



2025 Human Resources Conference



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Agenda

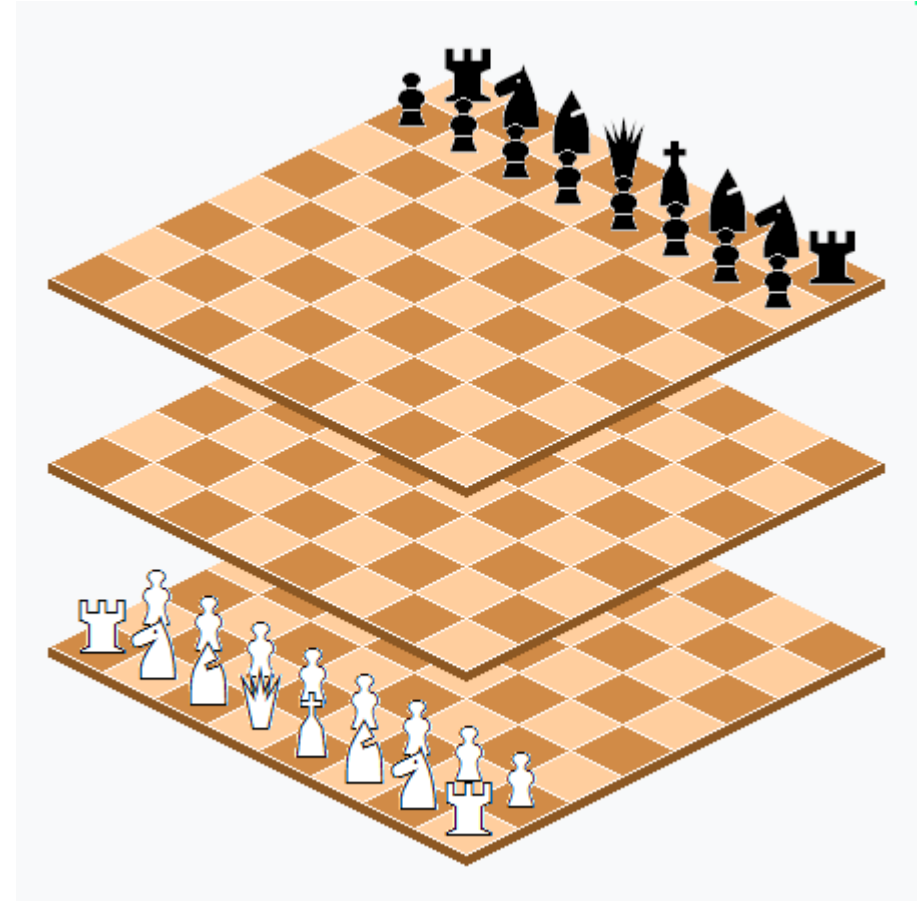
- Analyze Like a Lawyer: Employment Law Risks
- Investigations: A Practical Approach
- Employment Law: What the Heck is Happening



Analyze Like a Lawyer: Employment Law Risks

Risky Business

- Hiring
- Discipline and Discharges
- Leaves and Accommodations
- Pay Practices



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Risks in Hiring Practices

Untrained
Interviewers

Inappropriate
Questions

Background
Screens

Unlawful
Determinations

Pay
Negotiations

Risks with Discipline and Discharge

Lack of
Policies/Training

Lack of
Consistent
Application

Lack of
Documentation

Disparate
Treatment

Potential
Retaliation

Risks with Leaves and Accommodations

Disability

Pregnancy

FMLA

Documentation/Notice

Potential Retaliation

Risks with Pay Practices

Classification

Timekeeping/Overtime

Bonuses/Extra Pay

Pay Equity

Potential Retaliation



Investigating Complaints: A Practical Approach

Amanda Goldman

Investigating Complaints: A Practical Approach



Why Do We Investigate?

Avoid or
Minimize
Legal Liability

Maintain or
Improve
Morale

Improve
Factual Basis
for Decisions

Set Example

Demonstrate
Commitment
to Policies

When Do We Investigate?

