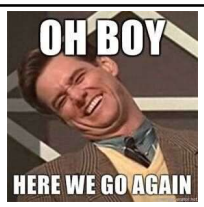

EMPLOYMENT LAW UPDATE:
2024 IN REVIEW AND WHAT TO EXPECT IN 2025

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Trump in 2025: 7 Things to Expect

1. More conservative position on diversity, equity, and inclusion (**DEI**) programs; challenges to existing DEI practices.

Considerations: Prior Trump Administration banned racial sensitivity training for federal contractors and, in 2023, US Supreme Court ended affirmative action in higher education.

2. Possible limits on Pregnant Workers Fairness Act (**PWFA**).

Considerations: PWFA's rules – must accommodate pregnancy-related conditions, including **abortion, menopause and infertility** -- drew criticism from conservatives. Also, possible attack on employers who offer abortion travel benefits as potential discrimination against pregnant workers who carry pregnancy to term.

Trump in 2025: 7 Things to Expect

3. Possible limits on protections for **LGBTQ+** employees.

Considerations: In 2024, EEOC revised its workplace harassment guidelines for the first time since 1999 stating that intentional **misgendering** and denying **restroom access** consistent with gender identity are unlawful gender bias. Rules were met with objections – 18 states filed lawsuits -- that they could interfere with religious freedom or expression.

Trump in 2025: 7 Things to Expect

4. More employer-friendly Department of Labor.

Considerations:

- Recall prior Trump Administration reclassified many federal workers as "at will" employees to reduce size/power of agencies.
- Immigration reform a key issue in 2024 election; likely more DOL "raids" – I-9 audits -- regarding employee authorization to work in US.
- Expect proposed Biden restrictive rule regarding who is an independent contractor to be replaced by prior Trump rule favorable to independent contractor classification.
- New look at exempt employee salary threshold increased by Biden Administration to $58,656 on January 1, 2025 – **struck down by a Texas court in 2024** – and likely limited. Recall, though, that Trump Administration increased salary threshold to $35,568 in 2019.

Trump in 2025: 7 Things to Expect

5. Retreat of the National Labor Relations Board (NLRB)

[Note: The NLRA does not cover public sector employers; however, Colorado has NLRA-like protections for public employees under state law.]

Considerations:

- Following the 2008, 2016, and 2020 elections, each new Administration has reversed many of the legal interpretations of the National Labor Relations Act of the prior Administration. Expect the same in 2025. A new general counsel will be appointed; enforcement memos of the prior Administration will likely be rescinded; and the NLRB will shift to a more business-friendly Republican majority.
- New NLRB will likely overturn *Stericycle Inc.*, 372 NLRB No. 113 (2023) loosening the standard by which work rules are reviewed for whether they interfere with employees' right to engage in concerted activity for mutual aid and protection.
- Trump Administration will likely leave non-compete agreements to the states. Recall that Biden FTC rule banning non-compete agreements is mired in litigation; Trump unlikely to defend the rule in litigation.

Trump in 2025: 7 Things to Expect

6. Relaxed workplace safety enforcement

Considerations: Prior Trump Administration cut number of OSHA inspectors, rescinded part of the electronic recordkeeping requirements, and did not mandate COVID protection measures. Expect fewer industry-specific standards. **Proposed "heat safety" rule, which takes effect in 2025, likely to be curtailed or ended.**

Trump in 2025: 7 Things to Expect

7. Change of course on artificial intelligence (**AI**)?

Considerations: Biden Administration issued a sweeping executive order regulating AI; Trump promised to repeal the executive order. Unclear how Trump Administration will address AI issues. Employers should still look to Department of Labor's AI memorandum to avoid AI discrimination in the workplace.

LAWS

COLORADO LEGISLATURE

Colorado minimum wage and salary 2025

Colorado minimum wage increased from $14.42/hour to **$14.81/hour** effective January 1, 2025.

Minimum salary for exempt (**non-governmental**) employees in Colorado increased from $55,000/year to **$56,485.00/year** ($1,086.25 per week).

"Highly-compensated employee" threshold raised to $127,091.00/year.

Colorado 2024 legislation: Biometric data and work

Colorado Privacy Act (CPA) protects "biometric data . . . uniquely identifying an individual" -- e.g., fingerprint, voiceprint, retina or iris scan, a facial map, facial geometry, facial template -- but CPA did not cover the personal data of individuals acting in a commercial or **employment context**.

HB24-1130, effective **July 1, 2025**, expands scope of CPA to include specific **provisions for employers**. Employers may require current or prospective employees to allow the employer to collect and process their biometric identifiers, but they may do so only to:

- Permit access to secure physical locations and secure electronic hardware and software applications (but not obtain consent to retain such data for current employee location tracking or tracking time using a hardware or software application);
- Record the commencement and conclusion of the employee's full workday, including meal breaks and rest breaks in excess of 30 minutes;
- Improve or monitor workplace safety or security or ensure the safety or security of employees; or
- Improve or monitor the safety or security of the public in the event of an emergency or crisis situation.

Colorado 2024 legislation: Biometric data and work

Scope: Employers that collect any amount of biometric identifiers or biometric data must comply; includes for-profit and nonprofit organizations. **Financial institutions, Colorado state institutions of higher education, governmental entities, air carriers, and national securities associations are exempt**.

Collecting or processing biometric identifiers for other purposes requires consent subject to CPA requirements. Requires a written policy if employer collects data.

