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**ACC** Association of  
Corporate Counsel  
**ST. LOUIS**



# 2022 ACC STL CLE TUETH KEENEY LEGAL UPDATE

# Schedule

- **11:30am:**

Lunch

- **12:00pm:**

Panel Discussion: What Keeps In-House Counsel Up At Night?

- **12:45pm:**

Employment Law Lightning Round

- **1:15pm:**

DOJ Gone Wild! IER Discrimination Investigations





TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

# Panel Discussion: What Keeps In-House Counsel Up At Night?

## Moderator

Kate L. Nash, Shareholder, Tueth Keeney Cooper Mohan & Jackstadt, PC

## Panelists

Mike Curry – Associate General Counsel – Employment,  
Edward Jones

Stephen Lee – Vice President and Deputy General Counsel, Ameren Corporation

Kate Molamphy – Vice President, General Counsel and Compliance,  
Americas for ICL Group

*Presented by:*

Moderator: Kate L. Nash

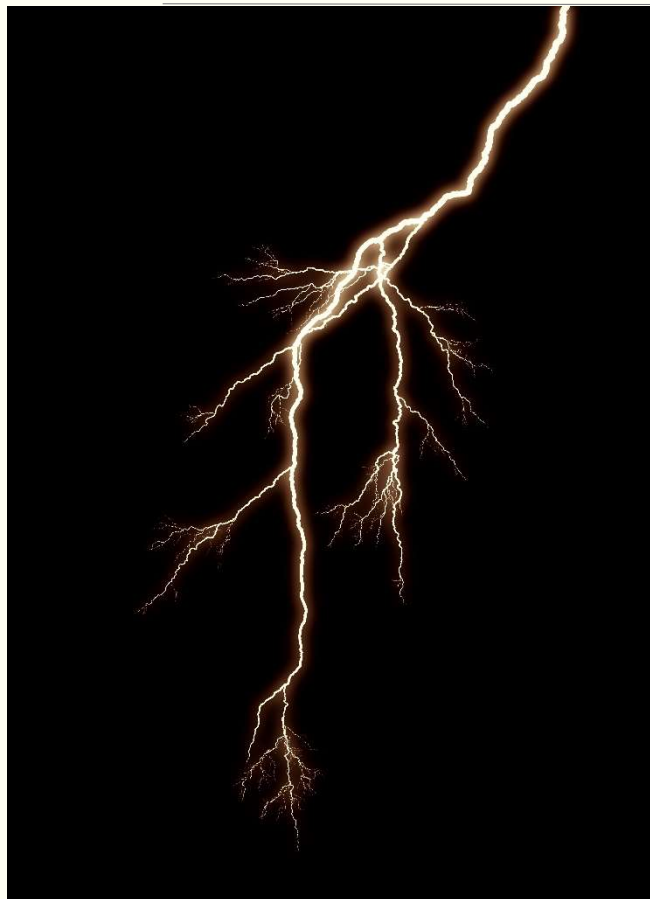
*Date:*

November 17, 2022

DIFFERENT  
BY DESIGN



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.



