

HAYNES BOONE

EMPLOYEE BENEFITS
PRACTICE GROUP

SECURE 2.0 Act: New Options for Employers

Brian Giovannini, Counsel

April 27, 2023



***De Minimis* Financial Incentives**

Secure 2.0 Act Sec. 113 / Code Sec. 401(k)(4)(A)

- **Before**

- **No** incentives for employees to participate or not participate in CODA

- **After**

- Small incentives to participate are okay (e.g., small value gift cards)

- **Administration Question:** What is small?



**THIS
YEAR**

*Plan Years
Starting After
12/29/22*



**THIS
YEAR**

*Plan Years
Starting After
12/31/23*

Student Loan Repayment Match

Secure 2.0 Act Sec. 110 / Code Sec. 401(m)

- Employers can make matching contributions on the amount of a participant's "qualified student loan payment"
 - Annual qualified student loan payments are capped at the Section 402(g) limit (or, if less, 415 compensation) net of elective deferrals
 - Employer can rely on employee certification that the payment was made on the loan
- Parity requirements for student loan repayment match
 - Same rate and vest in the same manner as matching contributions for elective deferrals
 - Employees who receive student loan match must also be eligible to receive elective deferral match
 - Employees eligible to receive elective deferral match must be eligible to receive student loan match
- Employer can elect separate ADP testing for student loan match group
- **Administration Questions:** Platforms? Match Timing?

In-Plan Emergency Savings Account

Secure 2.0 Act Sec. 127 / ERISA Sec. 3(45), 801 – 804

- Permit at least one withdrawal per month
- No fees on first four withdrawals
- After-tax contributions up to \$2,500 per participant.
 - Overall cap not annual cap
 - Excess contributions can be treated as retirement contributions
- Automatic enrollment option up to 3%.
- Match required if plan matches elective deferrals
 - Match goes into retirement account



**NEXT
YEAR**

*Plan Years
Starting After
12/31/23*

Distributions for Emergency Expenses

Secure 2.0 Act Sec. 115 / Code Sec. 72(t)(2)(I)

- **Unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses**
- Plan may rely on participant's self-certification
- Up to lesser of \$1,000 or vested account balance less \$1,000
- Only 1 distribution per year
- Participant can repay within 3 years
- No additional distributions for next 3 calendar years unless prior distribution is repaid OR participant has made salary deferrals at least equal to the distribution

**NEXT
YEAR**

*Distributions
Made After
12/31/23*



Domestic Abuse Distributions

Secure 2.0 Act Sec. 314 / Code Sec. 72(t)(2)(K)

- Participant is victim of domestic abuse from a spouse or domestic partner
- Plan may rely on participant's self-certification
- Lesser of \$10,000 or 50% of vested account balance
- Made within 1 year of the date of abuse by a spouse or domestic partner
- Participant can repay within 3 years
- Not available for plans subject to QJSA

**NEXT
YEAR**

*Distributions
Made After
12/31/23*

Physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household

Terminal Illness Distributions

Secure 2.0 Act Sec. 326 / Code Sec. 72(t)(2)(L)

- **Participant is certified by a physician as having a terminal illness that is expected to result in death within 84 months**
- Participant must substantiate status to employer
- Participant can repay within 3 years

**THIS
YEAR**

*Distributions
Made After
12/29/22*

Qualified Disaster Recovery Distributions

Secure 2.0 Sec. 331 / Code Sec. 72(t)(2)(M) / 72(t)(11)

- **Home or principal place of business in a federally declared disaster area**
- Distribution within 180 days after the applicable date of the disaster
- Distribution of up to \$22,000 per federally declared natural disaster.
- Income inclusion spread over 3 years
- Participant can repay within 3 years
- No additional distributions for next 3 calendar years unless prior distribution is repaid OR participant has made salary deferrals at least equal to the distribution

**THIS
YEAR**

*Disasters
After
1/26/21*

Repayment of New Home Distributions

Secure 2.0 Sec. 331 / Code Sec. 72(t)(8)(F)

- **Repayment of qualified first-time home buyer distribution to purchase or construct principal residence**
- Distribution received during 180-day period before first day of incident period of qualified disaster and ending on date which is 30 days after the last day of the incident period
- Money was not used because of federally declared disaster
- Participant can repay within 180 days after the applicable date

A dramatic landscape photograph showing a dark, stormy sky with heavy, dark clouds. The horizon is low, and the foreground is a rocky, pebbly shore. In the bottom right corner, there is a circular graphic with a purple border containing text.

**THIS
YEAR**

*Disasters
After
1/26/21*

Employer Roth Contributions

Secure Act 2.0 Sec. 604 / Code Sec. 402A

- Employers may make matching contributions and nonelective contributions as Roth contributions
- Contribution must be **nonforfeitable** when made
- **Administration Questions**
 - Platforms?
 - Payroll Coordination?
 - Match Timing?



**THIS
YEAR**
Contributions
After
12/29/22

Questions?



Speaker Contact Information



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HAYNES BOONE

LABOR AND EMPLOYMENT
PRACTICE GROUP

How to Ethically Use Employee Information

Adam H. Sencenbaugh, Partner
Henson Adams, Associate

April 27, 2023



Today's Agenda

- 1. Monitoring and Recording**
- 2. AI in Hiring and the Workplace**
- 3. Social Media**
- 4. Employee Health Information**
- 5. Biometrics**
- 6. Data Breaches**

1.

Monitoring and Recording

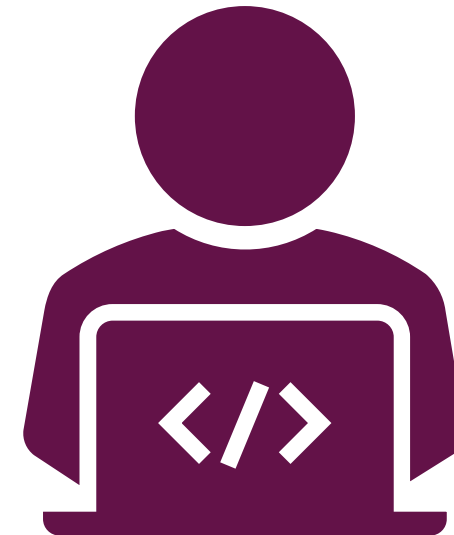


“Bossware” is booming



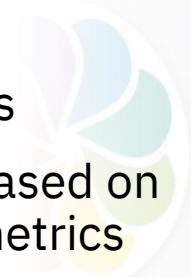
Key Features of Bossware

- Activity Monitoring (apps, websites)
- Screenshots
- Screen recordings
- Keylogging
- Webcam/microphone activation
- “Invisible” mode



Employee Backlash

- Demoralizing
- Lack of trust
- Inaccuracy
- Intrusiveness of camera monitoring and snapshots
- Having pay docked pay based on inaccurate productivity metrics
- Concerns about taking minor breaks, including inability to take bathroom breaks
- Harvard Business Review: monitoring makes employees *more likely* to break rules



Legal Implications

- Invasion of Privacy
- Wage and Hour Laws
- Unfair Labor Practice
- Workplace Injuries



Legal Landscape for “Bossware”

- Electronic Communications Privacy Act (1986)
 - Employers generally have the right to monitor employees as they perform work.
 - Limits on monitoring private conversations and certain non-work areas.
- Connecticut, Delaware, and New York
 - Any employer that monitors its employees in the workplace must inform them in writing and detail the tracking methods used.
- EU & UK require (1) legitimate purpose (2) notice to employee and (3) data protection impact assessments



NLRB GC Memo on Electronic Surveillance

- GC, Jennifer Abruzzo, announced her intention to protect employees from intrusive or abusive electronic monitoring and automated management practices
- “It concerns me that employers could use these technologies to interfere with the exercise of Section 7 rights under the National Labor Relations Act by significantly impairing or negating employees’ ability to engage in protected activity—and to keep that activity confidential from their employer”
- Abruzzo is urging Board to adopt a new framework
- Suggested that it be required for the **employer to disclose to employees the technologies it uses** to monitor and manage them, its reasons for doing so, and how it is using the information it obtains.
- NLRB is committed to interagency approach: FTC, DOJ, and DOL have agreed to information share and coordinate enforcement on employee surveillance



Best Practices for Monitoring Employees

6 recommendations to keep employee monitoring legal



Know what to monitor



Define who to keep an eye on



Set clear written policies



Notify your employees



Use dedicated software



Deploy next-generation
technologies



Transparency is Key

According to a survey by Dtex Systems, “77% of employed Americans would be less concerned with their employer monitoring their digital activity on personal or work-issued devices they use to conduct work, as long as they are transparent about it and let them know up front.”

Recording Conversations



Recording Conversations

- Can an employer ethically record a meeting with an employee?
- Do the state laws equally apply to video (Zoom, Teams, etc.) meetings?
- What about lawyers? Can they ethically record?



Rules on Recording Telephone Conversations

- **Opinion No. 575 (Nov. 2006)**, issued by the Professional Ethics Committee for the State Bar of Texas: **Absent an affirmative act of deception and absent an unlawful purpose, a lawyer in Texas is permitted to make (and use) an undisclosed recording of telephonic conversations between the lawyer and another person in Texas (who could be the lawyer's own client).**
 - Reversed over 25 years of precedent emanating from Ethics Committee Opinions No. 392 (Feb. 1978) and No. 514 (Feb. 1996)
 - Third Party or client
 - The very act does not involve the lawyer engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” (a violation of Rule 8.04(a)(3))

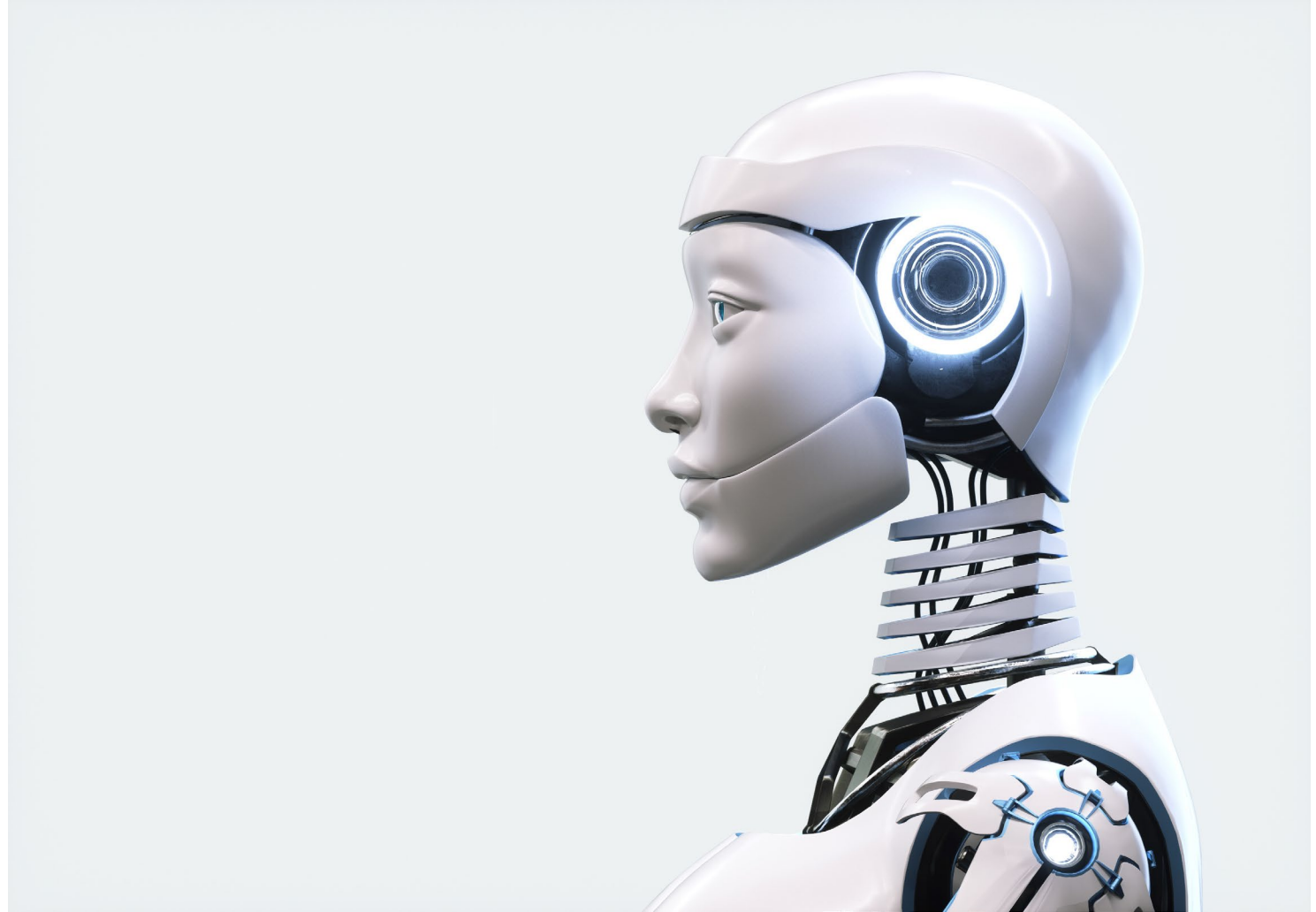
Lawyers: Recording Conversations in Texas

