LABOR & EMPLOYMENT LAW UPDATE

SHRM GUAM BREAKFAST BRIEFING
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BETTER WORKPLACES BETTER WORLD™

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TRUMP 2.0:
LABOR & EMPLOYMENT LAW EXPECTATIONS

A Change of Party Can Drastically Change Labor & Employment Law. WHY??

- Federal regulatory agencies (*e.g.*, USDOL, EEOC) have the most direct impact on the workplace – and they're part of the executive branch.
- Executive branch agencies pursue objectives that align with the President's goals and polices.
- The President has the power to appoint agency leaders.

TRUMP 2.0:
LABOR & EMPLOYMENT LAW EXPECTATIONS

Impact of the Change in Presidency May Be Extra Strong this Time Around.

- Both houses of Congress now controlled by republicans.
- Conservative majority on the U.S. Supreme Court
  - Including three Trump-appointed Justices.

TRUMP 2.0:
LABOR & EMPLOYMENT LAW EXPECTATIONS

Actions to Expect from Second Trump Administration:

- No national paid leave
  - Federal paid leave law not likely to be enacted
- Simpler independent contractor classification
  - Trump 1.0 rule (rescinded under Biden) may be brought back
- New leadership at USDOL and EEOC
  - President has power to appoint chairs of agencies
- Less regulatory activity
  - New agency chairs may claw back new USDOL/EEOC regulations
- Rollback of DE&I
  - EEOC likely to take a narrow view of what's deemed permissible DE&I
- Strict immigration enforcement
  - Likely to be more restrictive and involve increased scrutiny

EMPLOYMENT LAW TOPICS FOR TODAY

I. New Guidance From the EEOC

- Strategic Enforcement Plan
- Final Rule on PWFA
- Enforcement Guidance on Harassment in the Workplace
- Guidelines on Fair Use of AI in Employment Selection

II. New Federal Court Decisions Impacting the Workplace

- ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Cir. Dec. 12, 2023)
  **Impacts how employers should defend against discrimination claims
- ***Mobley v. Workday*** (CA Dist. Ct July 12, 2024)
  **Expands the reach of anti-discrimination laws beyond employers
- ***Students For Fair Admissions v. Harvard/UNC*** (U.S.Sup.Ct. June 29, 2024)
  **Affirmative action in colleges is unconstitutional (calls into question employer DE&I)
- ***Loper Bright v. Raimando*** (U.S.Sup.Ct. June 28, 2024)
  **No more deference given to agency interpretations of statutes
  - *Texas v. USDOL* (Tex. Dist. Ct Nov. 15, 2024)
    USDOL's **new salary exemption threshold** rule **INVALID**
  - *Colt & Joe Trucking v. USDOL* (NM Dist. Ct. Jan. 9, 2025)
    USDOL's **new independent contractor rule** **UPHELD**

III. Interplay Among Leave Laws

- ADA, FMLA, PWFA, Workers Comp.

I. NEW GUIDANCE FROM THE EEOC

NEW GUIDANCE FROM THE EEOC

1. **STRATEGIC ENFORCEMENT PLAN (2024-2028)**
2. **FINAL RULE ON PWFA**
3. **ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE**
4. **GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION**

WHAT IS THE EEOC?

- The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant/employee because of the person's race, color, religion, sex (*including pregnancy, childbirth conditions, gender identity, sexual orientation*), national origin, age (*40 or older*), disability or genetic information.

- **EEOC laws apply to employers with 15 or more employees**

  - (20 or more employees in age discrimination cases)

1.EEOC STRATEGIC ENFORCEMENT PLAN

Purpose: **"to focus and coordinate the agency's work over a multiple fiscal year (FY) period to have a sustained impact on advancing equal employment opportunity.**

". . . updates and refines the EEOC's priorities to reflect progress in achieving the EEOC's vision … while recognizing the significant challenges that remain in making that vision a reality."

