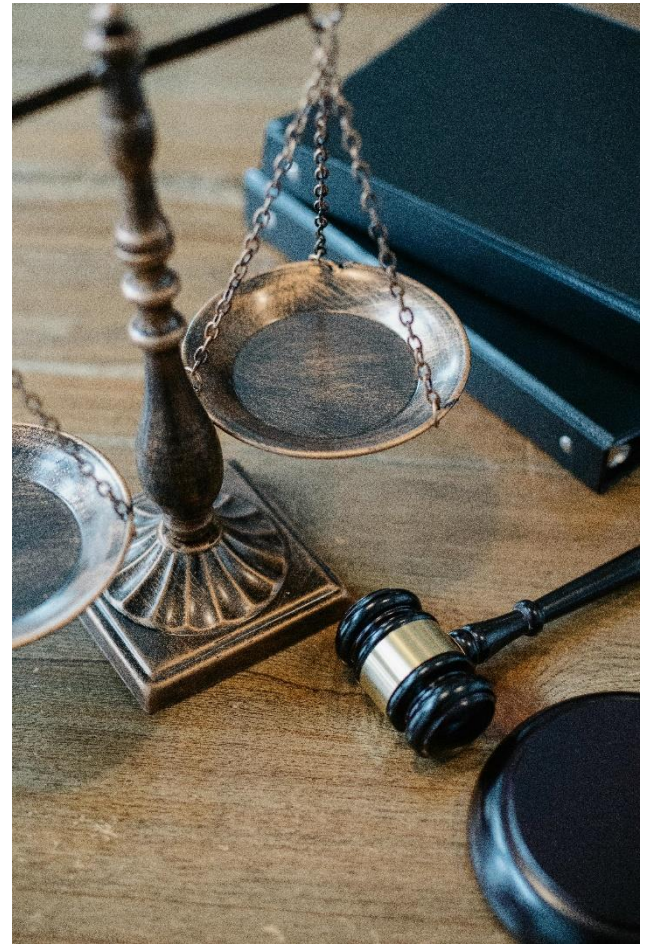
- The EEOC will prioritize a number of emerging and developing issues, including:
  - **Qualification standards and inflexible policies** that discriminate against individuals with disabilities.
  - Protecting workers affected by **pregnancy, childbirth, or related medical conditions**.
  - Addressing discrimination arising as backlash in response to **local, national, or global events**.
  - Discrimination associated with the long-term effects of COVID-19, including **"long COVID."**
  - **Technology-related** employment discrimination.

PRIORITY 4: ADVANCING EQUAL PAY FOR ALL WORKERS

- The EEOC will continue to use **directed investigations and Commissioner Charges** to facilitate enforcement of pay discrimination laws.
- Focus on employer practices that may contribute to pay disparities, such as:
  - Pay secrecy policies.
  - Discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers.
  - Reliance on past salary history or applicants' salary expectations to set pay.

PRIORITY 5: PRESERVING ACCESS TO THE LEGAL SYSTEM

- The EEOC will look for policies that deter filing charges or cooperating with EEOC investigations or litigation, including:
  - **Overly broad** waivers, releases, non-disclosure agreements, or non-disparagement agreements;
  - Unlawful, unenforceable, or otherwise improper **mandatory arbitration provisions**;
  - Failure to keep **applicant/employee data and records** required by statute/regulations; and
  - **Retaliatory practices**.



PRIORITY 6: PREVENTING AND REMEDYING SYSTEMIC HARASSMENT

- To combat systemic harassment (both in-person and online) the EEOC will continue to focus on **monetary relief and targeted equitable relief** to prevent future harassment.
- Additional focus on promoting **comprehensive anti-harassment programs**, including training tailored to the employer's workplace and workforce.
- A claim by an individual or small group may fall within this priority if it is related to a **widespread pattern or practice.**

LOOKING AHEAD

- Expect robust EEOC enforcement activity reflecting SEP priorities.
- Large settlements over the last year have included:
  - $1.25 million settlement of racial harassment and hostile work environment claims against Asphalt Paving Systems.
  - $1.1 million settlement of hiring discrimination claims against Radiant Services.

ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

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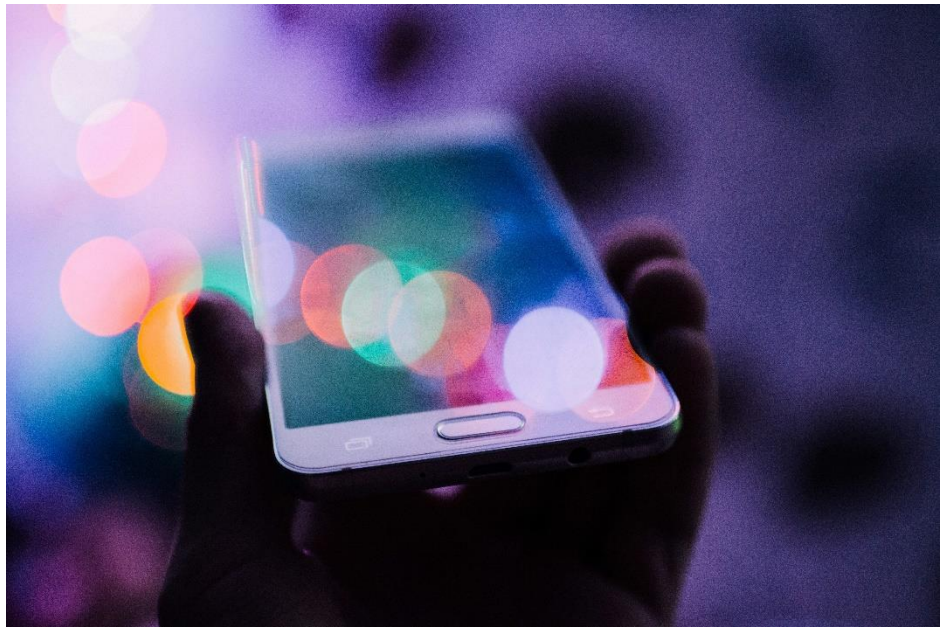
BOSTOCK V. CLAYTON COUNTY

- In April 2024, the EEOC issued new enforcement guidance on harassment in the workplace to incorporate the 2020 U.S. Supreme Court case *Bostock v. Clayton County*, 590 U.S. 644 (2020), and other emerging issues.
- *Bostock* held that Title VII's prohibition on sex-based discrimination includes discrimination on the basis of **sexual orientation and gender identity**.
- The guidance provides that the following conduct may be considered gender identity harassment:
  - **"Outing"** an employee's sexual orientation or gender identity without their permission;
  - Repeating or intentionally using a **name or pronoun** that is inconsistent with an individual's known gender identity; and
  - Denying access to a **restroom or other sex-segregated facilities** consistent with an individual's gender identity.

PROLIFERATION OF TECHNOLOGY



- Guidance acknowledges technology part of day-to-day lives.
- While employers are generally not responsible for off-duty conduct, the guidance recognizes potential employer liability for harassment occurring via **private phones, computers, or social media**, *if it impacts the workplace*.

