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EMPLOYMENT LAW UPDATE 2023

AGENDA

1. Federal law update
2. New Colorado laws!
3. Revised Colorado rules
4. Interesting cases and initiatives
5. Supreme Court watch

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2022 in 2 minutes

EEOC said anti-discrimination laws don't prohibit employers from requiring all employees who enter premises to be vaccinated, but must consider reasonable accommodation for medical and religious reasons. OSHA COVID vax-or-test requirement for large employers blocked by US Supreme Court; CMMS vax requirement for health care workers upheld

US DOL proposed overtime rule – to update salary level -- expected in 2022 never materialized

Poor economy stoked layoffs; must check WARN requirements. See Twitter and learn.

Workforce, like the country, is politically polarized

State legal trends included pay transparency laws and expanded time off; MD, MO and RI legalized recreational pot (AR, ND, SD rejected); CA enacted 5 days' unpaid bereavement leave; employers reviewed leave policies after the Supreme Court overturned *Roe v. Wade*

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Speak Out Act becomes law

On December 7, 2022, President Biden signed the Speak Out Act, voiding pre-dispute confidentiality and non-disparagement agreements in cases of sexual assault and harassment

In March 2022, President Biden signed H.R. 4445, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" into law

Employers must revise release forms consistent with the Speak Out Act. For pre-claim agreements and post-claim agreements in non-sexual harassment/assault cases, language should specify that the agreement does not limit the employee's right to discuss sexual harassment or sexual assault disputes.

4

Respect for Marriage Act becomes law

On December 13, 2022, President Joe Biden signed the bipartisan Respect for Marriage Act (RMA) protecting same-sex and interracial marriages.

RMA does not guarantee the right to marry or codify same-sex marriage. Instead, all states must recognize valid same-sex marriages across state lines and same-sex couples have the same federal benefits as any other married couple. RMA also protects churches/religious institutions right to "not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage;" RMA does not recognize polygamous marriages.

RMA is a direct legislative response to *Dobbs v. Jackson Women's Health Organization,* overturning *Roe v. Wade*, in which Justice Thomas listed Supreme Court's 2015 ruling in *Obergefell v. Hodges* – which affirmed the right to same-sex marriage -- as another landmark case that may be due for review.

Interestingly, Democrats were joined by 12 Republican senators (61-36 vote) and 39 Republican representatives (258-169 vote) to pass the bill.

5

PWFA and PUMP Acts become law

On December 30, 2022, President Biden signed $1.7 trillion omnibus spending bill including the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act).

PWFA requires employers with 15+ employees to make reasonable accommodation of known limitations related to pregnancy, childbirth, or related medical conditions, provided it does not impose an undue hardship on the employer. An employer may not require an employee take paid or unpaid leave if another reasonable accommodation is available. Same relief as under Title VII. **Colorado has a pregnancy accommodation law.**

PUMP Act expands 2010 FLSA protections for lactating employees by requiring employers to provide exempt and non-exempt employees who are nursing with reasonable time and private space to express breast milk. Employers with <50 employees may be exempt if they can show an undue hardship on the employer. Employee must give notice of violation, employer right to cure. Same damages as FLSA. **Colorado has a lactation rights law.**

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SECURE 2.0 becomes law

Omnibus spending bill also included the Securing a Strong Retirement Act of 2022 ("SECURE 2.0 Act") which includes five significant changes for retirement plans:

- Requires automatic 401(k) plan enrollment for eligible employees as plan participants for new plans starting 2025
- Changes the eligibility requirements under 401(k) plans so that it is easier for part-time employees to participate
- Beginning 2024, includes a new employer match for student loan payments and addresses how to factor student loan payment matching contributions into a plan's discrimination testing.
- Creates new starter 401(k) plans for employers without retirement plans
- Starting 2025, increases "catch-up" contributions to $10,000, modifies required minimum distributions incrementally from age 72 to age 75, and, effective 2023, lowers penalty for failure to take RMDs

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Federal regulatory issues to watch: COVID regulations

EEOC says COVID-19 viral test is a **medical examination** within the meaning of the ADA. Therefore, if an employer implements screening protocols that include COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." (EEOC Guidance, July 12, 2022) (ADA). Possible considerations in making the "business necessity" assessment may include the level of community transmission, the vaccination status of employees, the accuracy and speed of processing for different types of COVID-19 viral tests, the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant, and the potential impact on operations if an employee enters the workplace with COVID-19.

