The 2025 Employment Law Year in Review

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Andrew Sakallaris
General Counsel
LMI

John Remy
Jackson Lewis PC
John.Remy@jacksonlewis.com

Anna Margolis
Jackson Lewis PC
Anna.Margolis@jacksonlewis.com

JacksonLewis

Agenda

- 2025 Predictions Recap
- Trump Administration Executive Orders
- Litigation Roundup & Congressional Action
- Agency & Statutory Developments
- State & Local Legislation
- State Trends
- Workplace Considerations in a Globally Mobile, AI World
- Looking Ahead

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Issues to Monitor in 2025
How Did We Do?

2025 Predictions: How Did We Do?

1. States becoming more active in legislation as the federal government receded on the enforcement of employment laws
2. Litigation regarding Executive Orders and regulatory uncertainty
3. Increase of discrimination and other core employment claims in traditionally progressive areas
4. “Reverse discrimination” claims based on DEI programs
5. Economic impact in the DMV resulting in increased employment claims
6. More state paid family leave laws

New Trump Administration Executive Orders Since January 2025

Since January 20, 2025:

Over 100 Executive Orders, including

- Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- Ending Radical and Wasteful Government DEI Programs and Preferencing
- Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- Restoring Equality of Opportunity and Meritocracy

Over 100 lawsuits challenging various actions

EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

What Does the EO Say?

- Directs federal agencies/Attorney General to take action to implement the principles of the EO
- Required them to submit a report within 120 days that identifies:
  - "key sectors of concern," "egregious and discriminatory practitioners," and a plan to deter illegal DEI programs
  - "up to nine potential civil compliance investigations" of big targets
  - "other strategies" to encourage the private sector to end illegal DEI discrimination and preferences, including appropriate potential litigation for the administration to pursue.
- Ending "discriminatory" DEI programs a priority for new EEOC

What Does the EO Say?

Revokes EO 11246

and

Eliminates affirmative action requirements for race and sex

EO 11246 is Revoked

What Hasn't Changed?

- Affirmative action plans for individuals with a disability
- Affirmative action plans for protected veterans
- EEO-1 reporting (for employers with 100+ employees)
- VETS-4212 Reporting
- State or local contractor affirmative action requirements (e.g. Ohio, MN, NYC)
- State or local pay data reporting requirements (e.g. CA, IL, MA)

Contract Clause – False Claims Act

- EO calls for the development of a new contract term for inclusion in federal contracts, which will require contractors to agree that "**compliance in all respects with all applicable Federal anti-discrimination laws** is material to the government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code [the False Claims Act]."
- The EO requires contractors to **certify that they do not operate any illegal DEI programs**
- The White House Fact sheet accompanying the Executive Order notes this certification will be an "*unmistakable affirmation that contractors will not engage in illegal discrimination, including illegal DEI*"

EO 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing

What Does the EO Say?

Each agency is directed to:

- Terminate to the maximum extent allowed by law:
  - All “equity-related” grants or contracts;
  - All DEI or DEIA performance requirements for employees, contractors, or grantees.
- Provide the Director of the OMB with a list of all:
  - Federal contractors who have provided DEI training or DEI training materials to agency or department employees; and
  - Federal grantees who received Federal funding to provide or advance DEI, DEIA, or “environmental justice” programs, services, or activities since January 20, 2021.

EO 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

What Does the EO Say?

- Federal funds shall not be used to promote gender ideology.
- Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.

EO 14281: Restoring Equality of Opportunity and Meritocracy

What Does the EO Say?

- Revokes Presidential approvals of the parts of regulations that prohibit disparate impact discrimination under Title VI;
- Instructs Agencies to:
  - Deprioritize enforcement of disparate-impact liability
  - Repeal/amend the implementing regulations for Title VII re: disparate-impact
  - Assess pending investigations, proceedings, civil suits, or positions that rely on a theory of disparate-impact liability
  - Re-evaluate existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability
  - Consider challenges/preemption of State laws that impose disparate-impact liability

What it Means in Broad Strokes

The EOs

- Enforce prohibition on “illegal DEI” in employment
- Stop federal funds from going to support “DEI” or “gender ideology”

Why the EOs Matter

The Risk Has Changed

- Increased investigations and plans for private employer compliance
- Encourages whistleblowers (potential False Claims Act claims)
- More internal and external complaints
- More requests for religious accommodations
- Potential criminal prosecution?
- Federal contractors and grantees at higher risk
- Impact on funding

Litigation on the Horizon for 2026 (EO related)

"Reverse" discrimination claims – internal complaints, charges, litigation.

- Diversity initiatives, cultural inclusion issues leading to a new harassment claims
- Access to programs, failure to promote, etc.,
- Parental leave programs that favor mothers

Religion claims

- Policies or practices that are not consistent with an employee's religious views, leading to internal complaints and harassment claims – bathrooms, pronouns, etc.

Backlash litigation

- Employers need to ensure that behavior by co-workers and managers continues to conform to expectations

Litigation Roundup

Notable 2025 Supreme Court Cases

- *E.M.D. Sales v. Carrera* (January 15, 2025) – good news for employers defending FLSA-exempt classifications
- *Ames v. Ohio Dept. of Youth Services* (June 5, 2025) – one evidentiary standard for all Title VII plaintiffs
- *Stanley v. City of Sanford, Florida* (June 20, 2025) – roadmap for post-employment ADA claims
- *Trump v. CASA, Inc.* (June 27, 2025) – major limit on District Courts' injunction power

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."

Ames v. Ohio Dept. of Youth Services (No. 23-1039)

SCOTUS, Decided June 5, 2025

- **Issue:** Does a plaintiff who belongs to a majority group need to demonstrate "background circumstances suggesting that the defendant is the unusual employer who discriminates against the majority" in order to establish a *prima facie* case of discrimination under Title VII?
- **Held**: No, Title VII does not support imposing a heightened burden (the "background circumstances" test) on majority-group plaintiffs.
- Textual Analysis: Title VII "draws no distinctions between majority-group plaintiffs and minority-group plaintiffs" and "Congress left no room for courts to impose special requirements on majority-group plaintiffs alone."
- **Takeaway**: The decision emphasizes that Title VII's protections are broad and symmetrical and this may invite additional discrimination claims by members of majority groups.

What does this mean for employers?

- Eliminates a barrier that some courts had imposed on “reverse discrimination” claims, confirming that Title VII does not distinguish between majority and minority status when evaluating allegations of intentional discrimination.
- Employers should anticipate that plaintiffs of any background can invoke the same *prima facie* standards when bringing Title VII claims.
- This decision may lead to an increase in claims, including by those challenging DEI initiatives as unlawful discrimination.

