SO, YOU THINK YOU CAN LEAVE?
EMPLOYER'S GUIDE TO LEAVE LAWS

By Andrew M. Creal, Esq.

I. INTRODUCTION

A. There are a number of laws that govern when, how much, and what kind of leave an employer is required to give an employee.

B. Understanding which laws apply to your business and when those laws are implicated by an employee's actions is critical to the health of your company and minimizing exposure to liability.

C. Characteristics of Leave/Time Off and Questions to Ask Yourself:

1. Paid v. Unpaid

   a. Do you offer all employees paid leave? If so, do you offer unpaid leave upon the exhaustion of paid leave? If not, do you offer unpaid leave for those employees who are not eligible for paid leave?

2. Legally Required v. Discretionary

   a. Are you up to date on all legally required leave? Do you offer more than what is required?

3. Earned v. Accrued

   a. Is the leave earned in one lump sum on an anniversary? If so, is the anniversary the date of the employee's hire, the first of the calendar year, or some other date applicable to all employees?

   b. Or is the leave accrued by the employee over time at the company?

4. Use it or Lose it v. Paid Out

   a. What happens to the leave at the end of the company's fiscal year, or separation? Does the employee lose the leave if it is not used? Do you offer to pay for any unused leave?

   b. Under the Earned Sick Time Act ("ESTA"), employers must permit a carryover of unused benefits.

D. This presentation will focus on the following broad topics:

1. Navigating FMLA, ADA Requirements.

2. Workers' Compensation.

3. ESTA Issues as an Employer in 2025.

II. ACRONYM HEAVEN

A. For those of you thinking OMG, I'm just trying to be done with this lecture so I can get my credits and my boss won't be PO'd at me, listen up. You must understand the relevant acronyms in the world of Employee Leave so you can ensure your company is compliant.

B. Deciphering the Letters:

1. Family Medical Leave Act ("FMLA")

2. Americans with Disabilities Act of 1990, as Amended ("ADA")

3. Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA")

4. Michigan's Earned Sick Time Act ("ESTA")

C. Federally Required Leave – FMLA and the ADA

1. There is currently no federal law generally requiring private employers to provide paid sick leave.

2. However, certain employers are required to provide unpaid, job-protected leave, which brings us to the...

3. The Family Medical Leave Act of 1993 ("FMLA")

a. A major pillar in President Bill Clinton's first term in office, the FMLA requires employers allow eligible employees up to twelve weeks of unpaid leave during any 12-month period.

b. Covered Employer: 50 or more employees during a 20-week period of the calendar year or the previous calendar year.

i. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.

ii. Once an employer meets the requirements of a Covered Employer, it is covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.

iii. Integrated Employer Test: Employers with common management, interrelation between operations, a centralized control of labor relations, and

degree of common ownership/financial control will be treated as a single employer. This means that for FMLA purposes, the employees of all integrated employer entities must be counted to determine whether the employer is covered under FMLA.[1]

c. Eligible Employee: worked for the employer for at least 12 months (need not be consecutive), for at least 1250 hours in the past year, and work at a location that employs at least 50 people within a 75-mile radius.

d. Requirements: Eligible employees receive 12 weeks of leave in a 12-month period for:

   i. Birth of child or placement of child with employee for adoption or foster child care, and to bond with newborn or newly-placed child;

   ii. Care for spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;

   iii. Serious health condition that makes employee unable to perform the essential functions of the job, including incapacity due to pregnancy and for prenatal medical care; or

   iv. Any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or called to covered activity duty status.[2]

e. How to count the 12 weeks:

   i. Calendar Year

   ii. Any fixed 12-month period (e.g., employee's anniversary date, fiscal year)

   iii. First date employee takes FMLA leave

   iv. "Rolling" 12-month period

f. Coordination with Other Leave:

   i. FMLA is not required to be paid; however, employers may be more generous than the minimum requirement of the law and pay employees for some or all of FMLA leave.

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[1] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf at pg. 11.

[2] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf at pg. 11

ii. Employers may require other paid leave to run concurrently with FMLA.

iii. The standard should be applied uniformly to avoid a claim of unlawful discrimination. For example, if a female employee receives six weeks of paid FMLA leave to bond with her child, the employer should extend the same benefit to a male employee who is using FMLA to bond with a new child. Employers should be careful not to make assumptions about who is a primary caregiver, if the policy incorporates a distinction between primary/secondary caregiver.

4. Americans with Disabilities Act of 1990 ("ADA")

a. Covered Employers: employers with 15 or more employees.

b. Covered Employers must provide reasonable accommodations to employees with disabilities unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

i. Unpaid leave can be considered a "reasonable accommodation" consistent with the ADA's purpose to require employers to change the way things are customarily done to enable employees with disabilities to work.[3]

ii. If leave is required as a reasonable accommodation, the employer generally must welcome the employee back to the individual's former position at the same rate of pay.

(A) However, if leaving the position open would cause an undue hardship, the employer must consider the employee for an open position for which the employee is qualified.

c. ADA Amendments Act of 2008 ("ADAAA")

i. Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute.

ii. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of the protection for many individuals with impairments such as cancer, diabetes, and epilepsy.

[3] MCL 1210(14). Furthermore, job restructuring only applies to an employee's minor or infrequent duties relating to a particular job held by the person with a disability. MCL 37.1210(15).

iii. Regulations change how the phrase "substantially limits one or more major life activities" is interpreted. For example, an impairment does not need to prevent or severely or significantly restrict a major life activity to be "substantially limiting." Nonetheless, not every impairment will constitute a disability.

iv. The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

D. State Mandated Leave

1. Michigan Persons With Disabilities Civil Rights Act ("PWDCRA")

a. Unpaid, mandated.

b. Applies to employers with one or more employees.

c. An employer may be obligated to provide unpaid leave where the employee has a disability that requires leave, the leave does not pose an undue hardship on the employer, ***and the employee in Michigan makes the request within at least 182 days of having reason to know of the need for an accommodation***.

d. Employers with fewer than 15 employees are generally not required to restructure a job or alter the schedule of employees as an accommodation under this Act.

2. Crime Victim Leave

a. Unpaid, mandatory.

b. Employees in Michigan who are victim to a crime are entitled to take an unpaid leave of absence to attend judicial proceedings related to a crime. Employers may not threaten—or effectuate—discharge or discipline of an employee who is a victim subpoenaed by a prosecuting attorney to attend court for the purpose of giving testimony or if they are a victim's representative who attends or desires to attend court to be present during the testimony of the victim.

c. Employees are considered a victim representative of a crime victim if they are:

i. The guardian or custodian of a deceased victim's child;

ii. The parent, custodian, or guardian of an assault victim under the age of 18; or

iii. Designated to act for an assault victim suffering from physical or emotional disabilities.

d. This leave is different from ESTA, which may be used to attend civil or criminal proceedings arising out of domestic violence or sexual assault.

III. RECENT DEVELOPMENTS IN MICHIGAN AND FEDERAL LAW

A. Earned Sick Time Act ("ESTA") v. Paid Medical Leave Act

1. ESTA was adopted by the legislature and subsequently amended in December 2018 by passage of the PMLA.

   a. Michigan Court of Claims held that the "adopt and amend" strategy was unconstitutional.

   b. Michigan Court of Appeals reversed the Court of Claims, ruling the amended version of the statute was valid and enforceable.

2. Oral Arguments heard before the Michigan Supreme Court on December 7, 2023.

3. On July 31, 2024, the Michigan Supreme Court reversed the Court of Appeals decision and held that the adopt-and-amend approach violated the Michigan Constitution.

4. Implementation set to take place on February 21, 2025.

B. House Bill 4002, which was also signed into law on February 21, contains a number of notable changes from the original version of ESTA. Here are some of the bigger changes:

1. Waiting Period: Anyone hired after February 21 can be required to wait 120 calendar days (was 90 days) to use accrued earned sick time.

2. Small Business: An employer with 10 (was 9) or fewer paid workers during a given week is subject to certain lower requirements under ESTA. Notably, small businesses need only to allow employees to use up to 40 hours of paid sick time in a given year. (This was originally 40 hours paid and 32 hours unpaid.)

3. Small Business Effective Date: Small businesses have until October 1 to start complying with ESTA. As such, there is no requirement yet for small businesses to allow accrual of earned sick time, provide paid sick time (aka-frontload), or calculate and track accrual of paid earned sick time.

4. Covered Employee: A covered employee under ESTA remains anyone engaged in service to an employer in the business of an employer, but now excludes (in addition to US government employees) any statutorily defined "unpaid trainee or unpaid intern," employees subject to the Youth Employment Standards Act, as well as any individual who works in accordance with an employer policy if two conditions are met:

   a. The policy allows individuals to schedule their own working hours; and

b. The policy prohibits the employer from taking adverse personnel action against the individual if the individual does not schedule a minimum number of working hours.

C. Additional Points to be Aware of:

1. Earned Sick Time Increments: Employers now have the choice of using one-hour increments or the smallest increment the employer's payroll system uses for other absences. Practically speaking, this means non-FMLA employers may be able to require employees to use increments of two or more hours of leave at a time.

2. Prorating is Explicitly Allowed: Employers that provide 72 hours (40 hours for small businesses) of earned sick time for immediate use at the beginning of the benefit year do not have to: (1) allow carryover of unused time; (2) calculate and track employees' accrual of paid earned sick time; or (3) pay out unused accrued paid earned sick time at the end of the year in which it was accrued.

D. And more:

1. Prorating Frontloaded Leave for Part-Time Employees: ESTA now allows an employer to essentially prorate the frontloaded 72 hours for part-time employees, but the administrative burden may be too onerous for some employers. In order to prorate less than 72 hours of paid sick time at the beginning of the benefit year, the employer must "at the time of hire" provide written notice to the employee of the expected number of hours worked for a year. Based on that written notice expectation, the employer must then provide a proportion of paid leave in line with those hours that meet the minimum accrual standard (one hour of leave per 30 hours worked) under ESTA. In other words, the employer takes the total number of expected work hours for the year and divides by 30 to get the minimum permissible amount of prorated earned sick time. Finally, the employer must evaluate if the employee worked more than expected at the end of the year and, if so, adjust the next year's allotment of earned sick time to align with the prior year's hours worked.

2. PTO Compliance: An employer can still rely on a PTO policy to comply with ESTA as long as the PTO policy provides at least 72 hours of time off for ESTA-covered reasons.

3. No more right to file a private right of action: Employees can now only file an administrative complaint with the Department of Labor and Economic Opportunity (LEO).

4. New Civil Fine for Failing to Provide Earned Sick Time to an Employee: Up to eight times the employee's normal hourly wage can now be levied on the employer as a fine in addition to other employer fines and remedies available to employees.

