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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

The 2023 Employment Law Year in Review

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Agenda

- 2023 Predictions Recap
- Litigation Roundup
- Congressional Action
- Agency & Statutory Developments
- State & Local Legislation
- State Trends
- Artificial Intelligence
- Looking Ahead

Five Issues to Monitor in 2023 How Did We Do?

2023 Predictions: How Did We Do?

- Federal legislative gridlock will give rise to increased agency actions, similar to those taken under the Obama Administration
- State and localities will continue to actively legislate, especially in the area of pay transparency
- All eyes will be on the Virginia House elections
- Title VII will be interpreted to require ADA-like analysis for religious accommodations
- Federal courts will continue to shut down employment claims based on vaccine mandates/accommodation requests

Litigation Roundup

303 Creative LLC v. Elenis, No. 21-476

Supreme Court decision June 29, 2023

- "Pre-enforcement" challenge
- Lorie Smith, owner of 303 Creative LLC, sought exemption from the Colorado Anti-Discrimination Act (CADA) that would allow her to refuse to provide web services for same-sex marriages and to announce that she will not provide web services for same-sex marriages on her website.
- Smith does not support same-sex marriage due to her religious beliefs, and she claimed the law infringed on her Constitutional rights.
- By a 6-to-3 vote, the Supreme Court ruled in favor of Smith based on free speech protections (but not religious freedom).
- The court interpreted Smith's free speech right broadly in a way that did not require her to follow Colorado's anti-discrimination law.

Coinbase Inc. v. Bielski, No. 22-105

Supreme Court decision
June 23, 2023

- Issue: “Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court’s jurisdiction to proceed with litigation pending appeal?”
- 6-3 federal court split
- In a 5-4 decision by the Supreme Court, the court held that district courts must stay the proceedings when a party appeals the denial of a motion to compel arbitration.
- Following *Coinbase*, a case in federal court must be stayed automatically when a party seeks review of an order denying a motion to compel arbitration.
- This is significant for companies that have adopted arbitration agreements in order to resolve employment-related disputes efficiently.

Groff v. DeJoy (no. 22-174)
Supreme Court decision June 29, 2023

- In Groff, a unanimous Supreme Court “clarified” (changed) the undue burden test.
- According to the Court, it now “understands Hardison to mean that ‘undue hardship’ is shown when a burden is substantial in the overall context of an employer’s business.”
- According to the Court, “Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.”
- The Court declined to incorporate the undue hardship test under the Americans With Disabilities Act which requires “significant difficulty and expense.”
- But the Court did opine: “A good deal of the EEOC’s guidance in this area is sensible and will, in all likelihood, be unaffected by the Court’s clarifying decision.”
- The Court declined to determine what facts would meet this new test and remanded the case back to the lower court to decide.
- What’s next? Years of legal battles with courts attempting to apply this new standard.

Undue Hardship Post *Groff*

- Allowing remote work where “fundamental aspect of the job was to be physically present” was an undue hardship.
- Hiring an extra employee for an indefinite period was an undue hardship.
- Vaccine exemption would pose a risk to the health and safety of other co-workers and impact operations should the employer have to find substitutes for co-workers who fell ill; undue hardship found.
- Requiring employer to violate a state law, is both "excessive" and "unjustifiable”.
- Inability to wear SCBA due to facial hair posed an undue hardship for employee at fire department.

No Undue Hardship Post *Groff*

- 1.5 days of leave was not an undue hardship.
- Hypothetical policy reevaluation if everyone received an accommodation is not an undue hardship if employer grants one accommodation.

Kluge v. Brownsburg Community School Corporation et al (no. 21-2475), 7th Cir. 2023

- Evangelical Christian teacher John Kluge refused to use gender-affirming names and pronouns for his transgender students as required per school policy.
- He sued for religious discrimination, alleging his beliefs were not accommodated and he was illegally forced to resign.
- The school tried to accommodate him by letting him call students by their surnames, but then disallowed this after students complained it was “insulting and disrespectful.”

Muldrow v. City of St. Louis, Mo. (no. 22-193)

Oral argument December 6, 2023

Petitioner Jantonya Muldrow of the St. Louis Police Department argued that her eight-month transfer out of the Department's Intelligence Division constituted discrimination within the meaning of Title VII, even though she had not suffered any economic damages as a result of the transfer.

Federal district court dismissed Muldrow's discrimination claim on grounds that she failed to establish proof of harm resulting from the transfer. The U.S. Court of Appeals for the Eighth Circuit affirmed.

Muldrow argued that discrimination is a harm meant to be remedied by Title VII.

The City of St. Louis argued that courts have been applying a material harm requirement in Title VII cases for at least thirty years. Under this standard, a Title VII plaintiff must show they suffered some harm in the workplace in terms of responsibilities, chances for advancement, or other detriment.

Acheson Hotels, LLC v. Laufer (no. 22-429)

Supreme Court decision December 5, 2023

- Deborah Laufer sued Acheson Hotels for allegedly violating the Reservation Rule, a DOJ regulation requiring places of lodging to identify and describe accessible features in guest rooms and hotels offered through their reservations service.
- As a self-appointed test, Laufer has sued over 600 hotels by searching the internet for hotel websites and finding those lacking accessibility information. Although she has no intent of accessing the hotels she sued, she claims to enforce the law on behalf of other disabled persons.
- The hotels argued that Laufer lacks standing to bring these lawsuits. The Second, Fifth, and Tenth Circuits agreed. The First, Fourth, and Eleventh Circuits held she has standing.
- In an 8-1 opinion by Justice Amy Coney Barrett, the Supreme Court dismissed the case as moot.

Loper Bright Enterprises et al. v. Raimondo et al. (no. 22-451) and *Relentless Inc. et al v. U.S. Department of Commerce et al. (no. 22-1219)*

Oral argument January 17, 2023

- The Court consolidated cases brought by two fishing companies (Loper Bright Enterprises and Relentless Inc.) asking for the reversal of D.C. and First Circuit Court decisions.
- Specifically, the fishers sued challenging the court's application of Chevron deference to enforce a rule requiring fishers to pay part of the expense of having federal compliance monitors on board their ships.
- Federal government has urged the court to uphold Chevron deference, calling it a "bedrock principle of administrative law."
- The fishers argue the doctrine wrongfully protects federal agencies from judicial review of decisions that may stretch a statute's text.
- How the court decides these cases will have broad and enduring impact on the general predictability of the law across industries and ability of companies and individuals to hold government agencies accountable for their decisions.