Companion HB 24-1058 expands the definition of "sensitive data" under CPA. Sensitive data now includes biological data and neural data which are both collected from an individual's body or brain functions. The CPA imposes various duties on companies that process sensitive data.

IF COVERED, CONDUCT AN AUDIT TO DETERMINE USE/STORAGE OF BIOMETRIC AND SENSITIVE DATA

Colorado 2024 legislation: Civil protection orders

HB 24-1122, amending CRS §13-14-104.5, eases requirements for employers to obtain civil protection orders and **temporary restraining orders in cases of workplace violence**.

- An employer may obtain a civil protection order in Colorado by showing "a risk or threat of physical harm or the threat of psychological or emotional harm exists."
- A court can grant a protective order "regardless of when an incident occurred;" no longer required to prove "imminent danger." [Temporary protection order may be approved for a period up to one year after the date a permanent protection hearing is ordered.]
- Venue for a civil protection order is any county where any act or behavior that is the subject of the motion occurred. More favorable rules for petitioners regarding service of process; a court is prohibited from awarding any costs or assessing any fees (including attorney fees) against a petitioner seeking a civil protection order.

Colorado 2024 legislation: Delivery network drivers

HB24-1129 creates a new statute, C.R.S. § 8-4-126, that focuses on several different job-related protections for **delivery drivers who work for delivery-network companies**, including wage transparency, contract transparency, and account-deactivation transparency and challenge procedures. The new law also includes enforcement mechanisms.

The act applies to **delivery-network companies** (DNC), which are defined as, "any person that sells the delivery of goods or services, including delivery provided as part of the sale of goods, in the state and that engages or dispatches delivery drivers through a digital platform." In turn, a digital platform is "an online application, internet site, or system that a delivery network company uses to facilitate, manage, or facilitate and manage delivery services."

The act applies only to drivers who are independent contractors. DNCs need not comply with respect to drivers who are employees.

Colorado 2024 legislation: Non-competes and training

Recall significant restrictions to Colorado non-competition statute in 2022, including end to "executive/professional" exception to the law. 2022 law preserved an exception allowing employers to contract with employees to recover the **expenses of training and educating** an employee where the training is different from typical, on-the-job training. Employers may only recover the "reasonable costs of the training." The employer's recovery must decrease over the two years following the training, proportionately based on how many months have passed since the completion of the training, and any recovery must be in compliance with the Fair Labor Standards Act. HB 24-1324 adds language that

- Allows the Colorado Attorney General to establish rules regarding the training's transferability or the credentialing that is available to the employee because of the training.
- Adds enforcement language which allows the Attorney General to **recover three times the amount of any employer recovery** or attempted recovery when an employer's training-repayment provision is void under the law in addition to penalties allowed under the law.

Colorado 2024 legislation: New protected groups

Hair length. HB 24-1451 amends Colorado's CROWN Act by adding "hair length" as a characteristic commonly or historically associated with race. Hair length joins hair texture, hair type, and protective hairstyles commonly associated with race, e.g., locs, twists, braids, tight coils or curls, cornrows, Bantu knots, and headwraps.

Organ donors. HB 24-1132, adding C.R.S. § 8-2-132, prohibits an employer from intimidating, threatening, coercing, discriminating, or retaliating against, or taking any adverse action against an employee who is or becomes a living organ donor. The law creates a rebuttable presumption that an employer has engaged in any of the prohibited actions if the action is taken against an employee during the period that begins 30 days before the organ donor operation and ends 90 days after the operation; employers must show "clear and convincing evidence" to rebut presumption.

AI is the future

Europe: In March 2024, the European Parliament approved the European Union's Artificial Intelligence Act, the world's first comprehensive legal framework on AI.

US:

- October 2022, White House issued a "Blueprint For an AI Bill of Rights" ("AI Blueprint") to guide the design, use and deployment of AI systems. The AI Blueprint identified five key principles for protection when it comes to AI systems
- October 2023, President Biden issued **Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence**. EO **directs federal agencies to develop standards**, raise awareness, and increase regulation of AI uses, and also created the White House AI Council, which includes various members of President Biden's Cabinet, to coordinate agency efforts.
- **October 2024, US DOL issued "Artificial Intelligence and Worker Well-being: Principles and Best Practices for Developers and Employers" found at https://www.dol.gov/general/AI-Principles**

AI update: Colorado AI law

On May 17, 2024, Colorado Governor Jared Polis signed SB 24-205, which outlaws AI job discrimination, **effective February 1, 2026**; deployers of **"high-risk artificial intelligence systems"** must take "reasonable care" to prevent discrimination, such as by completing impact assessments for all AI systems annually and after modifications, and providing consumer disclosures about AI deployment. **Law will likely impact hiring, promotion, discipline, performance management and workplace surveillance**.

Employers that use AI must provide consumers opportunities to **correct** any incorrect personal data processed by an AI and **appeal** adverse consequential decisions made by an AI. In the event that a deployer discovers algorithmic discrimination has occurred, it must report the discovery to the state attorney general within 90 days.

Exceptions available when deployer of AI has fewer than 50 full-time employees and does not use its own data to train the AI; the AI system meets certain exemption criteria; and the deployer makes an impact assessment of the AI available to consumers. An affirmative defense is available if deployers cure violations or follow recognized AI risk management framework.

