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A Professional Law Corporation

2024 Employment Law Update

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Semi-Monthly Employment Law Update (email newsletter)

Jan. 25, 2024

Content

- Salt Lake SHRM's Annual Chapter Meeting
- Recently, in Nevada: The Nevada Supreme Court issues a ruling on blue-penciling non-competes
- In case you missed it: The NLRB found employees may record employers without consent, if the employees fear retaliation
- Looking ahead: The frequently applied *Chevron* deference test is under review

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Jan. 11, 2024

Content

- New Year Resolutions for HR Professionals
  - Amending Handbooks to Comply with Recent NLRB Decisions
  - Amending Severance Agreements to Comply with Recent NLRB Decisions
  - Ensuring that Independent Contractors are Properly Classified
  - Amending Handbooks to Ensure that Nursing Employees Are Accommodated

Now Happening at Parsons

SALT LAKE SHRM

Join Parsons Behle & Latimer at Salt Lake SHRM's Annual Chapter Meeting

Members of Parsons Behle & Latimer's employment and

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* You'll also have the option to download a PDF copy of today's presentation once you've completed the form.

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Legal Disclaimer

This presentation is based on available information as of March 12, 2024, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Equal Employment Opportunity (EEO) Update

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NEW EEOC Enforcement Guidance on Harassment

Proposed guidelines released 9/29/23; EEOC now working to finalize them.

- Found here: https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace
- Why now? EEOC says between 2016-2022, one-third of all EEOC charges included harassment allegations.

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NEW EEOC GUIDANCE ON HARASSMENT

Highlights

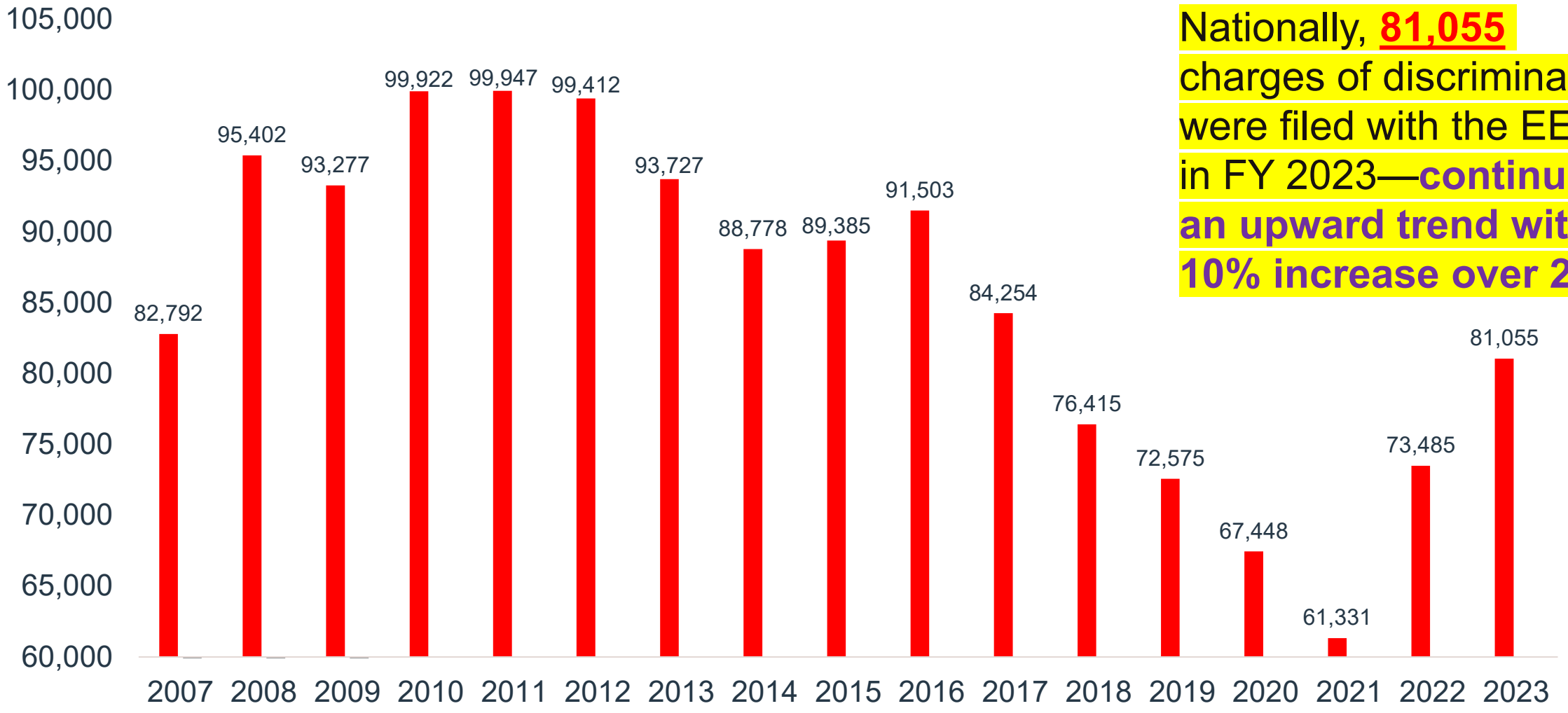
- Protected classes include traits or characteristics linked to class (e.g., name, cultural dress, accent, manner of speech, grooming, hair textures, hair style, attire, diet).
- Sex protected class includes orientation and identity. Harassment can include:
  - intentional and repeated use of pronouns inconsistent with someone's gender identity (misgendering).
  - denial of access to bathrooms or other sex segregated facility inconsistent with gender identity.