EEOC v. Charter Communications, LLC (no. 22-1231) 7th Cir. 2023

- James Kimmons had vision problems that made driving home from work at night unsafe. Public transit was not available on his schedule, so he asked for an earlier work schedule to avoid having to commute home at night.
- The 7th Circuit addressed the issue of whether, under the ADA, an employee was entitled to a modified work schedule as an accommodation to make his commute safer.
- The court held that, under the right circumstances, the ADA can require an employer to accommodate a disabled worker commuting to and from work.
- According to the court: "[I]f a qualified employee's disability interferes with his ability to get to work, the employee may be entitled to work-schedule accommodation if commuting to work is a prerequisite to an essential job function, such as attendance in the workplace, and if the accommodation is reasonable under all the circumstances."

Helix Energy Solutions Group Inc. v. Hewitt (no. 21-984)

Supreme Court decision February 2023

- 6-3 U.S. Supreme Court majority declined to treat an oil rig worker's high daily wage as the legal equivalent of a salary based on the text of the Fair Labor Standards Act of 1938 which describes salary as a “predetermined” weekly, or less frequent, amount that's paid “without regard to the number of days or hours worked.”
- $200,000 a year is a far cry from the minimum wages envisioned during New Deal passage, but language indicates there can still be an overtime entitlement.
- Textualism used differently to an employee-friendly outcome, but suggesting the text of the Department of Labor's FLSA regulations may simply be wrong (e.g., challenges “as inconsistent with the Act” forthcoming.)
- Employer paid based purely on the number of days worked during a period, not “on a salary basis”
  - Employer did not guarantee a minimum weekly payment approximating a salary.
  - Argued instead high earner OT would hurt business

Students for Fair Admissions v. University of North Carolina (no. 21-707) and *Students for Fair Admissions v. President & Fellows of Harvard College (no. 20-1199)*

Supreme Court decision June 2023

- SFFA—a non-profit group opposed to racial preferences in college admissions—alleged that Harvard and UNC violated Title VI of the Civil Rights Act of 1964 by, among other things, intentionally discriminating against Asian-American applicants, employing "racial balancing," failing to use race as a mere "plus factor" in decisions, and failing to utilize race-neutral alternatives
- Why does matter in the employment context?
  - Diversity and inclusion funding and programs
  - Statements and policies regarding workplace diversity

Congressional Action

PWFA Update

Pregnant Workers Fairness Act

Effective June 27, 2023.

EEOC published proposed regulations on August 11.

Public comment period closed on October 10.

PWFA directed the EEOC to issue final regulations by December 29.

** EEOC is accepting charges and enforcing the PWFA NOW.

5 Key Rules. Employers Cannot:

1. Fail to "make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."
2. Require an employee to accept accommodations without engaging in the interactive process.
3. Discriminate against employees based on their need for reasonable accommodations.
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided.
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation.

** Employers with at least **15 employees**.

***Remember some state laws may provide more protection than the PWFA and/or have affirmative policy and/or notice obligations.

Employees Who Cannot Perform Essential Functions May Be Entitled to Accommodation

ADA-Like Employees

- These employees can perform the essential functions of their job with or without a reasonable accommodation.
- The law does not require this ADA-Like employee to have a temporary limitation.
- If an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA).
- Employers must reasonably accommodate the ADA-Like employee subject only to the undue hardship defense.

ADA-Plus Employees

- These employees **cannot perform the essential functions** of their position even with an accommodation.

ADA-Plus Employees

- The Act says:
  - These employees are qualified if (1) the inability to perform the essential job function is temporary, (2) the essential job function can be performed in the near future and (3) inability to perform the essential job function can be reasonably accommodated.
- The EEOC says:
  - **T**emporary = lasting for limited time, not permanent, may extend beyond "in the near future"
  - In the near future = ability to perform essential function will "generally resume within 40 weeks."
  - Reasonable accommodation may be accomplished by temporarily suspending the essential job function(s) and performing the remaining functions, transfer, light duty, or other arrangements.

* Removing an essential function is not required if there is an undue hardship. However, the employer must consider other alternative accommodations that do not create an undue hardship.

Other Highlights from the EEOC's Proposed Regulations

- "Related medical conditions" is not defined in the Act and EEOC's interpretation is extremely broad.
- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified.
- Employers must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies. How much leave must be provided? *Up to the point of undue hardship.*
- There are 4 accommodations that are almost always reasonable:
  1. Allowing an employee to carry water and drink, as needed;
  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.
- Asking for medical documentation is not appropriate for the 4 "almost" always reasonable accommodations and accommodations for lactation.
- Lactation is covered as a related medical condition and must be accommodated subject to undue hardship. Accommodation obligation for lactation is broader than under the PUMP Act.

Workforce Mobility Act

Workforce Mobility Act

- A bipartisan group of U.S. Senators reintroduced this Act, which would largely ban the use of non-compete agreements, as a matter of federal law.
- The Act defines a non-compete agreement as an agreement entered into *after the enactment of the Act* between a person and an individual performing work for the person that restricts such individual, after the working relationship terminates from performing:
  - Any work for another person for a specified period of time;
  - Any work in a specified geographical area; or
  - Any work for another person that is similar to individual's work for the person that is a party to such agreement.

