



# Unraveling the Latest Trends in Employment Law and Discrimination

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November 9, 2023

The Fisher Phillips logo is located in the bottom right corner. It consists of a red, three-dimensional rectangular shape that appears to be a folded piece of paper or a ribbon. The words "Fisher" and "Phillips" are written in white, sans-serif font, stacked vertically on the red background.

Fisher  
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# Agenda

- Discrimination Update
- Recent lawsuits and court opinions
- What you can do
- Questions



# EEOC Update

- EEOC's 2023 budget increased \$35M
  - Filled hundreds of new jobs and staff vacancies
- Increased funding directed at the strategic enforcement plan.
- Number of charges had been trending down for 5 years
  - FY 2022 - charges increased by 20% (FY 2021: 61,331, FY 2022: 73,485)
  - \$ recovered is trending up
    - \$484M for FY 2021
    - \$513.7M for FY 2022

# EEOC Strategic Plan

- [FY 2022-2026](#)
- Overarching framework for achieving the EEOC's mission
- Several process, procedure and community outreach goals
  - One is to increase resolutions through conciliation and litigation
  - Not setting how many cases get cause findings, rather an expectation for relief in cases with cause findings
  - What we've seen with the EEOC in Louisiana

# EEOC Strategic Enforcement Plan

- [FY 2024-2028](#)
- Targeting discrimination, bias, and hate directed against religious minorities (including antisemitism and Islamophobia), racial or ethnic groups, and LGBTQI+ individuals.
- Expanding the vulnerable and underserved worker priority to include additional categories of workers who may be unaware of their rights under equal employment opportunity (EEO) laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections.

# EEOC Strategic Enforcement Plan Cont.

- Updating the emerging and developing issues priority to include protecting workers affected by pregnancy, childbirth, or related medical conditions, including under the new Pregnant Workers Fairness Act (PWFA) and other EEO laws; employment discrimination associated with the long-term effects of COVID-19 symptoms; and technology-related employment discrimination.
- Highlighting the continued underrepresentation of women and workers of color in certain industries and sectors, such as construction and manufacturing, finance, tech and other science, technology, engineering, and mathematics fields.

# Pregnant Workers Fairness Act (PWFA)

- Applies to employers who have 15 or more employees
- Protects a “qualified employee” - defined as “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions”
- *In effect requires employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same as accommodation requests under the ADA, which does not define disability to include pregnancy or pregnancy-related conditions.*



# Pregnant Workers Fairness Act (PWFA)

## It Prohibits:

- Failing to make reasonable accommodations to known limitations of qualified employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

# Pregnancy Related Accommodations and Leave (Louisiana)

- Effective August 1, 2021
  - [La. R.S. 23:341.1](#)
  - [La. R.S. 23:342](#)
  - Employers with over 25 employees
  - Provide workplace accommodations for females for pregnancy, childbirth and related medical conditions
  - Provide 6 weeks of unpaid leave for “normal” pregnancy and childbirth
  - Provide up to four months of unpaid leave for pregnancy related disability
  - Permit substitution of accrued paid leave
  - Restoration rights
  - [Workplace poster](#) and notice requirements

# EEOC Strategic Enforcement Plan Cont.

- Recognizing employers' increasing use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions.
  - [Guidance issued in May 2023](#)
  - Looking at adverse and disparate impact based on protected traits
- Preserving access to the legal system by addressing overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements when they restrict workers' ability to obtain remedies for civil rights violations.

# New EEOC Poster for 2023

- EEOC has updated its “EEO is the Law” poster
- “Must display poster in a conspicuous location at the worksite
- Must replace old poster within “a reasonable amount of time”
- The poster was released in October 2022
- Available in [English](#) and [Spanish](#) now





**The Fifth Circuit's 30-Year Precedent is No More**

# From “Ultimate Employment Decision” to “Affecting the Terms, Conditions, or Privileges”

- For the last 30 years = “Ultimate Employment Decision”
- Now = “Affecting the Terms, Conditions, or Privileges” of their employment
- Review any policies or practices for potential bias towards employees with protected characteristics, not just those about hiring, firing, promoting, etc.



