The 2024 Employment Law Year in Review

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Agenda

- 2024 Predictions Recap
- Litigation Roundup
- Congressional Action
- Agency & Statutory Developments
- State & Local Legislation
- State Trends
- Tech Talk: AI and Data Privacy
- Looking Ahead

This presentation and its accompanying materials should not be used as a substitute for legal advice on a particular matter. Any information provided herein (as well as responses to questions) are necessarily general in nature.

Issues to Monitor in 2024
How Did We Do?

2024 Predictions: How Did We Do?

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

Litigation Roundup

Muldrow v. City of St. Louis, Mo.

(No. 22-193)

SCOTUS, Decided

April 17, 2024

- **Issues:**
  - Is a job transfer without a "significant disadvantage" to the employee an adverse action under Title VII?
  - What constitutes "harm" under Title VII?
- **Held**: An employee challenging a job transfer under Title VII must show the transfer brought some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.
- Textual Analysis: The term "discriminate against" under Title VII means to "treat worse." To require more from a Title VII plaintiff, the Court reasoned, was to demand something other than the plain language requires.
- In addition to showing an improper discriminatory intent, a Title VII discrimination plaintiff "must show some harm respecting an identifiable term or condition of employment."
- **Takeaway**: The decision lowers the bar for employees to bring Title VII claims and sets a "some harm" standard.

Muldrow Fall Out

Since last spring, over 200 cases have dealt with the Muldrow decision in some fashion

- Consensus of the decisions is that an adverse employment action need not cause significant, material, or serious injury to be actionable, but there must be some disadvantageous change in a term or condition of employment. See e.g. *Harris v. Sec'y of VA*, 2024 U.S. Dist. LEXIS 106045 (D.Kan. June 14, 2024).
- Courts still require the plaintiff to identify an objective, non-speculative harm they have suffered as a result of the alleged conduct. See *Bonaffini v. City Univ. of New York*, 2024 U.S. Dist. LEXIS 174846, *13 (E.D.N.Y. Sept. 25, 2024).
- Analysis of adverse actions now frequently involves examination of the alleged adverse action in terms of the causal connection to the alleged discrimination and/or the damage allegedly incurred by the plaintiff.

Muldrow Fall Out (cont'd)

What statutes are impacted:

- Title VII discrimination and harassment claims – **Yes**
- Title VII retaliation and constructive discharge claims – **No**
- ADEA, ADA/Rehabilitation Act, § 1981, Title XI and Civil Service Reform Act – **Yes**
- State law claims – **Split**

Muldrow Fall Out (cont'd)

What actions are potentially adverse:

- Not all transfers (e.g. voluntary transfer during investigation)
- Transfers to position with fewer qualifications
- Transfer to position that cut off employee from co-workers
- Denial of a transfer
- Denial of telework
- Denial/delay of training opportunities
- Denial of use of preferred pronouns/titles
- Denial of accommodation request
- Lower performance rating
- Placement on paid suspension

Application of the “Some Harm” Standard

- On May 31, 2024, the Southern District of New York issued a decision in *Anderson v. Amazon.com, Inc.*, Case No. 23-cv-8347, applying the “some harm” standard.
- Plaintiff asserted adverse action in the form of a PIP and diminished responsibilities which:
  - Resulted in the assignment of more or worse tasks;
  - Tarnished her permanent record;
  - Dampened her prospects of a promotion or raise; and
  - Temporarily prevented her from transferring.
- District Court held that Plaintiff plausibly alleged that the PIP and diminished role were adverse actions.

What does this mean for employers?

- *Muldrow* will have broad applicability in discrimination cases.
- Applicability of *Muldrow* to employers' diversity, equity, and inclusion (DEI) programs.
- *Muldrow* left open the question of what showing of harm is sufficient for Title VII purposes.

Supreme Court Reins in Federal Agencies

- ***Loper Bright Enterp. v. Raimondo*** (June 28, 2024)
  - "Chevron" deference to administrative agencies is overturned
- ***Corner Post, Inc. v. Bd. of Governors Fed. Reserve Sys.*** (July 1, 2024)
  - Expands the time for litigants to bring facial challenges to federal regulations
    - Previously: within 6 years of formal publication
    - Now: within 6 years of suffering injury from the rule
- ***SEC v. Jarkesy*** (June 27, 2024)
  - Agency seeking civil penalties must bring enforcement action in court (rather than adjudicate a matter in-house). Agency (ALJ) proceeding violates jury trial right.
  - Post-*Jarkesy*: Can *any* federal agency pursue civil monetary penalties through agency adjudication?
  - Biggest Current Impact in Labor and Employment: NLRB's authority to adjudicate ULPs is in question (e.g., *Space X*)

The Demise of *Chevron* Deference:
Loper-Bright Enterprises v. Raimondo

- More challenges to federal rules likely
- Rules already under challenge:
  - Pregnant Workers Fairness Act regulations
  - Rules setting salary floor for exempt status (to be discussed later); defining “independent contractor” under FLSA, tip rules.
  - DOL’s ESG rule
  - NLRB joint employer rule
  - OSHA “walkaround” rule
- *Skidmore* “deference” may apply*
- Less deference = less predictability

Loper-Bright Ripple Effects

- *Loper Bright* challenges not a slam dunk
  - *Restaurant Law Center v. DOL* (5th Cir, Aug. 23, 2024): DOL's 2021 tip rule vacated as "contrary to the statutory scheme enacted by Congress"
    - District court had upheld the rule under *Chevron* deference
    - Appeals court applies *Loper Bright* standard, reverses

    But…
  - *Mayfield v. DOL* (5th Cir, Sept. 11, 2024): DOL right to adopt minimum salary rule upheld under *Loper Bright*, noting express grant of authority by Congress, and that the DOL rule was within the bounds of that authority

Loper-Bright Ripple Effects (cont'd)

- Recent rules (or rules that routinely flip-flop) are most vulnerable:
  - *Tennessee v. EEOC* (8th Cir): On appeal of decision upholding EEOC's 2024 Pregnant Workers Fairness Act (PWFA) regs, plaintiff contend: "The PWFA does not authorize the Final Rule's abortion-accommodation mandate—especially now that the district court's reliance on *Chevron* is off the table"
- Longstanding regulations less vulnerable:
  - *Perez v. Owl, Inc*. (11th Cir, Aug. 6, 2024): Cites *Loper Bright*, but finds DOL's longstanding interpretation of "regular rate" under FLSA, Davis-Bacon persuasive because the agency's position has been consistent for 80 years

Loper-Bright Ripple Effects (cont'd)

Impact? Too soon to tell.

- *Loper Bright* did **not** overturn precedential decisions that relied on *Chevron* deference
- Circuit courts inclined to remand, give district courts a first go
- Numerous hot-button regulatory challenges in 2024 did **not** implicate *Loper Bright* (e.g. noncompete rule, EEOC harassment guidance)
- Will *Chevron*'s demise deter Trump Administration's *de*regulatory efforts?

What's at stake?

- **EEOC**
  - Regulations implementing the ***Pregnant Workers Fairness Act***
  - ***Harassment*** guidance*
- **DOL**
  - Rule increasing the ***minimum salary threshold*** for application of the FLSA's EAP and Highly Compensated Employee exemptions
  - Rule defining "***independent contractor***" vs. statutory employee under the FLSA
  - ***Tip credit*** rule (limiting time employees can spend doing non-"tip producing" work)
- **FTC**
  - Rule barring ***non-compete*** agreements

What's at stake?

