



# Annual Employment Law Update

What you need to know to be prepared for 2026!

**SEPTEMBER 2025**

## Connect With Us



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# Today's Agenda

1. Changed Priorities/Approach at Federal Level
2. Discrimination and Disability Developments
3. Wage & Hour and the U.S. DOL
4. NLRB Developments
5. Restrictive Covenants
6. AI in the Workplace
7. Current Events, Social Media & the Workplace
8. State Law Developments
9. Q&A

## What We're Not Covering

### **BBB (Big Beautiful Bill)**

- Taxes on overtime & tips
- Medicaid eligibility requiring 80 hours/month
- Changes in limit on flexible spending accounts
- Additional flexibility in use of Health Savings Accounts

### **401k Investment in Crypto & Private Equity**

### **Federal Worker Matters**

# Changed Priorities/ Approach at Federal Level

## Changed Priorities/Approach at Federal Level

- One of President Trump's first steps was to issue an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity."
- The EO revokes EO 11246 which provides the regulatory underpinning for affirmative action by federal contractors
- Federal contractors need to cease consideration of race, color, sex, and other protected characteristics "in ways that violate the Nation's civil rights laws."
- The OFCCP must cease promoting diversity, holding contractors responsible for affirmative action, or allowing or encouraging balancing based on race, color, sex or other protected characteristics



## Changed Priorities/Approach at Federal Level



- On July 1, 2025, OFCCP published three proposed regulations in federal register to implement EO
- Would end nondiscrimination and affirmative action regulations while retaining enforcement protections for protected veterans (VEVRAA) and persons with disabilities (Section 503 of Rehabilitation Act)
- Even these oversight efforts may change if OFCCP is eliminated, as proposed by DOL. Compliance would be absorbed by EEOC and Veterans Employment & Training Service

## Discrimination Laws and the EEOC

# Focus by Federal Agencies on DEI

- March 20, 2025, EEOC and DOJ issue joint guidance: *What To Do If You Experience Discrimination Related to DEI at Work*
- EEOC also issues Q&A: *What You Should Know About DEI-Related Discrimination at Work*
- Prohibits taking protected characteristics into consideration, or limiting or segregating employees
- Can't limit membership in groups or segregate employees during training
- Can't restrict access to fellowships/internships, networking, sponsorship on basis of protected characteristics



# EEOC Information Requests

- March 6, 2025 Executive Order targeting Perkins Coie law firm and directing the Chair of the Equal Employment Opportunity Commission to “review the practices of representative large, influential, or industry leading law firms for consistency with Title VII of the Civil Rights Act of 1964, including whether large law firms: reserve certain positions, such as summer associate spots, for individuals of preferred races; promote individuals on a discriminatory basis; permit client access on a discriminatory basis; or provide access to events, trainings, or travel on a discriminatory basis.”
- Based on EO, Acting Chair Andrea Lucas sent letters to 20 law firms requesting information about their diversity, equity and inclusion (DEI) related employment practices

# EEOC Information Requests (cont.)

**Letters request information on:**

- Hiring practices
- Diversity-focused internships, scholarships, and fellowship programs
- Employee affinity groups and participation in DEI initiatives
- Clients that request diverse legal teams and how firms respond to those requests
- Demographic data (race, sex) of attorneys who have worked at or applied to these firms