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

1. Eliminating Barriers in Recruitment and Hiring

a. Use of AI in recruiting and hiring where systems intentionally exclude or disproportionately impact protected groups.

b. Job advertisements that exclude or discourage certain protected groups from applying

c. Steering individuals into specific jobs or duties based on protected characteristics

d. Policies and practices that limit access to on-the-job training based on protected characteristics

e. Restrictive application processes or systems that are difficult for disabled individuals or other protected groups to access.

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

2. Protecting Vulnerable Workers From Underserved Communities From Discrimination

Vulnerable Workers Include:

a. immigrant workers on temporary visas
b. temporary workers
c. people with developmental or intellectual disabilities
d. individuals with arrests/convictions
e. LGBTQ individuals
f. individuals employed in low wage jobs (including teenagers)
g. survivors of gender-based violence
h. persons with limited literacy or English proficiency

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

3. Addressing Selected Emerging and Developing Issues

a. Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities

b. Protecting workers affected by pregnancy, childbirth, or related medical conditions or disabilities under PWFA and ADA

c. Discrimination influenced by or arising as backlash in response to world events (*e.g. antisemitism/islamophobia*).

d. Discrimination associated with Long COVID.

e. Technology-based discrimination

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

4. Advancing Equal Pay For All Workers

a. Many workers don't know how their pay compares to their co-workers' and, therefore, are less likely to discover and report discrimination

b. EEOC will focus on employer practices that discourage or prohibit workers from asking about pay or sharing their pay information with co-workers

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

5. Preserving Access To The Legal System

EEOC will focus on:

a. overly broad waivers, releases, non-disclosure or non-disparagement agreements
b. unlawful, unenforceable or improper mandatory arbitration provisions
c. employers' failure to keep applicants and employee data as required by law
d. Retaliatory practices that dissuade employees from exercising their rights

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

6. Preventing and Remedying Systemic Harassment

a. Over 34% of the charges of employment discrimination the EEOC receives include an allegation of harassment

b. Not just sexual harassment – also includes harassment based on race, disability, age, and religion.

c. Focus will especially be on businesses with widespread pattern or practice of harassment

d. To combat this persistent problem EEOC will focus on strong enforcement and promoting comprehensive anti-harassment programs.

EEOC SEP (2024-2028)
SUBJECT MATTER PRIORTIES

*****KEY TAKEAWAYS*****

1. Be careful of technology-based discrimination
2. EEOC will be extra hard on employers who:
   - discriminate against vulnerable/disadvantaged workers
   - use contracts that overly limit a worker's access to the legal system, or
   - have policies that prevent employees from knowing if their right to equal pay is being violated
3. Harassment, other than sexual-harassment, can still be discriminatory

2. EEOC FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA)

PWFA REFRESHER

- Requires employers to provide **reasonable accommodations** for **known limitations** in the employee's ability to perform **essential functions** due to **pregnancy**, childbirth, or a related condition **unless this would result in undue hardship** to the employer
  - **"Undue hardship" means significant difficulty or expense**
- **Applies to employers with 15 or more employees**
- **Types of accommodations employers should be prepared to provide:**
  - **Closer parking to the building**
  - **Flexible hours and more frequent breaks**
  - **Leave/time off to recover from childbirth**
  - **Excused from strenuous activities**
  - **Excused from activities exposing to compounds not safe for pregnancy**
  - **Appropriately sized uniforms and safety apparel**

EEOC FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA)

EEOC's FINAL RULE (*issued 4/19/2024*) PROVIDES DEFINITIONS:

- **Known Limitation** Defined
  - "Known" means employee has actually communicated it to employer
  - "Limitation" means physical or mental condition related to pregnancy
    - Can be minor or episodic as long as it's related to health of employee or health of pregnancy
    - Can be the need to seek health care services
  - "Related to" means affected by or arising out of
    - Does not need to be the sole, original, or substantial cause of the limitation
    - Can be one of several causes

EEOC FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA)

EEOC's FINAL RULE (*issued 4/19/2024*) PROVIDES DEFINITIONS:

- **Qualified** Defined
  - "Qualified" means employee can perform the essential functions of the job with or without an accommodation OR ***cannot*** perform the essential functions of the job BUT the inability to perform is temporary and can be reasonably accommodated
  - "Temporary" means employee can perform in the near future
    - Generally means within 40 weeks
    - But determined on a case-by-case basis

EEOC FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA)

EEOC's FINAL RULE (*issued 4/19/2024*) PROVIDES FACTORS FOR DETERMINING UNDUE HARDSHIP:

- **Length of time unable to perform essential function(s)**
- **Whether there's still work for the employee to accomplish**
- **Nature of the essential function. Is it critical? Frequent?**
- **Whether employer has accommodated other employees**
- **Are other employees available to perform this function?**
- **Whether the essential function can be postponed and, if so, for how long**

EEOC FINAL RULE ON PREGNANT WORKERS FAIRNESS ACT (PWFA)

EEOC's FINAL RULE (*issued 4/19/2024*) GIVES EXAMPLES OF WHAT IS NOT UNDUE HARDSHIP:

- **Allowing employee to carry or keep water near to drink**
- **Allowing additional restroom breaks, as needed**
- **Allowing employee to sit or stand, as needed**
- **Allowing additional eating/drinking breaks, as needed**

These accommodations will "in virtually all cases" be determined to ***not*** cause undue hardship

3. EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

SCOPE OF EEOC'S ROLE:

- Laws enforced by EEOC prohibit workplace harassment based on a protected characteristic
  - Race, color, religion, sex (including sexual orientation, gender identity, and pregnancy, childbirth), national origin, disability, age
- Harassment is only an EEOC issue if it:

  involves a **change in the victim's employment** OR

  creates a **hostile work environment**

EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

SOME KEY GUIDANCE POINTS:

- Being rude, teasing, or mistreating somebody based on a personality conflict does not violate laws enforced by the EEOC
  - Must be based on a protected characteristic to be discrimination
- Harassment can be unlawful discrimination even if it's non-sexual
  - Ethnic or racial slurs
  - Displaying offensive materials (*e.g.*, swastika or other hate symbol)
  - Comments based on stereotypes about older workers
  - Mimicking a person's disability
  - Mimicking a person's accent
  - Making fun of a person's religious garments, jewelry, or displays

EEOC ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

OTHER KEY GUIDANCE POINTS:

- A person can be a victim of unlawful harassment even when the harasser is wrong about the victim's protected characteristic
  - *E.g.*, harassment of a Sikh man wearing a turban because the harasser thinks he's Muslim is religious harassment.
- Harassment can be unlawful discrimination if it's based on a person's association with somebody who does not share the same protected characteristic as the victim
  - E.g., EEO laws apply to harassment of a White employee because his spouse is Asian or harassment of an Asian employee because she has a biracial child.

4. EEOC GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION

EEOC GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION

What is Artificial Intelligence (AI)?

Artificial intelligence (AI) is the use of machines and software to perform tasks that typically have required human intelligence to complete.

- **Examples**:
  - Spam detection
  - Machine translations
  - Text summarization
  - Work simulations
  - **Employment Selection**

EEOC GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION

FOCUSES ON **TITLE VII OF THE CIVIL RIGHTS ACT**:

- Employment "selection procedures" violate Title VII when:
  - they are designed, **intended** or used to exclude persons based on a protected characteristic OR
  - they **have the effect** of disproportionately excluding persons based on a protected characteristic (known as "**disparate impact**")
- EEOC's guidelines apply to disparate impact discrimination

EEOC GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION

GUIDELINES:

1. **"Selection procedure" Defined: any measure or procedure used as a basis for an employment decision.**
   - Includes algorithmic decision-making tools

2. **If use of the algorithmic tool has a disparate impact on a protected class, then the use of it violates Title VII**
   - UNLESS employer can show that the use is "job-related and consistent with business necessity."

3. **If an employer uses an algorithmic tool that violates Title VII, the employer is liable even if the tool was developed by an outside vendor**
   - **TAKAWAY**: Ask the vendor what steps were taken to see if the use of the tool causes lower selection rate for individuals in protected class.