Workforce Mobility Act

- Non-compete agreements may be permitted between:
  - The seller and buyer of a business entity if buyer carries on a like business in a similar geographic area.
  - A senior executive official (who has a severance agreement) and the buyer or seller of a business if the buyer carries on a like business in a similar geographic area.
- The FTC, federal Department of Labor, state attorneys general, and individual employees would also have the right to sue employers who violate the Act for:
  - Penalties
  - Damages
  - Attorneys' fees
  - Injunctions
  - Other relief under the Act

Agency & Statutory Developments

Equal Employment Opportunity Commission

EEOC Enforcement Trends

- For FY 2022, EEOC reported 73,485 total charges, a 4-year high following 6 years of declining charges.
- The EEOC report notes FY2022 saw a significant increase in vaccine-related charges of religious discrimination being a possible source of data variation from prior years.
- The percentage of total claims related to religious discrimination was 18.8%, up from 3.4% of total claims in FY2021.
  - Religious discrimination claims increased from 2,111 in FY2021 to 13,814 in FY2022.
  - This was the only category of claims to increase in any significant way.
  - The percentage of religious discrimination claims had been relatively flat going back to FY2010.
- Disability claims increased slightly from 22,842 to 25,004, however the percentage of disability claims to total claims decreased (37.2% to 34.0%)

The EEOC Strategic Enforcement Plan for Fiscal Years 2024-2028

- Expands the categories of workers considered to be vulnerable and underserved.
- Recognizes employers' increasing use of technology (including AI) in job advertisements, recruiting and hiring and other employment decisions.
- Updates emerging and developing issues priority to include protecting workers affected by:
  - Pregnancy, childbirth, and related medical conditions;
  - Employment discrimination associated with the long-term effects of COVID-19;
  - Technology-related employment discrimination.
- Focuses on potential impediments to access to the legal system from overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements.

Visual Disabilities

- On July 26, 2023, the EEOC issued new technical guidance addressing how the ADA applies to job applicants and employees with visual disabilities. The guidance covers the following topics:
  - When an employer may ask an applicant or employee questions about a vision impairment;
  - How an employer should treat such disclosures;
  - Examples of reasonable accommodations for employees with visual disabilities;
  - How an employer should handle safety concerns;
  - Employers should be careful of AI assessments that screen out individuals with visual disabilities.

Updated Harassment Guidance

- In September 2023, the department released Proposed Enforcement Guidance on Harassment in the Workplace, suggesting revised guidance may be issued in 2024.
- The updated proposed guidance reflects noteworthy changes in the law, including the #MeToo movement, the Bostock v. Clayton County Supreme Court decision, and other current issues, such as online or virtual harassment.
- The proposed guidance delineates the legal standards and employer liability applicable to harassment claims under the federal employment discrimination laws.
- It includes updated examples reflecting a broad range of scenarios, current case law on workplace harassment, and addresses the proliferation of digital technology and how online content can contribute to a hostile work environment.

Department of Labor

DOL Issues White-Collar Exemption Proposed Rule

- Major Changes
- Minimum salary increases from $35,568 per year ($684 per week) to $55,068 per year ($1,059 per week)
  - 55% increase over the current salary floor
- Salary minimum may be even higher in the final rule, depending on the economic data the DOL uses to set the salary level.
  - $59,285 [2023 Q4 data]; $60,209 [2024 Q1 data]
- Highly Compensated Employee (HCE) exemption minimum increases from $107,432 to $143,988
  - 34% increase over the current salary floor
- Automatic adjustments (increases) every 3 years based on current wage data

Independent Contractor Rule

- Formally rescinds the independent contractor rule issued by the DOL during the Trump Administration.
- Provides a different interpretation of how the “economic realities” test should be applied.
- Returns to the six economic reality factors that both the DOL and federal courts historically have applied, with minor variations.
- The six factors are to be applied equally, with no factor to be given predetermined weight over other factors.
- At bottom, “economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor of an employee,” the Final Rule states. The analysis is whether the worker is in business for themself.

Nondisplacement of Qualified Workers

- Implements Executive Order 14055, issued by the President on November 18, 2021.
- The E.O. states that when a service contract ends and a new contract is awarded to a new company for the same or similar services, the new government contractor must in good faith offer service employees a right of first refusal of employment.
- The DOL states that the E.O. “ensures skilled workers remain in their jobs, preventing disruptions in federal services.”
- Rule takes effect February 12, 2024 and will apply to solicitations issued on or after the effective date.

National Labor Relations Board

NLRB Changes Impacting Non-Union Employers

- A New Handbook & Work Rules Standard
  - The Board adopted a new legal standard for assessing the lawfulness of work rules, abandoning the more consistent category-based approach used during the Trump Administration
    - Employee friendly standard
    - Case by case assessment
- Work rules now will be “presumptively unlawful” if they have a “reasonable tendency” to chill employees from exercising their organizing rights or if they have a coercive meaning
  - The “reasonable tendency” test is very subjective – “could” it be interpreted to limit employee rights? (rather than “would”)
- A two-step analysis will determine whether the rule or policy is unlawful
- Work rules that were once facially lawful may no longer be considered lawful → greater uncertainty for employers

A New Joint Employer Rule

- The Board issued its anticipated Final Rule for determining joint employer status under the NLRA
  - Analysis has significant implications for employers, as it determines when one entity jointly employs another firm's workers
- Under the new standard, an entity may be considered a joint employer if it shares or codetermines one or more of the other entity's employee's essential terms and conditions of employment
  - Enumerated list of 7 essential terms and conditions of employment
  - Even indirect (such as through staffing or temporary agencies) or reserved, unexercised control can establish joint employment
- Among other results, a joint employer finding makes both entities liable for each other's unfair labor practices
- The Final Rule goes into effect February 26, 2024

Sweeping Changes to Severance Agreements

- The Board issued McLaren Macomb, 372 NLRB No. 58 (2023)
- Employer offered severance agreements to eleven permanently furloughed union employees.
- The severance agreements "broadly prohibited them from making statements that could disparage or harm the image of the [employer] and further prohibited them from disclosing the terms of the agreement."
- The employer violated the Act by proffering severance agreements that conditioned severance benefits on the employees' acceptance of unlawful provisions.
- The confidentiality and nondisparagement provisions also violated the Act, the Board found, by interfering with the employees' Section 7 rights.
- Confidentiality and nondisparagement provisions in separation agreements must be narrowly tailored to avoid violation of Section 7.