5. Notice Requirement: Employers previously had until February 21 to provide written notice of certain items to current employees and then upon hire for all new employees thereafter. Now, because of the late amendment, employers have until March 23 to provide employees with notice of all of the following:

a. The amount of sick time that must be provided to an employee under ESTA;

b. The employer's chosen benefit year (for example, anniversary, calendar, fiscal, etc.);

c. The terms under which earned sick time may be used;

d. That retaliation against eligible employees is prohibited for requesting or using earned sick time; and

e. The employee's right to file a complaint with LEO for any violation of ESTA.

6. Adverse Action Allowed: Employers can take disciplinary action if the employee uses earned sick time for a purpose other than one covered by ESTA, or violates the notice requirements under ESTA.

7. Rebuttable Presumption Gone: The latest changes eliminated the rebuttable presumption of an ESTA violation if an employer took an adverse personnel action within 90 days of exercising a right provided by ESTA. As such, employees will have the burden of proving any violation of ESTA.

8. Still No Replacement Requirements Allowed: Employers still cannot require an employee to find a replacement as a condition of using ESTA-covered leave.

9. Collective Bargaining Agreements: If a CBA is in effect on February 21 and it conflicts with ESTA, then ESTA does not apply to the employees subject to that agreement until the stated expiration of the agreement.

	Paid Medical Leave Act	Earned Sick Time Act
Covered Employers	50 or more employees	Employers with at least one employee "small business" means an employer for which fewer than 10 individuals work for compensation during a given week.
Eligible Employees	Non-exempt employees who worked an average of 25 hours per week in the previous calendar year. Can require employee to wait 90 days before using.	All employees of a covered employer. Can require employee to wait 90 days before using.
Amount of Leave	40 hours of paid leave	72 hours of leave Small businesses need only provide 40 hours of paid leave, and the additional 32 hours may be unpaid. All other business must provide 72 hours of paid leave
Accrual	Can be offered in a lump sum at the beginning of the year OR accrual at one hour for every 35 hours worked	Accrues at a rate of one hour for every 30 hours worked.
Carry Over?	If lump sum, no carryover. If accrual, employer is not required to allow more than 40 hours carried over.	Cannot cap accrual and must permit carry out. However, employer can limit amount of leave used per year to 72 hours. No requirement to pay out unused leave upon separation from employment. Additionally, if an employee is rehired within 6 months of separation, accrued leave must be reinstated.
Presumption of Compliance?	Yes – as long as employers offer 40 hours of paid leave.	Yes – as long as the employer provides any paid leave in at least the same amounts, that may be used for the same purposes, and under the same conditions provided in this act that is accrued at a rate equal to or greater than the rate required under the act.
Notice Requirements	Use employer's usual and customary notice requirement.	If leave is foreseeable, cannot require notice more than 7 days in advance. If unforeseeable, can require notice "as soon as practicable."
Use	1-hour increments, unless the employer has a different policy.	The smaller of one-hour increments, or the smallest increment that the employer's payroll system uses to account for absences.
Documentation	Can require documentation prior to return to work.	Can only require documentation if the employee is absent more than three consecutive days.

10. Uses:

    a. The employee's physical or mental illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's mental or physical illness, injury, or health condition; or preventative medical care for the employee.

    b. For the employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's family member's mental or physical illness, injury, or health condition; or preventative medical care for a family member of the employee.

    c. If the employee or the employee's family member is a victim of domestic violence or sexual assault, for medical care or psychological or other counseling for physical or psychological injury or disability; to obtain services from a victim services organization; to relocate due to domestic violence or sexual assault; to obtain legal services; or to participate in any civil or criminal proceedings related to or resulting from the domestic violence or sexual assault.

    d. **NEW**: For meetings at a child's school or place of care related to the child's health or disability or the effects of domestic violence or sexual assault on the child.

    e. For closure of the employee's place of business by order of a public official due to a public health emergency; for an employee's need to care for a child whose school or place of care has been closed by order of a public official due to a public health emergency; or when it has been determined by the health authorities having jurisdiction or by a health care provider that the employee's or employee's family member's presence in the community would jeopardize the health of others because of the employee's or family member's exposure to a communicable disease, whether or not the employee or family member has actually contracted the disease.

11. Penalties and Remedies for Violations:

    a. 3-year statute of limitation.

    b. Private civil action for damages, including payment for used, earned sick time; rehiring or reinstatement; payment of back wages; reestablishment of employee benefits; and an equal additional amount of liquidated damages together with costs and reasonable attorney fees as the court allows.

    c. File a claim with the Michigan Department of Licensing and Regulatory Affairs.

12. Other Key Provisions:

    a. Employers must conspicuously display a poster at the place of business in English, Spanish, and any language that is the first language of at least 10% of the workforce.

b. Employers can decide how they want to define "year."

c. The definition of "Family" includes "any other individuals related by blood or whose close association with the employee is the equivalent of a family relationship."

d. The ESTA is also silent as to whether there is an accrual cap, although there is a cap on the number of hours that may be used in a year.

E. Post-COVID – Remote Employees

1. Many states require you to comply with their leave laws regardless of whether the employer is located in a different state and even if you have only one employee working in that state.

2. Counting for FMLA purposes:

a. Counted based on the office or workplace to which they reported or, if none, where their work assignments are generated.

i. E.g., if a remote employee receives assignments from a worksite that has at least 49 on-site employees, the remote employee will be eligible for FMLA leave, provided they have worked the requisite time periods.

ii. Ideally, employers should designate the worksite of a remote employee at the time of hire so this can be factored into evaluating an FMLA leave request.

IV. IMPACTS ON YOUR EXISTING LEAVE POLICIES

A. Updates to Your Handbooks

1. Have you tripped the 50-employee wire?

2. Do you have a policy that complies with the PWFA? With the PUMP Act?

B. Do you need to create a sick leave policy or are you presumed compliant?

C. Do you have employees working in a different state?

V. TRENDS OBSERVED IN PRACTICE

A. Forbes Advisor published its 2024 statistics for paid leave in the United States:[4]

1. 28 million Americans do not have any paid vacation or holidays.

[4] https://www.forbes.com/advisor/business/pto-statistics/

2. 31% (almost one-third) of US employees do not have access to PTO.

3. 52% of employees work even when using PTO.

4. Average Number of Days:

    a. 11 paid vacation days.

        i. Private sector: 15 days after 5 years of service; 17 days after 10 years of service; 20 days after 20 years of service

    b. 8 sick days.

        i. Generally, the longer an employee has been employed, the more sick days the employee has to use.

        ii. 8 days for full-time; 6 days for part-time.

    c. 7.6 paid holidays.

        i. Even though there are 11 federal holidays, the national average is 7.6, with 21% of employees receiving only 6 holidays per year.

5. Parental Leave.

    a. 2018 US Bureau of Labor Statistics:

        i. 17% of companies offered paid parental leave.

        ii. 89% offered unpaid parental leave.

        iii. New York is the most generous state with a program allowing parents to take up to 12 weeks of Paid Family Leave at 67% of their pay.

B. WTW 2023 Leave, Disability and Time-off Trends Survey[5]

1. Employers choosing to modify paid leave, time off, or disability programs to support attraction and retention strategies.

2. Enhanced parental leave, bereavement leave, and caregiver leave.

[5] https://www.wtwco.com/en-us/news/2024/01/majority-of-employers-will-change-their-leave-programs-in-the-next-two-years-wtw-survey-finds

3. Unlimited leave: 12% have a policy, up from 9% two years ago. 16% anticipate offering unlimited PTO to exempt employees in the next two years.

    a. 31% of companies reporting this type of program for directors and executives; 9% considering it over the next two years.

C. Increase in use of "Paid Time Off" rather than separate vacation and sick leave policies.

D. The rise and fall of unlimited leave policies.

1. Pros:

    a. ESTA – possible "presumed compliance."

    b. No need for "separate buckets of leave."

    c. Reduces HR hours.

    d. Attractive benefit for top talent.

2. Cons:

    a. Abuse?

        i. Although statistics show that most employees do not abuse unlimited PTO, there are those who will.

            (A) This can put stress on the team.

    b. Can encourage anxiety and burnout.

        i. Not all employees like the ambiguity of unlimited leave, especially your best employees - Employees will try to guess the "real" number of hours for leave, which can result in taking less time than if there was an accrued model.

        ii. Hardworking employees are less likely to take leave → causes burnout, and they leave.

    c. Not all managers will apply the policy equally.

        i. Some managers may be less willing to accept the unlimited PTO policies for their employees.

E. Flex Time

1. This is often seen used as a four-day workweek. Employers can also offer flex time to permit an employee to make up time taken for an appointment rather than requiring the employee to use PTO.

2. Flexibility in a job has become the primary driver for individuals switching from typical office hours to a flexible gig.[6]

   a. 63% of individuals say that setting their own schedule makes gig work more attractive.

   b. 44% of US respondents say they would consider leaving a full-time role for contingent work if it permitted a four-day workweek.

   c. 53% of individuals who already made the switch attribute it to interest in flexibility and work/life balance.

3. Data indicates that employers are already moving in this direction.[7]

   a. In February 2023, Britain completed the world's largest trial of a four-day workweek with a 92% success rate.

   b. Q4 of 2023 saw a 400% increase in jobs offering a 4-day workweek, 4.5-day week, or a 9-day fortnight compared to Q4 2022.

VI. CONCLUSION

Questions?

Thank you!

[6] https://www.forbes.com/sites/bryanrobinson/2024/02/06/new-flexible-jobs-making-a-2024-comeback-what-that-means-for-your-career/?sh=21490f9e3a39

[7] https://finance.yahoo.com/news/rise-little-flex-time-shorter-093000418.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAKYrrDE240L3XbJmWy5sGbJuBkHTusHHM17kxCWndU9qQhRun5BT3u7o3VRoI3irFEpegDlvEVAcsIKOngc4smiY9atfcW2UBunHhCSF-HJdj6PI-Uu2fEo_6lhQpVjUKDdzKQZYWarzoC-Y2TW4CCxyLMCiy4WtZueUHoXOUIo-

FLSA – COMMON PITFALLS – WHAT YOU DON'T KNOW CAN HURT YOU

By Kathleen H. Klaus, Esq.

I. SUMMARY OF IMPORTANT FLSA DECISIONS SINCE MARCH 2024

A. Burden of Proof.

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

a. Classification case, where outside sales team argued should have been classified as non-exempt.

b. The "default" is that all employees are covered by the FLSA, *i.e.* "Non-exempt" from the statute's overtime requirements.

c. Employer has the burden of "proving" that the employee is exempt.

i. "Preponderance of the evidence" means more than a coin toss or "51%".

ii. "Clear and convincing" is more stringent; some courts say 80-90% burden, just lower than "beyond a reasonable doubt" criminal standard.

2. United States Supreme Court resolved split in the federal courts over the appropriate standard and found that "preponderance of the evidence" is the burden of proof in exemption cases.

a. Why does it matter?

i. Job description supported by some testimony is likely a "preponderance."

ii. "Clear and convincing" likely means most employees in that position supporting employer's side.

b. Applies to all exemption cases, not just sales.

