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Navigating Tomorrow's Workplace Today: Key Insights into 2025 Labor Law Trends

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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

Agenda

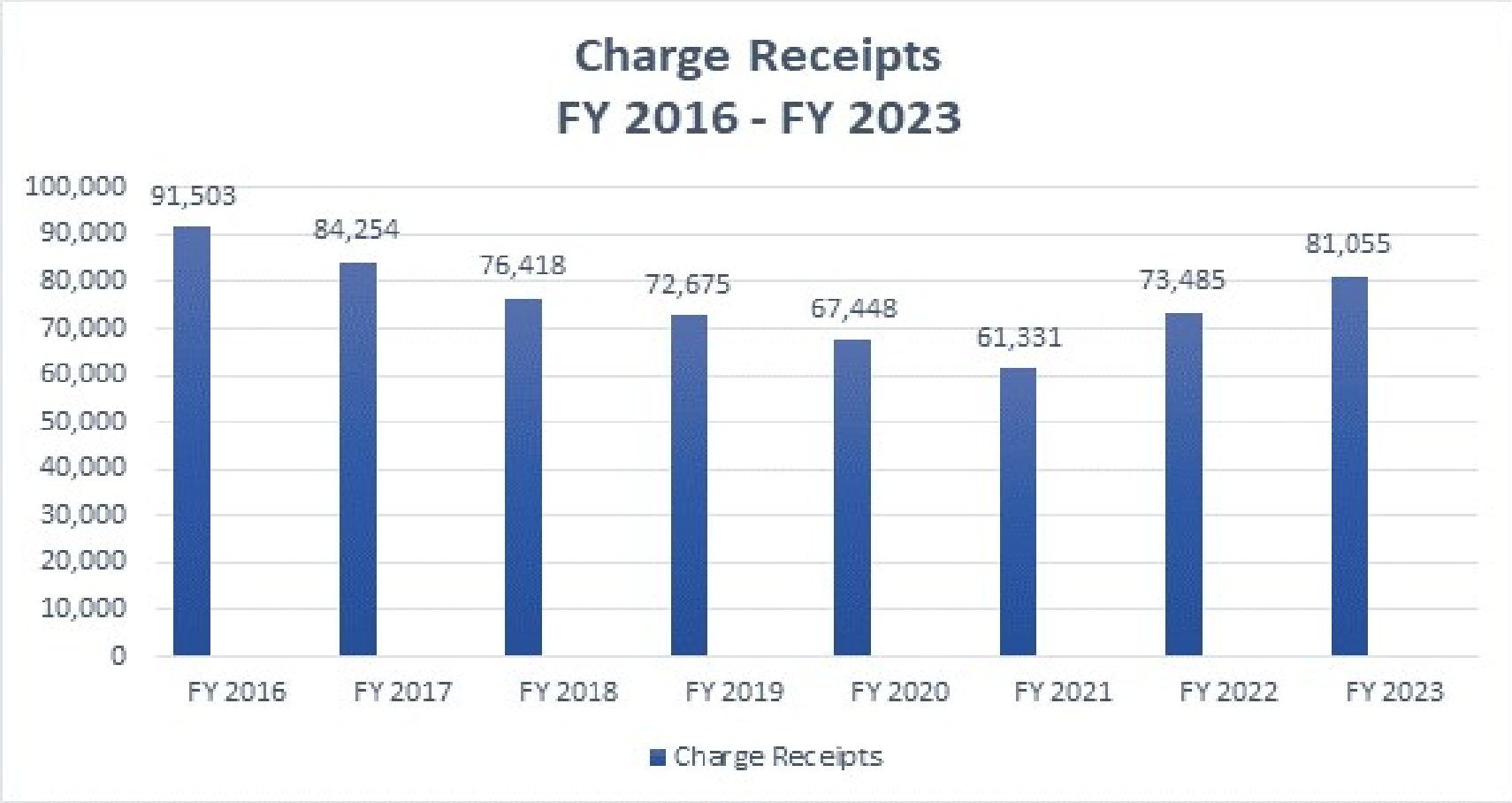
- EEOC Enforcement Statistics and Strategic Priorities
- EEOC's Updated Guidance on Workplace Harassment
- Status of DOL New Overtime Rule
- Pregnant Workers Fairness Act Final Regulations Have Taken Effect
- Status of FTC Non-Compete Ban and Implications
- Post-Harvard/UNC Admissions Cases and DEI
- Traditional Labor Update
- Parting thoughts…

EEOC Enforcement Statistics and Strategic Priorities

EEOC Enforcement

- EEOC's new enforcement statistics come out in October – these are the most recent figures through present:
  - Secured more than $665 million in monetary relief for employment discrimination, a 29.5% increase from 2022
  - 81,055 new charges, a 10.3% increase from 2022
  - Received 233,704 inquiries in field offices and fielded 522,000 calls through the agency contact center
  - Successfully resolved 46.7% of conciliations
  - Filed 143 lawsuits, including 86 lawsuits on behalf of individuals, 32 non-systemic suits with multiple victims, and 25 systemic suits with multiple victims

EEOC Trends, contd.