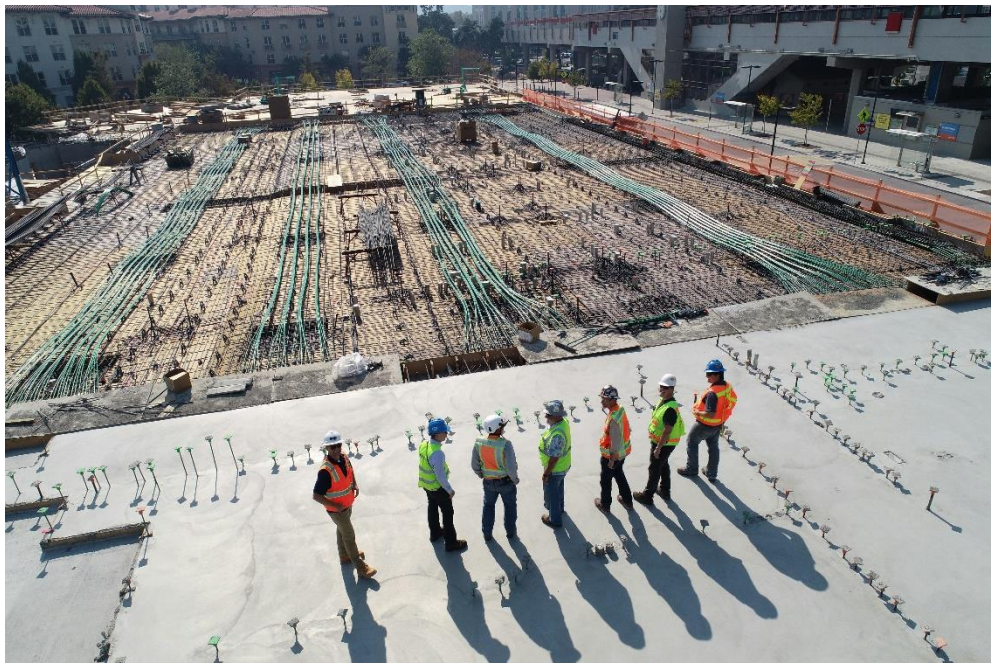
EXPANDED SCOPE OF COVERED HARASSMENT

- **Color-based harassment** due to complexion, or skin shade or tone.
- Harassment based on **pregnancy, childbirth, or related medical conditions** can include issues such as lactation, the use of contraceptives, or decisions related to abortion, if that harassment "is linked to a targeted individual's sex."
- Harassment under the **Genetic Information Nondiscrimination Act ("GINA")** applies to "harassment based on an individual's (or family member's) genetic test or on the basis of an individual's family medical history."
- Retaliatory harassment may still be challenged as unlawful retaliation "even if it is **not sufficiently severe or pervasive** to alter the terms and conditions of employment by creating a hostile work environment."
- Intraclass and intersectional harassment.

LEGAL CHALLENGES

- **Tennessee:** 18 Republican AGs filed a lawsuit in the E.D. Tennessee against the EEOC, seeking to block enforcement of the guidance as it pertains to **transgender employees – especially bathrooms and pronouns**.
  - Challenge claims EEOC lacks power to declare existing federal laws provide rights to transgender employees.
  - They argue that although Title VII may prohibit termination of transgender employees because of sex, it does not require them to provide accommodations.
- **Texas:** State of Texas and the Heritage Foundation filed suit in the N.D. Texas to vacate the guidance– again focused on **bathrooms and pronouns**.
  - The suit follows the Court's denial of an injunction on procedural grounds in July.
  - Complaint asserts that the guidance violates Title VII, relying on 2022 ruling by a Texas court that struck down the 2021 EEOC guidance.
- **New Splits:** New splits have emerged concerning whether *Bostock's* reasoning extends to other federal laws, including Title IX and the Affordable Care Act.
  - The 9th Circuit has rejected a district court's findings that *Bostock* did not apply to Section 1557 of the Affordable Care Act because the decision was limited to Title VII as "too narrow" of an interpretation.

PREVENTING HARASSMENT IN THE CONSTRUCTION INDUSTRY



- In June 2024, the EEOC released guidance and identified risk factors for harassment in construction industry.
- Recommendations include
  - Require that contract bids include anti-harassment measures;
  - Establish multiple reporting channels, including an anonymous hotline;
  - Conduct anonymous worker surveys;
  - Provide an anti-harassment policy written “in all languages commonly used by workers at the site”; and
  - Require each onsite employer to notify the GC of complaints.