We can't forget POWR: A new reality in Colorado

Protecting Opportunities and Workers' Rights Act (**POWR Act**), SB23-172, became law on **August 7, 2023**

Made six **significant changes** to Colorado law that require employer attention

POWR Act changes

1. Expressly rejects the "**severe or pervasive**" standard
2. To raise affirmative defense in supervisory misconduct cases, must establish a PROGRAM "reasonably designed" to prevent harassment
3. Amends framework for disability discrimination cases, narrowing defense in failure to accommodate cases
4. **Marital status** protected
5. Strict limits on non-disclosure agreements
6. Must maintain employment records for at least five years, including oral or written employee complaints of discriminatory or unfair employment practices

POWR rules

Colorado Code of Regulations, 3 CCR 708-1, effective **December 30, 2023**, revised Rule 85.1 – *Harassment Based Upon Protected Classes in the Workplace Prohibited*.

- Harassment occurs if the discriminatory treatment is unwelcome and has the effect of creating a work environment in which the conduct or communication is ***subjectively offensive*** *to the employee alleging discrimination* and ***objectively offensive*** *to a reasonable individual who is a member of the same protective class*.
- In the event of alleged workplace harassment of an employee by a supervisor, an employer may raise an **affirmative defense** to liability to a victimized employee. Such defense is that: (1) the employer has *established a program that is reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment*; (2) the employer has communicated the existence and details of the program to both its supervisory and nonsupervisory employees; and (3) the employee has unreasonably failed to take advantage of the employer's program.

EPEW strengthened: Three notice requirements

Effective January 1, 2024, SB23-105, amends Colorado's Equal Pay for Equal Work Act (EPEW):

- Deletes "promotional opportunities" language; instead, expands **notice** requirement to **all "job opportunities"** – vacancies (newly created or vacated position) – and adds to external/internal notice "the date the application window is expected to close;" eliminates posting requirement for automatic/regular/in-line progression based on time in role or other objective metrics
- New hires/promotions. Must make reasonable efforts to **announce**, post, or otherwise make known, within 30 calendar days after a candidate who is selected to fill a job opportunity begins work, information – name, former position (if internal), job title, information about similar opportunities -- to at least the employees with whom candidate works regularly
- For positions with a "career progression," employer must **disclose** and make available to all eligible employees the requirements for career progression, along with compensation, benefits, full-time or part-time status, duties, and access to further advancement

Colorado Web Accessibility: Digital ADA

HB21-1110, Colorado's Web Accessibility Law, passed on **July 1, 2021**, requires that **all state and local governments' (cities, counties, content owners managing government websites, and any public entity providing digital services or information) websites** follow digital accessibility guidelines in compliance with the Americans with Disabilities Act (ADA). The law permits challenges to government websites in state court. Penalties include monetary damages, attorney's fees, $3,500 fine payable to each plaintiff for each violation.

HB21-1110 set a deadline of **July 1, 2024** to meet Web Content Accessibility Guidelines (WCAG) 2.1 Level AA standards for digital accessibility. The State Chief Information Officer (CIO) published 8 CCR 1501-11, *Technology Accessibility Rules*, in February 2024. The rules can be found at https://oit.colorado.gov/ standards-policies-guides/guide-to-accessible-web-services/accessibility-law-for-colorado-state-0

HB 24-1454 granted a "grace period" to **July 1, 2025**, but state and local governments must show having made a good-faith effort toward meeting digital accessibility standards by July 19, 2024, including creating a detailed progress report on their websites and updating it quarterly and providing an easy-to-find way for visitors to report accessibility issues with clear contact information on public-facing pages.

22

New EPEW posting guidance

Interpretive Notice & Formal Opinion ("INFO") # 9A: *Transparency in Pay and Job Opportunities: The Colorado Equal Pay for Equal Work Act, Part 2*, effective May 29, 2024, found at *https://cdle.colorado.gov/*

- Job opportunity requiring notice? An employer has a "job opportunity" that must be disclosed whenever it is at least "**considering" filling any "current or anticipated vacancy**."
  - "Vacancy" can be either (1) a "vacated position" an employer intends to fill that is open, or held by a departing employee; or (2) a "newly created position."
- Not a job opportunity requiring notice?
  - **Non-competitive promotion: "career progression" and "career development";**
  - Acting, interim, or temporary ("AINT") positions;
  - Confidential replacements of current employees unaware of separation; and
  - Remote jobs for employers with no site, and under 15 staff, in Colorado

EPEW guidance includes sample notices

If a specific person is expected to be selected . . .

Jo Doe is recommended for promotion to senior accountant. Salary $50-70,000; health ins.; PTO; 401k. To apply by January 1, or to express interest in similar jobs, email interest@CompanyHr.com

New post-selection notice . . .

Ali C. has been promoted to Analyst IV from Analyst III. Any employee interested in similar opportunities in the future should email Human Resources at HR@company.com

Job Application Fairness Act effective July 1, 2024

SB23-058, new CRS § 8-2-131, :

- Covers all private employers and units of state/local government
- **After July 1, 2024**, prohibits employers from inquiring about applicant's age, DOB, and dates of attendance/graduation from an educational institution on an employment application
- Employer may require additional application materials, e.g., certifications, transcripts, if employer notifies applicant they may redact age-related information
- **Exception for age requirements imposed by BFOQ related to public or occupational safety, federal law or regulation, or state law requirement**

No private right of action; penalties (1st violation – warning; 2nd violation – up to $1,000; 3rd violation+ -- up to $2,500)

Must file complaint with CDLE within 12 months of violationmendments to the Act took effect.(opens in new window)

See Colorado INFO #9B, *Restrictions on Age Information in Job Applications: the Job Application Fairness Act ("JAFA")*, dated May 29, 2024

Protections for Public Workers Act (PROPWA) allows expression!