EEOC's Subject Matter Priorities

- The EEOC announced its "subject matter priorities" for 2024-2028, which include:
  - **Eliminating Barriers in Recruiting and Hiring**. The EEOC is focusing on policies and practices that may be neutral on their face but are likely to result in a disparate impact felt by a protected class (and thus susceptible to class action lawsuits).
    - For example, the use of criminal records in hiring decisions and the use of artificial intelligence (AI) in hiring, screening tools facilitated by AI or automated systems, job advertisements that exclude or discourage certain groups from applying, and employers' reliance on rigid job application systems that may be difficult for those with disabilities to access.

EEOC's Subject Matter Priorities

- **Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination.**
  - The EEOC defines vulnerable workers as: immigrant and migrant workers and workers on temporary visas; people with developmental or intellectual disabilities; workers with mental health-related disabilities; individuals with arrest or conviction records; LGBTQI+ individuals; temporary workers; older workers; individuals employed in low-wage jobs, including teenage workers employed in such jobs; survivors of gender-based violence; Native Americans/Alaska Natives; and persons with limited literacy or English proficiency.
  - The EEOC has directed the agency's federal sector program to identify vulnerable workers and underserved communities in their districts or within the federal sector for focused attention.
  - The EEOC launched its new REACH initiative in January to ensure that these workers have access to the EEOC's services and know their rights, making the Commission more accessible to those historically underserved. The program will hold listening sessions with stakeholders around the country to identify existing barriers to reporting discrimination, review and evaluate effective outreach strategies and tools, identify best practices for reaching vulnerable and underserved communities, and consider how to develop an increased presence in rural areas and areas far from physical EEOC office locations.

EEOC's Subject Matter Priorities

- **Addressing Selected Emerging and Developing Issues.** The EEOC is focused on issues that involve new or developing legal concepts or topics that are difficult or complex.
  - By way of example, employers should expect increased scrutiny of:
    - Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities;
    - Policies and practices for workers affected by pregnancy, childbirth, or related medical conditions under the Pregnant Workers Fairness Act and Pregnancy Discrimination Act;
    - Discrimination influenced by or arising as backlash to local, national, or global events, including discriminatory bias arising as a result of recurring historical prejudices; and
    - Discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID.

EEOC's Subject Matter Priorities

- **Advancing Equal Pay for All Workers.** Pay equity remains a focus and the EEOC is doubling down on efforts to bridge the wage gap. The focus extends beyond gender-based pay disparities to encompass all forms of wage discrimination, including those based on race, ethnicity, and other protected characteristics.
  - Employers can expect increased scrutiny of pay secrecy policies, the discouraging or prohibiting of workers from asking about pay or sharing their pay with coworkers, and a reliance on past salary history or applicants' salary expectations to set pay.

EEOC's Subject Matter Priorities

- **Preserving Access to the Legal System.** The EEOC will continue to scrutinize any practice that may deter employees from filing charges with the EEOC or cooperating freely in EEOC investigations. Specifically, the EEOC says it will focus on:
  - Overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements;
  - Unlawful, unenforceable, or otherwise improper mandatory arbitration provisions;
  - Employers' failure to keep applicant and employee data and records required by statute or EEOC regulations; and
  - Retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws.

EEOC's Subject Matter Priorities

- **Preventing and Remedying Systemic Harassment.** The EEOC is intensifying efforts to address systemic discrimination, recognizing that isolated incidents can contribute to broader patterns of inequality. The EEOC says it will continue to focus on "strong enforcement with appropriate monetary relief and targeted equitable relief to prevent future harassment."
- **No surprise**, the EEOC has indicated that it will implement a concerted effort to focus its resources on employment practices that often result in class and collective action lawsuits.

Key Takeaways

- Employers should be vigilant in monitoring these strategic enforcement initiatives, as EEOC investigations can quickly escalate to regional or even nationwide systemic investigations and corresponding litigation.
- ***Pro Tip*** – Expect the EEOC to be aggressive in its investigations and enforcement, given that it landed a $26 million dollar budget increase for 2024. Accordingly, Employers should review their use of AI in the hiring process, release agreements, nondisclosure agreements, nondisparagement provisions, arbitration provisions and record keeping practices with counsel to ensure compliance with applicable law.

