

STL ACC INHOUSE
Informed. Inspired. Involved.

ACC Association of
Corporate Counsel
ST. LOUIS



2024 ACC STL CLE TUETH KEENEY LEGAL UPDATE

Schedule

- **11:00am:**
Registration, Check In, and Lunch
- **12:00pm:**
Election Updates
- **12:25pm:**
Artificial Intelligence and Human Resources:
Dos and Don'ts
- **12:50pm:**
Retaliation Review
- **1:10pm:**
Employment Immigration: What's Hot and What's on
the Horizon





TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Election Updates



Presented by:
Veronica Potter
Shannon Orbe

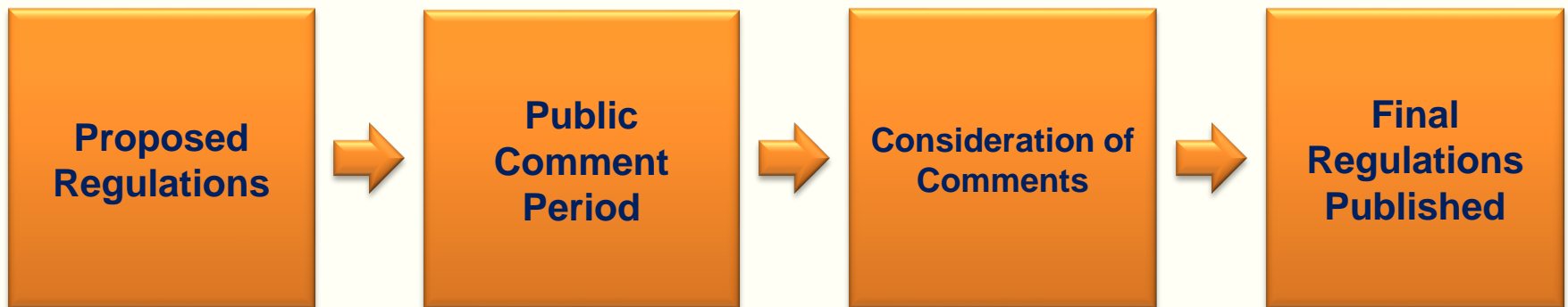
Date:
November 14, 2024

DIFFERENT
BY DESIGN

Federal Updates

- Final Regulations
 - Rescind through rulemaking process
 - Overturn through Congressional Review Act
 - Injunction/Judicial Action
- Proposed Regulations
 - Can be halted/rescinded by agency
- Guidance
 - Can be rescinded by agency
- Executive Actions
 - Can be rescinded by President

Steps of the rulemaking process



Regulations v. Guidance

- Regulations:
 - FLSA/Overtime
 - Pregnant Worker Fairness Act
 - FTC Non-Compete Clause Rule
- Guidance
 - EEOC Harassment Enforcement Guidance
 - EEOC and DOL AI Guidance

FLSA Regulations

- Current salary levels went into effect on July 1, 2024.
- New minimum salary levels are still set to go into effect January 1, 2025
 - Standard salary level: \$1,128 per week (\$58,656 per year)
 - Highly Compensated Employee threshold: \$151,164 per year



FLSA Regulations

- Recent decision from the Fifth Circuit on a challenge to a previous version of the rule held that the DOL does have authority to set salary thresholds for overtime.
- Three pending lawsuits challenging the regulations in federal courts in Texas and District of Columbia.