B. Salary Threshold for Executive, Administrative and Professional Exemption.

1. **Plano Chamber of Commerce, et al v. United States Department of Labor.**

a. Executive, administrative and professional employees are exempt.

b. Statute does not contain any description of the specific duties for the EAP exemption or even mention salary thresholds. The only "clue" in the statute is the phrase "*bona fide,"* which means "genuine," and the use of the terms, "executive, administrative and professional."

c. Department of Labor made regulations soon after the statute was passed.

d. You're familiar with them. For "administrative" exemption, "the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."

e. Always had a salary component, but the salary component was meant to be a proxy for the duties test and not a "white collar" minimum wage. Historically set at the 10% percentile of average salary in the South (where salaries and wages tend to be lower). In most cases, in the real world, if an employee did not meet the salary threshold, he or she also did not meet the duties test.

f. Rule changed in 2004; the threshold was raised to the 20% percentile. This is likely because the minimum wage had not been adjusted since 1997.

g. Rule changed in 2016 and nearly doubled the salary threshold into the 40% percentile. It also provided for automatic, indexed adjustments every three years. Changed the status of 4.2 million employees.

    i. This was struck down by a federal court as illegitimate because it essentially created a minimum wage for EAP workers.

h. Rule changed in 2019, with a modest increase that stayed within the 20th percentile and no automatic adjustments. This one also challenged, on the ground that ***any*** salary threshold is impermissible because it creates requirements not found in the statute.

    i. The regulation was upheld because the salary threshold was low enough to be a proxy, which is a legitimate exercise of the Department of Labor's powers.

i. Rule changed in 2024. Two-tiered increase in salary threshold from $684 to $844 on July 1, 2024, and to $1,128 on January 1, 2025. This would change the status of 5 million employees. Also included the automatic increases.

    i. This was a challenge to the decision striking down the 2016 rule, a decision that was not appealed because of the change in administration.

    ii. Found that the rule effectively created a white-collar minimum wage and therefore was an invalid use of the power delegated to the Department of Labor.

    iii. Case is pending in the Fifth Circuit Court of Appeals.

II. MISCLASSIFICATION OF EMPLOYEES.

A. Independent Contractor.

1. Rule implemented in 2024, and is a "totality of the circumstances" test, which means that there is no bright line.

2. Relevant factors are:

a. opportunity for profit or loss depending on managerial skill;

b. investments by the worker and the potential employer;

c. degree of permanence of the work relationship;

d. nature and degree of control;

e. extent to which the work performed is an integral part of the potential employer's business; and

f. skill and initiative.

3. Case filed in January 2025 by a salesman who was classified as an "independent contractor" of a company that sold gutter filters.

a. Plaintiff claimed he was "on call" 15 hours per day, 6 days per week.

b. On a Monday night, told to handle a potential sale that was 2.3 hours away from the salesman's home.

c. Salesman decided to take the next day off and vacation near the place of the sales call.

d. Company called and told him to be at a potential sale that evening. When he said he would not take the call, he was "fired."

i. This makes it sound like he was an employee.

B. EAP Exemption.

1. Problem often arises because rules written for manufacturing economy and our economy is a service economy. Regulations clearly state distinguish between those employees who produce the widgets and those employees who "assist with the running or servicing of the business."

2. What happens when the business ***is*** services and not production.

3. A "Move-In Coordinator" for a retirement home claimed to be non-exempt in a recent suit. Employer noted that she had considerable discretion over what work needed to be done to

prepare a unit and employee argued that she did not have actual decision-making authority, but was a go-between acting within parameters set by employer.

4. A "Logistics Coordinator" found to be non-exempt. The employer provided "middleman" services between a common carriers and customers. Court found that employees were essentially "production" employees and not administrators assisting with the "running or servicing of the business."

5. These employers hire consultants to frame the job so that it will be exempt. This may matter in finding that the employer acted in good faith, but it does not impact the test.

III. DEDUCTIONS FROM SALARIES

A. The EAP Exemption/Salary Basis.

1. Even if the duties and salary threshold tests are met, the exemption only applies if the employee is paid on a "salary basis."

2. This means the employee is paid "predetermined amount" each pay period, which represents all of her compensation, and which does not vary because of the "quality or quantity of the work performed."

3. Employer may not dock pay, if the employee is "ready, willing and able" to work that week.

4. May deduct if employee does not work and does not make use of available PTO.

5. Occasional docking will likely not impact exempt status. Employer must have an "actual practice" of docking.

B. "Uncontrollable Absence."

1. What if employee cannot make it in because of inclement weather?

2. Leave docking vs. salary docking.

IV. OFF-THE-CLOCK WORK

A. Must pay for all time "suffered or permitted" to work.

B. Does not have to authorize or know about it. Employee does not have to report overtime for the employer to be obligated to pay overtime.

1. Case out of New York where paramedics were required to perform safety checks before and after shifts.

2. Only paid for shifts.

a. Employer had written policy that required employees to report overtime.

b. The failure of employees not to report overtime found not to be a defense, where there was evidence that employers knew of the safety checks.

C. Cannot divide preparatory or wind-down activities into "incremental" tasks to avoid this rule within the *de minimis* rule.

1. Recent case filed by shift managers of Little Caesars corporate stores. The employees received work-related calls and text messages they had to respond to on a regular basis, regarding scheduling, ordering, inventory and similar matters.

2. Another recent case where employees were expected to "receive directions" and "inspect equipment" as part of shift transfer, but before they clocked it.

D. How to avoid unauthorized "off the clock" work.

1. Clear policy that the company does not permit employees to work off the clock. Provide examples of what working off the clock means to avoid misinterpretations.

2. Make sure employees take lunches and breaks ***away from their desk***.

3. Do not allow hourly employees to access their email remotely.

4. Train managers and supervisors to make sure that employees don't stay late to finish work and are clocked in for every minute they work.

5. While you can discourage employees from working outside scheduled work hours, they cannot refuse to pay employees for any time worked.

E. Probationary employees must be paid.

1. Case filed in January on behalf of someone who was not paid for the two days he worked as a "screen test" for whether he would be hired.

2. He was "working."

V. BONUSES AND OVERTIME CALCULATIONS

A. Shift premiums.

1. Add and average.

B. Non-discretionary bonuses.

1. This must be included in determining “regular rate of pay”.

2. Mileage does not have to be included. It’s considered reimbursement of business expense.

C. Employer cannot reduce wage as a way to avoid actual overtime.

1. Home healthcare worker reduced wages for weeks when employee worked overtime, which had the effect of paying the employee straight time for the extra hours.

2. Reductions are permissible, as long as they are not tied to the number of hours worked.

VI. BREAKS

A. Issues arise when employer does not pay for meal breaks and automatically deducts for meal breaks.

1. Such policies are not *per se* unlawful.

2. Employers have deducted meal break time from paychecks, on the assumption that employees took mandatory meal breaks.

3. Must have a way for employee to notify employer that they worked through the meal break, and time therefore should be compensated.

B. Even if employees are required to notify employer when they don’t use meal break, the employees can come back and sue later for unpaid wages.

C. But employee has to show that she ***worked*** during meal break; not just that she was on the work site during meal break.

VII. TRAVEL TIME

A. Do not have to compensate for:

1. Commuting to and from work.

2. If employee works two shifts, the commute home in between shifts is not paid work.

B. Do have to compensate for:

1. Mandatory travel between work locations.

2. Mandatory return to site at end of shift.

a. To load or unload

b. Safety checks.

ACCOMMODATING SUCCESSFULLY: NAVIGATING THE ADA AND PWFA

By Mariel G. Newhouse, Esq.

I. OVERVIEW

A. Overview of the Americans with Disabilities Act interactive process

B. Common types of requests and accommodations available

C. How the Pregnant Workers Fairness Act fits into this framework, and where additional assessment is needed

II. THE INTERACTIVE PROCESS

A. The ADA requires employers to provide reasonable accommodations to employees with disabilities as long as the accommodations do not cause undue hardship.

B. Steps in the Interactive Process:

1. Recognize an accommodation request

2. Request additional information, where necessary

3. Engage in a discussion with the employee regarding potential accommodations

4. Complete the process

C. Recognizing an Accommodation Request:

1. There is no key language.

a. You should not wait for an employee to explicitly state "I am requesting a reasonable accommodation."

b. Listen for where an employee indicates they have a problem related to a medical condition.

i. EXAMPLES FROM EEOC GUIDANCE

(A) "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing."

(B) "I need six weeks off to get treatment for a back problem."

(C) "My wheelchair cannot fit under the desk in my office."

D. Requesting Additional Information

1. Determine whether additional information is necessary.

    a. For example, if an employee is seeking an accommodation related to a wheelchair that the employee uses daily, additional documentation may not be necessary.

2. Assess what information you need:

    a. Has the employee requested a specific accommodation? If not, you may need to engage with the employee to figure out what the employee has in mind for an accommodation.

    b. If the employee provided medical documentation, did the physician have a copy of the job description? If not, you will likely need to ask the employee to provide a copy of the job description to their medical care provider.

    c. Only ask for what is absolutely necessary. This typically means asking for the requested accommodation and approximately how long the employee will need the accommodation.

E. Engaging in the Interactive Process

1. If the employee asks for a specific accommodation, and you are able to grant it, then the process may end here.

2. If the employee did not ask for a specific accommodation, you will need to engage with the employee to assess what accommodations will assist the employee. You do not have an obligation to guess what the employee needs (if it is not obvious), but if you are aware that the employee has a disability and has requested some sort of accommodation, you must at least attempt to engage with the employee as to what accommodations can be made.

3. If the employee requested a specific accommodation, but you are unable to grant that specific accommodation, you should suggest an alternative arrangement.

F. Completing the Process

1. Ideally, you are able to find a mutually agreeable accommodation and you implement the accommodation as necessary.

2. In some cases, the requested accommodation will pose an undue hardship or is simply not available for an employee with certain job duties. In these scenarios, you should document the decision as to why an accommodation could not be made. When in doubt, seek legal counsel to ensure you have fully engaged in the interactive process.

III. COMMON TYPES OF REQUESTS AND ACCOMMODATIONS

A. Leave

1. Typical situations in which an employer must offer leave:

a. There is no other effective accommodation;

b. The employee is not eligible under FMLA, but has a qualifying disability under the ADA;

c. The employee has exhausted their FMLA time, but needs additional time off; or

d. The employee has exhausted, or is not otherwise entitled to vacation/sick leave and the employee has a qualifying disability under the ADA.

2. What happens if an employee is eligible for leave under an employer's policies other than ADA?

a. According to the EEOC, if an employee requests leave due to a disability, but the leave falls within an employer's existing leave policy, the employee should be treated the same as an employee requesting leave for reasons other than disability.

b. According to the EEOC, if an employee requests leave that can be addressed by FMLA or workers' compensation program, the employer may provide leave under those programs first.