- **OSHA**
  - "***Walkaround***" rule
    - "Me too" for non-governmental parties?
- **NLRB**
  - ***Joint employer*** rule
  - ***Fair Choice – Employee Voice*** Final Rule
  - NLRB ***adjudications***
- **Other**
  - DOL ***ESG*** (environmental, social, and governance) rule for plan fiduciaries
  - DOL ***401k fiduciary*** rule
  - DOL Revisions to Davis-Bacon and Related Act ***prevailing wage*** regulations
- Rule implementing EO raising ***minimum wage for federal contractors***

Employer Takeaways from *Loper-Bright*

- Continue to follow agency regulations and guidance unless and until a court rejects these interpretations
- Employers currently in litigation may consider challenging the rule in question
- Employers currently in agency adjudication where civil penalties may be assessed may consider challenging the proceeding
- Watch for status of ongoing rule challenges
- Opportunity: There may be an opening to bring facial challenge to problematic longstanding regulations
- Review employment policies and practices with an eye to what changes may be coming
- In the immediate term, prepare for uncertainty

SEC v. Jarkesy

- Securities and Exchange Commission sought civil penalties from defendants for securities fraud
  - The administrative tribunal found for the SEC
- However, the U.S. Supreme Court held in a 6-3 decision that the 7th Amendment requires that the defendant be entitled to a jury trial in these types of actions
- The decision essentially ended the SEC's long-running use of in-house tribunals led by administrative law judges to adjudicate fraud actions
- Notably, the Supreme Court did not address *Jarkesy*'s other argument
  - The 5th Circuit held that the statutory removal protections for SEC administrative law judges were unconstitutional

Jarkesy Ripple Effects

- Following *Jarkesy*, many lawsuits have been filed in federal court — particularly in Texas – challenging different agencies' ability to adjudicate matters through an administrative process
- The challenges make the 7th Amendment arguments addressed by the Supreme Court in *Jarkesy* **and** the separation of powers argument the 5th Circuit had endorsed in the underlying *Jarkesy* decision not addressed by the Court

Jarkesy Ripple Effects (cont'd)

DOJ

- Multinational retailer successful in obtaining injunction in SD Ga. preventing the ALJs in the DOJ's Office of the Chief Administrative Hearing Officer (OCAHO) from continuing proceedings to determine administrative penalties for immigration-related recordkeeping requirements

NLRB

- Challenges to NLRB administrative proceedings in the 5th Circuit

- **OFCCP**
- Injunction issued by SD Texas halting DOL's administrative enforcement proceedings against a government contractor regarding mandatory contractual language concerning discrimination
- **OSHA**
- Complaint filed in ED Va. against the DOL challenging the DOL's ability to adjudicate Sarbanes-Oxley claims via ALJs
  - The DOL's motion to dismiss is pending

Jarkesy Ripple Effects (cont'd)

FTC

- Complaint against the FTC in the ND Texas challenging the FTC's ability to adjudicate unfair sales practices and discrimination claims in an administrative proceeding

FDIC

- Challenge to FDIC's use of ALJs in DDC by individual accused of engaging in a pattern of misconduct in connection with a loan referral program

FCC

- Three separate actions pending in the Second, Fifth and DC Circuits arguing the FCC lacked the ability to assess a total of 184^{+} million in fines related to location data sharing

Key Takeaways

1. Following *Loper Bright*, courts must interpret regulations without deference to agency interpretation
2. *Jarkesy* essentially ended the SEC's long running use of in-house tribunals led by ALJs
3. *Jarkesy* decision is reshaping the landscape of administrative enforcement actions, requiring more cases to be heard in federal courts with jury trials
4. Keep an eye on federal courts in Texas as more challenges to agency authority are likely coming in the short term
5. More instability with agency decisions in the short term
6. The cases are part of a much broader trend of reining in agency rules; next up: nondelegation doctrine

E.M.D. Sales, Inc. v. Carrera

SCOTUS –

(No. 23-217)

Decided Jan. 15, 2025

- **Held**: Employers need only establish an FLSA exemption applies through a "preponderance of evidence," not the higher "clear and convincing evidence" standard. (9-0 decision).
- Reverses an outlier decision by the 4th Cir. That required a heightened standard of proof for employers.
- Case involved applicability of the FLSA's outside sales exemption, but the reasoning applies to all statutory exemptions.
- Potential broader application: J. Kavanaugh noted the preponderance of evidence standard is the default standard of proof in civil cases.
  - "It is the rare instance when the higher clear and convincing standard has been applied, such as when the standard is expressly set forth in the statute or where important constitutional liberties are at stake."

Arbitration Trends

SCOTUS: *Smith v. Spizzirri*

- **Holding**: The language in the Federal Arbitration Act (FAA) providing a court "shall on application of one of the parties stay the trial of the action until [the] arbitration" requires courts to stay, not dismiss, actions subject to valid arbitration agreements

- **Reasoning**: When a court dismisses an action, the plaintiff has an immediate right to appeal, whereas there is no similar right to appeal the grant of a motion to compel arbitration
  - By dismissing the action, the district court effectively confers a right to appeal a decision otherwise foreclosed by the FAA

The 8th Circuit Navigates EFAA's Applicability

- ***Famuyide v. Chipotle Mexican Grill Inc. (8th Cir.)***
- **Issue**: What constitutes a "dispute" and when does it "arise" for purposes of applicability of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA)?
- **Holding:** Under the EFAA, no "dispute" exists until parties adopt opposing positions, and neither internal complaints nor letters from plaintiffs' counsel clear that bar unless they show an intent to pursue claims.

Ninth Circuit Warehouse Worker: FAA Exempt

- ***Ortiz v. Randstad Inhouse Services LLC (9th Cir)***
- **Issue**: Whether a warehouse worker falls within the definition of "transportation worker exemption" of the FAA
- **Holding**: Plaintiff's job duties were sufficiently connected to the transportation of goods through interstate commerce to trigger the transportation worker exemption

Employer Takeaways

- Application of the EFAA is still in flux
- Broadened interpretation of Transportation Worker Exemption means FAA may not apply to certain workers, so state laws will apply
- The law on arbitration is ever-evolving
- Expect more challenges to arbitration clauses

Congressional Action

Congress May Further Chip Away at Arbitration

- **Protecting Older Americans Act**
  - Would invalidate pre-dispute mandatory arbitration agreements regarding claims of age discrimination
  - Bipartisan measure
  - Cleared Senate Judiciary Committee in May 2024
- **Ending Forced Arbitration of Race Discrimination Act**
  - Would bar mandatory arbitration of race discrimination claims
  - No Republican sponsors
  - Pending before the House and Senate Judiciary Committees

Litigation Transparency Act of 2024

- In October 2024, Rep. Darrell Issa (R-Ca.) introduced the Litigation Transparency Act of 2024, which seeks to codify rules mandating the disclosure of the identity of litigation funders and their agreements to all parties in the litigation.
- Concerns:
  - Attorney/Client Privilege and Confidentiality
  - Maintaining control of litigation/settlement decisions

Agency & Statutory Developments

Equal Employment Opportunity Commission

Accommodations in Action: PWFA, Religion and Beyond

Pregnant Workers Fairness Act (PWFA) Final Rule

Employers must “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”

**** EEOC’s regulations went into effect June 18, 2024**

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.

Step 1: Known Limitation

- **Employee has a known limitation related to pregnancy, childbirth, or related medical conditions**

- Known Limitation:
- Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical condition.
  - Impediment or problem. Can be modest, minor and/or episodic. Includes healthcare.
  - Does not have to meet ADA disability!
- Communicated to the employer by employee or representative.
  - Final regs added **union rep** to the list of potential representatives.

Step 2: Pregnancy, Childbirth, or Related Medical Conditions

- **Employee has a known limitation related to pregnancy, childbirth, or related medical conditions**

- Pregnancy, Childbirth, Related Medical Condition:
  - Current, past, potential, intended pregnancy (under final regulations, infertility, fertility treatments, use of contraception are considered pregnancy or childbirth instead of related medical condition).
  - Related medical condition includes termination of pregnancy, ectopic pregnancy, preterm labor, gestational diabetes and MANY more conditions such as carpal tunnel, chronic migraines, etc.

Step 3: Employee Must be Qualified

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 for a **temporary period,** even with an accommodation, but can be reasonably accommodated without undue hardship.

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.

PWFA Regulations: Key Points

- "Related medical conditions" is not defined in the Act and EEOC's interpretation is extremely broad.
- 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.
- Family Members are not entitled to accommodations.
- Requesting an accommodation is now easier: 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.