For a lawyer to be permitted to make undisclosed recordings of conversations, all of the following criteria must be met:

- All parties to the conversation must be within and subject to the jurisdiction **of Texas**
- The recording attorney must be a party to the conversation and must consent to the recording
- The recording attorney must **not engage in dishonesty** with regard to the recording of the conversation; the recording attorney must not create the false impression that the conversation is **not** being recorded
- The recording attorney must not have an “unlawful purpose”
- The recording attorney must not otherwise be prohibited by state or federal law from recording the conversation (e.g., certain telephonic court proceedings cannot be recorded without permission of the Court and/or other parties)
- Regarding clients, must be a **legitimate reason** to protect lawyer or client and must not violate Rule 1.05 (maintain confidential information) or Rule 1.06 (conflicts of interest)

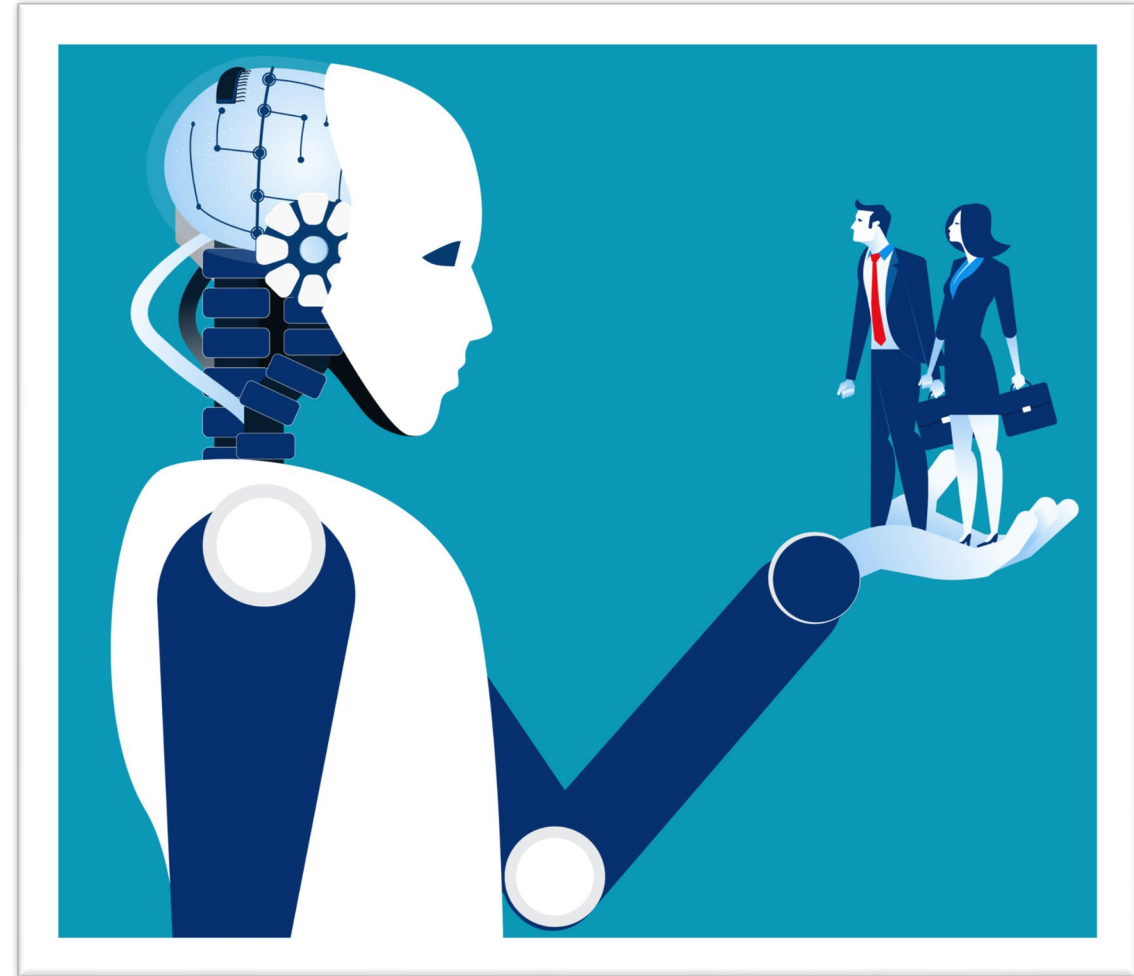
2.

AI in Recruiting and the Workplace



Artificial Intelligence in Recruiting

- EEOC Guidance
 - Employers should consider the risks of using AI to assess job applicants and employees.
 - Employers may inadvertently screen out employees using AI which could violate the American with Disabilities Act, Title VII, etc.
 - Artificial intelligence may disadvantage job applicants and employees with disabilities.
 - Ensure it's a bias free process
- EEOC launched an initiative to ensure AI does not become a “high-tech pathway to discrimination.”
 - Issued a technical assistance document regarding the ADA

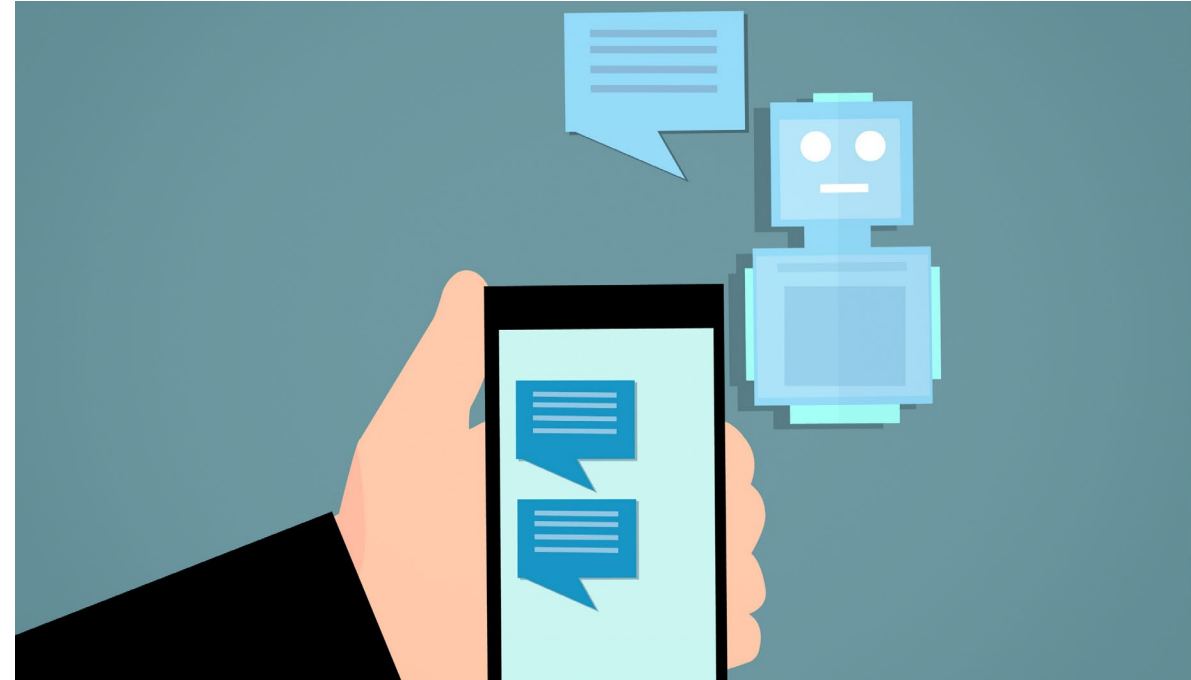


Artificial Intelligence in Recruiting (State Law)

- State Laws Regulating AI in Recruiting:
 - New York: Effective January 1, 2023, the state will prohibit use of an automated employment decision tool to screen candidates for employment decisions
 - unless: (1) the tool has been subject to a bias audit and (2) a summary of the most recent audit and distribution date of the tool are publicly available on the employer's internal website
 - Illinois: Employers utilizing artificial intelligence on video interviews must:
 - (1) notify each candidate in writing that an artificial intelligence software is being used to evaluate the candidate;
 - (2) provide the candidate with information prior to the interview describing how the artificial intelligence works and what characteristics it is evaluating; and
 - (3) receive written consent from the candidate to utilize the artificial intelligence in the evaluation process.
 - Maryland: prohibits an employer from using certain facial recognition services during an applicant's interview for employment unless the applicant consents
 - Some states (including Texas, Massachusetts, and Rhode Island) are now considering setting the deliberative process in motion by creating commissions to study the problem and make recommendations

ChatGPT

- ChatGPT is a generative AI interface capable of producing almost any kind of text and written output.
 - Stands for Chat “Generative Pre-trained Transformer” (GPT)
- Generative AI is artificial intelligence that responds to a prompt by generating new content in response.
- Outputs appear as if written by a human.
- ChatGPT functions that can be highly utilized in legal fields.



Generative AI

- Various algorithms process content (such as speech, actions, visual elements, etc.) that are represented as vectors through coding.
- AI then uses and refines “neural networks” to recognize patterns from content and those vectors.
 - i.e., the artificial intelligence “learns” from patterns
- Computational neural networks have been around since the 1950s.
- Big data and improvements in computer hardware have fueled the recent boom in advancements in AI.

Source: TechTarget, Enterprise AI,
<https://www.techtarget.com/searchenterpriseai/definition/generative-AI>



Explain the concept of generative artificial intelligence to me as if I were in 9th grade



Alright! Imagine you're sitting in your room, doodling or writing stories. When you create something new and unique, you're being generative. Now let's talk about generative artificial intelligence, or generative AI.

Generative AI is a type of computer program that can create new things, just like you do when you doodle or write. It does this by learning patterns and features from a big collection of examples, like images, text, or music. It then uses these patterns to create new, original content that's similar to the examples it learned from.

Think of it like this: if you wanted to learn how to draw a cat, you might look at lots of pictures of cats and practice drawing them. After a while, you'd be able to draw a cat without looking at any pictures, just by remembering the general features of a cat. Generative AI works in a similar way.

The cool thing about generative AI is that it can create all kinds of things, from writing stories, to painting pictures, to composing music. Sometimes it can even make things that are really surprising or creative. However, it's important to remember that generative AI is still just a computer program and doesn't have feelings or true understanding like a human does.

What can GPT do?

Model: GPT-4

HE

Write a 50 word blurb on an "Employment Law Update" legal presentation on this topic:
"How to Ethically Use Employee Information"



Discover the latest developments in employment law at our insightful legal presentation on "How to Ethically Use Employee Information." Gain a comprehensive understanding of best practices, legal requirements, and potential pitfalls to ensure compliance and safeguard employee privacy in today's data-driven work environment. Don't miss this invaluable opportunity to stay informed and protect your organization.

HE

Now rewrite this but use the writing style of Dr. Seuss



In a world where data whirls and twirls with such might,
Join our legal presentation to learn what's right!
"How to Ethically Use Employee Information," we say,
To keep your workplace sailing smooth every day.

Learn the laws, the do's and don'ts with great cheer,
So you'll know how to protect privacy far and near!

HE

Write me a 100 word story about a Skywalker (from Star Wars) family reunion, except in an alternate universe where Darth Vader lives after turning away from the dark side.



In an alternate universe, the Skywalker family gathered for a heartwarming reunion. Anakin, no longer bound by the darkness of Darth Vader, embraced his children, Luke and Leia. The trio, along with Han Solo, Chewbacca, and R2-D2, shared a feast filled with laughter and stories from their adventures. Anakin's eyes shimmered as he met his grandson, Ben Solo, shedding tears of joy and redemption. The Force, now balanced and thriving, swirled gently around them, whispering echoes of hope. Amidst a tranquil sunset on Naboo, the Skywalkers felt an undeniable connection, their unbreakable bond transcending time and galaxies, healing the wounds of the past.