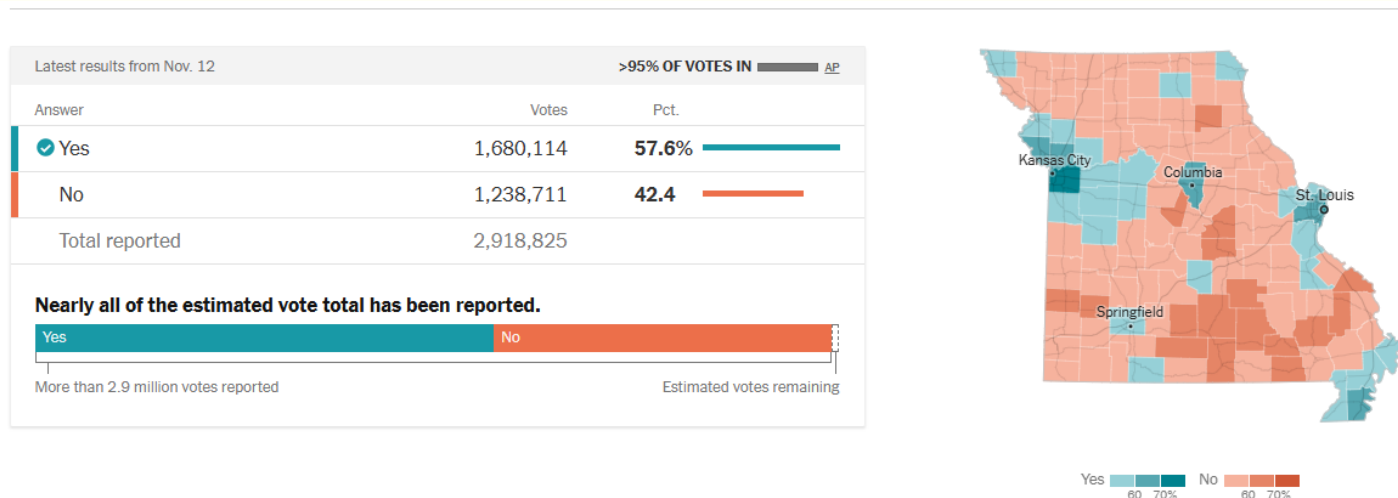


FLSA Regulations

- Preliminary injunction limited to State of Texas as an employer
- Arguments heard last Friday in Eastern District of Texas on cross motions for summary judgment – Texas and other Plaintiffs are asking that the court block the regulations nationwide.
- May see a ruling before the January 1, 2025 effective date.

Missouri Updates

- Prop A
 - Approved by 57.6% of voters
 - Increases minimum wage
 - Enacts Earned Paid Sick Time (PST)



Minimum Wage Increase

- Current MO minimum wage is \$12.30/hour
- Starting 1/1/2025 increased to \$13.75/hour
- Starting 1/1/2026 increased to \$15.00/hour
- Starting 1/1/2027, the minimum wage will be adjusted based on changes to the cost of living, as reflected in the Consumer Price Index for Urban Wage Earners and Clerical Works (as published by the U.S. Department of Labor)

Earned Paid Sick Time (PST)

- Starting 5/1/2025, employees begin accruing PST at a rate of one hour for every 30 hours worked
- No accrual maximum, however:
 - Employers with 15 or more employees = limit use of PST to 56 hrs/year
 - Employers with <15 employees = limit use of PST to 40hrs/year
- Carryover up to 80 hours of unused PST from year to year
- Frontloading permitted, but must pay out unused PST at end of year, and no carryover
- Existing Paid Time Off (PTO) Policies – if policy meets minimum requirements of new law, policy can continue in effect

Earned Paid Sick Time (PST)

- Use of leave covers:
 - Care of self: the employee’s own medical and mental health care
 - Care of a family member: caring for a family member who needs care or treatment
 - Public health emergencies
 - Safe Leave: absences necessary due to certain types of domestic violence, sexual assault, or stalking to employee or employee’s family member
- Employee Notice Requirements
 - If PST foreseeable → may require employee to “make a good faith effort” of advance notice
 - May require “reasonable documentation” that PST has been used for covered purpose when PST used for 3 or more consecutive work days

Earned Paid Sick Time (PST)

- Employer Notice Requirements
 - Must provide written policies of procedures for providing notice of PST
 - Must provide written notice about PST within 14 days of commencement of employment or on 4/15/2025, whichever is later
 - Notification of PST accrual beginning 5/1/2025
 - Notification of prohibition to retaliation against employees who request or use PST
 - Notification that employees have right to bring a civil action if PST law is violated
 - Notification of contact info for Missouri DOLIR
- April 15, 2025: employers required to display a poster containing above information

Earned Paid Sick Time (PST)

- Unlawful actions:
 - Unlawful for employers “to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right” under the PST law
 - unlawful to retaliate or discriminate against an employee because the employee exercises rights protected under the PST law.
 - unlawful for an employer’s attendance policy to count PST as an absence that may lead to or result in discipline, discharge, demotion, suspension, or another adverse action.

Earned Paid Sick Time (PST)

- Right to Bring a Civil Action
 - Employees may bring a civil cause of action for violations of PST law within 3 years of violation
 - No administrative complaint necessary
 - Damages: amount of any unpaid PST, actual damages, liquidated damages equal to twice any unpaid PST, costs, and reasonable attorneys' fees + other relief like reinstatement and back pay

Exceptions

- Certain employees and certain employers are not subject to these provisions
- For example:
 - Volunteers at non-profits
 - Employees of retail or service businesses with annual revenues under \$500,000



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Artificial Intelligence and Human Resources: Dos and Don'ts



Presented by:
Kate L. Nash

Date:
November 14, 2024

DIFFERENT
BY DESIGN



What is AI?