# EEOC Information Requests Continued



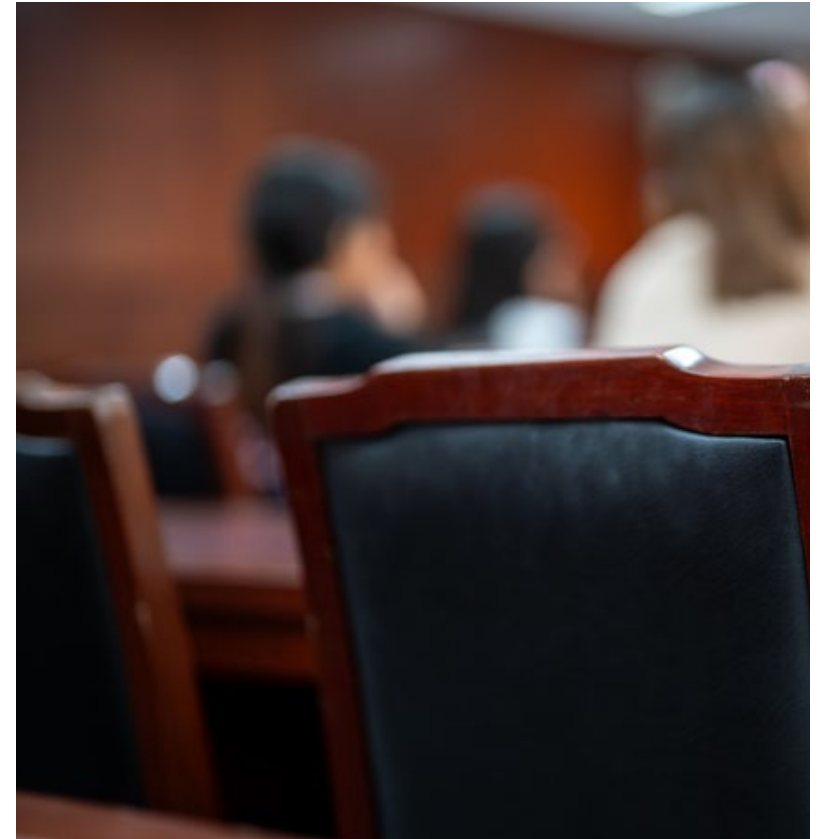
- Most commentators do not believe there is a legal basis for the information requests
- Firms who refuse requests fear formal investigations being launched or being targeted in other ways
- Tactics being used against law firms could be used against other private employers

# Supreme Court Decision in Ames v. Ohio Dep't of Youth Services

- Heterosexual woman alleged another employee was selected by employer based on sexual preference
- Some courts previously imposed heightened standard for reverse discrimination claims. Plaintiffs had to show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”
- On June 5, 2025, Supreme Court in unanimous opinion by Judge Jackson held that Title VII does not distinguish between majority and minority groups and standard of proof is the same

# Other Recent Anti-DEI Efforts

- *Vavra v. Honeywell* (7th Cir. 2024), *Young v. Colorado Dep't of Corrections* (10th Cir. 2024), *Diemert v. City of Seattle* (W.D. Wash. 2025) – efforts by plaintiffs to challenge DEI training as racist toward White people or as promoting divisive racial and political theories failed
- Exposure to training probably not enough to show hostile work environment for White employees
- Plaintiffs have had more success when using religion to attack gender identity aspects of training – *Norgren v. Minn. Dep't of Human Services* (8th Cir. 2024)





## What Should Employers Do?

- Don't give up on programs
- Eliminate the explicit use of protected characteristics in employment decisions (no quotas, plus factors, or set asides)
- Be careful with internships, affinity groups, and other targeted programs
- Diversity and inclusion is OK. Achieving equitable outcomes by favoring employees, even if in an effort to provide a level playing field, can be unlawful



## What Should Employers Do? (cont.)

- DEI training should not segregate employees or target only some types of discriminatory actions
- Give appropriate consideration to requests for religious accommodations
- Beware of actions which may be seen as retaliation against employees who raise concerns about DEI

# Discrimination and Disability Developments

## Pregnant Workers Fairness Act



## Pregnant Workers Fairness Act (PWFA)

- **Effective Date:** June 18, 2024
- **Purpose:** Require covered employers to provide *reasonable accommodations* to a worker's *known limitations* related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship
- **Enforcement Agency:** EEOC

## Pregnant Workers Fairness Act

# Accommodations Under PWFA

**Reasonable Accommodations** are changes in the work environment or the way things are usually done. Examples (under the PWFA):

- Flexibility in work schedules (shorter hours, part-time work, or a later start time)
- Flexibility with food, drink, and break policies
- Changing equipment, devices, or workstations
- Light duty or help with lifting/other manual labor
- Temporary reassignment
- Telework



## Pregnant Workers Fairness Act



### Failure To Provide Documentation By Employee

*Figlar v. Simonton Windows & Doors, Inc.* (U.S. District Court N.D. West Virginia)

### Known Limitation – Ambiguous Requests Not Considered Notice

*Keiper v. CNN Am., Inc.*, (U.S. District Court E.D. Wisconsin).