EEOC maintains its position that requiring an **antibody test is prohibited** under the ADA.

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Federal regulatory issues to watch: Proposed independent contractor rule

On October 11, 2022, U.S. Department of Labor (DOL) issued a proposed rule to clarify who is an independent contractor under the federal Fair Labor Standards Act (FLSA).

The DOL proposes to rescind a 2021 rule in which two core factors—control over the work and opportunity for profit or loss—carried greater weight in determining the status of independent contractors. The new rule implements an "economic realities" test with no favoritism towards any factor and relies on a "totality of the circumstances" analysis. Examples raise the bar for independent contractor classification. Additional factors in the economic realities test may include: The amount of skill required for the work; degree of permanence of the working relationship; worker's investment in equipment or materials required for the task; and extent to which the service rendered is an integral part of the employer's business.

Expect this rule to be challenged; huge potential impact on gig workers.

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FACT

COLORADO PAID FAMLI LEAVE ARRIVES 2023

Employers must comply with new law and its requirements

Are you ready for paid FAMLI leave?

- Paid Family and Medical Leave Insurance (FAMLI) Act passed in 2020. C.R.S. §§ 8-13.3-501
- Provides up to 12 weeks of paid FAMLI leave funded through a payroll tax paid by employers and employees equally; provides an **additional four weeks** of leave for pregnancy or childbirth complications
- Covers all employers with at least one employee
- Premium deductions begin **1/1/2023**; leave available on **1/1/2024**

Are you ready for paid FAMLI leave?

- **Who is eligible for FAMLI leave?** Any person who has worked at least 180 days and earned at least $2,500 in wages subject to premiums, or a self-employed individual who opts in and meets statutory requirements
- **FAMLI leave runs concurrently with federal FMLA**, same job protections, right to continued health insurance, intermittent leave, and same qualifying events as federal FMLA, **plus "safe leave"** for victims of domestic violence, stalking, sexual assault or abuse and their family members.
- **Paid leave substitution?** Employees cannot be required, but may agree, to use accrued vacation leave, sick leave with FAMLI insurance benefits up to average weekly wage.

Are you ready for paid FAMLI leave?

- Leave is funded through a payroll tax to be paid for by employers and employees in a 50/50 split. For 2023, the maximum annual premium is estimated to be $1,323 (based on wages up SSA cap of $147,000 per person). The maximum benefit is capped at $1,100 per week for 2024.
- For the first two years of the program (2023 and 2024), the premiums will be 0.9% of the employee's annual wage (0.45% by employer; 0.45% by employee). Employers can choose to pay a larger percentage of the cost up to 100%.
- **Who can opt out? Local governments**, and private businesses that already provide a **paid family and medical leave benefit similar to FAMLI**, may choose to opt out. Businesses with fewer than 10 employees are exempt from **employer** wage deductions.

Are you ready for paid FAMLI leave?

A "local government" could choose to:

1. **Participate** in FAMLI, paying employer's share of premiums, and deducting employee's share if ≥10 employees, commencing 1/1/23 (if employer opts in, employees can't opt out)
2. **Decline all** participation in FAMLI, upon vote not to participate, and notify FAMLI Division. Vote must occur before 1/1/23; must give employees 30 days' notice of decision; opt-out for minimum of 3 years; vote to opt-out every 8 years
3. **Decline employer participation**, but allow employees who want to participate through voluntary payroll deductions of employee share of premiums to FAMLI Division

- In any event, must register with FAMLI Division
- **Must have notified FAMLI Division of decision by notification letter on or before 1/1/23; failure to notify is treated as participation**

Are you ready for paid FAMLI leave?

- **By now, employers should have:**
  - Learned and followed FAMLI guidance, including new rules in 2022
  - Registered with FAMLI Division
  - Determined and budgeted estimated premium liability
  - Opted out, if a local government, or adopted a private plan paid short-term disability benefit if a private employer
  - Notified employees that **payroll deductions began 1/1/23**, but leave benefits **will not be available until 1/1/24**
  - Implemented required payroll deductions
  - Updated employee handbook to include FAMLI leave entitlement
  - Posted FAMLI Division poster at work

FACT

COLORADO SECURESAVINGS STARTS IN 2023

Must offer retirement savings program to employees

Small businesses: Colorado Secure Savings Program is here!