Stanley v. City of Sanford, Florida (No. 23-997)

SCOTUS, Decided June 20, 2025

- In *Stanley*, the Court held that the ADA does not protect a former employee who no longer holds or seeks an employment position from disability-based discrimination in post-employment benefits. The employment provisions of the ADA apply only to "qualified individuals" who currently hold or want a position and can perform its essential functions with or without an accommodation.
- Barred a retiree's ADA discrimination claim over retirement health benefits

Trump v. CASA, Inc.

(No. 24A884)

SCOTUS, Decided

June 27, 2025

- The case stemmed from an Executive Order by President Trump attempting to restrict birthright citizenship under the 14th Amendment.
- Significantly narrowed the ability of District Courts to issue "universal" or "nationwide" injunctions—through which enforcement of a federal policy can be halted or blocked across the United States, rather than only as to the parties (plaintiffs) in the case.
- The 6-3 Court majority held that universal injunctions *likely exceed* the equitable authority granted to federal courts under the Judiciary Act of 1789 (signaling that limited avenues for nationwide relief still exist)

Employer Takeaways from Trump v. CASA

- Changed litigation strategy – plaintiffs will now have a much harder time obtaining so-called "universal" injunctions to block federal executive orders and agency actions that they oppose. Plaintiffs must rely more on class actions, associational standing, or suing as states to achieve broad effects.
- Shift in power – reallocates power, giving the executive branch more authority to implement national policies while federal courts offer localized remedies.
- May lead to more state Attorney Generals filing suits to block federal actions.

Changing Employment Litigation Landscape

- Federal employment filings continue to climb, from 20,895 in 2022 to 25,367 in 2025
- Trials of employment claims in federal courts have also increased, from 169 in 2024 to 194 in 2025
  - Plaintiffs' winning percentage at trial also increased, from 47% in 2024 to 60% in 2025
- Increase of nuclear verdicts (> $10 million) and "policy-limits" settlement demands incentivizes plaintiffs' counsel to proceed to trial unless they obtain an inflated settlement
- Resulting pushback from employers who more frequently turn to "bet-the-company" approach to high stakes litigation

** Statistics from Lex Machina as of 12/16/25*

Congressional Action

American Franchise Act Seeks to Clarify Joint Employer Rules

- A group of U.S. Senators introduced the American Franchise Act aimed at clarifying the joint employer standard under the Act and under the Fair Labor Standards Act.
- The proposed legislation defines key employment terms, such as wages, benefits, hours, and supervision, and specifies that joint employment requires an entity to have substantial direct and immediate control over these conditions.
- Bill is intended to balance worker protections with the operational independence of franchise businesses.

House passes bill to restore federal workers' bargaining rights

- Protect America's Workforce Act (HR 2550)
- A step toward reversing the changes President Donald Trump enacted earlier this year which stripped collective bargaining protections for large swaths of the federal workforce
- Pending in the Senate

Agency & Statutory Developments

National Labor Relations Board

NLRB

- The NLRB has regained a quorum for the first time in 11 months after the U.S. Senate voted on 12/18/25, to confirm management attorney Scott Mayer and longtime Board official James Murphy to the two vacant Board member seats
- The NLRB has lacked a quorum since January 2025, following the firing of Member Gwynne Wilcox. Given the lack of quorum, not many Board decisions were issued in 2025.
  - There is a growing case back log from the past year
  - Decisions issued will likely lean toward more employer-friendly precedent
- The U.S. Senate also confirmed management-side attorney Crystal Carey for the NLRB General Counsel position

Recent Key ALJ Decision

- On December 3, 2025, an administrative law judge for the Board recently held that Amazon.com Services LLC violated Section 8(a)(1) of the NLRA by maintaining overly broad confidentiality, non-solicitation, and non-interference provisions in its nationwide employment agreements.
- The judge found that the agreements, which are required for all exempt and non-exempt employees as a condition of employment, contained language that a reasonable employee could interpret as restricting the exercise of their Section 7 rights, such as discussing working conditions, engaging in organizing activity, or encouraging others to support collective action. The judge emphasized that ambiguities in workplace rules are construed against the employer and that rules are unlawful if they could reasonably chill protected concerted activity.

Ordering Union Recognition

- The Biden Board made it easier for unions to circumvent the Board's election procedures
- And, if an employer commits a ULP that would require the election to be set aside, the Board will dismiss the petition without an election and order the employer to recognize and bargain with the union
- Not likely to survive the Court of Appeals; but if it does, the Board will likely reverse it

Work Rules + Handbook Policies

- Likely return to a more consistent, employer-friendly standard (overturning *Stericycle*)
- *Stericycle* overturned the *Boeing* decisions, which classified company rules into three categories:
  1. Rules that are lawful to maintain under the NLRA;
  2. Rules that warrant individualized scrutiny; and
  3. Rules that are unlawful and the adverse impact on NLRA rights is not outweighed by justifications associated with the rules.

Independent Contractor Test

- The Trump Board will likely return to the *SuperShuttle* test for determining if an individual is an independent contractor
- This test focuses on the extent to which the arrangement between the ostensible employer and the alleged employee provided an "**entrepreneurial opportunity**" to the individual
- This is a shift from the current lower standard under *The Atlanta Opera Inc*. that makes it easier to establish employee status
- Ultimately, the Board interprets the Court's position on the independent contractor test, and for that reason, this issue is likely to be resolved in the Courts

Mandatory "Captive Audience" Meetings

- A Trump Board will likely return to longstanding precedent that permitted employers to hold mandatory captive audience meetings during union election campaigns
- As long as employees were not threatened, interrogated, punished, or promised benefits, these meetings were permitted under the Act
- Useful tool for employers in messaging employees
- Some states have already enacted laws containing restrictions on captive audience meetings (NY, CT, OR, IL, NJ) with ongoing legal challenges that will likely be determined by the courts

“Quickie Election” Final Rule

- The Biden Board issued a final rule returning to its “**quickie election**” rules
  - Tight timelines on hearing dates and elections, promotes election speed over clarity of legal issues
- A Trump Board will likely issue a notice of proposed rulemaking to return to the 2019 rules
  - The 2019 rules emphasized pre-election clarity
- More time for the Board to receive papers, hold a formal hearing, review briefs, issue a thorough decision, and conduct an on-site secret ballot election