Potential Accommodations

- The EEOC identifies a LONG LIST of potential accommodations.
- Final regulations **added**:
  - **Remote work** or a change in work location
  - **Nursing** “during work hours (where the regular location of the employee’s workplace makes nursing during work hours a possibility because the child is in close proximity)”

**Covered employers should always consider the PUMP Act, the PWFA & state law.

Tips for Handling Requests

- Leave is accommodation of last resort.
- Employer must choose the accommodation that provides equal employment opportunity as similarly situated employees. Under language in final regulations, an employer should consider equal employment as compared to other employees **AND the employee making the request** before the employee had a limitation.
- Be prepared to respond promptly to requests for accommodation. The final regulations say that an unnecessary delay in providing a reasonable accommodation may be a violation.

Legal Challenges to the PWFA and Regulations

- *Texas v. DOJ* - ND of Texas ruled that Congress violated the Quorum Clause and improperly passed the Consolidated Appropriations Act of 2023, including the PWFA and enjoined the EEOC and DOJ from enforcing the PWFA **against the State of TX and its agencies**
  - This case is on appeal in the 5th Circuit
- A private employer filed suit against the EEOC in the ND of Texas challenging the constitutionality of the PWFA claiming it was adopted in violation of the Quorum Clause. The employer alleges the same claims as decided in favor of the State of Texas
  - The case is assigned to the same judge that decided the State of Texas case

Legal Challenges to the PWFA and Regulations (cont'd)

- *Louisiana and Mississippi v. EEOC* and *U.S. Conference of Catholic Bishops v. EEOC* – WD of Louisiana entered a preliminary injunction
  - Employers are not required to accommodate "elective abortions" for employees whose primary duty station is in **Mississippi or Louisiana**

- *Tennessee, et al. v. EEOC* – The ED of Arkansas ruled that the group of 17 states led by Tennessee lacked standing
  - On appeal to 8th Cir. Tennessee and the group of 17 states filed their opening brief in the 8th Cir. arguing that the SCOTUS decision in *Loper Bright* should revive their challenge to the regulations

Legal Challenges to the PWFA and Regulations (cont'd)

- *Catholic Benefits Association v EEOC* -- Filed suit in federal court in North Dakota challenging the PWFA Final Rule and the EEOC harassment guidance
  - The plaintiffs argue that the EEOC's final PWFA rule requires employers to accommodate and not retaliate against women employees seeking abortion or infertility treatments
  - On September 23, 2024, the court granted a preliminary injunction enjoining the EEOC from enforcing the PWFA and regulations **against the parties** "in a manner that would require them to accommodate abortion or infertility treatments that are contrary to the Catholic faith, speak in favor of the same or refrain from speaking against the same"
- Cases by private plaintiffs challenging the Final Rule also filed in federal court in TX and Missouri.

EEOC PWFA Litigation Filed Against Employers

Cases that allege employer failed to provide time off

- Refused to provide time off for prenatal appointments and to excuse employee from mandatory overtime and threatened to assess points for pregnancy related absences
- Fired employee after she requested six weeks off to physically recuperate from a stillbirth and grieve (Settled)
- Refused to return employee to work following maternity leave, told employee no work was available but hired new, non-pregnant employees before and after her attempted return
- Withdrew job offer when employee asked for time off during 1st training class due to emergency ultrasound, told employee she could reapply when she knew she could “100% attend” training

EEOC PWFA Litigation Filed Against Employers (cont'd)

Cases alleging other failures to accommodate

- Refused to accommodate transfer to a different position, placed employee on leave during interactive process, and made unlawful medical inquiries
- Refused to permit employee to sit, take breaks, or work part-time during the 3rd trimester of high-risk pregnancy, placed employee on unpaid leave, and refused to guarantee breaks to pump upon return
- *Keep in mind, these are summaries of the EEOC's allegations in the various complaints filed. No discovery, no factual determinations, and no decisions on the law have been made.*

Employer Takeaways

- Review the final regulations and examples
- Keep in mind that if another federal, state or local law provides greater protection or different requirements, those laws will also apply
- The PWFA incorporates Title VII's poster requirement
- Review your policies and procedures
- Carefully evaluate your forms
- Some state and local laws limit when medical information can be requested to support a pregnancy-related request
- Consider training your HR team, managers, first-line supervisors and others
- Communicate with any Third-Party Administrators
- Document!

Religious Accommodations – The BIG Question:

When does an accommodation present an undue hardship under Title VII?

Groff v. DeJoy

- Undue hardship is shown when a burden is substantial in the overall context of an employer's business
  - **Hardship**, at a minimum, means "**something hard to bear**"
  - Undue means that the requisite burden, privation or adversity "must rise to an '**excessive**' or '**unjustifiable**' level"
- "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"

Undue Hardship Post *Groff*

Undue hardship found

- Exceptions to grooming (no beard) policy
- Days off
- Exemptions to vaccine requirements
- Remote work

Undue hardship not found

- Exceptions to grooming (no beard) policy
- Days off
- Exemptions to vaccine requirements
- Remote work

Undue Hardship Post *Groff*

Courts have found undue hardship in these situations:

- 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
- Not working on Sunday (for a Sunday –Thursday work schedule)(fact specific issue)
- Violating seniority rights
- Inability to wear SCBA due to facial hair posed an undue hardship at fire department
- Requiring employer to violate a state law is both "excessive" and "unjustifiable”
- Exemption from pronoun mandates in school setting

No Undue Hardship Post *Groff*

Courts have declined to find undue hardship in these situations:

- Hypothetical policy reevaluation if everyone received an accommodation does not mean there is an undue hardship if employer grants just one accommodation
- Exemption to grooming policy, to allow facial hair
- Allowing employee to wear a kufi (religious headwear)
- Employer failed to meaningfully assess options
- 1.5 days of leave
- Religious days off – where employer did not look at ways to accommodate and the unavailability of others had been accommodated without creating safety issues

EEOC Enforcement Trends

- The EEOC issued a press release highlighting its 2024 fiscal year litigation focuses
- 110 lawsuits filed
- Most popular claims:
  - Americans with Disabilities Act (ADA) claims: 48 cases out of 110 lawsuits filed
  - Retaliation claims: Over 40 cases out of 110 lawsuits
- Emphasized focus on enforcing the Pregnant Workers Fairness Act (PWFA)

Updated EEOC Enforcement Guidance on Harassment

- Race-based harassment includes harassment based on traits or characteristics linked to a person's race such as their name, cultural dress, accent or speech pattern, and physical characteristics including hair style or texture.
- Express recognition that sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including the expression of one's gender identity
- Harassment can include intentional and repeated used of a name or pronoun inconsistent with an individual's gender identity
- Harassment can include denial of access to sex-segregated facilities such as bathrooms that are consistent with an individual's gender identity
- Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment
- Conduct based on stereotypes (whether positive, negative, or neutral) is prohibited

Updated EEOC Enforcement Guidance on Harassment (cont'd)

- Harassment can occur with remote work as it can in the physical workplace
- Virtual workplace, social media and similar technological advances outside the traditional workspace can still affect the terms and conditions of employment
- The prohibition on retaliation extends to "retaliatory harassment," harassment suffered by the employee due to their protected activity
- The threshold for establishing retaliatory harassment is different than that for establishing a hostile work environment as it extends to any conduct that might deter a reasonable person from engaging in protected activity
- Harassing conduct must be examined in the context for where it takes place or in the larger social context

EEOC Enforcement Guidance on Harassment: Instant Pushback

- May 13, 2024: Attorneys General from 18 Republican states filed a lawsuit in the United States District Court for the Eastern District of Tennessee seeking to block the enforcement of the new harassment guidance
  - Lawsuit pertains to guidance on transgender employees
  - The states allege that the EEOC lacked the power to declare existing federal laws provide the rights to transgender employees set forth in the new harassment guidance. Specifically, that while Title VII protects against sex-based discrimination (e.g., termination on basis of transgender status), it does not require employers to accommodate transgender employees.
  - Of particular concern to the states: Guidance regarding bathroom use and use of preferred pronouns.