Passed in 2020, the Colorado Secure Savings Act mandates that small business owners enroll in a state-run retirement savings plan. **2023 start date!**

WHO MUST COMPLY:

Employers with 5+ employees; in business for two or more years; and **don't have an existing qualifying plan** (e.g., no 401k or other qualified savings plan)

WHAT MUST BE DONE:

All employees who are 18 and older and have earned wages in Colorado for at least 180 days are eligible and will be automatically enrolled in the program.

Once enrolled, employees will have 30 days to either **opt out** or to **customize** their account. Employees who do not opt out will automatically have 5% of wages withheld on an after-tax basis and contributed to a Roth IRA. Contributions will be increased by 1% each January up to a maximum of 8%, unless otherwise adjusted by the employee.

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Small businesses: Colorado Secure Savings Program is here!

EMPLOYER OBLIGATIONS:

In early 2023, all Colorado employers will receive a notice (via US mail or e-mail) from the state to register with Colorado SecureSavings.

After receipt of the notification, employers have 30 days to either register with the program or apply for an exemption. The deadline to register or apply for an exemption varies based on the size of the employer.

Employer size	Registration deadline
Employers with 50 or more employees	March 15, 2023
Employers with 15–49 employees	May 15, 2023
Employers with 5–14 employees	June 30, 2023

A failure to timely register or apply for an exemption may result in a fine of up to $100 per employee per year, up to a maximum of $5,000 per year.

May opt out if have a tax-qualified retirement savings plan for employees, e.g., 401(k), 403(b), Simplified Employee Pension (SEP), or SIMPLE IRA

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Small businesses: Colorado Secure Savings Program is here!

NEXT STEPS

If no tax-qualified retirement savings plan, employer must provide payroll vendor's name (if any), payroll schedule, company bank information, employer contact information, and an **employee roster.**

Employees on roster will be automatically enrolled and then have option to opt out or make elections. New employees must be enrolled in the SecureSavings program within 180 days of hire date. Contributions to the program must begin with the payroll immediately after the 30-day opt-out period has passed, based on the employee's contribution elections.

Employers are prohibited from managing employees' accounts or investment options or providing any tax, legal, or other financial advice. Contributions do not need to be reported on an employee's Form W-2. Employees will receive a Form 5498 (IRA Contributions Information) directly from the program trustee no later than May 31 each year.

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FACT

COLORADO PASSED NEW LAWS IN 2022

Employers must familiarize themselves with the new laws

New restrictions on noncompetes

- HB 22-1317 eliminates exception for executive and management personnel and their professional staff
- Maintains **trade secret exception** only for "highly compensated" employees (presently, $101,250/year)
- Customer non-solicitation agreements must protect trade secrets and worker must earn at least 60% of the "highly compensated" annual threshold amount ($60,750 for 2022); employee non-solicitation agreements not addressed
- Maintains exceptions for "sale of business" and to recoup reasonable training expenses over time; requires notice of any covenant; criminal and civil penalties
- **Affects restrictive agreements after August 10, 2022**

Colorado Anti-Discrimination Act (CADA) amendments

HB 22-1367 extends the time within which a worker may file a charge with the Colorado Civil Rights Division ("CCRD") from 180 days to **300 days**, same as EEOC. Also extends the time the CCRD has to investigate a claim or retain jurisdiction over discrimination charges from 270 days to 450 days, and eliminates requests for extension.

Expands the definition of "employee" for the purposes of CADA to include **domestic service workers**.

Expands available remedies to employees in age discrimination lawsuits to include **punitive damages**.

Effective August 10, 2022; need to post updated CADA poster

Expanded whistleblower protection

SB 22-097 expands the "Public Health Emergency Whistleblower" (PHEW) law, enacted during the COVID pandemic, to now include employee's **health and safety concerns outside of a public health emergency**.

PHEW covers "principals" (employers with five or more employees or independent contractors) and gives workers (including contractors) the right to express concerns regarding workplace health or safety violation, not just about COVID-19 or other public health emergencies, but for all workplace health and safety situations.

Must post new poster updated June 1, 2022.

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Even more whistleblower protections

HB 22-1119, the Colorado False Claims Act (CFCA), prohibits retaliatory action against an individual because of the individual's efforts in furtherance of investigating, prosecuting or stopping false claims – fraud by public companies/individuals to obtain public funds.