Election Procedures Final Rule

- A Trump Board will likely issue a final rule similar to its 2020 rule on union election procedures
  - Rule would modify the Board's blocking charge policy, directing that elections be held as scheduled, irrespective of pending unfair labor practice charges
    - Ensure employees have a chance to be heard and not have their vote delayed
- Rule will also likely reestablish the Trump-era voluntary recognition policy
- Would limit the period employees and competing unions could file an election petition challenging recognition to a 45-day period after recognition

Occupational Safety and Health

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 (*see* Heat Workforce Standards Act of 2025)
- Employers should be mindful of state-level safety regulations such as Cal/OSHA's recent indoor heat safety regulations

Heat Workforce Standards Act of 2025 (H.R. 6213)

- **Status:** Introduced; in committee
- **Purpose:** Prevent the Department of Labor from finalizing, implementing, or enforcing OSHA's proposed heat injury and illness prevention standard
- **Key Requirements/Changes:**
  - Prohibit enforcement of any OSHA standard specifically regulating occupational heat exposure
  - Effectively halt OSHA's current rulemaking on heat-related workplace protections

Heat Workforce Standards Act of 2025 (cont'd)

Employer Takeaways:

- Would significantly limit OSHA's authority to regulate heat exposure
- If enacted, employers would not be subject to a federal heat illness prevention standard
- State plans or general-duty-clause enforcement could still influence heat-safety expectations

Liability for Violations

- Employers found in violation of OSHA standards face significant civil and potentially criminal liability. Fines vary depending on the severity and nature of the violation:
- **Other-than-serious and serious violations:** Maximum penalty has increased from $16,131 to $16,550 per citation
- **Willful or Repeat violations:** Increased to $165,514 per citation
- **Failure to Abate:** Up to $16,550 per day beyond the abatement deadline
- **Criminal penalties** are possible in cases involving a willful violation that results in a fatality, with referrals made to the U.S. Department of Justice

Other Trends

- Heat injury and illness prevention remains a developing area
- Smart technology like wearable sensors, smart helmets, AI monitoring systems
- Continuing focus on mental health and workplace stress
- Home office safety for remote workers

Equal Employment Opportunity Commission

EEOC

- Early in his administration, President Trump fired two Democratic commissioners along with then-EEOC general counsel Karla Gilbride, leaving the position vacant and the EEOC without a quorum
  - Andrea Lucas (first appointed by Trump in 2020) is now Chair of the Commission
  - Senate confirmed Brittany Panuccio on 10.07.25 restoring a quorum at the EEOC and giving Republicans a majority on the Commission

EEOC (cont'd)

- Trump nominated M. Carter Crow as General Counsel
  - As former president of the Houston Bar Association and global head of employment litigation at Norton Rose Fulbright, the EEOC GC's office will be led by an experienced litigator who is likely familiar with employers' perspectives on many employment law issues

EEOC's Objectives + Priorities

"[R]ooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement."

01.21.25 EEOC Press Release

EEOC's Objectives + Priorities (cont'd)

- National origin discrimination against Americans
- Eliminating all race and sex discrimination including against white male employees and applicants
- Religious accommodations
- Gender identity
- Now that the EEOC has a quorum again, the Commission is expected to formally rescind the vacated guidance in accordance with President Trump's January 2025 executive order directing agencies to withdraw conflicting provisions

EEOC Guidance

- What You Should Know About DEI-Related Discrimination at Work | U.S. Equal Employment Opportunity Commission
  - Taking an employment action "motivated—in whole or in part—by race, sex, or other protected characteristic."
  - "The EEOC's position is that there is no such thing as "reverse" discrimination; there is only discrimination."
  - "[L]imiting, segregating, or classifying employees or applicants based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities"
  - "In order to allege a colorable claim of discrimination, workers only need to show 'some injury' or 'some harm' affecting their "terms, conditions, or privileges" of employment."

What Is "Illegal DEI"?

If you are running a program, whether you call it DEI or something else, and you are using race or sex or another protected characteristic in an employment decision, even if it's only just part of the decision… that's unlawful discrimination

-- Andrea Lucas

https://www.wsj.com/articles/trumps-employment-bias-fighter-has-dei-in-her-crosshairs-3bdc505d

EEOC Guidance: ERGs

- Prohibition "applies to employee activities which are employer-sponsored (including by making available company time, facilities, or premises, and other forms of official or unofficial encouragement or participation), such as employee clubs or groups."
- "Unlawful segregation can include limiting membership in workplace groups, such as Employee Resource Groups (ERG), Business Resource Groups (BRGs), or other employee affinity groups, to certain protected groups."
- Prohibits separating employees "into groups based on race, sex, or another protected characteristic when administering DEI or any trainings, workplace programming or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources."

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EEOC Guidance: DEI Training

"Depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context. In cases alleging that diversity trainings created hostile work environments, courts have ruled in favor of plaintiffs who present evidence of how the training was discriminatory (for example, in the training's design, content, or execution) or, at the motion-to-dismiss stage, who make plausible allegations that explain how the training was discriminatory."

Areas to Review for Potential DEI Risks

- "DEI" references
- Numeric representation goals
- Mission statements/values (of the organization or of a DEI Council)
- Pronoun policies
- ERGs/affinity groups
- Celebration days (Black History Month, Women's History Month, etc.)
- Workplace training distribution/opportunities, leadership training
- Mentorship, intern and fellowship opportunities
- DEI related philanthropy or scholarships
- External surveys and partnerships
- DEI training
- Diverse slates, diverse hiring panels and other recruiting practices.
- Supplier diversity
- Self-identification of protected characteristics

National Origin Discrimination

- On 11.09.25, the EEOC released guidance titled Discrimination Against American Workers Is Against the Law
- Title VII protects all workers from national origin discrimination; treating American workers less favorably because of national origin is unlawful
- Examples of unlawful practices include job ads that prefer workers of a specific nationality or visa status, disparate treatment in hiring/firing, and harassment based on national origin
- Common business reasons like customer preferences, lower labor cost, or perceived productivity differences do not justify discrimination against American workers

Disparate Impact Claims

- President Trump signed an EO in April instructing agencies to deprioritize disparate impact claims
- The EEOC is unlikely to pursue disparate impact claims against employers
- An internal EEOC memo (Oct. 2025) reportedly directs the agency to discharge all disparate impact discrimination claims

