

Maddin Hauser's
Employment Law
Symposium

**2023 REWIND: HOT TOPICS
IN EMPLOYMENT LAW**

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Overview

- 2023 Amendments to the Elliott-Larsen Civil Rights Act
 - Understand how Michigan's Civil Rights Act Amendment expands workplace protections for LGBTQ+ employees.
- Proposed FTC Rule P201200
 - Prepare for FTC's proposed rule which may invalidate noncompete clauses and prohibit their future use.
- Polarizing Issues in the Workplace
 - Key lessons learned in 2023 on managing complex issues, including religious accommodations and abortion access.

 REWIND

AMENDMENTS TO THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

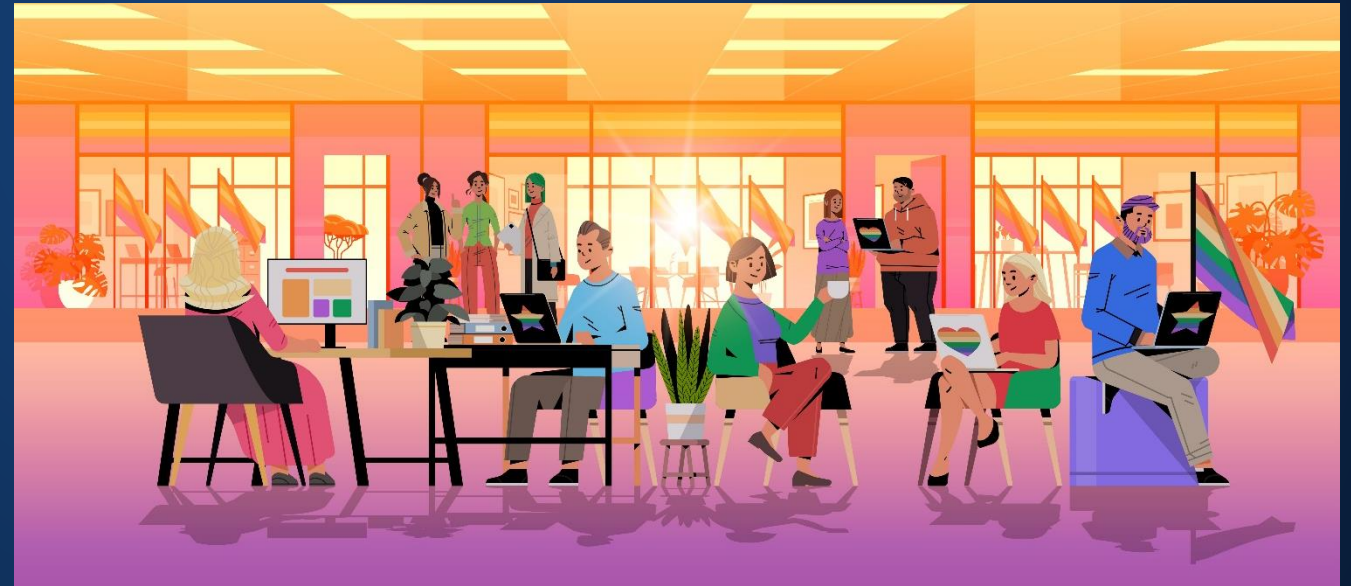
WHAT IS THE ELLIOTT-LARSEN CIVIL RIGHTS ACT?

- Elliott-Larsen Civil Rights Act, 1976 PA 453 (“ELCRA”)
- ELCRA prohibits discrimination against individuals based on various attributes (such as race, age, religion and sex) in various contexts, including employment.



WHAT'S DIFFERENT ABOUT ELCRA?

- On March 16, 2023 the Governor signed a bill into law expanding ELCRA's protections to prohibit discrimination in the workplace based on:
 - sexual orientation
 - gender identity
 - gender expression
 - ...in addition to the existing categories



WHAT'S DIFFERENT ABOUT ELCRA?