# Employment Law Lightning Round

*Presented by:*

Mollie G. Mohan  
Jenna M. Lakamp  
Adam C. Henningsen

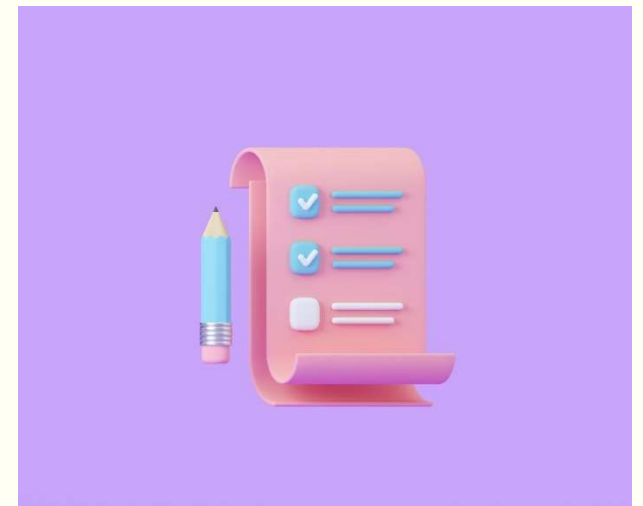
*Date:*

November 17, 2022

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# AGENDA

- Recreational Marijuana
- Proposed FLSA Regulations
- Confidential Court Filings
- EEOC Strategic Enforcement