- How serious is the nature of the complaint?
- What are the implications if the complaint turns out to be true or if you simply fail to investigate?
- Is there (or has there been) related concerns?
- Is litigation looming?



Characteristics Of A Good Investigation

- Prompt
- Sufficiently thorough
- Unbiased
- Well-documented
- Inspires confidence in the resulting decision
- **Does not exacerbate ongoing issues**

Overview Of Investigation Process

- Initial report
- Planning the investigation
- Taking emergency interim steps, if necessary
- Reviewing docs/data
- Conducting interviews
- Follow up document review/interviews
- Reaching a conclusion
- Creating a report
- Making a recommendation to management
- Implementing investigation results
- Following up

What an investigator should not do . . .

- Demonstrate or voice personal interest, bias or opinions
- Rely on assumptions, speculation or unsubstantiated assertions
- Ignore, avoid, or suppress relevant information
- Lose focus on the purpose of the investigation
- **Forget that others may see everything you create**



What an investigator should do . . .

- Think critically and objectively
- Always remain unbiased and neutral
- Be thorough, consider all the facts and circumstances
- Create a sufficient, easy-to-understand record



Initial Precautions

- Should accused or others be temporarily suspended or transferred?
- No adverse employment action towards accuser
- Document the reasons for your actions
- Tell complainant you're going to investigate
- Preserve documents and other relevant evidence
- Always keep in mind what **could** happen
 - EEOC Charge
 - Lawsuit
 - NLRB Charge



Who Should Investigate?

- Human Resources
- Outside investigators might be appropriate



Who Should NOT Investigate?

- Someone involved/named in complaint
- Someone who has a personal relationship with the accused
- Someone who lacks the necessary training/impartiality

Important Note Re: Privilege

Your investigation file could become a public record

Confidential communications between a client and legal counsel for the purpose of obtaining legal advice are **privileged**

Best practice for potential discrimination, harassment & retaliation complaints (and possibly others) that may become litigious:

- Notify in-house legal or outside counsel via email immediately:

From: Maggie Manager or Heidi HR

To: Attorney Jane

RE: Privileged and Confidential

Jane, Suzie Q has alleged that John Doe sexually harassed her. Please advise as to how you would like me to proceed.

Conducting the Interviews



- Interview complainant, complainant's witnesses, accused, then accused's witnesses
- Re-interview as needed
- Convenient, private location
- Have another manager present as your witness
- Schedule adequate time for each interview
- If someone refuses to cooperate, document it

Interviewing Witnesses

- Interview witnesses separately
- Ask each witness if he or she has spoken with others about the issue in question
- If possible, obtain a written statement or ask interviewee to sign a summary of his/her statement (prepared by you)
- Ask for confidentiality
- Invite witnesses to reach back out with further information
- Remind interviewee that retaliation is prohibited



Basic Interviewing Techniques

- Avoid leading or conclusory questions until appropriate
- Do not interrupt the flow of the narrative
- Ask “what else?” more than once during the interview
- Repeat important answers back to the witness
- Get clarification Clarify any inconsistencies in the story
- Distinguish hearsay from first-hand knowledge
- Close the funnel and ask “sum up” questions

Take Good Notes!

Take thorough and thoughtful notes, that anyone could read and understand—**without having to ask you questions!**

- Date, time & place of interview
- Names & titles of all present
- Consider typing out handwritten notes

Note, *but don't opine regarding*, credibility factors

- Acceptable: *"Wouldn't look me in the eye at all."*
- Not: *"Shifty as usual and never looked me in the eye."*

Questioning The Accused



- Again, start with general questions and then gradually hone in on the details
- Document denials and distinguish between “don’t know” or “don’t remember”
- Ask about workplace relationships:
 - How do you get along with your co-workers?
 - How long have you worked with [complainant]?
 - How do you two get along?

Getting into the Details

- Where were you between 6:30 and 7:00 p.m. on Saturday, June 6th?
 - Were you and [complainant] working together at that time?
 - Did something happen?
 - Tell me about it
- Did you ever touch [complainant]?
 - Why would she say that you did?
- Describe complaint (note his/her reaction)
 - No decision yet; chance to tell your side
 - “Why would complainant say these things?”
 - Have you ever been accused of anything like this before?