NEW EEOC GUIDANCE ON HARASSMENT

Highlights

- Harassment can be based on misperception that a person has a protected characteristic, for example mistakenly harassing a Hispanic employee based on belief the person is Pakistani.
- “Associational discrimination” is prohibited (e.g., bias against a white employee married to a black person).
- Reinforces that stereotyping harassment based on expectations of how persons should act or appear is barred. For example, gender stereotypes might include “He’s not manly” or “She’s not feminine.”)
- Harassment by a supervisor may heighten severity due to supervisory power. Due to this power, a supervisor’s harassment outside the workplace may be actionable.

EEOC CHARGE DATA (UPDATED MARCH 2024)



Nationally, **81,055** charges of discrimination were filed with the EEOC in FY 2023—**continuing an upward trend with a 10% increase over 2022**.

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EEOC/UALD Charge Statistics

www.eeoc.gov/statistics/enforcement-and-litigation-statistics

For 2022, the top 5 most frequently-filed charges **nationally** were:

Retaliation (51.6%)

Disability (34%)

Race (28.6%)

Sex (27%)

Age (15.6%)

For 2022, the top 5 most frequently-filed charges in **Idaho** were:

Retaliation (47.4%)

Disability (39.5%)

Religion (26.3%)

Sex (26.3%)

Race (17.1%)

PREGNANT WORKERS FAIRNESS ACT

December 22, 2022

Congress passed the

Pregnant Workers Fairness Act (PWFA)

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PREGNANT WORKERS FAIRNESS ACT

- PWFA requires that employers with at least 15 employees must provide reasonable accommodations for pregnant applicants and employees that are needed for pregnancy, childbirth and related medical conditions.
- PWFA became effective June 27, 2023.
- EEOC has issued proposed regulations. Final regulations due out any day.

PWFA IS NOT EXACTLY LIKE ADA

- PWFA accommodations are similar in some ways to the analysis under the Americans with Disabilities Act (ADA), with some key differences.
- Like the ADA, reasonable workplace accommodations must be provided to pregnant applicants/employees unless an undue hardship would result.
- Unlike the ADA, the PWFA provides an express timeline for accommodation: essential job functions must be modified or eliminated on temporary basis, up to 40 weeks (absent showing of undue hardship).

PWFA IS NOT EXACTLY LIKE ADA

- Unlike the ADA, the proposed PWFA rules identify four accommodations that should be granted in almost every circumstance.
  - These are allowing covered employees: (1) to have extra time for bathroom breaks; (2) to have food and drink breaks; (3) to drink water on the job; and (4) to sit or stand as necessary.
- Employers not allowed to get health care provider confirmation that an employee needs these four accommodations.

PREGNANT WORKERS FAIRNESS ACT

The proposed rule contains a "non-exhaustive list" of conditions covered by the Act.

- The list is quite broad, and includes current pregnancy, past pregnancy, potential pregnancy, lactation (breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth and "having or choosing not to have an abortion."
- The proposed rule also states that the Act covers postpartum anxiety and depression.

NLRB Updates

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What is the NLRB?

- The federal agency tasked with enforcing the National Labor Relations Act (NLRA).
- The NLRA covers the rights of unionized workers . . .

- The NLRA also codifies rights of *all* employees in **Section 7** of the Act. In that Section, the NLRA guarantees employees' right to engage in concerted activity, when two or more non-supervisory employees act for their mutual aid or protection about terms and conditions of employment.

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A Handbook Provision to Consider . . .

In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of the Company will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

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We protect what matters.

