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The Employment Law Rollercoaster – A Review of the Latest Developments

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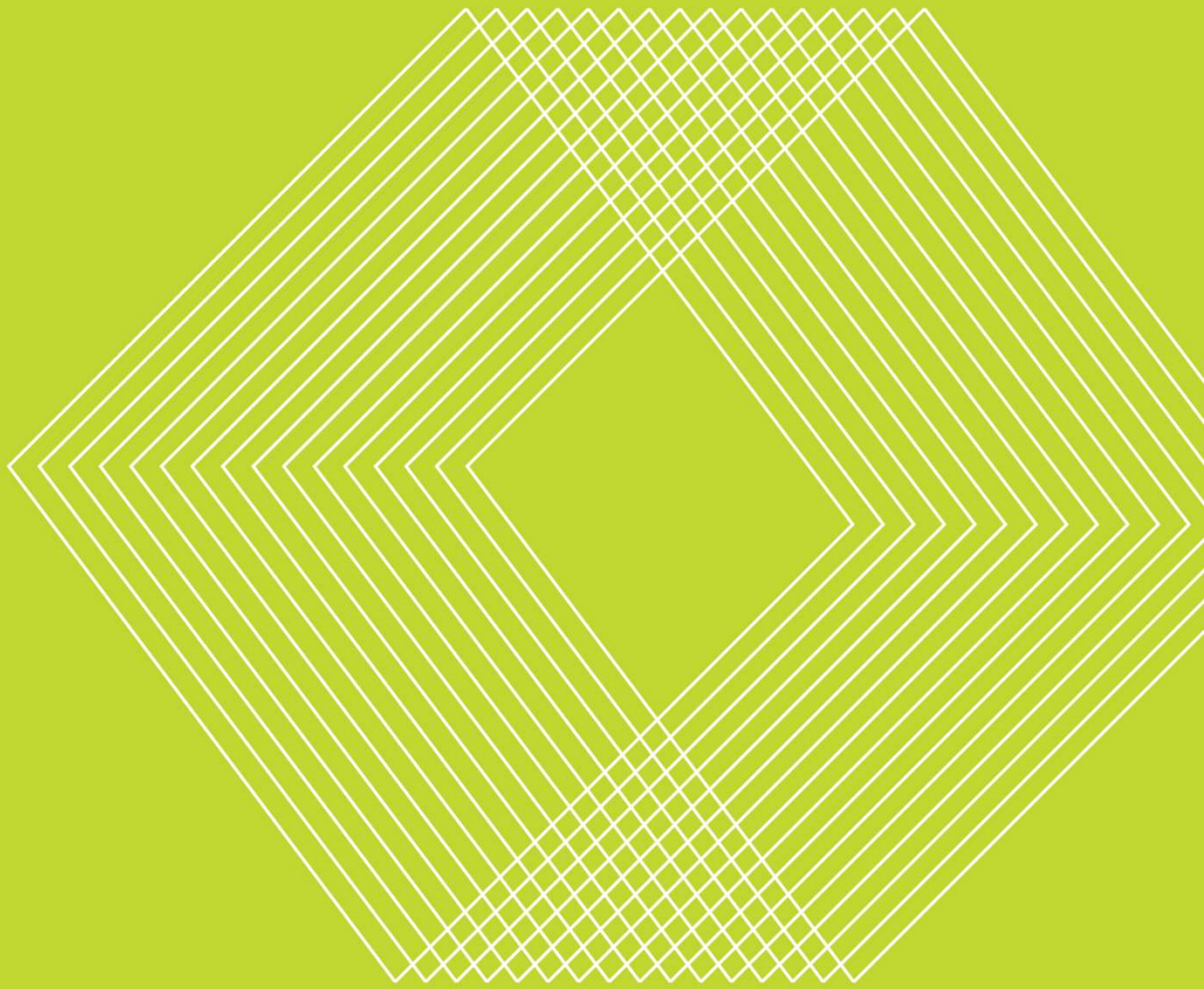
November 12, 2024

LAW ELEVATED

DOL Final Overtime Rule



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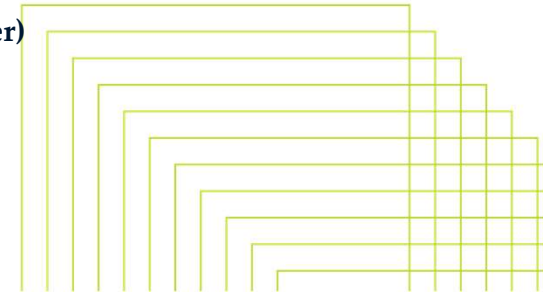
Fair Labor Standards Act ("FLSA") Overview

- **FLSA require**
  - **Minimum hourly wage ($7.25)**
  - **Timekeeping**
  - **Overtime at 1.5 x regular rate for hours over 40 in a week (unless an exemption applies)**

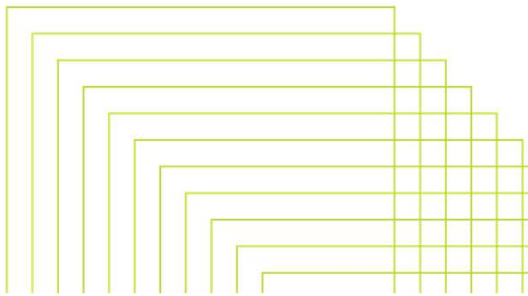
- **Salaried Basis of Payment for Exemptions:**
  - Weekly Guarantee
  - Without regard to quality or quantity or work
  - Since 2019 has been $684 per week ($35,568)

- **Changes ONLY apply to salaried exemptions (professional, executive, administrative, computer)**



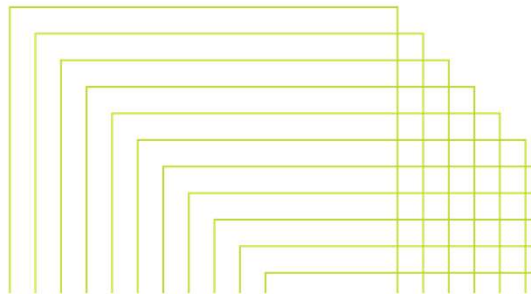
What is Changing?