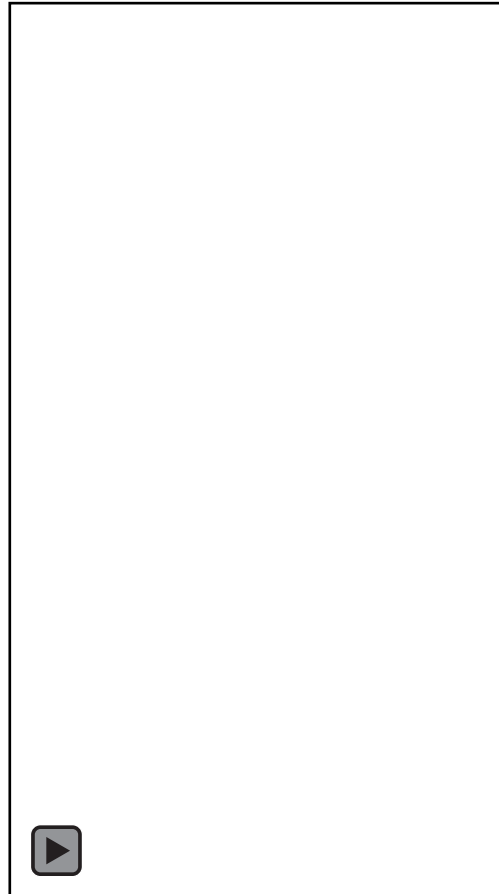


Wrapping Up With the Accused



- Ask accused to identify supporting witnesses
Ask for any corroborating documents
- Confirm receipt of Handbook & Policies
- Remind accused of Company's anti-retaliation policy

Making Appropriate Conclusions and Determinations



Do You Have Sufficient Information???

Does the investigation provide a reasonable basis for making a good faith decision? (if not, you're not done)

- Facts
- Documents
- Known witnesses
- Efforts to resolve disputed facts and credibility
- Likely motives reviewed and addressed
- No need for further investigation

Analysis & Reporting

- When you have sufficient information to make an informed decision, it's time for analysis
- **Remember:** You don't have to be right, but you have to be able to show you did it right:
- Once you've analyzed the information, report your findings and/or recommendations

Document, Document, Document



Preparing the Investigation Report

- The report should be thorough, concise, and written in an objective, neutral style
- Build a solid, unbiased, case for a legitimate decision
- NEVER FORGET, adverse parties may see your report some day
- Consider using a uniform format so all reports contain the same information



Remain Objective!

- Be painfully objective (if there is a hidden agenda, someone will eventually find it)
 - State facts, not opinions or assumptions
 - Keep emotions out
 - Not even a hint of bias
 - No commentary
 - If the facts don't support the action that someone wanted to take, don't try to stretch them

Make the Report User Friendly

- Captions
- Dates & page numbers
- Investigator's name & signature
- Avoid or explain acronyms & company lingo
- The first time you mention someone's name, write the full name
- Avoid the confusing use of pronouns
 - John told me he said he wasn't going to do it, then he did it anyway
- Don't leave incomplete sentences, they make the reader . . .

Include All Information Needed

- Statement of the circumstances that started investigation
- Brief description of how you conducted the investigation
- Statement of both undisputed and disputed facts
- Summary of relevant evidence
- Witness credibility assessment
- Analysis / Conclusions



State Your Conclusion – Safely!

State a conclusion without creating liability:

- “The weight of the information found in the investigation suggests Howard likely engaged in conduct that violated Company policies.”
- “We found nothing that supported Amy’s allegations against Howard.”
- “The investigation was inconclusive regarding Amy’s allegations against Howard.”

Avoid Legal Conclusions

Don't draw legal conclusions or make admissions!