FINAL PWFA REGULATIONS

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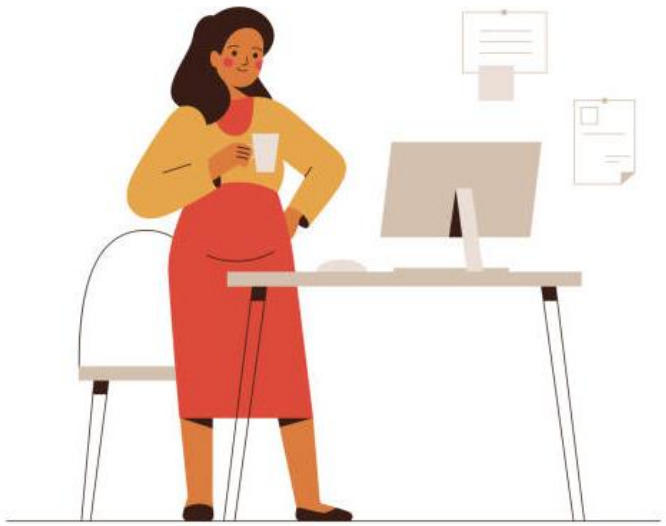
PREGNANT WORKERS FAIRNESS ACT ("PWFA")

- Effective June 27, 2023.
- Final regulations and interpretative guidance effective June 18, 2024.
- Expanded protections related to **pregnancy, childbirth, and related conditions**.
- Employers required to provide **reasonable accommodations** to a qualified employee or applicant with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless that will cause **undue hardship** on the employer.

ADA ACCOMMODATIONS VERSUS PWFA



- ADA disability not required.
- PWFA is **more expansive than ADA.** For example, employers may be required to **remove essential job functions as a temporary accommodation**, assuming that the employee can perform the essential functions in the near future.
- How long? Generally **40 weeks**.
- **Undue Hardship**: ADA standard – generally, significant difficulty or expense.

EXAMPLES OF REASONABLE ACCOMMODATIONS

- Frequent breaks (for fatigue or nursing);
- Seating for jobs that require standing;
- Schedule changes (such as, part-time hours or changes to accommodate medical appointments);
- Paid or unpaid leave;
- Telework arrangements;
- Reserved parking spots;
- Light duty;

EXAMPLES OF REASONABLE ACCOMMODATIONS (*cont'd*)

- Access to existing facilities (such as, bathrooms, lactation spaces, or elevators);
- Modifications to the work environment (such as, moving an employee or providing personal protective equipment to reduce exposure to hazards);
- Job restructuring;
- Modifying equipment or uniforms; and
- Modifying examinations or policies.

PREDICTABLE ASSESSMENTS

According to the final regulations, there are four "predictable assessments" that will rarely, if ever, impose an undue hardship:

1. Allowing an employee to carry or keep water nearby;
2. Permitting additional restroom breaks as needed;
3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed; or
4. Breaks to eat and drink as needed.

REQUIRING DOCUMENTATION

- Although an employer can ask for supporting documentation for a pregnancy-related accommodation, an employer must accept an employee's self-confirmation of pregnancy without additional documentation when:
  1. The limitation is **obvious**;
  2. The employer has **sufficient information** to determine whether the employee has a qualifying limitation and needs adjustment due to the limitation;
  3. When the employee satisfies a **"predictable assessment"**;
  4. The reasonable accommodation relates to a time and/or place to **pump or nurse during work hours**; or
  5. The requested accommodation is **available to employees without known limitations under the PWFA** pursuant to a policy or practice without submitting supporting documentation.

INTERACTION WITH THE PUMP ACT

- The EEOC's final regulations go beyond the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act.
- The PUMP Act generally requires **reasonable break time and space shielded from view and free from intrusion** for nursing mothers to express breast milk. It applies to employers of all sizes.
- Final PWFA regulations provide examples of accommodations, including:
  - Space for pumping that is in reasonable proximity to a sink.
  - Running water.
  - Refrigeration for storing milk.