- Extends National Labor Relations Act (NLRA) protections to most **public employees in Colorado**; allows right to organize a union; does not include right or obligation to recognize or negotiate a collective bargaining unit.
- PROPWA protects public employee rights to engage in:
  - speech on employee representation, workplace issues, or PROPWA rights;
  - concerted activity for mutual aid or protection;
  - **political participation while off duty and not in uniform**, including (i) speech with the public employer's governing body (or any of its members) on work terms and conditions or matters of public concern, and (ii) political activity of other kinds in the same manner as other Coloradans;
  - organizing, forming, joining, or assisting an employee organization, or refraining from doing so; and
  - exercising any rights under PROPWA, including but not limited to complaining, testifying or otherwise submitting evidence or information about, or opposing what the employee believes, reasonably and in good faith, to be a violation of PROPWA.

New PROPWA rules identify some limits on expression

1. "**Disruptive activity**" not protected if "expressive activity" is outweighed by the degree to which the activity **materially impairs significant interests**, such as (a) that a public employer must be able to deliver public services, maintain legally required confidentiality, or otherwise fulfill its obligations, (b) that a governing body (boards, commissions, etc.) must maintain relationships of trust with their policy-level and confidential employees, and (c) that a public employee must maintain professional relationships required to perform their duties. **"Disagreement with the content" of the activity, or viewpoint of the employee, cannot be a reason for activity to lose protection**.
2. Expressive activity not protected if it is pursuant to or part of "**official duties**" that the public employee either: (A) is paid by their public employer to perform; or (B) otherwise has a responsibility to perform under a directive from their public employer.
3. Expressive activity is protected in a "**public forum**" traditionally open to such activity or opened for such activity by a public entity unless contrary to a limitation on the **time, place, or manner** of such activity: (1) that is set and enforced on a content-neutral and viewpoint-neutral basis; (2) that is narrowly tailored to serve a significant governmental interest; and (3) that leaves open ample alternative channels for the activity that are known and available to the public employee.
4. "**Policy-level" employees** do not have PROPWA political participation protections

No private right of action under PROPRWA; rules effective July 1, 2024

Holiday pay and overtime

Colorado Supreme Court ruled that **holiday incentive pay** (paid at 1 and 1/2 times regular rate for working on a company holiday) must be included in non-exempt employees' regular rate of pay for determining overtime. *Hamilton v. Amazon.com Services LLC* (Colo., September 9, 2024) Former Amazon warehouse employee who filed class action lawsuit entitled to additional compensation for overtime hours worked on holidays. In a case of first impression, Court ruled that holiday incentive pay is a "shift differential" included within "regular rate" for determining overtime under Colorado COMPS Order.

Colorado employers should review their overtime policies to align with the decision.

CASES

US SUPREME COURT DECISIONS

US Supreme Court 23-24 term: Employment cases

Job transfer – even with no serious harm or loss -- can constitute unlawful gender discrimination under Title VII. *Muldrow v. City of St. Louis*, Mo. (S. Ct., Apr. 17, 2024) (Kagan, J).

Court ruled that employee challenging a job transfer need not show a heightened, serious, or material threshold of harm. Court left open question of **how much harm would be sufficient** for Title VII purposes.

Jatonya Muldrow, St. Louis Police Department, argued that her **eight-month transfer** out of the PD's Intelligence Division constituted sex discrimination under Title VII even though she had not suffered any economic damages by the transfer. Reversing dismissal of the claim, Supreme Court rejected City's argument that eliminating a threshold showing of significant or material injury requirement to bring a cognizable claim under Title VII would lead to a flood of "insubstantial lawsuits." Court concluded that a plaintiff would still have to overcome several hurdles to establish a Title VII claim, including establishing an injury that impacted a term or condition of employment and that the injury occurred because of a protected characteristic.

US Supreme Court 23-24 term: Employment-related cases

US Supreme Court overruled *Chevron, USA Inc. v. Natural Resources Defense Council*.(1984) which required courts to defer to federal agency legal rulings! As a result, federal rules – including labor and employment rules -- will be subject to greater scrutiny and challenge. *Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce* (S.Ct. June 28, 2024)(Roberts, J)

Impact of decision is uncertain, but likely wide-ranging: Federal agencies will have less leeway to write broad rules; rules must be closer to statutory language; **existing rules are subject to new challenge and review**. Watch DOL rules' challenges increase.

US Supreme Court 23-24 term: Employment-related cases

The statute of limitations for challenging federal agency rules has been lengthened. The Supreme Court ruled that the six-year statute of limitations for filing Administrative Procedure Act (APA) lawsuits begins to run when a regulation first affects a company, rather than when it's first issued, allowing a North Dakota truck stop to challenge fees that banks charge for debit card transactions. *Corner Post Inc. v. Board of Governors of the Federal Reserve System* (S.Ct. July 1, 2024)(Coney Barrett, J)

This decision, like *Loper*, will invite more challenges to federal agency rules.

2025 cases to watch

Reverse discrimination. In *Ames v. Ohio Department of Youth Services*, a heterosexual female alleged her gay manager discriminated against her based on sexual orientation when she lost her job to a gay male. Court to decide whether plaintiffs who are members of "historically majority communities" asserting "reverse discrimination" claims under Title VII must show there are "background circumstances" that support the inference that the defendant is the "unusual employer who discriminates against the majority." Textualist Supreme Court may eliminate 50-year old "background circumstances requirement."