Department of Labor

Final Rule Increasing Minimum Salary for EAP Exemptions Has Been Struck Down

- Major Changes
- Automatic, phased salary increases every 3 years

Prior EAP Salary Level Test	July 1, 2024	January 1, 2025
$35,568/year	~~$43,888/year~~	~~$58,656/year~~
($684/week)	~~($844/week)~~	~~($1,128/week)~~

Prior Highly Compensated Employee (HCE) Salary Level Test	July 1, 2024	January 1, 2025
$107,432/year	~~$132,964/year~~	~~$151,164/year~~

Texas Court Strikes Down Final Rule

- November 15, 2024. Texas federal court in the *Texas v. DOL* case grants summary judgment against DOL.
- The Court found that the DOL exceeded its statutory authority by issuing the rule change.
- “The minimum salary level imposed by the 2024 Rule ‘effectively eliminates’ consideration of whether an employee performs ‘bona fide executive, administrative, or professional capacity’ duties . . . in favor of what amounts to a salary-only test.”
- * The Texas court’s order applies nationwide.

DOL Independent Contractor Final Rule

Final Rule took effect March 11, 2024

- Trump DOL rule had focused on two "core" factors
  1. nature/degree of control over the work;
  2. the worker's opportunity for profit/loss
- Biden rule formally rescinded Trump rule

***several lawsuits pending; Trump Administration may restore prior standard*

- Biden IC rule applies six "economic reality" factors:
  1. Opportunity for profit or loss depending on skill
  2. Investments by worker and employer
  3. Degree of permanence of working relationship
  4. Nature and degree of control
  5. Is the work performed an "integral part" of the business?
  6. Skill and initiative
- Factors are to be applied equally.

Independent Contractor Rule Impact

- There is already much caselaw, including appellate decisions, on independent contractor status under FLSA
- DOL rule applies only to how “independent contractor” is defined under the FLSA
- Independent contractor enforcement is a DOL priority
- **Legal challenges pending**

Employer Takeaways

- Evaluate risk based on industry, locations
  - State law may control
- Review independent contractor agreements; revise where necessary
    - Eliminate provisions indicative of control over their work
- Review independent contractor policies
    - Do you eliminate independent contractors' expenses? (They are in business for themselves!)
- Not just HR — consult with purchasing/procurement
- Assess potential business impact
  - Is the organization reliant on an independent contractor model?
  - How many contractors, and for what functions?
- Consider reclassification or staffing agency model
- Evaluate in tandem with joint employment issues

Paid Sick Leave for Federal Contractors: New DOL Fact Sheet

- Implementation of Executive Order 13706, issued by the President on September 7, 2015, and regulations implementing same (29 C.F.R. 13).
  - E.O. 13706 requires covered federal contractors to provide employees with up to seven days of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking.
- DOL issued a Fact Sheet which addresses how E.O. 13706 interacts with state and local laws as well as the FMLA.
  - Nothing in E.O. 13706 excuses noncompliance with or supersedes any applicable federal, state, or local law or CBA requiring greater paid sick leave or leave rights than those established in the Order.
  - Similarly, compliance with state or local laws does not exempt contractors from E.O. 13706, but employers may meet obligations by offering accrued paid sick time that also complies with state or local laws, provided time is accrued and may be used in a manner meeting or exceeding the E.O. requirements.
  - Paid sick leave can run concurrently with unpaid FMLA leave.

Federal Contractor E.O. 13658 and 14026 Min. Wage Increases

- Implementation of E.O.13658, issued by POTUS on February 12, 2014 (final regs at 29 CFR part 10), and E.O.14026, issued by POTUS on April 27, 2021 (final regs at 29 CFR part 23).
- On 01.01.25, the applicable min. wage rate for workers performing work on or in connection with federal contracts covered by E.O. 13658 rose to $13.30/hr. ($9.30/hr. for tipped employees).
- On 01.01.25, the applicable min. wage rate for workers performing work on or in connection with federal contracts covered by E.O. 14046 (contracts entered into on or after Jan. 30, 2022, or renewed or extended on or after Jan. 30, 2022) rose to $17.75/hr. for both tipped and non-tipped employees.
  - *SCOTUS declined to hear an appeal from the 10th Cir. Decision upholding the E.O. increasing the min. wage. Challengers to the Order claimed POTUS does not have authority under the federal procurement statute. SCOTUS did not provide reasoning for rejecting the appeal.

Wage and Hour: What to Watch

- Campaign promises (but Congress must weigh in)
  - No tax on tips or overtime?
  - Comp time for private employees?
  - From 40-hour to 80-hour cycle?
- Labor Secretary nominee Lori Chavez-DeRemer a wild card?

- Wage and hour collective actions: procedural shifting sands
  - Erosion of “conditional” certification
  - *Bristol-Myers* reigns in nationwide collectives
- Enforcement, litigation: Will the locus shift to the states?

National Labor Relations Board

NLRB

- Currently, the Board has a 2-1 Democratic majority
  - President Biden renominated Board Chair Lauren McFerran to a third term and nominated Joseph Ditelberg to fill the Board's vacant Republican seat
  - However, Senate Republicans blocked McFerran's nomination from advancing in a 50-49 vote
- Confirmation would have led to a continuation of pro-labor policies and decisions
- Vacancies will now be filled by President Trump, and the Board will return to a Republican majority

New Joint Employer Rule - Vacated

- 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 was scheduled to go into effect March 11, 2024, after delays

New Joint Employer Rule - Vacated

- On March 8, 2024: a Texas federal judge vacated the rule, finding it too expansive.
  - Court issued its order following oral arguments between the NLRB and a coalition of business groups led by the U.S. Chamber of Commerce
- The NLRB initially filed to appeal the order but later dropped the appeal
  - Potential to revisit the issue through case adjudication rather than rulemaking?

Key Takeaways

- For now, the NLRB's prior 2020 rule requiring "direct and immediate control" over the essential terms and conditions of employment of another entity remains in effect
- Employers should review existing and future contracts containing terms or rights over another employers' employees in case the NLRB revisits the standard
  - Avoid providing a basis for the NLRB to claim the entity is a joint employer
  - Review each company's commercial rights and obligations potentially impacting employees

Immediate Changes to Expect

- Appointment of a new NLRB General Counsel expected on Inauguration Day
  - President Biden terminated Peter Robb upon taking office and appointed Jennifer Abruzzo
- A new GC will likely rescind current GC memoranda, and avoid prosecuting certain issues, including those related to:
  - Consequential damages
  - Remedies in settlement agreements
  - Electronic monitoring and algorithmic management of employees
  - “Stay-or-pay” in employment agreements

Later Changes to Expect

- A Republican NLRB will likely return to employer-friendly policies and decisions including those related to:
- Ordering union recognition without an election
- Work rules and handbook policy enforcement standards
- Independent contractor test
- “Quickie election” rules and other procedural changes
- Prohibitions on “captive audience” meetings
- Stay-on provisions and non-competes

What Likely Will Not Change

- Items identified for change, but not successfully changed by outgoing board majority and GC:
  - *Weingarten rights*
  - Obligation to bargain over discipline post-certification but before CBA negotiation
  - Joint-employer standard
  - Agency's funding
- Organizing and Strike Activity
  - Political divisions, along with President Trump's support for organized labor, support likelihood of continued uptick in organizing and strike activity

Key Takeaways

1. Immediate changes at the NLRB are expected, including the appointment of a new GC
2. NLRB composition is expected to shift to a Republican majority
3. Many current GC memos will be rescinded
4. Likely return to standards providing more consistency and predictability for employers
5. Changes expected in how unions are recognized, making it harder to unionize *without* an election
6. Organizing activity will likely continue rising

Occupational Safety and Health

Safe Work: Key OSHA Initiatives

Heat Stress Standard

- OSHA issued a proposed rule addressing heat injury and illness prevention on 08.30.24
- Comment period ended 12.28.24
- Heat trigger requires additional heat safety measures when the heat index reaches 90°F
  - Mandatory paid rest breaks of at least 15 minutes every two hours in cool areas
  - Employers must actively monitor employees for signs of heat stress
- Under Trump Administration, this rule will likely be dramatically curtailed or discarded entirely
- Employers should be mindful of state-level safety regulations such as Cal/OSHA's recent indoor heat safety regulations