What is AI?

- “AI”
 - Advanced algorithms
 - Machine learning applications
 - Process automation
 - Text analytics
- “Generative AI”
 - Algorithms utilized to create text, images, and other content in response to prompt or question
 - Large language models, trained with databases of information

How is AI used in HR?

- Recruitment
- Tracking Performance
 - Promotion
 - Termination
- Payroll

Employment Laws Impacting HR

- Anti-discrimination
- Wage/hour
- Workplace safety
- Labor
- Immigration

Legal Framework

- Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence – Order No. 14110
- Directed federal agencies to publish guidance on AI



EEOC Guidance – Title VII

- Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection
Procedures Under Title VII of the Civil Rights Act of 1964
 - Focuses on disparate impact, not disparate treatment
 - If AI process has disparate impact, employer must show that process is “job-related and consistent with business necessity”
 - Must be necessary to safe and efficient performance of job
 - Employer must also show there is not a less discriminatory alternative available

EEOC Guidance – Title VII

- EEOC recommends checking process/software to determine whether use of process causes a selection rate for individuals in the group that is “substantially” less than the selection rate for individuals in another group
- Employer is liable even if outside vendor develops or administers process
- AND vendor can also be liable – see *Mobley v. Workday, Inc.*, 2024 WL 3409146 (N.D. Cal. July 12, 2024)

EEOC Guidance - ADA

- Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees
- Employers are prohibited from using “algorithmic decision-making tool” that intentionally or unintentionally screens out an individual with a disability

EEOC Guidance - ADA

- Employers are also prohibited from making “disability-related inquires” or conducting “medical examinations”
- Includes assessments that are likely to elicit information about a physical or mental impairment
- Also might violate Employee Polygraph Protection Act

EEOC Guidance - ADA

- Example: Employer uses chatbot to conduct screening interviews for cashier job. Chatbot asks: “Can you stand for three hours straight?” Potential employee uses a wheelchair and answers, “No,” at which point the chatbot terminates the interview and excludes potential employee.
- Violation of ADA?

EEOC Guidance - ADA

- Example: Employer uses program that screens resumes based on various factors, including screening out employees with a particular time-frame gap in employment. Potential employee, who has two-year gap during which individual was undergoing cancer treatment, is screened out.
- Violation of ADA?

DOL Guidance - FLSA

- Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards
- Must properly track time and pay for hours worked
- “Artificial intelligence or monitoring systems . . . are not determinative of whether an employee is performing ‘hours worked’ under the FLSA.”
- Must properly calculate rate of pay

DOL Guidance - FMLA

- Must appropriately process leave requests
- Must track time off without improper penalties
- Employees cannot be retaliated against or treated adversely for taking FMLA leave

DOL Guidance – PUMP Act

- Employees must be provided break time to pump
- Frequency, duration, and timing of breaks will inevitably vary
- Employer cannot require a fixed schedule
- Employer must adequately track break time and not penalize employee for taking protected breaks

Illinois Artificial Intelligence Video Interview Act

- Passed in 2019
- If an employer requires applicants to submit video interviews, it must:
 - Notify applicant that AI may be used to analyze the video
 - Provide applicant information explaining how AI works and what type of characteristics it uses to evaluate applicants
 - Obtain consent before interview to be evaluated by AI program described
 - “An employer may not use artificial intelligence to evaluate applicants who have not consented to the use of artificial intelligence analysis.”

Illinois Artificial Intelligence Video Interview Act

- Requires yearly report to Department of Commerce and Economic Opportunity
- Report must contain:
 - Race/ethnicity of applicants selected for in-person interview after AI analysis
 - Race/ethnicity of applicants who are hired

What's Next?

- In his official campaign platform and on the campaign trail, President-Elect Trump vowed to withdraw the Executive Order
- Agencies might also withdraw guidance
- BUT – underlying laws have not changed

Best Practices

- Identify when/how AI is being used
- Vet vendor contractors*
 - Determine whether vendor has evaluated selection results
 - Discuss accommodations process/alternative formats
 - AND notice requirement
 - Request indemnity
- Screen for consistency

Best Practices

- Provide instructions for how to engage in interactive process
- Make sure process is necessary to determine whether employees can perform or are performing essential functions of job
- Must have human oversight
- Remember that you are the employer!
- Call your lawyer



QUESTIONS?