Demands for Union Recognition

- The Board changed long-standing precedent making it much easier to unionize without an election
- Now, if a demand for recognition is made, an employer must either recognize the union or file a petition for an election within two weeks. If not, the Board will order the union in
- Importantly, if the company is found to have engaged in an unfair labor practice during the campaign, the Board may also order the union in
  - Previously, the Board would typically order a “re-run” election instead
- This means that even a single employee handbook or work rules violation could lead to a bargaining order instead of an election
- With the Board’s new employee-friendly work rules standard, this could be a way for unions to circumvent secret ballot elections

NLRB General Counsel Argues Non-Competes Violate the NLRA

- NLRB General Counsel Jennifer Abruzzo has issued various enforcement memoranda seemingly pushing the boundaries of NLRA application
- GC memos are not binding law but outlines theories the GC will prosecute.
- May 30, 2023 enforcement memorandum (GC Memo 23-08) asserts that certain non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act.
- Under GC Memo 23-08, the GC seeks to pursue a new theory that non-compete agreements generally interfere with employee rights protected by Section 7 of the Act.

Occupational Safety and Health

Expanding Illness and Injury Data Submission Requirements for High-Hazard Industries

- Last August, the DOL introduced a rule (effective as of January 1, 2024) that requires certain employers in designated high-risk sectors to electronically submit injury and illness info to OSHA.
- Under the rule, establishments must include their legal company name when making these electronic submissions from their records.
- OSHA plans to publish the data it collects on its website so that its accessible to employers, employees, customers, researchers, and the general public.
- The goal is to provide transparency around a company's workplace health and safety record, allowing for more informed decision making.

Federal Trade Commission

FTC's Proposed Rule to Ban Noncompetes

- January 5, 2023 proposed rule that would effectively ban non-compete clauses in most employment contracts.
- The FTC rule also would require employers to rescind existing non-compete agreements within 180 days of the rule's official publication.
  - Employers would be required to provide all employees with notice of rescission within 45 days of rescission.
- Exception: selling a business that they once substantially or wholly owned.
- Current FTC Chair op-ed article in the *New York Times*:
  - Non-compete agreements restrict individual liberty.
  - Non-compete agreements suppress wages, even for minimum wage earners.
  - Non-compete agreements stifle innovation and entrepreneurship.
  - Other restrictive covenants, such as NDAs, are more effective at preventing trade secrets from being shared.

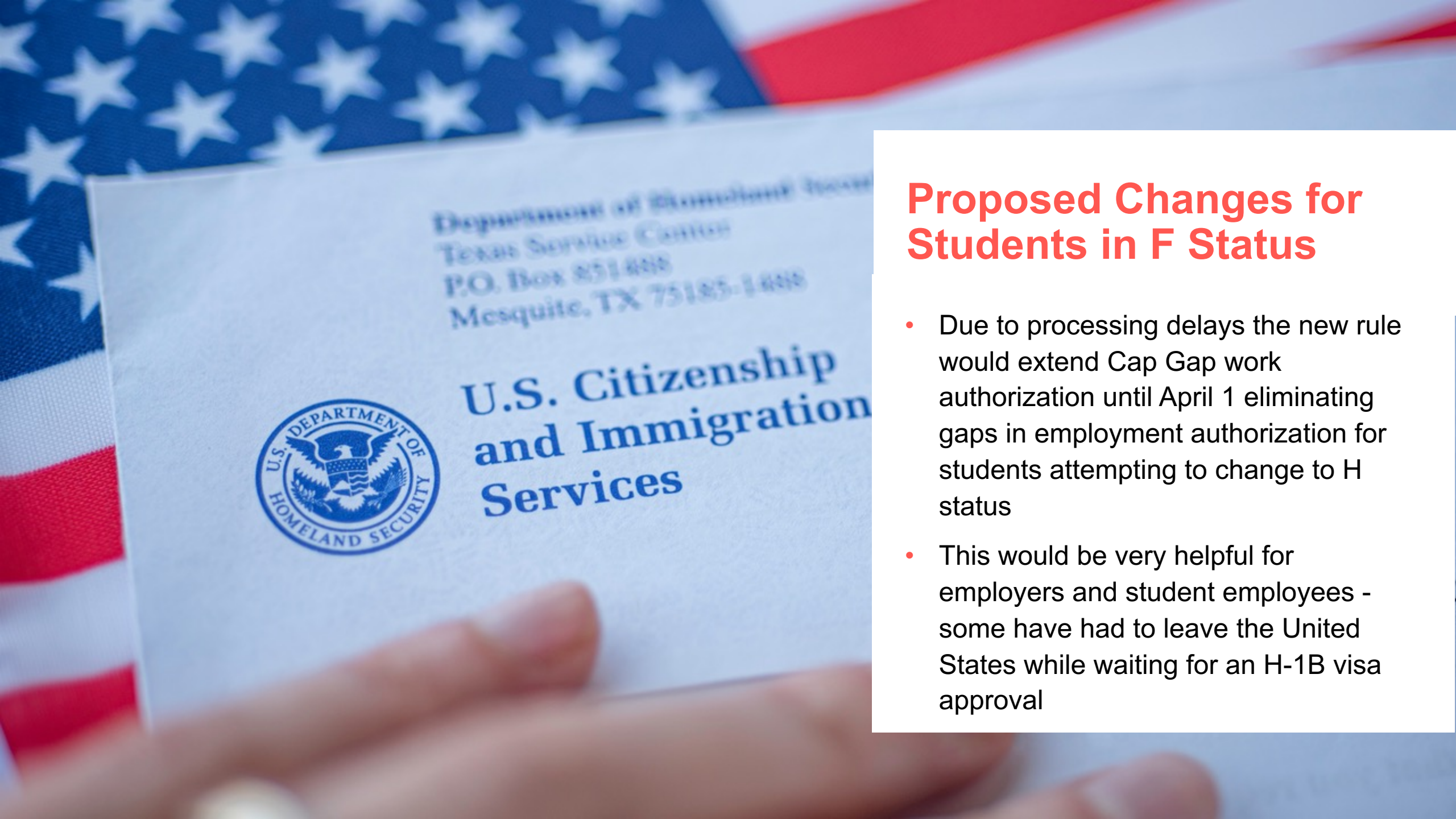
Immigration

DHS Proposes New Rule to Reform H-1B Process

- Comment period ended December 22, 2023.
- These changes are important because H-1B Visas are the “Workhorse” of the Temporary Work Permit Visas, but there is “Cap” on the number available:
  - 65,000 Per Year
  - Plus 20,000 for Beneficiaries with Advanced Degrees from US institutions
  - The competition is fierce and each year the USCIS conducts a lottery.
  - This year there were over 780,000 unique registrations for the 85,000 visas!
- Some employers and employees try to game the system and the DHS wants to put an end to that!