DOJ +DEI

Increased enforcement

- The Attorney General directed DOJ's Civil Rights Division to "investigate, eliminate, and penalize" illegal DEI programs in the private sector and educational institutions
- The DOJ has issued civil investigative demands (CIDs) to employers seeking detailed information on their DEI programs
- The Civil Rights Fraud Initiative expressly uses the False Claims Act (FCA) to scrutinize recipients of federal funds whose DEI practices might violate federal civil-rights laws, including alleged "racial preferences"

Increased Enforcement

- Because these investigations can precede formal litigation, the DOJ will use them both as enforcement and deterrent tools
- The FCC has considered DEI initiatives in approving transactions

EEO-1 Reporting

- The EEO-1 Report is a collection of employee race, ethnicity, and sex data reported by job category
- For years, the EEOC and the Office of Federal Contract Compliance Programs used the report to identify potential workplace discrimination trends
- Uncertain how the agency will manage the future of the annual EEO-1 Report

EEOC's Harassment Guidance

- In the 01.20.25, Executive Order 14168, "**Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government**," President Trump directed the EEOC to rescind all guidance inconsistent with the terms of the Order, including the 2024 harassment guidance
- The EEOC just rescinded Enforcement Guidance on harassment about a week ago

Religion

“[T]he EEOC is restoring evenhanded enforcement of Title VII—ensuring that workers are not forced to choose between their paycheck and their faith”

Andrea Lucas, 08.22.25

Religion (cont'd)

- In August, the EEOC published "**200 Days of EEOC Action to Protect Religious Freedom at Work**" acknowledging the agency's work "**to defend the religious liberty of American workers**"
- Driven by the EEOC's priorities under the Trump Administration and the 2023 SCOTUS decision in *Groff v. DeJoy* discussing the undue hardship standard under Title VII, employers should expect to see a continued emphasis on religious accommodation from the EEOC and employees
- The Office of Personnel Management issued guidance related to federal workers' rights to practice their religious faith in the workplace. Unclear whether EEOC will extend similar guidance to private workplaces
- Employers should be alert for faith-based accommodation requests that may conflict with other Title VII protections

EEOC Litigation Focus on Religion

2025 cases signal more of the same for 2026

- 7 Failure to accommodate requests for time off to observe the Sabath or attend religious observances, some have been settled by consent decrees ranging from $80,000 - $303,758
- 3 Failure to accommodate the wearing of skirts for religious reasons, some of which have settled by consent decrees ranging from $47,500-$61,000
- Multiple cases alleging failure to accommodate religion related to COVID-19 vaccine policies resulting in significant settlements
- Failure to accommodate beards and time off for religious reasons

EEOC Litigation Focus on Religion (cont'd)

2025 cases signal more of the same for 2026

- Repeatedly asking an employee to remove their hijab head covering, which settled for $20,000
- Antisemitism harassment and retaliation cases
- Firing non-supervisory employee who frequently posted Bible verses and faith-based messages on his personal social media account which did not mention workplace or coworkers

Recommendations for How to Address Religious Accommodation Issues

1. Policy review – anti-discrimination and accommodation policies should be updated regularly to ensure compliance with changing laws. Ensure that policies apply equally to all faiths and nonreligious beliefs
2. Interactive process – engage in documented, good faith dialogue to identify reasonable options for accommodations
3. Manager and HR training – supervisors should be trained to recognize and appropriately respond to religious accommodation requests

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.

Pregnant Workers Fairness Act (Updates)

- Expect changes to the Final Rule
- Lucas supports the PWFA, but issued a public statement on 04.03.24 that she believes the final regulations go too far
- According to the statement, the rule's interpretation is overly broad and conflates accommodations related to pregnancy and childbirth with accommodations related to female biology and reproduction in general
- Lucas specifically disagreed with the inclusion of abortion within the scope of "**related medical conditions**"

Department of Labor

DOL

- DOL's Wage and Hour Division has focused more efforts on compliance assistance
- Relaunched voluntary Payroll Audit Independent Determination (PAID) program
- Will no longer seek liquidated damages when trying to settle wage violations through administrative proceedings
- Resurrected opinion letter program

DOL

- Regulatory rollback
- Rulemaking from prior administrations has been rescinded, DOL has declined to enforce, or defense of the regulations in litigation held in abeyance:
  - 2024 minimum salary rule
  - 2024 independent contractor rule
  - Rule implementing executive order increasing minimum wage for federal contractors
  - 2023 Davis-Bacon Act rule changes
  - Phase-out of 14(c) subminimum wages for workers with disabilities

DOL: On the Agenda – Watch for:

- Independent contractor proposed rule
- Joint employment proposed rule
- Proposed rule defining EAP, outside sales, and computer professional exemptions
- Proposed rule to rescind dual jobs rule for tipped workers in its entirety

DOL Independent Contractor Proposed Rule

- The DOL rule addresses independent contractor status *under the FLSA*
- The new rule likely will return to the independent contractor factors adopted by rulemaking late in the first Trump administration
  - This test focused on **two "core" factors** as having the greatest weight:
    1) The nature and degree of control over the worker's work; and
    2) The worker's opportunity for profit or loss based on initiative and/or investment

DOL Joint Employer Proposed Rule

- The rule will guide DOL enforcement of joint employer liability **under the FLSA**
- DOL likely will return to the 2020 joint employer rule adopted in the first Trump administration
  - Under the 2020 standard:
    - Actual, not mere theoretical, exercise of control is required to establish a joint employment relationship;
    - The existence of a franchisor relationship is a “neutral” factor, among other “neutral” business models, practices, contract provisions;
    - Economic dependence is irrelevant
- For now, case law controls, and the breadth of “joint employment” varies by circuit

White-Collar Exemption Rule

- 2024 DOL rule raised the minimum salary floor for application of executive, administrative, and professional exemption, in two stages, from $35,568 to $58,656 per year
- 2024 rule invalidated by Texas federal court; DOL filed appeal but case is held in abeyance.
- DOL indicated it will take further regulatory action on the regulation “defining executive, administrative, professional, outside sales, and computer professional exemptions”
- DOL may adopt a more modest increase to minimum salary requirement for EAP exemption

Tax Cuts on Tips and Overtime

- The One Big Beautiful Bill Act signed into law July 4, 2025, ushered in sweeping federal tax cuts. Included among these provisions were employee-friendly tax deductions on tips and overtime earnings for tax years 2025 through 2028.
- **Overtime –** The OBBBA created a limited deduction for overtime pay premiums earned for hours worked beyond 40 hours in a workweek. Premium pay is the amount paid in excess of an employee's regular rate of pay.
- **Tips –** The OBBBA also creates a separate deduction for tipped workers, allowing them to deduct up to $25,000 of qualified tips earned. To be a "qualified" tip, the tip must be paid voluntarily by the customer or client, not subject to negotiation.