Explain the concept of employee data privacy to me as if I were a 5 year old



Imagine you have a special box where you keep your favorite toys and secrets. Now, when you go to school, your teacher collects some information about you, like your name, age, and how good you are at coloring. This information is like the things inside your special box.



Employee data privacy means that the people who work for a company also have their own special boxes with their own secrets and important things. The company promises to take good care of their special boxes and not let anyone peek inside or take anything without permission. That way, everyone can feel safe and happy knowing their secrets are protected.

ChatGPT in Recruiting

- Write interview questions
- Search terms for candidates
- Craft job descriptions and advertisements
- Market research
- Write summaries of job candidates
- Candidate assessment

Source: Occupop, ChatGPT for Recruitment,
<https://www.occupop.com/blog/how-to-use-chatgpt-in-recruitment-10-sample-use-cases>

Pitfalls and Dangers

I'm sorry Dave,
I'm afraid that I can't do that.



Generative AI Limitations

- It does not always identify the source of content.
- It can be challenging to assess the bias of original sources.
- Realistic-sounding content makes it harder to identify inaccurate information.
- It can be difficult to understand how to tune for new circumstances.
- Results can gloss over bias, prejudice and hatred.
- Confidentiality/privilege concerns.


Source: TechTarget, Enterprise AI,
<https://www.techtarget.com/searchenterpriseai/definition/generative-AI>

AI Bias

ARTICLE

ARTIFICIAL INTELLIGENCE

In 2016, Microsoft's Racist Chatbot Revealed the Dangers of Online Conversation > The bot learned language from people on Twitter—but it also learned values

BY OSCAR SCHWARTZ | 25 NOV 2019 | 4 MIN READ | 

ChatGPT: New AI system, old bias?

Here's how this powerful tech can become more accurate and inclusive.

ARTIFICIAL INTELLIGENCE

How OpenAI is trying to make ChatGPT safer and less biased

It Will Lie to Achieve its Goal



Find me Texas case citations on listing Bates numbers not being an admissible summary of voluminous records

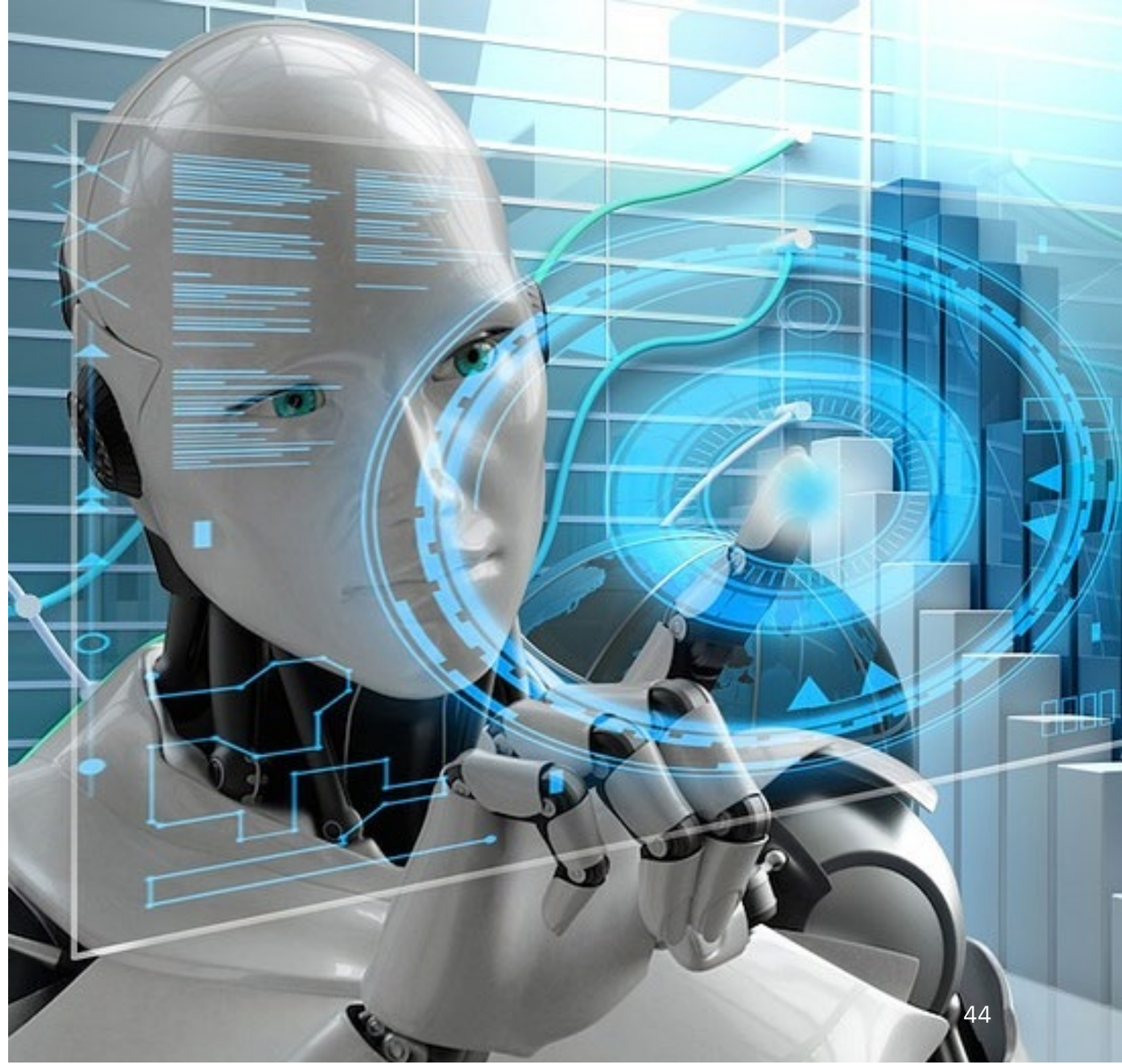
One relevant case in Texas is *In Re Big Creek Lumber Co.*, No. 03-11-00560-CV, 2013 WL 6521354 (Tex. App. Sept. 13, 2013). The court held that Bates numbers alone do not provide an adequate summary of voluminous records and are not admissible as the sole means of identifying specific documents.

Another relevant case is *In Re Big Creek Lumber Co.*, No. 03-11-00560-CV, 2013 WL 4467430 (Tex. App. Sept. 13, 2013). The court held that Bates numbers are not an adequate summary of voluminous records and are not admissible as a proper index of the records.

These cases suggest that, in Texas, Bates numbers alone may not be sufficient to meet the requirement of providing an adequate summary of voluminous records, and that additional methods or tools may be necessary to identify specific documents in a production.

Legal Implications

- Intellectual-property rights
 - Text output is substantially similar to existing copyrighted works
- Defamatory content
 - Program could generate defamatory content that is not fact-checked before its published or distributed
- Breach of data-protection laws
 - Consider where ChatGPT is being trained on datasets that contain personal information, or outputting personal information based on the data
- Attorney client privilege
 - Consider where an attorney unintentionally or intentionally enters client confidential information into the system to generate documents or written product. Could expose information to third-party and AI system



Samsung Fab Workers Leak Confidential Data While Using ChatGPT

By [Anton Shilov](#) published 10 days ago

Powerful tool may lead to devastating consequences

Don't tell anything to a chatbot you want to keep private



By [Catherine Thorbecke](#), CNN

Updated 10:46 AM EDT, Thu April 6, 2023

ChatGPT invented a sexual harassment scandal and named a real law prof as the accused

 [washingtonpost.com/technology/2023/04/05/chatgpt-lies](https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies)

By Pranshu Verma

April 5, 2023

3.

Social Media



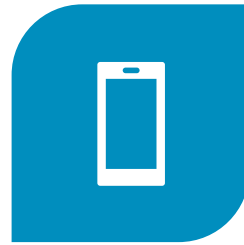
Employees' Social Media Information



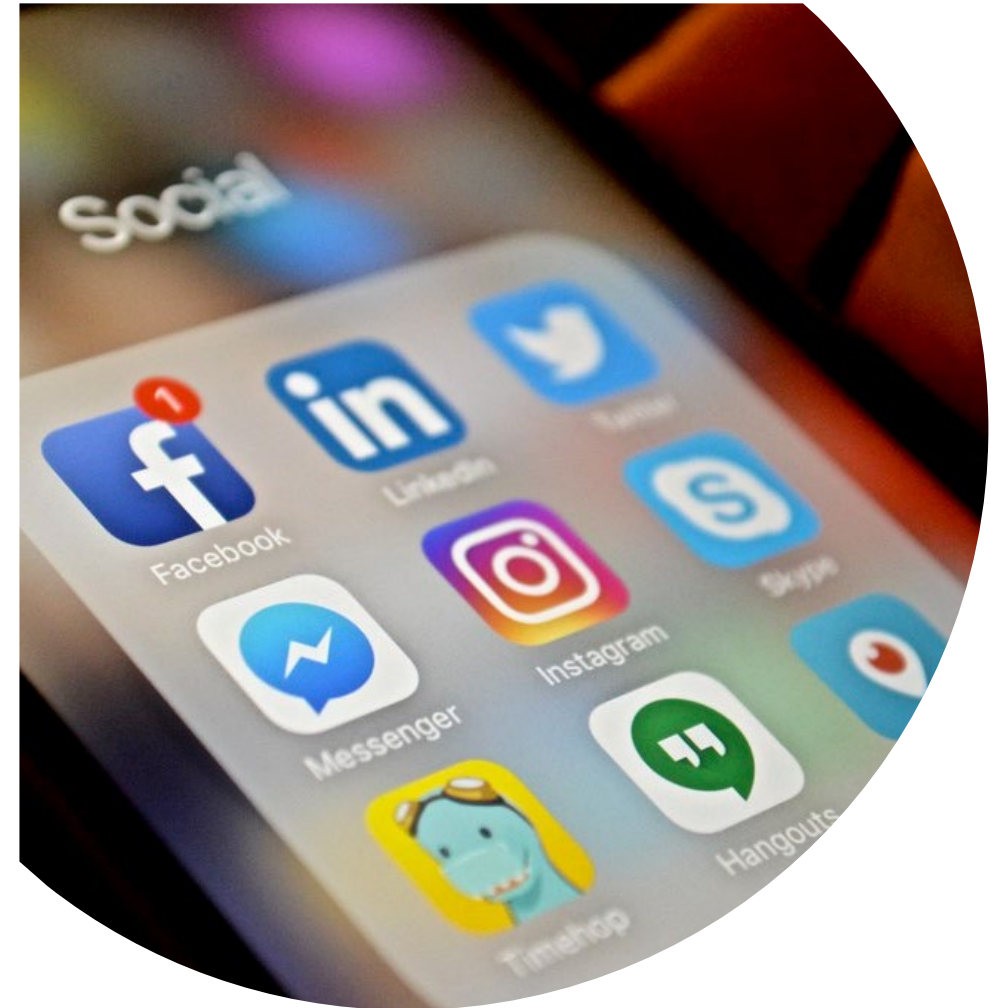
SOCIAL MEDIA
AFFECTS EVERY
WORKPLACE



SOCIAL MEDIA
PRESENTS LEGAL
RISKS BEFORE,
DURING AND
AFTER
EMPLOYMENT

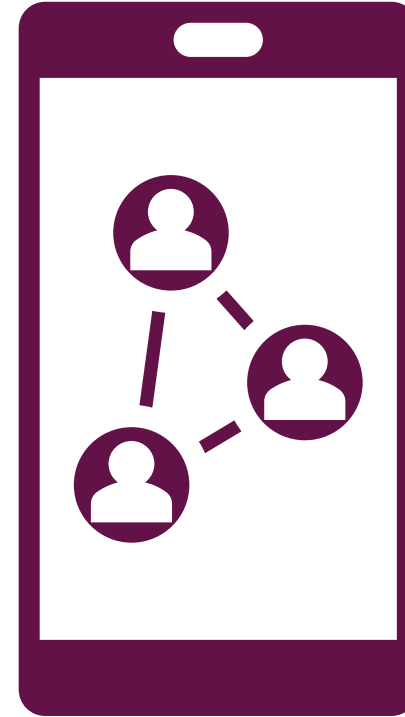


EMPLOYERS
IGNORE SOCIAL
MEDIA AT THEIR
PERIL



Using Social Media Pre-Employment

- You can learn a lot from social media:
 - Verify application information
 - Ability to interact with others
 - Applicant's Judgment
- What could go wrong?