Proposal to Reform the Cap Lottery to Make it Fairer and Eliminate Fraud

- Overwhelmed with multiple registrations for the same beneficiary, USCIS proposes to conduct the lottery by unique beneficiaries not unique registrations
- Companies would be notified if one of their beneficiaries is selected
- Then the beneficiary (for whom several registrations were submitted) may be able to negotiate with various petitioners about which job to accept – an interesting development for beneficiaries
- Petitioners must have at least a legal presence in the United States and be amenable to service of process
- Should probably expect increased enforcement regarding lottery fraud



Proposed Changes for Students in F Status

- Due to processing delays the new rule would extend Cap Gap work authorization until April 1 eliminating gaps in employment authorization for students attempting to change to H status
- This would be very helpful for employers and student employees - some have had to leave the United States while waiting for an H-1B visa approval

Clarifying and Generally Broadening H-1B Eligibility

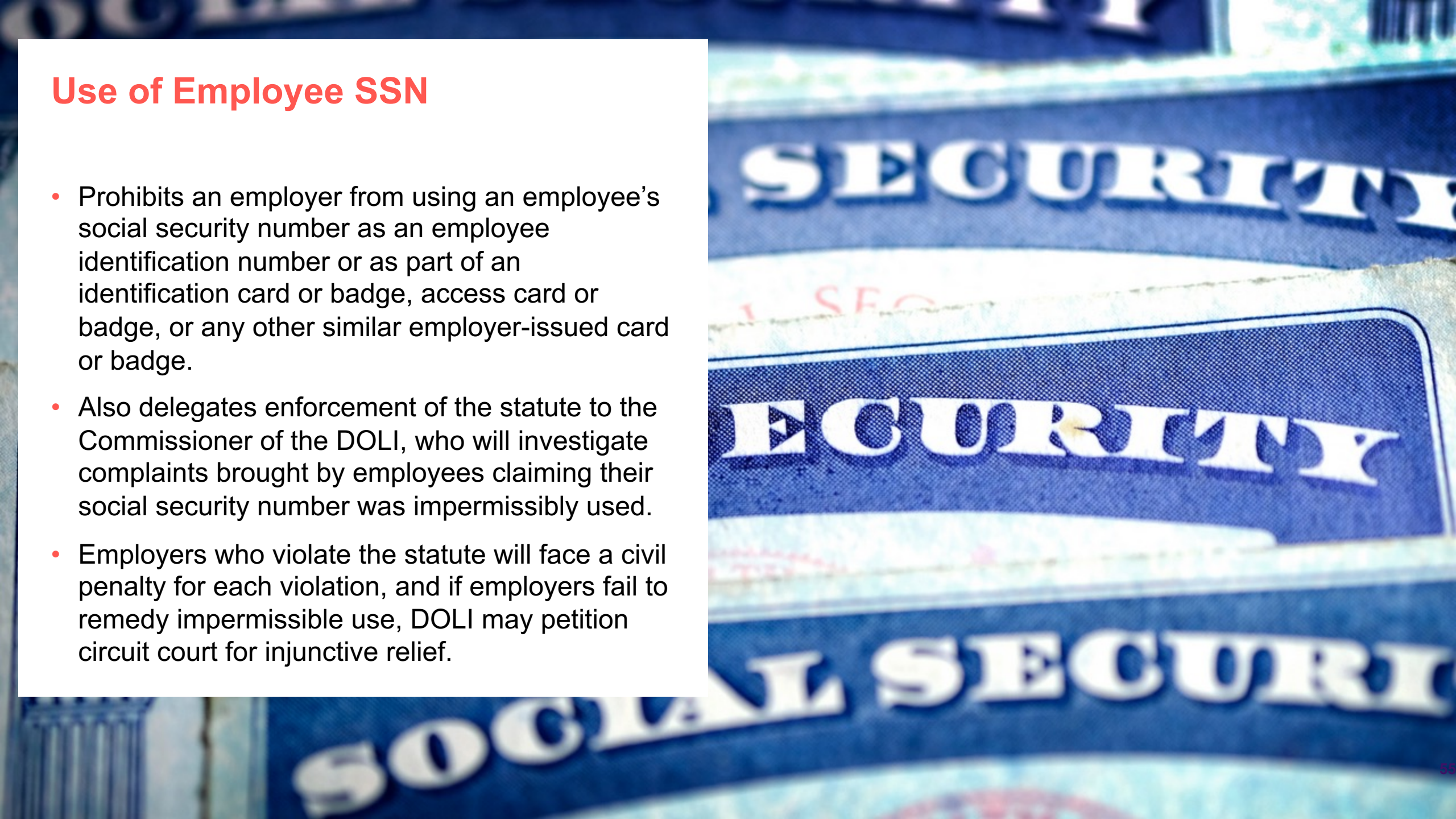
- Revise definition of “specialty occupation” clarifying that that a job must not “always” require at least a bachelor’s degree but rather that it “normally” requires a bachelor’s degree
- Clarify that jobs may require a range of degrees as long as any required degrees are directly related to the position and skills
- But also clarifying that generic degrees may not support an H-1B visa, i.e. a degree in business without further specialization might not support an H visa for a marketing position
- Changes in definitions to make it easier for nonprofit research organizations and government research organizations to quality for cap exemption
- Help entrepreneurs by allowing some company owners to apply for H-1B visas

State & Local Legislation

Virginia

Use of Employee SSN

- Prohibits an employer from using an employee's social security number as an employee identification number or as part of an identification card or badge, access card or badge, or any other similar employer-issued card or badge.
- Also delegates enforcement of the statute to the Commissioner of the DOLI, who will investigate complaints brought by employees claiming their social security number was impermissibly used.
- Employers who violate the statute will face a civil penalty for each violation, and if employers fail to remedy impermissible use, DOLI may petition circuit court for injunctive relief.



