



LABOR & EMPLOYMENT LAW UPDATE

**SHRM GUAM BREAKFAST BRIEFING
MAY 3, 2023**

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65TH ANNIVERSARY OF LAW DAY

Law Day was May 1, 2023



This Year's Law Day Theme:
"Civics, Civility, and Collaboration"

65TH ANNIVERSARY OF LAW DAY – MAY 1

What is Law Day?

- Law Day, held annually on May 1, is a national day set aside to celebrate the rule of law. Law Day provides an opportunity to understand how law and the legal process protect our liberty, strive to achieve justice, and contribute to the freedoms that all Americans share.
- An annual theme is chosen to spotlight a particular aspect of law or the legal process and its impact on our daily lives.

65TH ANNIVERSARY OF LAW DAY – MAY 1

- May 1 is the official date for Law Day, but many celebrations take place the week(s) before or after that date. Some organizations celebrate Law Week or Law Month in April or May.
- Thousands of Law Day programs are conducted each year by local bar associations, courts, schools, youth groups, and community organizations.
- The President of the United States has issued a Law Day proclamation recognizing the importance of the rule of Law every year since 1958.

65TH ANNIVERSARY OF LAW DAY – MAY 1

- **Monday, May 1** – State of the Judiciary Address
- **Tuesday, May 2** – Students visit each branch of government
- **Wednesday, May 3** – Fairy Tale Mock Trial, 6 p.m., Judicial Center
- **Thursday, May 4** – Naturalization Ceremony, 9:30 a.m., U.S. District Court
- **Friday, May 5** – Jump for Justice Fitness Competition with DYA
- ***For more info:*** Contact the Guam Bar Association
guambar.org

65TH ANNIVERSARY OF LAW DAY – MAY 1

- **The 2023 Law Day Theme**
- ***“Cornerstones of Democracy: Civics, Civility, and Collaboration”***
- In recent years, tensions in our democratic system have revealed deep divisions in American society. These divisions are aggravated by incivility in public discourse and insufficient understanding among many people about the Constitution and the way the American government works. Together, however, we can collaborate to overcome our differences, resolve our disputes, and preserve our democracy and republic. To that end, we call on members of the legal profession to lead the way in promoting civics, civility, and collaboration—the cornerstones of our democracy.
- *American Bar Association 2023 Official Law Day Statement*

TOP 5 EMPLOYMENT LAW HEADLINES

1. Pregnant Employees Now Have Stronger Protections
2. Religious Accommodations may Now be Harder to Avoid
3. FLSA Overtime Exemption has been Clarified
4. Arbitration Agreements are Now More Limited
5. Artificial Intelligence and Social Media Create New Liability Risks

1. NEW FEDERAL LAWS PROTECTING PREGNANT WORKERS



NEW FEDERAL LAWS PROTECTING PREGNANT WORKERS

- **THE PREGNANT WORKERS FAIRNESS ACT (PWFA)**
- **THE PROVIDING URGENT MATERNAL PROTECTIONS
FOR NURSING MOTHERS ACT (PUMP Act)**

PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Requires employers to provide **reasonable accommodations for pregnancy**, childbirth, or a related condition **unless this would result in undue hardship** to the employer
 - “Undue hardship” means significant difficulty or expense
- Same as ADA reasonable accommodations
 - PWFA applies to employers with 15 or more employees
 - PWFA became law on December 29, 2022
 - Goes into effect on **June 27, 2023**

PREGNANT WORKERS FAIRNESS ACT (PWFA)

**But even without the PWFA
aren't employers required to
provide reasonable
accommodations for pregnant
employees?**



PREGNANT WORKERS FAIRNESS ACT (PWFA)

NOPE. PRIOR TO THE PWFA, LEGAL PROTECTION OF PREGNANT EMPLOYEES WAS LIMITED TO:

- **Title VII protection against discrimination.** But Title VII has no separate accommodation requirement.
- **ADA protections for significant medical complications.** The ADA requires accommodation of “disabilities.” But pregnancy and its most common symptoms are not considered “disabilities” under the ADA.

PREGNANT WORKERS FAIRNESS ACT (PWFA)

TYPES OF ACCOMMODATIONS EMPLOYERS SHOULD BE PREPARED TO PROVIDE:

- Closer parking to the building
- Ability to sit or drink water
- Flexible hours
- Additional break time to use the restroom, eat, and rest
- Leave or time off to recover from childbirth
- Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy
- Receive appropriately sized uniforms and safety apparel

PREGNANT WORKERS FAIRNESS ACT (PWFA)

UNDER PWFA, AN EMPLOYER MAY NOT DO THESE THINGS:

- Require an employee to accept an accommodation without discussion about it between the worker and the employer
- Deny a job or other employment opportunities to an employee based on the person's need for a reasonable accommodation
- Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
- Retaliate against the employee for reporting or opposing violations of the PWFA

PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHER ACT (PUMP ACT)

- Requires employers to provide **breastfeeding employees** with **additional break time** and a **private room** to express breast milk **for up to one year** after their child's birth
- **NOTE: These rights previously existed under the FLSA but applied only to non-exempt employees. PUMP Act extends these rights to all employees, including “white collar” salaried employees**

PUMP ACT APPLICABILITY

- PUMP Act applies to ALL employers regardless of size of the employer
 - **Exception**: PUMP Act does **not** apply to crewmembers of air carriers. “Crewmember” means a person assigned to perform duty in an aircraft during flight time
- PUMP Act technically became law on December 29, 2022, but the **enforcement remedies** (reinstatement, backpay, compensatory and punitive damages, etc.) **just became effective last Friday, April 28, 2023.**

PUMP ACT BREAK TIME REQUIREMENT

- Employers required to provide reasonable additional breaks
- Frequency and duration of breaks vary
 - Employer must be flexible regarding break frequency/duration
 - Employer cannot deny an employee a needed break to pump
- Must be completely relieved of duty during the breaks
 - If doing any work at all while pumping, the entire break must be paid
- Employees who work remotely are entitled to take pump breaks on the same basis as in-person employees