- Section 102(1): “The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, **sexual orientation, gender identity or expression**, height, weight, familial status, or marital status as prohibited by [ELCRA], is recognized and declared to be a civil right.”
- Section 202(1): “**An employer shall not do any of the following:** (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment ... (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity or otherwise adversely affects the status of the employee or applicant ...

UNDERSTANDING ELCRA'S NEW PROTECTIONS

How does ELCRA define sexual orientation, gender identity and gender expression?

- Section 103(l): “**Sexual orientation**” means having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation.
- Section 103(f): “**Gender identity or expression**” means having or being perceived as having a gender-related self-identity or expression whether or not associated with an individual’s assigned sex at birth.

UNDERSTANDING ELCRA'S NEW PROTECTIONS

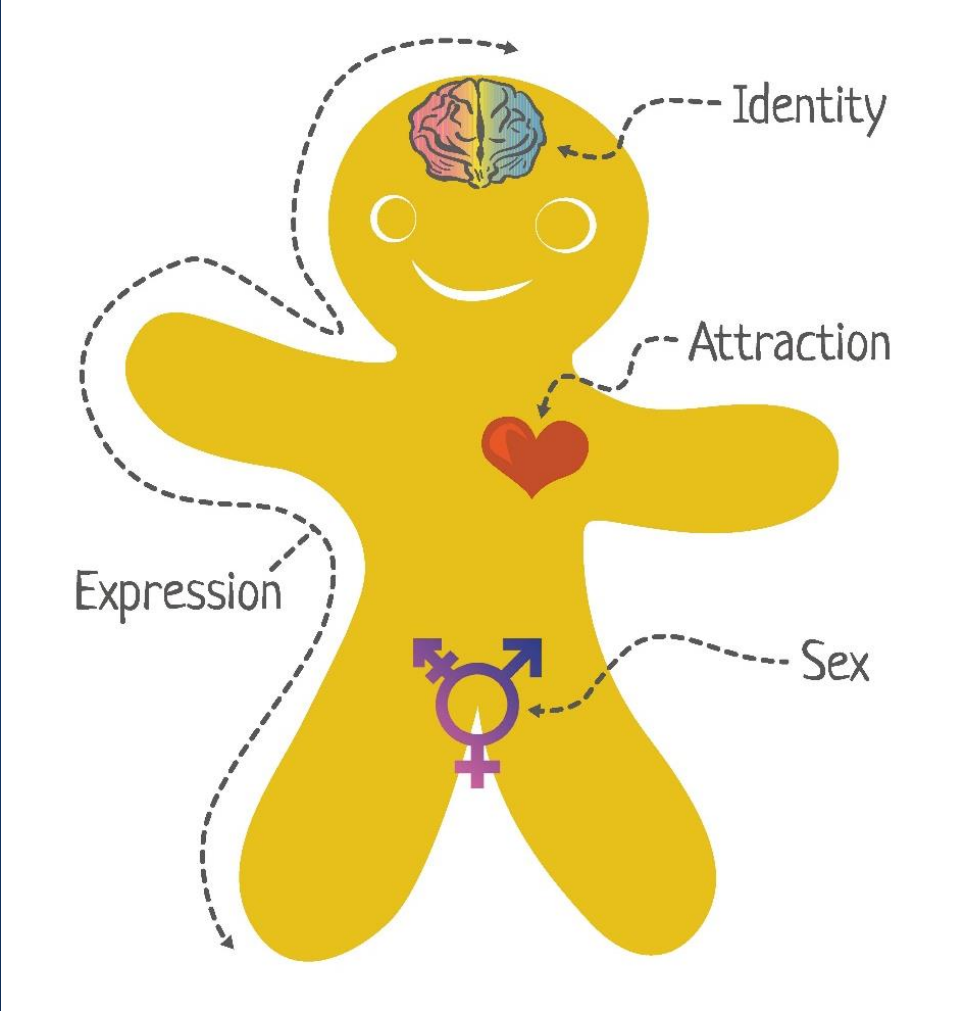
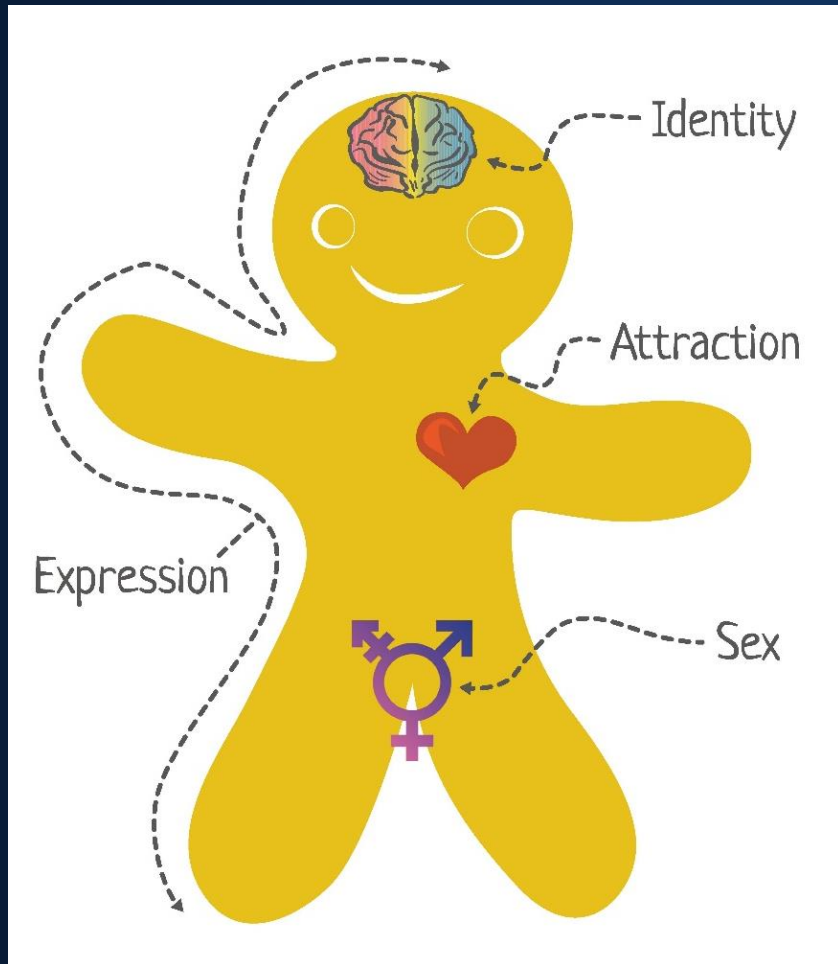