Walkaround Rule

- Effective 05.31.24: Allows third parties, including union officials, to accompany OSHA compliance, safety and health officers on workplace inspections at an employee's request
- Ongoing court challenges that, after *Loper Bright*, may result in the rule being invalidated or set aside, are likely

Guarding Standard

- *Mar-Jac Poultry MS LLC v. Su*, 5th Cir., No. 24-60026
- Case involving the death of a poultry plant worker caught in an eviscerator machine
- Opportunity for the courts to clarify compliance standard for how machines should be guarded
  - A “specification standard” that specifically articulates safety requirements?
  - Or a “performance standard” that does not specify how a company should comply, which provides the employer with some discretion of how to comply?
- The court held oral arguments on 10.08.24

Other Trends

- Smart technology like wearable sensors, smart helmets, AI monitoring systems
- Continuing focus on mental health and wellness
- Home office safety for remote workers

Key Takeaways

1. Enhance compliance programs
2. Develop heat illness prevention plans
3. Promote mental health and psychological safety
4. Leverage AI and technology
5. Implement workplace violence prevention measures
6. Stay informed on state-specific regulations

Federal Trade Commission

FTC's Final Rule on Non-Competes is Stayed

- The rule, which would have effectively banned non-compete clauses in most employment contracts, was supposed to take effect on Sept. 4, 2024. A federal court in Texas stayed the rule nationwide on August 20, 2024. *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. Aug. 20, 2024)
- Court held the Federal Trade Commission Act (FTCA) did not authorize the FTC to issue substantive rules like the Final Rule banning non-compete clauses. Rather, the FTCA limits the FTC's authority to prevent unfair methods of competition through case-by-case adjudication.
- The Court also held the Final Rule was arbitrary and capricious because the FTC lacked sufficient evidence to support a categorical ban on non-compete agreements and failed to consider less restrictive alternatives.
- The FTC has appealed to the 5th Circuit.

FTC's Final Rule on Non-Compete Agreements

- Final rule issued on April 23, 2024
- The final rule broadly prohibited all true non-compete **clauses**
  - Would apply to not just agreements, but any workplace policy, written or oral
- The FTC's definition of non-competes is broad
- Had a notice requirement

State Limitations on Non-Competes

- The FTC rule would preempt state laws only where there is a conflict
- Some states have outright bans (CA, MN, NE, ND, OK)
- Other states have income or other compensation-based thresholds
- Some states do not allow non-competes for certain medical professionals

New FTC Leadership

- Trump announced that Andrew Ferguson, current FTC commissioner, will become the new chair
- Commissioner Ferguson voted against the FTC Final Rule
  - The FTC did not have authority to engage in rulemaking on major questions
  - The regulation of non-compete agreements is the particular domain of state law

Predictions

FTC

- FTC will have a Republican majority
- Less activism in terms of rulemaking
- FTC enforcement actions will be focus, likely concentrating on the most egregious violations

Federal Legislation

- Previous bipartisan bills could be resurrected
- Would be less controversial than the FTC's outright ban
- Possible limitations on "easy targets" like salary thresholds, prior notice

Predictions (cont'd)

State-Level Limitations

- Louisiana, Maryland and Pennsylvania passed laws going into effect in 2025 that restrict or limit the use of non-competes for certain types of healthcare professionals
- State legislatures will continue to enact limitations on the use of non-competes and other restrictive covenants
- New York, Maine, and Rhode Island had passed laws that would ban non-competes, but the governors vetoed
  - Legislatures may try again
- Trend of limiting use of non-competes for healthcare professionals will continue

Delaware Courts

- Trending away from long-standing willingness to enforce restrictive covenants, focusing on rule of reasonableness
- In December, Delaware Supreme Court invalidated an overly broad non-compete agreement in *LKQ Corp. v. Rutledge*
  - Declined to “blue pencil” the agreement
- “Employee choice doctrine” has been recognized

Key Takeaways

1. True non-compete agreements continuing to fall out of favor
2. Prepare for the trend to continue, including more robust state-level restrictions
3. Focus on drafting and training to stay agile in response to ongoing changes
4. Be mindful of which employees to bind by true non-competes
5. Be cautious relying on Delaware for choice of law
6. Focus on other restrictive covenants and the protection of confidential information and trade secrets

Immigration Insights + Election Impacts

Increased Scrutiny of Business Immigration Petitions

- Possible reinstatement of the “Buy American and Hire American” executive order policies
- Increased costs and less predictability for employers
  - More requests for evidence
  - More denials
  - New guidance on eligibility
  - Less deference to prior petition approvals
  - More PERM labor certification audits
  - Best and brightest H-1B standard

Longer Processing Times for All Cases

- Potential decrease in USCIS and DOL staffing
- More interview requirements
- More biometrics requirements
- Slower PERM adjudications and slower prevailing wage adjudications

Possible Elimination of Humanitarian Immigration Benefits

- Temporary Protected Status (TPS) might not be renewed
- Deferred Enforced Departure (DED) might be eliminated
- Other humanitarian parole programs could be eliminated
- More attempts to end the Deferred Action for Childhood Arrivals (DACA) program

Travel Bans and Delays Affect Travel for Key Employees

- The Trump Administration may reinstitute travel bans for individuals from “suspect” countries on national security grounds
- Visa processing at consulates abroad could be slowed due to staffing issues
- Possible increase in extreme vetting and administrative processing

More Enforcement

- More FDNS (Fraud Detection and National Security) site visits
- More ICE or HSI audits of I-9 forms
- A return to worksite enforcement actions (commonly known as raids)

Possible Elimination of Work Authorization Benefits

- Elimination of H-4 Employment Authorization Documents (EADs) for eligible dependents
- Change in policies granting automatic extensions of EADs to avoid employment gaps
- Ability to speed processing of EADs for eligible dependents through bundling could be ended

Key Takeaways

1. Review job descriptions, employee eligibility and sponsorship policies to prepare for higher scrutiny
2. Include considerations of travel and visa delays in business plans and strategies
3. Consider whether changes in humanitarian programs would affect your workforce
4. Evaluate how delays in processing could affect hiring and retention policies
5. Conduct self-audits to prepare for compliance investigations
6. Train staff how to respond to worksite visits

New Trump Administration Executive Orders

E.O. on Initial Recissions of Harmful E.O. and Actions (01.20.25)

- Trump revoked a long list of E.O. and actions by the Biden Administration, including:
  - E.O. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
  - E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government; and E.O. 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
  - E.O. 14069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency
  - E.O. 14099 of May 9, 2023, Moving Beyond COVID-19 Vaccination Requirements for Federal Workers
  - E.O. 14020, Establishment of the White House Gender Policy Council

E.O. Ending Illegal Discrimination and Restoring Merit-Based Opportunity (01.21.25)

- The E.O. does not change existing law, but signals the Trump Administration's focus on targeting organizations that violate anti-discrimination laws in employment practices.
- For Federal Contractors, it eliminates affirmative action plan obligations regarding race and gender and enforcement activity by the OFCCP regarding race or gender affirmative action plans.
- For all employers, the E.O. signals increased investigation and enforcement activities relating to DEI programs that utilize discriminatory preferences.

E.O. Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (01.20.25)

- The E.O. states federal agencies should only recognize two sexes (male and female) and applied to federal agencies and their employees.
- The E.O. signals future directives and restrictions will be applied, through agency action, to federal contractors, and recipients of federal funding.
- All employers should carefully consider policies and practices with respect to bathroom access and keep in mind several states require employers to provide bathroom access to employees based on gender identity while others restrict access to sex assigned at birth.