PUMP ACT **PRIVATE ROOM** REQUIREMENT

- Employers required to provide a private space **other than a bathroom**
- Must be shielded from view and free from intrusion from coworkers and the public
- Must be a functional as a space for expressing breast milk
 - If the space is not dedicated to nursing employee's use, it must be available when needed by the employee
 - Temporarily created or converted space is okay as long as shielded from view and intrusion
- Employees who work remotely must also be free from observation through the computer camera or other remote video system

PUMP ACT **UNDUE HARDSHIP** EXEMPTION

An employer with **50 or fewer employees** is **exempt from the PUMP Act** break time and space requirements if it would impose an **undue hardship**

- Employer must show that compliance requires significant difficulty or expense as compared to the size and financial resources of the business
- Not available to employers with 50 or more employees.
- All employees (part time, full time, on-call) are counted toward the 50-employee threshold

PUMP ACT SPECIAL NOTICE REQUIREMENT

Before an employee can file a private suite against an employer for failing to provide a space to pump, the employee must first notify the employer and give the **employer 10 days to come into compliance**

- Notice requirement does not apply if the employee has been fired for requesting compliance or where the employer has expressed a refusal to comply
- Notice is not required prior to filing a private suit to enforce the reasonable break time requirement
- Notice is not required prior to filing a complaint with USDOL

NEW FEDERAL LAWS PROTECTING PREGNANT WORKERS

KEY TAKEAWAYS

- **PWFA**

- Must provide **reasonable accommodations** to pregnant employees
- ADA accommodation and undue standards apply
- **No retaliation**

- **PUMP ACT**

- Must provide **additional break time** (as many as needed) and **private space** (not the bathroom) for nursing employees
- Undue hardship exception may be available if less than 50 employees
- **No retaliation**

GUAM PWFA and NANA YAN PATGON ACT

Guam Law also Protects Pregnant Workers

- **Guam PWFA** (New Chapter 3, Title 22, GCA)
 - Same protections as under the Federal PWFA
 - Goes into effect on November 2023
- **Nana Yan Patgon Act** (Chapter 92A, Title 10, GCA)
 - Same basic protections as PUMP Act (*i.e.*, pump breaks; private room)
 - **BUT: Breaks must be paid** AND “if possible, concurrent with any break time already provided to the employee.”
 - **No undue hardship exception**
 - Has been in effect since February 2014

2. INCREASED DUTY TO PROVIDE RELIGIOUS ACCOMMODATION



INCREASED DUTY TO PROVIDE RELIGIOUS ACCOMMODATION

A Religious Accommodation Case Currently PENDING in the U.S. Supreme Court

- ***Groff v. DeJoy***, 25 F.4th 162 (2022), United States Court of Appeals, Third Circuit
- **Issues:**
 - Should the court disapprove of the “more-than-de-minimus-cost test” for refusing religious accommodations under Title VII?
 - Should an employer be allowed to demonstrate “undue hardship” if it only shows that the requested accommodation burdens the employee’s coworkers (not just the business)?

RELIGIOUS ACCOMMODATION REFRESHER

- It's unlawful under Title VII of the Civil Rights Act of 1964 for an employer to discriminate against any employee because of the employee's religion
- The employer must reasonably accommodate the employee's religious observance, practice, and beliefs unless a reasonable accommodation would cause "undue hardship" to the employer's business.

RELIGIOUS ACCOMMODATION REFRESHER

- **The Two Most Important Definitions in this Rule:**
- **“Reasonable accommodation”** means COMPLETELY ELIMINATING THE CONFLICT between the religious practice and the job requirement
 - *Example: If the person’s religion requires her to wear a hat at all times, the reasonable accommodation must be an accommodation that allows her to wear a hat at all times*
- **“Undue hardship”** means “MORE THAN A DIMINIMUS COST” to the employer’s business

RELIGIOUS ACCOMMODATION REFRESHER

- **To Establish a Claim of Religious Discrimination**, an employee must show:
 - (1) the employee holds a **sincere religious belief** that conflicts with the job requirements;
 - (2) the **employer has been informed** of the conflict; and
 - (3) **disciplinary action was taken** because the employee failed to comply with the conflicting job requirement

RELIGIOUS ACCOMMODATION REFRESHER

EXAMPLES OF RELIGIOUS ACCOMMODATIONS

- Scheduling changes
- Voluntary shift substitutions
- Job reassignments
- Modifying the company dress code or grooming policy
- Designating a private location in the workplace where a religious observance can occur
- Use of paid vacation or unpaid leave to observe the Sabbath

RELIGIOUS ACCOMMODATION

- ***Groff v. DeJoy***, 25 F.4th 162 (2022), United States Court of Appeals, Third Circuit
- **Background:**
 - Gerald Groff, former postal worker, sued the U.S. Postal Service (USPS) for failing to accommodate his religious practice of being off on Sundays in observance of the Sabbath.
 - USPS doesn't deliver mail on Sundays but has a contract to deliver packages for Amazon that includes Sundays.
 - PENNSYLVANIA FEDERAL COURT RULING: Exempting Groff from Sunday deliveries was an “undue hardship” because it caused “more than a de minimus cost” to USPS.

RELIGIOUS ACCOMMODATION

- ***Groff v. DeJoy***, 25 F.4th 162 (2022), United States Court of Appeals, Third Circuit
- **“Undue Hardship” Claimed by USPS:**
 - Groff’s absence on Sundays negatively impacted co-workers who had to fill in for him
 - Diminished employee morale
 - Created a tense atmosphere
 - Made timely delivery of mail more difficult
 - Required other carriers to deliver more mail

RELIGIOUS ACCOMMODATION

- ***Groff v. DeJoy***, 25 F.4th 162 (2022), United States Court of Appeals, Third Circuit
- **Accommodations Offered by USPS:**
 - Offered to let Groff attend Sunday services in the morning and report to work in the afternoon
 - Asked others to cover Groff's Sunday shifts
 - Asked Groff to "pick a different day of the week to observe the Sabbath"
- **Conflict Not Completely Eliminated**
 - Some of Groff's Sunday shifts were covered by others but on most Sundays Groff failed to report to work with no replacement
 - Groff faced progressive discipline for 2 years due to his repeated absences and he eventually quit

RELIGIOUS ACCOMMODATION

- ***Groff v. DeJoy***, 25 F.4th 162 (2022), United States Court of Appeals, Third Circuit

Why did the Pennsylvania Federal Court Rule for USPS?