- **Increases Already in Effect:**
    - July 1, 2024, increased salary threshold to $844 per week (($43,888 annualized)
- **Upcoming Increases:**
    - January 1, 2025, increases to $1,128 per week ($58,656 annualized)
    - HCE increases from $107,432 to $151,164
    - Automatic increase every 3 years starting July 1, 2027
- Challenges?
    - Several cases pending in Texas federal district court
    - No orders/injunctions yet



So what? Now what?

- **Evaluate affected employees**
  - **Maintain A/C privilege**
  - **Identify exempt employees making less than the new minimum**
  - Decide whether to increase pay or reclassify as hourly
- Proper communication of the changes is essential in this process
- Good time for FLSA compliance self-audit
  - Publicity on wage & hour issues



DOL Guidance on Final Overtime Rule

- https://blog.dol.gov/2024/04/23/what-the-new-overtime-rule-means-for-workers#:~:text=The%20department's%20final%20rule%2C%20which,pay%20protections%20under%20the%20FLSA.

EEOC and the Pregnant Workers Fairness Act (PWFA)

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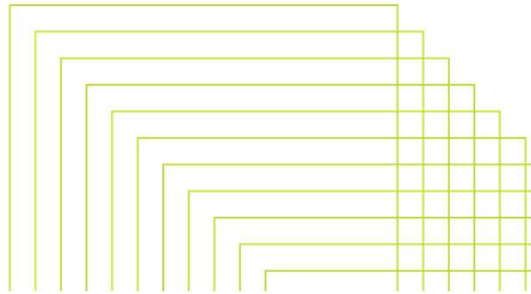
PWFA Protections

- **Effective June 27, 2023**
    - **Private and public sector employers with 15 or more employees.**
    - **Requires employer to provide a reasonable accommodation to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.**
    - **Unlike the ADA, the PWFA requires accommodations for pregnant workers even if they temporarily can't perform essential functions of their job.**
    - **Employer cannot require employee to take leave (paid/unpaid) if another effective reasonable accommodation exists, absent undue hardship.**
- **EEOC Final Regulation (effective June 18, 2024)**
    - Reasonable Accommodation Examples
    - Further defines interactive process
    - Explanation of Undue Hardship
    - When an employer can request supporting documentation



EEOC Enforcement of PWFA

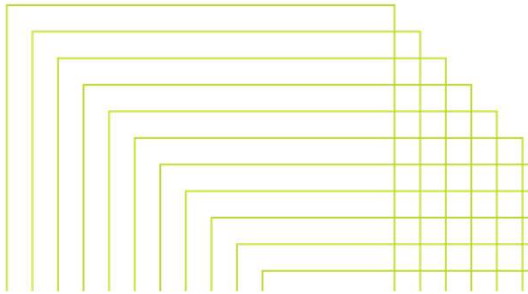
- **EEOC Lawsuits:**
  - *EEOC v. Wabash National Corporation*, Case No. 5:24-cv-00148-BJB (U.S. District Court for the Western District of Kentucky) – Filed September 10, 2024.
    - Denied a pregnant employee's accommodation request to transfer to a role that did not require lying on her stomach and forced her to take unpaid leave and ultimately gave her no choice but to return to her position without modification. She was forced to resign.
    - Company also unlawfully required medical documentation and failed to accommodate even though it could have provided changes similar to those company provides for non-pregnant workers with similar limitations.
  - *EEOC v. Polaris Industries, Inc.*, Case 5:24-cv-1305 in U.S. District Court for the Northern District of Alabama – Filed September 26, 2024.
    - Employer refused to excuse an employee's absences for pregnancy related conditions and medical appoints and made her work mandatory overtime knowing that her physician had restricted her from working over 40 hours/week. She resigned.
  - *EEOC v. Urologic Specialists of Oklahoma, Inc.,* Case 4:24-cv-0452 in U.S. District Court for the Northern District of Oklahoma – Filed September 26, 2024.
    - Medical practice did not allow medical assistant to sit, take breaks, or work part-time as her physician said was needed to protect her health and safety during first trimester of high-risk pregnancy. Instead, practice forced her to take unpaid leave and refused to guarantee she would have breaks to express breastmilk. When she refused to return to work without the guaranteed breaks, she was terminated