EEOC's New Enforcement Guidance on Workplace Harassment

EEOC's Updated Enforcement Guidance on Harassment in the Workplace

- On April 29, 2024, the EEOC updated its Enforcement Guidance on Workplace Harassment (Enforcement Guidance) for the first time in more than 30 years.
- The Enforcement Guidance is ***effective immediately*** and supersedes previous guidance published in the 1980s and 1990s.
- The Enforcement Guidance provides several key updates to the legal standards for employer liability under federal employment discrimination laws that protect covered employees from harassment based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age, or genetic information.

EEOC's Enforcement Guidance: Key Updates

- **Race-Based Harassment**: Harassing conduct about race includes not only racial epithets but also offensive comments based on stereotypes or traits and characteristics about a complainant's race, such as the complainant's name, cultural dress, accent or manner of speech, hairstyles or hair textures, and other physical characteristics.
- **Color-Based Harassment**: Includes harassment due to an individual's pigmentation, complexion, skin shade, or tone.
- **National Origin-Based Harassment**: Includes ethnic epithets as well as derogatory comments about an individual's traits or characteristics linked to the individual's national origin, such as physical characteristics, ancestry, ethnic, or cultural characteristics (e.g., attire or diet), and linguistic characteristics (e.g., a non-English language accent or lack of fluency in English).
- **Religion-Based Harassment**: Includes religious epithets or offensive comments about a complainant's religion (including a lack of religious belief), religious practices, or religious dress, as well as harassment based upon a complainant's request for an accommodation because of a religious belief.

EEOC's Enforcement Guidance: Key Updates

- **Age-Based Harassment:** Includes harassment based upon negative perceptions about older workers or stereotypes about older workers, even if not motivated by animus, such as pressuring an older employee to transfer to a job that is less technology-focused because of the perception that older workers are not well-suited for such work.
- **Disability-Based Harassment:** Includes harassing behavior that targets, mimics, or mocks the manner in which an employee moves, looks, or speaks, as well as commentary that criticizes an employee's receipt of a reasonable accommodation due to a disability as unfair "special treatment."
- **Genetic-Based Harassment**: Includes harassment based upon an individual's or family member's genetic test or family medical history, such as harassing an employee's carrying of a gene linked to cancer or because an employee's family member recently experienced a severe case of a virus.
- **Objectively Hostile Work Environment Created Even Though a Complainant Continued to Perform Well**: Although harassing conduct may not result in a decline in work performance or in psychological injury, the nature of the harassing behavior and the complainant's reaction may be sufficient to create a hostile work environment if the harassing conduct made it more difficult for a reasonable person in the complainant's position to do their job.