# DEI Programs in the Workplace

# DEI = Diversity, Equality, Inclusion

- How “Race-Conscious” College Admission Policies Can Potentially Affect Employers
- What has Florida and Texas been up to?
- If you have a DEI program, make sure it does not involve quotas or goal-targets for minorities, women, etc.
  - Hiring and promotions should be based on business-related criteria and merit





# Transgender Employees

# Transgender Employees

- [EEOC Guidance](#)
- Pronouns
- Bathrooms
- Hostile Work Environments
- The Goal: Create a healthy, safe, and inclusive environment for all workers



# Changing the Religious Accommodation Burden

# Changing the Religious Accommodation Burden Standard

- Gerald Groff versus the United States Post Office
- “De Minimus” is not the minimum requirement anymore
- Make sure your supervisors are taught to bring any requests for time off for religious services to you
- Relevant factors:
  - The accommodations at issue
  - The practical impact of the accommodation on the nature, size, and operating cost of the employer
  - Impact on co-workers can be included, but that alone won't be enough. It must also have substantial ramifications for the conduct of the employer's business



# **Working From Home as a Disability Accommodation**



# Work From Home (WFH)

- WFH may make our pets happy, but what about sufficiently running a business?
- If you did it before, you may have to do it again
- Evaluate accommodation requests on a case-by-case basis, and be able to back up why some employees can be accommodated, but not others





# Associational Discrimination

# Associational Discrimination Under the ADA

- What does it mean if my employee's spouse or parent has a disability?
- Reasonable Accommodation
- Measure and evaluate employee performance uniformly, regardless of any connections to a person with a disability.
  - Actual documented performance should drive your decision making





**Questions?**

# Hiring Foreign Nationals

## South Central Industrial Association 2023 Employment Law Update

November 9, 2023

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# Form I-9 General Compliance

It is unlawful for employers to knowingly hire or continue employing individuals who are not authorized to work in the United States.

# Penalties

- Paperwork violation fines now range between **\$272 to \$2,701** per I-9 form for first violation.
- Knowingly hiring or employing unauthorized workers have fines ranging from **\$676 to \$5,404** per violation.
- Second- and third-violations of knowingly hiring or employing unauthorized workers range between **\$5,404 up to more than \$27,018 per violation.**
- Arrests and criminal convictions for knowingly hiring or employing unauthorized workers are on the rise as well.

# Examples of Fines Recently Assessed

- **Minnesota staffing company - \$227,000** fine for I-9 violations even though no unauthorized workers were found. The person signing the form on behalf of the employer in section 2 never actually met with the employee and viewed original documents (they only saw faxed document copies sent by a remote representative who met with employee). Also fined for missing an I-9 for one employee. <http://imlaw.biz/minnesota-based-staffing-company-hit-with-227000-fine-for-i-9-violations>
- **California Studio - \$605,250** fine for repeated paperwork violations like neglecting to sign section 2 of the form on 797 I-9s, failure to fill out I-9s for four employees, failure to locate eight form I-9s at the time of inspection, failure to ensure that three workers checked a box in section 1 indicating immigration status, failure to ensure that two workers signed section 1, failure to ensure that two workers entered their alien numbers on the form, and finally, for missing list A, B and C documents. <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Largest-I-9-Paperwork-Penalties.aspx>

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# The New Form I-9

## Edition 08/01/23

Must Use by 11/01/2023

# Changes to the New Form I-9

Section 1 and 2 on the first same page

Section 2 includes, "Alternative Procedure" checkbox

List of acceptable documents on Page 2. NOTE Form I-766 EAD card is listed as List A and NOT List C document

Supplement A, Preparer/Translator Certification separate page

Supplement B (fka Section 3), Reverification/Rehire Section separate page with multiple sections

<https://www.uscis.gov/sites/default/files/document/forms/i-9.pdf>

Must use 08/01/23 edition by 11/01/2023. Stop using Oct. 2019 edition.

**Phillips**

**Employment Eligibility Verification**  
 Department of Homeland Security  
 U.S. Citizenship and Immigration Services

USCIS  
 Form I-9  
 OMB No. 1615-0047  
 Expires 07/31/2026

**START HERE:** Employers must ensure the form instructions are available to employees when completing this form. Employers are liable for failing to comply with the requirements for completing this form. See below and the [Instructions](#).

**ANTI-DISCRIMINATION NOTICE:** All employees can choose which acceptable documentation to present for Form I-9. Employers cannot ask employees for documentation to verify information in Section 1, or specify which acceptable documentation employees must present for Section 2 or Supplement B, Reverification and Rehire. Treating employees differently based on their citizenship, immigration status, or national origin may be illegal.