CFCA states that an employee, contractor or agent is entitled to all relief necessary to make that individual whole if the individual is retaliated against or discriminated against for engaging in protected conduct under the CFCA. The Colorado Attorney General's Office has enforcement authority over the CFCA, but the CFCA additionally provides an individual with a private right of action.

Effective August 10, 2022

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New notice requirements upon discharge

SB 22-234 expands the information employers are required to provide to employees at termination to include the following:

Employer's name and address;

Employee's name, address and ID number or the last four digits of the employee's SSN;

Employee's first and last dates worked;

Employee's year-to-date earnings;

Employee's wages for the last week worked; and

The reason the employee separated from the employer.

The notice containing this information can be in electronic or hard copy format, and it must be provided to all employees at termination, regardless of the reason for the employment separation.

Effective May 25, 2022

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Wage theft law updated

Senate Bill 22-161 increases penalties for employers that do not timely pay wages within 14 days of written demand (increased further for willful failure to pay); allows employees to demand wages on behalf of a class of similarly situated employees; permits the CDLE's Division of Labor Standards and Statistics to investigate such demands on a class-wide basis; and severely limits employers' ability to recover attorney's fees for successfully defending a claim.

Further, **limits ability of employers to deduct for unreturned property**. In order to deduct amounts from final pay, an employer must provide a notice to the employee within 10 days of separation containing: (1) a written accounting specifying the amount of money or the specific property that the employee failed to pay or return; (2) the replacement value of the property; (3) when the money or property was provided to the employee; and (4) when the employer believes the employee should have paid the money or returned the property.

Most significant changes are effective January 1, 2023.

Colorado SB 22-161

"Natural medicine" approved in Colorado

In 2022, Colorado voters approved (53% - 47%) Proposition 122 to categorize certain psychedelic plants and fungi — such as dimethyltryptamine (DMT), ibogaine, mescaline and psilocybin — as "natural medicines" and decriminalize the personal use, possession, growth and transport of such medicines for adults 21 years old and older. By 2024, will allow the supervised use of two of the drugs found in the mushrooms, psilocybin and psilocin, at state-regulated "healing centers."

The Natural Medicine Health Act states that it should not be construed "to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, or growing of natural medicines in the workplace."

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FACT

COLORADO AMENDED RULES IN 2022

Colorado's workplace rules can be tricky

Colorado minimum wage 2023

State minimum wage is **$13.65** per hour (Denver minimum wage is $17.29/hour in 2023)

Tipped employee minimum wage is $10.63 per hour

Salary of exempt employees of non-governmental employers is $961.54 per week **($50,000** rounded annual equivalent)($55,000 in 2024)

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Updates to HFWA rules

CDLE released updated Interpretive Notice and Formal Opinion ("INFO") #6B on June 24, 2022 and August 2, 2022

Paid sick leave (PSL) carryover is limited to 48 hours; employers can count unused sick leave toward 48-hour limit in the next year.

Timing of public health emergency (PHE) leave. The 80-hour PHE leave supplement must be provided at the time of the request, unless the employer provides the sufficient number of hours, free and clear at the outset under a separate PTO policy.

Using accrued leave when PHE-leave-eligible. If an employee has unused accrued paid leave when the need for PHE leave arises, the employer may count accrued leave as a "credit" toward the amount of PHE leave that it must provide. (PHE leave must be used before other accrued leave.)

General PTO policies can comply with HFWA so long as the policy provides PTO for same amount, same purposes, and under same conditions as HFWA. Additional leave is not required if employee uses all PTO for non-HFWA reasons (unless a new PHE event occurs).

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Updates to HFWA rules

Effective January 1, 2023, HFWA rules will change – for the third time -- how employers calculate the rate of pay when employees use PSL and/or PHE leave.

Pay rate and amount of HFWA leave. Under C.R.S. § 8-13.3-402(8), leave must be paid at the same rate and with the same benefits, including health benefits, as the employee normally earns during hours worked, not including overtime, bonuses, or holiday pay. Leave must be paid on the same schedule as regular wages.

The pay rate for leave must be at least the applicable minimum wage. The HFWA pay rate shall be calculated based upon the **employee's pay over the 30 calendar days prior to taking leave**; shall include any set hourly or salary rates, shift differentials, tip credits, and commissions; and shall not include overtime, bonuses, or holiday pay. If an employee has not yet worked 30 calendar days, the longest available period shall be used.