NLRB Issues *Stericycle* Decision, Changing the Standard for Employer Conduct Rules

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Have you checked your handbook lately?

On August 2, 2023, the NLRB issued a long-anticipated opinion in a case called *Stericycle*, which analyzes whether employer conduct rules are lawful.

Your policies likely address conduct standards, such as rules requiring professionalism and civility.

These rules need to be balanced against an employees' Section 7 rights to engage in **concerted activity** (to discuss together, or complain about, the terms and conditions of employment).

Prior to *Stericycle*, we applied an employer-friendly balancing test to weigh the conduct rule against the Section 7 rights.

Facially neutral rules about professionalism and civility were presumptively valid.

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The Pendulum Swings Back in Favor of Employees

Stericycle reversed that precent, adopting a new case-by-base balancing approach to determine is a conduct rule has "a reasonable tendency to chill employees from exercising their Section 7 rights."

The Board will read conduct rules from the perspective of a "reasonable employee."

If a "reasonable employee" could interpret the rule in a way that limits Section 7 rights, the rule will be presumptively invalid.

The employer's intent in making the rule is irrelevant.

Another Handbook Provision to Consider . . .

The Company strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment. All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

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Confidentiality Instructions Changed Too

For internal investigations, many employers instruct all witnesses to maintain the confidentiality of the investigation—during and after the investigation.

- For supervisors, there's no change. Recall that supervisors don't have Section 7 rights. Feel free to tell them to keep it secret.
- But what about non-supervisors?

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Confidentiality Instructions to Non-Supervisors

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you needed to apply "individualized scrutiny" in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In *Stericycle*, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality with non-supervisors.

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So . . . what can we do?

- The standard is retroactive, so start thinking through your policies now.
- Look for workplace rules or policies addressing employee conduct, behavior, social media use, or speech.
  - Can those rules be more narrowly tailored?
- Add disclaimer language
  - Address policies' non-application to protected Section 7 rights.
- Modify language in handbooks about confidentiality in investigations—handle on a case-by-case basis for non-supervisors.

NLRB Enters the Non-Compete Fray

On May 30, 2023, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum declaring that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7.

- Abruzzo asserts that non-competes interfere with Section 7 rights by making workers believe they'll have a harder time replacing lost income if they're discharged for exercising their Section 7 rights. Abruzzo's memorandum is not an official statement or ruling by the NLRB. But, as the NLRB's GC, Abruzzo sets the direction for regional offices and instructs them on the types of complaints to file against companies.

DOL Publishes Final Rule on Independent Contractors – *Haven't we been here before?*

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Let's have a little history lesson about the DOL and Independent Contractors…

- The traditional worker classification "economic realities test" articulated in the DOL's guidance over time originates from 1947 Supreme Court decision *United States v. Silk*.
- 2015: the Obama Rule
  - Six-factor test
  - Primary focus is whether the worker is economically dependent on the employer
- 2021: the Trump Rule
  - June 2017: Withdrew Obama Rule
  - January 2021: Put in the Trump Rule
    - Five factors
    - But two core factors are paramount: Control and opportunity for profit or loss

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What does the Final Rule say?

This final rule continues to affirm that a worker is not an independent contractor if they are, as matter of economic reality, economically dependent on an employer for work.

- Six Factors—but no factor has predetermined weight and additional factors may be relevant:
  - (1) opportunity for profit or loss depending on managerial skill;
  - (2) investments by the worker and the potential 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 potential employer's business; and
  - (6) skill and initiative.

The Final Rule’s Guidance on the Control Factor

This factor considers the potential employer's control (including reserved control) over the performance of the work and the economic aspects of the working relationship.

- Facts relevant to control: does the potential employer set the worker's **schedule**, supervise the **performance** of the work, or explicitly limit the worker's ability to **work for others**?
- Does the potential employer use technological means to **supervise** the performance of the work (such as by means of a device or electronically), reserve the right to supervise or **discipline** workers?

The Final Rule's Guidance on the "Integral Part of Employer's Business" Factor

- This factor considers whether the work performed is an **integral** part of the potential employer's business.
- This factor weighs in favor of the worker being an employee when the work they perform is **critical, necessary, or central** to the potential employer's principal business.