- The court found “undue hardship” because the only way to reasonably accommodate Groff’s religious practice was to completely exempt him from working on Sundays which disrupted workflow and diminished employee morale
- The court applied the “more than a de minimus cost” standard (also known as the *Hardison* standard) adopted in the U.S. Supreme Court opinion in a 1977 case called *Trans World Airlines v. Hardison*

RELIGIOUS ACCOMMODATION

Groff v. DeJoy Is Currently PENDING before the
United States Supreme Court

- Oral argument was held on April 18, 2023.
- **Issues:**
 - Should the Court continue to apply the Hardison standard of “more-than-de-minimus-cost” for determining undue hardship?
 - Can “undue hardship” be based solely on the impact of the accommodation on coworkers?

RELIGIOUS ACCOMMODATION

****KEY TAKEAWAYS****

How will the Supreme Court rule in *Groff v. DeJoy*?

- It's always hard to predict how a Court will rule
- **But**: Best to be prepare for a change
 - Strong possibility the *Hardison* standard (*de minimus*) will be replaced with something more similar to ADA undue hardship - “significant expense or difficulty”
 - Employers should ensure that they have religious accommodation request forms and accommodation policies in place. And be ready to update those policies in the next few months.

3. FLSA OVERTIME EXEMPTION REVISTED

EXEMPT vs.
NON-EXEMPT

FLSA OVERTIME EXEMPTION REVISTED

Clarification of Overtime Exemption by U.S. Supreme Court

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **Issue:**
 - Should the highly compensated employees (HCE) exemption under the FLSA apply to supervisors who perform executive duties and satisfy the weekly/annual earnings threshold but are paid on a “daily-rate” basis?

FLSA OVERTIME EXEMPTION REFRESHER

FLSA's Overtime Rule:

- Employers must pay 1.5x the employee's regular rate for every hour worked over 40 hours in a workweek UNLESS one of the FLSA's overtime exemptions apply

FLSA OVERTIME EXEMPTION REFRESHER

Employees Exempt from Overtime:

- Administrative Employees
 - Primary duties include non-manual work directly related to running or servicing the business
- Executive Employees
 - Primary duties include tasks like managing processes, production, departments, employees, scheduling, budgeting, and compliance
- Must Satisfy Two Tests:
 - (1) **Duties Test** and (2) **Salary Test**

FLSA OVERTIME EXEMPTION REFRESHER

1. Duties Test:

- Administrative Employees
 - Has operational authority
 - Exercises independent judgment
 - Works in admin department (*e.g.*, HR, finance, marketing, *etc.*)
- Executive Employees
 - Supervise at least 2 full-time or 4 part-time employees
 - Exempt work is more than 50% of work
 - Has authority to hire and fire

FLSA OVERTIME EXEMPTION REFRESHER

2. Salary Test (actually 2 separate salary tests)

- **Salary Basis Test:**

- Must be paid a **predetermined and fixed salary** on a **weekly or less frequent basis** (e.g. weekly, bi-weekly)
- Salary is fixed and must be paid in full regardless of how many days or hours are actually worked

- **Salary Level Test:**

- Guam: At least \$455 weekly/\$23,660 annually
- Federal: At least \$684 weekly/\$35,568 annually

FLSA OVERTIME EXEMPTION REFRESHER

Special USDOL Rule

Highly Compensated Employees (HCE's)

- Employees who make at least \$107,432 per year have an easier duties test
- HCE Duties test:
 - The employee's primary duty is office/non-manual work; and
 - The employee regularly performs at least one of the exempt duties from the duties test.
 - Example: An employee may qualify as an HCE if the employee supervises 2 full time employees even though she does not meet all of the other normal duties test requirements

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **Issue:**
 - Should the HCE exemption under the FLSA apply to a supervisor who performs executive duties and satisfies the weekly/annual earnings threshold but is paid on a “daily-rate” basis?

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **Background:**
 - An oil rig worker named Michael Hewitt was paid \$900 - \$1,300 per day and he usually worked 12 hours a day, 7 days a week. He worked an average of 84 hours a week.
 - He sued his employer Helix Energy for 44 hours per week of overtime claiming he was not paid a “salary” and thus was not exempt from the FLSA’s overtime requirements.

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **Background (cont.):**
 - In 2018, the federal district court in Houston dismissed Hewitt’s claims finding the daily rate he was paid was a “salary” under the FLSA so he was exempt from overtime under the HCE exemption
 - Hewitt appealed that ruling and the Fifth Circuit Court of Appeals reversed holding the daily rate was not a “salary” and therefore the exemption did not apply – so Hewitt is entitled to overtime
 - Helix Energy appealed to the U.S. Supreme Court

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **U.S. Supreme Court's Holding:**
 - The Court analyzed the DOL regulations regarding the “salary basis” and the HCE exemption
 - Hewitt’s daily rate, even though it exceeded the weekly salary minimum, did not satisfy the “salary basis” test because his pay was calculated by the day, not by the week
 - Hewitt was entitled to overtime even though he makes more than \$200,000 per year

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **U.S. Supreme Court’s Holding (cont.):**
 - Being a highly paid employee (HCE) only means that the “duties test” is easier to satisfy – doesn’t change the “salary test”
 - The “salary basis” test (*predetermined salary computed on at least a weekly basis*) must be satisfied regardless of how much an employee is paid
 - Being paid on a daily rate basis does **not** satisfy the “salary basis test”