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Public health emergency leave remains in effect

Useable as of 1/1/21, in the event of a "public health emergency," all employers must supplement an employee's paid sick leave to ensure the employee may take up to 80 hours (proportional for PT employees) one-time emergency leave. See INFO #6C

Despite reports to the contrary, Colorado's 80-hour COVID-related leave continues as long as a COVID-related emergency remains "declared by a federal, state, or local public health agency;" current federal COVID-19 emergency renewed by the Secretary DHHS on 10/13/22 effective until 1/12/23.

Further, HFWA continues the right to COVID-related leave "until four weeks after" all applicable public health emergencies end or are suspended. Therefore, earliest possible end date of Coloradans' HFWA right to 80-hour COVID-related emergency leave is 2/8/23.

Public health emergency includes RSV, flu

On November 11, 2022, Governor Polis signed an executive order amending and extending the state's COVID-19 disaster emergency declaration, which has been in place since March 2020, to "include Respiratory Syncytial Virus (RSV), influenza, and other respiratory illnesses."

The Colorado Department of Labor and Employment (CDLE) clarified that employees "can use their 80 hours [of PHE leave] for a broader range of conditions" than just COVID

This most recent interpretation does not require employers to "top up" an employee's PHE leave balance or provide any additional sick leave, if PHE leave was provided when the COVID-19 PHE was "declared." However, if an employee has PHE leave remaining, "PHE leave is usable for a range of PHE-related needs, not just for confirmed cases."

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Commissions and bonuses

On June 24, 2022, Colorado Department of Labor and Employment (CDLE) released Interpretive Notice & Formal Opinion ("INFO") #17, addressing payment of commissions and bonuses. INFO #17 puts Colorado employers on notice that the CDLE interprets the Colorado Wage Act as **prohibiting "present-to-win" clauses in bonus and commission agreements**. A "present-to-win" clause requires an employee to be employed by the employer (or "present") at the time of payout to receive the commission or bonus.

In the CDLE's view, the employer must pay commissions or bonuses "so long as the employee did the required work, any agreed-upon and valid conditions for payment are met, and the wages can be calculated," even if the employee has resigned or been discharged. In other words, employers cannot avoid paying commissions and bonuses on the basis that the employee is no longer employed as of the payout date if the employee has otherwise met the employer's conditions for earning the bonus or commission.

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FACT

INTERESTING CASES AND INITIATIVES

Unusual facts make interesting law

COVID-related HR topics in 2022

Effort to pass "vaccine status discrimination" protection failed in Colorado in 2022

The "**Great Resignation**" spurred: (1) Employee well-being initiatives; (2) hybrid work; (3) "values alignment;" (4) initiatives to help working parents; and (5) confronting "toxic bosses"/"toxic culture"

In the wake of COVID, we must ask: Are **open-plan work spaces** the dumbest management idea of all-time? Face-to-face interactions have not increased, instead, electronic communication has; illness is shown more likely to be transmitted in open-space environments; open space reduces costs and square footage of work areas . . . but so does remote work

We survived a pandemic: Work is a marathon, not a sprint. Stanford Center on Longevity's "New Map of Life" (April 2022) predicts half of US (and other economically-advanced countries) 5-year-olds today can expect to live to the age of 100 and will likely work 60 years or more. Next-generation employees may have multiple, lengthy careers. **Must consider employee engagement, education requirements, future skills-building NOW**

A new workplace: We now have quiet quitting vs. soft lifers, quiet firing, "acting your wage," "career cushioning" (a professional Plan B)

COVID has changed work law

EEOC: Law evolving around MANDATING a vaccine vs. INCENTING a vaccine

DOL: Telemedicine visits can be FMLA-qualifying, Field Assistance Bulletin (FAB) 2020-8, issued 12/29/20, extended indefinitely; can also provide FMLA postings electronically for remote workers

DOJ/HHS: **"Long COVID" could be a disability under the ADA** and Rehabilitation Act if substantially limiting; endorsed by EEOC in its Technical Assistance Q&A dtd 12/14/21

COVID and the ADA: So many issues for employers

1. Requests for leave and other accommodations based on "long COVID"
2. Requests for accommodation based on pre-existing (previously-undisclosed) conditions outed disclosed during pandemic – often related to return to work
3. Requests for accommodation based on psychological, emotional and mental health issues, e.g., depression, anxiety, during the pandemic
4. Managing different types of leave requests, e.g., PSL, PHEL, FMLA, extended leave requests
5. Requests to work remotely indefinitely as an accommodation
6. What is the best work arrangement: In person, remote or hybrid
7. Requests for accommodation based on family or household members

Growth of marijuana: Will the federal government change course?