The Supreme Court for Employers: Changes and Cautions from the 22-23 Term

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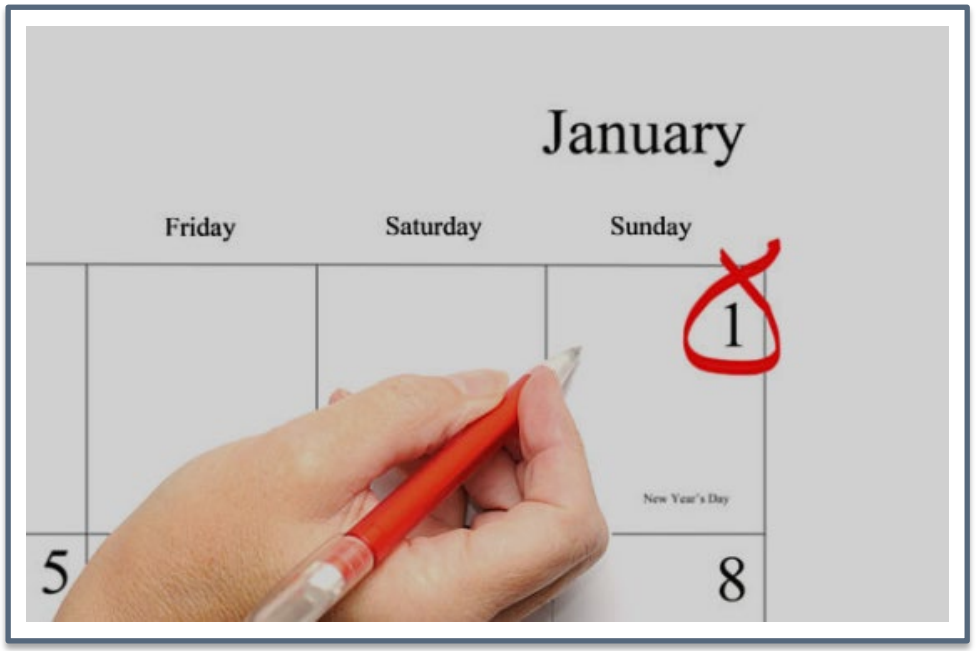
Religious Accommodation – Raising the Bar

Title VII of the Civil Rights Act of 1964 requires employers provide reasonable accommodations for their employees' religious beliefs and practices.

In late June 2023, the United States Supreme Court issued a decision in *Groff v. DeJoy*—a case that reset the standard for the burden an employer must meet in demonstrating that it is not required to grant an employee's request for a religious accommodation.

What *is* an "undue hardship"?

Religious Accommodation – Raising the Bar



An employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.

Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost."

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Religious Accommodation – Raising the Bar

Similarly, the Americans with Disabilities Act (ADA) requires employers provide disability accommodations unless an employee's request imposes an "undue hardship."

However, the standard for "undue hardship" under the ADA is far more stringent, requiring a showing of "significant difficulty or expense."

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Religious Accommodation – Raising the Bar

- The plaintiff, Gerald Groff worked for the U.S. Postal Service (USPS) and asked for Sundays off, asserting that his religion as an Evangelical Christian forbad Sunday work.
- USPS asked Goff's coworkers to voluntarily trade shifts with him, but that did not work.
- Ultimately, USPS denied Groff's request and then disciplined him when he missed work on Sundays. Groff resigned and filed suit.