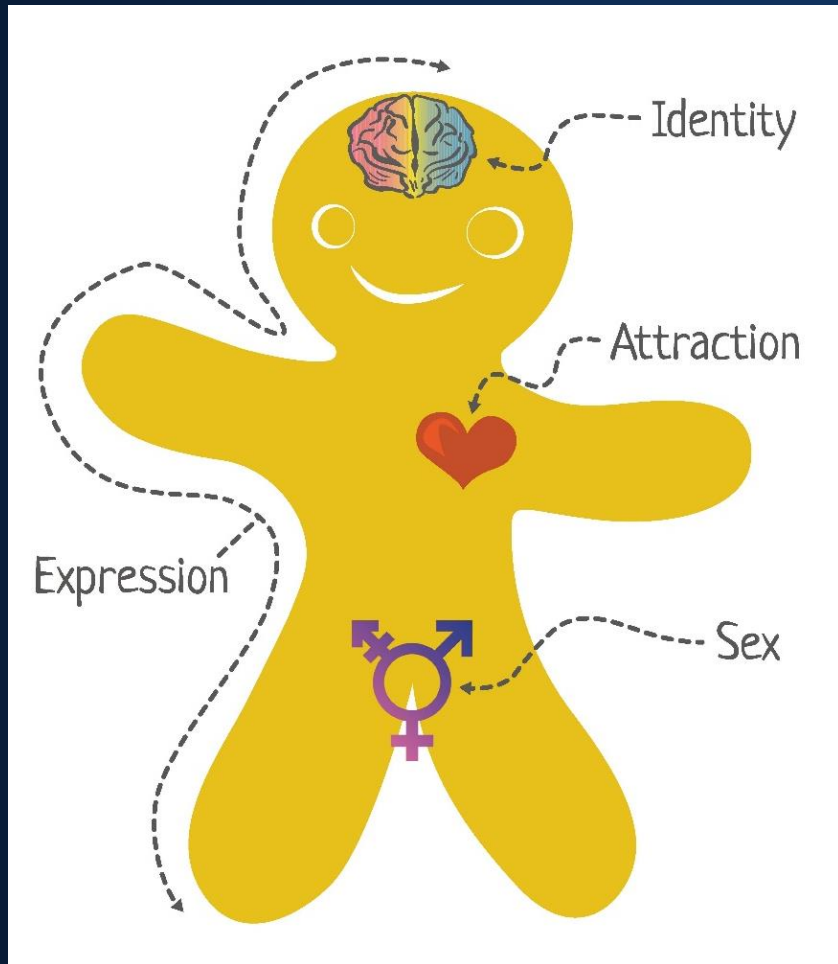
Image by Sam Killermann

UNDERSTANDING ELCRA'S NEW PROTECTIONS



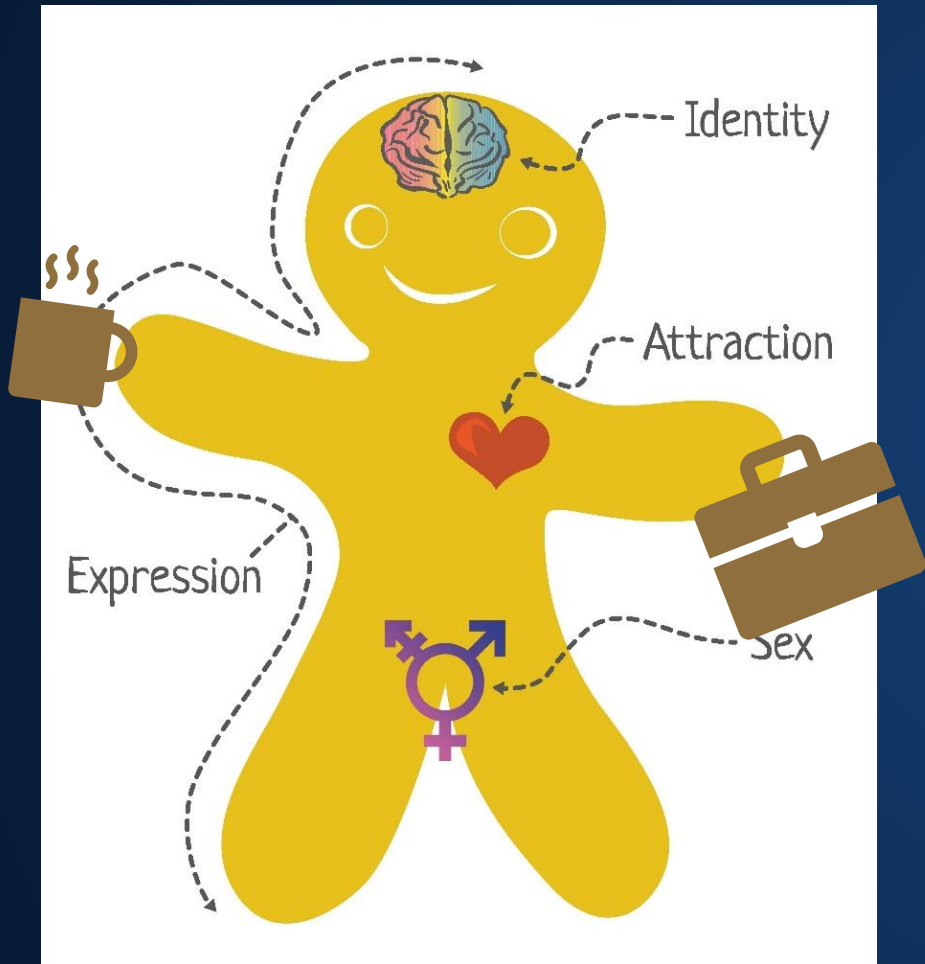
- **Sex:** Physical traits that we understand as “sex characteristics”.
 - Examples: Body hair, voice pitch, genitalia, chromosomes.
- **Orientation/Attraction:** Which categories of people an individual is romantically or sexually attracted to.
 - Examples: Homosexual, heterosexual, pansexual, asexual.
 - Note that the amended ELCRA only addresses heterosexuality, homosexuality, and bisexuality specifically.