FLSA OVERTIME EXEMPTION REVISTED

- ***Helix Energy Solutions Group v. Hewitt***, 598 U.S. ____ (2023), 143 S.Ct. 877, 2023 (Feb. 22, 2023)
- **Why the *Helix* Case Matters:**
 - Employers often assume (incorrectly) that if they pay an employee more than the minimum weekly salary amount, they've satisfied the salary test.
 - *Helix* reminds us that the “salary basis” test is a separate salary test that you also have to satisfy
 - Being highly paid doesn't mean you're NOT entitled to overtime
 - Being NOT highly paid doesn't mean you ARE entitled to overtime

FLSA OVERTIME EXEMPTION REVISITED

****KEY TAKEAWAYS****

- ***Helix Energy Solutions Group v. Hewitt***
- **Make sure** all of your exempt employees are paid in a way that satisfies the “salary basis” test
- **Be careful** if you pay exempt employees on a “daily rate” basis
 - It probably doesn’t satisfy the “salary basis test”

4. ARBITRATION AGREEMENTS

— Arbitration —



ARBITRATION AGREEMENTS

Use and Enforcement of Arbitration Agreements
limited by Federal Law and by the U.S. Supreme Court

- ***New Federal Law*** **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**
 - Became law on March 3, 2022
 - Mandatory arbitration does not apply to sexual harassment or sexual assault claims
- ***New U.S. Supreme Ct Decision*** **Badgerow v. Walters**, 142 S.Ct. 1310 (March 31, 2022)
 - Arbitration awards can rarely be enforced in federal court

ARBITRATION AGREEMENT REFRESHER

What is an Arbitration Agreement?

- It's when an employer and an employee agree in advance to have a neutral third party (an arbitrator) decide any legal claims rather than suing in court
- It is usually one section (like a couple of paragraphs) within an employment agreement

ARBITRATION AGREEMENT REFRESHER

Sample Arbitration Agreement Language:

- In the event that Employer and Employee are unable to resolve any dispute, including any dispute involving the hiring, performance or termination of employment, and should either desire to pursue a claim against the other, both Employer and Employee agree to have the dispute resolved by final and binding Arbitration

ARBITRATION AGREEMENT REFRESHER

Why do employers and employees like arbitration agreements?

- Arbitration is **faster** than court
- Arbitration is **less expensive** than court
- Arbitration is **private** (unlike public court proceedings)

ARBITRATION AGREEMENT REFRESHER

Arbitration usually requires some court involvement

- (1) When one of the two parties does not want to arbitrate even though they signed an arbitration agreement
 - Other party must file in court a **motion to compel** arbitration
- (2) When one of the two parties refuses to abide by the decision of the arbitrator
 - One of parties must file in court a **motion to confirm, modify, or vacate (cancel)** the arbitration award

ARBITRATION AGREEMENTS

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Mandatory arbitration does not apply to sexual harassment or sexual assault claims
- **Purpose of the law:**
 - Allows employees who bring sexual harassment claims to decide on their own if they want to speak publicly about their claims or resolve their claims in a private arbitration

****Key Takeaway****

- Employers should consider excluding sexual harassment claims from their arbitration clauses or making those claims optional

ARBITRATION AGREEMENTS

Badgerow v. Walters, 142 S.Ct. 1310 (March 31, 2022)

- A **motion to compel** arbitration can be enforced in federal court as long as the employment dispute is based on federal law (e.g., Title VII, ADA, etc.)
- BUT a **motion to confirm, modify, or vacate** an arbitration award can only be filed in federal court if there is a separate federal basis for the motion (separate from the basis of the employment dispute)

****Key Takeaway****

- Employers (and employees) will now usually be required to file motions to confirm, modify, or vacate arbitration awards in state and local courts (not federal court)

5. ARTIFICIAL INTELLIGENCE (AI) AND SOCIAL MEDIA CREATE NEW LIABILITY RISKS



ARTIFICIAL INTELLIGENCE (AI) AND SOCIAL MEDIA CREATE NEW LIABILITY RISKS

What is Artificial Intelligence?

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

- **Hardware:**
 - Laptop, cellphone, computer-controlled robotic
- **Software:**
 - Programs (algorithms) which give directions to control the behavior of the machine and are specialized to mimic human intelligence and capabilities.

ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

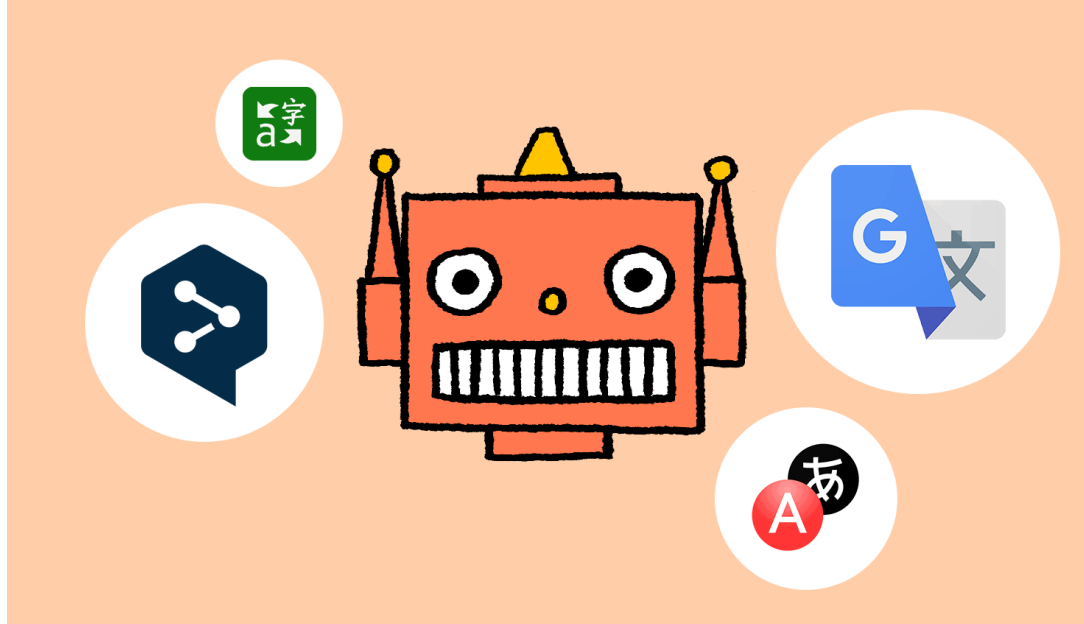
- **SPAM DETECTION:** AI used to scan e-mail and identify text patterns that indicate spam attacks. (Email junk folder)