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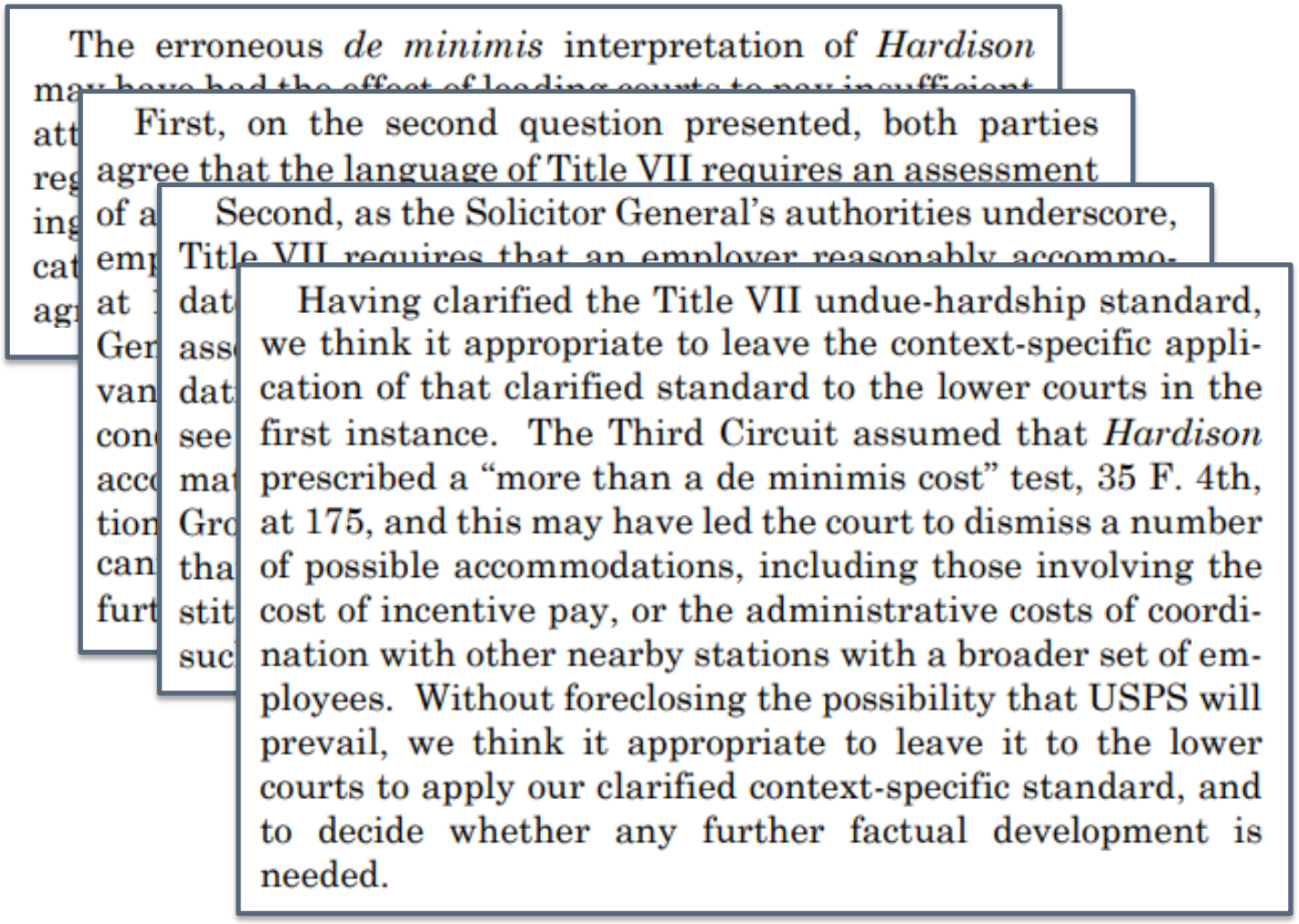
Religious Accommodation – Raising the Bar

A federal district court and appellate court found in favor of USPS because Groff's request for Sundays off imposed "more than a de minimis cost" because the request "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."

But the Supreme Court reversed.

Religious Accommodation – Raising the Bar



The erroneous *de minimis* interpretation of *Hardison*

First, on the second question presented, both parties agree that the language of Title VII requires an assessment

Second, as the Solicitor General's authorities underscore,

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

Takeaways

The *de minimus* standard is out, but the work of making "context-specific" determinations of how to apply the undue-hardship standard has been left to the lower courts.

Be careful about "coworker impacts," and keep an eye on "reasonably accommodating *the practice*," not simply thinking about whether certain workplace changes are reasonable.

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What's Next for DEI Initiatives?

Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

That's Title VI, not Title VII.

But: Section 1981 of the Civil Rights Act of 1886 "offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship . . . ."

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What's Next for DEI Initiatives?

In *Students for Fair Admissions v. Harvard/UNC*, a nonprofit sued Harvard and UNC, "arguing that their race-based admissions programs violate Title VI and the Equal Protection Clause of the Fourteenth Amendments.

Lower courts found both admissions programs "permissible under the Equal Protection Clause and [the Supreme Court's] precedents."

What's Next for DEI Initiatives?

After assessi pplicant's als along these lines, the reader es an out whether the student should b d then "writes a comment defending nded decision." *Id.*, at 598 (internal quota ted). In making that decision, readers may o a "plus" based on their race, which "may be si individual case." *Id.*, at 601 issions decisio , "pro-visiona v. *Uni-versity* MDNC, Nov. 9,

The final stage of Harvard's process is called the "lop," during which the tentativel ted students is winnowed further at th ss. Any appli-cants that Harva rs this stage are placed on a "lop lis nly four pieces of information: legacy d athlete status, financial aid eligibility, 0 F. 3d, at 170. The full com to lop. 397 F. S e com-mittee c ce the lop pro is set. *Ibid.* I deter-minativ mitted African 78.

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What's Next for DEI Initiatives?

Although Title VI and Title VII have similar language, **affirmative action in the employment context is distinct from the education context** and governed by different rules and case law.