Tax Cuts on Tips and Overtime (cont.)

- **Employer impact -** Beginning with the 2026 tax year, the IRS will begin enforcing the requirement that employers report qualified tips and qualified overtime on Form W-2 (the IRS provided penalty relief for 2025).
- This means additional reporting obligations and adjustments to payroll systems. For example, employers will need to distinguish FLSA overtime premium from other overtime earnings, which are not eligible for the tax deduction. The legislation also presents opportunities to reclassify overtime-exempt employees so they can benefit from the temporary partial tax relief.

Wage and Hour: What to Watch

- Portal-to-Portal Act
  - Many states have expressly incorporated the PPA or have enacted similar provisions so the federal PPA would also apply under state law. But in several states, courts have held state wage and hour laws do not incorporate the federal PPA (PA, NV)
- Wage and hour collective actions: standard for authorization of collective actions
  - Application of *Bristol-Myers* to FLSA Collective Actions
  - Does two-stage "conditional" certification still apply?

Federal Trade Commission

FTC's Noncompete Rule

- On April 23, 2024, the FTC voted to finalize a new rule prohibiting employers from enforcing noncompete agreements against workers and was set to take effect on September 4, 2024.
- Roughly 1 in 5 Americans (nearly 30 million people) are subject to noncompete agreements.
- Received over 26,000 comments—over 25,000 commenters supported categorical ban on noncompete agreements.
- Estimated that new business formation will grow by 2.7%, creating over 8,500 new businesses each year.
- Estimated that American workers' earnings will increase by $400 to $488 billion in the next decade, with workers' earnings rising an estimated $524 a year on average.

Legal Actions & Appeals

- In August 2024, FTC lost challenge to Final Rule in Ryan LLC v. FTC
  - The Court found that promulgating a rule that retroactively invalidated millions of existing contracts exceeded the FTC's statutory authority.
  - The Court also found the ban was "arbitrary and capricious", as the FTC lacked sufficient evidence to support such a categorical ban and failed to consider less restrictive alternatives.
- On October 18, 2024, the FTC gave notice of their appeal of this decision.
- Another challenge to the rule, *Properties of the Villages, Inc. v. FTC*, also saw a Florida Court invalidate the Rule. That decision was appealed to the Eleventh Circuit Court of Appeals.
- Both appeals remained pending, until recently . . .

FTC Withdraws Appeals

- On September 5, 2025, the FTC withdrew its appeals in *Ryan, LLC v. FTC* and *Properties of the Villages v. FTC*.
- As such, the FTC essentially conceded that it did not have authority to pass the broad April 2024 rule prohibiting non-compete agreements.
- In doing this, Commissioners of the FTC released a statement, indicating they would be focusing more on direct action analogous to that taken in Gateway.
  - This means resources will be dedicated more toward investigations and enforcement of particular companies, as opposed to fighting for a broad-sweeping rule.

FTC Begins Enforcement Actions

- On September 4, 2025, the FTC issued its first enforcement action regarding post-employment non-compete agreements under the Trump Administration.
- FTC determined that Gateway Services, Inc., a large pet cremation company, entered into unenforceable post-employment non-compete agreements with almost all of its approximately 1,800 employees.
  - The non-compete agreements at issue had temporal restrictions of one year after termination of employment with Gateway.
  - Barred employees from working in the pet cremation industry anywhere in the country.
- FTC deemed these agreements unfair and anticompetitive, and, therefore, violative of Section 5 of the Federal Trade Commission Act.
- FTC proposed a consent order to amend Gateway's post-employment non-compete practices.
  - This essentially eliminated, with limited exceptions, the enforceability of Gateway's post-employment non-compete agreements and Ordered Gateway to provide notice to all employees covered by the agreements that they were no longer subject to a post-employment non-compete agreement.
  - Agreements entered into with directors, officers, senior employees and those entered into in conjunction with equity-based interests were carved out from the consent order.

Why This Matters?

- While there is now no FTC rule prohibiting employers from requiring their employees enter into non-compete agreements, the FTC has signaled it will be committed to challenging overly restrictive agreements and is expected to ramp up enforcement actions.
  - FTC chairman Ferguson issued a statement advocating for "a steady stream of enforcement actions against" employers' imposition of unreasonable noncompete agreements.
  - FTC launched public inquiry encouraging "[m]embers of the public including current and former employees restricted by noncompete agreements, and employers facing hiring difficulties due to a rival's noncompete agreements, [] to share information about the use of noncompete agreements."
  - FTC sent letters to several healthcare employers and staffing firms urging a review of their employment agreements, noncompete agreements, and other restrictive agreements. Emphasized that "enforcement against unreasonable noncompete agreements remains a top priority" and encouraged companies to take a close look at their use of noncompete agreements and other restrictive covenants that limit worker mobility.

What Should Employers Do?

- Employers should therefore examine existing post-employment non-compete and other restrictive covenant agreements to ensure the scope of such is reasonable and the agreements comply with state laws.
- Don't forget VA "low wage worker" non-compete ban…
- Key questions:
  - Are the restrictions no greater than necessary to protect the employer's legitimate business interests?
  - Do the restrictions properly balance the employer's legitimate business interests against the hardship inflicted on the employee and any potential injury to the public.
  - FTC will focus on employers who use noncompete agreements that apply to low-wage or nonexecutive employees, lack a clear business justification, restrict employees from working in entire industries or geographic regions, and are used across the board regardless of role or access to sensitive information.
- Even where employers' noncompete agreements comply with state law, they may still be vulnerable to federal scrutiny if:
  - Overly broad;
  - Applied indiscriminately;
  - Used in ways that suppress competition or worker mobility.