## Accommodations in the Workplace

# EEOC's 2024-2028 Strategic Enforcement Plan

- EEOC pledges to focus on disabilities and eliminate barriers in recruitment, hiring, and treatment of individuals with disabilities
- Identified issues in this space include:
  - Qualification standards and inflexible policies and practices
  - Online systems or applications that are difficult to engage with and discourage individuals with disabilities from applying to roles or discriminate against individuals with disabilities



## Accommodations in the Workplace

# EEOC's 2024-2028 Strategic Enforcement Plan (cont.)

- “Vulnerable workers and persons from underserved communities” include:
  - People with developmental or intellectual disabilities
  - Workers with mental health-related disabilities



# Executive Order – January 20, 2025

## In-Person Work has Returned

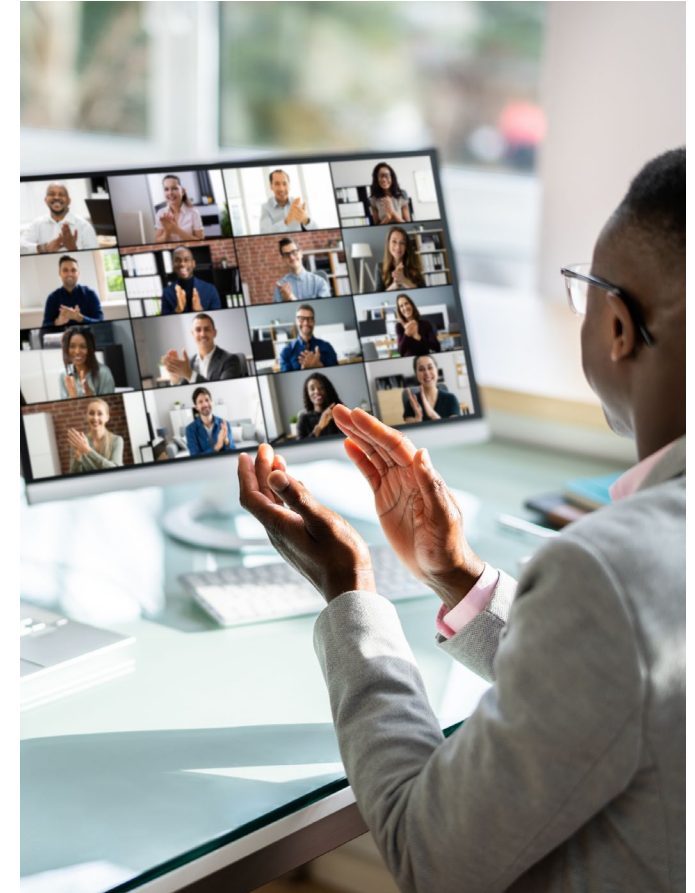
*“Heads of all departments and agencies in the executive branch of Government shall, as soon as practicable, take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary.”*



# Telework as Reasonable Accommodation

## In-Person Work has Returned

- The ADA does not require an employer to offer a telework program to all employees
  - However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program
- Even where the employer does not have a telework program, changing the location where work is performed (i.e. from home), may fall under the ADA's reasonable accommodation requirement of modifying workplace policies



## Telework as Reasonable Accommodation (cont.)

### Employees Duty to Request Reasonable Accommodation

*Ali v. Regan, 111 F.4th 1264 (D.C. Cir. 2024)*

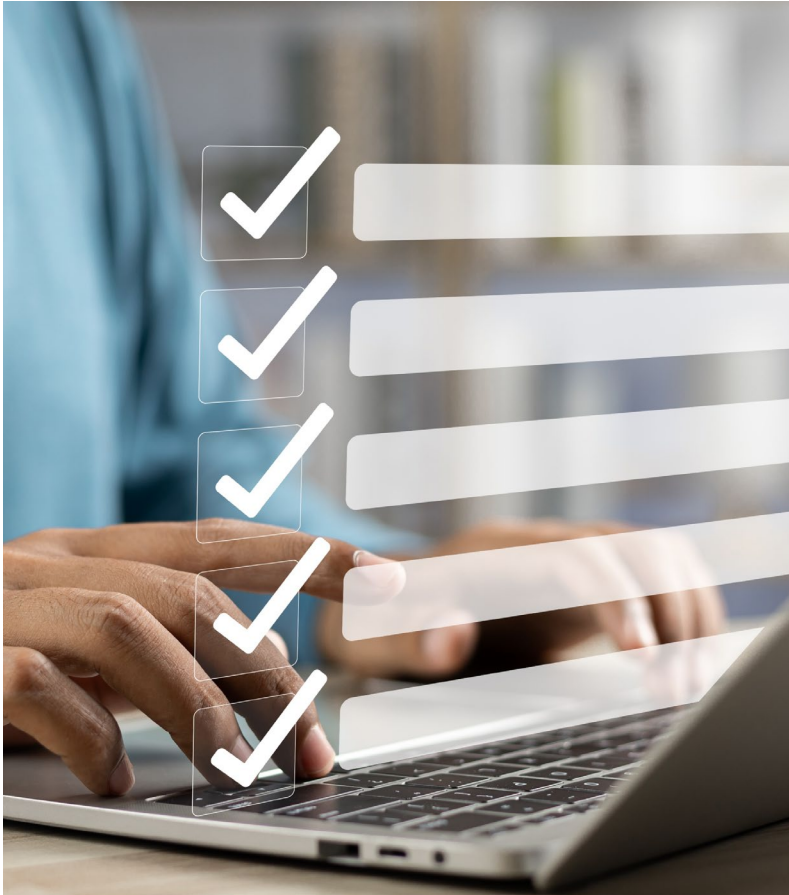
- Plaintiff's actions caused a breakdown in discussions and therefore bore sole responsibility for the failure to settle on an appropriate accommodation.