Employers **cannot consider race or other protected characteristics when making decisions**.

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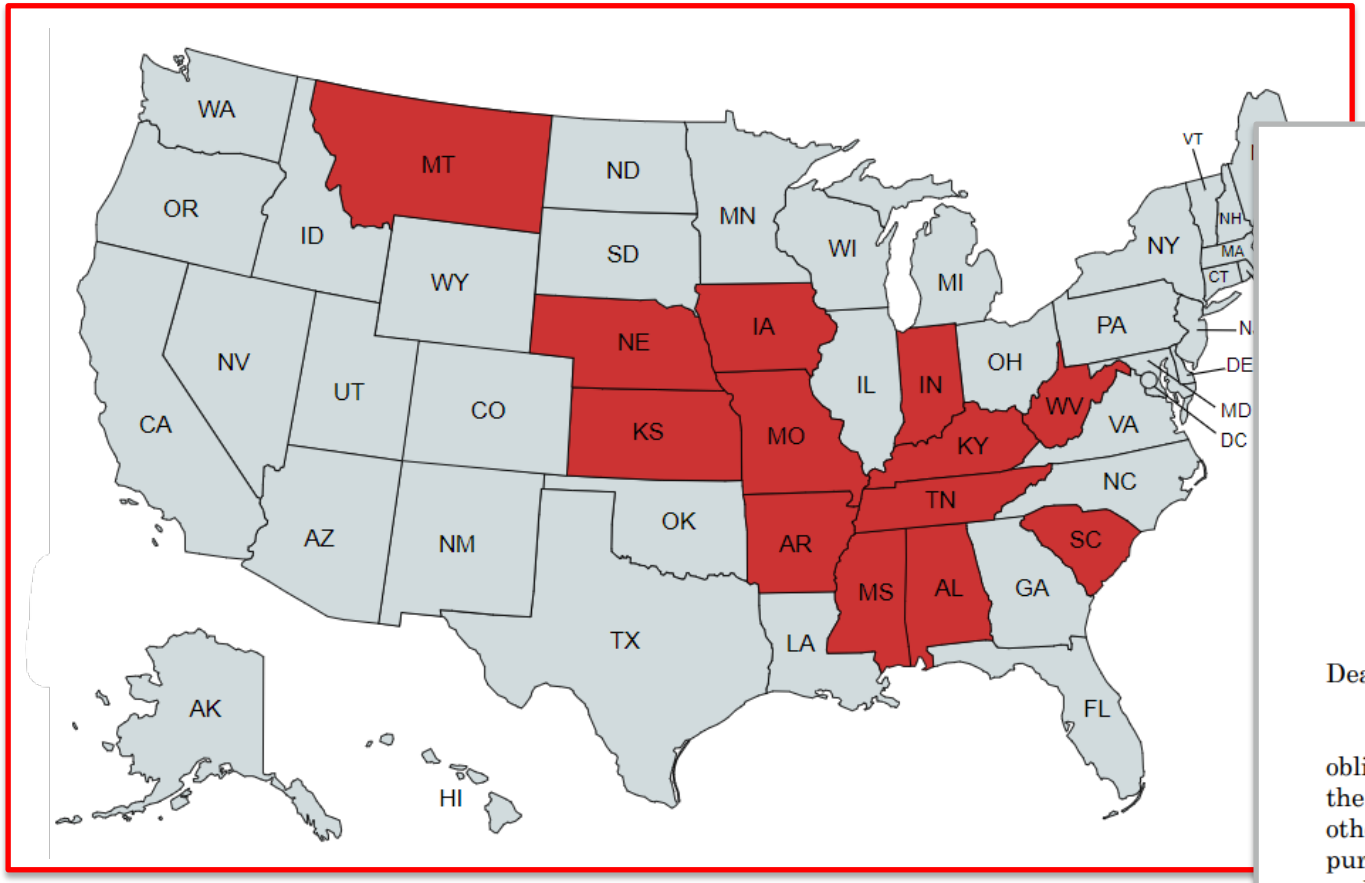
What's Next for DEI Initiatives?



July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of "diversity, equity, and inclusion" or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

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What's Next for DEI Initiatives?