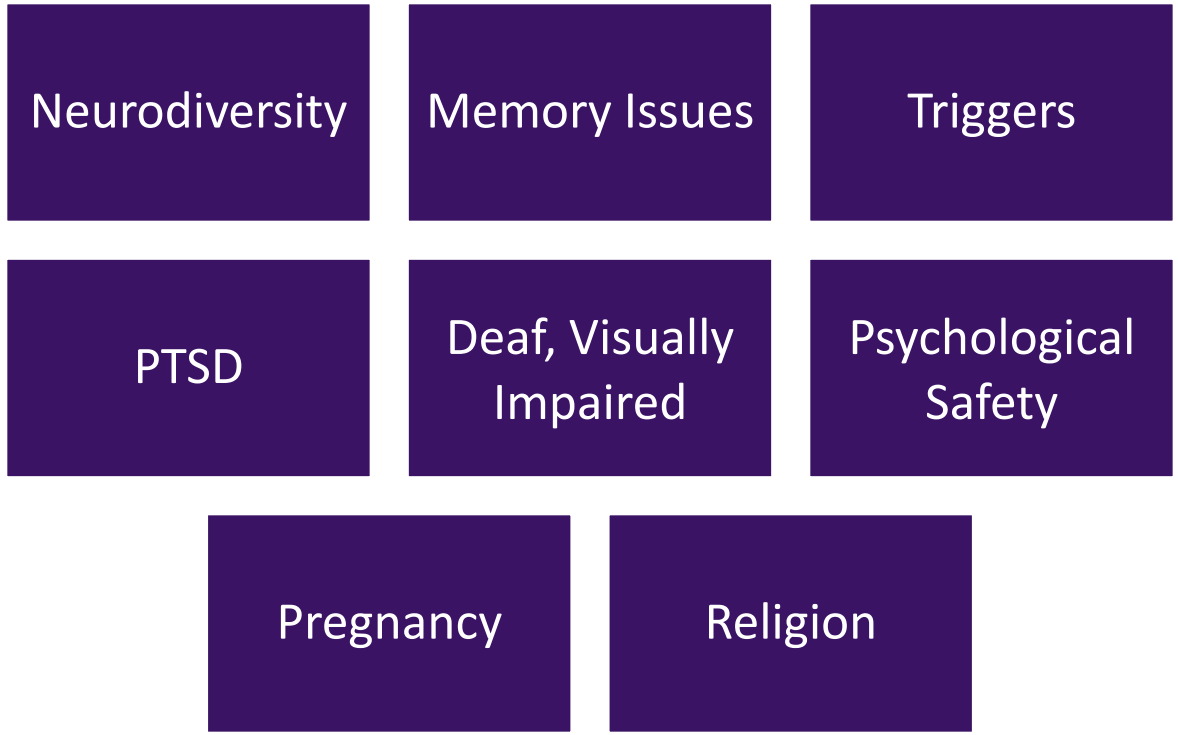
E.O. on Immigration

- Trump signed several E.O. addressing immigration, including:
  - **Ending Birthright Citizenship:** The Order will deny US citizenship, including passports, to children born in the US after Feb. 19, 2025, if at least one parent is not an American citizen or green card holder.
    - Litigation is pending
  - **Enhanced Vetting:** The Order signals travel bans from certain countries, similar to his first administration, are likely to come. These bans were upheld in *Trump v. Hawaii*, 585 U.S. 667 (2018).
  - **Creating "Homeland Security Task Forces":** Employers should have an action plain in place in the event of an ICE enforcement action ("raid").

Litigation on the Horizon for 2025

- PWFA
- ADA
- PDA
- Title VII
- FMLA
- USERRA

- **Buzz words**



Litigation on the Horizon for 2025 (cont'd)

- Failure to appropriately engage in the interactive process
- Failure to accommodate requests to continue to work from home made by employees who have been successfully working remotely or on hybrid schedules and nothing has changed about their jobs
- Failure to accommodate disability related commuting difficulties such as shift changes, flexible schedules, hybrid schedules etc.
- Medical examinations and inquiries that are either improperly timed and/or not job related and consistent with business necessity
- Mandatory referrals to EAP for evaluation/treatment based on threat of harm to self but threat is not connected in any way to the workplace
- Failure to hire or accommodate vision-impaired or hearing-impaired individuals during interviews, onboarding, training etc.

Litigation on the Horizon for 2025 (cont'd)

- Attendance policies that charge points for disability related absences
- Requests for accommodation for service and comfort animals at work
- Failure to hire or accommodate severe endometriosis symptoms (current EEOC action)
- Attendance policies that forgive points based on perfect attendance but do not excuse FML intermittent absences
- Failure to provide FML to employees standing in *loco parentis*
- Failure to recognize an employee's request to be excused from overtime or work a limited number of hours as reduced schedule FML

Litigation on the Horizon for 2025 (cont'd)

- Use of wearables for employees that track their activities and monitor their physical or mental condition in the workplace in such a way that the practice: runs afoul of the ADA's limited exceptions for employee medical exams or inquiries; violates the ADA's confidentiality obligations or state privacy laws; creates a disparate impact on various protected categories; fails to provide for consideration of requests for accommodation based on disability, pregnancy, or religion
- Use of AI hiring software and platforms that arguably screen out individuals with psychological disabilities who fail to answer questions with appropriate positivity, speech cadence, visual connection, and personality attributes
- Use of AI systems to monitor productivity without consideration of need for adjustment based on approved accommodations or lactation breaks
- Failure to provide private space and breaks for lactation

Litigation on the Horizon for 2025 (cont'd)

- Shortened statute of limitation clauses
- Continued increase in requests for religious accommodation requests in light of the *Groff* undue hardship standard
- Strength based tests as part of the hiring process that allegedly create disparate impact based on sex
- Military leave policies that provide less pay or benefits than other comparable non-statutory leaves of absence (consider policies such as jury duty leave, bereavement leave, sick leave, and parental leave)
- Parental leave policies that provide more benefits to birth mothers than fathers for the period after the birth mother is no longer medically incapacitated from working
- Reassignments to alternative positions in light of increased scrutiny after *Muldrow*
- More PWFA claims
- Former employees bringing ADA claims? We'll see what SCOTUS says this term

Key Takeaways

1. Differentiate PWFA, ADA and Title VII accommodation processes
2. Use appropriate forms and letters depending on the type of accommodation requested
3. Consider state and local laws
4. Review your policies, practices, and use of AI tools
5. Consider refresher training for your HR team, managers, and first-line supervisors
6. Monitor rapidly evolving leave and accommodation landscape

State & Local Legislation

Virginia

Virginia

- HB1730: Provides that in an action for injury to a person arising out of an act that would constitute criminal sexual assault committed by an employee or agent, such act shall be deemed to have occurred within the course and scope of his employment or agency if certain factors are proven by a preponderance of the evidence. The bill provides that the injured person has a cause of action whether or not the employee or agent has been charged or convicted of criminal sexual assault. (Pending in Committee).

- HB2400/SB1402 – Repeals statutory provisions limiting dissemination of criminal history record information related to marijuana possession.
  - Repeal and various revisions are effective 07.01.25, or earlier if certain sealing procedures take effect before that date

Virginia

- HB14/SB381: Provides that an employer's account shall not be relieved of charges relating to an erroneous payment if the Virginia Employment Commission determines that (1) the employer failed to timely or adequately respond to a written required for information related to the claim; and (2) the employer has established a pattern of failing to respond timely or adequately to such requests, as described in the law. (Becomes effective 07.01.25).

- HB1609: Requires health insurance policies, subscription contracts, and health care plans to offer and make available coverage for the diagnosis and treatment of infertility and for standard fertility preservation procedures, as such terms are defined in the bill. (Pending in subcommittee).