EEOC GUIDELINES ON FAIR USE OF AI IN EMPLOYMENT SELECTION

GUIDELINES:

4. **"Selection Rate" Defined: the proportion of applicants from a particular class who are hired or make it through to the next round**
   - Number of persons hired ÷ Number of total candidates in the group
   - Ex.1, 12 out of 40 Non-White people hired. Sel. Rate = 12/40 (30%)
   - Ex.2, 48 out of 80 White people hired. Sel. Rate = 48/80 (60%)

5. **Rule of thumb is the "four-fifth rule"**
   - If ratio of the two rates being compared is less than 4/5, it's likely unlawful

6. **If an employer discovers that its algorithm disproportionately excludes a protected class, the employer can adjust it or use a different tool**
   - **TIP**: Algorithmic tools produce a variety of equally effective
   - algorithms. Pick the least discriminatory algorithm

TEN MINUTE BREAK

II. NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

1. ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Cir. 12/12/2023)

   Impacts how employers should defend against discrimination claims

2. ***Mobley v. Workday*** (CA Dist. Ct 7/12/2024)

   Expands the reach of anti-discrimination laws beyond employers

3. ***Students For Fair Admissions v. Harvard/UNC***(SupCt 6/29/24)

   Affirmative action in colleges is unconstitutional
   - Calls into question employer DE&I

4. ***Loper Bright v. Raimando*** (SupCt 6/28/2024)

   No more deference given to agency interpretations of statutes

5. ***Texas v. USDOL*** (Tex. Dist. Ct 11/15/2024)

   USDOL's **new salary exemption threshold** rule **INVALID**

6. ***Colt & Joe Trucking v. USDOL*** (NM Dist. Ct. 1/9/2025)

   USDOL's **new independent contractor rule** **UPHELD**

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

Evidentiary test usually used in discrimination cases (*aka McDonnell Douglas* Test) is only one way of proving discrimination

- ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Circuit Court of Appeals, December 12, 2023)
- **Issue:**
  - Is a plaintiff in a Title VII discrimination case required to satisfy the *McDonnell Douglas* Test in order to prevail?
- **Court's Holding**:
  - No. A plaintiff can still prevail in a discrimination case even without satisfying the *McDonnell Douglas* Test

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

WHAT IS THE *MCDONNELL DOUGLAS* TEST?

- ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973)
- U.S. Supreme Court articulated a procedural framework to help courts determine if an employee has presented sufficient evidence of discrimination
- In most discrimination cases, only circumstantial evidence is available, so it's difficult to determine the *actual* reason the employee was terminated

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

WHAT IS THE *MCDONNELL DOUGLAS* TEST?

- ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973)
- If the plaintiff has some evidence of each of these four elements, then the burden shifts to the defendant to show a non-discriminatory reason for the termination.
  - 1. "She belongs to a protected class."
  - 2. "She was subjected to an adverse employment action."
  - 3. "She was qualified to perform the job in question."
  - 4. "Her employer treated 'similarly situated' employees outside her class more favorably."

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Circuit Court of Appeals, December 12, 2023)
- **Background**:
  - Lawanna Tynes, former detention center superintendent, was terminated for performance-based reasons.
  - She sued the Florida Dept. of Juv. Justice for race and sex discrimination
  - At trial, jury verdict in favor of Tynes finding race and sex were motivating factors in her discharge.
  - Employer appealed arguing that Tynes did not present any evidence of the 4th *McDonnell Douglas* factor – that her employer treated comparable employees outside of her class more favorably.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Circuit Court of Appeals, December 12, 2023)
- **Court's Holding**:
  - Plaintiff's failure to show a comparison employee more favorably treated does **not** mean she loses her case.
  - The *McDonnell Douglas* Test has been misunderstood.
    - It's not a strict test that must be met in every discrimination case.
    - It's just "an evidentiary tool to establish an order of proof."
  - If a plaintiff cannot satisfy McDonnell Douglas, she can still prove her case by presenting a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination."
  - *McDonnell Douglas* Test is still useful
    - Plaintiffs who cannot satisfy it probably have a weak case

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

KEY TAKEAWAYS

- ***Tynes v. Florida Dept. of Juvenile Justice*** (11th Circuit Court of Appeals, December 12, 2023)
- Employees who bring discrimination cases will now rely more on the "convincing mosaic" test in proving their cases.
- Employers should not focus on a specific list of factors.
- Employers should consider the totality of the circumstances.
  - Could the events leading up to the termination cause a judger or a jury to conclude that discrimination occurred?