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

DIFFERENT
BY DESIGN



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Retaliation Review

Presented by:
Veronica E. Potter
Sarah P. McConnell

Date:
November 14, 2024

DIFFERENT
BY DESIGN

Agenda

- Retaliation Claims Generally
- Prop A
- Whistleblower Protections
- Practical Considerations for Avoiding Retaliation Claims

RETALIATION CLAIMS

EEOC Retaliation Charges in 2023

Total Charges	81,055
Retaliation (All Statutes)	56.8%
Retaliation (Title VII)	39.4%
Disability	36%
Race	33.9%
Sex	31.4%
Age	17.4%
National Origin	8.6%
Color	7.2%
Religion	5.4%

What is retaliation?

Employers are prohibited from taking adverse employment action against an employee because the employee engaged in “protected activity.”



What is “protected activity”?

- Generally, “protected activity” is:
 - Filing a complaint or Charge of Discrimination;
 - Complaining to your employer, supervisor, or HR department that you believe you have been discriminated against;
 - Participating in the EEO process; or
 - Reasonably opposing conduct made unlawful by an EEO law.
- Retaliation is prohibited even if the individual’s underlying discrimination allegation is unsuccessful or untimely

What employer action is serious enough?

- What is a “materially adverse action”?
 - Discharge;
 - Suspension;
 - Failure to hire;
 - Denial of benefits;
 - Failure to promote;
 - Demotions
- Can include non-work-related actions or actions that do not affect employment if the action could dissuade a reasonable person from engaging in the protected activity

Causal Connection

- Under Title VII of the Civil Rights Act – “but for” standard
- Under the Missouri Human Rights Act – “motivating factor” standard



Relevant Evidence

- Examples of evidence that courts will consider to support a claim of retaliation:
 - Proximity in time;
 - Verbal or written statements showing a retaliatory motive; or
 - Evidence of comparable employees (how similarly-situated employees have been treated).

Damages for Retaliation Claims

- Title VII of the Civil Rights Act
 - Front pay, back pay, compensatory damages. and punitive damages
 - Attorney's fees
- Missouri Human Rights Act
 - Back pay
 - Other damages not to exceed fixed amount based on number of employees (\$50,000 - \$500,000)
 - Attorney's fees

MISSOURI PROP A

Earned Paid Sick Time

- Employer shall not take retaliatory personnel action or discriminate against an employee for exercising rights under the statutes, including:
 - Right to request or use earned PST
 - Right to file a complaint or inform any person about employer's alleged violation of statutes
 - Right to participate in/cooperate with/ assist with an investigation, hearing or proceeding related to alleged violations of the statutes
 - Right to inform any person of their rights under the statutes.

Retaliatory Personnel Action

- Defined as: denial of any right guaranteed under section 290.600 through 290.642, or any threat, discharge, suspension, demotion, reduction of hours, or any other adverse action against an employee for the exercise of any right guaranteed herein.
- Retaliatory personnel action shall also include interference with or punishment for in any manner participating in or assisting an investigation, proceeding, or hearing under sections 290.600 through 290.642.

Retaliatory Personnel Action

- Employers must include in the notice to employees that it is prohibited for the employer to take retaliatory personnel action against employees who request or use earned paid sick time.

Enforcement

- MO Dept. of Labor and Industrial Relations can investigate and determine compliance with the list and receive and attempt to resolve complaints.
- Can impose fines for willful violations of up to \$500 per day for continuing violations.
- Employer who willfully violates or fails to comply shall be guilty of a class C misdemeanor.
- Employer who willfully violates notice/posting requirements shall be guilty of an infraction.

Right of action

- Any person who claims to have suffered retaliatory personnel action can bring a civil action in court.
- Must bring claim within 3 years.
- Action can be brought without first filing an administrative complaint.



Right of action

- Available relief:
 - Injunction
 - Reinstatement to employment
 - Full amount of unpaid earned sick time
 - Actual damages
 - Back pay
 - 2x earned paid sick time as liquidated damages
 - Attorney's fees

WHISTLEBLOWER CLAIMS

Whistleblower Protection Act

- In 2017, the Missouri legislature passed the Whistleblower Protection Act (“WPA”) (alongside the MHRA amendments)
 - See § 285.575 R.S.Mo.
- The WPA “is intended to codify the existing common law exceptions to the at-will employment doctrine and to limit their future expansion by the courts.”