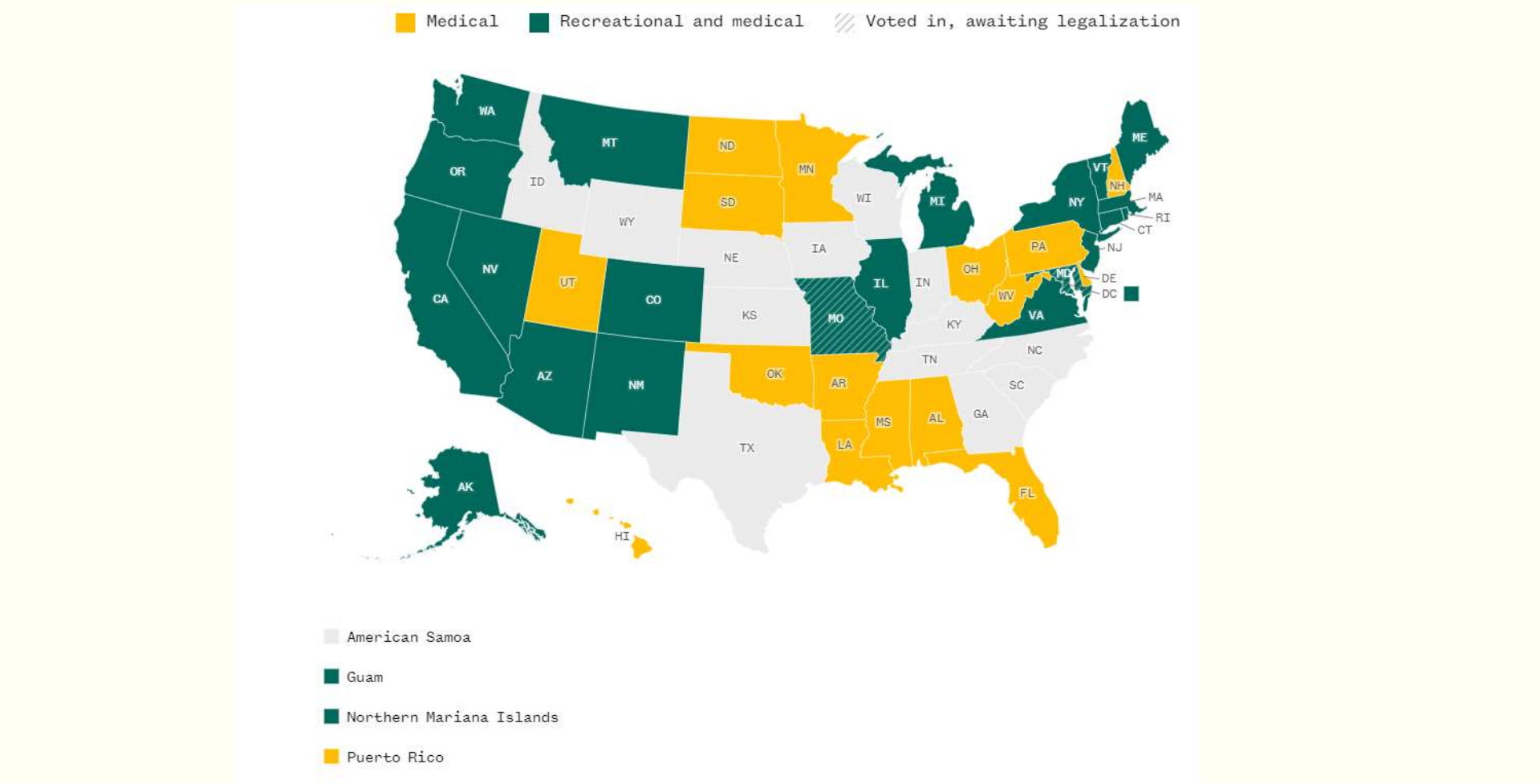


# **AMENDMENT 3 - RECREATIONAL MARIJUANA**

# Federal Law

- Controlled Substances Act
  - Lists marijuana as Schedule I drug; illegal
- Drug-Free Workplace Act
  - Must have a drug free workplace policy and awareness program and must make a “good faith effort” to maintain a drug free workplace
  - Applies to:
    - Entities who receive federal contracts of \$100,000 or more
    - Entities receiving federal grants (of any size)

# State Law





# State Law

- Medical marijuana
  - Constitutional amendment 2
  - Passed November 6, 2018
  - Effective December 6, 2018
- Recreational marijuana
  - Constitutional amendment 3
  - Passed November 8, 2022
  - Effective December 8, 2022



# Refresher: Medical Marijuana

- Medical marijuana is legal under MO law if person is a “qualified patient”
  - Must have medical marijuana ID card certified by MD or DO
  - For qualifying condition, including “any chronic, debilitating, or other medical condition”



# Refresher: Medical Marijuana

Employee cannot “bring a claim against any employer, former employer, or prospective employer for wrongful discharge, discrimination, or any similar cause of action or remedy, based on the employer, former employer, or prospective employer prohibiting the employee, former employee, or prospective employee from being under the influence of marijuana while at work or disciplining the employee or former employee, up to and including termination from employment, for working or attempting to work while under the influence of marijuana.”

# Constitutional Amendment 3

- So, what does Amendment 3 add?
  - Legalizes recreational possession/use of 3 ounces for persons over 21
  - Legalizes growth of 6 plants if registered with DHSS
  - Modifies medical marijuana law related to employment discrimination
  - Removal of residency requirement
  - Addition of nurse practitioner for ID card
  - Modifies prohibition on use in public places

# Modification to Med Marijuana

- Amendment modifies medical marijuana law by prohibiting employer from discriminating against a person for:
  - Being a qualified patient (or primary caregiver) with valid ID card INCLUDING legal use of marijuana off premises during nonworking hours UNLESS person was “under the influence” of marijuana on the premises or during the hours of employment
  - Testing positive for marijuana UNLESS the person “used, possessed, or was under the influence” on the premises or during the hours of employment

# Modification to Med Marijuana

- Anti-discrimination provision applies UNLESS “a failure to do so would cause an employer to lose a monetary or licensing-related benefit under federal law”
- Anti-discrimination provision does NOT apply to an employee “in a position in which legal use of a lawful marijuana product affects in any manner a person's ability to perform job-related employment responsibilities **OR** the safety of others, **OR** conflicts with a bona fide occupational qualification that is reasonably related to the person's employment”

## Section 2 – Recreational Marijuana

- What about recreational marijuana?
- Amendment 3 does NOT “preclude, limit, or affect laws that assign liability relative to, prohibit, or otherwise regulate:”
  - Operating motor vehicle while under the influence of marijuana
  - Smoking marijuana where smoking tobacco is prohibited
  - Consumption in a public place
  - Conduct that endangers others
  - Undertaking any task while under the influence of marijuana if doing so would constitute negligence, recklessness, or professional malpractice

## Section 2 – Recreational Marijuana

- Amendment 3 does NOT:
  - “Require an employer to permit or accommodate conduct otherwise allowed by this section in any workplace or on the employer’s property.”
  - “Prevent an employer from disciplining an employee for working while under the influence of marijuana.”
  - “Prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because that person was working while under the influence of marijuana.”