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

"Indirect employers" can be sued as employers under anti-discrimination laws

- ***Mobley v. Workday*** (CA Dist. Ct 7/12/2024)
- **Issue:**
  - Can a software vendor that operates an applicant screening system for its customers be sued for discrimination?
- **Court's Holding**:
  - YES. When a software vendor operates an applicant screening system for its customers, it acts as an agent for its customers. Anti-discrimination laws apply to employers and their agents.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Mobley v. Workday*** (CA Dist. Ct 7/12/2024)
- **Background:**
  - Derek Mobley, African-American male over 40, sued software company, Workday, Inc., for employment discrimination.
  - When Workday's algorithm is used, an applicant can advance in the hiring process only if he gets past Workday's screening system.
  - Mobley alleged that Workday's algorithm discriminated against him on the basis of race, age, and disability (anxiety/depression).
  - He applied for positions at over 100 companies that use Workday's system and he was screened out of every one of them even though he meets the educational/training requirements for the positions.
  - Workday moved to dismiss the case because it's not an "employer."

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Mobley v. Workday*** (CA Dist. Ct 7/12/2024)
- **Court's Holding:**
  - Workday's motion to dismiss is denied.
  - An agent of an employer, such as Workday, can be sued as an "employer" under anti-discrimination laws because it has been delegated functions that are traditionally exercised by an employer.

*****KEY TAKEAWAY*****

  - Companies that provide third-party HR services of any kind (even non-AI) should be careful of not to violate anti-discrimination laws.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

Harvard/UNC's Affirmative Action Admissions Programs Declared Unconstitutional

- ***Students For Fair Admissions v. Harvard/UNC*** (Supreme Court of the United States, June 29, 2024)
- **Issue:**
  - Are the admissions systems used by Harvard and UNC lawful?
- **Court's Holding**:
  - NO. Harvard/UNC's admissions programs violate the Constitution and the Civil Rights Act.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Students For Fair Admissions v. Harvard/UNC*** (Supreme Court of the United States, June 29, 2024)
- **Court's Holding:**
  - Consideration of a college applicant's race as a factor (even just one factor) in making an admission decision in order to realize the educational benefits of diversity is unconstitutional.
    - Violates the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act.
    - Programs impermissibly use race as a "negative" (*e.g.*, fewer admissions of Asian-American students)
    - Programs engage in impermissible racial stereotyping (*i.e.*, assumes all students of a particular race think a like).

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Students For Fair Admissions v. Harvard/UNC*** (Supreme Court of the United States, June 29, 2024)

*****KEY TAKEAWAYS*****

- *SSFA v. Harvard/UNC* applies only to colleges and universities. ***Does <u>not</u> apply to private employers.***
- College affirmative action programs intentionally factor race into admission decisions. ***This is <u>not</u> what HR does.***
- **<u>SO WHY DO WE CARE ABOUT THIS?</u>**
  - Because it has prompted some groups to bring legal challenges to private employer DE&I programs
  - Employers should describe their DE&I programs in a race-neutral way
  - DE&I programs that include race as a factor in hiring are likely to be declared unlawful by the courts

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

Courts Will No Longer Give Deference to an Agency's Interpretation of its Statute

- ***Loper Bright v. Raimando*** (SupCt 6/28/2024)
- **Issue:**
  - Should the longstanding rule from *Chevron v. National Resources Defense Council,* 467 U.S. 837 (1984) that courts must give deference to an agency's interpretation of its statute be overruled?
- **Court's Holding**:
  - YES. The *Chevron* case is **overruled**.
  - No more *Chevron* Deference.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

WHAT IS *CHEVRON* DEFERENCE?