B. Reassignment

1. This type of accommodation is typically offered when an employee can no longer perform the essential functions of their current position with or without an accommodation, and an alternative position is available.

2. This does NOT require the employer to restructure a job for the employee or create a vacant position for an employee.

C. Modified Schedule

1. This is typically in the form of adjusting arrival or departure times, providing periodic breaks, altering when certain functions are performed, or providing additional unpaid leave.

2. Like all accommodations, this must only be granted if it will not pose an undue hardship. If there is a certain position in which time is an essential function (e.g., a teacher may be expected to work during certain hours of the school day), it may cause an undue hardship on the employer to modify the schedule.

D. Telework

1. In a post-COVID era, employers may find it more difficult to claim that telework will pose an undue hardship.

2. If an employee requests to work from home as an accommodation, an employer is not required to accept that accommodation request. However, the employer must engage in the interactive process to see if there is another accommodation available.

3. The employer should review the existing job description to assess whether an essential function of the job must be performed in the office.

   a. An employer does not have to remove an essential function from a job, but if it is a minor role, the employer may need to re-assign that task so that the employee with the disability can perform the work at home.

IV. HOW THE PWFA FITS INTO THE ADA DISCUSSION

A. The PWFA provides for reasonable accommodations for qualified individuals who have known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.

B. PWFA and the ADA:

1. As a preliminary matter, some pregnancy-related conditions under the PWFA may also be covered under the ADA. However, pregnancy itself is not a disability under the ADA.

2. Just like the ADA, the PWFA requires employers to provide a reasonable accommodation for the known limitation of a qualified individual, unless the accommodation would cause an undue hardship.

C. Documentation under the PWFA:

1. Encourages employers to minimize documentation

2. Self-confirmation – an informal process in which the employee provides the employer with information about their pregnancy

   a. An employer must accept as sufficient an employee's self-confirmation when: (1) the pregnancy is obvious; or (2) the employee seeks a "predictable assessment" accommodation.

3. "Predictable Assessment" – four assessments that will not impose an undue hardship in 'virtually all cases'

   a. Allowing an employee to carry or keep water near to enable them to drink;

b. Permitting an employee to take additional restroom breaks as needed;

c. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand as needed;

d. Allowing an employee to take breaks to eat and drink as needed.

4. It is NOT reasonable to seek supporting documentation where:

a. The limitation/adjustment/change is obvious and the employee provides self-confirmation;

i. e.g., the employee needs a bigger uniform

b. Employer has sufficient information to determine whether the employee has a qualifying limitation and needs an adjustment or change due to the limitation;

i. E.g., employer is aware of employee's morning sickness. The employer cannot ask for medical documentation each time the employee is sick due to morning sickness.

c. Employee is pregnant and requests a "predictable assessment";

d. The reasonable accommodation relates to time and/or place to pump/nurse during work hours and employee provides self-confirmation; or

e. The requested accommodation is available to employees without known limitations under the PWFA pursuant to a policy or practice without submitting supporting documentation.

i. E.g., employer does not seek medical documentation unless an employee is absent for three or more days; therefore, the employer should not seek documentation from a pregnant employee who is only absent for one day.

5. It IS reasonable to seek documentation to:

a. Confirm the physical or mental condition;

b. Confirm the condition is related to, affected by, or arising out of pregnancy, childbirth or related medical condition; or

c. Describe the adjustment/change needed due to the limitation.

6. Definition of "undue hardship"

a. When an employee can perform all of the essential functions of the job, undue hardship has the same meaning as under the ADA – significant difficulty or expense for the employer's operation

b. If the employee cannot perform all of the essential functions, and the requested accommodation is a temporary suspension of an essential job function, then the employer must consider the ADA definition of undue hardship AND the following relevant factors:

i. Length of time the employee/applicant will be unable to perform the essential function(s);

ii. Whether there is work for the employee to accomplish by allowing the employee to perform all the other functions of the job, transferring the employee to a different position, or otherwise;

iii. The nature of the essential function, including its frequency;

iv. Whether the covered entity has temporarily suspended the performance of essential job functions for other employees in similar positions;

v. Whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s); and

vi. Whether the essential function(s) can be postponed or remain unperformed for any length of time and for how long.

7. Examples:

a. One month into her pregnancy, an employee at a paint manufacturing plant is told by her healthcare provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of her job involves regular exposure to these chemicals. The employee explains her limitation to her supervisor and asks that she be allowed to continue to perform her other tasks that do not require exposure to chemicals.

i. The employee's need to avoid exposure to chemicals is a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth or related medical conditions; she needs an adjustment or change at work due to the limitations; she communicated this with her employer.

ii. If modifications that would allow the employee to continue to perform the essential functions of her position (e.g., enclosing chemicals or providing additional protective gear) are not effective or cause an undue hardship, the

employee can still be qualified under the definition that allows for a temporary suspension of the essential function:

(A) Her inability to perform is temporary;

(B) She can perform the essential functions in the near future because she is pregnant, and the suspension would be for less than 40 weeks;

(C) This can be reasonably accommodated by suspending the essential functions and allowing the employee to do the remainder of her job.

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LABOR PAINS: NAVIGATING THE NLRB'S SHIFTING STANDARDS

By Jonathan M. Sollish, Esq.

I. OVERVIEW OF NATIONAL LABOR RELATIONS ACT ("NLRA") AND NATIONAL LABOR RELATIONS BOARD ("NLRB")

A. NLRA governs relations between employees and their employers.

1. Employee rights under the NLRA

a. Under Section 7 of the NLRA, employees have "the right to self-organize, to form, or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in other concerted activity for the purpose of collection bargaining or other mutual aid or protection."

b. Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA.

c. These rights apply even if employees are not represented by a labor union.

2. Employer rights under the NLRA

a. Section 8(d) and 8(b)(3) of the NLRA imposes a duty on labor unions to bargain in good faith with employers. It is unlawful for a labor union to refuse to bargain with an employer. The NLRA also imposes a duty on employers to bargain in good faith with unions.

B. Structure of the NLRB

1. The NLRB is an independent federal agency that has an adjudicatory arm and prosecutorial arm.

a. The Board

i. The adjudicatory arm of the NLRB.

ii. Made up of a five-member panel.

iii. Members of the Board are appointed by the President to staggered five (5) years terms.

iv. Oversees the NLRB's division of administrative law judges, who hear and adjudicate unfair labor practice cases.

v. Decisions by administrative law judges can be appealed to the Board.

vi. Much like the courts, the Board sets precedent by reviewing ALJ decisions.

b. The General Counsel

i. Independent from the Board.

ii. Oversees the investigation and prosecution of unfair labor practice charges.

(A) The investigation and prosecution of unfair labor practice charges occurs in regional offices.

iii. The General Counsel is appointed by the President to four (4) year term.

iv. Responsible for setting enforcement policy.

C. Current composition of NLRB

1. The Board

a. At the moment there are only three members of the Board: Republican Chairman Marvin Kaplan, Democrat David Prouty, and Democrat Gwynne Wilcox.

b. On January 27, 2025, President Trump attempted to fire Member Gwynne Wilcox, temporarily leaving the Board without a quorum.

i. Wilcox has been reinstated by a federal judge, but the Trump Administration is appealing that decision.

c. Wilcox's firing left the Board unable to hear appeals, seek injunctions from the federal courts, promulgate regulations through rulemaking, and enforce subpoenas for six weeks.

d. During periods when the Board lacks a quorum, regional offices can still investigate and prosecute unfair labor practice charges and hold representation elections.

e. While some uncertainty remains about President Trump's plan for the NLRB, it is largely expected that he will appoint republican members to fill the vacant seats.

2. The General Counsel

a. President Trump appointed William Cowen as Acting General Counsel.

b. Prior to his appointment, Cowen had been the Regional Director of NLRB's Los Angeles office since 2016. Cowen has also worked in private practice and served as a Board member for a short period of time after a recess appointment by President George W. Bush.

II. STANDARDS ARE EXPECTED TO SHIFT UNDER THE NEW COMPOSITION OF THE NLRB

A. Policy and precedent

1. Current employee-friendly standards are expected to shift to more employer-friendly standards.

a. During the Biden Administration, the Board and the General Counsel implemented standards that were very employee friendly.

b. While precedent set by the Board during the Biden Administration will likely be overturned in the coming months and years, those decisions remain in effect.

c. Actions taken by the NLRB during the first Trump Administration offer a glimpse into types of policy shifts that are expected to take place.

d. The General Counsel can shift policy by issuing memorandums that direct regional offices on how they should investigate and prosecute unfair labor practice charges. Cowen has already rescinded the memorandums issued by the former general counsel.

e. The Board shifts policy by issuing opinions to appeals. The Board can also shift policy through administrative rule making, although this is somewhat rare for the Board.

B. General Counsel memorandums

1. General Counsel issues memorandums to provide policy guidance to regional offices.

a. The following memorandums have been rescinded. It is expected that the permanent General Counsel will issue guidance implementing employer friendly enforcement policy.

i. Memorandum directing regional offices to seek wide breadth of consequential damages, including costs related to job searches such as gas, ride share payments, and daycare expenses; lost contributions into retirement funds; and expenses related to evictions. (GC 21-06).

ii. Memorandum directing regional offices to seek wide breadth consequential damages in settlement agreements and discouraging the use of non-admission clauses. (GC 21-07).

iii. Memorandum directing regional offices to seek make-whole remedies for all employees harmed as result of an unlawful work rule of contract term. (24-04).

iv. Memorandum expressing it is the General Counsel's opinion that non-compete agreements violate the NLRA and directing regional offices to submit

cases involving non-compete agreements to the General Counsel's office for analysis. (GC 23-08).

v. Memorandum to regional offices reiterating the importance of seeking injunctive relief under the appropriate circumstances. (GC 24-05).

vi. Memorandum urging the Board to find certain types of "stay or pay" provisions unlawful under the NLRA, including stay or pay provisions tied to mandatory training that the employer requires the employee to attend or obtain; repayment of fees that are higher than the costs of the training provided to the employee; relocation or sign-on bonus payments that fail to include an option between the employee taking an up-front payment or deferring the receipt of the bonus until the end of the stay or pay time period; and a repayment provision where the employee is terminated for "any reason whatsoever." (GC 25-05).

vii. Memorandum encouraging "the Board to find that an employer has presumptively violated Section 8(a)(1) [of the NLRA] where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." (GC 23-02).

C. Recent Board Decisions likely to be overturned.

1. In the coming months and years, it is likely that Republicans will hold a majority of seats on the Board and will overturn many of Board's recent decisions.

a. The following are cases that remain good law and demonstrate Board's recent shift towards employee-friendly standards.

i. *Lion Elsatomers LLC II*, 372 NLRB No. 83 (2023)

(A) The Board overturned *General Motors LLC*, 369 NLRB No. 127 (2020), and reinstated the four-factor test from *Atlantic Steel*, 245 NLRB 814 (1979), for determining whether an employee loses the protection of the Act for conduct towards management in the work place. Under *Atlantic Steel*, in determining whether "an employee's conduct during Sec. 7 activity loses the protection of the Act, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* at 1, fn 3.