*Green v. Rocket Mortg. LLC, No. 2:23-CV-11005, 2025 WL 747864 (E.D. Mich. Mar. 7, 2025)*

- The plaintiff abandoned the interactive process by not providing sufficient documentation to support her requests to work remotely.



## Remote Work Policies



## Recommendations

- Review past practices for remote work requests
- Do a case-by-case analysis
- Demonstrate engagement in the interactive process
- Do a “job analysis,” including an analysis of “essential elements”

# Third-Party Harassment

## What We Know

- Employers may be held liable for third-party harassment if they knew or should have known about it and failed to act
  - This responsibility requires employers to establish clear mechanisms for identifying and addressing harassment by non-employees. Effective harassment policies, regular training, and clear reporting procedures are essential components of this effort.



## Third-Party Harassment

# Third-Party Harassment (cont.)

### Departure From Original Framework

*Bivens v. Zep, Inc.*, (U.S. District Court E.D. Michigan)

- This case marks a departure from the long-time framework:
  - An employer can be liable under Title VII for a non-employee's harassment of an employee where the employer intends for the harassment to occur



# Reminders About Harassment

### Impact of Digital Technology and Social Media

- Conduct in which employers may be liable occurs in the work environment if it is conveyed using work-related systems, accounts, devices, or platforms including:
  - Employer's email system
  - Electronic bulletin board
  - Instant message system
  - Videoconferencing technology
  - Intranet



# Wage & Hour and the U.S. DOL

## Wage & Hour and the U.S. DOL

# FLSA... what a difference a year can make!

- Increases to salary minimum required for white collar exemptions found unlawful, and DOL not pursuing appeal
- Rolled back both July 2024 increase (which went into effect) and January 2025 increase (which never went into effect)
- DOL has indicated it will consider, but timing unclear
- DOL has proposed a rule reinstating exemption under FLSA for domestic workers by expanding the type of services that may be provided and extending the exemption to those engaged through third parties



## Independent Contractor Status Redo

- In 2024, DOL adopted a “non-exhaustive” six-factor analysis to determine if a worker can be classified as an independent contractor. Made it more difficult to establish independent contractor status
- May 1, 2025, DOL Field Assistance Bulletin
  - DOL will no longer apply 2024 Rule’s analysis
  - Instead, will return to “economic realities” test from 2008



### Relaunch of Opinion Letter Program

- Opportunity to receive official guidance regarding specific situations
- Creates a library of guidance, promoting clarity

### Payroll Audit Independent Determination (PAID) Program

- Allows employers to self-identify and resolve minimum wage & overtime violations under FLSA and violations under FMLA
- Ineligible if currently under audit or in litigation, found to have violated in last 3 years, or have used program in last 3 years

# “PAID” Program Process

- Conduct self-audit of compensation and/or leave practices
- Contact Wage & Hour Division (WHD) to discuss any issues discovered that the employer wants to resolve
- Submit required information to WHD
- WHD generates summary of unpaid wage/remedies
- Employer must pay/implement within 15 days of receipt
- WHD estimates full process will take fewer than 90 days



# “PAID” Program Process (cont.)

### Pros

- Opportunity to correct without penalties or attorneys' fees
- Allows employers to get into compliance with less risk

### Cons

- Employees can reject the payment and then sue
- Only resolves federal claims, not state/local
- Doesn't waive WHD's right to conduct further investigations