**Section 1. Employee Information and Attestation:** Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.

Last Name (Family Name) First Name (Given Name) Middle Initial (if any) Other Last Names Used (if any)

Address (Street Number and Name) Apt. Number (if any) City or Town State ZIP Code

Date of Birth (mm/dd/yyyy) U.S. Social Security Number Employee's Email Address Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements, or the use of false documents, in connection with the completion of this form. I attest, under penalty of perjury, that this information, including my selection of the box attesting to my citizenship or immigration status, is true and correct.

Check one of the following boxes to attest to your citizenship or immigration status. (See page 2 and 3 of the instructions.)

1. A citizen of the United States  
 2. A noncitizen national of the United States (See instructions.)  
 3. A lawful permanent resident (Enter USCIS or A-Number):  
 4. A noncitizen (other than item Numbers 2, and 3, above) authorized to work until (exp. date, if any):

If you check item Number 4, enter one of these:  
 USCIS A-Number OR Form I-84 Admission Number OR Foreign Passport Number and Country of Issuance

Signature of Employee Today's Date (mm/dd/yyyy)

If a preparer and/or translator assisted you in completing Section 1, that person MUST complete the [Preparer and/or Translator Certification](#) on Page 3.

**Section 2. Employer Review and Verification:** Employers or their authorized representative must complete and sign Section 2 within three business days after the employee's first day of employment, and must physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, documentation from List A OR a combination of documentation from List B and List C. Enter any additional documentation in the Additional Information box; see instructions.

	List A	OR	List B	AND	List C
Document Title 1					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 2 (if any)	Additional Information				
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 3 (if any)					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					

Check here if you used an alternative procedure authorized by DHS to examine documents.

**Certification:** I attest, under penalty of perjury, that (1) I have examined the documentation presented by the above-named employee, (2) the above-listed documentation appears to be genuine and to relate to the employee named, and (3) to the best of my knowledge, the employee is authorized to work in the United States.

First Day of Employment (mm/dd/yyyy):

Last Name, First Name and Title of Employer or Authorized Representative Signature of Employer or Authorized Representative Today's Date (mm/dd/yyyy)

Employer's Business or Organization Name Employer's Business or Organization Address, City or Town, State, ZIP Code

For reverification or rehire, complete [Supplement B, Reverification and Rehire](#) on Page 4.

Form I-9 Edition 08/01/23 Page 1 of 4

# General I-9 Requirements

- Foreign Nationals should be marking box 4 and will likely have an expiration date
- If employee's **work authorization** will expire, reverify
  - EAD card
  - I-94 or I-797 approval notices for H-1B, E, L, O-1, TN, P, H-2A, H-2B
  - Form I-20 for CPT or DS-2019 for J-1
- Do not re-verify green cards, passports or driver's licenses
- Calendar work authorization expiration for reverification
- Reverify on or before expiration date



# General I-9 Requirements

- Section 2 Document Inspection
- Physical Review
  - In-person by onsite employee or *Authorized Representative*
  - *Authorized Representative*
    - Can be any person including Notary
      - California exception: Immigration Consultant
    - Have HR manage the *Authorized Representative*
      - Video conference call like *Alternative Procedure*
- Alternative Procedure – Virtual Verification via Video Conference

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**Section 1: New hire must complete on or before first day of employment.**



**Section 2: Employer or Authorized Representative must complete within three business days of Employee's first day of employment.**

Note: Employment lasts less than 3 days? Complete on first day.

Calendar work authorization expiration dates (Does NOT include List B documents, green card, or U.S. passport)

# Alternative Procedure

## Requirements

- Must be enrolled in E-Verify and in good standing
- If offered to one, then must be offered to all employees at that company site
- May offer only to offsite employees
- Must attach copies front and back

## Process

- Send Employee I-9 to complete before video conference
- Employee scans to Employer the document(s) chosen to verify
- Employee completes Section 1 and sends I-9 back to Employer
- Employer schedules video conference but no later than 3 business days after start date
- Employer reviews original documents by video and compares to scanned copies
- Employer completes Section 2, marks alternative procedure box and attaches scanned copies
- Employer safely stores completed I-9

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# Avoiding Immigration- Related Discrimination

Immigration And Nationality Act

# Discrimination Under The Immigration And Nationality Act (INA)

## • **Citizenship Status Discrimination**

- The Immigration and Nationality Act (INA) protects US Persons from discrimination based on immigration status
- US Person means:
  - US Citizens
  - Nationals
  - Lawful Permanent Residents (LPRs); and
  - Asylees / Refugees