UNDERSTANDING ELCRA'S NEW PROTECTIONS



- **Identity:** An individual's internal experience of their own gender.
 - Examples: Woman, man, agender, bigender.
- **Expression:** How an individual exhibits gender in the way they present themselves to the world.
 - Examples: Haircut (short vs. long), makeup, clothing, mannerisms.

UNDERSTANDING ELCRA'S NEW PROTECTIONS



When the Genderbread Person goes to work, the amended ELCRA prohibits their employer from discriminating based on their...

- **Sex:** Unchanged by ELCRA amendments.
- **Orientation:** Who an employee is married to, dating, or attracted to.
- **Gender Identity:** The employee's stated gender, regardless of the relationship between their gender and any physical sex characteristics they may possess.
- **Gender Expression:** The employee's outward presentation relating to gender, regardless of the relationship between their presentation and any physical sex characteristics they may possess.

 REWIND

PROPOSED FTC RULE ON NONCOMPETE CLAUSES

FTC'S PROPOSED RULE IN MATTER NO. P201200

- If enacted, proposed Rule P201200 would ban employers from imposing noncompete clauses on workers.
- The proposed addition would add new language to the law identifying noncompete clauses as **“an unfair method of competition”** which is prohibited by law.



WHERE DID RULE P201200 COME FROM?

- The FTC previously issued a preliminary finding that “noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.”
- Recent enforcement actions have focused on already illegal noncompetes
 - Example: Consent judgment as to Michigan-based companies Prudential Security, Inc. and Prudential Command Inc., which enforced noncompete clauses against minimum wage former employees who sought higher paying jobs at competitors.

WHAT WOULD RULE P201200 DO IF ENACTED?

- The Rule would make it illegal for an employer to:
 - **Enter into** or even attempt to enter into a noncompete with a worker;
 - **Maintain** a noncompete with a worker; or
 - **Represent** to a worker (in some circumstances) that the worker is subject to a noncompete.



WHAT WOULD RULE P201200 DO IF ENACTED?

- If the Rule is enacted, this prohibition will apply to workers of all types:
 - employees,
 - independent contractors, and
 - unpaid workers such as interns.



FAQS ABOUT RULE P201200

When would the Rule be effective?



FAQS ABOUT RULE P201200

When would the Rule be effective?

We don't know yet.

- The Notice and comment period concluded in 2023.
 - FTC could move to finalize the rule or adopt alternatives at any time.
- If finalized, the Rule would go into effect 60 days after it was published in the Federal Register.
 - Proposed rule includes provisions for a 180-day compliance period from publication.

FAQS ABOUT RULE P201200

If the Rule goes into effect, will existing noncompete language be invalidated?

FAQS ABOUT RULE P201200

If the Rule goes into effect, will existing noncompete language be invalidated?

Yes.

- The Rule is retroactive, and would invalidate existing noncompete language.
- The Rule would also require that employers proactively inform workers that any existing noncompetes are no longer effective.

FAQS ABOUT RULE P201200

Would the Rule apply to agreements not to compete in connection with a sale of a business?

FAQS ABOUT RULE P201200

Would the Rule apply to agreements not to compete in connection with a sale of a business?

In some cases, yes.

- The Rule includes an exception for noncompetes in “selling a business entity” if the person agreeing not to compete is a “substantial owner of” the business entity at the time they agree.
- The Rule narrowly defines “substantial owner” as someone who holds at least a 25% ownership interest.

FAQS ABOUT RULE P201200

If the Rule goes into effect, would it prohibit compensation that is contingent on non-competition?