(B) Under the Trump administration, this standard is expected to shift back to the test under *General Motors LLC,* in which the General

Counsel must first prove that the employee's protected concerted activity played a role in adverse action, and then the employer bears the burden of proving it would have taken the adverse action despite the employee's protected concerted activity.

(C) At the moment employees have more latitude to act out and be disruptive while engaging in protected concerted activity.

ii. *McLaren Macomb*, 372 NLRB No. 58 (2023)

(A) The Board found that severance agreements that include non-disparagement clauses that require employees to waive their rights under the NLRA are unlawful.

(B) The Board's decision overturned the 2020 decision of *Baylor University Medical Center and IGT d/b/a International Game Technology* that held similar non-disparagement clauses were lawful. It is likely that this precedent will be reinstated.

(C) As of right now, non-disparagement clauses in severance agreements, employee handbooks, and employment agreements must be carefully tailored to ensure employees are still permitted to engage in protected concerted activity.

iii. *Amazon.com Services LLC*, 373 NLRB No. 136 (2024)

(A) The decision overturned precedent from 1948, so it is likely this decision will be reversed during the Trump Administration.

(B) If employers want to hold meetings to express their views on unionization, the following conditions must be met: (1) The employer intends to express its views on unionization at a meeting at which attendance is voluntary; (2) Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting; and (3) The employer will not keep records of which employees attend, fail to attend, or leave the meeting.

iv. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024)

(A) The Board reinstated the clear and unmistakable waiver standard for determining whether a union has waived its right to bargain over mandatory subjects. This standard, which had been in place for nearly 70 years before it was overturned in 2019.

(B) This decision "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term."

v. *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023)

(A) The Board overturned *SuperShuttle* (2019) and returned to the use of common-law factors for determining whether a worker is classified as an employee or independent contractor.

(B) The 2019 standard of analyzing a worker's entrepreneurial opportunity will likely be reinstated in the coming years.

(C) As of right now, the common law test remains in place, meaning that more workers are covered by the NLRA.

vi. *Thryv, Inc.*, 372 NLRB No. 22 (2022)

(A) Board held that make-whole remedies include "all direct and foreseeable pecuniary harms suffered" as a result of unfair labor practices.

(B) It is likely that in the near future, the Board will return to limiting damages to back pay.

(C) Right now, employers may be liable for more extensive damages.

III. LABOR LAW LEGISLATIVE OUTLOOK

A. Richard L. Trumka Protecting the Right to Organize Act (The PRO Act)

1. The PRO Act would greatly expand employees' rights under the NLRA.

a. If passed, the PRO Act would do the following:

i. Revise definitions of employee, supervisor, and employer;

ii. Weaken right-to-work laws;

iii. Expressly outlaw captive audience meetings;

iv. Increase the NLRB's injunctive relief power;

v. Hold corporate officials personally liable for unfair labor practices; and

vi. Prohibit employers from replacing striking employees.

b. Despite the inroads President Trump made with organized labor at the ballot box, it is very unlikely that the PRO Act will get passed.

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HR, AI, FCRA, NLRB, AND EVERY ACRONYM IN BETWEEN: BEST PRACTICES AND RISKS DURING THE ONBOARDING PROCESS

By Jordan M. Small, Esq.

I. AI IN HIRING AND ONBOARDING

A. Companies small and large are deploying AI in their hiring process – AI is rapidly becoming a large part of many companies' hiring strategy.

1. **Why Chipotle is turning to AI as it steps up its seasonal hiring to 20,000 (https://www.marketwatch.com/story/chipotle-recruiting-20-000-seasonal-workers-using-ava-cado-ai-program-b287da22)**

   a. Chipotle launched an AI program on its recruitment website, which claims to have shortened the average time it takes a job seeker to fill out an application and has helped the restaurant chain increase its application-completion rate to 85% from 50%.

   b. Applicants have a conversation with the AI-generated "Ava Cado" which helps them complete their applications and identify roles that fit their needs.

   c. Chipotle's AI was developed with Paradox, Inc., a company which was used by GM, and estimated to have generated $2 million in annual cost savings.

2. **Mercor, an AI recruiting startup founded by 21-year-olds, raises $100M at $2B valuation** (https://finance.yahoo.com/news/mercor-ai-recruiting-startup-founded-140000777.html)

   a. Mercor uses AI to automate the hiring process. Its platform automates resume screening, candidate matching, offers AI-powered interviews, and payroll management.

   b. Mercor alleges that its AI systems "remove bias from the process" because AI systems are less biased than human ones.

   c. The company has already helped HR teams evaluate 468,000 applicants.

3. **65% Of Employers To Use AI To Reject Candidates In 2025 (https://www.forbes.com/sites/rachelwells/2024/10/27/65-of-employers-to-use-ai-to-reject-candidates-in-2025/)**

   a. Nearly seven in ten employers say that they plan to use AI in the next year to screen and reject candidates **without any human oversight.**

   b. 70% of employers use AI to automatically reject candidates at the initial stage

c. The number of employers who use AI throughout their hiring process will increase in 2025.

B. How is AI being used?

1. **Companies are using AI in virtually all aspects of the hiring process**

a. According to a survey from Resume Builder:

i. Resume review—83%

ii. Candidate assessment analysis—69%

iii. Social media and personal website scan—47%

iv. Chatbots to communicate with candidates—39%

v. New hire onboarding—36%

vi. Conducting interviews—19%

C. Despite the proliferation in AI – over a third (34%) of HR professionals do not have official AI guidelines in their workplace.

D. Why is this problematic?

1. Studies have shown that AI systems, when used in the hiring process, can create bias, and employers may violate existing anti-discrimination laws (such as Title VII of the Civil Rights Act)

2. Additionally, Employers need to be aware of emerging laws directly related to the use of AI in hiring.

E. Laws to Consider for AI in Hiring

1. The EEOC's 2022 Guidance on AI in Hiring: This focuses on potential ADA violations when using AI tools that may screen out individuals with disabilities and recommends providing specific disclosures and accommodations in AI-driven hiring processes.

2. Utah, Colorado, Illinois, New York City laws

3. EU/UK regulations

F. What to do?

1. TRAIN!

2. Know your vendor

3. Implement AI policies

4. Allow for opt-outs

5. Audit bias

6. Avoid fully-automated processes

II. NLRB & HANDBOOKS

A. NLRA Overview

1. **What is the NLRA?**

a. National Labor Relations Act ("NLRA") governs relations between union employees and their employers but also protects some nonunion employee actions.

b. Applies to ALL "employees" EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, railroad employees. Independent contractors are not considered "employees." Management includes employees who act in a capacity for persons who determine or administer policy.

c. Guarantees all employees the, "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in protected concerted activities for purposes of collective bargaining or other mutual aid or protection." (Section 7 rights)

B. *Stericycle* and Handbooks

1. **The *Stericycle* Decision**

a. August 2, 2023 – NLRB issues *Stericyle Inc.* decision regarding unlawful work rules under Section 8(a)(1) of the NLRA.

b. If the employee establishes that the work rule has the reasonable tendency to chill an employee from exercising their rights, the rule is presumptively illegal.

i. Ask yourself: Does the work rule have a reasonable tendency to interfere with, refrain, coerce or restrict the employee who contemplates engaging in protected concerted activity?

2. Employer must prove that the work rule advances a legitimate and substantial business interest AND that employer cannot advance its interest with a more narrowly tailored rule.

C. Changes to NLRB Board

1. Removal of NLRB counsel Jennifer Abruzzo

2. Removal of NLRB chair Gwynne Wilcox

3. Potential quorum issue?

D. Potential Changes

1. **How could the changes to the NLRB board affect these rules?**

a. The new NLRB board could likely return to the more consistent, employer-friendly *Boeing* standard that existed before *Stericycle*.

b. Under that standard, the Board classified company rules into three categories:

i. Rules that are lawful to maintain under the NLRA;

ii. Rules that warrant individualized scrutiny; and

iii. Rules that are unlawful and the adverse impact on NLRA rights are not outweighed by justifications associated with the rule.

III. FCRA UPDATES

A. NLRA Overview

1. **FCRA Refresher**

a. When employers run background checks through a company in the business of compiling background information, they must comply with the Fair Credit Reporting Act (FCRA)

b. What is "background information"?

2. **FCRA Best Practices**

a. All applicants must sign a background check authorization form.

b. Do not seek background information from references or prior employers prior to obtaining this authorization.

c. Place information in personnel file, except if name of person making the reference would be disclosed.

3. **Updated FCRA Summary of Consumer Rights**

   a. In 2023, the CFPB (Consumer Financial Protection Bureau) released an updated version of the publication titled "A Summary of Your Rights Under the Fair Credit Reporting Act," commonly referred to as the "FCRA Summary of Consumer Rights."

   b. Supersedes 2018 version

   c. Available on CFPB website

   d. Place information in personnel file, except if name of person making the reference would be disclosed.

   e. Forms required to be updated with the revised summary by March 20, 2024.

4. **Potential Intersection with AI**

   a. In November 2024, CFPB issued guidance on the FCRA which affects virtually every employer using third-party vendors for employee screening, monitoring, or assessment.

   b. Companies developing AI algorithms may qualify as consumer reporting agencies if they collect data from multiple sources to train their algorithms or generate worker assessments

   c. "Similar to credit reports and credit scores used by lenders to make lending decisions, background dossiers—such as those that convey scores about workers—that are obtained from third parties and used by employers to make hiring, promotion, reassignment, or retention decisions are often governed by the FCRA."

WORKPLACE RETALIATION

By Rita M. Lauer, Esq.

I. DEFINING PROTECTED ACTIVITY THAT RETALIATION COVERS

A. What is retaliation?

1. Retaliation happens when an employer takes adverse action against an employee because they engaged in a protected activity or threatens to report a violation, like reporting discrimination, harassment, or safety concerns, essentially punishing them for exercising their right to speak up against wrongdoing within the company.

a. Just needs to be a "good faith" belief that the activity is protected, even if the alleged behavior is not unlawful or protected.

2. Can have "retaliation" even before the materially adverse action. Example: if employment handbook or policy discourages exercise of EEO rights or other protected activity.

3. Agency Guidance.

a. Agency guidance defining retaliation including: Wage and Hour Division of the US Department of Labor and EEOC.

b. US Department of Labor Field Assistance Bulletin No. 2022-22 addressing how Wage and Hour Division engages to protect employees from retaliation. Specifically addressed are the FLSA, FMLA, MSPA and EEPA.