EEOC Enforcement of PWFA

- **EEOC Lawsuits (cont'd.):**
  - *EEOC v. Kurt Bluemel*, Case No. 24-cv-2816 in U.S. District Court for the District of Maryland – Filed September 30, 2024.
    - Pregnant worker requested maternity leave with the expectation that she would resume employment after giving birth. When she attempted to return to work, she was told that no work was available. However, the employer hired new, non-pregnant employees before and after her attempted return.
  - *EEOC v. ABC Phones of North Carolina, Inc. d/b/a Victra*, Case No. 3:24-cv-00444 in U.S. District Court for the District of Nevada – Filed October 8, 2024.
    - Denied a worker's request to leave new hire training early for an urgent medical evaluation (ultrasound for a high-risk pregnancy) related to her pregnancy and rescinded her job offer instead. In contrast, the EEOC found that the company permitted other new hires to adjust or reschedule their training start dates or attendance for various reasons unrelated to pregnancy.
  - *EEOC v. Gracious, LLC d/b/a Gracious Bakery + Café*, Civil Action No. 24-cv-418 in U.S. District Court for the Eastern District of Louisiana- Filed September 27, 2024 – Company agreed to pay former employee $**46,500** to settle after employer fired employee for missing two shifts to seek emergency medical treatment related to her pregnancy.
  - *EEOC v. Lago Mar Properties, Inc.*, Case No. 24-cv-61812 in the U.S. District Court for the Southern District of Florida – Filed October 11, 2024 - - Company agreed to pay former employee **$100,000** after employee was terminated after requesting leave to recover and grieve following a stillbirth during fifth month of her pregnancy.

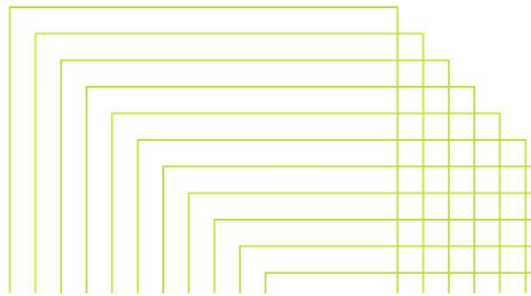
EEOC Enforcement of PWFA

- **EEOC Conciliations:**
    - Sailormen, Inc./Popeye's (10-11-2024) Miami, FL –
        - Employee fired upon employer learning she was pregnant because it believed she would need accommodations to perform her job duties.
    - Family Fresh Harvesting (10-10-2024) Detroit, MI –
        - H-2A employee fired after requesting unpaid time off to attend medical appointments for her pregnancy.
    - ABC Pest Control, Inc. (9-11-2024) Tampa, FL –
        - Employee fired after requesting accommodation to attend monthly medical appointments for her pregnancy.

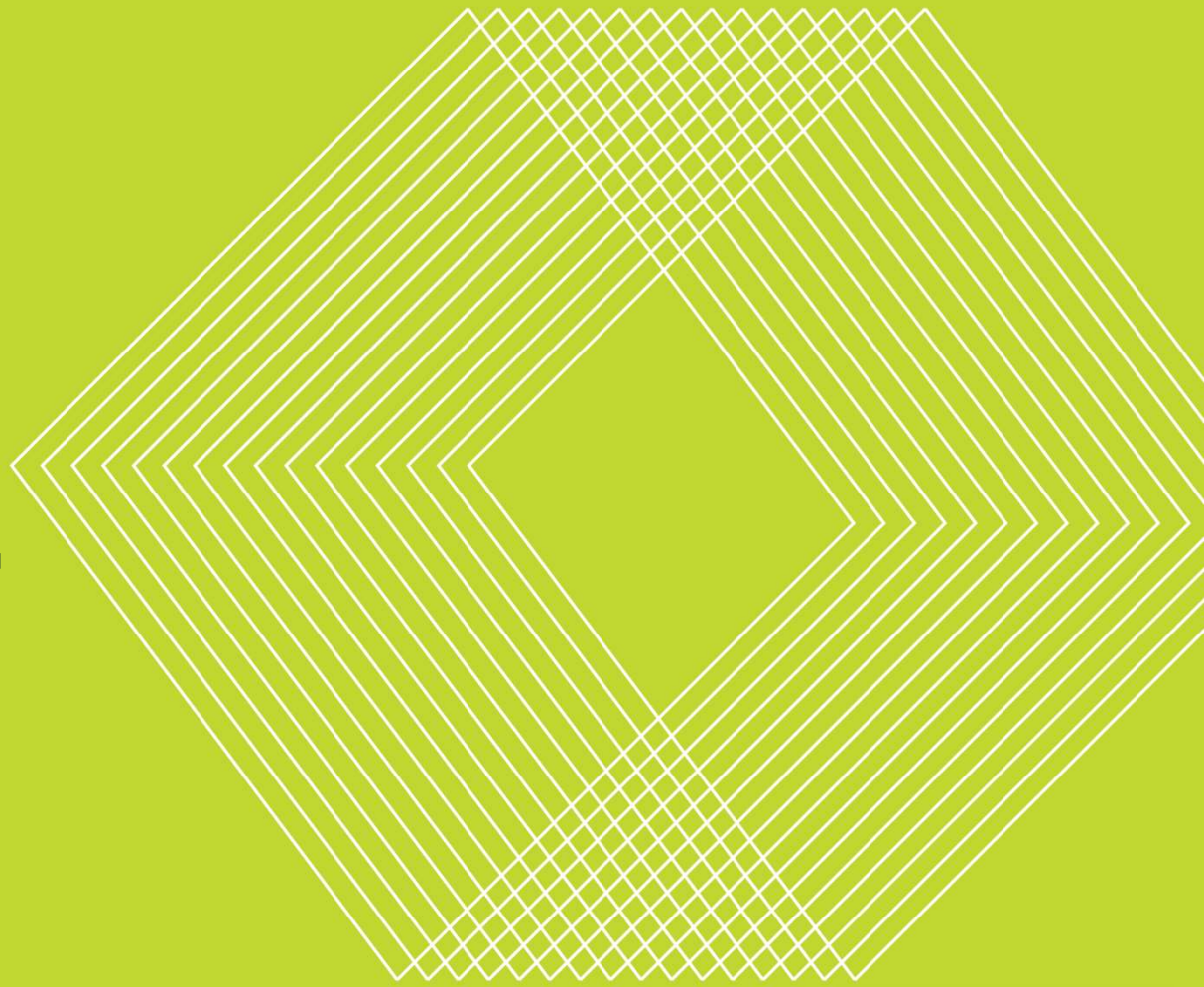


What Should Employers Do?