- If Sally tells you, "John grabbed my breast," do you write:
 - "John grabbed Sally's breast;" or
 - "John sexually harassed Sally;" or
 - "Sally claims John grabbed her breast."
- Make it easy for the reader to follow
 - E.g., put a caption at the top of the interview summary
 - "Direct quotes are indicated by quotation marks."

Be Careful About Recommendations

- Factors to consider in making recommendations and decisions:
 - Legal liability for actions taken or not taken
 - Applicable Company policies
 - Seriousness of the misconduct
 - Degree of certainty as to what really happened (the truth)
 - Prior discipline of the accused, and its effectiveness
 - Actions taken in similar, prior cases (consistency)
- Better if someone other than investigator makes final decisions.

Think Like the Jury

Juries tend to believe documents

If it isn't in writing, it didn't happen

If it is in writing, it's probably true

Be careful what you write

*Think about how your words
could be misconstrued*



Tying Up the Loose Ends



Silence Isn't Golden in the end...but it may be golden during interviews.....

- If you don't follow up with the complainant, he/she may assume nothing was done
 - This is a VERY common complaint in litigation
 - May cause him/her to seek help from government agency or attorney
- You can tell complainant
 - Company investigated the allegations
 - Explain if results are inconclusive or don't support allegations
 - If remedial action has been taken, note this, but don't disclose too much detail
 - Retaliation will not be tolerated, and should be reported immediately

Documentation to Complainant

Written Communication to the Complainant at conclusion of investigation is best!

- a. Convey appreciation for raising issues
- b. Stress importance of issues raised
- c. Use as vehicle to continue to treat in a professional and respectful manner
- d. Brief outline of resolution
- e. Assurance of no retaliation
- f. Instruction to report immediately to HR any future perception of retaliation or harassment



Accused And Others

- Inform the accused of the Company's decision
 - If taking adverse action, refer only to violations of Company policy--
not violations of any law
 - Document this in his/her file
- If appropriate, notify others (e.g., the parties' supervisors)
 - Don't tell people who do not have a need to know (might lead to defamation claims)
 - If witnesses ask, tell them it is a confidential personnel matter
- Remind appropriate persons that retaliation is forbidden

Summary

- Conduct sufficient investigations, appropriate for the circumstances
- Act Fast/High Priority
- Preserve documents, email, videos
- Treat Complainant With Respect and Appreciation
- Establish a reasonable, good faith basis for a lawful decision
- Strive for credibility and impartiality
- Document thoroughly, carefully, and for user friendliness
- Preserve attorney-client privilege when necessary
- Follow through to maximize benefit and prevent future problems



Employment Law Update

First Day in Office

- **President Trump signed numerous executive orders Monday following his inauguration**
 - Revived Schedule F Policy
 - Makes it easier to fire select career employees
 - Eliminated government DEI policies
 - Directed civil rights agencies (DOL & EEOC) to recognize only two sexes—male and female—when enforcing anti-discrimination laws
 - Reversed Biden-era policies, including a measure to regulate artificial intelligence
 - Implemented hiring freeze
 - Ordered workers back to the office



Department of Labor (DOL) Updates

Secretary of Labor Nominee

Lori Chavez-DeRemer

- Former Rep. from Oregon
- Publicly supported as nominee by Teamsters President Sean O'Brien
- One of three Republican co-sponsors of the PRO Act
- ***Pro-business? Pro-labor? Somewhere in between?***



The “White-Collar” Exemption Salary Threshold

- DOL Rule effective July 1, 2024:
 - Minimum salary = \$844 / week (\$43,888 / year)
 - \$1,128 / week (\$58,656 / year) - 1/1/25
 - Highly Compensated Employee = \$132,964 / year
 - \$151,164 / year - 1/1/25
 - Amounts automatically updated every 3 years beginning 7/1/27
- **Federal court enjoined on November 14, 2024 (both the July 2024 and January 2025 increase)**
- **Chavez-DeRemer changes the equation a bit - Trump DOL may come out with new rule (somewhere in the \$44k range?) in 2025 or 2026**
- **The Trump administration will likely take its time in making any policy changes or will scale back the thresholds for salary.**