ADA. In *Stanley v. City of Sanford*, a Florida firefighter who retired due to complications associated with Parkinson's disease is challenging her disability benefits package, which included a retirement health insurance subsidy that covered the cost of health insurance for qualifying retirees who retired early due to disability until they reached age 65. The employer prevailed in the lower courts arguing that the former employee is no longer a "qualified individual" as defined by the ADA and therefore lacked standing to sue.

USERRA. In *Feliciano v. Department of Transportation*, Court will address differential pay for federal employees who are recalled to active duty.

RULES

NEW REGULATORY REQUIREMENTS

PWFA rules released

On December 30, 2022, President Biden signed the **Pregnant Workers Fairness Act (PWFA); US EEOC issued a 408-page final rule effective June 18, 2024**

- **Expansive scope of conditions** that qualify for a "request for accommodation" under the PWFA include current pregnancy, past pregnancy, **potential pregnancy**, lactation (including breastfeeding and pumping), use of **birth control**, menstruation, migraines, pregnancy-related conditions that are episodic-like morning sickness, postpartum depression, gestational diabetes, infertility and fertility treatments, preeclampsia, endometriosis, miscarriage, stillbirth, and having or choosing to have an abortion, among other conditions.
- **Limits supporting documentation** to minimum documentation sufficient to confirm the employee's physical or mental condition; confirms the physical or mental condition is related to, affected by, or arises out of pregnancy, childbirth, or related medical conditions; and documentation that describes the change or adjustment needed at work due to the limitation.
- Allows employee to be qualified for an accommodation, even if they cannot perform one or more essential functions of the job, if the inability to perform the essential function(s) is "temporary," the employee could perform the essential function(s) "in the near future," and the inability could be reasonably accommodated.

PWFA rules released

- **Broad guidance as to possible reasonable accommodations**, including frequent breaks, sitting/standing, schedule changes, part-time work, and paid and unpaid leave to recover, remote work, closer parking, light duty, making existing facilities accessible or modifying the work environment, job restructuring, temporarily suspending one or more essential functions, acquiring or modifying equipment, uniforms, or device, and adjusting or modifying examinations or policies.
- **"De facto" reasonable**: Modifications that don't cause undue hardship in "virtually all cases" are allowing an employee to keep or carry water near and drink, as needed; allowing an employee to take additional restroom breaks, as needed; allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and allowing an employee to take breaks to eat and drink, as needed.
- **Prohibited practices**
  - Failing to provide (including unnecessary delay) a qualified employee or applicant with reasonable accommodation;
  - Requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process;
  - Denying employment opportunities based on the employer's need to make a reasonable accommodation for the known limitation of an employee/applicant;
  - Requiring a qualified employee or applicant to take paid or unpaid leave if another reasonable accommodation exists; and
  - Taking adverse action against a qualified employee/applicant

PWFA additional considerations

The final rule states it is a best practice to provide an "**interim accommodation**" to an employee which may mitigate against a claim of delay by an employee.

The final rule clarifies there is no right to a reasonable accommodation under the PWFA based upon an individual's **association with someone else who may have a PWFA-covered limitation**, or even if the individual themselves has a physical or mental limitation arising out of someone else's pregnancy, childbirth or related medical condition.

The final rule clarifies that time for **bonding or for childcare is not covered by the PWFA**.

PUMP Act guidance

The **Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)** became effective December 29, 2022. US DOL has issued a **fact sheet;** and is drafting industry-specific guidance, including for the education industry.

- PUMP Act amended FLSA to now cover **exempt employees**
- Nursing employees may take reasonable break time and have access to an appropriate space to express breast milk for a nursing child up to one year after the child's birth; **Colorado has a two-year window**.
- Time for pump breaks may be unpaid unless otherwise required by federal, state, or local law
- The location provided for nursing employees must be a place other than a bathroom and must be functional to express breast milk, shielded from view, and free from intrusion from coworkers, students, and the public.
- **PUMP Act requirements are potential reasonable accommodations under the PWFA.**

Please see Colorado INFO #7: *Workplace Accommodations for Nursing Parents*, dated September 9, 2023

Federal regulatory issues: New harassment rules

On April 29, 2024, US Equal Employment Opportunity Commission ("EEOC") finalized "Enforcement Guidance on Harassment in the Workplace." **First time since 1999** that the EEOC has updated its harassment guidance! Unlawful harassment includes:

- Intentional use of a name or pronoun inconsistent with the individual's known gender identity (**misgendering**); denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity; and disclosing an individual's sexual orientation or gender identity without permission.
- Insulting, criticizing, and demeaning behavior towards a person based on their **pregnancy or pregnancy-related** medical condition, such as lactation or morning sickness; insulting, criticizing, demeaning, or changing the working conditions of an employee based on their decision to use or not use contraception, including abortion.

Federal regulatory issues: New harassment rules

- Acknowledges claims of "retaliatory harassment" and "intraclass" and "intersectional harassment."
  - *Retaliatory harassment* refers to harassment that occurs when an individual experiences harassment as a result of engaging in protected activity. *Intraclass harassment*, e.g., 52-year-old supervisor directs derogatory age comments toward a 65-year-old employee. *Intersectional harassment*, e.g., more than one protected category, male manager making comments to a 51-year-old female worker that she was having a "menopausal moment."
- Includes "remote" and "online" harassment using work-related communications systems, accounts, devices, or platforms" or non-work activity that has an impact on the workplace, e.g., posts on social media if the victim learns of the post through a coworker, or if the post otherwise impacts the victim's workplace.