EEOC's Enforcement Guidance: Key Updates

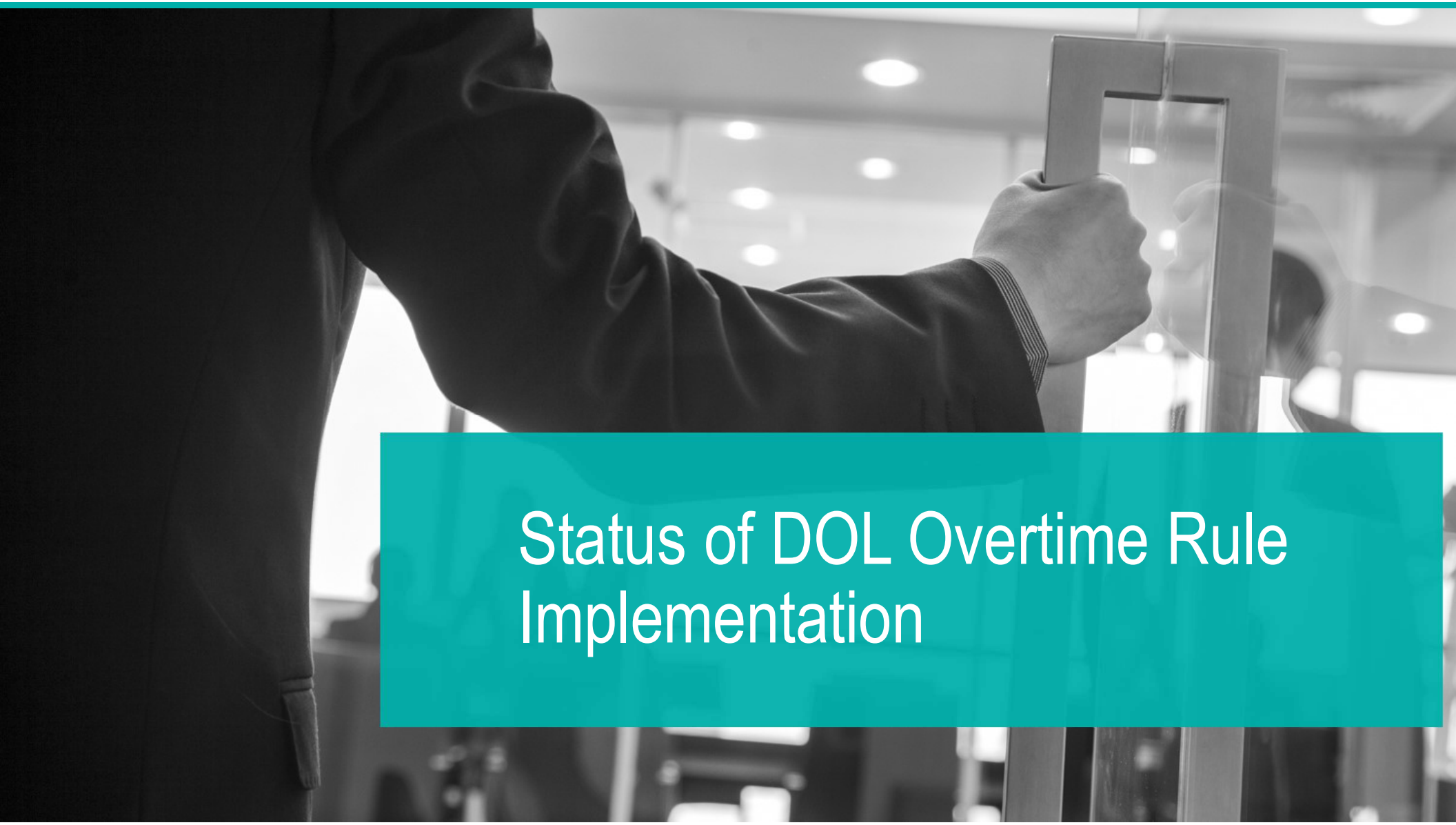
- **Harassing Conduct Occurring Outside of Regular Place of Work**: May still give rise to a hostile work environment claim if the harassing behavior occurred at an employer-sponsored/hosted event or if the off-site behavior has negative consequences in the workplace.
- **Joint Employer Liability**: If an individual has been assigned by an employment agency to work for a client, both the agency and the client have a responsibility to take corrective action when it has notice of harassment occurring at either entity, as employers have a responsibility to prevent and correct the harassment of both non-direct hire employees and permanent employees.
- **Harassment Based on Perceived Protected Characteristics**: Even if the perception is incorrect, the related conduct still constitutes unlawful harassment under federal antidiscrimination law.
- **Intraclass Harassment**: A complainant may be harassed by a colleague with whom the complainant shares the same national origin, sex, or other protected characteristic (e.g., age 40 or older).

EEOC's Enforcement Guidance: Key Updates

- **Sex-Based Harassment**: Includes conduct of a sexualized nature, such as unwanted conduct based upon sexual attraction or involving sexual activity, as well as harassment based on pregnancy, childbirth, or related medical conditions including issues involving lactation, use or nonuse of contraception, and the decision to have or not have an abortion or vasectomy.
  - For example, the EEOC explains that harassing behavior includes or may include:
    - Harassing behavior that targets how an employee expresses their gender identity
    - The denial of an employee's access to a bathroom or other sex-segregated facility consistent with the individual's gender identity
    - Harassing behavior may also include targeting an employee because that individual does not present in a manner that would stereotypically be associated with that person's sex
    - The repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering)
    - Physical assault due to sexual orientation or gender identity; or outing (disclosure of an individual's sexual orientation or gender identity without permission)

Key Takeaways

- It's time to revisit and update workplace policies to ensure they reflect the Enforcement Guidance.
- TRAINING! Employers need to update their training to align with the new enforcement guidance. We strongly recommend that employees should receive new training no later than Q1.



Status of DOL Overtime Rule Implementation

New Minimum Thresholds for Overtime Exemptions

- As many of you know, this Spring the DOL announced a finalized rule increasing the minimum compensation levels for the so-called “white collar” exemptions to the federal Fair Labor Standards Act’s (FLSA) overtime premium pay requirements.
- The rule increased the minimum salary threshold to qualify for the “white collar” or “executive, administrative, and professional employee” exemptions to overtime to $844 per week ($43,888 annualized) effective July 1, 2024. That threshold will increase again on January 1, 2025 to $1,128 per week ($58,656 annualized).

New Minimum Thresholds for the Highly Compensated Employee Exemption (HCE)

- The rule also increased the minimum annualized salary threshold to qualify for the white-collar HCE.
- Effective July 1, 2024, the HCE minimum went up to $132,964 and on January 1, 2025, it will go up again to $151,164.