The Federal Minimum Wage

- Trump has been unclear about raising the federal minimum wage
 - opposed increasing it in his first term as harmful to small businesses
 - opposed to increasing it in 2020 election
 - his 2024 campaign website says he supports raising the federal minimum wage, but \$15 per hour is unlikely
 - likely to revoke Biden Executive Order 14026 setting the current federal contractor minimum wage at \$17.20 per hour
 - assuming it survives court challenges.
- Raise in federal minimum wage may be irrelevant for some employers (depending on state or local minimum wages)

The Independent Contractor Rule

- Biden DOL Rule effective 3/11/24:
 - Six-factor test for Independent Contractor status
 - The worker's opportunity for profit or loss
 - The relative amount of investment made by the worker
 - The permanency of the worker's relationship
 - The nature and degree of the potential employer's control
 - Whether the work is part of an integrated unit of production
 - Whether the worker uses specialized skills
- Determined by the totality of the circumstance
 - Look to the economic realities

The Independent Contractor Rule

- Trump DOL Rule adopted January 2021:
 - Five-factor test for Independent Contractor status
 - *The nature and degree of the individual's control over the work;*
 - *The individual's opportunity for profit or loss;*
 - The amount of skill required for the work;
 - The degree of permanence of the working relationship; and
 - Whether the work is part of an integrated unit of production.
- Emphasis on first two factors as most important

Does Chavez-DeRemer Change the Equation?

- Co-sponsored the PRO Act
 - Contained a CA-style “ABC test” for independent contractor status
- Biden’s nominee (Julie Su) was held up largely over concerns about her support for the ABC test
- ***Seems unlikely she will push for an ABC test***
- ***But will DOL push for going back to the Trump-era test? Or something different?***

EEOC Updates

EEOC – Who Are They?

- Five members appointed by the President and confirmed by the Senate to 5-year staggered terms:
 - Charlotte A. Burrows, Chair - Democratic appointee (7/28)(fired)
 - Jocelyn Samuels, Vice Chair - Democratic appointee (7/26)(fired)
 - Andrea R. Lucas, Commissioner - Republican appointee (7/26)
 - Kalpana Kotagal, Commissioner - Democratic appointee (7/27)
 - Vacant Commissioner
- General Counsel appointed by the President and confirmed by the Senate to 4-year term:
 - Karla Gilbride (10/27)(fired)

Acting Commissioner of EEOC

- President Trump named Andrea Lucas acting chair of the EEOC shortly after his inauguration
- Appointed during first Trump administration
- Outpaced the agency's other members in filing commissioner charges - charges initiated from within the agency rather than by a job applicant or worker
- Has previously questioned legality of corporate DEI policies
- Lucas will initially be limited in her ability to push through partisan policies - Democrats hold voting majority until 2026



Potential Trump Administration EEO-Related Initiatives

- DEI opposition at the EEOC
 - Commissioner Lucas has made it clear that affirmative action-type diversity measures are on shaky ground after *UNC/Harvard*
 - More reverse discrimination charges and lawsuits
 - More religious freedom charges and lawsuits
- Reinstating and expanding Trump's Executive Order 13950
 - Prohibited federal contractors from providing certain workplace diversity training and programs
- Revoking Biden executive orders promoting diversity for federal agencies, contractors, and grant recipients

A Lesser Threat of Employment Litigation?

- Non-EEOC employment suits are on the rise in the federal courts
- Receiving an EEOC “cause” determination greatly increases your chances of being sued by a current or former employee
- **This is not the time to let your guard down**

Pay Data Reporting

- **2016:** Obama EEOC – pay data collected in “Component 2” of EEO-1
- **2017:** Trump EEOC reversed
- **2024:** Biden EEOC wants to revive by January

- **Disability Discrimination** (*EEOC v. Federal Express Corporation*)
- EEOC filed a Complaint against FedEx, alleging that it violated the ADA by ignoring dispatchers' requests for accommodations to continue teleworking
- Highlighted the experience of one employee
 - EEOC alleges she was forced to retire early after the company rejected her request to continue teleworking because her disability (Type II diabetes, asthma, hypertension, chronic kidney disease and diabetic neuropathy) impacted her ability to walk
 - Her office was relocated to Manhattan from Somerset, New Jersey, and would have required her to take several trains
- Suit alleges FedEx denied accommodation requests for other employees with disabilities preventing them from returning to work