## Section 2 – Recreational Marijuana

- Person whose prior conviction for possession/use is expunged under Section 2 SHALL NOT be required to “acknowledge the existence of such a criminal history record or answer questions about the record in any application for employment.”



# Potential Implications for Employers

- Testing
- Accommodation claims
  - What about employees who are using marijuana recreationally – without an ID card – to treat depression?
- Workers' compensation claims
- Unemployment claims

# Best Practices

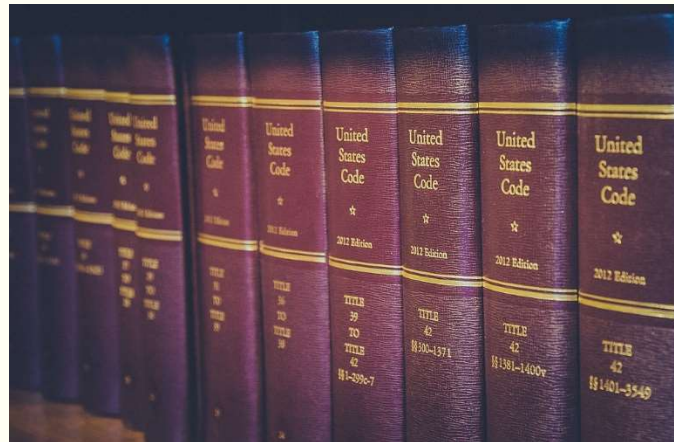
- Check policies
  - Drug free workplace
  - Drug testing requirements and process
- Check position descriptions
- Train supervisors
  - Need to be able to spot employees who are under the influence



# FLSA PROPOSED REGULATION

# Employee v. Independent Contractor FLSA Rule

DOL announced in late October notice of proposed rulemaking regarding who can be classified as an employee versus an independent contractor under the Fair Labor Standards Act (FLSA)



# Current Rule

- The current “economic reality” test focuses on whether workers are economically dependent on an employer or are in business for themselves
- The rule includes a list of factors to be considered, but attempts to streamline the analysis by focusing on two “core factors”:
  - (1) “the nature and degree” of control over the work
  - (2) “the worker’s opportunity for profit or loss”

# Goals of the Proposed Rule

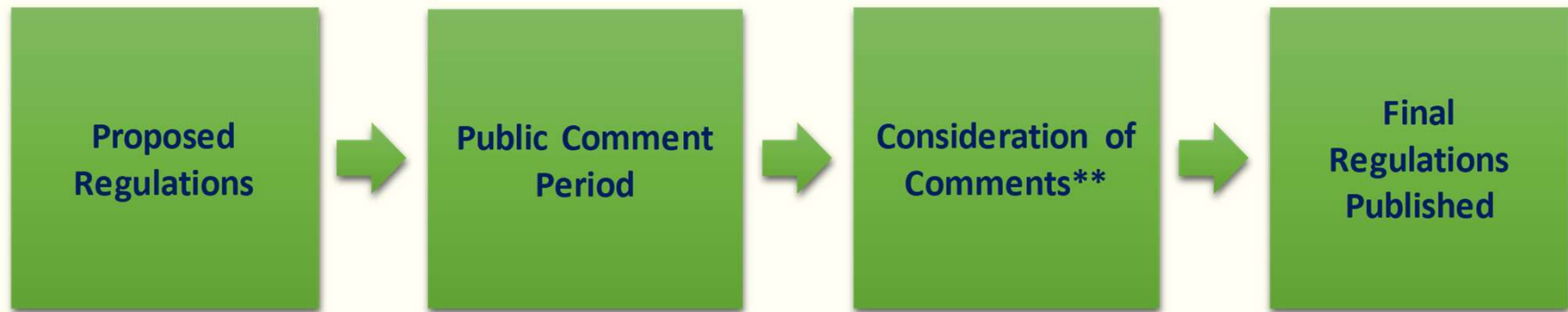
- Align the Department's approach with courts' interpretation of FLSA and application of the economic reality test
- Restore the longstanding multifactor, totality-of-the-circumstances analysis to determine whether a worker is an employee or independent contractor under the FLSA
- Ensure that all factors are analyzed without assigning any predetermined weight to any particular factor or set of facts
- Return to "longstanding interpretation" of the factors, including investment factor, control factor, profit or loss factor, and integral factor, which considers whether the work is integral to the employer's business