# USERRA Update – Dole Act Amendments (1/2/25)

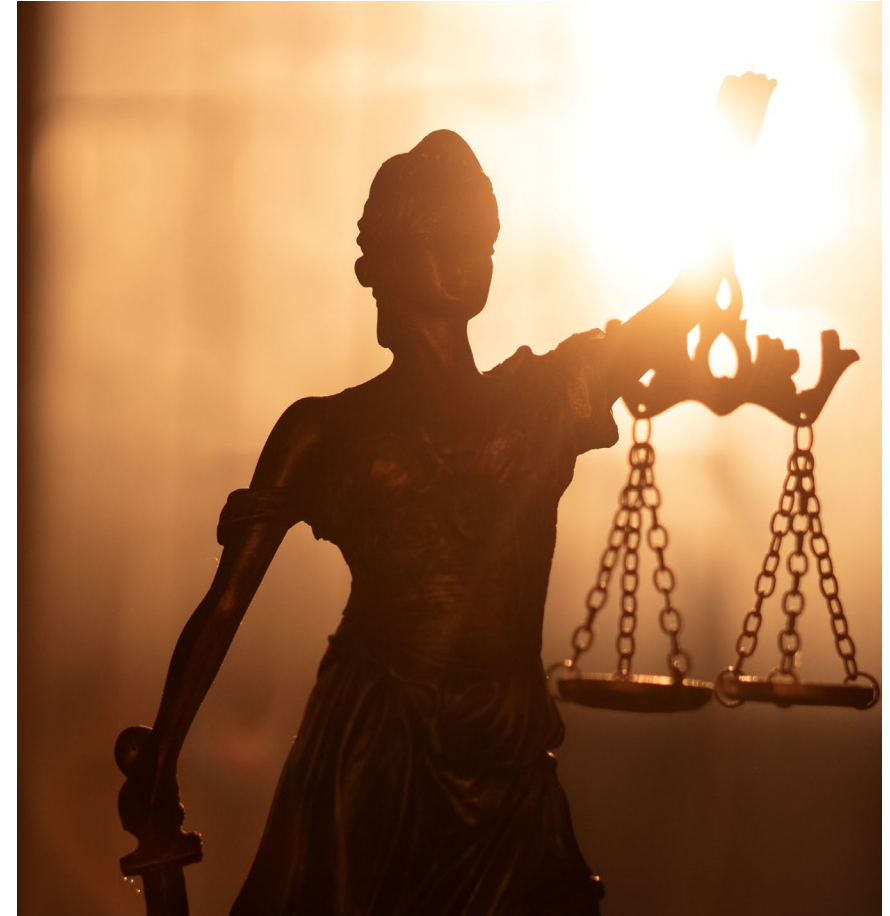


- Clarifies Reserve and National Guard members are covered
- Expansion of retaliation protections – prohibiting any “retaliatory act,” not just adverse employment actions
- Liquidated damages minimum of \$50K & only requires showing of “knowing failure to comply” – not willful
- Injunctive relief allowed
- Mandatory attorneys’ fees

# NLRB Developments

# No Quorum at the NLRB

- To act, the NLRB requires a quorum of three members to act
- Two vacancies as of January
- In January 2025, President Trump terminated Board Member Gwynne Wilcox ...the legality of that removal is the subject of ongoing litigation and no one has been appointed to fill her seat



# No Quorum at the NLRB (cont.)

- Chairman Marvin Kaplan's term expired August 27th
- President Trump has nominated two people – Scott Mayer and James Murphy – to fill the two seats that were vacant at the beginning of the year
- If approved by the Senate, there will be a quorum (3 members)