Maryland

Family and Medical Leave Insurance Program - Modifications

- Effective 10.01.24 | Enacted 04.25.24
- Payroll deductions to fund the state paid family and medical leave program begin 07.01.25
- Benefits will be available beginning 07.01.26

Noncompete and Conflict of Interest Provisions

- **Maryland HB 1388**
- Effective 07.01.25 | Enacted 04.25.24
- Non-compete and conflict of interest provisions for healthcare professionals licensed under the Health Occupations Article who provide “direct patient care” will be banned or restricted

Privacy

- **Maryland HB 567/SB 541**

- Effective 10.01.25 | Enacted 05.09.24
- Establishes, generally, the manner in which a controller or a processor may process a consumer's personal data
- Authorizes a consumer to exercise certain rights in regard to the consumer's personal data
- Requires a controller of personal data to establish a method for a consumer to exercise certain rights in regard to the consumer's personal data

State Trends

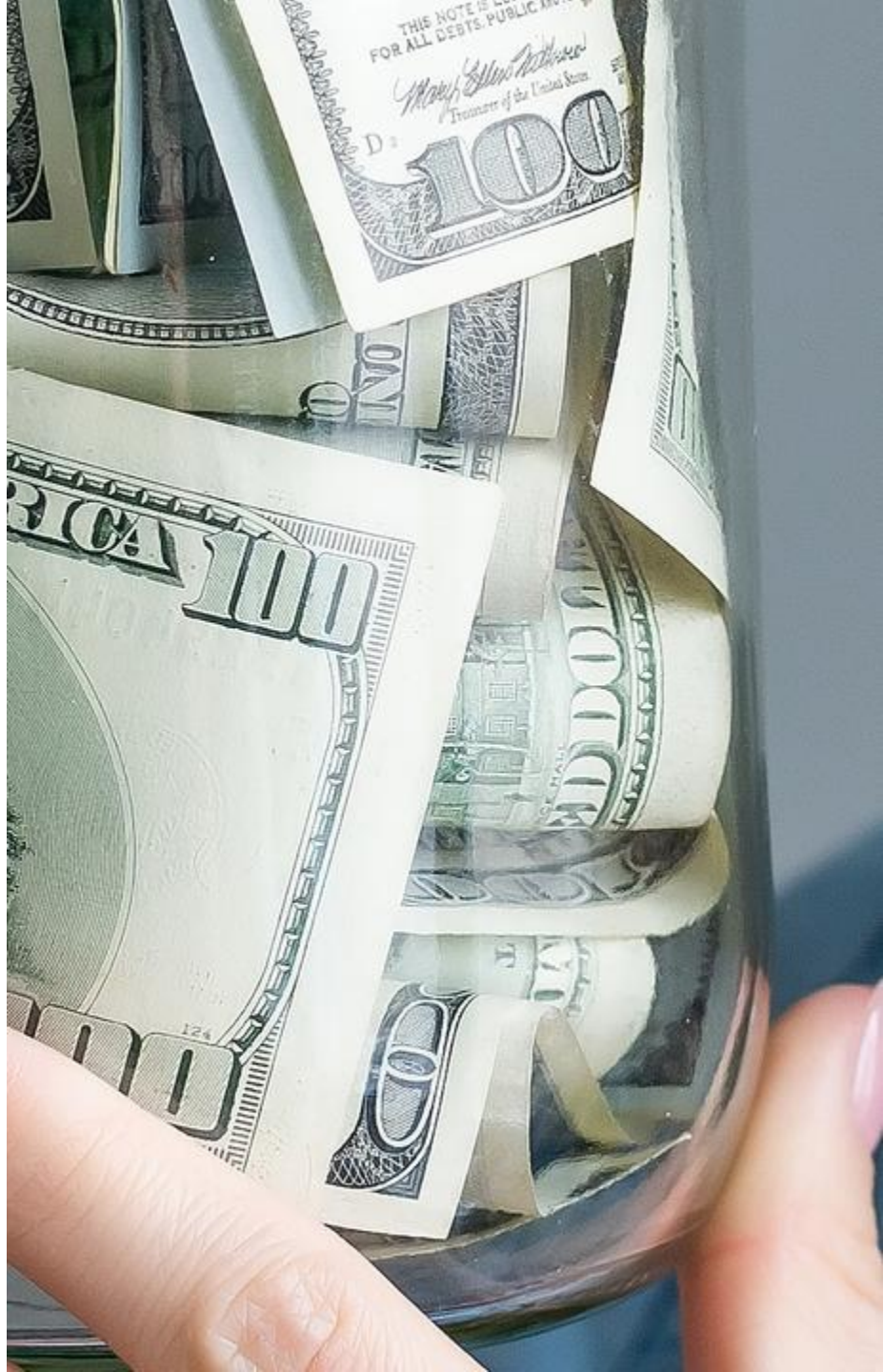
Pay Transparency

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.
- State laws requiring pay disclosure in job ads: Washington, California, Colorado, New York, Hawaii, Illinois
- Pending: numerous states
- Federal legislation: Introduced in Congress in 2023: Salary Transparency Act (with private right of action)
  - Pending in the House Committee on Education and the Workforce.

Pay Transparency Laws Effective in 2025

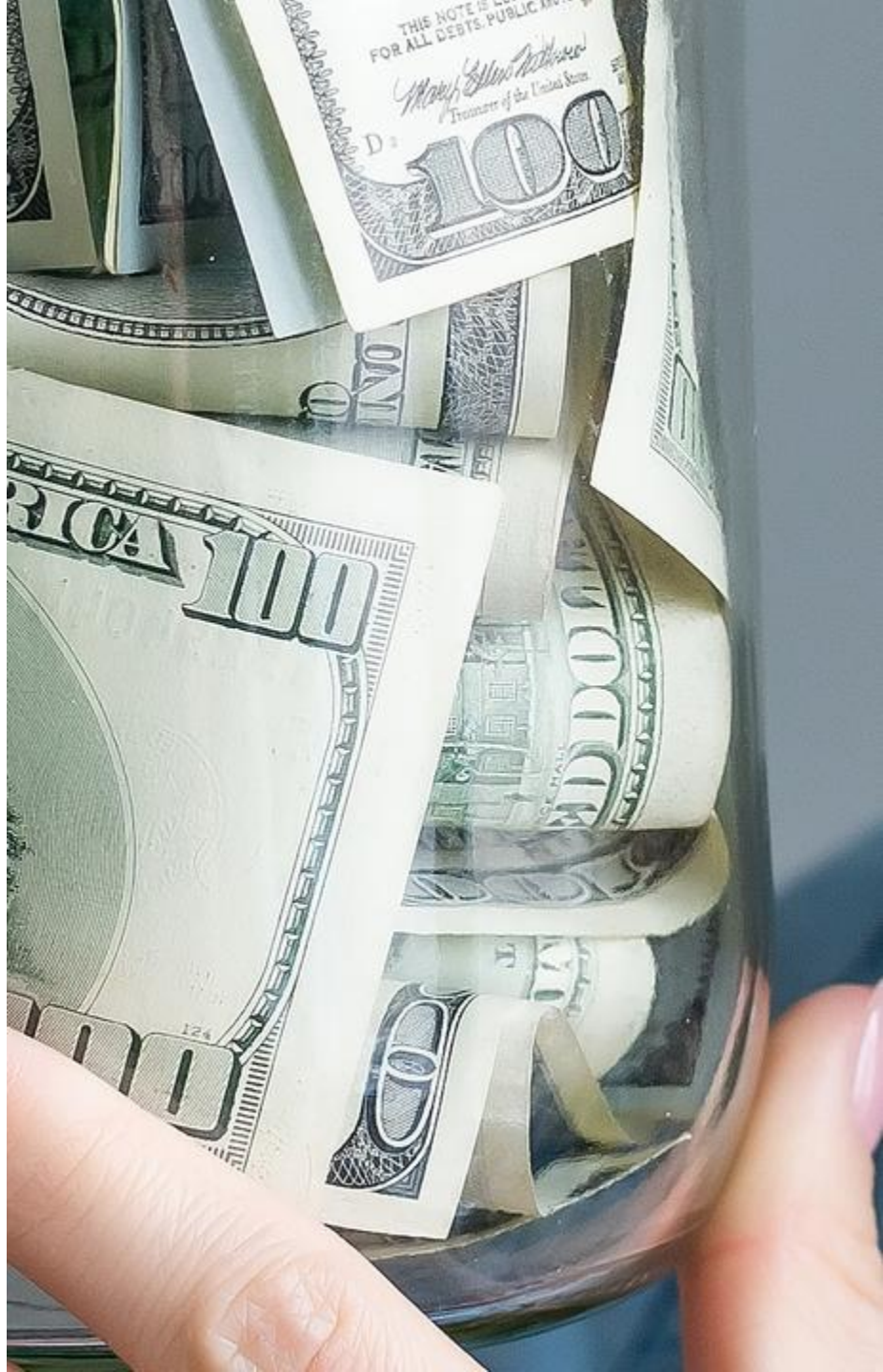
- **Massachusetts HB 4890 –**
  - Effective 10.29.25 | Enacted 07.31.24
  - Requires Massachusetts employers with 25 or more employees in the commonwealth to disclose the pay range for jobs in the posting of the position and to employees offered a promotion or transfer and to an employee or applicant upon request
- **New Jersey AB 4151/SB 2310 –**
  - Effective 06.01.25 | Enacted 11.18.24
  - Requires transparency concerning compensation with promotional opportunities and in employment listings
  - Provides that an employer must make reasonable efforts to announce, post, or otherwise make known opportunities for promotion
  - Provides that an employer's failure to comply for one promotional opportunity will be considered one violation for all listings of a particular promotion, even if that promotion is listed on multiple forums
  - Provides for civil penalties