New harassment rules: Social media use

Although employers generally are not responsible for conduct that occurs in a non-work-related context, they may be liable when the **conduct has consequences in the workplace** and therefore contributes to a hostile work environment, including electronic communications using private phones, computers, or social media accounts, if it impacts the workplace.

- **E.g., Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a hostile work environment based on national origin.**
- However, postings on a social media account generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees and do not impact the work environment. Non-consensual distribution of real or computer-generated intimate images, such as through social media, messaging applications, or other electronic means, can contribute to a hostile work environment, if it impacts the workplace.
- Harassment by a supervisor outside the workplace is more likely to contribute to a hostile work environment than conduct by coworkers, given a supervisor's ability to affect an employee's employment status.

A new harassment primer; lots of examples

EEOC highlights conduct that may, if sufficiently severe or pervasive, rise to the level of actionable harassment, including:

- Saying or writing an ethnic, racial, or sex-based slur;
- Forwarding an offensive or derogatory "joke" email;
- Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
- Threatening or intimidating a person because of the person's religious beliefs or lack of religious beliefs;
- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person's disability;
- Mocking a person's accent;
- Making fun of a person's religious garments, jewelry, or displays;
- Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts;
- Groping, touching, or otherwise physically assaulting a person;
- Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim; and
- Threatening a person's job or offering preferential treatment in exchange for sexual favors.

New harassment rules: Good reminders for employers

1. Harassment covers ALL protected groups; hostile work environment NOT based on membership in a protected group is not actionable: **Holding all employees to rigorous standards is not harassment**
2. Harassment based on *perception* of membership in a protected group, even if incorrect, is unlawful
3. Intersectional discrimination is based on intersection of two or protected characteristics, e.g., Black female
4. A threat to carry out adverse action, even if not carried out, can be actionable quid pro quo harassment
5. "Boorish, juvenile or annoying behavior," without more, is not unlawful harassment: A "more than merely offensive" standard
6. Subjectively unwelcome: Relevant, but not dispositive if employee participated in behavior; does not matter if other members of the protected group may have found the behavior welcome

Workplace violence prevention; will this trend head to Colorado?

California: New Senate Bill 553 requires most California employers to establish and implement an effective, written **workplace violence prevention plan (WVPP)** containing specific information by July 1, 2024. The WVPP may be a stand-alone document, or incorporated as a separate section of an employer's existing injury and illness prevention program. **Workplace violence prevention training also is required**.

DEI: Life after the *Students for Fair Admission* decision

On June 29, 2023, the U.S. Supreme Court ruled that Harvard's and UNC-Chapel Hill's race-conscious admissions practices violate the 14th Amendment's Equal Protection Clause of the U.S. Constitution and/or Title VI of the Civil Rights Act of 1964. Take-aways:

- Case is limited to higher education, but has implications for government contractors with affirmative action requirements and employers with voluntary DEI programs
- The Court noted that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university."
- **Voluntary DEI programs must be reviewed to avoid actual, or perceived, diversity quotas/goals and unlawful preferences based on a protected category.**

DEI: Life after the *Students for Fair Admission* decision

- **The "anti-woke" backlash**: In 2024, Elon Musk accused DEI efforts as "racist;" candidate Trump promised to end "work equity" programs; following "pressure campaigns," John Deere, Tractor Supply slashed DEI programs and will no longer participate in cultural awareness events; SHRM eliminated "equity" rebranding as "I&D." Most surveyed organizations say they remain committed to DEI initiatives.
- **Don't interview diverse candidates just to look good**. *SEB Investment Management AB v Wells Fargo & Co*. (N.D. Cal., July 29, 2024) Federal court permitted securities lawsuit to proceed where bank allegedly misled investors about diversity of its workforce by conducting sham interviews of diverse candidates for high-paying jobs with no intention of hiring them.
- **DEI training is lawful . . . and, if done well, can benefit organizations**. A former Honeywell employee failed to show that his employer discriminated and retaliated against him when he was fired for failing to complete mandatory unconscious bias training. *Vavra v. Honeywell International, Inc*. (7th Cir. 2024). White employee called mandatory training a "joke," ignored reminders to complete online class, complained training cast white employees as "villains." Employee could not show protected opposition to employer conduct when he'd never seen the training and could not form an objectively reasonable belief that the program violated federal or state law; he insufficiently assumed training would vilify white people.

WFH and the ADA

In a post-COVID world, employers must consider work-from-home (WFH) requests under the ADA.

A jury awards **$22.1M** to a former Wells Fargo managing director laid off after a WFH accommodation request. Court ruled it wasn't clear whether the employer engaged in "genuine discourse" about the ADA request. Employee with paralyzed colon and bladder needed frequent, unplanned restroom breaks due to disability; requested WFH before pandemic restrictions were lifted; his managers eliminated his position before the matter was resolved.

Billesdon v. Wells Fargo Securities, Inc. (W.D.N.C., jury award July 26, 2024).

WFH and the ADA

Indefinite remote work isn't a reasonable accommodation when in-office presence is an essential function of the job.

Long-term employee of public utility diagnosed with multiple sclerosis. Employer accommodated mobility limitations, including providing employee an electric scooter. During COVID pandemic, employer allowed temporary work from home, but required all employees to return to work to provide essential services to the public. Employee requested continued work from home, based on doctor's recommendation, for an indefinite period. Employer placed employee on FMLA, then long-term disability. Employee alleged failure to accommodate under the ADA. Court ruled for employer finding that employer had attempted to accommodate employee's limitations and in-office presence was an essential function of the job despite temporary work from home in the past. Fact in-office presence was not in job description was not dispositive.