MD, MO and RI legalized recreational marijuana in 2022; AR, ND, SD rejected legalization. Now, 21 states (AK, AZ, CA, CO, CT, IL, MA, MD, ME, MI, MO, MT, NV, NJ, NM, NY, OR, RI, VA, VT, WA), DC and Guam allow adult recreational use of marijuana

37 states (AL, AK, AZ, AR, CA, CO, CT, DE, DC, FL, HI, IL, LA, ME, MD, MA, MI, MN, MS, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, SD, UT, VT, WA and WV) have some form of legalized medical marijuana in 2022. [Note: low-THC CBD oil is lawful in GA, IN, IA, KS, KY, NC, SC, TN, TX, VA, WI, and WY]

Will the Biden Administration address federal marijuana law?

The next big fight: Diversity programs and the law

In 2022, former NFL head coach Brian Flores filed a lawsuit against the NFL, and its teams, alleging racial discrimination. *Flores v. National Football League* (S.D.N.Y., complaint filed 02/01/22). Since 2003, the NFL has utilized a diversity initiative – the "Rooney Rule" -- under which NFL teams committed to interviewing at least two minority candidates when seeking to fill head coaching/senior level operations jobs. Flores argues the Rooney Rule is a sham to disguise race bias in hiring.

Diversity programs are beneficial and popular, but employers are reminded they **cannot unlawfully discriminate to achieve diversity goals**. A North Carolina jury awarded a white male former employee $10 million finding that the employer used race and gender as motivating factors in terminating the employee in a diversity initiative aimed at hiring women and minorities. *Duvall v. Novant Health, Inc.* (W.D.N.C., Oct. 26, 2021)

Must consider religious objections to inclusion efforts

In 2022, Kroger Company agreed to pay $180,000 to settle religious discrimination claims filed on behalf of two workers in Conway, AR who objected to wearing a LGBTQ+ "pride" symbol on their uniforms.

In November 2019, Kroger debuted its new logo, a multi-colored heart, adorned on work uniforms. Citing religious objections, two employees refused to wear the logo as they believed it resembled a rainbow LGBTQ Pride flag. Kroger maintained that the heart had no relation to the LGBTQ+ community. The employees were fired for refusing to wear the logo despite asking for religious accommodations, including wearing a nametag over the heart. The EEOC brought suit because Kroger never considered requested accommodations based on religion or suggested alternative solutions.

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Can social media be sufficient notice of a medical absence?

Appellate court ruled that it is a question of fact for a jury whether social media messages between an employee and his manager constituted "usual and customary" notice for purposes of call-in procedure under attendance policy. Employee underwent emergency appendectomy and experienced complications; communicated regularly with his manager via social media messaging app; and took two months' FMLA leave. After return, employee experienced pain and messaged his manager he would be taking additional time off. Supervisor did not respond, reported absences to company's HR department, and employee was fired for no-call, no-show. *Roberts v. Gestamp West Virginia, LLC* (4th Cir., August 15, 2022)

Beware managers modifying notice procedures by informal means

No need to accommodate misconduct under the ADA

Sleepwalking employee who crawled into bed with coworker cannot prove disability discrimination.

In *Harkey v. NextGen Healthcare, Inc.* (5th Cir., July 15, 2022), appellate court affirmed that female employee who crawled into a male coworker's bed while "sleepwalking" during business travel, and was subsequently fired, failed to establish disability discrimination under the ADA or Texas state law. Discipline occurred not due to sleepwalking, but behavior while sleepwalking.

This is a weird case, but reminds employers to assess the employee's limitations due to an underlying medical condition versus misconduct occurring while employed.

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Don't search a cell phone as a pretext to fire an employee

Employee filed claims of race discrimination, retaliation and violations of the FMLA against his employer. During the pending lawsuit, employer fired the employee after it cut the padlock off of an on-site locker the employee had been using as part of an effort to move the locker. Upon opening the locker, the contents were removed, including a cell phone. An HR representative took the phone — allegedly believing it to be a company-provided phone — correctly guessed its password and searched it finding alleged evidence the employee had solicited sex workers via text during work time.