# Discrimination Under The Immigration And Nationality Act (INA)

## • **National Origin Discrimination**

- The Immigration and Nationality Act (INA) protects work-authorized individuals from discrimination based on national origin
- Applies to all work-authorized individuals regardless of citizenship status

# Discrimination Under The Immigration And Nationality Act (INA)

## • Unfair Documentary Practices During Employment Eligibility Verification

- Unfair documentary practices during the employment eligibility verification process, which refers to the I-9 and E-Verify processes, include actions such as:
  - Requiring too many or specific I-9 documents
  - Improperly rejecting I-9 documents
  - Forcing an employee to complete an I-9 or go through E-Verify when not required

# Recruiting

- **Job Postings – US Citizenship**

- Cannot require / prefer US citizenship unless it is a legal requirement for the position
- Statements that can be inferred to mean US citizenship is required for all positions can be problematic

# Recruiting

## • **Job Postings – Security Clearances / Export Compliance**

- Permissible to state that position requires security clearance
- Permissible to state that candidates must be able to get export license
- Export licensing cannot be basis to require US citizenship



# Recruiting

- **Job Postings – Immigration Sponsorship**

- Permissible to state that position is not eligible for immigration sponsorship
- Still must be careful that posting does not dissuade US workers from applying

# Applicant Screening

- **Unacceptable**

- Questions about applicant's lineage, ancestry, national origin, descent, place of birth, native language, or national origin of applicant's parents or spouse
- How applicant acquired the ability to read, write or speak a foreign language

- **Acceptable**

- Inquiries into applicant's ability to read, write, and speak English or foreign languages when required for the specific job

# Applicant Screening

- **Permissible Questions about Immigration Status**
  - Are you authorized to work in the US?
  - Do you now or will you in the future require immigration sponsorship?
- It also is permissible to clarify the second question - e.g.:

# Applicant Screening

## • Permissible Questions about Immigration Status

- For the purposes of this question, immigration sponsorship means an H-1B visa, an O-1 visa, an E-3 visa, TN status and “job flexibility benefits” (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer. Please ask if you are uncertain whether you may need immigration sponsorship or desire clarification. If so, are you currently in a period of Optional Practical Training (OPT)? If you are currently in OPT, are you eligible for a 24-month OPT extension based upon a degree from a qualifying U.S. institution in Science, Technology, Engineering or Mathematics.

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# US Worker Shortage

Obtaining Foreign Talent

# H-1B

- For “Specialty Occupation”
- Full-time or part-time
- Employer-specific
- “Specialty Occupation” Means:
  - theoretical and practical application of highly specialized knowledge
  - **and**
  - attainment of a bachelor's or higher degree, or equivalent experience, in the specific specialty for entry into the occupation

# H-1B Cap and Lottery

- Annual Numerical Limit (Cap)
  - 65,000 (Established in 1990\*)
  - 20,000 “Master’s Cap Exemption”
  - Cap Exempt Institutions
- Lottery Opens Every March for October 1<sup>st</sup> Start Date

• *\*Approximately 40,000,000 jobs added to the US workforce since 1990*



# H-2A

- Agricultural Workers
- Temporary or Seasonal Nature
- No Cap
- Often Considered Cost-Prohibitive





# H-2B

- Non-Agricultural Workers
- Seasonal, Peak Load, One-Time Need, Intermittent
- 66,000 Annual Limit
  - DHS announced on 11/3 that there would be an additional 64,716 H-2B worker visas available for Fiscal Year 2024
- Split into Two Periods Starting April 1<sup>st</sup> and October 1<sup>st</sup>
  - Can Submit 90 Days in Advance
    - April Filing Period Opens January 1<sup>st</sup>
    - October Filing Period Opens July 3<sup>rd</sup>
  - Applications received in the first 3 days are randomized into groups for priority
    - Group A is about 35,000
    - All Subsequent Groups are About 20,000

# F-1 CPT / OPT

- F-1 Students can get work authorization for private employers through:
  - Curricular Practical Training (CPT) – working while in school such as internships
  - Optional Practical Training (OPT) – one year of work authorization after graduation
  - STEM OPT – 24-month extension of OPT for graduates with STEM degrees who work for E-Verify employers

## TN - USMCA

- Coming to U.S. to work in profession listed on USMCA schedule
- Generally, require a bachelor's degree in field, but depends on occupation
- Canadians apply at border
- Mexicans apply at Consulate
- Three-year stay
- Renewable indefinitely

# J-1 Exchange Visitor

- Cultural Exchange Category Managed through Department of State
- Categories include:
  - Trainees
  - Interns
  - Research Scholars
  - Summer Work Travel



# Permanent Residence

- Normally a 3-step process involving the Department of Labor and USCIS
- Takes 2-3 years, but can lead to work authorization earlier
- Avoids visa renewal expenses
- Employees are not tied to the employer once issued and often beforehand

**Questions?**

**Thank You!**

**DAVID S. JONES**

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# Louisiana and Other States' Wage and Hour Laws

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November 9, 2023

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# What Happened to the FLSA?