- First of 3 lawsuits filed in September 2024.
- The employee requested light duty for the duration of her pregnancy. The EEOC is alleging that the company offered only unpaid leave as a pregnancy-based accommodation when light duty was made available to non-pregnant employees, including those with temporary disabilities, who requested similar accommodations under the ADA. Light duty included administrative work, inventory management, workspace housekeeping, and assembly assistance.
- According to the EEOC's complaint, the employee was able to perform administrative tasks like inventory management, order processing, and workspace maintenance supervision. She also could have performed any assembly line tasks that did not require extensive bending or lying on her stomach.

- What does the EEOC claim the employer did wrong?
- The employer placed her on leave without engaging in the interactive process, which “constituted a forced accommodation in violation of the PWFA.”

- The agency filed against the manufacturing company after Polaris refused to excuse an employee's absences for pregnancy-related conditions and medical appointments and required her to work mandatory overtime despite knowing that her physician had restricted her from working over forty hours per week during her pregnancy.
- Because of her pregnancy-related absences, the company assessed attendance points against her and warned that she would be terminated if she acquired another point.
- As a result, the employee resigned to avoid termination and protect her pregnancy.

- The agency filed against the specialty medical practice when it did not allow a medical assistant at its Tulsa facility to sit, take breaks, or work part-time as her physician said was needed to protect her health and safety during the final trimester of her high-risk pregnancy.
- Instead, the practice forced her to take unpaid leave and refused to guarantee she would have breaks to express breastmilk.
- When she would not return to work without those guaranteed breaks, Urologic Specialists terminated her.

Takeaways

- Major changes at the EEOC are unlikely in the short-run
 - **Don't let your guard down!**
- Don't expect large reduction in Charges
- Good employment practices will protect you regardless of which political party is in power
 - have clear and known work rules
 - keep your work rules updated
 - train your supervisors and managers
 - apply your work rules consistently and fairly
 - give the employee a chance to tell their side of the story before acting
 - don't be afraid to recognize you were wrong
 - understand how your decisions will look to the EEOC, judge, or jury

National Labor Relations Board (NLRB) Updates



Chair



Marvin Kaplan (R)
Term Expires 8/25



Lauren McFerran (D)
Term Expires 12/24



David Prouty (D)
Term Expires 9/26



Gwynne Wilcox (D)
Term Expires 8/28

Vacant Seat
Formerly Occupied by
John Ring (R)

- Trump announced Monday Marvin Kaplan will serve as agency chair for the NLRB
- Kaplan will lead the Board's Republican majority after Trump's pending nominees for the two open seats win Senate confirmation



Does Chavez-DeRemer Change the Equation?

- NLRB is a separate agency
- Not under DOL control
- ***But will her pro-union position influence Trump labor policy beyond DOL? Will he seek a more union-friendly NLRB?***

Jennifer Abruzzo - Fired

- Assumed GC office on July 22, 2021.
- Immediately outlined a “restructuring” of NLRB law to help unions.
- NLRB Regions have been dedicated to implementing this “restructuring.”



- **Decisions of the Board likely overturned:**

- Employee Handbook Rules (*Stericycle*)
- Strict Limitations on Confidentiality and Non-Disparagement in Severance Agreements (*McLaren Macomb*)
- Independent Contractors vs. Employees (*Atlanta Opera*)
- Unionization without Elections (*Cemex*)
- Captive Audience Meetings (November 2024)

DOGE Lawsuits

- Department of Government Efficiency, to be led by Elon Musk, is set to advise President Trump on spending cuts and regulatory reform
- Trump has previously promised to fire federal employees who do not return to the office and drastically reshare the civilian public workforce



- The largest federal employee union and national teachers union filed lawsuits accusing DOGE of violating the Federal Advisory Committee Act

- Requires groups advising president to hold open meetings and include members of varying viewpoints

- Allege DOGE violated Act because past meetings have not been open to public and national security experts haven't been included in the group



Immigration Updates

Immigration Under Trump's Administration

- First Term (2017-2021):
 - Travel bans
 - Immigration enforcement
 - Curbing of border and humanitarian migration
 - Very active USCIS, including allowing discretion to deny without RFEs
 - Public Charge rule
 - Mandating interviews for all green card applicants
- Immigration was number one issue he highlighted through use of Executive Orders.