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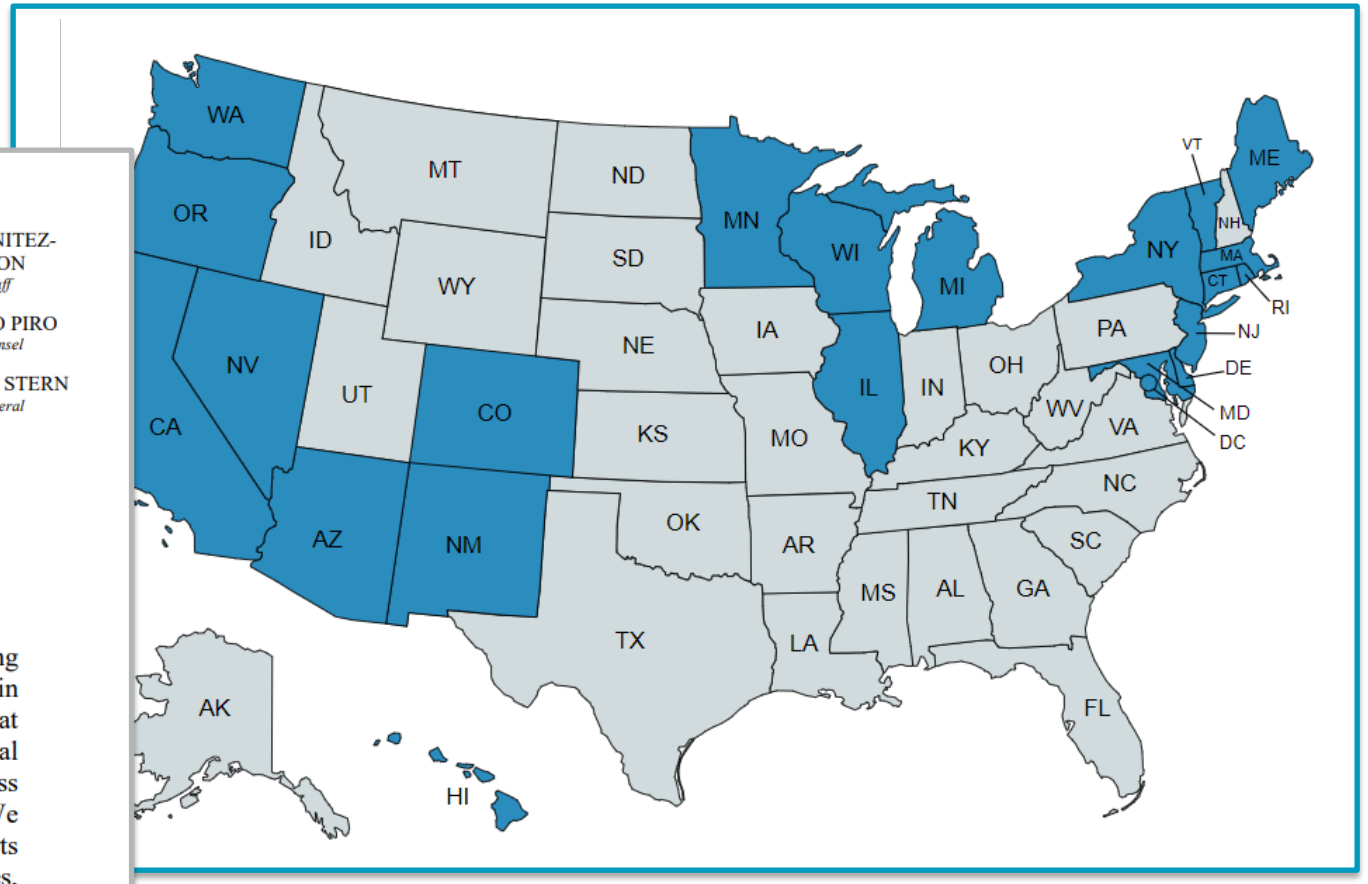
July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.



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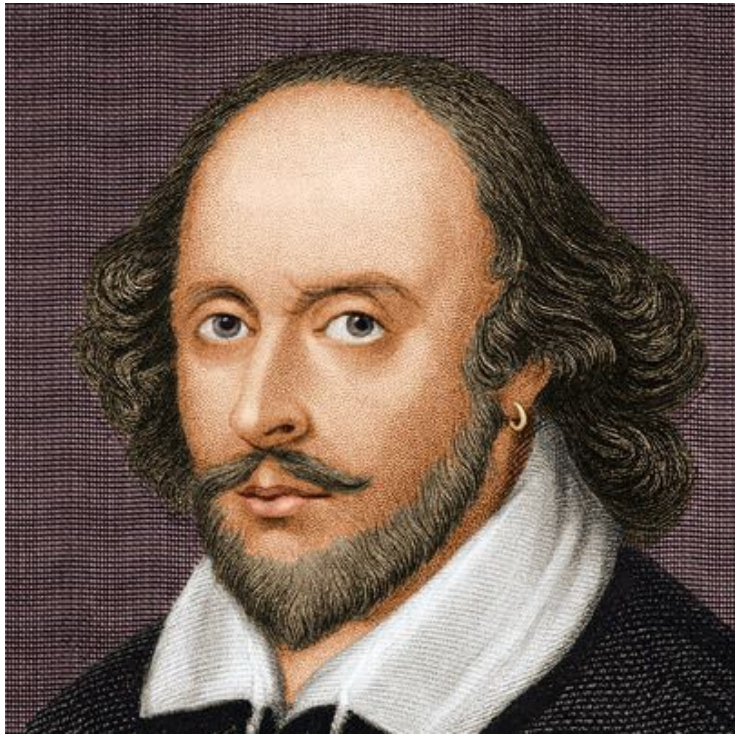
What's Next for DEI Initiatives?