LEGAL CHALLENGES

- **Arkansas**
- **Louisiana**
- **Mississippi**
- **Texas**
- **Kentucky**
- **Alabama**
- **Oklahoma**

PAY DATA COLLECTION

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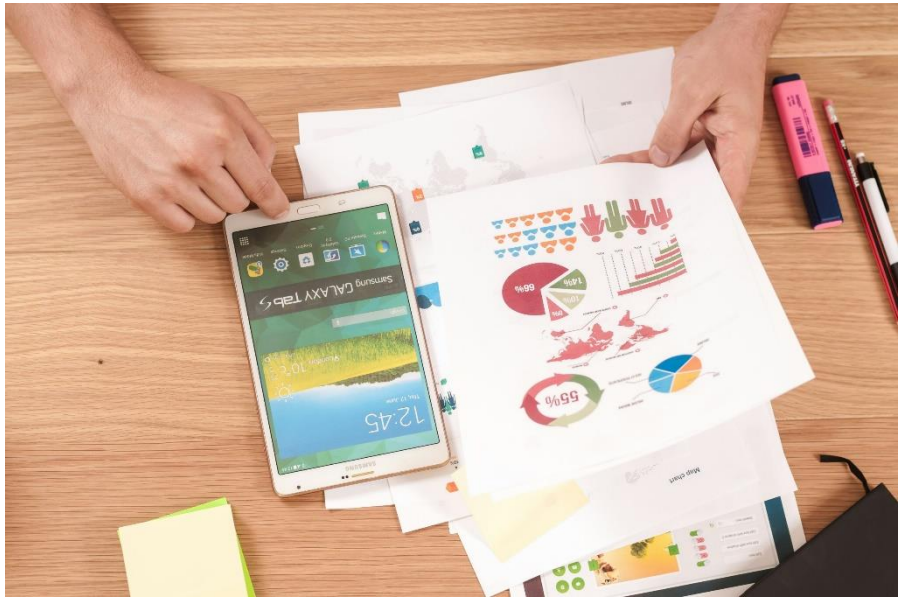
PAY DATA COLLECTION

- The EEOC seeks to reinstate pay data collection for annual EEO-1 reporting obligations.
- Back to the Future?
- The proposal is expected to be released in January 2025 for public comment.
- Expect significant legal challenges.



RECENT EEOC ACTIVITY

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RECENT SETTLEMENTS

Bark If You're Dirty (Pet Store) $340,000 Settlement

- Claim: Class of female employees claimed sexual harassment.
- Equitable relief: Must retain an independent consultant experienced in the area of employment discrimination law to train its employees, managers, owners, supervisors and human resources personnel on sex discrimination, sexual harassment, and retaliation; must review existing policies against discrimination and retaliation; must make any necessary revisions to those policies to help prevent future sexual harassment; agreed to not rehire the male manager and male employee who sexually harassed the women.

Walmart (Disability Discrimination) $100,000 Settlement

- Claims: Disability discrimination lawsuit by cashier whose seizures caused her to miss work and who was fired after being told absences for seizures would no longer be excused.
- Equitable relief: Two-year injunction against discrimination, management and employee training, posting notices, and policy review to prevent future ADA violations. Walmart will report to the EEOC for two years to ensure compliance with the decree

ON THE RADAR

- America First Legal ("AFL")
  - AFL is pushing to have the EEOC commence investigations of 35 different "Woke" companies based on their DEI initiatives.
- Amendments to Notice Posting Requirements
  - EEOC's proposal to amend its regulations regarding the electronic posting of the "Know Your Rights" poster is pending
- Recordkeeping and Reporting Requirements
  - EEOC's proposal to amend its regulations on exemptions to certain recordkeeping and reporting requirements is expected in December 2024.

THE TRUMP ADMINISTRATION

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IMPLEMENTING NEW PRIORITIES

- Budget Limitations
  - EEOC already facing budgetary challenges – no relief likely
  - Limited ability to pursue outside litigation; strategic priorities
  - Right to sue; settlement
- Administration Priorities
  - Reverse Discrimination
  - DEI / Title VII
  - Harassment Guidance
  - Scope of PWFA Protections
- Timing Issues
  - New General Counsel; Republican Chair
  - No Republican majority until 2026 (?)

THANK YOU FOR JOINING US!

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Thank you for joining us!

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