Legal Challenges

- *State of Texas v. U.S. DOL,* No. 4:24-cv-499-SDJ (E.D. Tex. June 28, 2024)
  - A federal judge in Texas enjoined the DOL from enforcing its Final Rule raising the minimum salary level requirements for executive, administrative, and professional (EAP) exemptions to the minimum wage and overtime requirements of the FLSA.
  - The injunction, however, only bars the DOL from enforcing the increase as to Texas government employees.
  - The court did not grant the requested nationwide injunctive relief.

Key Takeaways

- The new FLSA minimum-salary increases are expected to impact 4 million workers, potentially rendering them misclassified as exempt, unless the employer raises their pay to meet the new requirements or reclassifies the workers as nonexempt.
- Employers should assess the current exemptions of their workforce to help ensure that all workers presently classified as exempt will still qualify under the new criteria. Options include: reclassification of all workers vs. split categories vs. pay increases
- Employers should consider conducting a comprehensive internal audit of job duties and exempt status to help ensure all employees are properly classified.
    - Talk with counsel on the best was to handle the audit

Pro Tip – Consider using this change as an opportunity to correct unrelated exemption issues.

Pregnant Workers Fairness Act – Final Regulations Have Taken Effect

Pregnant Workers Fairness Act

- The Pregnant Workers Fairness Act (PWFA) affords reasonable workplace accommodations to employees affected by pregnancy, childbirth, or related medical conditions.
  - PWFA demands the same interactive process set forth in the ADA between employer and employee for identifying a reasonable accommodation.
  - Like the ADA, PWFA includes the same definitions "reasonable accommodation" and "undue burden."
  - It also contains a notice provision, requiring that an employer know of an employee's limitation requiring accommodation before a violation of the PWFA can be found.
- PWFA is applicable to employers with 15 or more employees and extends the protections of the Pregnancy Discrimination Act (PDA).
- The EEOC now accepts charges arising under the PWFA and the EEOC's final regulations are now in effect – let's take a closer look….

Pregnant Workers Fairness Act – Regs., contd.

- The final regulations explain that PWFA maintains a broad definition of pregnancy, childbirth or related medical conditions, which includes Infertility, menstruation, endometriosis, fertility treatments, miscarriages and abortions.
- Pregnant employees must be afforded reasonable accommodations that may include the temporary suspension of even essential job functions, which the ADA does not require.
  - Examples of Reasonable Accommodations: making existing facilities used by employees readily accessible to an usable by employees with known limitations under the PWFA; job restructuring; part-time or modified work schedules; breaks for use of the restroom, drinking, eating, and/or resting; modifying equipment, uniforms, or devices (including devices that assist with lifting or carrying for jobs that involve lifting or carrying); providing unpaid leave; telework, remote work, or change of work site; temporarily suspending one or more essential functions; and adjusting or modifying examinations or policies.
  - The EEOC provides further detail regarding reasonable accommodations for lactation, including that a lactation accommodation can include permitting the employee to nurse during work hours where the child is in “close proximity” to the employee.

Pregnant Workers Fairness Act – "Predictable Assessments"

- "Predictable Assessments" that Are *De Facto* Reasonable:
  - Allowing an employee to carry or keep water 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
  - Allowing an employee to take breaks to eat and drink, as needed

Pregnant Workers Fairness Act – Medical Documentation and Inquiries

- An employer may obtain medical documentation only if it is reasonable under the circumstances to determine if the employee has a qualifying condition and needs an adjustment or change at work due to the limitation.
  - Reasonable documentation means the minimum that is sufficient to (1) confirm the physical or mental condition underlying the limitation; (2) confirm that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) describe the adjustment or change at work that is needed due to the limitation. Employers may not require that supporting documentation be submitted on a specific form. Requests for more information than what is permitted may constitute retaliation.