Immigration: What May Be Coming

- Immediate focus and speculation will be on pledge for **mass deportations** and tougher enforcement at the **border**
- Other areas for potential activity:
 - Returns to high rates of Request for Evidence
 - In office interviews for employment based green cards
 - Travel bans and consular delays
 - Reinstating "Remain in Mexico" and Title 42
 - Higher wage requirements for H-1Bs and PERM/green cards?
- Too early to tell what actual changes will be to the law or regulation
- **All of this may impact labor workforce and business immigration**

- Changes to H-2A and H-2B visa categories took effect January 17, 2025
- Key Changes
 - Worker Flexibility
 - H-2 nonimmigrants can commence work with new employer as soon as the employer files an extension of stay petition
 - Enhanced Worker Protection
 - Anti-retaliation measures
 - Wage security
 - Health and safety standards
 - Improving H-2 Program Efficiencies and Reducing Barriers to Legal Migration

First Day in Office



- Trump issued no less than 10 executive order related to immigration policy following his inauguration
- Reinstated “Remain in Mexico” policy
 - Requires asylum seekers to wait in Mexico while their US immigration cases are processed
- Terminated asylum-related mobile app
 - Ends use of app to schedule asylum appointments. Will further deter asylum seekers and likely reduce number of immigrants
- Ended automatic birthright citizenship of children of undocumented immigrants
 - Will certainly be challenged as running counter to 14th Amendment

Immigration: Planning Ahead

- Things to consider:
 - Travel eligibility: obtaining visas for travel
 - Filing extensions 6 months prior to expiry (decreased risk of fee increases, lengthy processing times)
 - Evaluation of employee population
 - Are there TPS employees at risk?
 - Are there employees who may qualify for a non-traditional category - AI background, entrepreneur
 - Long term strategies to obtain a green card
 - Increased I-9 audits
 - Strongly recommend internal audits

OSHA/Workplace Safety Updates

OSHA/Workplace Safety Updates



What Did Trump Do During His First Term?

- Cut inspections to lowest number in OSHA's history
- Declined to issue COVID-specific protections
- Rescinded key electronic recordkeeping requirements

2025 Predictions - Chavez-DeRemer Influence?

- Scrap union walkaround rule?
- Enforce through OSH Act's general duty clause?
- Scale back proposed heat safety rule and seek more employer input?
- Revisit electronic recordkeeping?

OSHA Updates (continued)

Current Workplace Safety Environment

- Very aggressive enforcement - SVEP (Severe Violator Enforcement Program), Penalty Grouping, Instance-by-Instance Penalty Adjustments policy, use of Emphasis Programs.
- Expect the new administration to rein in OSHA's exercise of discretion as to enforcement tools.
- Expect fewer new OSHA rules to go forward during Trump's second term.

OSHA Updates (continued)

Increased OSHA Penalties

- Department of Labor's annual penalty increases went into effect January 16, 2025, including for employers who currently have an open inspection with the agency

Increased OSHA Penalties for 2025

Increased penalties will apply to all OSHA citations beginning **January 16**

Category of Violation	2024 Penalties	2025 Penalties
Serious	Minimum: \$1,190 Maximum: \$16,131	Minimum: \$1,221 Maximum: \$16,550
Other Than Serious	Minimum: \$0 Maximum: \$16,131	Minimum: \$0 Maximum: \$16,550
Willful	Minimum: \$11,524 Maximum: \$161,323	Minimum: \$11,823 Maximum: \$165,514
Repeated	Minimum: \$11,524 Maximum: \$161,323	Minimum: \$11,823* Maximum: \$165,514
Posting Requirement	Minimum: \$0 Maximum: \$16,131	Minimum: \$0 Maximum: \$16,550
Failure to Abate	Minimum: N/A Maximum: \$16,131 per day unabated beyond abatement day (generally limited to 30 days maximum)	Minimum: N/A Maximum: \$16,550 per day unabated beyond abatement day (generally limited to 30 days maximum)