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

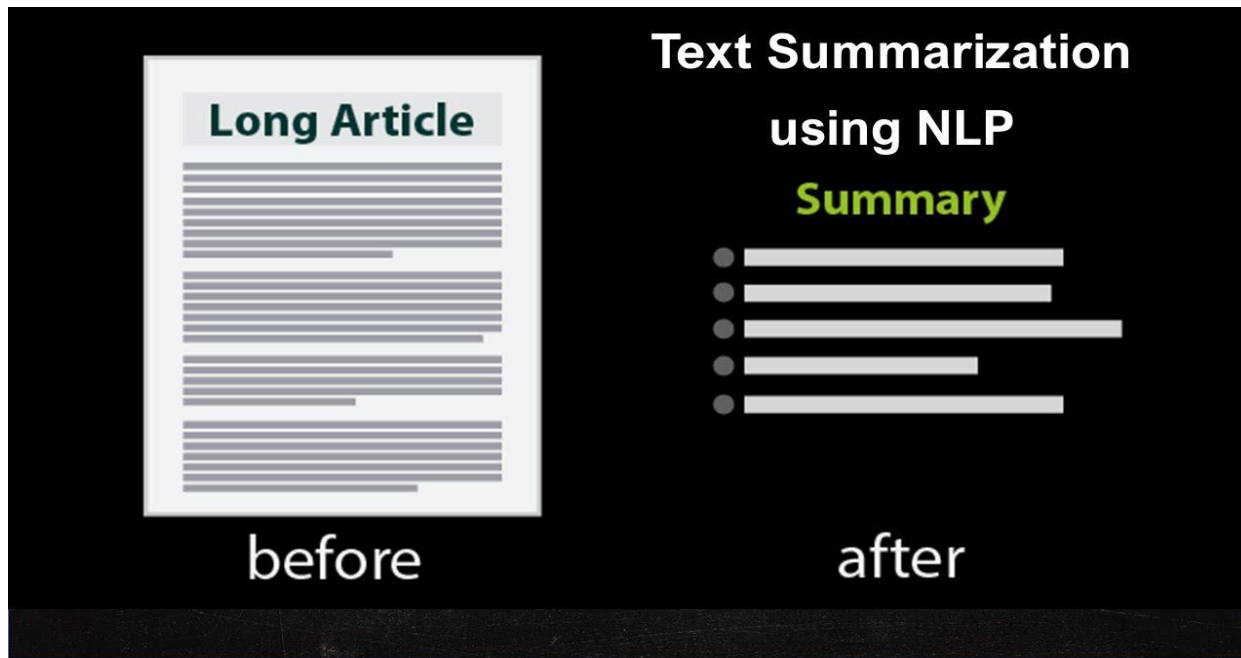
- **MACHINE TRANSLATION:** AI used to quickly translate e-mail, presentations and other documents into multiple languages to enhance internal communication.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

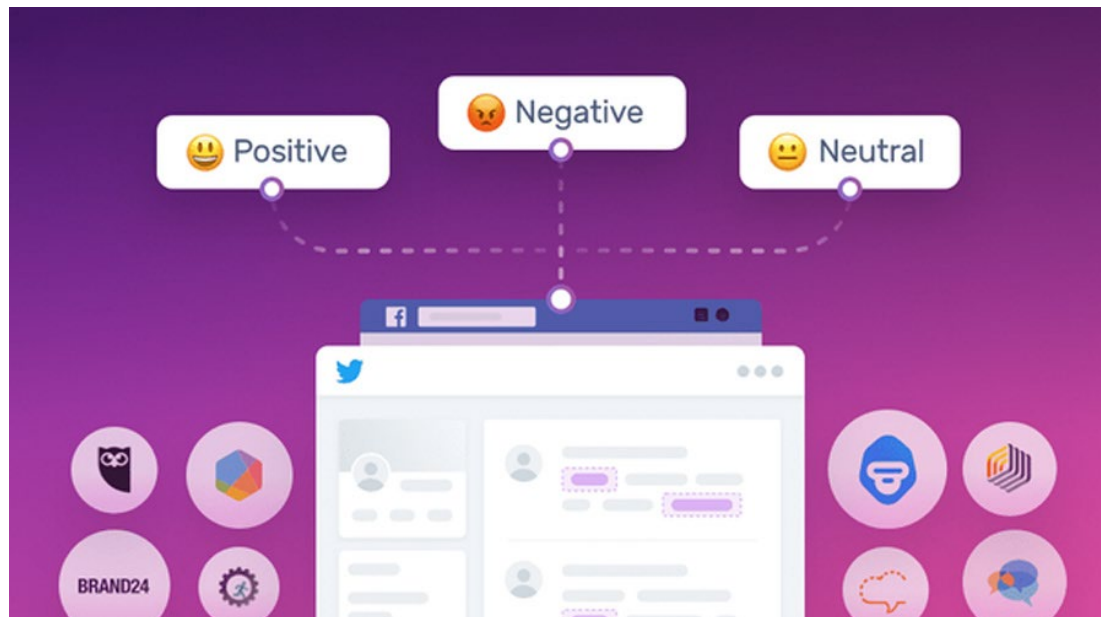
- **TEXT SUMMARIZATION:** Use of AI to extract key information from original texts to create easily consumable summaries.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