4. "Protected Activity" – Worker's Compensation, Protected Leave (FMLA/ADA/Pregnancy), Discrimination/Harassment charges, MIOSHA or DOL complaints or investigations.

a. This can include actions such as being a witness in an EEOC charge, investigation or lawsuit.

b. Refusing to engage in orders that would result in discrimination.

c. Intervening to protect others from discriminatory actions such as sexual advances,

d. Asking management about employee wages.

II. TYPES OF RETALIATION AND TEMPORAL RETALIATION

A. Discipline,

B. Actions to "dissuade" employee from raising a concern relating to possible violations,

C. Taking passports/immigration documents being held by employer and/or threatening to call immigration,

D. Making employee's work-life more difficult,

E. Threatening employee's family members,

F. Demotion,

G. Changing schedule, verbal abuse, altering job responsibilities,

H. Threatening transfer,

I. Intentionally giving lower performance evaluations,

J. Threatening to call police authorities on employee,

K. Coercing an individual to forgo an accommodation or leave,

L. Termination, and/or

M. Constructive discharge.

III. WHO DOES THIS APPLY TO?

A. Family members can be included.

B. Under FLSA, "it is a violation for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA."

1. This prohibits retaliation "by any person" and is not limited to the employer. Could be employer's agent – such as employer's outside counsel being liable for retaliation.

2. Employers who willfully violate FLSA can be prosecuted criminally and fined, and/or imprisoned for 6 months. 29 USC 215(a)(3).

IV. WHAT IS NOT RETALIATION

A. Discipline or termination due to performance issues.

B. Fabrication of performance issues to support termination or discipline of employee is considered retaliatory and will result in penalties by the DOL Wage and Hour and EEOC.

C. Reduction in Force.

D. Misconduct. Employee is not protected or shielded from their own consequences of misconduct or bad behavior.

E. Theft, falsification of records or dishonesty.

F. Document all discipline or termination of any employee who may have engaged in any protected activity.

G. Defense for any further claims.

V. DAMAGES AWARDED FROM RETALIATION

A. Front Pay,

B. Back Pay,

C. Attorney Fees,

D. Reinstatement of employment,

E. Damages arising from alleged violation of FLSA, MSPA (protects seasonal workers), Title VII, FMLA, and/or

F. Possible civil penalties.

VI. TIME LIMITATIONS

A. Gentle reminder – 180-day limit to file a charge with the EEOC.

NON-COMPETES, DUTY OF LOYALTY, WORK FOR HIRE, CONFIDENTIALITY AND IP

By Nolan J. De Jong, Esq.

I. SO, ARE NON-COMPETES REALLY ENFORCEABLE?

A. What is a non-compete?

1. A non-compete agreement is a contractual provision in which an employee agrees not to enter into competition with an employer during or after employment.

2. These agreements typically restrict employees from working for competitors, starting a competing business, or engaging in activities that could harm the former employer's competitive edge.

   a. Non-competes often include limitations on duration, geographic scope, and the type of restricted activities.

   b. Non-competes are designed to protect *legitimate business interests* such as trade secrets, confidential information, and client relationships, courts scrutinize their reasonableness to ensure they do not unduly limit an individual's ability to earn a livelihood.

B. Michigan courts take a case-by-case approach to non-compete agreements, assessing their reasonableness in terms of duration, geographic scope, and the protection of legitimate business interests.

1. The Michigan Antitrust Reform Act (MARA)

   a. MARA prohibits unreasonable restraints on trade, meaning overly broad non-competes may be unenforceable.

   b. Courts generally uphold non-competes that protect trade secrets, confidential information, or goodwill but may strike down those that unduly restrict an employee's ability to work.

      i. *Coates v. Bastian Brothers, Inc.* (2007): The Michigan Court of Appeals upheld a non-compete agreement, emphasizing that such agreements are enforceable if they are reasonable in duration, geographic scope, and serve to protect legitimate business interests.

      ii. *Innovation Ventures, LLC v. Liquid Manufacturing, LLC* (2016): The Michigan Supreme Court clarified that non-compete agreements between businesses are not governed by MCL 445.774a, which applies only to employer-employee

agreements. Instead, such agreements must be evaluated under the federal antitrust 'rule of reason' standard, which considers the impact on competition rather than solely protecting business interests like trade secrets or confidential information.

C. The Federal Trade Commission (FTC) rule banning non-competes

1. In April 2024, the FTC issued a rule that would ban most non-compete agreements nationwide, arguing they stifle competition and suppress wages.

   a. Once (and if) it goes into effect, the rule will prohibit employers from imposing non-competes on workers (including independent contractors and unpaid workers), and the ban will extend to all terms or conditions of employment that either "prohibit" a worker from, "penalize" a worker for, or "function to prevent" a worker from either seeking or accepting work in the United States with a different person, or operating a business in the United States, after their employment ends.

   b. In addition to preventing employers from entering into new non-compete agreements as of the effective date, the rule would also require employers to notify non-excepted employees that existing non-competes will not be, and cannot be, enforced.

2. If enacted, the rule will allow existing non-competes with senior executives and in sale of business agreements to remain in force, but it bans new non-competes with senior executives.

   a. A "senior executive" as a worker earning more than $151,164 who is in a "policy-making position."

   b. The narrow exception allowing non-competes in certain "sale-of-business" agreements, includes bona fide sales of a business, of a person's ownership interest in a business, or of all or substantially all of a business's operating assets.

3. Status of lawsuit that is preventing the FTC from enforcing its rule prohibiting non-competes.

   a. Nationwide Injunction on FTC Rule

      i. On August 20, 2024, a federal court in *Ryan LLC v. FTC* ruled that the FTC lacks authority to enforce the rule, issuing a nationwide injunction. The FTC appealed to the Fifth Circuit on October 18, 2024.

   b. Key Findings in *Ryan LLC*

      i. The court held that the FTC exceeded its statutory authority, ruling that the FTC Act does not grant the FTC power to issue substantive competition rules. The rule was also found to be arbitrary and capricious.

   c. Impact of *Loper Bright* Decision

i. The Supreme Court's June 28, 2024, ruling in *Loper Bright* eliminated *Chevron* deference, making it harder for the FTC to defend its rule by requiring courts to evaluate its authority without deferring to its interpretation.

d. Next Steps in Litigation

i. The Fifth Circuit will hear oral arguments after the FTC's Reply Brief is filed on February 24, 2025. The outcome of the appeal could shape the future of the FTC's authority in rulemaking.

D. What does an *enforceable* non-compete look like?

1. Customizing non-compete agreements based on industry-specific risks ensures they remain enforceable while protecting legitimate business interests. For example:

a. Tech Industry

i. A software development company implements a non-compete clause preventing employees who had direct access to proprietary source code and trade secrets from working at a direct competitor within a 12-month period in the same geographic market.

(A) This restriction is narrowly tailored to protect confidential business information without unnecessarily restricting career mobility.

b. Manufacturing

i. A specialty automotive parts manufacturer requires key engineers who develop proprietary production techniques to sign non-competes restricting them from working for direct competitors within a 50-mile radius for 18 months.

(A) This restriction reasonably protects confidential information and prevents unfair competitive advantages.

c. Healthcare

i. A medical practice enforces a non-compete agreement preventing specialist physicians who have built strong patient relationships from opening a competing practice within a 10-mile radius for two years.

(A) This restriction reasonably protects patient retention and business goodwill.

E. What does an *unenforceable* non-compete look like?

a. Tech Industry

i. A software development company imposes a blanket non-compete preventing all engineers, regardless of role or access to trade secrets, from working at any other tech company nationwide for five years. This is overly broad and unlikely to hold up in court due to excessive restrictions on employment.

b. Manufacturing

i. A general assembly line worker is required to sign a non-compete prohibiting them from working at any manufacturing company in the state for three years.

(A) Since the worker does not have access to proprietary processes, this broad restriction is likely to be deemed unreasonable and unenforceable.

c. Healthcare

i. A hospital requires all nurses, regardless of specialization or access to sensitive patient information, to sign a non-compete preventing them from working at any healthcare facility within a 50-mile radius for five years.

(A) This broad restriction excessively limits employment opportunities in a high-demand field and is likely to be struck down as unreasonable.

II. PROTECTING OUR STUFF

A. What is a trade secret versus what is general employee knowledge?

a. Trade secrets include proprietary formulas, processes, customer lists, and other confidential business information that provide economic value by remaining undisclosed.

i. Trade secrets may be protected through confidentiality agreements and enforcement mechanisms to prevent misappropriation.

b. General employee knowledge refers to the skills, experience, and general industry know-how that an employee acquires over time and can take with them to future jobs.

i. General employee knowledge cannot be restricted by a confidentiality agreement because it is not proprietary to the employer and does not constitute a trade secret.

B. What is a confidentiality agreement?

1. Confidentiality agreements outline specific obligations for employees and third parties to prevent unauthorized disclosure of sensitive business information.

    a. Employers must ensure these agreements are narrowly tailored to protect only legitimate business interests without overreaching into publicly available, commonly known industry knowledge or general employee knowledge.

C. How do we make sure employees know the difference between a trade secret and general employee knowledge?

1. Educating Through Training Programs

    a. Regular training sessions help employees distinguish between trade secrets and general industry knowledge.

        i. These programs should include real-world examples, case studies, and interactive discussions to reinforce the differences.

2. Developing Clear Confidentiality Policies

    a. Employers should draft clear and accessible policies that outline what constitutes a trade secret and how employees are expected to handle such information.

        i. These policies should be included in employee handbooks and re-visited during performance evaluations.

3. Implementing Secure Information Management Practices

    a. Restricting access to trade secrets through role-based security, encrypted databases, and internal monitoring ensures that confidential information remains protected and prevents unintentional dissemination.

4. Enforcing Consequences for Breaches

    a. Establishing and consistently enforcing penalties for unauthorized disclosures ensures that employees understand the gravity of mishandling trade secrets.

        i. This may include disciplinary actions, termination, or legal consequences when appropriate.

III. WHAT ARE THE NON-CONTRUCTUAL OBLIGATIONS OF WORKERS?

A. Duty of Loyalty and Good Faith

1. Employees must act in the best interest of their employer, meaning they should avoid conflicts of interest, self-dealing, or actions that undermine the company's operations.

a. It is crucial to establish clear conflict-of-interest policies and provide training on ethical business practices to mitigate risks of employee misconduct.

i. Ensure transparency and disclosure mechanisms that allow employees to report potential conflicts before they become legal issues.

B. Workplace Safety and Compliance

1. Employees have an obligation to follow safety regulations, adhere to OSHA standards, and comply with internal workplace policies.

2. Employers should regularly update safety protocols, conduct training, and perform audits to prevent workplace hazards.

3. Management teams play a key role in enforcing compliance, addressing violations, and fostering a culture of accountability to minimize legal exposure and enhance employee well-being.

C. Confidentiality and Data Protection

1. Employees must safeguard proprietary company information, trade secrets, and sensitive client data, even if they have not signed a formal confidentiality agreement.