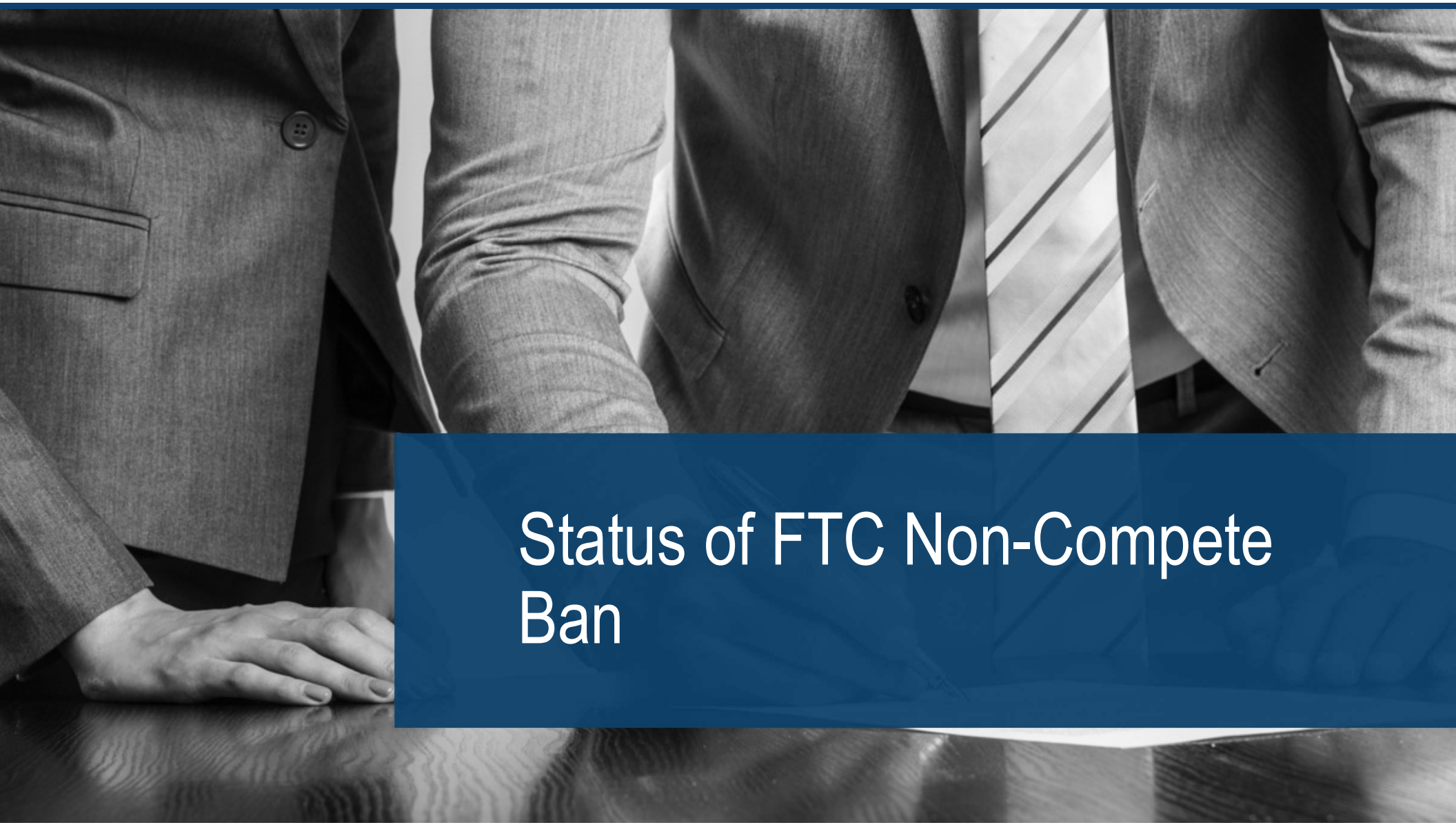
Pregnant Workers Fairness Act – Medical Documentation and Inquiries, contd.

- Employers may not seek supporting documentation in five instances:
  - when the limitation and the adjustment or change at work needed due to the limitation are obvious and the employee provides self-confirmation
  - when the employer already has sufficient information to determine whether the employee has a physical or mental condition related to, affected by, or arising out of a limitation and needs an adjustment or change at work due to the limitation
  - when the employee is pregnant and seeks one of the four "predictable assessment" accommodations
  - when the reasonable accommodation is related to a time and/or place to pump at work, other modifications related to pumping at work, or a time to nurse during working hours and the employee provides self-confirmation
  - when the reasonable accommodation is available to employees without known limitations under the PWFA pursuant to a covered entity's policies or practices without submitting supporting documentation.
- An employer may not require that an employee submit to an examination by a healthcare provider of its choosing.

Key Takeaways

- Employers should familiarize managers with their obligations under the PWFA and its final regulation. Consider providing training to managers on managing leave and accommodation requests under the FMLA, ADA and PWFA.
- Employers must also be aware of other state or local laws that provide greater or equal protections for protected individuals.
- Employers should review their current practices and policies to ensure that they comply with applicable law and conduct management training to ensure that their employees are informed of applicable law.

Pro Tip – Update their workplace accommodation policies to account for accommodations under the PWFA in addition to the ADA.



Status of FTC Non-Compete Ban

Procedural History – Setting the Stage

- July 9, 2021 – President Biden published his Executive Order on Promoting Competition in the American Economy, directing the FTC to exercise its statutory authority:
  - "[T]he Chair of the FTC is encouraged … to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to ***curtail the unfair use of non-compete clauses*** and other clauses or agreements that may unfairly limit worker mobility"
- January 5, 2023 – FTC Proposed Rule was announced; published in the Federal Register January 19, 2023.
- Final rule was halted in August….