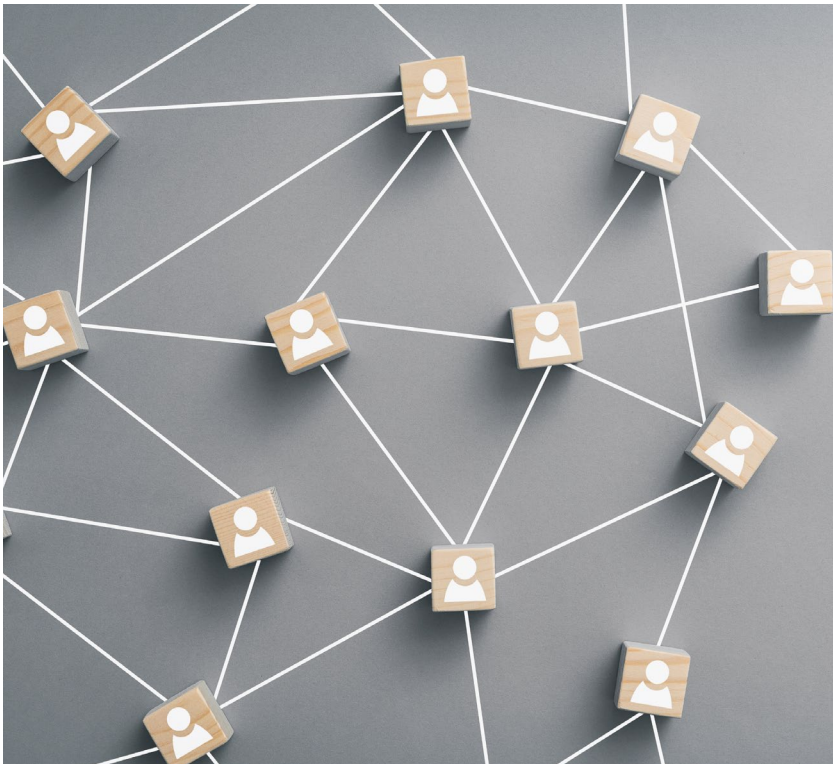


### New York Steps In

- On September 5th, the NY Governor signed a law into effect that was designed to address concerns that, with the lack of quorum at the NLRB, those bringing ULPs were being denied the opportunity to have them heard
- On September 11th, the Acting General Counsel of the NLRB announced that the NLRB is preparing to sue to block the NY law, saying that it is preempted by the NLRA



# (Acting) General Counsel Memoranda



- Recording bargaining sessions secretly is a per-se violation of the NLRA
- In cases where a union member applying for a job at a non-union employer in order to organize workers (a “salt”) claims discrimination, they need to prove they had a “genuine interest” in the position

# (Acting) General Counsel Memoranda (cont.)



- Withdrew prior GC's memoranda
  - Additional remedies beyond back pay, reinstatement and posting
  - Limitation on employers' right to communicate with employees prior to votes
  - Requirement that employers recognize in certain circumstances even if union hasn't won a vote

# (Acting) General Counsel Memoranda (cont.)

- Change in approach to confidentiality, non-disparagement & non-compete provisions
  - In an NLRB decision and GC Memos in early 2023, the Board took the position that confidentiality, non-disparagement & non-compete clauses violated the NLRA when given to non-supervisory employees
  - In a GC Memo issued February 14, 2025, the 2023 GC Memos were rescinded
  - Signals a change in approach in review of provisions and policies that have the potential to limit protected activity, even if they never do

# Restrictive Covenants

## Restrictive Covenants

- On August 13, 2025, President Trump rescinded EO 14036. This EO from President Biden instructed federal agencies to find ways to promote competition in the American Economy.
- On September 5, 2025, the FTC abandoned its appeal of district court decision invalidating the 2024 Non-Compete Ban. The FTC is giving up on this sweeping regulatory effort.
- However, the FTC has signaled it will still challenge non-compete agreements in investigations and targeted litigation.
- **For example**, on September 4, 2025, the FTC filed a complaint against Gateway Services, challenging the ability of the pet cremation company to use non-competes with its nearly 1,800 employees.



# Further Action at State Level

- **Wyoming** – enacted new law effective July 1, 2025, that voids or severely limits most new non-competes
- **Virginia** – bars non-competes for all non-exempt (overtime eligible) employees
- **Kansas** – new presumptions of enforceability for non-solicit agreements