2. Implement strong cybersecurity policies, limit data access based on roles, and educate employees about the consequences of data breaches.

a. Employers should establish procedures for handling confidential data breaches and reinforce expectations during onboarding and periodic training sessions.

D. Professional Ethics and Conduct

1. Upholding ethical standards is a fundamental expectation for employees across all industries. This includes honesty in reporting time worked, proper use of company resources, and adherence to professional codes of conduct.

a. Employers must communicate these expectations through codes of ethics, training, and disciplinary procedures to ensure integrity in the workplace.

E. Whistleblower Protections and Reporting Duties

1. Employees who report unlawful or unethical activities are protected under state and federal whistleblower laws.

a. Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 et seq.

i. The WPA prohibits employers from retaliating against employees who report violations of law, participate in investigations, or refuse to engage in illegal activities.

b. Federal statutes such as the Sarbanes-Oxley Act and the Dodd-Frank Act.

i. These federal statutes provide protections for employees in financial and corporate sectors who expose fraudulent or unlawful conduct.

2. Employers should create clear internal reporting mechanisms, provide assurances against retaliation, and ensure compliance with legal protections.

a. Establishing anonymous reporting options and fostering a culture where employees feel safe speaking up.

UPDATES IN DISCRIMINATION LAW

By: Ronald A. Sollish, Esq.

I. OVERVIEW

A. Understanding the current Legal Landscape and how Various Shake-Ups in Federal Government and Workforce are Impacting the Private Sector.

B. Discussing Various Techniques for Adapting to a Landscape that is Rapidly Evolving and Facing Multiple Legal Challenges.

C. Addressing Rapid Changing Landscape and how to Continue to Address Discrimination, Harassment and Retaliation Concerns within your Organization.

II. AN OVERVIEW OF THE EEOC

A. Created by the Civil Rights Act of 1964.

1. It was tasked with enforcing Title VII and ensuring compliance from employers with discrimination, harassment and retaliation in the workplace.

B. 2024 marked the 60th anniversary of the Civil Rights Act.

1. President John F. Kennedy proposed the 1964 bill in June of 1963.

2. President Lyndon Johnson signed the bill into law on July 2, 1964.

3. The Act is known as the most sweeping civil rights legislation since Reconstruction.

C. 2024 secured almost $700 million for over 21,000 victims of employment discrimination—the highest monetary recovery in its recent history.

D. The EEOC currently describes its responsibilities as: enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, childbirth, or related conditions, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information.

1. Their role is to fairly and accurately assess the allegations in the charges by employees and issue a finding as to their investigation finding.

2. If the EEOC finds that discrimination has occurred, their primary goal is to settle the charges between the employer and employee.

3. If settlement is unsuccessful or prove unviable, they have the authority to file a lawsuit to protect the rights of individuals and the interests of the public.

III. CHANGE TO STATE LAW IN MICHIGAN: AMENDMENT TO THE MICHIGAN ELLIOT-LARSEN CIVIL RIGHTS ACT (ECLRA) – MCL 37.2202

A. After a landmark ruling from 2022 in *Rouch World v Michigan Department of Civil Rights*, the Michigan legislature codified the holdings in *Rouch World*, ensuring that discrimination on the basis of sexual orientation and gender identity is unlawful. This made Michigan the 22nd state to explicitly include sexual orientation and gender identity in its civil rights statutes.

B. The Bill was signed into law on May 17, 2023 by Governor Whitmer and applies to any Michigan employer with one or more employees.

C. Effective February 13, 2024, ELCRA was amended to include both "sexual orientation" and "gender identify or expression" to the various classes that someone could not be discriminated against for.

1. Now the Statute specifically reads that:

(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, because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.

(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 because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status.

2. The amendment defines "gender identity or expression" as "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."

3. 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."

4. The amendment explicitly codifies the protection afforded by the *Rouch* decision and expands upon it to add protection for gender identity and gender expression, which were not addressed in the Court's opinion.

IV. UPDATES ON RECENT FEDERAL EMPLOYMENT AND RETALIATION DECISIONS

A. *Murray v UBS Securities, LLC*, 2024 WL 478566 (U.S. Feb. 8, 2024).

1. The Supreme Court unanimously held that a whistleblower bringing an anti-retaliation claim under the Sarbanes-Oxley Act (SOX) does not have to establish that the employer acted with retaliatory intent.

2. Rather, a plaintiff need demonstrate only that the protected activity contributed in some way to the adverse employment action in order to set forth a prima facie case of whistleblower retaliation.

3. The opinion held that "[s]howing that an employer acted with retaliatory animus is one way of proving that the protected activity was a contributing factor in the adverse employment action, but it is not the only way."

4. As other whistleblower protection statutes contain nearly identical language to SOX, the decision potentially has a wide-reaching impact for all federal whistleblower actions.

B. *Muldrow v City of St. Louis, Missouri,* 601 US 346, 144 S Ct 967, 218 LEd 2d 322 (2024)

1. Held that Title VII of the Civil Rights Act bars employers from discriminating in decisions like lateral transfers, without requiring employees to show that the discriminatory decision caused "significant" disadvantage.

2. The court held that employee plaintiffs do not need to demonstrate that a discriminatory decision under Title VII cases caused a "materially significant disadvantage" but rather, "need show only some injury respecting [their] employment terms or conditions" that left them "worse off" than before.

3. While the Court did not provide much guidance on the meaning of "some injury," it listed examples, including less prestigious work assignments, the assignment of only nighttime work, and decreased visibility within the relevant department.

V. UPDATES ON RECENT MICHIGAN DISCRIMINATION DECISIONS

A. *EEOC v PACE Southeast Michigan* – EDMI Case No: 2:24-cv-12424

1. Complaint alleged that PACE's (a company providing all-inclusive care for the elderly) Family and Medical Leave Act (FMLA) policy that allowed for an employee unable to return after the expiration of time provided in the FMLA to be treated as "voluntarily resigning" from said position.

2. The suit centered around two (2) employees**:**

a. Both of the employees had requested brief extensions of time with documentation supporting need for such accommodation, but were nonetheless denied an extension and were treated as though they voluntarily resigned from their positions.

b. Additionally, PACE replaced both of the employees with new-hires that did not start until *after* the requested extension period would have expired.

3. The lawsuit alleged that PACE violated the Americans with Disabilities Act (ADA) and the Consent Settlement was as follows: PACE will

a. Pay $60,000 each to the two (2) former employees,

b. Train HR employees on compliance with the ADA,

c. Develop a reasonable accommodation policy which includes examples of additional leave as a reasonable accommodation, and

d. Submit annual reports regarding any requests for leave extensions.

i. The settlement also directs that PACE will provide a list of any employees who were terminated under the same policy.

ii. Further directed that an additional $50,000 will be distributed among any of those individuals who would have qualified for a reasonable accommodation.

4. This decision should cause employers to review their current FMLA policies and carefully consider what "reasonable accommodations" they are making for employees affected by disabilities.

B. Richard Miller v Michigan Department of Corrections – MSC 164862

1. Plaintiff's Complaint alleged that they were terminated because of their association with a co-worker who has filed racial discrimination & hostile work environment complaint against their employer.

a. Specific allegations were that Plaintiffs, Messrs. Miller and Whitman were terminated from the Michigan Department of Corrections after they were involved in internal investigations that occurred as a result of their supervisor had complained to HR about harassment his wife was experiencing.

b. Plaintiffs themselves had not complained about harassment, but allege they were wrongly accused of wrongdoing and fired as a result of the MDOC's effort to retaliate against their supervisor (and his wife).

2. The question was whether the Elliott-Larsen Civil Rights Act's (ELCRA) anti-retaliation provision extended to employees who did not themselves complain about, report or oppose

discrimination, but *who were known to be friends with employees who did engage in that protected activity*.

3. While the trial court allowed the claim, the Michigan Court of Appeals rejected the claim, on May 22, 2024, the Michigan Supreme Court ruled unanimously that indirect retaliation is an allowable claim under the ELCRA.

4. The Supreme Court's reversal of the COA opinion was based on a US Supreme Court decision from 2011 – *Thompson v North American Stainless*.

5. The MSC held that because ELCRA only requires that the plaintiff suffer an adverse employment action, a causal connection exists between that action and a protected act.

    a. Therefore, the protected act does not have to be by the person filing suit, but rather if the plaintiff can evidence that due to a connection with the co-worker who engaged in the protected activity, they were terminated.

6. The required causal link in such cases, if proven, is the plaintiff's close relationship with the co-worker and the employer's desire to punish the complaining employee by firing complainant's friends.

VI. UPDATES ON EEOC GUIDANCE MANUALS

A. What is EEOC guidance?

1. EEOC's guidance provides the Commission's interpretations of the laws enforced by the agency.

2. It draws from the text of the statute/s, the legislative history, prior Commission policy and decisions, case law, and other legal sources.

3. The guidance documents are approved by a majority vote of the Commission.

4. These are not often released, prior to 2024, the last guidance issued was in early 2021.

B. Newly Issued Enforcement Guidance on Harassment in the Workplace – *Approved 4/29/2024*

1. Provides guidance on the three (3) components of a harassment claim

    a. Covered Bases (Race, Color, National Origin, Religion, Sex, Age, Disability, Genetic Information, Retaliation) and Causation

    b. Nature of the Harassment

    c. Liability Basis

2. Sex-based discrimination under Title VII includes employment harassment based on sexual orientation or gender identity, including how that identity is expressed. As an example, the EEOC notes repeated, mis-gendering, by intentional use of a name or pronoun inconsistent with the individual's known gender identity, could be considered harassment.

3. Where an employee experiences harassment not based on a protected category, there is no causation to support a claim. For workplace harassment to violate the law, not only must it be based on a protected category, but it must also affect a term or condition of employment.

4. The guidance also reaffirms that, to be actionable harassment, the conduct must be severe or pervasive and must be viewed in light of the totality of the circumstances. For example, a "one-off" offensive remark does not constitute a hostile work environment.

5. Last, there is a recognized defense for the employer in hostile environment claims where the employer takes prompt remedial action to prevent and correct the harassment and the complaining employee unreasonably fails to use the employer's complaint procedure or take other steps to minimize the harm from the harassment.

VII. RECENT ADMINISTRATION CHANGES & IMPACT ON RECENT RULINGS

A. Andrea R. Lucas, Chair of the EEOC

1. Recently appointed new Chair of the EEOM, Andrea R. Lucas has served as an EEOC Commissioner since 2020, and was nominated by President Trump during his first term.

2. In an issued statement, her goal as the chair will be to "dispel the notion" that a claimant has to be the "right sort" of litigant, and instead wants to focus on civil rights laws "ensuring equal justice under the law and to focusing on equal opportunity, merit, and colorblind equality."

3. Her statements since being appointed have it clear that her focus will be rooting 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."