- **Update Handbooks**
- **Modify Existing Policies**
- **Develop Separate Processes for pregnancy-related accommodations**
    - In *Wabash,* EEOC claims employers use of an existing ADA form for evaluating pregnant worker's accommodation request violated the PWFA by making disability-related inquiries that were unnecessary to evaluate her pregnancy accommodation request.
- **Train Human Resources Personnel and Managers/Supervisors**
- **Engage in the Interactive Process**
- **Be Familiar with Applicable State Laws**



SCOTUS & SIXTH CIRCUIT OVERVIEW



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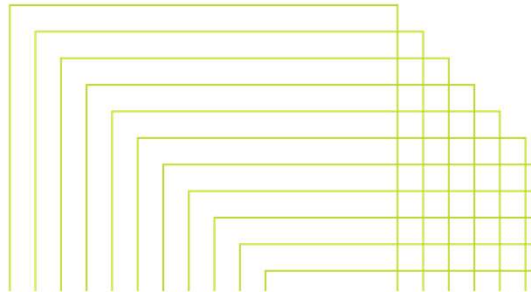
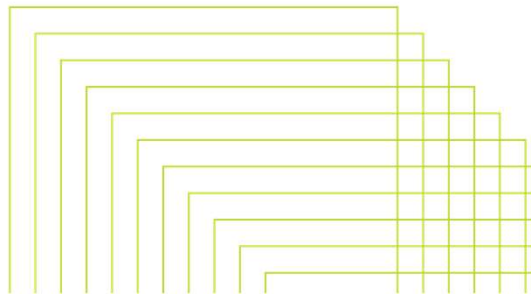
Muldrow v. St. Louis

- Previously there was a circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm – significant, serious, etc.
- Held that an employee must only show that the transfer brought **some harm** with respect to an identifiable term or condition of employment.
- US Supreme Court adopts new "some harm" or "simple injury standard" in Title VII cases.
- *Muldrow v. St. Louis, No. 22-193, 601 U.S. _____ (2024)*



What Does This Mean For Employers?

- The simple injury standard will be defined through litigation.
- Employers should scrutinize employment actions that involve undesirable outcomes or changes of employment conditions (i.e. fewer perks, less responsibility or unwanted or inflexible work hours/schedule.).
- Employers should prepare to demonstrate the legitimate non-discriminatory reasons for employment decisions that result in harm, even if minor.



Sixth Circult Decisions of Note

Yanick v. The Kroger Co. (6th Cir., April 29, 2024): A bakery worker returned after breast-cancer leave with her doctor's OK to return to full duty. But she struggled with certain tasks and was demoted. She filed an ADA lawsuit, and the court sided with her, saying the employer should have inferred that her comments about her physical struggles amounted to a request for an ADA accommodation.

The lesson: As with the FMLA, employees don't need to say any magic words to request an ADA accommodation. Make sure your managers know what may qualify and to elevate those subtle requests for accommodations up to HR.

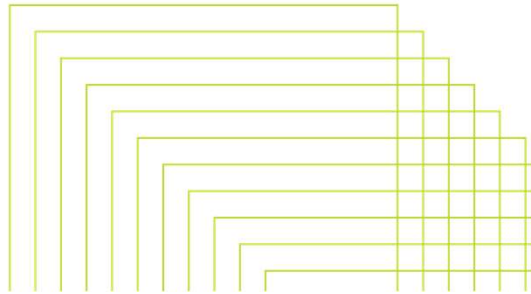
Fisher v. Airgas USA, Inc. (6th Cir., Jan. 31, 2024): An employee out on cancer leave used a product called "Free Hemp" for relief of treatment pain. The hemp was not prohibited under company policy. However, when he was chosen for a random drug test and failed, he was fired. He sued and won. The court said the company could not rely on the "honest belief" doctrine without adequately investigating that his use of the hemp could have caused a false positive.

The lesson: The company should have consulted with its drug-testing provider about the potential impact of hemp use on the test results before firing the employee.