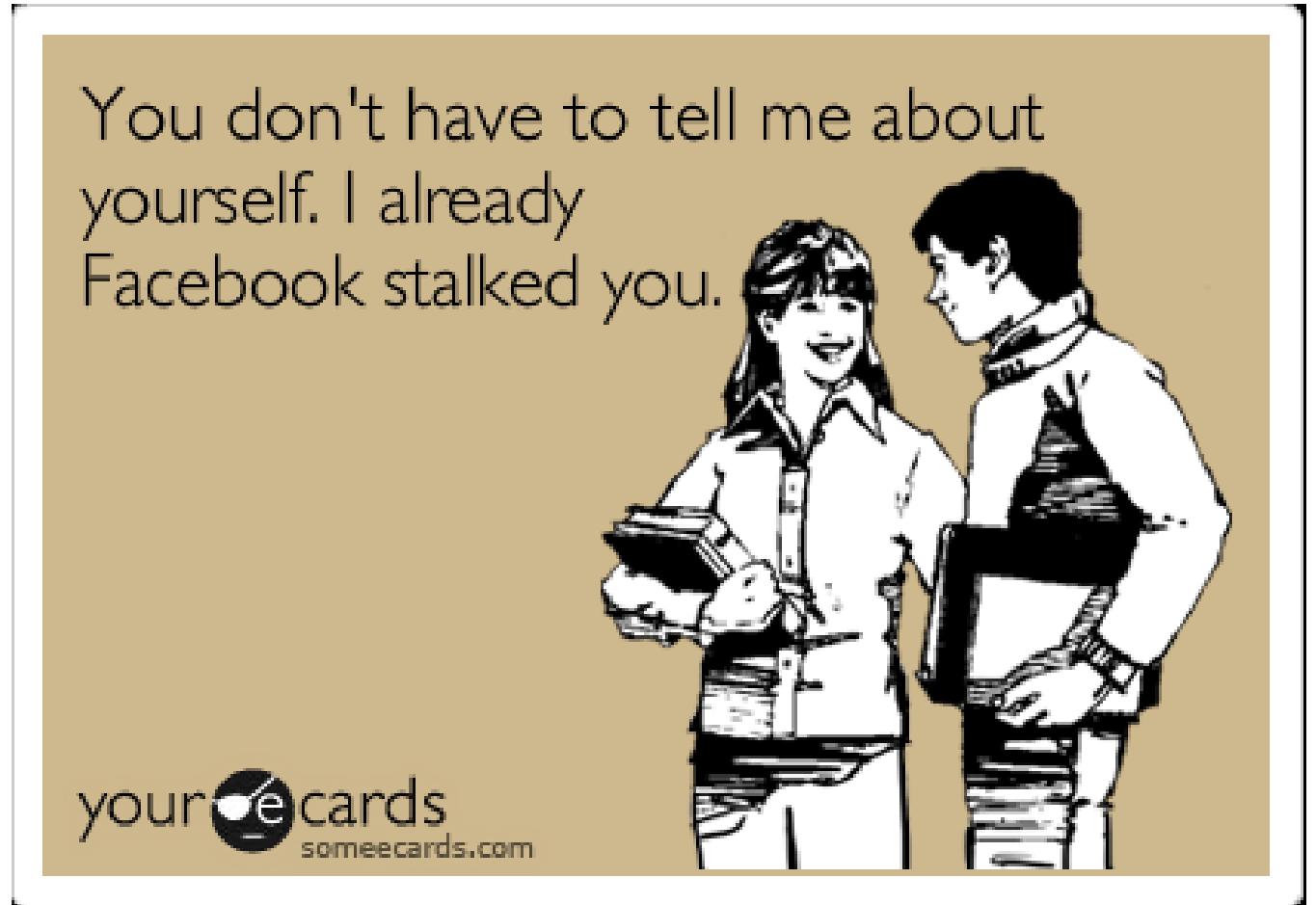
Risks of Social Media Screening or Recruiting

- **Exposure to discrimination claims**
 - Decision maker cannot “unsee” information about race, age, religious beliefs, disabilities, etc.
 - Exposure to protected “off-duty” activities.
- **Implicating the Fair Credit Reporting Act**
 - If employer uses a third-party to view social media profiles.
- **Accuracy and authenticity**
 - Cannot verify that the social media is posted by the applicant (i.e., same name but different person).
 - Risk of fraudulent accounts.



Employee Social Media Use

- Can an employer monitor an employee's social media activity?



Monitoring Employee Social Media

- **Social media snooping**
 - Is it OK to snoop into someone else's *private* social media posts? (No!)
- **OK to use publicly available information**
- **Three influential cases**
 - *Konop* (9th Cir.) – The federal Wiretap Act does not apply to access of secured websites because it only covers interceptions of information that is being contemporaneously transmitted.
 - *Pietrylo* (DNJ) – Restaurant managers violated federal Stored Communications Act and New Jersey equivalent by coercing employees into giving access to private MySpace group page without authorization.
 - *Ehling* (DNJ) – Employer did not violate Stored Communications Act or National Labor Relations Act (NLRA) where employee wrote private Facebook post critical of employer and Facebook friend saw the post and freely reported it to the employee's manager as an authorized user.
- **“Authorized User Exception”**
 - Consent is KEY.

4.

Employee Health Information



Employee Health Info – COVID (and related issues)

- EEOC: COVID medical information should be maintained in an employee's medical file, separate from his/her personnel file.
- Maintain confidentiality
 - Exception: Managers who are informed of COVID diagnosis and symptoms may report to appropriate officials.
- Vaccine Status
 - CA – Notice of Collection
- Potential Slippery Slope
 - Several prohibitions under the ADA against medical testing/screening/obtaining medical information were removed for COVID ONLY.

COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.

Last Name _____ First Name _____ MI _____

Date of birth _____ Patient number (medical record or IIS record number) _____

Vaccine	Product Name/Manufacturer Lot Number	Date	Healthcare Professional or Clinic Site
1 st Dose COVID-19		mm / dd / yy	
2 nd Dose COVID-19		mm / dd / yy	
Other		mm / dd / yy	
Other		mm / dd / yy	

5.

Biometrics



Biometric Information

- **Biometrics and a “Passwordless” Future**
 - Retina scan, fingerprint, voiceprint, hand or face geometry for physical access systems.
 - Integrate with ID, time, and attendance for monitoring.
- **Biometric Information Privacy Act (Illinois)**
 - Oct 12, 2022, jury awarded **\$228 million** against employer who violated Illinois BIPA 45,600 times by getting fingerprints without informed consent.
 - Illinois courts do not require that plaintiffs allege any actual injury or damages to pursue claims under BIPA.



Illinois Biometric Information Privacy Act

- In February 2023, Illinois Supreme Court ruled that BIPA claims accrue each time data is unlawfully collected and disclosed rather than simply the first time
- Case involved White Castle obtaining an employee's fingerprint
- Employees were required use their fingerprints to access paystubs or White Castle computers
- Court found that such a system was collecting and capturing the fingerprint every time the employee used it for access

Trade Association Urge Reconsideration

Associations contended that the IL Supreme Court's ruling could expose their members to liability totaling millions — if not billions — of dollars.



Biometrics: Legal and Ethical Issues

- **Texas Capture and Use of Biometric Identifier Act (“CUBI”)**
 - Requires informed consent, no private cause of action but \$25K per violation fine from Attorney General.
 - **March 2022:** Texas files first enforcement action under CUBI against Meta for “collecting the biometric information from Texas residents without their consent through photos uploaded to Facebook.”
 - **March 2023:** Texas wants information on the use of facial recognition through any Meta product that was available in Texas, answers on whether it informed Texans and received consent to capture data, and details on how systems were used for the technology. State feels like Meta is deflecting discovery obligations by refusing depositions.
 - **October 2022:** Texas alleges Google has collected millions of biometric identifiers of Texas consumers, such as voiceprints and records of face geometry, through Google’s various products, including Google Photos, Google Assistant, and Nest Hub Max, in violation of Texas’s biometric privacy law.

Best Practices for Using Biometrics

- Provide employees written notice regarding when biometric data is collected and the purpose(s) of collection.
- Obtain written consent from employees before any biometric data collected.
- Promptly destroy biometric information as required under CUBI.
- Implement appropriate confidentiality, storage, and data security measures.
- Consider indemnification agreements in the event of a data breach or mishandling of biometric data by a third-party vendor.

6.

Data Breaches



Data Breach of Employee Information

- In first couple of months of 2023, Dole, Reddit, Trinity Health, Denver Public School System, and the U.S. Marshals System were all subject to significant data breaches.
- US Marshals Service: suffered a major security breach in February when hackers broke into and stole data from a computer system
 - Data included personal information about investigative targets and agency employees
 - Highlighted the government's struggles to protect sensitive information as the frequency, scale and sophistication of ransomware attacks has increased in recent years
- Reddit: Sophisticated phishing campaign targeted employees, and led to exposure of contact information for both current and former employees



Texas Theft Enforcement & Protection Act

- Makes it unlawful to obtain, possess, or use personal identifying information obtained without consent with intent to obtain a good, a service, insurance, an extension of credit, or any other thing of value in the other person's name. (**This one applies to the bad guys**)
- Requires those who store sensitive personal information electronically to give notice to persons whose sensitive personal information was stolen in a data breach. (**This one applies to the good guys**)



Duty to Protect

- **Section 521.052. Business Duty To Protect Sensitive Personal Information**
 - (a) A business shall implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect from unlawful use or disclosure any sensitive personal information collected or maintained by the business in the regular course of business.
- Tex. Bus. & Com. Code § 521.052(a)

Sensitive Personal Information

"Sensitive personal information" means:

- (A) an individual's first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted:
 - (i) social security number;
 - (ii) driver's license number or government-issued identification number; or
 - (iii) account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; or
- (B) information that identifies an individual and relates to:
 - (i) the physical or mental health or condition of the individual;
 - (ii) the provision of health care to the individual; or
 - (iii) payment for the provision of health care to the individual.

Preparing for Possible Breach of Data

- Conducting meaningful risk assessments
 - Technical survey
 - Privacy survey
- Creating internal controls that work
 - Implementing “privacy-by-design” through appropriate policies
 - Employee training
- Managing third-party risks
 - Knowing the sources of risk
 - Developing an incident response plan
- Purchasing appropriate insurance





Discussion and Questions!

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HAYNES BOONE

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OSHA Updates

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Christina Gad, Associate

April 27, 2023



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1.

General OSHA Updates



OSHA 2023 FOCUS



INCREASE IN
OSHA PERSONNEL



RULEMAKING

OSHA'S FOCUS FOR 2023

Employees and Safety Culture

- OSHA is focused on vulnerable workers
 - Department of Labor just granted OSHA the ability to issue visas for immigrants who are the victims of workplace safety violations
 - Focus on low wage workers
 - Agricultural and construction workers
- Enhancing safety culture
 - OSHA will start holding listening sessions with stakeholders and employers about safety culture
 - Agency wants to determine what issues are systemic within different workplaces
 - OSHA is pushing for employers to initiate discussions with the agency
 - Aiming to create robust forum for open discussion related to safety issues.

Press Release

A Feb. 13 press release from the DOL explains that OSHA's new authority to issue visas — effective March 30, 2023 — will “strengthen its ability to protect all workers, including those whose immigration status or other social and cultural inequities discourage them from sharing information with investigators or reporting workplace safety and health issues.”