4. On February 19, 2025 she also asserted her commitment to protecting workers from "Anti-American bias."

   a. Her statement was was intended to send a very clear notice to Employers of ". . . if [an employer is] part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop." And point out that the purpose of The EEOC is " . . . to protect all workers from unlawful national origin discrimination, including American workers."

b. In her statement, she does give some clues about what she will be focusing on as to this "crackdown," stating that the below provisions are not legally permissive reasons to violate Title VII:

i. lower cost labor (whether due to payment under the table to illegal aliens, or exploiting rules around certain visa-holder wage requirements, etc.);

ii. a workforce that is perceived as more easily exploited, in terms of the group's lack of knowledge, access, or use of wage and hour protections, anti-discrimination protections, and other legal protections;

iii. customer or client preference;

iv. biased perceptions that foreign workers are more productive or have a better work ethic than American workers.

c. What she does make crystal clear is that protections under the law are not just for minorities, but for all Americans, stating: "prohibition on national origin discrimination applies to any national origin group, including discrimination against American workers in favor of foreign workers."

d. Pursuing cases by applying Title VII to bias against Americans is definitely a departure from the way Title VII has been applied historically and it is unclear currently how this will look in these next few years.

i. Possible that EEOC may focus on reasoning from an October 2024 Jury trial in California that found that Cognizant Technology Solutions, an IT Company, intentionally engaged in discrimination against non-South Asian and non-Indian employees.

ii. The Jury specifically relied upon evidence that Cognizant was 8.4 times more likely to terminate non-South Asian and Non-Indian employees.

B. Andrew Rogers, Acting General Counsel for the EEOC

1. In a statement regarding his appointment, he said his goal is: "to advance robust, high-quality, efficient, and transparent enforcement of our nation's civil rights laws via the agency's litigation program.

2. He has served as chief counsel to Lucas since October 2020.

3. He has a long history with employment law prior to his time with the EOOC as both a practicing employment and labor lawyer in private practice, as well as serving in the Wage and Hour Division of the US Department of Labor issuing opinions focusing on regulations.

C. Removals from the EEOC and NLRB

1. Jocelyn Samuels and Charlotte Burrows were both removed as commissioners. Ms. Samuels was the Former EEOC commissioner and was Trump's pick to fill a Democratic seat in 2020. The EEOC's general counsel, Karla Gilbride was removed alongside them.

2. Gwynne Wilcox was removed as a member and the chairman of the NRLB Jennifer Abruzzo, general counsel for the NRLB was also removed by President Trump.

3. These removals currently leave the EEOC and NLRB without a quorum to decide cases.

4. Guidance has also been taken down from website that was issued during the Biden Administration and as of today, this leaves the EEOC and NLRB in a state of flux.

D. On February 15, 2025, it was reported that the EEOC is seeking to drop a gender discrimination case directly following the new Executive Orders from the Trump Administration.

1. The lawsuit was against Harmony Hospitality, LLC, which operates a Home2 Suites by Hilton Hotels in Dothan, AL. The Plaintiff identified as a non-binary gay male who styled himself as a gender-conforming male while at work and as non-gender-conforming outside of work. The employer, when discovering the employee's sexual orientation and gender identity, stated the employee needed to be "hidden," and he was fired shortly thereafter.

2. The Complaint specifically accused the employer of violating Title VII of the Civil Rights Act by terminating the employee "because of his sex, sexual orientation, gender identity, and failure to adhere to male gender stereotypes."

3. The EEOC's request to now dismiss the case, marks a complete 180 from its prior interpretation of civil rights law after the Trump administration declared that the government would recognize only two sexes: male and female.

VIII. EXECUTIVE ORDERS & MUCH ADO ABOUT "DEI"

A. What is "DEI" anyway?

1. Diversity, Equality and Inclusion – its historical purpose was to foster and promote diversity in the workforce and encourage hiring of underrepresented minorities.

   a. "Diversity" is intended to acknowledge and value human differences, including race, gender, sexual orientation, etc.

   b. "Equity" is intended to "level the playing field" and ensure that everyone has access to opportunities.

   c. "Inclusion" is meant to create an environment where all are respected, valued and included.

2. Some "DEI" mantras include the Acronym "A" for Acceptance.

3. The argument against DEI is that it threatens merit-based acknowledgment and leads to reverse discrimination that underlines quality in a range of activities, from education to the candidate pools of potential new hires.

B. What Executive Orders have been Issued that Ban DEI & What do They Mean?

1. EO 14148 (1/20/2025) - "Initial Rescissions of Harmful Executive Orders and Actions"

a. Also revoked seventy-eight (78) Orders by the Biden Administration that were designed to promote diversity and inclusion.

i. The Revoked Executive Orders from the Biden Administration were geared towards addressing prevention of discrimination of unserved communities and the LGBTQ+ population in the United States.

b. The new Trump Administration asserts that "[t]he injection of "diversity, equity, and inclusion" (DEI) into our institutions has corrupted them by replacing "hard work, merit, and equality with a divisive and dangerous preferential hierarchy."

c. This Executive Order does not enable federal contractors and sub-contractors to disregard existing legislature regarding anti-discrimination, such as Title VII protections, Equal Pay Act, and the ADA. Much of the existing legislature, regardless of the Executive Order, has language that requires affirmative action and non-discriminatory protection for employees.

i. Title VII of the Civil Rights Act prohibits employment discrimination because of an individual's "race, color, religion, sex, or national origin."

ii. Also mandates that an employer shall not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

2. EO 14168 (1/20/2025) – "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."

a. The purpose of this EO is to ". . . defend women's rights and protect freedom on conscience by using clear and accurate language and policies that recognize women are biologically female and men are biologically male."

b. The Order further defines "gender ideology" as a "false claim" and "gender identity" is a "fully internal and subjective sense of self . . . that does not provide a meaningful basis for identification . . ."

c. We must, once again, bring up the changes to the ELCRA in Michigan (MCL 37.2202) and the additions that were codified into state law of: "gender identity or expression."

d. This EO creates a direct conflict with current Michigan Statutory law and employers must be very careful in navigating these conflicts.

i. Employers should prepare for the shift in federal employment law away from protection of gender identity and expression.

ii. Topics such as restroom access, pronouns and preferred names will certainly need to be navigated as this progresses.

e. The Order also provides for proposed codification of terms (to be within 30 days of Order - 2/19/2025), which we are still awaiting the presentation of.

3. EO 14170 (1/20/2025) - "Reforming the Federal Hiring Process and Restoring Merit to Government Service"

a. Its basic purpose is to "attract the highest caliber of civil servants committed to achieving the freedom, prosperity and democratic rule that our Constitution promotes" and seeks to ban Federal hiring "based on impermissible factors, such as one's commitment to illegal racial discrimination under the guise of ''equity,'' or one's commitment to the invented concept of ''gender identity'' over sex."

b. The Order, in large part, seeks to "prevent the hiring of individuals based on their race, sex, or religion, and prevent the hiring of individuals who are unwilling to defend the Constitution or to faithfully serve the Executive Branch."

c. Additionally, the EO directs the Assistant to the President for Domestic Policy within the next 120 days to "develop and send to agency heads a Federal Hiring Plan that brings to the Federal workforce only highly skilled Americans dedicated to the furtherance of American ideals, values, and interests." It is unclear at this time what the plan will entail, and the potential challenges it may face within the Court systems, or how it will impact the private sector.

4. EO 14173 (1/25/2025) "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"

a. This Executive Order revoked a 60-year standing Executive Order enacted by President Johnson that mandated affirmative action in federal contractors and sub-contractors.

i. According to the Department of Labor, this requirement has become deeply embedded in the operational frameworks of approximately 25,000 firms and 120,000 establishments, impacting nearly 20% of the U.S. workforce. By revoking this order, this effectively dismantles the federal mandate for race and gender-based affirmative action.

b. Additionally, the Executive Order mandates that the Office of Federal Contract Compliance Programs stop requiring federal contractors to take affirmative actions. Federal contractors must stop "promoting diversity."

c. Last, it seeks to enforce this standard on *private* sector companies as well, ordering in part that: ". . . all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."

i. Under Sec. 4 of the Order it goes on to state:

(A) 4(a) "[t]he heads of all agencies, with the assistance of the Attorney General, shall take all appropriate action with respect to the operations of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work identified in section 2 of this order."

(B) 4(b) "[t]o further inform and advise me so that my Administration may formulate appropriate and effective civil rights policy, the Attorney General, within 120 days of this order, . . . shall submit a report . . . containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including DEI.

d. By February 3, 2025 the first lawsuit in the USDC for the District of Maryland had already been filed.

i. It is unclear just how this may impact the private sector as of today.

ii. The lawsuit, *National Association of Diversity Officers in Higher Education, et al v Trump* brings a six (6) count complaint alleging that the EO is: ultra vires, unconstitutionally vague and violates the Due Process Clause, in violation of the Free Speech Clause, and in violation of the Separation of Powers in the Constitution.

e. On the flip side of the coin, as to any large companies that are upholding their standing DEI practices, some states have already shown that they intend to make good on the provision in the EO that calls on State AG's to enforce the EO in the private sector.

i. The AGs of 19 other states have already issued a warning to Costco via a letter, urging the CEO of Costco to "end all unlawful discrimination imposed by the company through [DEI] policies" within thirty (3) days of receipt of the letter. The 19 nineteen (19) AG's also urge Costco to "do the right thing."

C. Must remember that Executive Orders cannot impact the laws that are currently in place without an act of Congress, and of course, subsequent case law on the subject. Also, the distinction between the Federal sector and the private sector needs to be considered as the State would control the private sector.

1. Important to recall that Michigan has codified certain protections which could be considered DEI in its legislature. (MCL 37.2202).

2. With that said, employers should not just discontinue their existing policies and procedures geared towards preventing discrimination.

3. The general overtone of these Orders though is to focus more on a "merit-based" opportunity.

4. It goes without saying that workplaces can still promote diversity and inclusion and still hire the most meritorious of candidates who happen to be a minority, non-conforming gendered, homosexual or disabled.

D. Outside of the Federal Government – these Executive Orders do not have effect on private sector workers and Employers do not do away with the federal laws, Title VII and their own state laws regarding protections for sex, race, national origin, religion, etc.

IX. CONCLUSION

A. What to do about current policies and procedures?

1. It remains to be seen how long President Trump's Executive Orders will be held up in the Court Systems, or how they will be ultimately ruled upon.

2. Adherence to "DEI" practices or practices based on "Merit" as outlined in the Executive Orders right now is not absolute.

3. Employers need to be clear about what the Civil Rights Act provides for in addition to specific state requirements such as ELCRA in Michigan to determine how they move forward navigating updates to internal policies and procedures.

B. Further, Employers need to be careful to avoid any backlash from promoting anti-discrimination practices and keeping up to date on exactly where these Orders stand and how they are being enforced.

1. This includes staying in the know about where the Executive Orders stand and how they could eventually affect, or not affect the private sector.