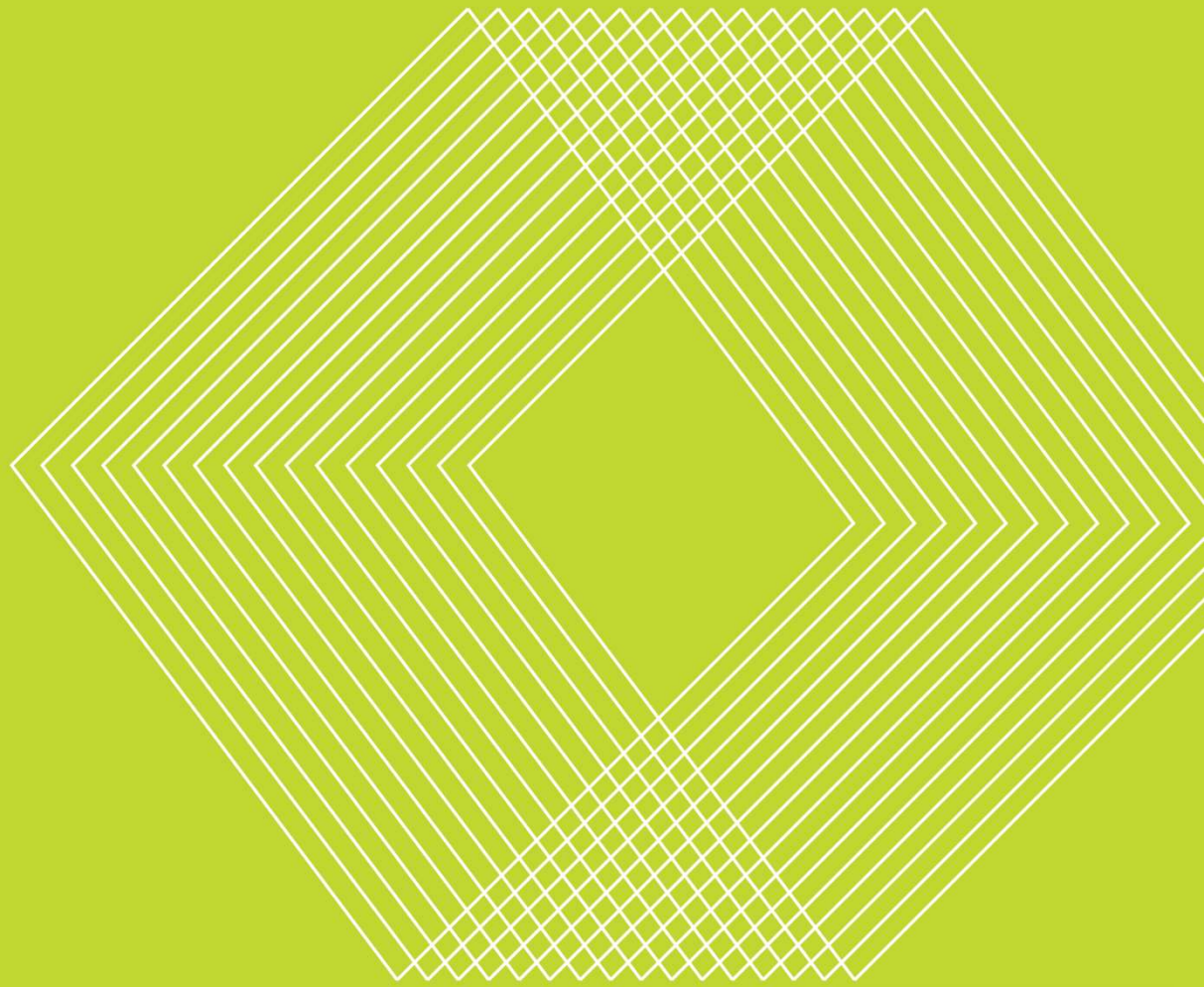
"When you're doing this testing—whether it's random or otherwise—you've got to take the time to figure this stuff out," said Lessig. "If an employee tells you something, you've got to communicate that [to the drug testing company]."

SCOTUS 2024-2025

- *E.M.D. Sales Inc. v. Carrera* (evidence needed for FLSA exempt classification).
- *Stanley v. City of Sanford, FL* (can retiree sue over post-employment benefits under ADA)
- *Lackey v. Stinnie* (interpretation of "prevailing party" under certain civil rights laws for deciding whether to award attorney's fees)



FTC Noncompete Final Rule



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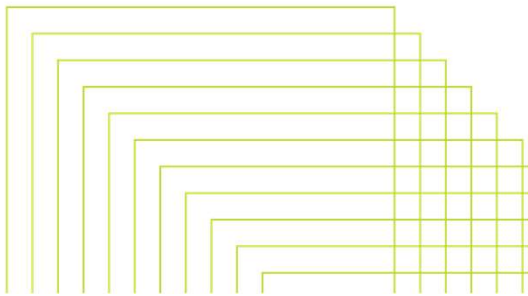
FTC Noncompete Final Rule

Nutshell:

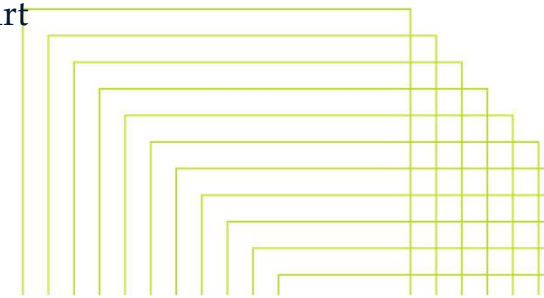
- **Most non-competes in country would be unenforceable**
- **Scheduled to go into effect on Sept 4**
- **U.S. District Court in Texas issued a nationwide injunction on August 20**
  - **(Ryan LLC v. FTC)**
- **On October 18, FTC Appealed to the 5th Circuit**
- **Most expect the Court to affirm, but there's another case out there…**

"So, you're tellin' me there's a chance?"



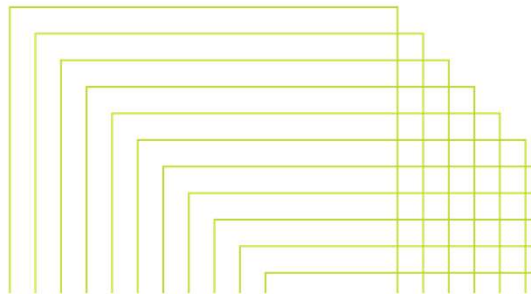
Other Cases

- Case in Pennsylvania (ATS Tree Services)
    - Court sided with FTC and denied Plaintiff's request for Injunction
    - Court did not stay the case due to the Texas case…. Case is proceeding to the merits.
- There's also a case in Florida (Properties of the Villages, Inc.)
    - Court sided with FTC on many issues, but enjoined enforcement
        - Did so for reasons different from Texas case
        - Was not a nationwide injunction
    - FTC appealed to 11th Circuit.
- Looks like a brewing 5th and 3rd (and perhaps 11th) Circuit Split heading to the US Supreme Court