Organ Donor Leave

Requires employers to provide eligible employees with up to 60 business days of unpaid organ donation leave to serve as an organ donor and up to 30 days of unpaid leave to serve as a bone marrow donor.

Employees must meet certain requirements to be eligible.

Employers may not consider an employee's use of unpaid organ donation leave as a break in continuous service with respect to employee benefit accrual or the continuation of an employer-provided health benefit plan.

Minimum Wage

- Removes the minimum wage exemption for certain disabled workers.
- Amends the coverage extended to Virginia workers under the Virginia Minimum Wage Act to include any person who is paid pursuant to 29 U.S.C. § 214(c) of the FLSA.
- Individuals working under certificates issued by Virginia's DOL Wage and Hour division will no longer be exempt if the certificate was issued on or after July 1, 2023. Individuals working under certificates issued prior to this date will remain exempt.

General Assembly 2024 Regular Session

- Minimum wage increase to $13.50 per hour effective January 1, 2025.
- Hate crimes (ethnic origin) discrimination
- Add citizenship or immigration status to the protected classes under the VHRA
- Unemployment compensation; employer's failure to respond to requests for information, etc.
- Paid sick leave for all private employers (1 hour for every 30 hours worked)
- Paid family and medial leave insurance program
- Clarify timing for dual-filed complaints alleging unlawful discrimination under VHRA
- Unpaid family bereavement leave (10 days, unpaid)
- Covenants not to compete (health care professionals)

District of Columbia

Pay Transparency

- In December, D.C. passed the Wage Transparency Omnibus Amendment Act of 2023, which seeks to address concerns and perceptions regarding income disparities.
- Under the act, an employer must:
  - Provide the minimum and maximum projected salary or hourly rate in all job listings and position descriptions; and
  - Disclose to applicants before the first interview the schedule of benefits an employee may receive.
- An employer cannot:
  - Screen prospective employees based on their wage history; or
  - Seek a prospective employee's wage history.

Maryland

Family and Medical Leave Insurance Program - Modifications

- Time to Care Act provides up to 12 weeks of paid leave through a program that functions similarly to insurance in which eligible employees apply to the state for benefits.
- Amended the law in several notable ways, including:
  - Delaying the start date for employer and employee contributions to Oct. 1, 2024
  - Delaying start date for benefits payments to covered employees to Jan. 1, 2026
  - Setting employer/employee contribution rates at 50/50 percent, instead of being set by Maryland DOL.
  - Not requiring employees to use up all employer-paid leave.

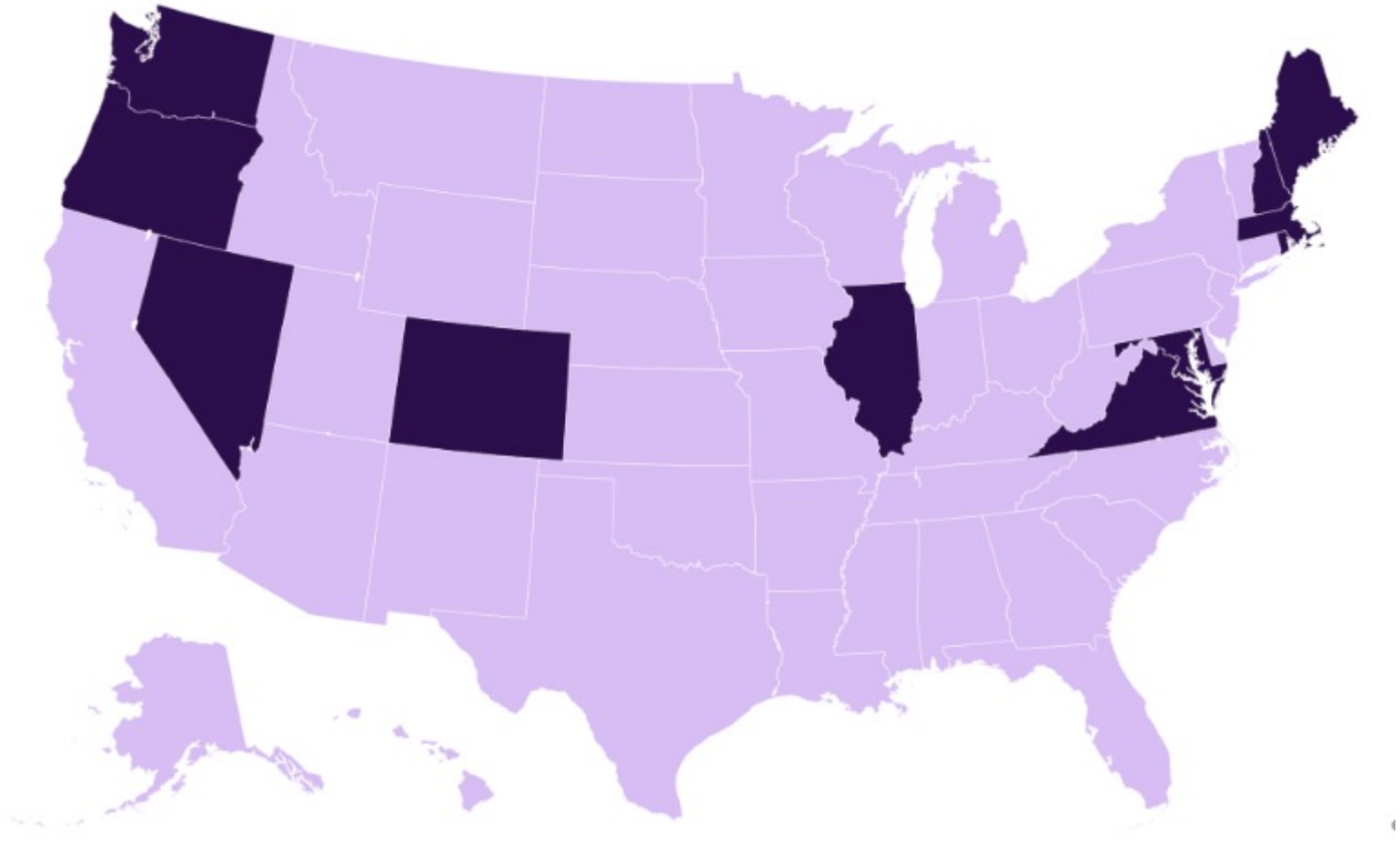
Noncompete and Conflict of Interest Provisions

- Raises the salary threshold required to hold an employee to a noncompete agreement or conflict of interest provision.
- Under the prior law, employers could not require a prospective or current employee to sign a noncompete if the employee earned equal to or less than $15/hour ($31,200 annually).
- New threshold requirement rises to 150% of the state minimum wage annually).