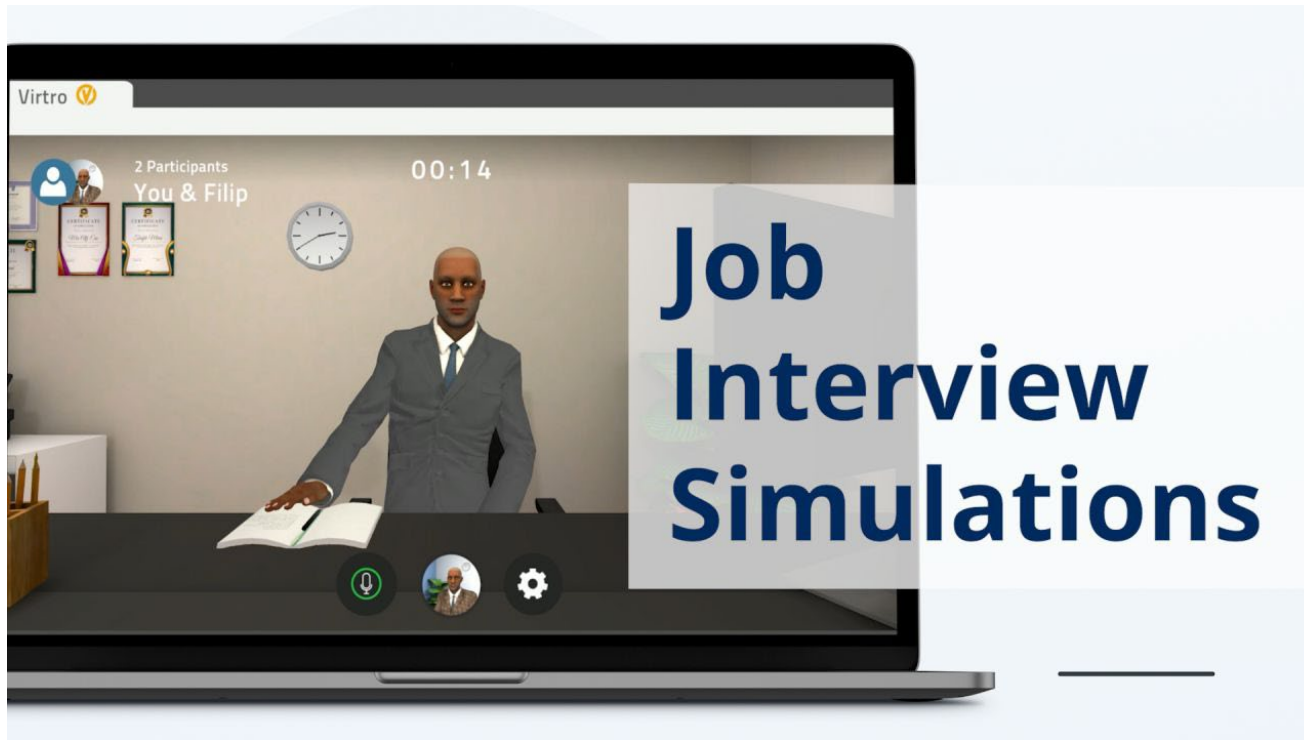
- **SENTIMENT ANALYSIS:** To analyze large amounts of text to determine if the data is positive, negative or neutral. Also known as opinion mining.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

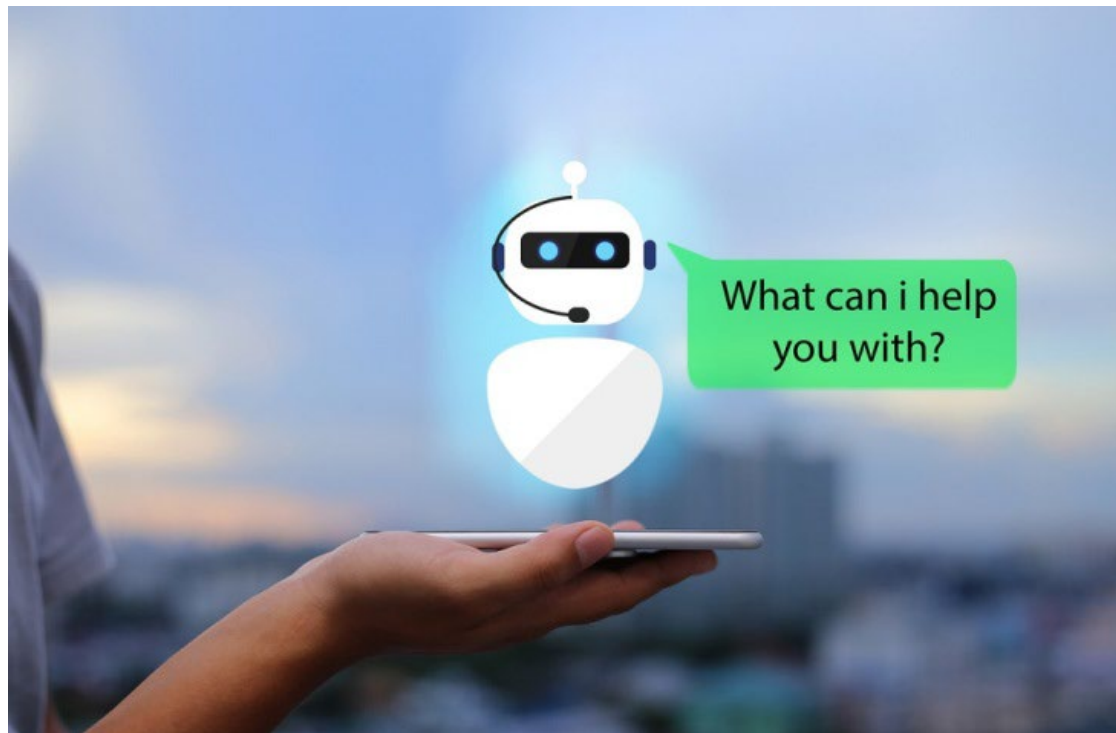
- **WORK SIMULATIONS:** To train employees and new hires.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