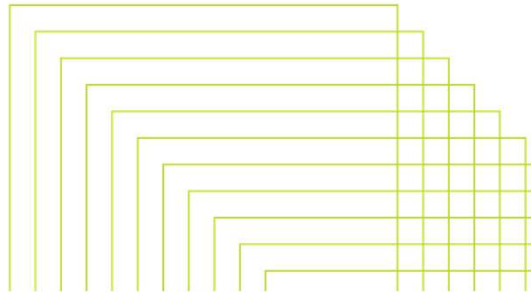
So what? Now what/

- Keep eye on appellate courts
- Even if the FTC Rules is permanently blocked, it reveals a growing animus against non-competes in various parts of the country
- Evaluate the importance that non-competes play in your organization's information protection strategy
    - Tailor employment agreements to comply with the applicable state laws, while protecting your organizations proprietary information

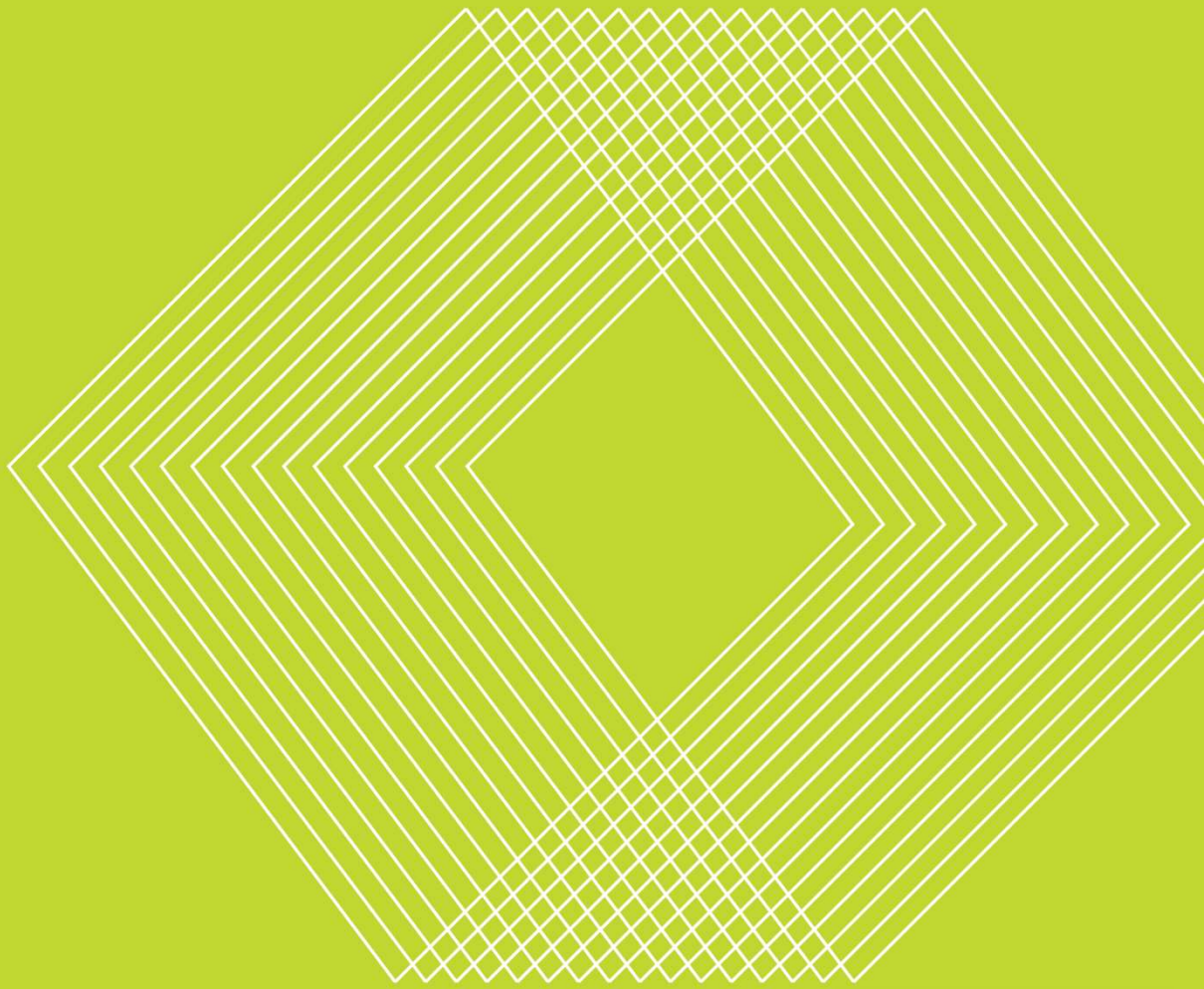


FTC Noncompete Rule Webinar:

https://butlersnowlaw.wistia.com/medias/e5t599ia3l



Remote Work



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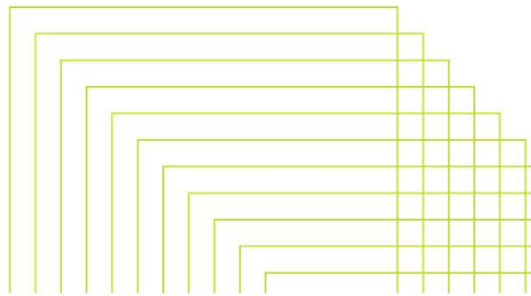
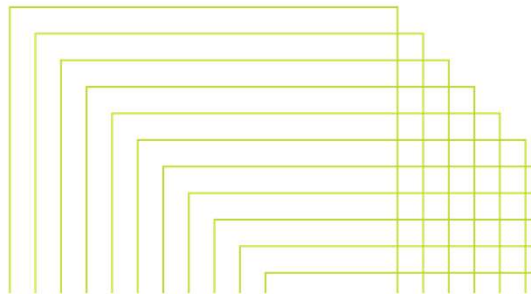
Legal Considerations