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- 2023 5,190 Federal FLSA lawsuits filed
- 58 in Louisiana
- DOL collected \$150,000,000 in back wages in 2022
- Proposal to raise minimum salary for exemptions to \$1,059 per week





# States and Cities Are Acting Anyway

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- Minimum Wage
- Overtime
- Industry Specific
  - Fast Food
  - Hotels
- Scheduling
- Paid Sick Leave



# Louisiana Has a Long History of Laws Governing Wages

- The Civil Code
- Company Stores 1916
- Employee Loans 1912





# The Paycheck Law

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- Must inform employees upon hire:
  - Amount
  - Frequency
  - Method
- Requires pay no less often than twice monthly for certain industries
  - Manufacturing
  - Oil
  - Public Service Corporations



# Payment of Wages on Termination

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- Discharge
  - Next regular payday or 15 days whichever is sooner
- Resignation
  - Payday for the pay cycle in which the employee was working at time of discharge or 15 days whichever is sooner
- Vacation
- Penalties



Termination by [Nick Youngson](#) [CC BY-SA 3.0](#) [Pix4free](#)



# Louisiana Prohibits Wage Forfeitures and Fines

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- Forfeiture: A situation where the employee does not receive pay he has already earned because of his discharge
- Fines: A pecuniary penalty imposed for the violation of a law, rule, or regulation.



ICIAL PENALTY



# Problem Areas

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- Commissions
- Bonuses
- Unlimited PTO



# Pay Discrimination

Louisiana Equal Pay Act

Louisiana Employment  
Discrimination Law





# Drug Tests and Medical Examinations

- Louisiana law prohibits requiring employees to pay any cost for:
  - Medical examinations
  - Drug tests
  - Fingerprinting
  - Records retrieval
- Exception: Pre-employment drug test or medical exam if:
  - Full-time non-seasonal employee
  - Earns at least \$8.25 an hour
  - Quits in first 90 days not due to a substantial change in employment

# Employees in Other States

- Minimum wage
- Overtime
- Pay frequency
- Pay notices
- Pay methods
- Scheduling laws
- Expense reimbursement





**Thank you for  
attending!**

# NLRB & OSHA Updates

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## South Central Industrial Association

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November 9, 2023



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# NLRB & OSHA

## National Labor Relations Board

- Formed in 1935
- Enforces National Labor Relations Act

## OSHA

- Formed in 1971
- Enforces the Occupational Safety & Health Act





# National Labor Relations Act

Passed in 1935 (Oldest federal workplace statute)

Congress declared it to be “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred **by encouraging the practice and procedure of collective bargaining** and **by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing**, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

# Why All Employers Need to Understand the National Labor Relations Act

“Federal law protects employees engaged in union activity, but that's only part of the story. **Even if you're not represented by a union - even if you have zero interest in having a union - the National Labor Relations Act protects your right to band together with coworkers to improve your lives at work.**”

<https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law> (Emphasis added).

# Who is Covered by the NLRA?

- The NLRA applies to **most private sector employers**, including manufacturers, retailers, private universities, and health care facilities.
- The NLRA does not cover public-sector employees, agricultural and domestic workers, independent contractors, employees working for their parents or spouses, workers for air and rail carriers covered by the Railway Labor Act, and supervisors.

• <https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards>





# National Labor Relations Act Section 7

## Employees Shall Have The Right To:

- Self-organize, form, join, or assist labor organizations
- Bargain collectively through their chosen representatives
- Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or
- Refrain from any or all such activities....