State Limitations on Non-Competes

- Over the past three years alone, more than 150 bills have been introduced in more than 35 states restricting noncompetes to at least some degree.
  - Some states have outright bans (CA, MN, MT, WY, ND, OK)
  - Other states have income or other compensation-based thresholds (CO, D.C., IL, ME, MD, MA, NV, NH, OR, RI, VA, and WA)
  - Some states do not allow non-competes for certain medical professionals
- State legislatures will continue to enact limitations on the use of non-competes and other restrictive covenants
- Trend of limiting use of non-competes for healthcare professionals will continue

Immigration Insights

USCIS' Expanded Role in Immigration Worksite Enforcement

- Fraud Detection and National Security Directorate (FDNS) site visits are increasing in frequency and impact
- Unannounced visits tied to employment-based visa petitions are serving as gateways to enforcement
- Site visit findings are increasingly referred to ICE and DOJ
- Greater scrutiny of job duties, worksite locations, and remote work arrangements
- Inconsistencies between petitions and actual practices are more likely to trigger follow-on action

ICE: Broader, More Disruptive Worksite Investigations

- Worksite investigations is a core interior enforcement tool, with raids used to deter noncompliance and uncover broader violations. Raids are often preceded by indicators such as prior I-9 audits, FDNS referrals, tips, or data-driven discrepancies across filings.
- Employers should expect little or no advance notice and limited opportunity for informal resolution once agents arrive
- Preparation is critical: employers should maintain written response protocols, designate trained points of contact, and ensure staff know how to respond to warrants and requests
- Advance planning and training can reduce disruption, avoid obstruction allegations, and protect employer rights during enforcement actions

What is the Difference Between a Raid and an Audit?

ICE Raids

- Observed/Predicted worksite strategy includes:
  - Aggressively targeting employers and corporations by increasing the number of raids
  - Arrests of undocumented workers at these worksites and maybe company management
  - High profile actions to encourage self deportations and discourage illegal immigration

Who is a Likely Target?

- Unlawful workers visible at work site
  - Contractors, staffing company—of special interest to this administration
- Criminal Informants and tips
  - Disgruntled former employees; employees picked up by ICE
- Sanctuary jurisdictions: Cities and localities with official policy of non-cooperation with ICE
- I-9 audit result indicates high incidence of unlawful workers, poor recordkeeping

Be Prepared: ICE Liaison

- ICE Liaison is the contact who will ensure all parties are notified and the staff at the site are supported
- Contact outside counsel
- Provide a copy of the warrant or notice
- Notify other managers/supervisors immediately
- May remind employees they have the right not to talk to the officers if they wish

Be Prepared: Initial Response

- Ascertain why law enforcement is on-site and request a warrant or notice. If there is a judicial warrant, officers and agents will enter immediately. Do not obstruct, and consent is not needed.
- If Law Enforcement Officers do not have a signed judicial warrant, do not consent to a search but do not obstruct. If no judicial warrant, direct agents/officers to a designated location (such as a conference room)
- Contact the ICE Liaison – NAME, EMAIL, PHONE
- Make copies of all documents-send to counsel/leadership

Don’t Wait for Audit or Raid: Prepare Now

- Address SSA, IRS, other No Match indicators
- Timely reverify expiring Work Authorization documents!
- **Conduct a privileged internal review of I-9s and onboarding processes.**
  - Privilege needed
  - Review I-9s and under advice of counsel, remediate forms
  - Consider E-Verify—needs to be evaluated and thoughtfully implemented if added to the onboarding flow
  - Train on I-9 best practices

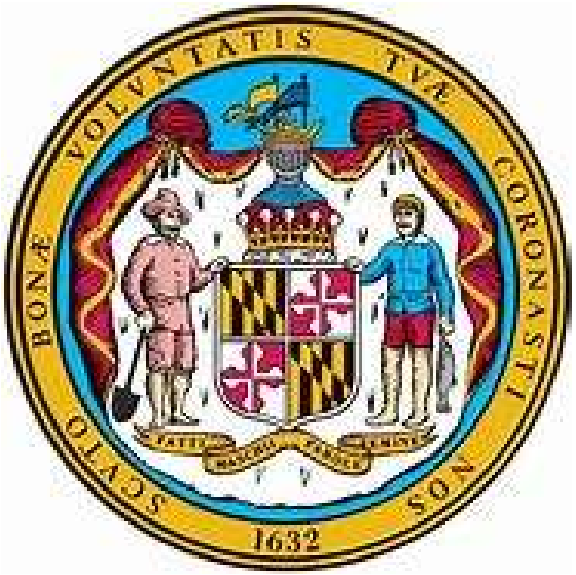
Government Enforcement is Getting Smarter

- ICE and DOJ are increasingly using data-driven enforcement, targeting employers based on anomalies in filings or E-Verify records.
- DOJ's Immigrant and Employee Rights (IER) unit is aggressively pursuing document abuse and citizenship discrimination claims.
- Risk management: attorneys should help clients develop written immigration compliance policies especially in multi-state or remote settings.

State & Local Legislation

Maryland

Family and Medical Leave Insurance Program: Update



On May 6, 2025, Governor Wes Moore signed HB 102 into law, officially postponing the implementation of FAMLI by 18 months. FAMLI, established under Maryland's 2022 Time to Care Act, is a state-administered insurance program that will provide eligible employees with paid family and medical leave benefits (up to 12 weeks of leave) funded through joint employer and employee payroll contributions.

Updated implementation timeline:

January 1, 2027 – Payroll deductions for the FAMLI program begin.

April 2027 – The first employer remittances to the state FAMLI fund are due. The exact due date will be set by the Maryland Department of Labor closer to the program's implementation.

January 3, 2028 – Employees will be able to start claiming FAMLI benefits.

Noncompete and Conflict of Interest Provisions

- **Maryland HB 1388**
- Effective July 1, 2025
- Non-compete and conflict of interest provisions for healthcare professionals licensed under the Health Occupations Article who provide “direct patient care” and earn $350,000 or less in total annual compensation will be banned or restricted
  - For professionals earning more than $350,000, non-compete provisions will be unenforceable if they include (i) a restrictive period of more than one year or (ii) geographic limitation of greater than 10 miles from the professional’s principal place of employment. In addition, if a patient of a professional earning more than $350,000 asks, employers will be required to inform the patient when the healthcare professional who is subject to a restrictive covenant transitions to a new practice location.

Virginia

Virginia

- Sexual Assault Employer Accountability Act (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. Effective July 1, 2025

- 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. Effective May 2, 2025

Virginia

- SB1218: Expands definition of “low-wage employee” (effective July 1, 2025)
- Under Virginia law, “low-wage employees,” who are defined as employees who earn less than Virginia’s average weekly wage, cannot have noncompete agreements enforced against them. In 2025, that number equates to an annual salary of $76,081.