- **Jurisdictional compliance: generally, law of employee's place of residence will apply**
  - **Onboarding/offboarding requirements**
  - **Pay transparency/criminal history/pay history**
  - **Wage and hour law/expense reimbursement/sick and family leave accrual, use and payout**
  - **Lawsuits in other states**
- **Wage and Hour Compliance**
- **Data privacy and security**
- **Tax law compliance**
- **Workplace safety**



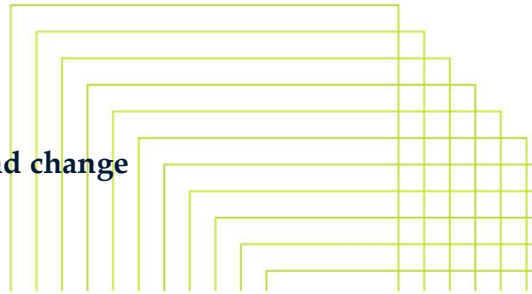
Practical Considerations

- Set conditions/eligibility requirements/notice and permission requirements
- Setting performance and conduct expectations is critical
    - Work hours/availability/responsiveness
    - Productivity expectations
    - Outside work restrictions
    - PTO usage
- Remote work agreement and handbook policies can help

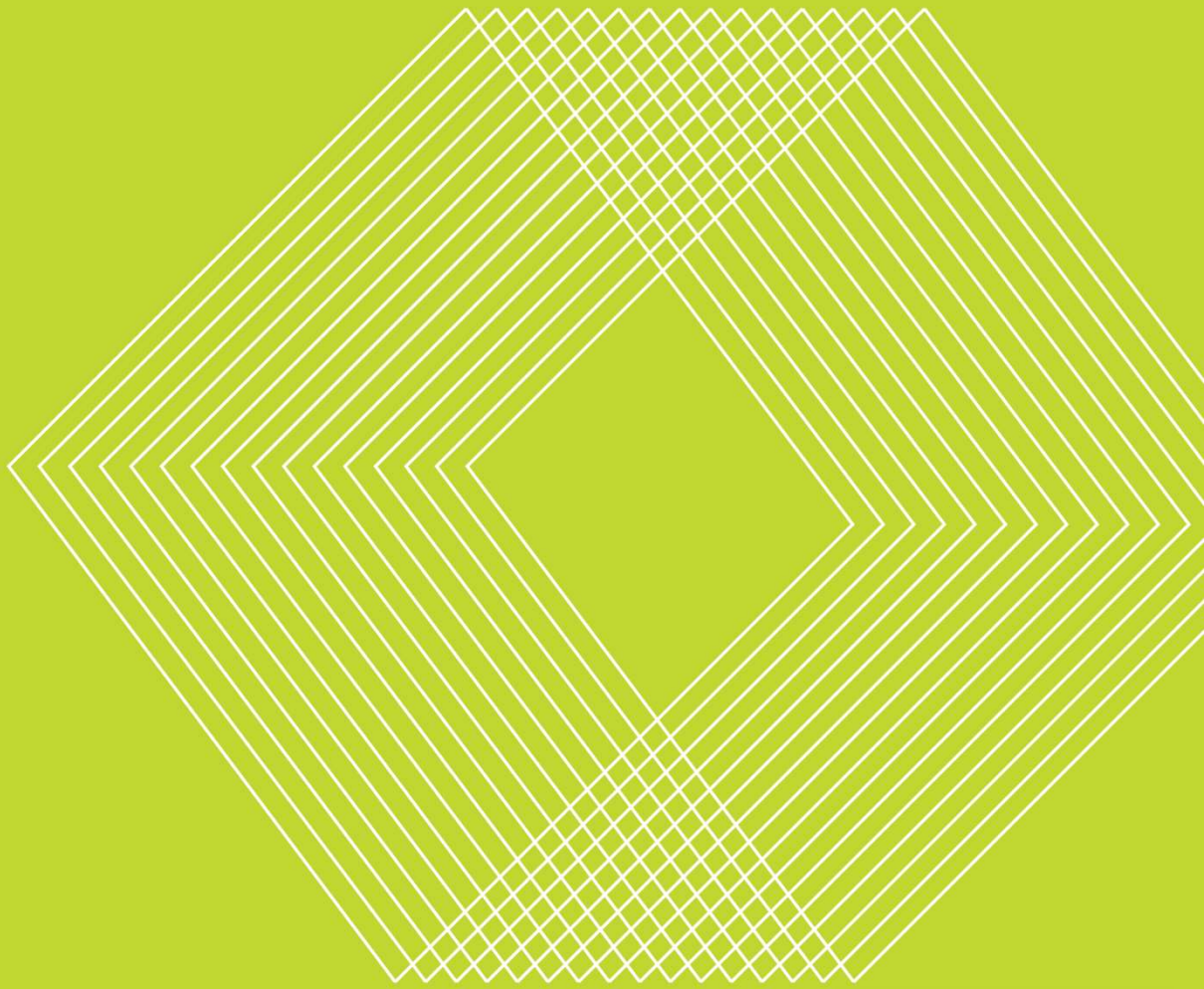


ADA/PWFA and Remote Work

- **Be careful with blanket prohibitions—remote work may be a required accommodation for disabled and pregnant employees**
    - **Blanket telework prohibitions will not excuse the requirement to engage in the interactive process under the ADA and PWFA**
- ***See Mosby-Meachem v. Memphis Light Gas and Water* (Sixth Circuit, 2018)(Employer not entitled to summary judgment because the jury reasonably concluded that the employee was "otherwise qualified to perform her job from home for ten weeks without being physically present in the office")**
- ***But see Crews Sanchez v. Frito Lay Inc*. (Fourth Circuit, 2024) (Appellate court affirms dismissal of case agreeing that employee could not perform her job functions remotely.)**
- **The interactive process is key (document your process!)**
    - **Consider alternative accommodations**
    - **Be prepared to provide evidence to support your position**
    - **Make clear when a remote work accommodation is temporary and subject to monitoring and change**



Artificial Intelligence in Recruiting



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AI and the EEOC

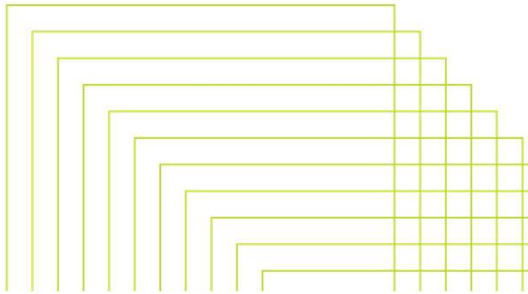
- **Recruitment and Hiring:** AI tools for screening resumes, conducting initial interviews, and predicting candidate success
  - AI is being adopted across various recruitment functions, including candidate sourcing, resume screening, interviewing, and onboarding
    - AI-powered platforms can complete these tasks more efficiently than humans
      - **But AI decision making can lead to discrimination claims.**
- **EEOC launched an Initiative on Artificial Intelligence and Algorithmic Fairness in 2021.**
- **Released Technical Assistance Q&A document in 2023.**
- **EEOC Strategy Enforcement Plan Fiscal Years 2024-2028:**