**NOTE: a repeated other-than-serious violation that otherwise would have no initial penalty shall result in a proposed Gravity Based Penalty of \$472 for the first repeated violation, \$1,182 for the second, and \$2,364 for a third repetition*

OSHA Updates (continued)

Chavez-DeRemer influence will be key here

- A likely return to enforcement/analysis of many workplace safety complaints under the “General Duty” clause
- OSHA’s final “walkaround” rule may well be withdrawn altogether. Should the Texas district court judge find that the rule does not pass legal muster, expect the new administration to let the rule die without appeal.
- The proposed heat stress rule is still in the public comment period which ended December 30, 2024. A Trump administration is likely to move forward with a scaled-back version of the rule after more employer input.

Non-Competes Updates

FTC Non-Competes Rule Status

- In April 2024, the FTC issued a final rule which they stated would promote competition by banning non-competes nationwide
- The rule was set to go into effect in early September but on August 20, 2024, the US District Court for the Northern District of Texas issued an Order in the *Ryan LLC. v. FTC* case, that said the FTC's ban exceeded its legal authority
- In other preliminary rulings, a Pennsylvania court sided with the FTC and a Florida court sided with the challengers to the ban
- The FTC has appealed the Texas ruling
- Ultimate Supreme Court review will be a multi-year process
- **Trump FTC will likely drop legal fight and/or repeal rule entirely**

NLRB “Stay or Pay” Provisions

- NLRB General Counsel Memo 25-01 (October 7) said many “stay-or-pay” provisions violate federal law
- The NLRB also reminded employers that they believe many non-compete agreements also run afoul of existing law
- A “stay-or-pay” provision generally refers to “any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe.”
 - educational repayment contracts
 - damage clauses
 - sign-on bonuses or other types of cash payments tied to a mandatory stay period

• **Likely to be immediately rescinded when Trump replaces General Counsel**

A Post-*Chevron* World

The *Chevron* Doctrine – What is It?

- A 1984 U.S. Supreme Court decision on admin law
- The *Chevron* doctrine provided a two-step framework for courts/agencies to interpret statutes
 - If the text spoke to a precise issue, then the agency was bound by the unambiguous expressed language
 - If it was silent or ambiguous, then the court should defer to the agency's interpretation
- Deference provided stability throughout the years – but has given agencies outsized power to set regulations that govern the workplace

The *Chevron* Doctrine Overturned

- On June 28, 2024 the U.S. Supreme Court overturned the decades-old *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce*
- If agency action is challenged in court, courts will continue to respect the agency's authority if it has been properly **delegated by statute**
- However, if a law is ambiguous, **courts will now get to decide** whether an agency has acted within its statutory authority – rather than yielding to the agency



Hospital Menonita de Guayama, Inc. v. NLRB (2024)

- U.S. Supreme Court recently directed the D.C. Circuit Court of Appeals to review its deference to the NLRB in light of the *Loper Bright* decision
- D.C. Circuit previously affirmed the NLRB's decision finding that an employer violated the NLRA when it failed to follow the Board's successor doctrine
- D.C. Circuit now required to independently assess whether the success bar doctrine is consistent with the NLRA

What Does This Mean for Employers Under Trump?

- New standard gives employers new tools for pushing back when agency rulemakings are overly aggressive
- But this cuts both ways
- Trump Administration regulations will fall under new standard and potentially face hostility (depending on the court)

IF YOU HAVE ANY
QUESTIONS
FOLLOWING THIS
PRESENTATION,
PLEASE
CONTACT US



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**Thank you for
attending!**