FTC Final Rule – Legal Challenges

- *Ryan LLC v. FTC*, No. 24-cv-00986-E (N.D. Tex.)*
- *Chamber of Commerce et al. v. FTC*, No. 24-cv-00148 (E.D. Tex.)
- *ATS Tree Services LLC v. FTC*, No. 24-cv-01743 (E.D. Pa.)
- *Properties of the Villages, Inc. v. FTC,* No. 5:24-cv-00316 (M.D. Fla.)

*The order will likely be appealed to the U.S. Court of Appeals for the Fifth Circuit, but the FTC cannot enforce the Rule against any employer, nationwide, at this time.

Key Takeaways

- Employers should review and audit existing restrictive covenants and policies and practices on restrictive covenants.
- Employers should review and update employee handbooks and exit interview and return of company property procedures to ensure adequate protection of employer information and trade secrets.
- ***Pro Tip***
  - Unless you have concerns that your non-compete agreements are unreasonable restraints on trade due to scope or to whom they apply, do not rescind your non-compete provisions until the final rule take effect (if ever).
  - Consider alternatives – like Garden Leave – to tradition non-compete provisions.

The Impact of the Supreme Court's Harvard/UNC Decision on Corporate DEI Initiatives

Supreme Court Ruling will Likely Have Ripple Affects

- The Supreme Court severely restricted higher educational institutions from using race or ethnicity as part of their admissions process, curbing the practice of using affirmative action principles during admissions for schools across the country.
- While employers may not be directly impacted by the decision, the new standard will likely have big ripple effects on the world of workplace law before long — and the time is now to prepare for the oncoming chain of events.

Key Takeaways

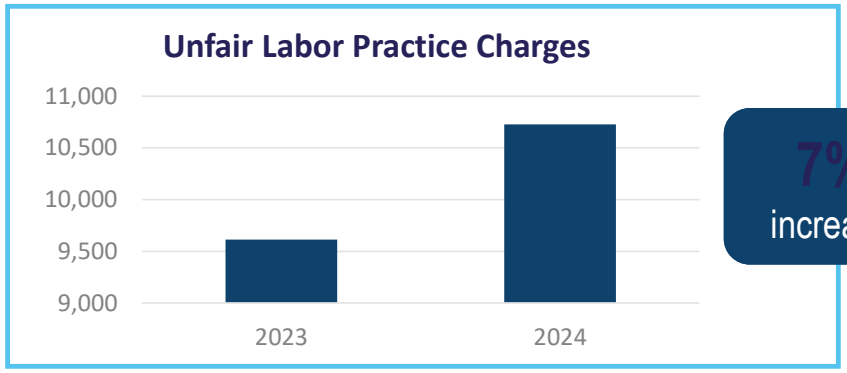
- The Supreme Court's decision does not mean that companies must eliminate their DEI programs, but they should reevaluate their existing DEI commitments, policies and public statements and consider whether such programs are compliant with existing anti-discrimination laws.
- **Review existing DEI programs and policies to assess potential legal risk.** For example, employers should not provide any preference (or exclusion) based on race or other protected categories. Also, setting quotas or targets in the workforce is highly likely to be scrutinized. However, employers can continue to set aspirational goals for improving diversity. Crafting language that aligns with the organization's DEI goals while staying within legally permissible parameters is a nuanced undertaking, and consulting with legal counsel is strongly advised.
- **Update training programs on diversity, anti-discrimination, anti-harassment and bias across the entire organization.** Training efforts should include training managers on the goals of the company's DEI policies and how to discuss them with employees.