  - "EEOC will focus on recruiting and hiring practices and policies that discriminate on any basis. . . . These include: the use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups; . . . The use of screening tools or requirements disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks"
  - "The EEOC will focus on employment decisions, practices, or policies in which covered entities' use of technology contributes to discrimination based on a protected characteristic. These may include, for example, the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions."

Relevant Lawsuits

EEOC v. *iTutorGroup, Inc.*, No. 1:22-cv-02565-PKC-PK (E.D.N.Y. Aug. 9, 2023)

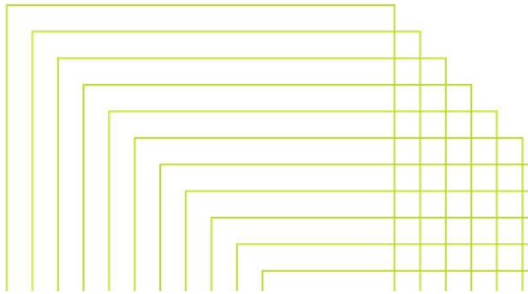
- On August 9, 2023, the EEOC announced the settlement of the agency's first lawsuit involving the alleged discriminatory use of artificial intelligence ("AI") in the workplace
- In the lawsuit, *EEOC* v. *iTutorGroup, Inc.*, the EEOC alleged that iTutorGroup's hiring software automatically rejected older job applicants in violation of the Age Discrimination in Employment Act ("ADEA")

- *Mobley v. Workday Inc*, No. 23-cv-00770-RFL (N.D. Cal. July 12, 2024)
  - Plaintiff filed a putative class action in February 2023 alleging his applications for 80-100 jobs with employers using Workday's screening tools were rejected due to discriminatory judgments. Filed Amended Complaint in February 2024 with two additional theories of liability – that Workday should be held liable as either an "indirect employer" or an "employer's agent."
  - On July 12, 2024, district court ruled that Mobley plausibly alleged that Workday acts as an agent of its client-employers and, therefore, falls within definition of "employer" of Title VII, the ADEA, and the ADA.
  - Ruling has significant implications for both AI vendors and employers using AI-powered hiring tools in terms of liability.



What Should Employers Do?

- **Research and Verify the AI Vendor**
- **Review and become familiar with the AI tools**
    - If decision-making ultimately remains with a human, and not technology, then risk of inadvertent discriminatory impact is reduced.
- **Include Protections in the Vendor Contract**
    - Require vendor to provide representations/warranties that the AI tool complies with all applicable anti-discrimination laws and regulations.
    - Include an indemnification clause in the event a claim is asserted against the employer
- **Educate human resources/management on potential discrimination risks when using AI**
- **Regularly audit and perform bias checks of AI systems**
- **Be Familiar with and Ensure Compliance with Local Laws**
    - Colorado, Utah, New York City, Illinois



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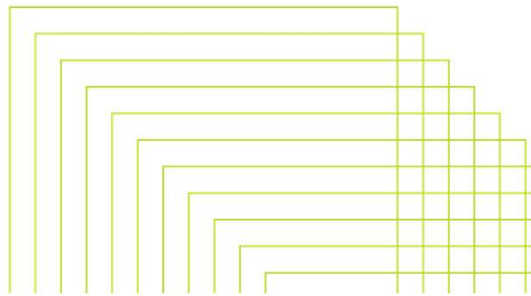

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Thank You

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