- **CHATBOTS:** For employee learning and development, performance evaluation, and FAQs.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

- **ROBOTICS:** Delivery robots (self-driving vehicles) and security robots.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

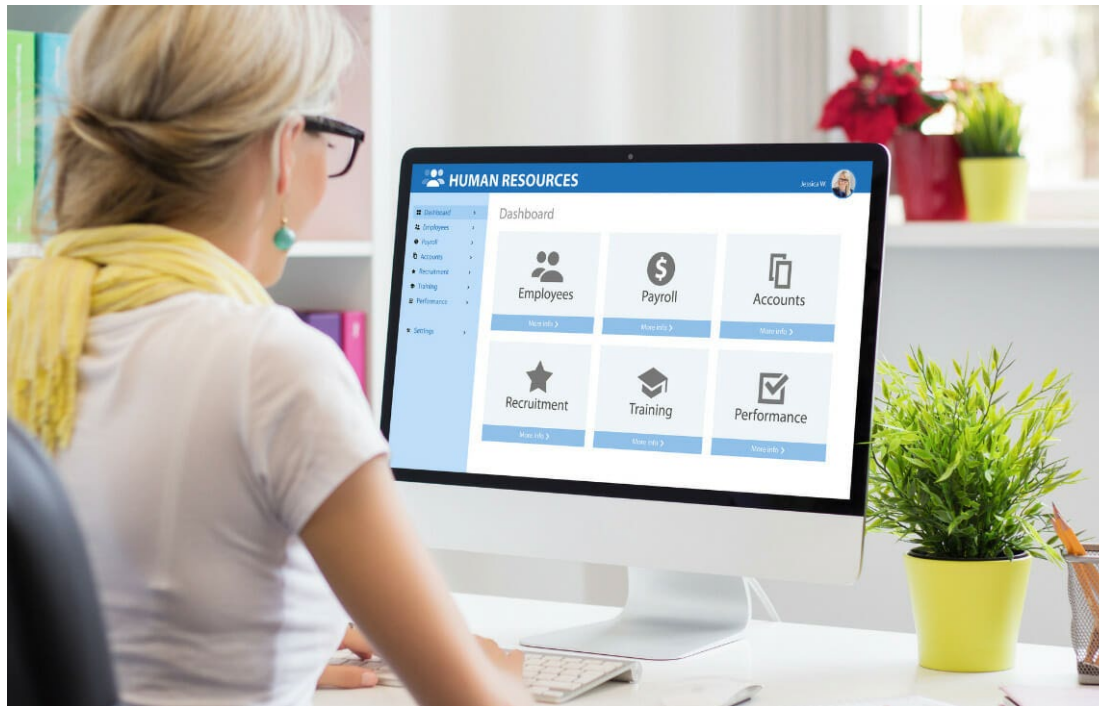
- **VIRTUAL ASSISTANTS:** Simulates written or spoken conversation and recognizes contextual patterns to provide better responses over time.



ARTIFICIAL INTELLIGENCE (AI)

AI in the Workplace

- **TALENT ACQUISITION:** To source, recruit, evaluate, and communicate with potential new hires.



ARTIFICIAL INTELLIGENCE (AI)

In which areas does HR currently utilize automation and/or AI?

**Question was select all that apply.*



79%

Recruitment and hiring



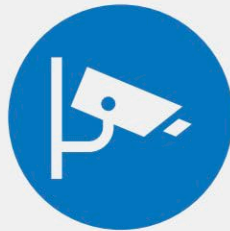
41%

Learning and development



38%

Performance management



18%

Productivity monitoring



8%

Succession planning



4%

Promotion decisions

AI LIABILITY RISKS FOR EMPLOYERS

APPLICANT TRACKING SYSTEMS (ATS)

A type of software used by businesses to assist with management and tracking of job applicants

- **Software Features:**

- Resume screening
- Automated emails
- Virtual interviews
- Games designed to analyze personality
- Facial recognition software
- Analytics and reporting

AI LIABILITY RISKS FOR EMPLOYERS

Some Popular ATS Programs



AI LIABILITY RISKS FOR EMPLOYERS

Legal Risks in Using ATS

An ATS's algorithm can have a defect and be biased resulting in illegal discrimination in violation of Title VII.

- **Example -- Amazon:**

- In 2018, Amazon discovered that its ATS discriminated against women in selecting job candidates
- Its algorithm which selected the top candidates was based on the resumes that had been submitted over past decade, but most of those resumes were from men.
- The ATS was therefore trained to favor men over women
- Amazon abandoned the ATS

AI LIABILITY RISKS FOR EMPLOYERS

Legal Risks in Using ATS

An ATS's algorithm can also be programmed to be biased resulting in violations of Title VII.

- **Example -- iTutorGroup:**

- iTutorGroup provides virtual tutoring services to students in China.
- iTutorGroup hires thousands of tutors based in the U.S. each year
- They programmed their ATS to automatically reject female applicants over age 55 and male applicants over age 60
- EEOC sought back pay and liquidated damages for more than 200 applicants who were denied jobs due to their age

AI LIABILITY RISKS FOR EMPLOYERS

Legal Risks in Using ATS

An ATS's algorithm may disadvantage job applicants and employees with disabilities in violation of the ADA

- **Examples**

- Video interview software that analyzes applicant's speech patterns to rate their ability to solve problems can unfairly score an applicant with a speech impediment
- An ATS programmed to reject applicants with large gaps in their employment history could screen out an applicant with a disability who needed to stop working to undergo treatment
- An ATS that uses a game to assess memory could screen out individuals who have good memories but are blind so they can't see the computer screen to play the games

AI LIABILITY RISKS FOR EMPLOYERS

Legal Risks in Using ChatGPT

ChatGPT can help employers analyze written text, provide responses to customer queries, and perform various tasks normally performed by a human.