# Further State Law Action (cont.)

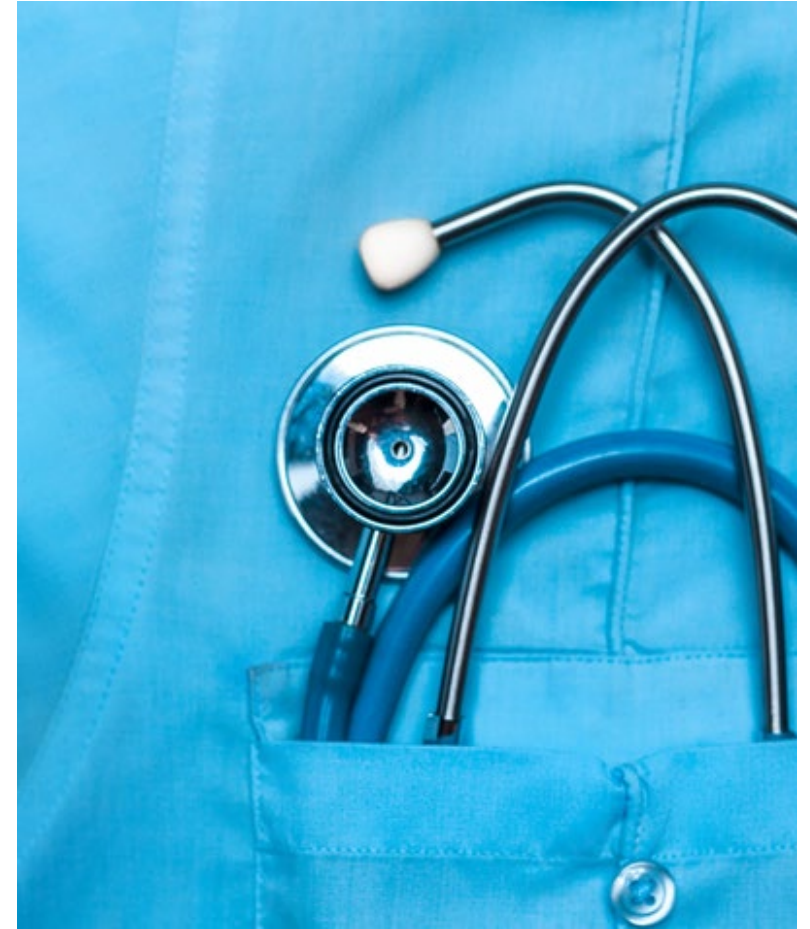
- **Florida** – biggest changes of any state:
  - New rules for covenants not to compete and garden leave provisions
  - Terms of up to 4 years permitted
  - Only applies to employees/contractors making 2x mean wage in county
  - New presumptions for enforcement



## Restrictive Covenants

# Further State Law Action

- Lots of new protections put in place for health care workers – Arkansas, Maryland, Colorado, Montana, Indiana, Oregon, Utah, Louisiana, Texas, and Illinois



# AI in the Workplace

# What Is Generative AI?

**We know this but...here are the basics**

- Generative AI is an “open” AI system capable of generating text, images, video, etc. in response to prompts
  - It learns patterns/structure of input training data to generate new data with similar characteristics
  - **Examples:** AI “chatbots” and ChatGPT, and new products like Microsoft Copilot and Google Gemini



# Legal Precautions Around GenAI

## Potential Data Privacy and Security Issues

- When using Generative AI tools, be aware of privacy policies and disclosures of the uses of data input within those tools
- ChatGPT's disclaimers include:
  - “Our use of content. We may use content to provide, maintain, develop, and improve our services, comply with applicable law, enforce our terms and policies, and keep our services safe.”
  - “Output may not always be accurate. You should not rely on output from our services as a sole source of truth or factual information, or as a substitute for professional advice.”

### Policies for the Workplace

**So, do you have a policy?**

- Policy provisions to consider:
  - Unauthorized Software Prohibited
  - Approval process
  - Requirements even where approved
  - The decision maker
  - Manner of enforcement
  - Confirm compliance with laws where employees work



# Developments in Legislation on GAI in the Workplace

### California Veto

- September 29, 2024, Veto
  - This AI Bill would have been the most far-reaching to date
    - SB 1047 was seen as a blueprint Liability upon tech companies
    - Kill Switch
  - A less expansive version of this bill has
- [LP]** been approved by California's state senate





## Enacted Legislation on GAI in the Workplace (cont.)

### Amendments to Illinois Human Rights Act

- Effective January 1, 2026
- Notice required if AI is used for employment-related purposes
- Prohibits use of AI that results in discriminatory employment decisions
- Audits not required but recommended

## AI in Labor and Employment

*Mobley v. Workday (U.S. District Court N.D. California)*

*EEOC v. iTutorGroup, Inc. (U.S. District Court E.D. New York)*



# Current Events, Social Media & the Workplace

## Current Events, Social Media & the Workplace

Recently, we've had lots of inquiries on what to do when employees make arguably political posts that upset management, other employees, or those a company does business with....



# Key Legal Considerations

1. **Government employer?** If not, freedom of speech is irrelevant!
2. **Does Federal law protect the employee?**
  - NLRA (non-supervisory employee discussing terms/conditions of employment)
  - Related to religion, disability or another protected characteristic
3. **Does state law protect the employee?**
  - Some states protect employees engaging in political speech (viewed broadly)
  - Consider impact of general discrimination laws
  - How did you learn about their posts?
4. **General restrictions on action**
  - Union employee? Employment agreement?
  - Is the employee at-will?
5. **Consistency**

# Other Considerations

- Is the employee a supervisor? Member of leadership?
- Nature of the post (threatening, discriminatory, derogatory...)
- Who (if anyone) complained?
- How (if at all) is the post impacting the business?
- What does your policy say?
- These are complicated decisions...
- Consult with your employment attorney!