# Traditional Section 7 Rights

- Forming or attempting to form or join a union
- Assisting a union to organize employees
- Going out on strike to secure better working conditions
- Refraining from union activities
- Banding together for mutual aid or protection regarding employment terms and conditions

# Section 7 Rights

Modern examples of rights protected by Section 7:

- Complaints via email and social media
- Repeated disruptive complaints regarding pay and benefits
- Organized and concerted work stoppages and walk-outs
- Discussions of safety investigations
- The right to not being discriminated or retaliated against for engaging in protected concerted activities



# NLRB's Application of Section 7

- During the "Obama Board" years, the NLRB dramatically expanded application of Section 7
  - Lawfulness of handbook policies and work rules governing **non-union** employees
- During the "Trump Board" period, the NLRB aggressively rolled back many of the prior Board's changes
- The "Biden Board" is swinging back to Obama Administration and in some ways going further in favor of labor

# GC MEMO 21-03: Protected Concerted Activity

- GC's intent to “robustly enforc[e] the Act's provisions that protect employees' Section 7 rights.”
- Proclaims that certain conduct is “inherently concerted.”
- Even when not “explicitly connected to workplace concerns.”
- Includes political and social justice advocacy w/nexus to employees' “interests as employees.”
- No longer depends on extent to which others agree.
- Increased walkouts, sickouts, protests and wildcat activity.
- **Allows for broad scrutiny of all rules governing workplace conduct.**

# *Stericycle* Decision

- As the General Counsel previewed in GC Memo 21-04, she prosecuted a case against Stericycle for maintaining certain handbook rules in violation of Section 7.
- In 2015, the employer in *Stericycle* distributed a revised employee handbook to its employees, which included a rule restricting the use of personal electronic devices to break times only. The union filed an unfair labor practices charges and the NLRB's general counsel (GC) issued a complaint under the theory that the rule unlawfully infringed on employees' Section 7 rights.
- The administrative law judge (ALJ) disagreed and held that any impact on Section 7 activity was outweighed by Stericycle's desire to ensure employees did not use their cell phones in hazardous work areas.
- The GC appealed the ALJ's decision to the board, and argued, among other things, the Board's then-current framework which deemed a given rule lawful where its potential impact on Section 7 rights was outweighed by the employer's business justifications - should be thrown out and replaced with a more employee-friendly standard.

# *Stericycle* Decision Cont.

- The NLRB obliged by swinging the pendulum back toward Obama-era standards focusing on whether policies “tend to coerce” employees.
- In doing so, the Board overruled its prior *Boeing* decision and returned to its *Lutheran Heritage* standard.
- Chairman McFerran: “[I]n interpreting a rule [under the *Stericycle* test], the Board will take the perspective of the ‘economically dependent employee’ who contemplates engaging in Section 7 activity.”
- Member Kaplan (Dissent): “Employers would be well advised to. . . avoid a finding of presumptive unlawfulness . . . by retaining competent labor counsel to craft, for inclusion in their employee handbooks, language that would make it impossible . . . to interpret any rules contained therein to restrict Section 7 activity.”

# The Impact of *Stericycle*

- The NLRB will once again analyze work rules from the perspective of the employee.
- If the Board determines an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumptively unlawful.
- The employer may then rebut the presumption by proving the rule **advances a legitimate and substantial business interest** that the employer is **unable to advance with a more narrowly tailored rule**.



# What kinds of policies are affected?

- Conduct policies
- Social media policies
- Moonlighting policies
- Policies regarding confidential information
- Cell phone/photography/recording policies
- At-will employment
- Media contact
- Any other policy that regulates employee conduct

# What Does This Mean for Employers?

- Employers should review all workplace policies governing employee conduct in light of *Stericycle*.
- Decisions in the prior *Lutheran Heritage* era will be helpful guides on how the NLRB analyzes decisions, but *Stericycle* adds an emphasis on the business need for policies.
- This provides an opportunity for employers to consider the business purpose of each policy and to tailor the policy to narrowly meet that need.

# Takeaways

- Be mindful that an employee's conduct may constitute protected concerted activity
  - Train supervisors on this concept
- Don't retaliate against an employee
- Reach out to outside counsel for guidance
- Stay tuned for potential changes in the law



# Severance Agreements

- In *McLaren Macomb*, 372 NLRB No. 58 (February 21, 2023), the Board held that the “mere proffer” of a severance agreement containing overly broad confidentiality and non-disparagement provisions violates the Act.
- This decision overruled Trump-era precedent and is applicable to both union and non-union employees.
- This decision also encompasses an employer’s offer of severance agreements that broadly waive their rights under the NLRA.

# *McLaren Macomb* NLRB Ruling

- Eliminating confidentiality and non-disparagement is the most risk-adverse option.
- Narrowly tailoring these provisions to affirmatively allow Section 7 activity and to file unfair labor practice charges may be the best practice.
- Takeaway: review and update your form separation/severance agreement for non-supervisory personnel.