- ***Chevron v. National Resources Defense Council***, 467 U.S. 837 (1984)
- U.S. Supreme Court held that courts were required to defer to an agency's reasonable interpretation of an ambiguous statute administered by the agency.
- Even if the court disagrees with the agency's interpretation of its statute, if the statute is ambiguous, the court must still defer to the agency's interpretation.
- Courts have followed this rule of interpretation (*Chevron* Deference) for the past 40 years.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

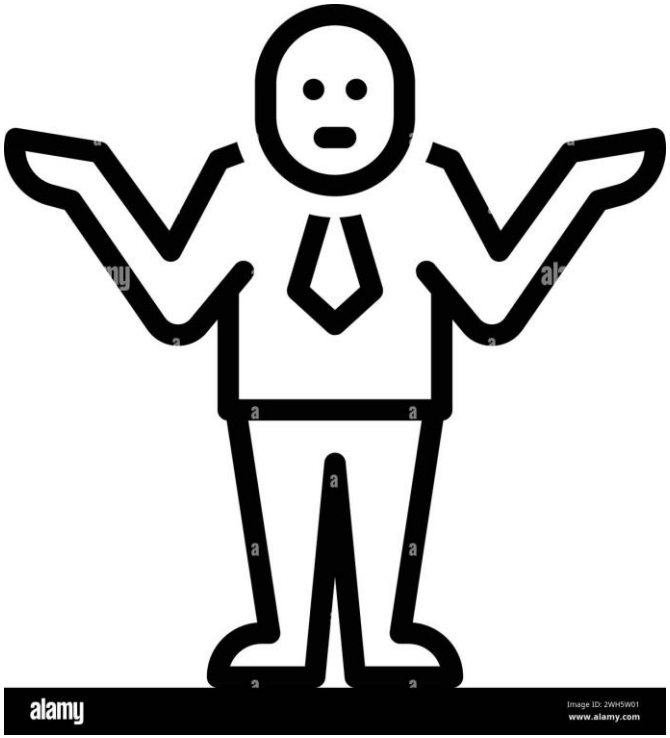
- ***Loper Bright v. Raimando*** (U.S. Supreme Court, June 28, 2024)
- **Background:**
  - Loper Bright Enterprises, Inc., a family-owned fishing businesses, sued the National Marine Fisheries Service (NMFS) for improperly applying a federal fishing statute.
  - Loper Bright argued that the federal statute does not authorize NMFS to mandate that Loper Bright pay for observers required for fishery management plan.
  - The trial court found the statute to be ambiguous, but ruled in favor of NMFS, applying *Chevron* Deference.
  - Loper Bright eventually appealed to the U.S. Supreme Court.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Loper Bright v. Raimando*** (U.S. Supreme Court, June 28, 2024)
- **Court's Holding:**
  - The Framers of the Constitution envisioned that courts would be the final authority on what the law says.
  - A federal law called the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.
  - Courts may not defer to an agency's legal interpretation simply because a statute is ambiguous.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

WHY SHOULD WE CARE ABOUT THE ELIMINATION OF *CHEVRON* DEFERENCE?



NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

GLAD YOU ASKED!!

BECAUSE THE *LOPER BRIGHT* DECISION HAS ALREADY LED TO TWO MAJOR COURT DECISIONS IMPACTING THE WORKPLACE

- ***Texas v. U.S. Dept. of Labor*** (Tex. Dist. Ct Nov. 15, 2024)
  - Struck down USDOL's new salary exemption threshold rule
- ***Colt & Joe Trucking v. U.S. Dept. of Labor*** (NM Dist. Ct. Jan. 9, 2025)
  - Upheld USDOL's new independent contractor rule