State Trends

Virginia Employers Should Embrace for Change in 2026

- **Significant laws slated for consideration in the 2026 legislative session:**
  - New Paid Sick Leave Mandate (HB 5)
    - Expands the scope of paid sick leave to *all* employees of private employers and state and local governments, not just home health care workers as previously stated under § 40.1-33.3
  - Statewide Paid Family and Medical Leave Insurance Program (SB 2)
    - Directs the VA Employment Commission to create a paid family and medical leave insurance program beginning January 1, 2029
  - Employee Child Care Assistance Pilot Program (SB 3)
    - Provides matching funds to employers to encourage contributions toward employees' childcare expenses.
  - Minimum Wage (HB1 & SB1)
    - HB 1 and SB 1 propose amendments to increase the minimum wage beginning January 1, 2026, to 12.77, then increase to $13.75 in 2027, and $15.00 in 2028.
  - Overtime for Domestic Workers (SB 28)
    - Adds domestic workers to overtime protections, effective July 1, 2027

Pay Transparency

Key Themes and Disclosure Requirements

Common Requirements

1. Base pay range disclosures
2. Existence of other types of compensation (bonus, stock, commissions, equity, etc.).
3. Existence of benefits (healthcare, retirement, paid time off, paid sick time, other taxable benefits)

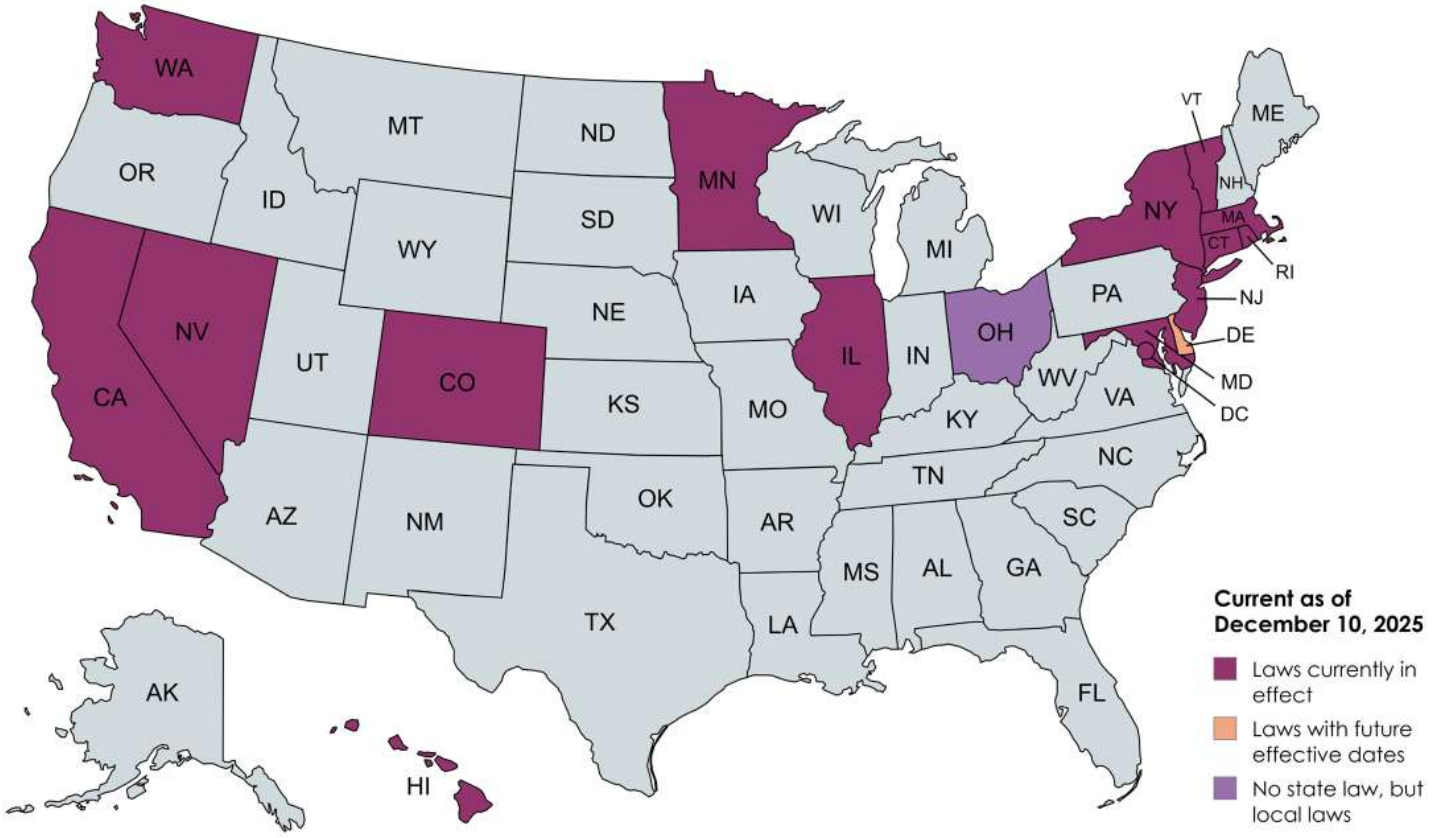
Less Common Requirements

1. Benefit details
2. Commission structures
3. Closing date of application window
4. Promotional opportunities
5. Post selection notices
6. Pay data reporting to state

Varying Requirements by Jurisdiction

- **Disclosure Timing:** At job posting, upon request, during interviews, with offer.
- **Covered Employers:** Employee count thresholds (*e.g.*, 1 employee in California or Colorado; 15 employees in Illinois; 30 in Minnesota; 0 in Washington or New Jersey).
- **Covered Job Openings:** Jobs in state, remote roles, location of supervisor.
- **Application Beyond Job Postings:** Required disclosure of promotional opportunities, other employee notices.

Pay Transparency Laws



State-Level Pay Transparency

- **Differences in pay range disclosure requirements**
  - Washington: “full” pay range
  - California, Colorado, and other states: reasonable starting pay range in job postings
  - Connecticut, Nevada, Rhode Island: other conditional triggers (upon request, post-interview)
  - New Jersey (proposed rules): would cap range width at no more than 60% of the minimum
- **Local Considerations**
  - Local laws typically operate in addition to state requirements, not in place of them

Pay Transparency

- **Fragmented state job posting disclosure requirements create implementation challenges**
  - Inconsistent definition of “pay range”; some require full, starting, “reasonable” ranges
  - Some states require disclosure of promotion and transfer opportunities and pay ranges
  - Varying requirements on whether benefits must be disclosed and to what level of specificity
  - Increasing pay data reporting requirements at state and local levels
- **Developing EU pay transparency requirements for international employers**