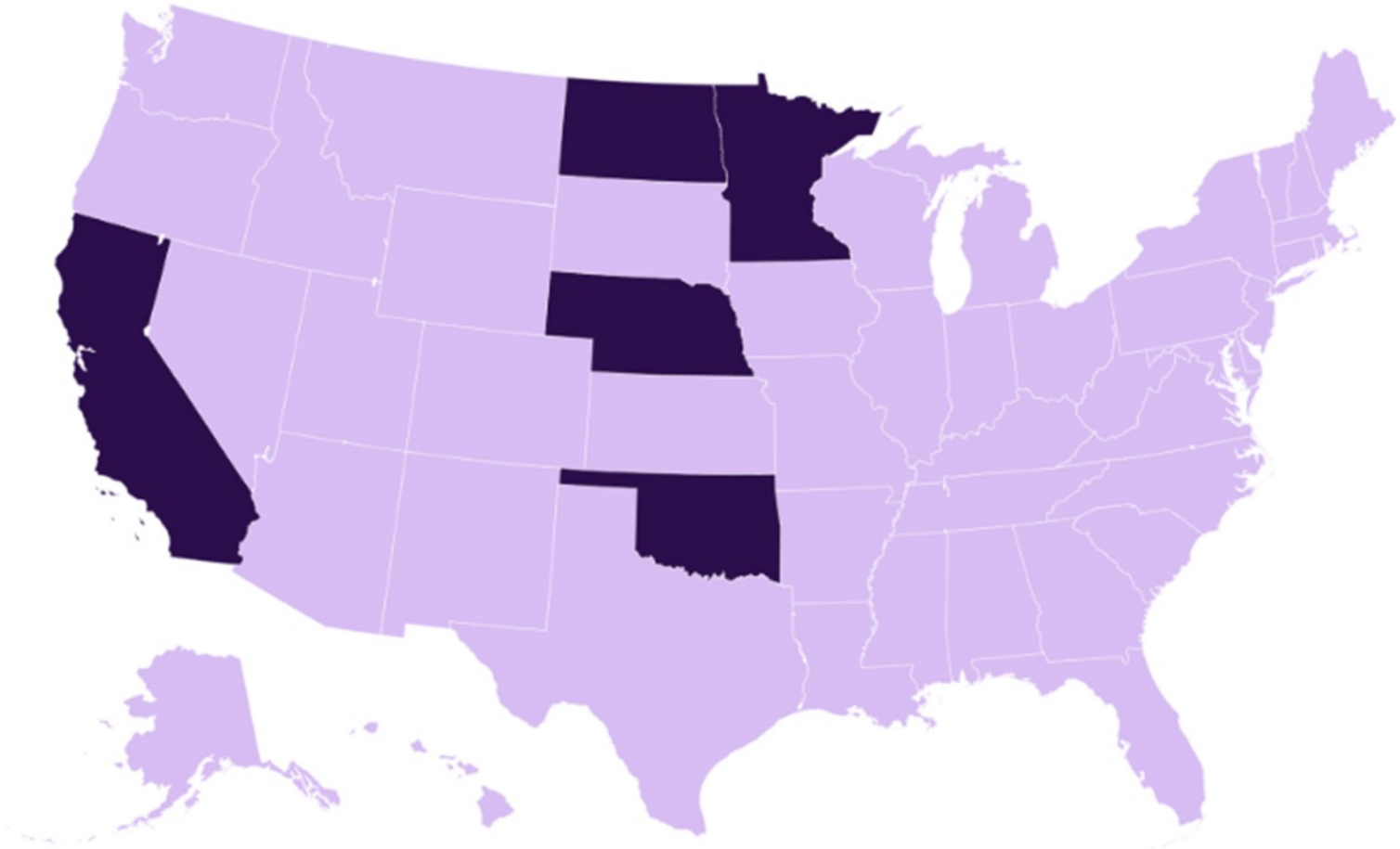
State Trends

Restrictive Covenants

States That Impose Income or Other Compensation-Based Thresholds



States That Ban Non-Compete Agreements Entirely



Navigating the Non-Compete Minefield in 2024

- Employers need to comply with California's notice provision by February 14, 2024
- FTC's proposed rule would ban most non-compete agreements
- NY Governor's veto
- Delaware Chancery Court is no longer a safe space
- States and the FTC are poised to zealously enforce bans
- Pending legislation to restrict or prohibit non-competes
  - Workforce Mobility Act of 2023
  - Connecticut
  - New Jersey

Pay Transparency

Pay Transparency Laws

- An ever-evolving patchwork of state laws
  - Some require disclosure of benefits in addition to salary.
  - Some require salary info in job postings. Some merely require disclosure upon request by employee/applicant.
  - Some require disclosure for internal job movements as well as external postings.
  - Some require annual pay data reporting to state agency.
- Most problematic: Washington Equal Pay and Opportunity Act
  - Private right of action
  - The result: 50 class action suits actions and counting…
- Other laws requiring pay disclosure in job ads: California, Colorado, New York
- Passed: Hawaii (eff. Jan.1, 2024); Illinois (eff. Jan. 1, 2025)
- Pending: numerous states
- Federal legislation: Introduced in Congress: Salary Transparency Act (with private right of action)

Pay Transparency Laws

- **Colorado SB 105** – Amendment to Equal Pay for Equal Work Law, significant revisions.
- **Hawaii SB 1057** – Requires employers to include a pay range in job listings and amends its equal pay statute to prohibit pay discrimination based on any protected characteristic.
- **Minnesota SB 2909** – Prohibits employers from inquiring, considering, or requiring disclosure of a job applicant's pay history for the purpose of determining compensation or benefits for that applicant.