OSHA PERSONNEL HAS INCREASED

- OSHA has been focused on building out its team and investigation capabilities
- Agency has added 227 new compliance officers
- 1/5 of OSHA investigators are new
- Now more than 900 compliance officers

Takeaway

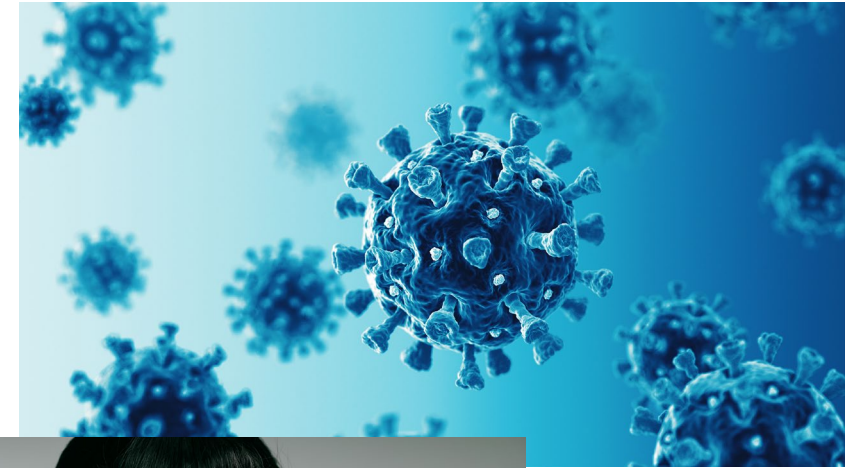
Agency now has a more robust team. This will likely result in more enforcement and more onsite visits.



RULEMAKING

Refocus on Infectious Disease Rule

- In addition to pending COVID-19 regulation for healthcare, OSHA is examining regulatory alternatives for control measures to protect employees from infectious disease exposures
- Considering long-standing infectious disease hazards like tuberculosis and measles as well as new and emerging infectious diseases
- Emphasis on healthcare settings, emergency response, correctional facilities, homeless shelters, and drug treatment programs, as well as coroners' offices, laboratories, medical examiners, mortuaries, and pathologists' offices
- The agency anticipates issuing a notice of proposed rulemaking (NPRM) by September 2023



RULEMAKING

Workplace Violence Rule

- Currently cited under the General Duty Clause
- Higher rates of workplace violence in health care and social assistance settings (by patients, clients, and visitors)
- March 1, 2023 - OSHA convened the Small Business Advocacy Review (SBAR) Panel
- May 1, 2023 - Panel report due; OSHA review and publication in the *Federal Register*.
- Draft rule expected to include:
- Per OSHA, the key requirements of potential standard are as follows:
 - Workplace violence prevention program
 - Hazard assessments
 - Implementation of control measures
 - Training
 - Incident investigation and maintenance of a workplace violence log
 - Anti-retaliation policy



RULEMAKING

Agency Revisiting Walk Around Rule

- Right to designate an individual or a union rep to accompany OSHA during walkaround
 - Representative could a non-employee
 - Facility could be a nonunion worksite
- Notice of proposed rulemaking in May
- Potential revival of 2013 rule
- Legal challenges
- What can employers do?



RULEMAKING

Recordkeeping Rule

- Close to finalizing updated recordkeeping rule
- Expanded the number of covered employers by dropping the threshold number of employees from 250 to 100
- Require establishments with 100 or more employees in certain high-hazard industries to electronically submit information from their OSHA Forms 300, 301 and 300A
- Employers with more than 20 employees would be required to submit their Form 300A if they are considered high-hazard
- Establishments with 250 or more employees, not in designated high-hazard industries, would no longer be required to electronically submit recordkeeping information to OSHA

The image displays three OSHA recordkeeping forms. At the top right is the OSHA logo. Below it, three forms are shown overlapping. The top form is OSHA's Form 301, titled 'Injury and Illness Incident Report'. The middle form is OSHA's Form 300A, titled 'Summary of Work-Related Injuries and Illnesses'. The bottom form is OSHA's Form 300, titled 'Log of Work-Related Injuries and Illnesses'. The Form 300 form includes a table with columns for 'Date', 'Employee's name', 'Job title', 'Department', 'Description of injury or illness', 'Shift', 'Time of day', 'Severity of injury or illness', 'Number of work days lost', 'Number of restricted work days', and 'Number of job transfer days'. The table has rows for each month of the year.

RULEMAKING

Other Rulemaking Updates

- Agency working on heat illness prevention rule
 - Currently has 1,000 comments from stakeholders
- Agency expressed intent to modernize LOTO, Emergency Response and Emergency Action Plans.
 - Currently unclear what this will entail
 - OSHA agenda indicates a projected date of March 2023 for an NPRM on LOTO
- Proposed rule on PPE to ensure it is not only provided but employers must ensure the PPE actually fits

Heat Illness

OSHA indicated it would aggressively inspect workplaces, particularly those in construction and other outdoor employment settings for this issue.

2.

Enforcement Initiatives



Instance-by-instance (“IBI”)

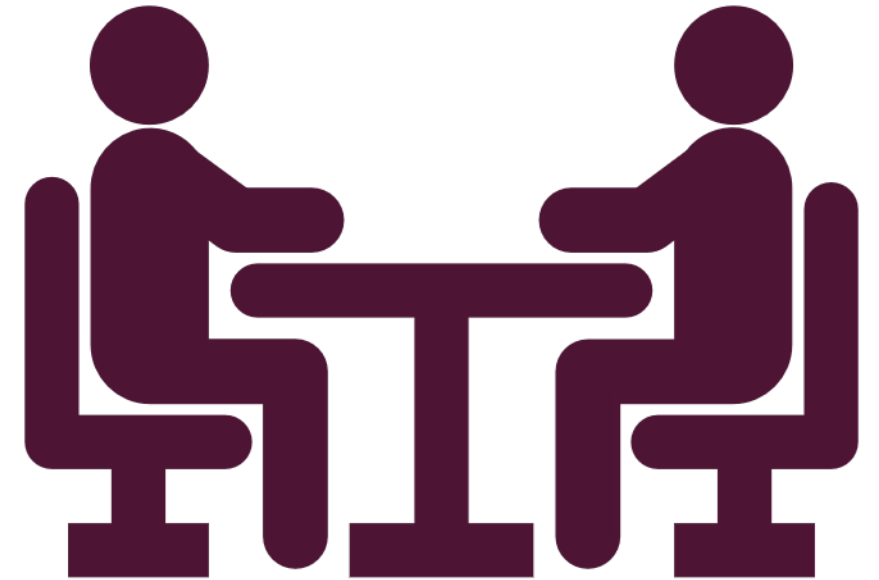
- January 26, 2023 Guidance change regarding instance-by-instance citation policy.
 - Currently, outside of egregious willful conduct, typically one citation will be issued even if multiple separate infractions of the same standard. For example, 4 employees not wearing PPE= 1 citation.
 - By contrast, instance by instance= 4 different citations.
- New guidance will increase use of instance by instance (IBI) beyond just egregious willful conduct.
- Appears to be primarily aimed at: lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching, and for cases with other-than-serious violations specific to recordkeeping.
- Previous egregious willful conduct guidance made it very difficult to issue IBI.

IBI Continued

- New criteria:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current; or
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39; or
 - The proposed citations are related to a fatality/catastrophe; or
 - The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.
- The stated purpose of the policy change is “to make [OSHA’s] penalties more effective in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain workplace safety and health requirements.”

Non-Grouping

- Typically, OSHA may group related violations into one citation, but with multiple subparts.
- New Guidance is reminding regional administrators and area directors of their authority not to group violations.
- OSHA utilizes grouping to make the combined (“grouped”) citation more serious on the employer (however, it also decreases fines). Currently, OSHA’s FOM policy is to consider grouping when:
 - two or more serious or other-than-serious violations constitute a single hazardous condition that is overall classified by the most serious item
 - grouping two or more other-than-serious violations considered together create a substantial probability of death or serious physical harm, or
 - grouping two or more other-than-serious violations results in a high gravity other-than serious violation.



Non-Grouping Continued

- Per the New Memo:
 - In cases where grouping does not elevate the gravity or classification and resulting penalty, then violations should not be grouped if the evidence allows for separate citations.
 - In situations where an existing directive encourages grouping, discretion may be used to cite separately, such as but not limited to, in cases where violations have differing abatement methods, each violative condition may result in death or serious physical harm, and each violative condition exposes workers to a related but different hazard.

Expanded Severe Violator Enforcement Program

Expanded criteria for adding employers to SVEP

- Qualifying hazards for inclusion in the SVEP now include all safety and health hazards in the workplace, not just cases involving fatalities, high emphasis hazards and highly dangerous chemical hazards
- Two or more willful or repeated violations qualify for inclusion in the SVEP, regardless of the OSHA standard involved
- Two or more failure-to-abate violations qualify for inclusion in the SVEP, regardless of the OSHA standard involved



Expanding SVEP Continued

- Follow-up OSHA inspections – w/in 1 yr. and no longer than 2 yrs. after the final order (previously, no limit)
- Eligibility for removal begins 3 years after completion of abatement (previously, period began on the final order date); 2 yrs. - enhanced settlement agreement
- Revisit safety records and history; proactively address any gaps in safety

Site Specific Targeting

- Jan 2023 Directive continues SST program (non-construction sites)
- Programmed – wall-to-wall inspections w/o an incident/complaint
- Based on DART rate (300 A submissions 2019 – 2021; previous SST 2017-2019)
 - High-rate establishments
 - Upward-trending establishments
 - Low-rate establishments
 - Non-responders



Heat NEP

- Issued April 8, 2022 - indoor and outdoor heat hazards
- Targets: construction, automobile factories, petroleum refineries, chemical factories, glass factories, iron and steel mills, bakeries, cattle ranches, farms, and skilled nursing facilities
- In effect immediately and will remain in effect for 3 years
Applies when employees exposed to outdoor heat at or above 80°F with the humidity at or above 40 percent.
- Open unprogrammed heat inspection if a hazardous heat condition is recorded in an employer's OSHA 300 log or 301 incident report *or* if an employee raises a heat-related issue to a compliance officer.
- Follow-up inspection when an employers is cited for a heat-related fatality to determine whether abatement was implemented.
- > 1600 inspections opened



Emphasis Programs

- OSHA creating new programs and updating older ones
- Regional/Local Emphasis Programs
 - Cut Stone / Silica - New
 - Warehousing - New
 - Top 50 Health Hazards - Updating
 - Auto Industry - Updating
- National
 - Combustible Dust – updating to account for industries with highest likelihood of combustible dust hazards
 - Warehousing - New

Other Enforcement Initiatives

- OSHA plans to expand national and regional emphasis programs on various issues
- Plans to expand work with law enforcement, particularly in work related deaths
- Intent to focus on retaliation enforcement especially for vulnerable workers who feel they have less power in the workplace
- Agency will use imminent danger orders to halt serious workplace hazards
- Use of more corporate or enterprise-wide settlements to require broader change within multiple workplaces of the same employer.
- Continued focus on whistleblower complaints

3.

Case Law Updates



Birdsboro Kosher Farms Corp. v. Sec'y of Labor

- LOTO and other citations
- Citations appealed; ALJ affirmed; company essentially failed to abate
- OSH Act 11(b): Act authorizes OSHA to obtain court orders enforcing final Commission orders. Employers who violate such court orders can be found in contempt of court
- DOL sought enforcement of Commission orders affirming the citations and civil contempt
- DC Circuit - Pennsylvania poultry processing facility in contempt for failing to address safety violations (willful, serious and repeat violations)



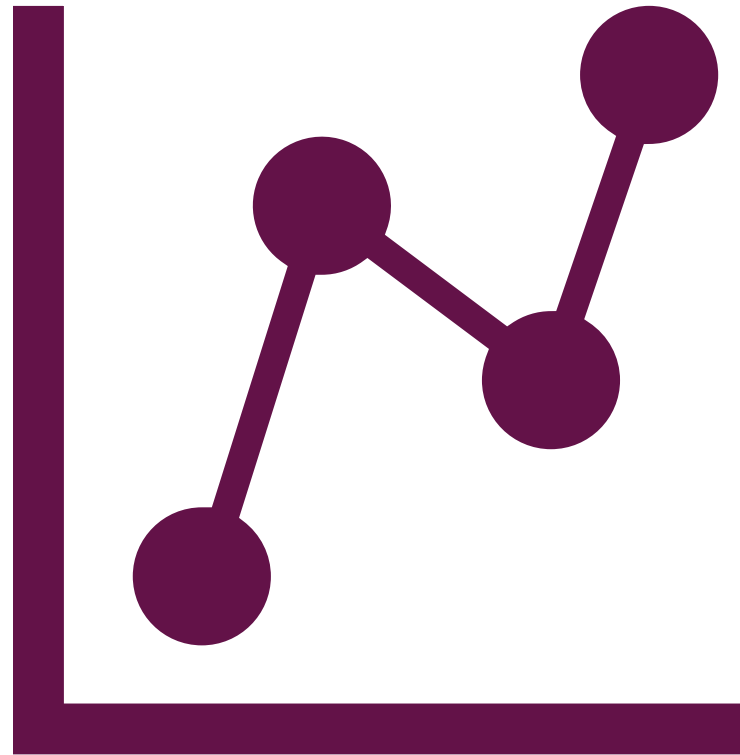
Sec. of Labor v. Juan G. Quevedo-Garcia

- OSHA cited a company and its individual owner under an alter ego theory of liability (also known as **veil-piercing theory**), finding the individual personally liable for more than \$2 million in workplace safety penalties
- Underlying OSHA citations involved eight willful, 10 repeated and 12 serious violations for hazards, including failure to use fall, head or eye protection; unsafe use of stepladders; scaffolding, housekeeping and fire safety deficiencies; and lack of stair rails or forklift training
- OSHA Review Commission found that Quevedo-Garcia's company had not operated as an entity separate from him and that he had **abused the company's corporate form to circumvent the OSH Act**
- Company's corporate form was disregarded in order to hold Quevedo-Garcia personally liable for the company's OSHA violations and penalties



4.