Pay Transparency Laws Effective in 2025 (cont'd)

- **Minnesota HF 3947/SF 3852–**
  - Effective 01.01.25 | Enacted 05.17.24
  - Requires employers with at least 30 employees to include pay rate and benefits information in job postings and solicitations

- **Vermont HB 704–**
  - Effective 07.01.25 | Enacted 06.04.24
  - Requires most written job advertisements to include certain information regarding the type and range of monetary compensation that an employer expects to offer



New Laws Going into Effect January 2025

State Minimum Wage Increases Effective January 1, 2025

Increased Due to a 2024 Legislative Change or Ballot Initiative

- Minnesota
- Missouri

Increased Due to a Preciously Established Rate Schedule or Regular Annual Adjustment Based on Economic Factors

- Alaska
- Arizona
- California
- Colorado
- Connecticut
- Delaware
- Illinois
- Maine
- Michigan (will inc. again Feb. 21, 2025)
- Montana
- Nebraska
- New Jersey
- New York
- Ohio
- Rhode Island
- South Dakota
- Vermont
- Virginia
- Washington

Leave Laws – Effective January 1, 2025

- California (AB 2123) – Employers will no longer be permitted to require employees take up to 2 weeks of earned but unused vacation days in order to begin receiving benefits under the state's paid family leave program.
- Connecticut (HB 5005)– Expanded paid sick leave
- Minnesota (Omnibus Bill) – MN's new Earned Sick and Safe Time law requirements apply to other paid time off when used for an ESST-qualifying purpose.
- New York (Budget Bill) – NY employers required to provide pregnant employees with 20 hours of paid prenatal leave each year in addition to any paid sick leave required under state law.

Leave Laws – On Horizon 2025 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)

Miscellaneous

- California SB 399; Illinois SB 3649 – CA employers will be subject to a civil penalty or civil action if they hold mandatory meetings that discuss religious or political matters, including union representation discussions; IL employers prohibited from holding mandatory meetings with employees concerning religious or political matters, including union representation discussions.
- California SB 988 – New “basic worker protections” and other requirements will apply to contracts between hiring parties and freelance workers entered into or renewed on or after January 1, 2025.
- California SB 1137 – CA first state to protect against intersectional discrimination in the workplace, meaning discrimination based on a combination of protected characteristics.
- Kentucky SB 47 – KY’s Medical Cannabis Program kicks off in January 2025. Employers are permitted to set rules restricting even lawful use by employees.

Tech Talk: AI Regulations + Data Privacy

Federal Government + AI Guidance

- **DOL**
  - "AI in the Workplace Under FLSA and Other Federal Standards"
    - Emphasizes that statutory protections apply as usual, irrespective of the new tools and systems employers are using
  - "AI and Worker Well-Being"
    - Sets forth principles for AI developers and employers in the use of AI and its effect
      on employees
- **OFCCP**
  - "Artificial Intelligence and Equal Employment Opportunity for Federal Contractors"
    - Provides 10 "frequently asked questions"
      followed by a list of "promising practices" for the development and use of AI by federal contractors

Federal Government + AI Guidance (cont'd)

- **EEOC**

- "Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964"
  - Q&A on whether and how employers should monitor algorithmic decision-making tools to determine whether these procedures cause disproportionately large negative effects on the basis of race, color, religion, sex, or national origin under Title VII

- "The Americans with Disabilities Act (ADA) and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees"
  - Explores how the use of certain tools that rely on algorithmic decision-making may disadvantage job applicants and employees with disabilities, and practical tips for complying with the ADA.

State AI Developments: Colorado

- Effective date: 02.01.26
- High-risk AI systems: Defined as systems making consequential decisions affecting areas like employment, education, healthcare and more
- Role-specific obligations
    - Developers: Must provide necessary documentation and mitigate algorithmic discrimination
    - Deployers: Required to conduct risk management and impact assessments and to provide consumer rights

State AI Developments: Colorado (cont'd)

- Consumer rights: Includes the right to notice, explanation, correction and appeal for decisions made by high-risk AI systems
- Algorithmic discrimination: Duty of care to prevent both intentional discrimination and disparate impact
- Enforcement: Colorado Attorney General has significant authority to enforce the law

State AI Developments: California

- Effective date: 01.01.26
- Creates California AI Transparency Act
- Ensures transparency in the training data used for generative AI systems
- Applies to developers of generative AI systems or services, including substantial modifications

State AI Developments: California (cont'd)

- **Disclosure Requirements**
  - High-level summary of datasets used
  - Sources or owners of the datasets
  - Description of how datasets further the AI system's purpose
  - Number and types of data points in the datasets
  - Information on whether datasets include copyrighted, trademarked, or patented data
  - Details on whether datasets are purchased, licensed or include personal information
  - Description of any data cleaning, processing or modifications
  - Time period of data collection and notice if ongoing

State AI Developments: California (cont'd)

- Comprehensive proposed AI regulations under the California Consumer Privacy Act move forward concerning Automated Decision-Making Technology (ADMT)
- Civil Rights Council examining comments to Initial Text for Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems

State AI Developments: Illinois

- New laws address use of generative AI and digital likeness, publicity rights
- Updates its civil rights law to make clear that uses of artificial intelligence, including generative AI, could constitute civil rights violations

State Privacy Laws Taking Effect in 2025

- **January 1**
  - Delaware Personal Data Privacy Act
  - Iowa Consumer Data Protection Act
  - Nebraska Data Privacy Act
  - New Hampshire Consumer Data Protection Act
- **January 15**
  - New Jersey Data Privacy Act
- **July 1**
  - Tennessee Information Protection Act
- **July 31**
  - Minnesota Consumer Data Privacy Act
- **October 1**
  - Maryland Online Data Privacy Act

Trends in Data Privacy and Security Litigation and Regulatory Enforcement

- Increase in data breach class actions
- Website tracking technology claims
- Illinois Biometric Information Privacy Act and Genetic Information Privacy Act claims
- AI and data privacy actions: Legal challenges to AI's use of personal data and decisions made with assistance from AI
- Regulatory enforcement actions: Aggressive enforcement by state AGs and industry regulators

Key Takeaways

1. Difficult to predict how change in administration will impact federal government guidance on AI
2. Likely 2025 will see more state laws on AI regulation for not only developers, but also deployers
3. Privacy litigation will continue to grow as plaintiffs' bar tests out new
4. Likely to see more state-level enforcement actions of state privacy and security laws
5. Organizations should take preventative measures to protect personal data they maintain (including data processed by their vendors)
6. Organizations should take stock of data they maintain to determine how to ensure privacy law compliance

2025: Five Issues to Monitor

2025 Issues to Monitor (Predictions!)

1. As the federal government recedes on enforcement of employee laws, states step up, including becoming more active in legislation
2. Ongoing litigation over the executive orders and resulting regulatory uncertainty
3. Discrimination and other core employment claims actually increase in value in traditionally progressive areas
4. “Reverse” discrimination claims based on DEI programs, including internal complaints
5. Potential wave of economic impacts, especially in the DMV, and the resulting increase in employment claims

Questions?

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Thank you.

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