Rogers v. Unified Government of Wyandotte County/Kansas City, Kansas (D. Kan., summary judgment, October 17, 2024)

Federal regulatory issues: New overtime threshold vacated

On April 23, 2024, US Department of Labor (DOL) announced its final rule increasing compensation thresholds for overtime eligibility under the Fair Labor Standards Act (FLSA), **effective July 1, 2024**.

- July 1, 2024: Raised from $684/week ($35,568/year) to **$844/week ($43,888/year**)
- January 1, 2025: $1,128/week (**$58,656/year**)
- To be a "highly compensated executive," salary threshold will be increased as follows: July 1, 2024: $132,964/year; January 1, 2025: $151,164/year.

On November 15, 2024, a federal district court in Texas struck down the DOL final rule and enjoined enforcement of the rule nationwide. *Plano Chamber of Commerce et al. v. United States DOL* (E.D. Tex. Nov. 15, 2024)

Previous threshold of $35,568/year reinstated. No increase on January 1, 2025. DOL has appealed the ruling.

Federal regulatory issues: Independent contractor rule

On January 9, 2024, U.S. Department of Labor (DOL) announced the issuance of its final rule to clarify who is an independent contractor; rule effective March 11, 2024

The DOL rescinds the Trump Administration's 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. The new rule implements an "economic realities" test with no favoritism towards any factor and relies on a "totality of the circumstances" analysis. **Examples raise the bar for independent contractor classification**. Additional factors in the economic realities test may include: The amount of skill required for the work; degree of permanence of the working relationship; worker's investment in equipment or materials required for the task; and extent to which the service rendered is an integral part of the employer's business.

The 2024 rule is currently in litigation and is likely to be altered by the Trump Administration.

Federal regulatory issues: FTC ban on non-competes

On April 23, 2024, the Federal Trade Commission (FTC) issued its final rule prohibiting all non-compete agreements, for all employees, at all levels, with limited exceptions.

- Applies to agreements between employers and all "workers," which include employees, independent contractors, externs, interns, volunteers, apprentices, or sole proprietors.
- Prohibits employers from enforcing existing non-competes with workers other than senior executives after the compliance date.
- Two limited exceptions: (1) existing non-competes can remain in force for "senior executives," defined as an "officer with policymaking authority" who earns in excess of $151,164, but this exception will not be available for new non competes entered into after the Rule's effective data; and (2) non-competes made in connection with the sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.
- Requires employers to inform workers and former workers that any preexisting non-compete agreement is no longer enforceable.
- FTC rule does not prohibit other types of restrictive covenants, such as non-disclosure agreements ("NDAs"), non-solicitation agreements, and training repayment agreement provisions ("TRAPs"). However, such provisions could be "de-facto" non-competes if drafted so broadly that the provision would hinder the ability of a worker to seek or accept employment or operate a business after the conclusion of their employment.

Federal regulatory issues: FTC ban on non-competes

FTC ban on non-competes was to be effective September 4, 2024.

However, on August 30, 2024, a Texas federal judge granted a motion for summary judgment that set aside the noncompete rule and issued an injunction. *Ryan LLC v. FTC* (N.D. Tex., August 30, 2024). The decision has nationwide effect.

FTC appealed on October 18, 2024.

Pot watch: The federal government is changing course

As of November 2024, **24 states** (AK, AZ, CA, CO, CT, DE, IL, MA, MD, ME, MI, MN, MO, MT, OH, NV, NJ, NM, NY, OR, RI, VA, VT, WA), DC and Guam allow **adult recreational use** of marijuana

38 states (AL, AK, AZ, AR, CA, CO, CT, DE, DC, FL, HI, IL, KY, ME, MD, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, SD, UT, VT, WA and WV) have some form of legalized **medical marijuana** in 2024.

No employer duty to accommodate marijuana use under Colorado law; **May 2024, US DOJ proposed to reclassify marijuana from Schedule I to Schedule III uses. DEA held public hearing on December 2, 2024.**

Biggest proposed change in US drug policy in 50 years

The culture war: Religion vs. gender

Recall *Meriwether v. Hartop* (6th Cir. 2021) holding that public university professor plausibly alleged that his First Amendment/academic freedom rights were infringed when the university disciplined him for refusing to refer to transgender female student with "she/her" pronouns in violation of the school's nondiscrimination policy. Case settled in 2022 in professor's favor.

- In 2023, appellate court rejected a public employee's claim that he was unlawfully discriminated against based on religion after he refused to attend mandatory LGBTQ anti-discrimination trainings because he did not want to be forced to listen to "indoctrination" in contradiction to the tenets of his faith. *Zdunski v. Erie 2-Chautauqua-Cattaraugus BOCES* (2d Cir., Mar. 13, 2023) Court found no evidence training -- recognizing the difference between sex and gender; understanding aspects of gender identity -- was discriminatory on the basis of religion.
- Also, a divided federal appeals court upheld an Indiana school district's firing of a music teacher who refused to address transgender students by their first names and pronouns for religious reasons. *Kluge v. Brownsburg Community School Corp.* (7th Cir., April 7, 2023) Court found the teacher's requested accommodation -- allowing him to use only last names to refer to all students – created an undue hardship on transgender students; therefore, district could require all school personnel to address students consistent with their names, pronouns, forms of address in the district's PowerSchool database of students. **Outcome might be different applying *Groff v. DeJoy* decision.**

The culture war: Religion vs. gender revisited

On rehearing, *Kluge v. Brownsburg Community School Corp.* (S.D. Ind., April 30, 2024), applying *Groff v. Dejoy* (S. Ct. 2023) religious accommodation standard, court ruled in favor of school district.