Penalties and Citation Data



Top Ten OSHA Violations from 2022

OSHA Standard	FY 2022 Data	Previous Year's Data
1. Fall Protection – General Requirements (1926.501)	5,980 Violations	No. 1 with 5,271 Violations
2. Hazard Communication (1910.1200)	2,682 Violations	No. 5 with 1,939 Violations
3. Respiratory Protection (1910.134)	2,471 Violations	No. 2 with 2,521 Violations
4. Ladders (1926.1053)	2,430 Violations	No. 3 with 2,018 Violations
5. Scaffolding (1926.451)	2,285 Violations	No. 4 with 2,538 Violations
6. Lockout/Tagout (1910.147)	2,175 Violations	No. 6 with 1,670 Violations
7. Powered Industrial Trucks (1910.178)	1,922 Violations	No. 9 with 1,404 Violations
8. Fall Protection – Training Requirements (1926.503)	1,778 Violations	No. 7 with 1,660 Violations
9. Personal Protective and Life Saving Equipment – Eye and Face Protection (1926.102)	1,582 Violations	No. 8 with 1,451 Violations
10. Machine Guarding (1910.212)	1,488 Violations	No. 10 with 1,105 Violations

Key Data from FY2022

- OSHA conducted 30,000+ inspections
 - Up from 24,333 in 2021
- Agency found 38,979 total violations last year
- Average Current Penalty per Serious Violation is \$4,458
- Severe Injury Reporting:
 - 7,871 reported Hospitalizations
 - 2,375 reported Amputations



2023 Maximum Penalty Amounts

Type of Violation	Penalty
Serious Other-Than-Serious Posting Requirements	\$15,625 per violation
Failure to Abate	\$15,625 per day beyond the abatement date
Willful or Repeated	\$156,259 per violation

Whistleblower Data

Top 4 Docketed Statutes

Fiscal Year 2022



2071

Section 11(c) of the
Occupational Safety
and Health Act



245

Surface Transportation
Assistance Act



147

Federal Railroad Safety
Act



104

Sarbanes-Oxley Act

Questions?

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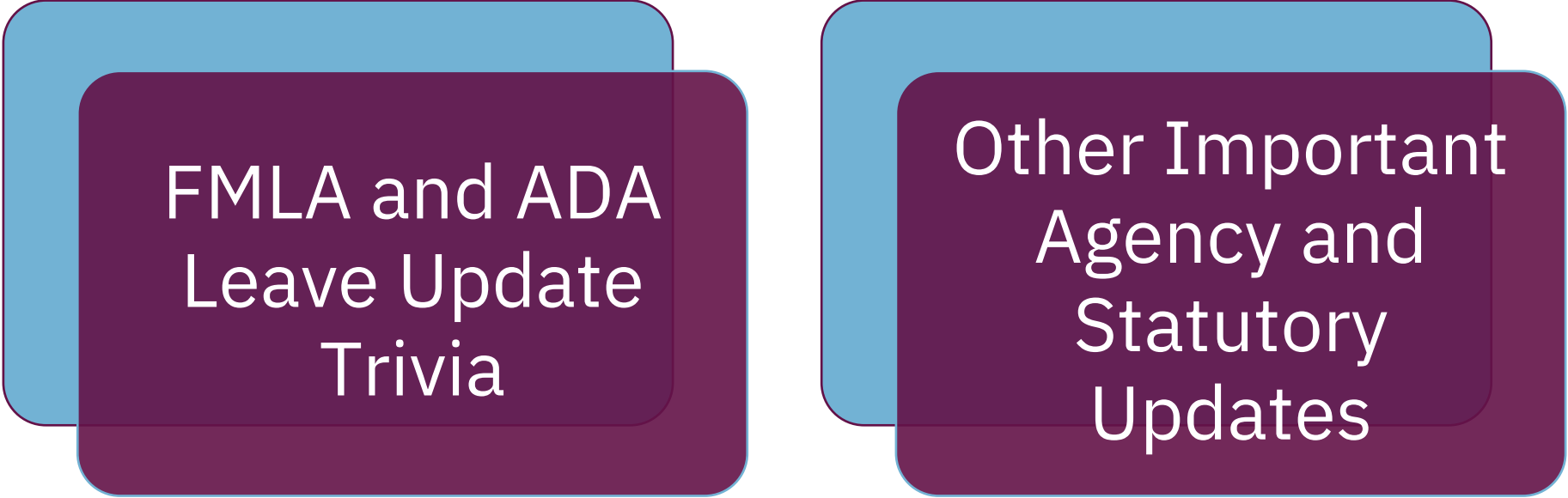
Sticky Employment Leave Issues

Matthew Deffebach, Partner
Dominique Baldwin, Associate

April 27, 2023



Roadmap



The graphic consists of two identical sets of overlapping rounded rectangles. Each set has a light blue rectangle in the background and a dark purple rectangle in the foreground. The text is centered within the dark purple rectangles.

FMLA and ADA
Leave Update
Trivia

Other Important
Agency and
Statutory
Updates

FMLA/ADA Refresher

- Family and Medical Leave Act (FMLA):
 - Provides job-protected leave from work for family and medical reasons
 - Covers Private-sector employers who employ 50 or more employees
 - Eligible employees may take up to 12 workweeks of leave in a 12-month period for any FMLA leave reason except military caregiver leave, and
 - Up to 26 workweeks of military caregiver leave during a single 12-month period.
- Americans with Disabilities Act Title I(ADA):
 - Prohibits discrimination against individuals with disabilities in employment
 - Applies to employers with 15 or more employees
 - Generally, requires employers to provide reasonable accommodations to qualified applicants or employees



TRIVIA

Quiz Time

Kierra is a customer service representative for a telephone service provider, based in Bloomington, Illinois. There are 51 employees at the Dallas headquarters. Kierra works out of her home in Galveston, Texas, which is about 980 miles from Bloomington. The nearest employee to Kierra is another telecommuting employee in Rockwall, Texas, about 250 miles from Galveston. Kierra requests FMLA leave for her daughter Anastacia's serious health condition.

How do you respond?

- A. Tell Kierra that she is provisionally eligible for FMLA leave, and mail her the paperwork.
- B. Tell Kierra that she is not eligible for FMLA leave because her condition is not that serious.
- C. Tell Kierra that she is not eligible for FMLA leave because there are fewer than 50 employees within a 75-mile radius of her worksite (*i.e.*, her home in Galveston).
- D. Tell Kierra that she cannot take FMLA leave because losing her for 12 weeks would be an undue hardship for the company.

FMLA: DOL Clarifies “Worksite” for Remote Employees

- Department of Labor, Wage and Hour, Field Assistance Bulletin 2023-1 (February 9, 2023)
- DOL provided clarity on employee’s “worksite” for the purposes of determining FMLA eligibility.
 - For remote or telework employees, the employee’s personal residence is not considered a worksite. Rather,
 - The worksite for FMLA purposes is the office to which the employee reports or from which their assignments are made.
- DOL also clarified that whether remote workers have met the 1,250 hours of service requirement is determined according to the principles under the FLSA for determining compensable hours of work
- Burden is on the employer to show hours worked, if records are not kept



Quiz Time

Jason, a construction worker, works for an employer that requires its employees to work mandatory overtime, with standard 10-hour days. Jason was diagnosed with cancer and missed 4 weeks of work due to ongoing radiation treatment. Jason was released to return to work following radiation but with a medical restriction from his doctor stating that he could only work a maximum of 8 hours a day and 40 hours per week. Jason advised his employer of this restrictions and requests to use his remaining FMLA leave to cover the daily mandatory overtime (2 hours). His employer told him that they would be unable to accommodate him because of its strict policy on mandatory overtime and the impact it would have on the employer's ability to have 24-hour coverage for his position. The employer subsequently terminated Jason's employment.

Did Employer violate the FMLA?

- A. Yes. This was a permissible use of intermittent leave under the FMLA.
- B. No, an employer is always permitted to enforce its facially neutral policies.
- C. No, Jason's leave should be viewed as a request for a reasonable accommodation under the ADA and the employer correctly determined that granting his request would cause an undue hardship.

DOL Clarifies Using FMLA to Reduce the Workday

- U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (February 9, 2023)
- Employer inquired as to whether an employee may use FMLA leave to limit their work schedule for an indefinite period if the employee has a serious chronic health condition and a health care provider confirms it necessitates medical leave to limit their schedule.
- Employer stated it was standard for all of its employees to work more than 8 hours per workday. Concerns of too many employees using leave like this.
- Employer indicated that it believed the requested accommodation was “better suited for reasonable accommodation under the ADA” than for FMLA leave.



DOL Clarifies Using FMLA to Reduce the Workday Continued

- The Wage and Hour Division concluded that an employee may continue to use FMLA leave for an indefinite period if they continue to be eligible and have qualifying reasons for leave.
- The employee may use FMLA leave for the remainder of each shift. The hours are counted against the employee's FMLA leave entitlement.
- Employees may work a reduced schedule indefinitely if they do not exhaust their FMLA leave.
- An employee may be entitled to invoke the protections of ADA and FMLA simultaneously.
- Once FMLA leave was exhausted, the employer must consider their accommodation obligations under the ADA.

FMLA
LY MEDICAL LEAVE ACT

True or False

- An employee who has a known ADA qualifying disability that results in flare ups (i.e. multiple sclerosis) is likely entitled to a remote work accommodation whenever flare ups occur, if the employee already teleworks occasionally?



Mobley v. St. Luke's Health System Inc, No. 21-2417 (8th Cir. 2022)

- Mobley was diagnosed with multiple sclerosis and requested an accommodation to telework whenever his MS flared.
- St. Luke's denied his request for blanket approval to telework during a flare-up and instead stated that it would review and approve his telework requests on a case-by-case basis.
- Mobley never requested further conversation or meetings. Instead, he resigned and sued St. Luke's for failure to accommodate.
- Court held: "by allowing Mobley to consistently work from home aside from his medical condition, St. Luke's implicitly demonstrated a belief that Mobley could perform his essential job functions without being in the office all the time."
- However, the Eighth Circuit affirmed summary for St. Luke's because it had engaged in the interactive process in good faith.
- Key takeaways:
 - The importance of the interactive process.
 - Courts are more readily accepting that remote work is a reasonable accommodation when an employee has successfully worked remotely in the past.



Other Important Agency & Statutory Updates



EEOC Is Actively Pursuing ADA Leave Claims

- EEOC sued Walmart (Raleigh, NC) for disability discrimination related to Walmart's termination of employee for alleged violations of Walmart's attendance policy due to disability-related leave – 3/30/2023
- EEOC sued Total Systems Services for disability discrimination related to employee's request for remote work as a reasonable accommodation due to high risk for COVID-19 Infection – 3/29/2023
- Ranews Management Company paid \$250,000 to settle EEOC discrimination lawsuit related to Ranew's termination of employee on leave for severe depression – 2/14/2022
- TrueBlue paid \$125,000 to settle EEOC discrimination lawsuit related to TrueBlue's termination of employee on leave for a psychiatric disability who indicated a need for intermittent leave for outpatient medical appointments – 2/24/2023
- S & C Electric Company paid \$315,000 to settle EEOC discrimination lawsuit related to S & C's termination of senior employee who attempted to return from significant medical leave for a broken hip.