But it has built-in bias.

- It generates responses using a dataset of 300 billion words from Wikipedia entries, articles, and other internet sources
- Information from the internet is filled with bias

AI LIABILITY RISKS FOR EMPLOYERS

Legal Risks in Using ChatGPT

Limit the Use ChatGPT

- Always assume that there's some bias and stereotyping in ChatGPT's analysis
- **Independently assess** ChatGPT's recommendations assuming they contain the common biases
- **Don't forget to document** the decision-making process.
 - ChatGPT will generate its recommendation in 2 seconds without any record of how it reached its conclusions

AI LIABILITY RISKS FOR EMPLOYERS

How to Avoid Discrimination When using an ATS or ChatGPT

****KEY TAKEAWAYS****

- Understand how the algorithm was designed and how individuals are screened in or out.
 - Question the programmers so you are satisfied that the selection criteria they used is not discriminatory (*Amazon; iTutorGroup*)
- Regularly review the screening results to ensure that the ATS isn't learning bias or illegal selection criteria over time

AI LIABILITY RISKS FOR EMPLOYERS

How to Avoid Discrimination When using an ATS or ChatGPT

****MORE KEY TAKEAWAYS****

- Clearly communicate to applicants applying through screening platforms that reasonable accommodations, including alternative formats/tests are available to people with disabilities
- Provide clear instructions for requesting reasonable accommodations
- Make sure the main decisionmaker is a human being and don't forget to document all steps the way you would if you weren't using AI

SOCIAL MEDIA LIABILITY RISKS



- **Discriminatory Employment Decisions**

- Social media sites reveal the person's race, gender, approximate age, and sometime ethnicity
- Personal information from these sites may not be used to make employment decisions on prohibited basis

- **Workplace Harassment**

- Co-workers may post sexually harassing information about other co-workers
- Employers may be subject to hostile work environment complaints if they know of the harassment or if a work phone or laptop was used
- A co-workers social media posts can be used to substantiate a claim of workplace racial harassment

SOCIAL MEDIA LIABILITY RISKS



- **Unfair Labor Practices**

- Some employee group conversations on social media are protected by the National Labor Relations Act (NLRA)
- Employers cannot prohibit group “concerted activity”
- NLRA protections apply even though the employees are not part of a union
- **Example:** Five employees participate in FB postings about plans to complain to management about wages or working conditions -- **Protected “concerted activity”**
- **But:** An employee’s gripes about the employer or a co-worker on social media are **not protected**
- To be protected, it must in relation to a group activity among employees

SOCIAL MEDIA LIABILITY RISKS



- **Communicating with Attorneys**
 - HR managers sometimes communicate with their attorneys via direct message
 - Communications with an attorney are protected by the attorney-client privilege **only if** the “primary purpose” is to seek legal advice
 - If it’s a group message and anyone in the group is not part of the employer’s company, the communication will not be protected even if its primary purpose is to seek legal advice.

SOCIAL MEDIA LIABILITY RISKS



****KEY TAKEAWAYS****

- Be extra careful when using information obtained from social media in making employment decisions
- If you become aware of harassment occurring among your employees on social media, deal with it just as you would if it occurred at work
- Don't prohibit employees from communicating in groups on social media about workplace issues
- When you need to get legal advice from your attorney, its safer communicate by email, phone, or regular text

BONUS TOPIC

Quiet Quitting



QUIET QUITTING

What is Quiet Quitting?

A phrase used to describe employees who do the bare minimum of what's required in their job description

Examples of Quiet Quitting:

- Limiting their time in the office
- Refusing overtime
- Not promptly responding to emails or texts
- Lacking initiative
- Not encouraging others to work

QUIET QUITTING

What is Quiet Quitting?

Some employees do this openly but describe it as a life choice.

- Work/Life Balance
- Workforce Disassociation
- Morale-Adjusted Productivity
- “Turtling” (*keeping to themselves/slowly moving along*)
- Reverse Hustle

QUIET QUITTING

Potential Causes of Quiet Quitting

- Toxic workplace
- Lack of engagement
- Drama filled days
- Lack of workplace flexibility
- Lack of communication
- Burnout
- Ineffective complaint procedure

QUIET QUITTING

Legal Liability Concerns For Employers

Beyond the lack of productivity of the employee, the quiet quitting may be a sign of an underlying liability issue that needs to be addressed

- The quiet quitter may be the subject of harassment
- The quiet quitter may have safety concerns not being addressed
- There may be an overbearing manager
- The quiet quitter may believe he/she is a potential whistleblower

QUIET QUITTING

****KEY TAKEWAYS****

Be observant in your workplace and try to spot quiet quitting and see if there's a workplace reason behind it

Ways to Change a Quiet Quitter to a Positive Performer

- Train managers to look for and address quiet quitting
- Engage workers on an individual basis
- Make sure wages and benefits are fair and up to date
- Encourage employees to speak up if they are unhappy at work
- Make sure the company has an effective and easily accessible complaint procedure



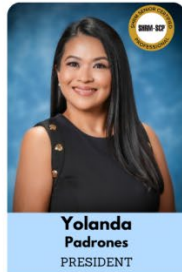
Visit the SHRM Guam Chapter website at <https://www.guam.shrm.org> to become a SHRM member

A Wealth of Valuable Guidance regarding Prevention of Sexual Harassment and sample Workplace Policies is Available on the SHRM Website at the following link: <https://www.shrm.org>

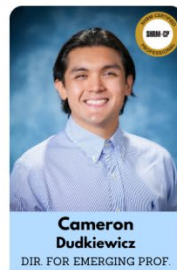
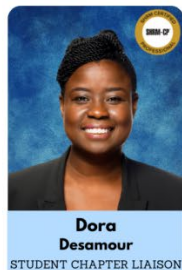
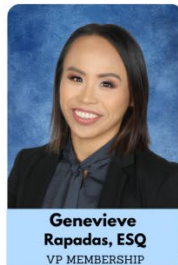


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THANK YOU!



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