# A Quick Note on Union Organizing...

- NLRA Core - right to organize by forming or joining a union
  - Private employment - less than 7% unionized
  - Unions won 80% of elections in past 12 months
  - Number of elections has increased
- Recent Developments:
  - Focus on underserved communities
  - Political support increasing
  - NLRB law changes favorable to unions
  - Younger workers attracted to unions (social change)
  - University Medical Center (New Orleans) - Nurses
- Be on the look out for any signs of organizing - time is of the essence

# What to Expect from OSHA in 2023/2024

- Reliance upon Regulations, not Legislation
- Focus on training for new/temp workers and subcontractors
- The Heat Illness Standard
- Increase Workplace Safety Penalties for Violations
- Changes in subpoenas and inspection procedures

# OSHA's Official 2023 Agenda

- **Heat Illness in Prevention in Outdoor & Indoor Work Settings** – Small Business Advocacy Review (SBAR)
- **Infectious Disease** – NPRM September 2023
- **Improve Tracking of Workplace Injuries and Illnesses** – Final Rule Published July 21, 2023
- **Worker Walkaround Representative Designation Process** – Proposed Rule on August 30, 2023
- **Lock Out/Tag Out Update** – NPRM was slated for July 2023 but has not been announced





# The Heat Standard

- In 2021 OSHA issued an advanced notice of proposed rulemaking (ANPRM) for a heat-specific workplace standard - *Inspection Guidance for Heat-Related Hazards*
- Workers, particularly those in agricultural and construction industries, are at risk of hazardous heat exposure, leading to visits to the emergency room and even death.
- OSHA notes that jobs in these fields are disproportionately held by workers of color.

# The Heat Standard

- During 2019, OSHA says its heat-related inspections occurred most often in: roofing, postal and delivery service, construction and contracting, masonry, landscaping, restaurants, and warehousing and storage.
- Large percentage of heat illness incidents occur in “very small businesses” with 10 or fewer employees. Federal heat illness standard could apply to small businesses.
- Prior OSHA state plans have required:
  - protocols for access to drinking water;
  - shade or cool-down areas;
  - breaks;
  - health monitoring, and emergency response measures;
  - heat illness prevention plans; and
  - recordkeeping requirements.
- Expect OSHA to issue a Notice of Proposed Rulemaking (NPRM)

# A New Infectious Disease Standard

- OSHA stated that it is prioritizing its resources on the COVID-19 health care standard, but it is possible OSHA could then turn to the broader rule after.
- OSHA previously rebooted rulemaking for an infectious disease standard in high-risk environments like hospitals, labs and correctional facilities that would expressly cover COVID-19 along with other dangerous pathogens.
- OSHA announced a plan to create a standard regulating infectious diseases in the workplace. (TB, chicken pox and shingles, measles, SARS, MRSA, and COVID-19)
- Impacted by SCOTUS' decision to strike down the ETS

# Expect to be Inspected by OSHA

## **Change 1: Instance-by-Instance Citations**

- Used for “high gravity” serious violations
- Language of the rule supports citation for each instance of non-compliance
- Conditions to include:
  - lockout/tagout,
  - machine guarding,
  - permit-required confined space,
  - respiratory protection,
  - falls,
  - trenching, and
  - other-than-serious violations specific to record keeping.

# Expect to be Inspected

## Change 1: Instance-by-Instance Citations (continued)

- Factors inspectors will use:
  - Receiving a willful, repeat, or failure to abate violation within the past five years where that classification is current;
  - Failure to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39;
  - Citations are related to a fatality/catastrophe; and
  - Recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

# Expect to be Inspected

## **Change 2: Grouping will be Discouraged**

- OSHA reminded Regional Administrations and Area Directors of authority not to group citations.
- Instead, issue separate citations.
- Looks to existing guidance on instance-by-instance citations contained in OSHA's Field Operations Manual and CPL-02-00-080: "Handling of Cases to be Proposed for Violation-by-Violation Penalties."