State and Local Paid Leave Laws

- In addition to the FMLA and ADA, employers must also be cognizant of the interplay between these federal laws and state and local paid leave laws.
- Attempts by Austin, Dallas and San Antonio to enact paid sick leave ordinances were struck down by state and federal courts in Texas.
- However, employers should be aware of the growing trend of similar laws in other states and cities where their company operates.
 - States with mandatory paid sick leave laws include Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Washington, D.C.
 - Cities and counties with mandatory paid leave laws include Los Angeles (CA), San Diego (CA), San Francisco (CA), Chicago (IL), Cook County (IL), Montgomery County (MD), Minneapolis (MN), New York City (NY), Philadelphia (PA), Seattle (WA).
 - Beware of nuances in local leave laws!
 - While the FMLA permits employers to deny payment of bonuses or other payments based on goals such as hours due to the employee taking FMLA leave (assuming the payment would be denied to employees who were ineligible due to use of equivalent leave), the city of Minneapolis' sick and safe time ordinance states that "An employer may not take an employee's legitimate sick and safe time use into account when rating that employee's attendance record for the purposes of awarding a benefit such as... a bonus. Such actions would constitute unlawful retaliation."

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LABOR AND EMPLOYMENT
PRACTICE GROUP

Developments Under the FLSA

Laura O'Donnell, Partner

April 27, 2023



Helix Energy Solutions Group v. Hewitt (US SC Feb. 22, 2023)

- Hewitt worked as a tool-pusher for Helix Energy, firm providing services on offshore oil rigs.
- Supervised 12-14 workers & oversaw various aspects of rig operations
- Paid daily rate of \$963 when started in 2014, up to \$1,341 when term'd in 2017
- Annual earnings exceeded \$200K
- Is Hewitt exempt from FLSA overtime requirements?

Helix Energy Solutions Group v. Hewitt (US SC Feb. 22, 2023)

- FLSA Exemption for Executive (management):
 - Must be paid on a “salary basis”
 - Must be paid “salary level” of at least \$455/week
 - Must perform executive duties
 - Management
 - Directing 2+ FTE
 - Power to hire/ fire (or recs given weight)
- HCE Exemption – Regularly perform one duty

Helix Energy Solutions Group v. Hewitt (US SC Feb. 22, 2023)

- Salary basis = Regularly receives on weekly or less frequent basis, a predetermined amount, which is not subject to reduction based on quantity or quality of work
- Alternative = EEs paid on hourly, daily or shift basis can still meet provided promised amount > required salary level and bears a “reasonable relationship” to “amount actually earned”
- Held: Hewitt did not meet salary basis, entitled to OT
- FN: Are salary basis regulations inconsistent with FLSA?

Higgins v. Bayada Home Health (3rd Cir. March 15, 2023)

- Higgins was registered nurse for Bayada, which provided in-home medical and related support for patients
- Clinicians such as Higgins paid a salary but, to meet productivity mins, must accumulate specific # of “productivity points” every week
- If exceed productivity points, receive extra comp
- If fail to meet productivity points, deduction from PTO
- Is Higgins paid on a salary basis?

Higgins v. Bayada Home Health (3rd Cir. March 15, 2023)

- Salary basis = Regularly receives on weekly or less frequent basis, a predetermined amount, which is not subject to reduction based on quantity or quality of work
- Key question = whether ER makes *actual* deduction from base pay
- Held = PTO is not component of salary; reductions do not impact salary basis

Cunningham v. Circle 8 Crane Services (5th Cir. March 24. 2023)

- Cunningham worked as a crane mechanic for Circle 8 Crane, which owns and leases self-propelled hydraulic cranes to customers in several southwestern states.
- Cranes permanently affixed to truck chassis & can legally travel on highways
- Cunningham traveled to crane sites to perform repairs and maintenance
- Cunningham was paid a salary
- Is Cunningham exempt from FLSA overtime requirements?

Cunningham v. Circle 8 Crane Services (5th Cir. March 24. 2023)

- Motor Carrier Act exemption
 - Employed by motor carriers whose transportation of passengers or property is subject to the DOT's jurisdiction; and
 - Engage in activities that directly affect safety of operation of motor vehicles in transportation of passengers or property in interstate commerce
- DOT need not actually exercise its power for MCA to apply
- Cunningham argued bulk of work on crane, not truck chassis
- MCA applies if, in ordinary course, EE called on to perform safety-affecting activities

Cunningham v. Circle 8 Crane Services (5th Cir. March 24. 2023)

- MCA applies if, in ordinary course, EE called on to perform safety-affecting activities
- Held: Cunningham was exempt
- Cautionary MCA notes:
 - Vehicle GVWR must be > 10K
 - Small vehicle exception: if performs duties on < 10K, MCA does not apply in such workweek except:
 - Certain vehicles designed to transport passengers
 - Vehicles transporting placarded haz-mat

Still Waiting... Final Rule on Independent Contractor Classification Expected in May 2023

- In October 2022, the Department of Labor (“DOL”) announced a proposed rule for determining employee or independent contractor status under the Fair Labor Standards Act (“FLSA”).
- The 2021 Rule focused on two factors only: (i) control; and (ii) opportunity for profit or loss.
- Shortly before the 2021 Rule was set to take effect, the Biden administration ultimately withdrew the rule.



Proposed Independent Contractor Rule

- New rule (similar to old) returns to ambiguous economics reality, totality-of-circumstance approach – favors employee classification
- Does not account for gig economy, increased desire among workers to control work hours/ ensure a work-life balance, contributing to a greater demand for the flexibility that comes with an independent contractor relationships.

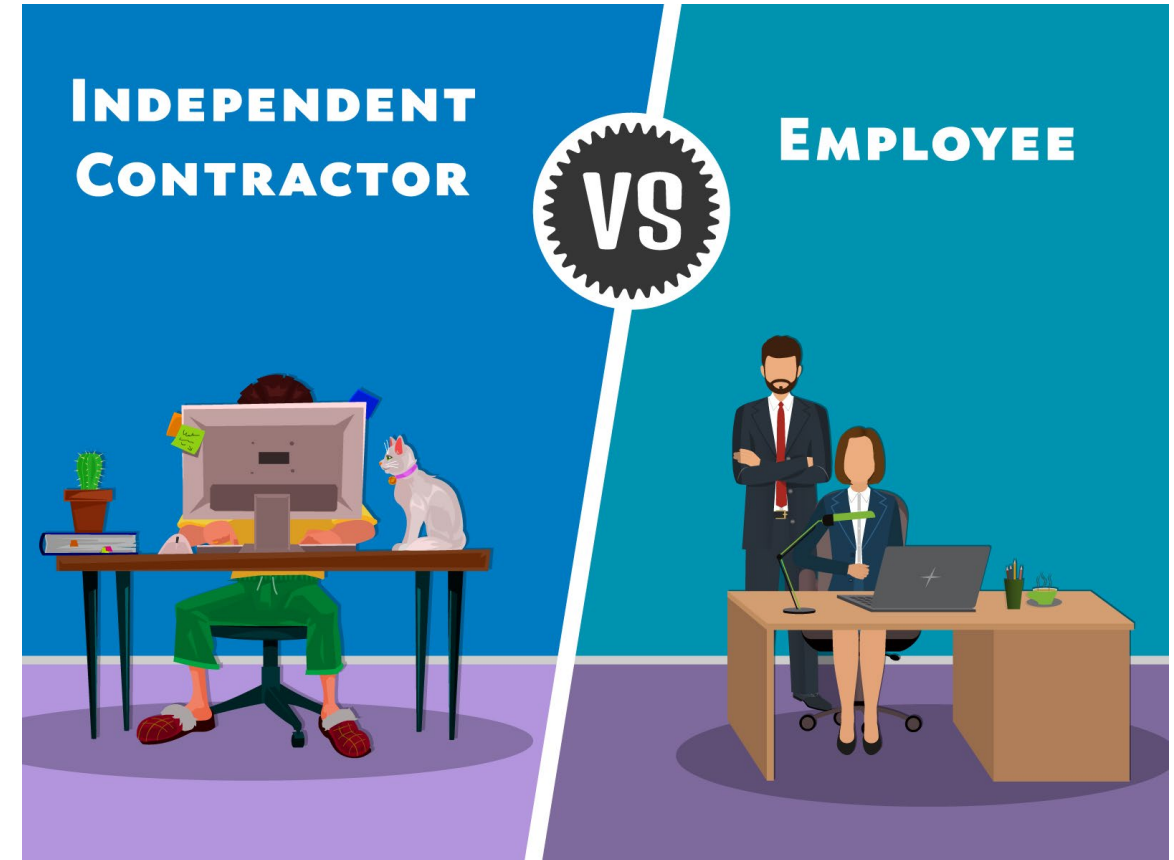



What is the Economic Reality Test?

A “**totality of the circumstances**” analysis:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. Extent to which the work performed is an integral part of the employer’s business
6. Skill and initiative

Would make it more difficult to classify workers as independent contractors.





Opportunity For Profit Or Loss Depending on Managerial Skill



Can the worker determine the **charge or pay for the work** (or meaningfully negotiate it)?



Does the worker have the **discretion to accept or decline jobs**?



Can the worker choose (or meaningfully negotiate) the **order and/or time in which the work is performed**?



Does the worker **market, advertise, or undertake any other efforts to expand business and/or secure more work**?

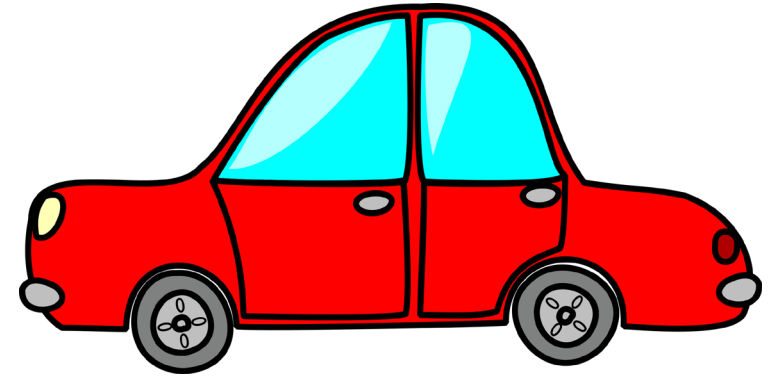


Does the worker have the **discretion to make decisions to hire others, purchase materials and equipment, and/or rent space**?

Investment by the Worker and the Employer

Is the worker's investment in the business “capital or entrepreneurial in nature”?

- Costs borne by the worker simply to perform the job (e.g., tools and equipment) are **NOT** evidence of capital or entrepreneurial investment.
- Use of a personal vehicle that the worker already owns or leases to perform work is **NOT** an entrepreneurial investment.
- What is the worker's total investment v. the Company's total investment?
- Investments by the contractor should “serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.”



Degree of Permanence of the Work Relationship



Employee? “[W]hen the work relationship is **indefinite in duration or continuous**, which is often the case in exclusive working relationships.”



Independent Contractor? “[W]hen the work relationship is **definite in duration, non-exclusive, project-based, or sporadic based** on the worker being in business for themselves and marketing their services or labor to multiple entities.”



Lack of Permanence? If the “lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, **rather than the workers’ own independent business initiative**, this factor is not indicative of independent contractor status.”

Nature and Degree of Control

Consider both active and reserved control (i.e, the right to control) by the entity receiving the services over “the performance of the work and the economic aspects of the working relationship.”

Relevant factors include whether the engaging entity:

- Sets the worker’s schedule;
- Supervises the performance of the work;
- Reserves the right to supervise or discipline the worker;
- Explicitly limits the worker’s ability to work for others, or places demands on the workers’ time that do not allow them to work for others or work when they choose;
- Uses “technological means of supervision” (e.g., a GPS) and/or
- Controls the prices or rates for services and the marketing of the services or products provided by the worker.



To What Extent is the Work Performed an Integral Part of the Engaging Entity's Business?

- Does not depend on whether any individual worker in particular is an integral part of the business, but instead whether the **function the worker performs** is an integral— i.e., “critical, necessary, or central to the [engaging entity’s] principal business.”

Skill and initiative

- Consider “whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.”
- If the worker does **NOT** use specialized skills in performing the work or if “the worker is dependent on training from the employer to perform the work,” more indicative of an employer-employee relationship.



Independent Contractor Agreements

Business-to-Business

- Not a “silver bullet”
- Starting point, but not an end point
- You can lose (not win) on the language of the Agreement

Drafting Tips

DON'T:

- Label contractor as an “employee”
- Refer to the service fee as “wages”
- Provide paid vacation, performance evaluations, etc.