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Texas v. U.S. Dept. of Labor*** (Texas Dist.Ct, Nov. 15, 2024)
- **Background:**
  - State of Texas challenged the validity of USDOL new salary exemption overtime rule.
    - Raised minimum salary level for exempt employees from $35,568 to $43,888 as of July 2024 (*not applicable to Guam or other territories*).
    - Increased again to $58,656 in January 2025.
    - Automatic increases every three (3) years.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Texas v. U.S. Dept. of Labor*** (Texas Dist.Ct, Nov. 15, 2024)
- **Background:**
  - FLSA's language on exemption:
    - Exempt from overtime if employed "in a bone fide executive, administrative, or professional ("EAP") capacity as those terms are "defined and delimited by agency regulations."
    - Whether an employee is a bona fide EAP is duties-based determination
  - USDOL's regulations have always included a salary test
    - Salary test is supposed to "screen-out" the obviously nonexempt employees

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Texas v. U.S. Dept. of Labor*** (Texas Dist.Ct, Nov. 15, 2024)
- **Court's Holding:**
  - Applied the "no deference" standard set by *Loper Bright*.
  - Text of the FLSA does not include a salary test.
  - FLSA authorizes USDOL to impose a salary test, "within limits," to help define when an employee is an EAP.
  - But the high minimum salary level imposed by the new rule effectively eliminates the duties test.
    - Excludes millions of bona fide EAP's from the exemption
  - USDOL's new high salary threshold exceeded USDOL's authority under the FLSA. The new rule is **INVALID**.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Colt & Joe Trucking v. U.S. Dept. of Labor*** (NM Dist.Ct, Jan. 9, 2025)
- **Background:**
  - NM based trucking company challenged the validity of USDOL's new independent contractor rule.
    - Asserted that the rule is arbitrary and exceeds USDOL's authority under the FLSA and should be invalidated pursuant to the *Loper Bright* case.

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Colt & Joe Trucking v. U.S. Dept. of Labor*** (NM Dist.Ct, Jan. 9, 2025)
- **Background:**
  - USDOL's **New Independent Contractor Rule (Biden Era)**:
    - Six-Factor Economic Realities Test
      - 1. Opportunity for profit or loss depending on managerial skill
      - 2. Investments by worker and employer
      - 3. Permanence of the work relationship
      - 4. Nature and degree of control
      - 5. Skill and initiative
      - 6. Whether the work performed is integral to the employer's business
    - All Factors should be considered
    - No one factor or combination of factors holds more weight than any other

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Colt & Joe Trucking v. U.S. Dept. of Labor*** (NM Dist.Ct, Jan. 9, 2025)
- **Background:**
  - USDOL's **Previous Independent Contractor Rule (Trump Era)**:
    - "Core Factors"- "Guidepost Factors" Test
      - 1. Opportunity for profit or loss
      - 2. Nature and degree of control
      - 3. Permanence of the work relationship
      - 4. Whether the work is part of an integrated unit of production
      - 5. Amount of skill required for the work
    - First two factors are "core factors."
    - Other three factors are "guideposts" to be used only if the "core factors" point in different directions

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

- ***Colt & Joe Trucking v. U.S. Dept. of Labor*** (NM Dist.Ct, Jan. 9, 2025)
- **Court's Holding:**
  - Declined to apply the *Loper Bright* "no-deference" rule in this situation.
    - Loper Bright "no deference" only applies when an ambiguous statute is involved
    - Here the question is the agency's policymaking authority, not its interpretation of the law
    - Courts should still give deference to an agency's policy decisions as long as the agency acted "on legitimate grounds."
  - Both the new rule and the old rule are valid exercises of UDOL's authority. The new rule is **UPHELD.**

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

USDOL'S NEW INDEPENDENT CONTRACTOR RULE

- **Six-Factor Economic Reality Test:**
  - 1. **Opportunity for profit or loss depending on managerial skill**
    - Worker performs landscaping assignments only as directed by the company for its clients. Doesn't market his services (**probably employee**)
    - Worker provides landscaping services directly to corporate clients. Produces his own advertising (**probably IC**)
  - 2. **Investments by the worker or the employer**
    - Worker performs design services for a design firm. Firm provides software/computer/office space. Designer provides some tools (**probably employee**)
    - Worker occasionally completes specialty design projects for the same design firm. Designer purchases her own design software/computer/drafting tools and rents her own space (**probably IC**)
  - 3. **Permanence of the work relationship**
    - Continuous work with no fixed ending date and no other work relationships (**probably employee**)
    - Sporadic or project-based work with a fixed ending date or regularly occurring fixed periods of work (**probably IC**)