# Proposed Rule

- Restores the totality of the circumstances analysis to determine whether a worker is “economically dependent” upon an employer
- Six factors to analyze:
  - Opportunity for profit or loss depending on managerial skill
  - Investments by the worker and the employer
  - Degree of permanence of the work relationship
  - Nature and degree of control
  - Extent to which the work performed is an integral part of the employer’s business
  - Skill and initiative



# Rulemaking Process



Comment period open until December 13, 2022

# Key Takeaways

- Although we do not have final rule, definitely going to be shift toward classifying workers as employees
- Audit workforce now!





# CONFIDENTIAL COURT FILINGS

# PREVIOUSLY ON . . .



# What had we been doing?

- Motion for Joint Protective Order
  - Agree what is confidential
  - Agree how to treat confidential information/documents
  - Agree how to dispose of confidential documents
  - Agree what to file under seal
- Court enters the Order
- Dispositive motions filed under seal
  - Deposition transcripts and exhibits with confidential info are attached **BUT DON'T BECOME PUBLIC RECORDS**



**((( BREAKING NEWS )))**

**AND NOW . . .**



“Documents that affect the disposition of federal litigation are presumptively open to public view, even if the litigants strongly prefer secrecy, unless a statute, rule, or privilege justifies confidentiality.”

- Judge Easterbrook

*In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010)



This matter is before the Court on Defendant [REDACTED] consent motion for an extension of time and on the parties' joint motion for a protective order. I will grant Defendant's motion for an extension of time. However, the Court has reviewed the parties' joint motion for protective order and sees that it references court personnel having access to confidential material and that it contemplates the parties filing documents with confidential material, but it makes no mention of compliance with the procedures of Local Rule 13.05.

**DENIED**

Accordingly,

**IT IS HEREBY ORDERED** that the parties' joint motion for protective order is **DENIED** for failure to include the procedures that would be required under Local Rule 13.05 for filing any material under seal.



# Local Rules

- EDMO – Rule 13.05A(3)
  - The fact that certain information or material has been protected as confidential by parties in a case pursuant to a Protective Order is *relevant to*, but not dispositive of, whether this information or material will be sealed when filed with the Court.

# What are we seeing now?

- Courts are less willing to enter more broad protective orders with general terms
  - Requiring more specificity in the motion as to what is confidential and WHY
- Courts will not enter protective orders that allow parties to file documents under seal
  - Requiring a motion to seal with specific analysis of each document requesting to seal

# What should counsel be doing?

- Courts do allow redaction of documents when permitted by law
- Examples:
  - FERPA
  - HIPAA
  - Other Personally Identifiable Information
- Parties should work to agree on a redaction/naming protocol

# EEOC'S STRATEGIC ENFORCEMENT PLAN

# FY 2022-2026 Strategic Plan

- Strategic Goal 1: Enforcement Authority For Preventing And Remediating Discrimination
- Strategic Goal 2: Education And Outreach
- Strategic Goal 3: Organizational Excellence