# State Law Developments

# Illinois Developments

- IHRA Amendments
  - Fact-finding conferences now discretionary
  - Increased civil penalties for violation
- Prohibition on state agencies reducing worker protections below Federal requirements as of April 28, 2025
- One Day Rest in Seven Act now includes anti-retaliation provisions



# Illinois Developments (cont.)

- Nursing Mothers in the Workplace Act
  - Employees must be paid at regular rate
  - Cannot require use of PTO
- Illinois Minimum Wage Law Amendments expand circumstances when performance bonuses need to be included in Regular Rate of Pay



## State Law Developments



### Nevada

If regular rate of pay is less than 1½ times the minimum wage, employees must be paid overtime for all hours after 8/day in addition to 40/week

## State Law Developments

### Iowa

- Gender identity no longer a protected classification under Iowa Civil Rights Act
- More flexibility for employers under drug testing laws



# State Law Developments



## Ohio

New law requires that paystubs include name, address, total gross and net wages, amounts and purposes of each addition or deduction, the payment date and the pay period

## State Law Developments

### Rhode Island

State Fair Employment Law now protects against traits historically associated with race (i.e. hair texture and protective hairstyles) AND Labor Relations Act now prohibits adverse employment action based on refusal to attend a meeting with the primary purpose of communicating employer's opinion on religious/ political matters or to listen to/view a speech or communications with that primary purpose



## State Law Developments



### California

Signed, revocable, prospective meal period waivers are now enforceable for all employees (exempt & non-exempt)

## State Law Developments

### Texas

Any agreement that prohibits disclosure of sexual abuse or related facts is void and unenforceable



## State Law Developments



### Minnesota

Employers can require reasonable notice of unforeseeable sick & safe leave and require documentation if more than 2 days AND as of 1/1/26 may frontload anticipated leave so long as true based on time actually worked

## State Law Developments

### New York

Paid Prenatal Leave Law requires 20 hours paid leave in any 52-week period for prenatal appointments, exams, procedures, monitoring & discussions. *This is in addition to paid sick and family leave!*



## State Law Developments



### Arkansas

Employers must have the employee's consent to disclose substantiated allegations of sexual abuse or harassment by an employee, or their resignation during an investigation or following allegations

# Washington

- Expands protections for applicants and employees with criminal history by prohibiting check until after conditional offer of employment, banning policies that exclude those with criminal records from jobs, and specific requirements if taking action based on criminal record
- Employees may use sick leave to prepare for immigration proceedings



# Any questions?

Ask us anything. We're happy to answer now,  
or connect with us later if you prefer.

## Connect With Us



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# Purpose in practice

We cultivate deep business relationships that last and have seen our clients thrive beyond their expectations.



*We've always seen ourselves as much more than a law firm. Since 1999, we've been focused on a single purpose: helping our clients achieve amazing things.*

# Our Services

We've structured our team to offer knowledge, experience, and creative thinking that put our clients' goals in reach.

## **COMMUNITY ASSOCIATION**

We are a one-stop shop to help navigate contract review, collections, governance, and more.

## **CORPORATE**

We work to understand and anticipate your needs through complex legal, tax, and business issues.

## **EMPLOYMENT AND EXECUTIVE COMPENSATION**

Our attorneys routinely advise employers on compliance with the full range of federal, state, and local employment laws.

## **FINANCIAL SERVICES AND RESTRUCTURING**

We assess opportunity and risk to guide commercial lenders and borrowers.

## **INTELLECTUAL PROPERTY**

We work diligently to protect our clients' ideas and products.

## **LITIGATION**

We work to protect your assets: products, intellectual capital, human resources, and time.

## **REAL ESTATE**

We act as business partners and deal managers through the acquisition of commercial properties.

## **TAX PLANNING AND LITIGATION**

Our attorneys bring creativity, intellect, and pragmatism to the full range of tax matters.

## **TRUSTS AND ESTATES**

We help clients achieve their business and personal goals through gift, charitable, and estate planning.



# Our Services

## Employment & Executive Compensation

We routinely advise employers on compliance with the full range of federal, state, and local employment laws, and assist companies in implementing sound policies, practices, and programs to avoid problems in the future. We have experience handling virtually every type of employment matter and the know-how to help you effectively resolve even the most complicated issues.