# The Fairfax Memo – Changes to Inspection Procedures

- OSHA recently proposed a rule revisiting and revitalizing the Obama Administration's Fairfax Memo
- Union-friendly changes to current OSHA inspection procedures
- What was the Fairfax Memo?
  - 2013 Memo by former Deputy Assistant Secretary Richard E. Fairfax
  - Permitted workers at a worksite, even without a CBA, to designate a person affiliated with a union or other organization to act as their representative during OSHA walkaround inspections
- Rescinded by Trump Administration in 2016

# The Fairfax Memo – Changes to Inspection Procedures

- Repeal of the Fairfax Memo created a higher burden of proof for unions and employees trying to have union representation during OSHA inspections
- New OSHA proposal will reinstate the Fairfax Memo
  - Worker/union rep can accompany OSHA inspector during the inspection/walkaround, regardless of if they are employee, if, in the judgment of the Compliance Safety and Health Officer, such person is reasonably necessary to support an effective and thorough physical inspection.
- Will face legal challenges – 2013 memo was challenged with no result prior to rescinding



# OSHA's "Clarity" on Subpoena Power

- OSHA proposed "interim final" rule to provide "helpful clarity" about subpoena power for documents and testimony
  - "interim final" rule allows it to take effect without public review
- Clarity isn't necessary - so why provide it?
  - Indicates aggressive approach to investigations
  - Increase in amount of subpoenas - both for documents and testimony
  - OSHA frustration over protracted legal battles regarding subpoenas
  - Could lead to more changes, attempted increase in scope
- Upside? New rule may give employers more time to respond
  - Current Field Operations Manual provides five working days, makes it hard to retain counsel, gather/review docs, and respond

# Potential for Criminal/Willful Violations

Section 17(e) of the Act provides that:

"Any employer who willfully violates any standard, rule or order promulgated pursuant to Section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than \$20,000 or by imprisonment for not more than one year, or by both."

# Types of Criminal Violations

- Willful violations causing an employee's death
- Providing false statements on documents required by the Act
- Providing unauthorized advance notice of an OSHA inspection





# How to Handle OSHA Inspection

# Handling OSHA Inspections

## Model Behaviors for the Inspection Process

- **Know your rights**
- **Be an active participant**
- **Do not be intimidated**
- **Be firm, but polite**



# OSHA Inspections

## Model Behaviors for the Inspection Process

- **Have a system in place for dealing with the processes in advance.**
- **Know when to ask questions.**
- **Know when you need help and ask for it immediately.**

# OSHA Inspections

## Opening Conference

- **Cooperative relationship with the compliance officer**
- **Purpose of inspection or visit**
- **Parameters of the inspection**
- **Identify inspection team**
- **When and how interviews will be conducted**
- **Put it in writing**

# OSHA Inspections

## Records

- **Ask for a written list of requested records**
- **Inform compliance officer that any requests for records not required by the OSH Act will be reviewed**



# Rules of Thumb for Documents

- Anticipate litigation
- Consistency
- Avoid speculation



# Establish a Document Control System

- Designate document control associate
- Keep required documents in a central location
- Number and index all documents
- Maintain originals
- Limit the number of copies for distribution of privileged materials



# OSHA Inspections

## Participation

- **Accompany the compliance officer at all times.**
- **Take photographs/video records/samples, etc.**
  - **Take notes of all conditions noted by the compliance officer.**
  - **Arrange abatement and/or protective measures.**



# OSHA Inspections

## Participation

- **Discuss abatement time extensions**
- ***Do not make* admissions against interest**
- **Give compliance officer only facts**
- **Take notes of all available evidence regarding any alleged violation**



# Employee Interviews

- Interviews may be conducted at any time during an inspection.
- Interviews may be conducted at locations other than the workplace.



# Know your Rights

- **The OSHA Act permits OSHA compliance officers to conduct private interviews of employees. However, the employee must give his or her consent to such interview.**



# Employee Rights During an Interview

## Every Employee:

- **Has a right to refuse to be interviewed by the compliance officer.**
  - **An employee cannot be forced to have a private one-on-one interview.**
  - **These interviews are totally voluntary.**
  - **If the employee declines to be interviewed, the agency will have to obtain a subpoena to require the interview.**
  - **If the agency obtains a subpoena, the employee has the full scope of rights to respond, including the right to counsel.**

# Employee Rights During an Interview

## Every Employee:

- **Has a right to refuse to sign a statement, be tape recorded or photographed.**
- **Has the right to refuse to provide any private contact information, such as home address and telephone number.**
- **Has the right to require the interview to occur at the workplace.**



# Management

- **Management should notify the Company that OSHA requests an interview.**
- **The Company can participate in all management interviews.**
- **Management can require that the Company's legal counsel be present during the interview.**

# OSHA Inspections

## Closing Conference

- Request duplicates of OSHA samples and photographs
- Alleged violations and suggested abatement methods
- What citations will be issued
- Correct any factual misunderstandings
- *Do not make admissions against interest*
- Take notes

# Questions?

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# THANK YOU!

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