"The first thing we do, let's [get] all the lawyers."
--*Henry VI, Pt. 2*, Act IV, Scene 2



BIGLAW

Two Biglaw Firms Sued Over Diversity Initiatives

Affirmative action in college was only the first target.

By KATHRYN RUBINO on August 22, 2023 at 2:29 PM

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What's Next for DEI Initiatives?

Lawyers suing ***lawyers*** . . .

about hiring ***certain lawyers*** . . .

instead of ***other lawyers***.

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What's Next for DEI Initiatives?

Takeaways

The decision in *SFFA v. Harvard/UNC* has no direct current legal impact on employers. The framework (Title VI/Equal Protection Clause) does not apply to private employers, and in the context of employment, the use of race in employment decisions was **already** prohibited.

Employers may still: promote diversity in the workplace, have DEI training (generally), implement DE&I programs and policies, improve hiring pipelines, etc.

But DE&I programs will likely be subject to increased scrutiny and more frequent legal challenges. We recommend you work with legal counsel to assess the benefits and costs of any current program and to ensure compliance with existing law.

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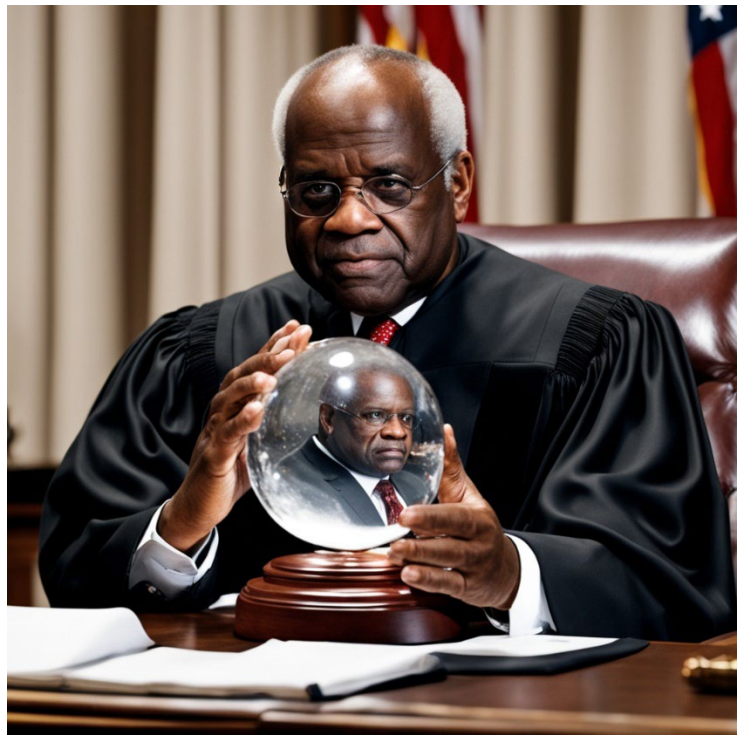
What May Be on Tap for This Year?

Muldrow v. City of St. Louis (heard Dec. 6, 2023)

The New York Times

Supreme Court Leans Toward Police Officer in Job Bias Case

The officer, Jatonya Muldrow, said she had been transferred to a less desirable position based on her sex. Lower courts said that she had not shown concrete harm.



The Supreme Court appears poised to conclude that *transfers* could constitute discrimination within the meaning of Title VII, even if the employee does not suffer economic damages.

At oral argument, JJ. Thomas and Barrett asked directly about the overlap between decisions regarding "differential treatment in the workplace" and DEI initiatives.

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Mark Your Calendars!

WEDNESDAY, OCTOBER 23, 2024 | 8 A.M. – 1:30 P.M.

Boise Centre East | 195 South Capitol Blvd. | Boise, Idaho

More details to follow.

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