Whistleblower Protection Act

- Who can be sued?
 - Any entity that has six or more employees
- Who cannot be sued?
 - State of Missouri
 - Any individual employed by an employer

Whistleblower Protection Act

- What is *prohibited*? Employer is prohibited from discharging (firing) an employee who:
 - Reports unlawful act of employer to government, officer of employer, HR, or employee's supervisor
 - Reports serious misconduct of employer that violates clear mandate of public policy from constitution, statute, or regulation
 - Refuses to carry out order of employer that would result in violation of law

Whistleblower Protection Act

- Employee is NOT protected if he/she:
 - Is manager or supervisor and reporting allegedly unlawful conduct is part of the job (aka complaints are part of the employee's job)
 - Complains to a person or entity who allegedly committed unlawful act (aka complaints to the wrongdoer)

Whistleblower Protection Act

- Motivating factor causation standard
 - Employee’s complaint must have “actually played a role in the adverse decision or action”
- Employee may recover:
 - Back pay
 - Reimbursement of any medical bills
 - Can get double as liquidated damages if “evil motive or reckless indifference to the rights of others.”

PRACTICAL CONSIDERATIONS

Tips to Help Avoid Retaliation

- Disciplinary context:
 - Document!
 - Avoid arbitrarily cumulative discipline
 - Continue to follow your disciplinary policies, practices, processes, and/or procedures with fidelity
 - Avoid treating an employee differently because they filed a complaint at the initial stages
 - If investigation finds problems with supervisor’s disciplinary action, fix it!
 - If investigation doesn’t find problems, continue with same process.

Tips to Help Avoid Retaliation

- In any context:
 - Be wary of “suspicious timing” of a supervisor’s seeking adverse action against an employee. Temporal proximity is an important consideration
 - Be wary of “inconsistent or shifting explanations” by your supervisors motivating them to encourage or make adverse employment actions

Tips to Help Avoid Retaliation

- Conduct an investigation immediately
- Ensure your institution has comprehensive policies
- Conduct annual training on anti-harassment policies
- Train supervisors on new earned paid sick time requirements
- Have a hotline available to report concerns anonymously
- Organization's removal of alleged harasser from working with complainant and/or
- Organization's offer to change employee's assignment, if that is preferable

Tips to Help Avoid Retaliation

- Create clear process/script for those involved in HR investigation process when faced with discrimination complaints.
 - Advise all involved that retaliation is prohibited against the complainant, any witnesses, and/or anyone opposing discrimination.
 - Advise individuals on process for reporting retaliation and/or where they can go internally to obtain guidance and counsel if concerns arise about possible retaliation
 - Advise alleged perpetrator that retaliation is strictly prohibited and should further discrimination and/or retaliation claims be substantiated, they will face discipline up to and including possible termination
- Document that all of this occurred! Consider getting those involved to sign an acknowledgement form that they were counseled accordingly.

QUESTIONS?



Veronica Potter
vpotter@tuethkeeneey.com

Sarah McConnell
smcconnell@tuethkeeneey.com

(314) 880-3600



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Employment Immigration: What's Hot and What's on the Horizon

Presented by: Melanie Gurley Keeney

Date: November 14, 2024

DIFFERENT
BY DESIGN

What's on the Horizon

- New Administration in 2025 -- What are the implications for employment-based immigration?
- Changes in workforce and in worker eligibility?
- Changes in compliance and enforcement?

What's on the Horizon

- Changes in workforce?
 - DACA workers
 - H-4 EADs – Spouses of H-1Bs
 - F-1 student workers and OPT and STEM OPT
 - Temporary Protected Status (TPS)
 - Workers on visas (H-1B, Ls, TNs, O-1s, etc.)

What's on the Horizon

- Policy interpretations
 - Executive Orders
 - Friday Memos
- The concept of “deference” to prior USCIS or other government body decisions

What's on the Horizon

- H-1B Program Potential Changes
 - Wage-based selection process for lottery
 - Prevailing Wage Calculations
 - 2020 DOL published rule
 - Changes in definition of “Specialty Occupation”
 - H-1B workers at customer sites

What's on the Horizon

- Processing Times
 - USCIS
 - Embassies/Consulates
- Green Card Processing
 - Form I-944
 - Interviews

What's on the Horizon

- Compliance
 - I-9 Audits
 - Fines and Penalties
 - Site Inspections

Potential Litigation

- *Impact of Loper Bright Enterprises et al. v. Raimondo (June 2024)*

“The Administrative Procedure Act requires courts to exercise their independent judgement in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; Chevron is overruled.”



QUESTIONS?



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Melanie Gurley Keeney
mkeeney@tuethkeeney.com

Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
Main: 314-880-3600 Fax: 314-880-3601
www.tuethkeeney.com



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
Main: 314-880-3600 Fax: 314-880-3601
www.tuethkeeney.com



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

DIFFERENT
BY DESIGN

THANK YOU FOR ATTENDING!!!