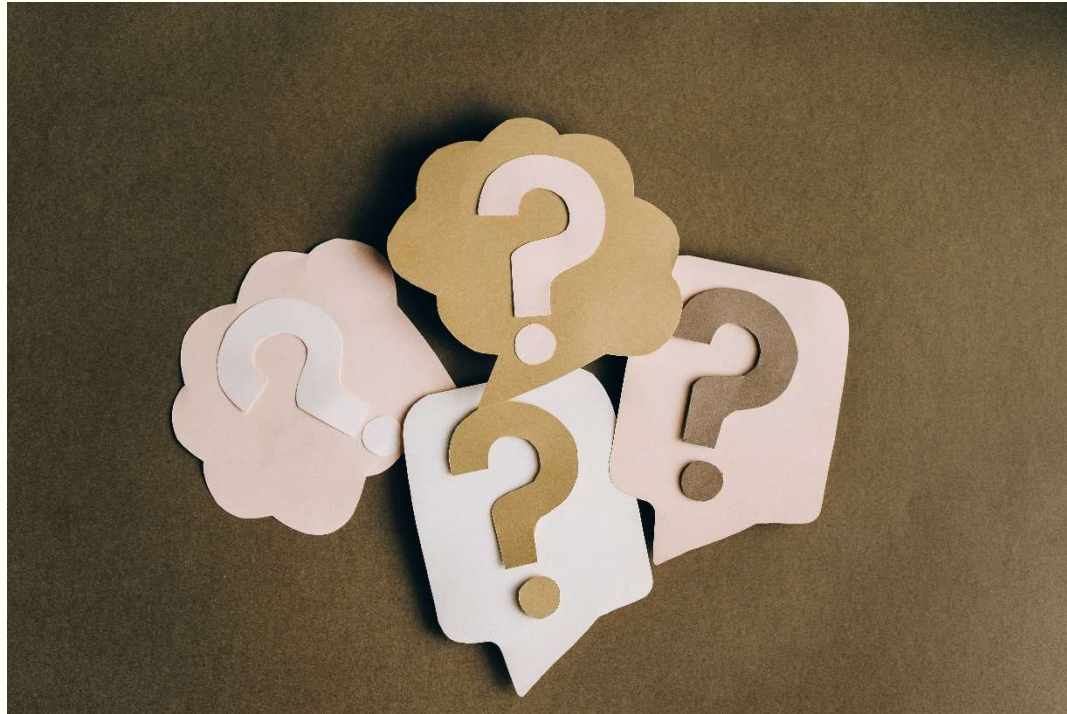
# FY 2022-2026 Strategic Plan

- Key enforcement objectives:
  - Having a broad impact on preventing and remedying employment discrimination while providing meaningful relief for victims of discrimination
  - Exercising enforcement authority fairly, efficiently, and based on the circumstances of each charge or complaint
- Performance Measure:
  - Obtain targeted equitable relief in 90% of all conciliation and litigation resolutions by the final year of the plan
  - Increase capacity to conduct investigations of systematic discrimination through training

# FY 2022-2026 Strategic Plan

- 2006 → Systemic Initiative
  - Prioritizing pattern and practice cases (“top priority”)
- 2022-2026 → Proposal to increase capacity to conduct investigations of systemic discrimination
  - “Refocusing efforts on cases that have a broad impact on an industry, profession, company, or geographic region . . . .”

# QUESTIONS?





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# **DOJ Gone Wild! IER Discrimination Investigations**

*Presented by:*

Melanie Gurley Keeney  
John M. Reynolds

*Date:*

November 17, 2022

DIFFERENT  
BY DESIGN

# AGENDA

- **THE IER**
- **WHO THEY ARE AND WHY YOU SHOULD CARE?**
- **RISK MITIGATION**

# IER Website



How Does IER Protect Your Rights? View [this brief video](#).

The Immigrant and Employee Rights Section (IER), enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b. Regulations for this law are found at 28 C.F.R. Part 44.

This federal law prohibits: 1) citizenship status discrimination in hiring, firing, or recruitment or referral for a fee, 2) national origin discrimination in hiring, firing, or recruitment or referral for a fee, 3) unfair documentary practices during the employment eligibility verification, Form I-9 and E-Verify, and 4) retaliation or intimidation.