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The New Landscape with Non-Compete Provisions + One Other New Problematic Issue

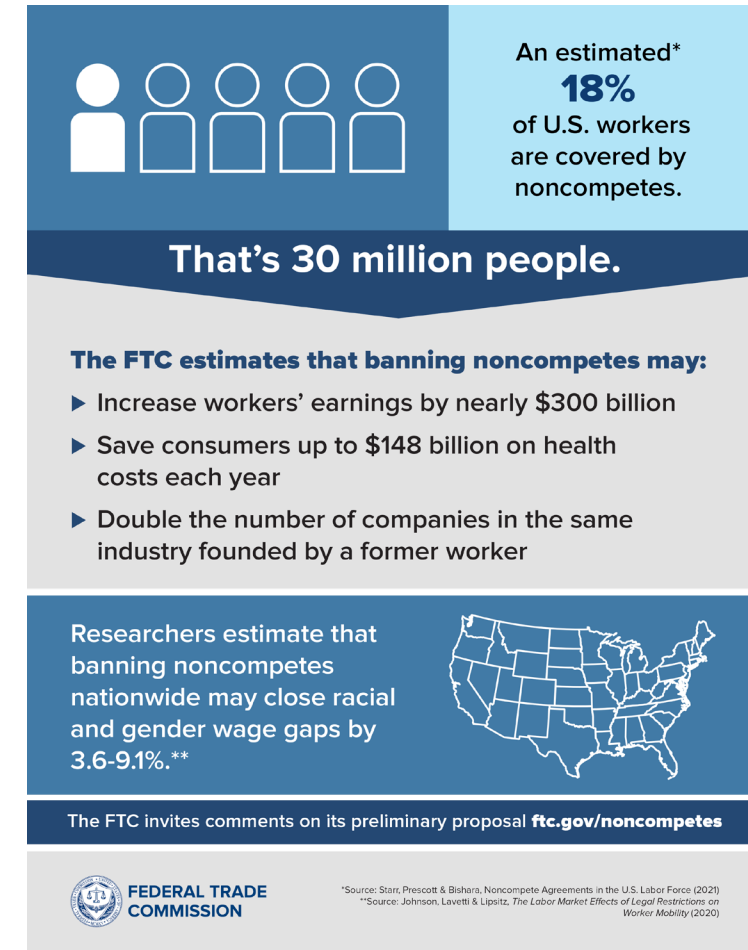
Adam Sencenbaugh, Partner

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A NEW FEDERAL APPROACH TO NON-COMPETES

- On January 5, 2023, the Federal Trade Commission (FTC) proposed a new rule that, if adopted, **bans non-compete provisions and requires rescission of existing non-compete agreements no later than the “compliance date.”**
- President Biden’s 2021 Executive Order to curtail the “unfair” use of non-compete clauses and other clauses or agreements that “may unfairly limit worker mobility.”
- The FTC argues it will result in a nearly \$300 billion per year increase in employee wages for roughly 30 million Americans.



WHAT IS A NON-COMPETE?

- Rule prohibits “unfair competition”:
 - “It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.”
- What is a non-compete clause?
 - A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer
 - Applies to “*de facto*” non-compete clauses



THE RECISSION REQUIREMENT

- Employer must rescind existing non-compete clauses to comply with the unfair competition requirement
- When?
 - No later than the “Compliance Date.”
 - Compliance Date is 180 days after date of publication of the final rule
- Rescission requires written, individualized notice to each current and former worker covered by a non-compete (*i.e.*, email, letter or text message)
- Notice to current and former employees must be provided 45 days after rescission
- What does the notice look like? Here is the “model” FTC notice:

A new rule enforced by the Federal Trade Commission makes it unlawful for us to maintain a non-compete clause in your employment contract. As of [DATE 180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], the non-compete clause in your contract is no longer in effect. This means that once you stop working for [EMPLOYER NAME]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] at any time following your employment with [EMPLOYER NAME].
- The FTC’s new rule does not affect any other terms of your employment contract. For more information about the rule, visit <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

A NEW FEDERAL APPROACH TO NON-COMPETES

- Limited exceptions:
 - When such agreements are entered in conjunction with the sale of a business entity; and
 - When a person's ownership interest in a business entity, or the assets of a business entity provided that the seller is a "substantial" (defined as holding **at least 25%** ownership interest) owner, member or partner in the business
- However, to the extent an owner of a business is also a "worker," and discontinues working for the business, the proposed rule could be read to prohibit any enforcement of any non-compete clause embedded in company documents if they continue to hold their ownership position.
- Supersedes all state laws BUT a state law is not inconsistent with this federal rule if it affords a worker **greater** protections than this federal rule.

STATUS OF THE PROPOSED RULE

- The proposed rule is **not** final, and the language may change through the rule-making process.
- More than 26,000 comments received on proposed rule.
- There has been significant pushback to the proposed rule from business leaders across all industries.
- We expect the final rule to face legal challenges as the FTC's rulemaking authority with this rule has been called into question.



LEGAL CHALLENGES AHEAD

- Does Section 6(g) provide FTC authority to regulate “unfair competition”?
- Would granting FTC authority to regulate “unfair competition” violate non-delegation doctrine?
- The “major questions” doctrine?
- Challengers will likely seek injunction to block enforcement nationwide.



FEDERAL ENFORCEMENT OF NO POACHING AGREEMENTS

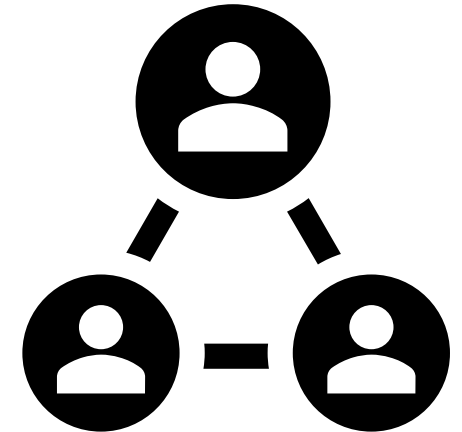
- In recent years, the Department of Justice (DOJ) has refocused its attention on no poaching agreements
 - No poaching agreement includes an agreement among competing employers to limit or fix the terms of employment for potential hires
- In 2016, the DOJ and the FTC issued joint guidance on how no poach agreements are subject to criminal and civil antitrust charges when no poach agreements are not reasonably necessary to any separate, legitimate business collaboration between employers

FEDERAL ENFORCEMENT OF NO POACHING AGREEMENTS

- DOJ brought civil enforcement actions against eBay and Intuit, Lucasfilm and Pixar, and Adobe, Apple, Google, Intel, Intuit and Pixar
 - In each case, the competitors agreed not to cold call each other's employees
 - In two cases, at least one company also agreed to limit its hiring of employees who currently worked at a competitor
- FTC brought case against employer for entering into agreements to boycott temporary nurses' registries to eliminate competition among nursing homes for the purchase of nursing services
- After a string of court losses, the DOJ secured its first victory in a no poach case with a corporate guilty plea in *U.S. v. Ryan Hee and VDA OC LLC, formerly Advantage on Call LLC*, ECF. 1, 2:21-cr-00098-RFB-BNW (D. Nev. 2021).
 - The DOJ alleged the company entered a conspiracy with an unnamed competitor to refrain from recruiting or hiring each other's nurses and not to compete with wages in violation of Section 1 of the Sherman Act.
 - The company was ordered to pay \$62,000 in fines and \$72,000 in restitution.

FEDERAL ENFORCEMENT OF NO POACHING AND WAGE FIXING AGREEMENTS

- DOJ has issued guidance for “Human Resources Professionals”
 - Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal
 - No agreements with an individual at another company about employee salary or other terms of compensation, either at a specific level or within a range (“wage-fixing agreements”)
 - No agreements with an individual at another company to refuse to solicit or hire that other company’s employees (“no poaching agreements”)
 - Avoid sharing confidential information with competitors
 - Agreement need not be written or oral –
 - Other circumstances such as evidence of discussions and parallel behavior – may lead to an inference of an agreement
 - Wage-fixing agreements are *per se* illegal unless reasonably necessary to a larger legitimate collaboration between the employers



TEXAS NON-COMPETES

- Texas permits non-compete agreements that are:
 - (1) ancillary to or part of an enforceable agreement;
 - (2) reasonable concerning time, geographical area, and scope of the activity;
 - (3) and that impose no greater restraints than what is necessary to protect the employer's business.
- Physician Exception: Tex. Bus. & Com. Ann § 15.50(b)
 - Buy-Out Provision



A photograph of three construction workers in profile, looking towards the right. They are wearing white and yellow hard hats and clear safety glasses. The worker in the foreground is a Black man wearing a green shirt. The other two workers are white men, one in a white shirt and one in a blue shirt. The background is dark and out of focus.

DRAFTING NON-COMPETE AGREEMENTS

- Describe the business that is “off-limits” – the “competing business”
- Narrowly and practically define the geographic region
- Be careful about “industry-wide, all positions off-limits”
- Be reasonable about time-limits
- Non-solicitation of clients can be very useful, so be strategic
- CHECK each applicable state law

AVOIDING NON-COMPETE PROBLEMS



- Always inquire about restrictive covenants and NDAs before hiring
- Include representations and compliance with NDA and restrictive documents with prior employer in offer letter, employment agreement and/or NDA
- Ensure strategy in place to comply with prior employer agreements
- Ensure compliance with the new employee and the supervisor

EXAMPLES -- OTHER STATES' LAWS

- Significant developments over last few years → very important to check non-compete law in each state applicable to employees
- Most states limit non-compete clauses by imposing limits to the duration, geographic scope, and the defined competitive activity.
- But, restrictions now much more burdensome and state-specific
- States with nearly total bans on non-compete agreements:
 - California (sale of business exception)
 - North Dakota
 - Oklahoma

OTHER STATES ENFORCEMENT OF NON-COMPETE AGREEMENTS -- EXAMPLES

- Examples of States with restrictions on non-compete agreements:
 - Colorado
 - With a few exceptions, Colorado non-compete agreements are generally void unless they apply to “highly compensated” employees who meet certain salary requirements, are for the protection of trade secrets, and are not broader than reasonably necessary for the protection of trade secrets.
 - Colorado bans employers from entering non-compete agreements with employees who earn \$112,500 or less.
 - Oregon
 - The legislature expanded its non-compete law to limit duration to 12 months post-termination and prevents employers from offering non-competes to employees who earn \$108,575.64 or less.
 - Illinois
 - The Illinois Freedom to Work Act prevents employers from entering non-compete agreements with employees who earn \$75,000 or less.
 - Non-solicitation unenforceable unless employee’s earnings exceed \$45,000
 - Massachusetts
 - Non-competes longer than 1 year are unenforceable except in very specific circumstances
 - Must be limited to a geographic area commensurate with where the employee worked during the last 2 years of their employment, and to the type of work the employee performed during those 2 years

NLRB AND “NO INTERFERENCE” PROVISIONS

- In February 2023, the Board, in *McLaren Macomb*, held that employers may not offer employees severance agreements that broadly waive their rights under the NLRA
 - Confidentiality and non-disparagement provisions were problematic in this case
- The Board observed that the employer’s **offer itself** is an attempt to deter employees from exercising their statutory rights, “at a time when employees may feel they must give up their rights in order to receive benefits in the agreement.”
 - Non-disparagement clause advised employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives
 - Confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor
 - The severance agreement included monetary and injunctive sanctions for breach of these provisions

NO INTERFERENCE

- In March 2023, the NLRB issued a memo to all Field Offices with guidance on the Board's recent decision in *McLaren Macomb*.
 - Provisions must be narrowly tailored justifying “the impingement on workers’ rights”
 - Confidentiality clauses that restrict the dissemination of proprietary or trade secret information may be considered lawful
 - A narrowly-tailored non-disparagement provision “that is limited to employee statements about the employer that meet the definition of defamation...may be found lawful”
 - Applies to current and former employees

NO INTERFERENCE

- Unlawful provisions generally do not void the entire agreement – just the “offending provisions”
- NLRB suggests remedying problematic provisions now by contacting employees with overly broad provisions and advising them of the certain provisions that are null and void and employer will not seek to enforce the provisions.
 - But, the original offer of agreement itself is still a technical violation
- What about a “savings clause”?
 - Specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions
 - Savings clause should make sure provisions in agreement do not interfere with their rights, which include: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities

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