BCSC revoked "Last Names Only" accommodation provided to music teacher who argued that requiring him to call transgender students by preferred first names violated his religious beliefs. Relying on *Groff,* court determined that continuing the "Last Names Only" accommodation would be an undue hardship to BCSC. The court considered "all relevant factors," including whether the accommodation at issue had a practical impact in light of the nature, size, and operating costs of BCSC. The court found that the accommodation created an unreasonable risk of substantial disruptive litigation, citing discrimination cases filed by other transgender students, and *imposing substantially increased costs as a matter of law.* Court granted summary judgment for BCSC.

Interesting cases in 2024

EEOC settled case against Dallas car dealership after a Black employee was awarded a trophy at a holiday office party labeled "Least Likely to Be Seen In The Dark," was harassed about it, and employee quit after employer did not respond to employee's complaints. *EEOC v. AOD Ventures, Inc.* (E.D. Tex., January 10, 2024)

Paralegal given adult diapers and fake pills at 50th birthday party didn't prove that her boss caused her to be fired based on her age when she had underlying performance issues. *Liebau v. Dykema Gossett, PLLC* (6th Cir., April 23, 2024)

Town manager's written request to City Council for "courteous communication," without referencing need for assistance based on a disability, did not trigger duty to accommodate under the ADA. *Kelly v. Town of Abingdon (VA)* (4th Cir. 2024)

Interesting cases in 2024

On February 21, 2024, NLRB ruled that Home Depot violated federal labor law when it discharged an employee for refusing to remove "BLM" — the acronym for "Black Lives Matter" — from their work apron as it related to "issues of racial injustice in the workplace.

On May 21, 2024, administrative law judge struck down Starbucks' overly broad civility policy, Respectful Communications, as violative of NLRA.

A transgender former Chick-fil-A employee's sexual harassment case may go to a jury trial jury, rejecting employer's argument that the employee is "heterosexual." *Taylor v. IJE Hospitality, LLC* (N.D. Ga., March 29, 2024)

Mandatory DEI training not sufficiently severe or pervasive to constitute harassment of white male employee, but court warned that negative race-based messaging could support claims. *Young v. Colorado Department of Corrections* (10th Cir., March 11, 2024)

Interesting cases in 2024

A California school district paid $360K to settle a lawsuit with a Christian teacher who was fired for not adhering to district policy allowing transgender students to use restroom associated with gender identity and use of pronouns. *Tapia v. Jurupa Unified School District* (C.D. Cal., May 15, 2024) Case is interesting for employers because teacher never failed to follow school/state policies; teacher raised religious objections and requested religious accommodation; instead, fired for social media posts students found offensive and reported to school.

An African-American employee overhearing two employees – one of whom was also African-American -- using a single offensive racial slur was not sufficiently severe to constitute unlawful racial harassment. The employee confronted the offending co-worker and he immediately apologized. *Batiste v. City of Rayne* (W.D. La., July 15, 2024) Court distinguished this case from cases finding harassment for a supervisor's single use of offensive language.

Expectant father does not have right to FMLA leave to travel out of state to see his former girlfriend and prepare for the birth of his child with her. *Tanner v. Stryker Corporation of Michigan* (11th Cir. 2024) Employee used four days of leave to plan, prepare, and pack to go to Connecticut, where his girlfriend had moved, and arrived eleven days before the baby was born to tour local neighborhoods to see if he'd like to move there; none of which is protected by the FMLA.

Interesting cases in 2024

FMLA covers time off to participate in **clinical trials** to cure own serious health conditions according to a DOL opinion letter dated November 8, 2024

Worldwide Printing and Distribution, in Tulsa, Oklahoma, will pay $47,500 to settle allegations it violated the Genetic Information Nondiscrimination Act and Title VII of the Civil Rights Act of 1964 by subjecting a mixed-race employee to harassment because of her African ancestry. *EEOC v. Worldwide Printing and Distribution, Inc.* (N.D. Okla., August 14, 2024) While at work, the employee showed her supervisor the results of an at-home DNA test, which indicated she had a small percentage of ancestry from Cameroon, the Congo and Northern Africa. Afterward, the supervisor allegedly began using racial and ethnic slurs forcing the employee to quit.

59

Interesting cases in 2024

On November 8, 2024, a jury found Blue Cross Blue Shield of Michigan liable for **$12.69M for refusing to accommodate a former employee's request to be exempted from receiving the COVID-19 vaccine** on the basis of religious objection. *Domski v. Blue Cross Blue Shield of Michigan*. The former employee, who is Catholic, requested an accommodation on the basis she has a "sincere personal religious belief that human life begins at conception;" that the "COVID vaccines were either developed or tested using fetal cells that originated in abortions;" and that "abortion is murder and a sin against God." The employer refused to engage in an interactive dialogue or consider alternatives, such as mask requirements and periodic COVID testing.

In *Spagnolia v. Charter Communications, LLC* (10th Cir., July 2, 2024) (unpublished opinion), appellate court upheld company's policy against **secret recording in the workplace** finding no reasonable person could find that her termination for surreptitious recording was in retaliation for making a lactation accommodation request.

Questions?

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