**If you feel you have suffered one of these forms of discrimination, click [here](#) to file a charge or call our Worker Hotline: 1-800-255-7688.**

# The IER – Who are they?

**United States Department of Justice**



**Civil Rights Division**



**Immigrant and Employee Rights Section**

# The IER – What do they do?

**The IER is the enforcement agency responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA) set forth in 8 U.S.C. § 1324b.**

# Relevant Federal Legal Framework

**INA § 1324b prohibits:**

- 1. Citizenship status or national origin discrimination in employee hiring, firing, or recruitment or referral for a fee**
- 2. Unfair documentary practices during the employment eligibility verification process (e.g. Form I-9 and E-Verify)**
- 3. Intimidation, threats, coercion or retaliation against an individual for the purpose of interfering with their rights under § 1324b**

# Other Related Federal Laws Concerning Employment

**Title VII of the Civil Rights Act of 1964 – its anti-discrimination provisions include, among other protected categories, protection against discrimination on the grounds of national origin**

- ***Enforced by the U.S. Equal Employment Opportunity Commission (EEOC)***



# Related Federal Laws Concerning Employment

## 42 U.S.C. Section 1981–

***"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...as is enjoyed by white citizens..."***

- Enforced by private cause of action rather than agency***

# The IER Investigation Process

- **Complainant files a charge of discrimination with the IER - complainant is usually an individual, but a charge can also be made by the DHS or self-initiated by the IER when they have reason to believe there is a violation**
- **Within 10 days of receipt of charge, IER will send employer a notice of the charge via certified mail**
- **IER will request a response from employer no later than 90 days, but will include requests for information on a shorter time-frame (e.g. 20 to 30 days)**

# The IER Investigation Process

**Information sought by the IER investigator may include:**

- (a) documents;**
- (b) interrogatories;**
- (c) testimony;**
- (d) site inspection; and/or**
- (e) I-9 and E-Verify information.**

# The IER Investigation Process

- **IER tries to conclude its investigations within 120 days but can extend the time if it desires to do so**
- **Following the investigation, IER makes a determination whether to file a formal complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which is the tribunal that hears these types of claims**

# IER Civil Penalties

**The IER is not as well known as other enforcement agencies, but it can pack a punch.**

**In October 2021, the largest INA anti-discrimination monetary award in the history of its enforcement was reached in a settlement agreement with Facebook: \$4,750,000 civil penalty, \$9,750,000 victim restitution fund**

# IER Facebook Settlement

**IER alleged Facebook used recruiting methods designed to deter U.S. workers from applying to positions reserved for temporary visa holders in connection with the permanent labor certification process (“PERM”), and refused to consider U.S. workers who applied to the positions, and hired only temporary visa holders for the positions**

# Common INA Violations Investigated by the IER

**The IER routinely investigates and reaches settlements with companies for various types of violations:**

- **Demanding specific documents during the I-9 process, particularly asking LPRs for green cards**
- **Demanding additional documents beyond what were already shown in I-9 process**
- **Only checking citizenship status of non-U.S. citizens**
- **Unlawfully screening employees based on citizenship status**
- **Treating USC or other protected individuals differently**



# BEST PRACTICES



# Best Practices for Risk Mitigation

- 1. Include the employment verification process as part of your legal compliance/risk management protocols or procedures – this process is mandatory for all U.S. employers and the risk is directly proportional to the size of your workforce**
- 2. The risk can be widespread if the process is not centralized - the wider the reach of personnel involved in the employment verification process the greater the need for oversight and education/training**
- 3. Third-parties can also create risk – e.g. recruiting violations**
- 4. Consider the use of electronic I-9 systems – these systems can significantly reduce frequent errors in the manual I-9 process that create undue risk of fines**



# QUESTIONS?



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