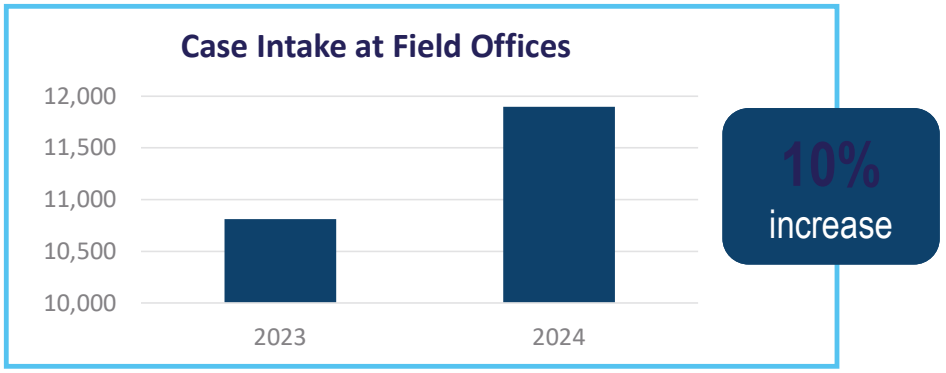
Key Takeaways

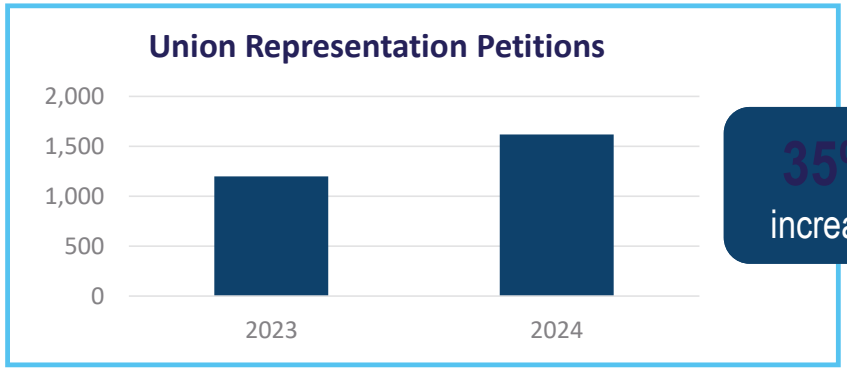
- **Review recruiting and outreach efforts to ensure focus on diversifying the candidate pool remain lawful.** This means employers may continue programs aimed at connecting with minority applicants, including high schools in diverse communities, HBCUs and organizations that promote women, minorities, veterans, disabled individuals and other underrepresented groups. However, employers should be cautious about considering protected categories as a basis for employment decisions.
- **In discussing DEI programs and strategy, explain how they benefit the entire organization and advance broader corporate goals and strategy.** The organization should understand the views of such stakeholders on DEI policies and anticipate potential changes resulting from litigation and/or regulatory developments.
- **Existing mentoring programs that promote career development remain legal.** However, employers should open such programs to all employees regardless of race or other protected category.
- **Business or affinity groups also remain legal, just as they were before the *Harvard* decision.** However, employers should review membership guidelines to ensure that anyone interested in the group's focus may join and membership is not limited by sex, race or any other protected category.

Traditional Labor Update

US Labor Relations Dashboard







88%
Of employees under 30 support unions

76%
of retail grocery elections were won by unions

66%
of food distribution elections were won by unions

Election petitions and unfair labor practice charge filings **rose substantially** in the first half of the NLRB's 2024 fiscal year (10/1/23 - 3/31/24) compared to the same timeframe for the 2023 fiscal year.

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The NLRB's "Bermuda Triangle"

Changes to NLRB Election Timing – A Return to the "Quickie Election" Rules

- Effective mid-December 2023, the NLRB's representation election procedures reverted to shortened timeframes and stricter guidelines on what election eligibility issues could be litigated pre-election
- The time between the filing of a representation petition by a union and the election date has shrunk from approximately 35 days to as little as 22 days

NLRB *Cemex* Decision (372 NLRB No. 130 – 8/25/23)

- If a Union can show majority support at a store or warehouse location and demands bargaining:
  - The company must either agree to recognize and bargain with the union; or
  - Petition the NLRB for an election within 2 weeks of the demand (unions are now filing petitions on same date as demand)
- If the Company wins the election, but is found to have engaged in **any** objectionable conduct, the traditional rerun election remedy will no longer apply, and a bargaining order will issue

The NLRB's "Bermuda Triangle"

The *Stericycle* Decision (372 NLRB No. 113 - 8/2/23)

- The NLRB changed the standard for determining whether a facially neutral workplace policy has a chilling effect on employees engaging in protected activity and is therefore unlawful.
  - If the rule has a reasonable tendency to chill employees from exercising Section 7 rights it is unlawful.
  - The rule will be interpreted from the perspective of an employee who is economically dependent on the employer and who contemplates engaging in protected activity
  - The employer's intent in maintaining the rule is irrelevant

How it Impacts You

- The "quickie election" rules materially shorten the time for an effective campaign and place a premium on early detection and an immediate response
- The *Stericycle* decision requires periodic review of all workplace policies and their efficacy and management training on the application of policies – one unlawful policy could trigger a *Cemex* bargaining order
  - Policies requiring "respectful" or "professional" conduct are likely unlawful
  - Policies restricting negative comments about working conditions through social media or other channels are likely unlawful
- The *Cemex* decision requires maintaining strict control over campaign messaging
- The combination of these three changes creates a significant advantage for unions in organizing bargaining units

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Questions?

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