Pay Transparency Strategy

- **Looking Forward: Develop a harmonized disclosure approach and consistent practices to help ensure compliance**
  - Build a unified disclosure approach to reconcile differing state formulas to reduce likelihood of non-compliance
  - Use automation to align postings, requests, and internal-mobility disclosures as well as with reporting obligations
  - Prepare for expanding reporting obligations across states and localities
  - Rely on compliance framework for monitoring current and developing obligations

New Laws Going into Effect January 2026

State Minimum Wage Increases Effective January 1, 2026

- Alaska ($14.00, effective July 1, 2026)
- Arizona ($15.15)
- California ($16.90)
- Colorado ($15.16)
- Connecticut ($16.94)
- D.C. ($17.95 as of July 1, 2025)
- Florida (15.00, effective Sept. 30, 2026)
- Hawaii ($16.00)
- Maine ($15.10)
- Michigan ($13.73
- Minnesota ($11.41)
- Missouri ($15.00)
- Montana ($10.85)
- Nebraska ($15.00)
- New Jersey ($15.92)
- New York ($16.00, $17.00 in NYC, Nassau, Suffolk, and Westchester counties)
- Ohio ($11.00)
- Oregon ($15.05 as of July 1, 2025, $16.30 in Portland metro, $14.05 in nonurban counties)
- Rhode Island ($16.00)
- South Dakota ($11.85)
- Vermont ($14.42)
- Virginia ($12.77)
- Washington ($17.13)

Minimum Salaries for White-Collar Exemptions (Effective January 1, 2026)

- Alaska $1,120 weekly/$58,240 annually (effective July 1, 2026)
- California $1,352 weekly/$70,304 annually
- Colorado $1,111.23 weekly/$57,784 annually
- Maine $871.16 weekly/$45,300.32 annually
- New York $1,199.10 weekly/$62,353.20 annually
  - $1,275.50 weekly/$66,300 annually (New York City, Nassau, Suffolk, Westchester counties)
  - (applicable to executive and administrative exemptions only; professional exemption follows federal law)
- Washington $1,541.70 weekly/$80,168.40 annually

Workplace Considerations in a Globally Mobile, AI World

Traditional AI v. Generative AI: What's the Difference?

Traditional AI

- Often called "narrow" AI
- Focuses on performing a specific task
- System designed to respond to a particular set of inputs
- System has the capacity to learn from data and make predictions based off that data
- Primarily used to analyze data and make predictions

Generative AI

- System has ability to create something new
- System is trained on a set of data and learns the underlying patterns
- Consider Chat GPT, Open AI's language prediction model
- Trained on the internet, it can produce human-like text that is (almost) indistinguishable from text written by a human
- Primarily used to create new data similar to its training

Tech's Expanding Impact on Workflows + Compliance

- AI decision-making + "bossware" trigger governance, monitoring, and privacy challenges
- Emerging algorithmic-management laws push transparency, fairness, and worker rights
- Rapidly shifting AI-privacy regimes create patchwork global compliance risks

AI's Role in Global Talent Strategy

- AI enhances recruiting, workforce planning, and performance management—but with compliance risk
- Reskilling and talent redeployment become core business imperatives
- Multinational use of AI tools raises cross-border data, transparency, and bias-audit obligations

Legal and Ethical Risks Using AI

What Are the Concerns?

- Discrimination
  - ✓ Disparate treatment
  - ✓ Disparate impact
- Privacy Considerations

No Decisions Should Be Made By AI Alone – AI Should *Assist E*mployers in Making Employment Decisions

- Recruiting / Hiring
- Leave (ADA, FMLA) Administration
- Time and Attendance
- Promotion, demotion
- Salary
- End of employment

AI and Recruitment/Hiring/Related Decisions: How It Can Be Used

- Advertisements
- Recruitment Platforms
- Promotions/Demotions
- Performance Management
- Terminations

What Issues Can Result?

- Technology requesting information not allowed under law (protected characteristics).
- Technology that does not ensure the rights and user experiences of job seekers with disabilities, including those who may also be members of other protected classes.
- Technology does not provide / account for reasonable accommodations.
- Technology / algorithms that excludes classes of individuals without oversight.

AI and the FMLA/ADA

How Is AI Used in Connection with the FMLA/ADA?

- Process leave requests
- Track time off
- Integrate absence calendars
- Administer leave requests
- Analyze leave use
- And more

What Issues Can Result?

- Timekeeping program may incorrectly determine hours worked and lead to incorrect employee eligibility determination for FMLA.
- An automated system that "tests" for eligibility more frequently than permitted under the FMLA regulations could result in improper denial.
- A system could undercount how much FMLA leave an employee has available.
- A system that propagates rules for leave certification/re-certification that results in an employee being asked to disclose more medical info than FMLA/ADA allows.
- A system that triggers penalties when an employee misses a certification deadline without taking into account circumstances that should permit extra time.
- A system that counts leave as a negative factor in hiring, promotions, discipline may violate the FMLA/ADA.
- A system that assigns negative attendance points to protected absences may violate the FMLA/ADA.

Privacy Concerns Employers Should Be Aware of When Leveraging AI

- Data security measures
- Transparency
- Data minimization and anonymization
- Consent and opt-out options
- Training and guidelines
- Compliance with regulations
- Ethical AI usage

Key Takeaways

1. **New Tools-Same Rules.** Difficult to predict how administration will impact federal government guidance on AI.

2. **Understand the risks** of using AI in the workplace (e.g., recruiting, performance monitoring, performance improvement, safety and so on).

3. **Carefully evaluate new AI tools** before purchasing and implementing.

4. **Keep an eye on state law.** Likely to see more state-level enforcement actions of state privacy and security laws.

5. Organizations should **take preventative measures to educate, train and protect AI uses**, including data maintained by AI (including data processed by their vendors).

6. **Consider the risks and implement strategies to minimize** Possible strategies can include providing notice to candidates of the use of AI, obtaining informed consent, being transparent with the Company's use of AI, and performing annual audits on the technology to ensure fairness and non-discrimination.

2026: Five Issues to Monitor

2026 Issues to Monitor (Predictions!)

1. VA will pass several employment laws (effective 7/1)
2. States will continue to legislate around pay transparency, paid leave, and non-competes
3. VA non-solicits for employees – if no S.Ct. or Assembly action, these agreements must change
4. AI will lead to employment suits (hiring, etc.)
5. States may break away from FLSA regs and adopt CA-like wage regulations

Questions?

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Thank you.

John Remy
Jackson Lewis PC
John.Remy@jacksonlewis.com

Anna Margolis
Jackson Lewis PC
Anna.Margolis@jacksonlewis.com