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

USDOL'S NEW INDEPENDENT CONTRACTOR RULE

- **Six-Factor Economic Reality Test (Cont.):**
  - 4. **Nature and degree of control**
    - Does the company control scheduling, manner of performance of work, and restrict worker from working for others? (**probably employee**)
    - If worker controls these things and is free to work for other (**probably IC**)
  - 5. **Skill and initiative**
    - Highly skilled welder performs services only for one construction firm, doesn't make independent decisions or use welding skills to bid on other jobs (**probably employee**)
    - Welder provides specialty welding services, such as custom aluminum welding, for a variety of companies (**probably IC**)
  - 6. **Whether the work performed is integral to the employer's business**
    - Tomato farm pays workers to pick tomatoes during harvest (**probably employees**)
    - Tomato farm pays accountant to provide non-payroll accounting support (**probably IC**)

NEW FEDERAL COURT DECISIONS IMPACTING THE WORKPLACE

****USDOL'S NEW INDEPENDENT CONTRACTOR RULE****

- **Irrelevant Factors:**
  - What the worker is called
  - Whether the worker is paid off the books or receives a 1099
  - Agreeing verbally or in writing to be classified as an IC
  - Signing an IC agreement
  - Location of where the work is performed
  - Whether the worker has a business license or contractors' license

NOT RELEVANT TO WHETHER THE WORKERS IS AN INDEPENDENT CONTRACTOR OR EMPLOYEE UNDER THE FLSA

III. INTERPLAY AMONG LEAVE LAWS

INTERPLAY AMONG LEAVE LAWS

1. PWFA **(15+ Employees)**

Employee entitled to reasonable accommodation for ***pregnancy, childbirth, or a related condition*** unless this would result in undue hardship.

2. ADA **(15+ Employees)**

Employee entitled to reasonable accommodation for a ***disability*** unless this would result in undue hardship

3. FMLA **(20+ Employees)**

Employee entitled to 12 weeks of protected leave to deal with employee's or family member's ***serious health condition***.

4. Workers Comp (All Employers)

Employee entitled to payment of medical expenses and paid time-off to recover from ***workplace injuries***.

INTERPLAY AMONG LEAVE LAWS

PWFA LEAVE	ADA LEAVE
Who is eligible? All employees with pregnancy related conditions	Who is eligible? Only qualified employees with disabilities (*physical or mental impairment*)
Must employee be able to handle essential job function? No, as long as inability is temporary	Must employee be able to handle essential job function? Yes.
Is leave a possible accommodation? Yes.	Is leave a possible accommodation? Yes.
Can documentation be required? Usually not.	Can documentation be required? Sometimes.

INTERPLAY AMONG LEAVE LAWS

FMLA LEAVE	ADA LEAVE
Who is eligible? All employees with a serious medical condition	Who is eligible? Only qualified employees with disabilities (*physical or mental impairment*)
Must employee be able to handle essential job function? Irrelevant	Must employee be able to handle essential job function? Yes.
Is leave a possible accommodation? Yes. Actually, its mandatory	Is leave a possible accommodation? Yes.
Can documentation be required? Yes. Always	Can documentation be required? Sometimes.

INTERPLAY AMONG LEAVE LAWS

- **<u>Managing Leave When Multiple Laws Apply</u>**
  - In a situation where PWFA, FMLA, and ADA may all be applicable, provide the PWFA accommodation first
    - PWFA applies without requiring anything from the employee
  - In a situation where only the FMLA and ADA may be applicable, provide the FMLA accommodation first.
    - If you apply the FMLA first, you may not have to grant an accommodation pursuant to ADA
  - Indefinite leave is not an accommodation under the ADA
    - Considered an undue hardship

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