New Laws Going into Effect January 2024

Marijuana Laws

- **Tennessee SB 378** – Permits the use, sale, and distribution of hemp-derived cannabinoids, does not require employers to accommodate the use of such substances.
- **Washington SB 5123** – Prohibits employers from discrimination against job applicants for either off-duty use of cannabis or an employer-required drug screening that detects non-psychoactive cannabis metabolites.
- **California SB 700** – Amends its Fair Employment and Housing Act to prohibit employers from requesting information from an applicant relating to the applicant's prior use of cannabis and from using information about a person's prior cannabis use obtained from the person's criminal history, with certain exceptions.
- **California AB 2188** – Prohibits employment discrimination based on off-duty use of marijuana. Does not permit drug testing that detects non-psychoactive cannabis metabolites.
- **Ohio Voter Initiated Statute** – Ohioans voted to pass an initiative legalizing and regulating the cultivation, sale, purchase, possession, use, and home growth of recreational marijuana. Does not require an employer to "accommodate an employee's use, possession, or distribution of adult use cannabis."

Leave Laws – Effective January 1, 2024

- California – Increase in amount of paid sick leave
- California – Leave for reproductive loss
- Colorado – Family and medical leave insurance benefits become available
- Illinois – Extended child bereavement
- Illinois – Paid Leave for All Workers Act
- Illinois – Chicago's new paid sick/safe and PTO law (*effective Dec. 31, 2023)
- Minnesota – Paid sick and safe leave
- Minnesota – Amendments to Bloomington's Sick and Safe Time Ordinance and amendments to St. Paul's Sick and Safe Time Ordinance to align with the Minnesota state statute

Leave Laws – On Horizon 2024 and Beyond

- Delaware – Paid Family Medical Leave Insurance (contributions begin January 1, 2025; benefits begin January 1, 2026)
- New Hampshire – Workplace Accommodations for Nursing Employees (begins July 1, 2025)
- Maine – Paid Family Medical Leave (contributions begin January 1, 2025; benefits begin May 1, 2026)
- Maryland – Paid Family and Medical Leave Insurance Program (contributions begin October 1, 2024; benefits begin January 1, 2026)
- Minnesota – Paid Family and Medical Leave (contributions and benefits begin January 1, 2026)
- Oregon – Amendments to Oregon Family Leave Act (new requirements begin July 1, 2024)

Miscellaneous

- California AB 1076 – Makes it unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy specified exceptions.
- California SB 699 – Makes employee noncompete agreements void and unenforceable regardless of where and when the contract was signed.
- California SB 553 – Requires employers to implement a workplace violence prevention plan, record each incident in a log, provide training to employees, and retain training and incident records.

Artificial Intelligence

AI & Employment – Federal & State Developments

Federal Developments

May 2023:

- **EEOC** Issues Technical Assistance: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.

August 2023:

- First EEOC Consent Decree with AI-related claims: ***EEOC v. iTutorGroup.***

October 2023:

- President Biden signs **Executive Order** on Artificial Intelligence dated October 30, 2023.

State Developments

January 2023:

- **New Jersey** proposes *Assembly Bill 4909* requiring companies to notify candidates of the use of AI when screening applicants.
- **California** proposes *AB 331* and *SB 721 (Becker)* modifying use of AI in automated-decision systems.
- **Vermont** proposes *Assembly Bill 114* restricting the use of AI in employment decision making.

February 2023:

- **Massachusetts** introduces *House Bill 1873* restricting the use of AI when making employment-related decisions.
- **Washington, D.C.** introduces *"Stop Discrimination by Algorithms Act of 2023".*

July 2023:

- **New York City** regulation (*Local Law 144*) on using AEDT in employment goes into effect.

October 2023: White House Issues Executive Order Regarding AI

- Direct the following actions related to employment:
  - Secretary of Labor to develop guidelines to mitigate the harms and maximize the benefits of AI for workers by addressing displacement, labor standards and related issues.
  - Chair of Council of Economic Advisers to produce a report on AI's potential labor market impacts and study and identify options for strengthening federal support of workers facing labor disruptions.
  - Federal Trade Commission to develop rules to ensure fair competition in the AI marketplace and workers protection from harms enabled by the use of AI.
  - Office of Management and Budget to issue guidance to agencies for assessing and mitigating disparate impact, algorithmic discrimination, and more.
- Order also calls for the Department of Homeland Security and Department of State to identify new pathways and build upon existing programs to attract and retain the best foreign nationals with AI knowledge, skills, and education.

Takeaways for Using AI in the Workplace

- Understand the risks of using AI in the workplace (e.g., recruiting, performance monitoring, performance improvement, safety and so on).
- Track emerging laws, guidance, and established frameworks surrounding the use of AI.
- Consider the risks and implement strategies to minimize
  - Possible strategies can include providing notice to candidates of the use of AI, providing candidates with informed consent, being transparent with the Company's use of AI, and performing annual audits on the technology to ensure fairness and non-discrimination.
- Incorporate "promising practices" suggested by the EEOC, such as ensuring reasonable accommodations are available.
- Review record retention obligations on federal, state, and local levels.

2024: Five Issues to Monitor

2024 Issues to Monitor (Predictions!)

1. More cases on long COVID under the ADA.
2. More cases addressing mental health
3. Continued court cases rejecting claims that employees should have been exempted from vaccine requirements
4. More cases about transgender and in particular nonbinary issues; pronoun misgendering.
5. More state paid family leave laws
6. Increase in state/local pay transparency laws, such as publishing salary ranges
7. Continued actions by the NLRB to reverse Trump-era rulings and reinstate Obama era rulings in some cases

JacksonLewis

Thank you.