Example: An employment agreement states that the employee will receive a \$50,000 severance bonus, but if that employee competes then the severance bonus is void.

FAQS ABOUT RULE P201200

If the Rule goes into effect, would it prohibit compensation that is contingent on non-competition?

The Rule’s “functional test” looks to the effect of the clause, and could deem it to be a noncompete.

- Section 910.1(b)(2): “The term non-compete clause includes a contractual term that is a de facto non-compete clause because it has the effect of” a noncompete.
- The Rule provides examples of functional noncompete:
 - NDAs that are so broad as to effectively prevent employment by a competitor;
 - Terms requiring repayment of training costs as a penalty upon departure.

 REWIND

LESSONS LEARNED IN NAVIGATING 2023'S MOST POLARIZING ISSUES



LESSON 1:
Stay current on developments in the law

GROFF V DEJOY, 600 U.S. 447 (2023)

- New Supreme Court holding addresses religious accommodations in the workplace.
- Prior to Groff, an employer was not obligated to accommodate an employee's religious beliefs if it would cause the employer to bear more than a "de minimis" cost. See *Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1997).



THE FACTS IN *GROFF*



- Gerald Groff is a USPS mail carrier.
- In 2013, USPS agrees to deliver Amazon packages 7 days a week.
- Groff requests that, due to his observance of a Sunday Sabbath, he is not scheduled to work on Sundays.
- USPS accommodates his request for some time, but eventually disciplines Groff for refusing to work on Sundays.
- Groff files suit against USPS.

NEW RULE AFTER *GROFF*

- An employer denying a religious accommodation to an employee must show that the accommodation would result in “**substantial increased costs** in relation to the conduct of the particular business.”
- The Court stated that it was a fact-specific analysis to determine what is a “**substantial increased cost**” as described by the ruling.
 - More clarity is likely to come as lower courts begin to apply *Groff*'s new standard.

OPEN QUESTIONS AFTER *GROFF*

- How will the courts interpret *Groff's* new standard for...
 - employers who use a seniority-based bidding system to schedule employee shifts?
 - businesses experiencing staffing shortages, given the scalability element of the new test (“...in relation to the conduct of the particular business”)?





LESSON 2:
**Stay current on issues that are
important to your employees**

ABORTION IN THE WORKPLACE

Dobbs v. Jackson Women's Health Organization (2022)

- Supreme Court decision which overturned *Roe v. Wade* which established abortion as a constitutional right.
- The decision in *Dobbs* was issued in 2022, but subsequent changes have followed.
 - Some states enacted immediate bans on abortion
 - Other states have since followed suit
 - Certain states have expanded legislation on the topic

ABORTION IN THE WORKPLACE



- Since the *Dobbs* ruling, employees have tuned in to their employers' stances on the issue.
- Post-*Dobbs* polling indicates that most employees under age 40, regardless of their political affiliation, want to work for a company that supports access to abortion.
 - Many of these employees would consider switching jobs to preserve this access.

ABORTION IN THE WORKPLACE

Employers are responding to these priorities by providing new benefits to employees, such as:

- Specific extension of healthcare plan coverage to cover abortion care
- Reimbursement for costs of travel to employees who travel to a state where abortion is legal for the procedure
- Industry-specific protections against state law provisions
 - Example: Lyft has agreed to defend drivers against a Texas law that could punish Lyft drivers who drive customers to abortion care appointments.

ABORTION IN THE WORKPLACE

- However, employers should remain cautious when considering new policies like these.
 - Considerations relating to abortion access may be particularly impactful for employers operating in multiple states.
 - State laws may apply differently depending on where your company maintains offices.
 - The home states of each remote worker may also impose certain obligations or requirements.
- Before implementing new policies, understand how applicable laws may limit your ability to provide benefits.

ABORTION IN THE WORKPLACE

- Example: Texas and Oklahoma have enacted legislation which imposes criminal and civil penalties on anyone who “aids or abets” an abortion.
- In those states, Employers who provide travel benefits to employees for the purpose of obtaining an abortion in another state could have exposure under those state laws.



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THANK YOU



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