Appellate court found a reasonable jury could determine that employer was looking for an excuse to fire the employee when it searched his text messages. *Canada v. Samuel Grossi & Sons, Inc.* (3rd Cir. Sept. 15, 2022). Employer could not provide any legitimate basis for searching [the employee]'s locker, let alone the cellphone inside the locker," during the move.

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Personal belief that manager is biased is not enough to prove race discrimination

White firefighter could not show his Black supervisor deprived him of higher-paying driving assignments due to his race based solely on "personal belief" the supervisor hired two Black employees – who shared driving duties with him -- due to racial favoritism. *Stieglitz v. City of Chicago* (7th Cir., July 12, 2022).

Firefighter presented no factual evidence that his captain hired the two Black drivers out of racial favoritism: Employees were qualified for the position; fire captain never mentioned race, or disparaged White people, or had any history of favoritism toward non-Whites. Fact captain rotated drivers – described by the White firefighter as "fishy" – was a management decision that did not demonstrate racial bias. Fire captain was not required to explain his reasoning to his subordinates, but he offered that rotating drivers was consistent with his own training, gave him flexibility with scheduling, ensured more firefighters learned local geography, and more obtained driving experience.

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All races are protected; bias must be proven

White employee failed to show that he was rejected from two school district administrative positions on the basis of his race. *Groves v. South Bend Community School Corp*. (7th Cir., Oct. 19, 2022).

26-year employee/high school athletic director applied for district-wide athletic director position. Superintendent and committee interviewed applicants, chosen applicant interviewed best, while plaintiff interviewed poorly, and had prior instances of noncompliance with state athletics association's rules. Employee sued alleging superintendent, who is Black, favored chosen candidate, who is also Black, solely on the basis of race. Position was later modified to a dean of students/athletics position, for which employee applied and was also rejected.

Appellate court upheld dismissal of the lawsuit since employee never offered evidence that the employer's proffered nondiscriminatory reason was a pretext for discrimination. Employee argued he was the most-qualified "on paper," but district showed other factors were part of hiring decisions, including subjective interview assessments by the the interview committee.

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"Reverse" discrimination claims have a different standard of proof

A White nurse couldn't show she was fired because of a manager's alleged racial favoritism toward Black employees. *Painter v. Midwest Health, Inc*. (10th Cir., Nov. 30, 2022).

Nurse worked at an assisted living facility in Kansas. A resident's son accused her of not checking the resident's vital signs; the two allegedly got into an argument; and the nurse was fired for neglecting her duties and acting unprofessionally. Nurse claimed she was fired for conduct the nursing director, who is Black, would have not fired Black employees.

Appellate court upheld dismissal of reverse discrimination claim. Plaintiffs suing for reverse discrimination must allege more than that they were "qualified and that someone with different characteristics was the beneficiary of the challenged action," but also that the defendant is "one of those unusual employers who discriminate against the majority." The employee failed to show the employer treated white employees less favorably.

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Reassignment to a new supervisor is not a required reasonable accommodation

Employee alleged her manager was hostile toward her by scheduling work shifts that conflicted with ability to care for daughter; altered time sheets; changed schedule without notice; improperly marked her absent. Employee provided a doctor's note that diagnosed her with anxiety and depression and "recommended" she be reassigned to a different location with a different manager. *Bender v. Department of Defense* (11th Cir., Aug. 26, 2022)(Rehabilitation Act case similar to ADA).

Appellate court held that employee was not asking for reassignment to a vacant position – which may be a reasonable accommodation – but was **asking for a new supervisor which is not a reasonable accommodation** under federal disability law. Of course, nothing prohibits an employer from providing a new supervisor when the relationship between the supervisor and employee is at odds. Other options could include training supervisors, reinforcing better management techniques, conflict management strategies; and providing day-to-day feedback.

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Watch the time it takes to "boot up" computers at start and end of the day

Employers that decline to pay employees for time spent waiting for computers to "boot up" could be in violation of the Fair Labor Standards Act ("FLSA") according to the U.S. Ninth Circuit Court of Appeals. *Cadena et al. v. Customer Connexx LLC* (9th Cir. Oct. 24, 2022).

Call center agents alleged employer failed to pay them for time they spent booting up their computers prior to clocking into the company's electronic timekeeping system and turning off their computers after clocking out of the timekeeping system. The workers' primary duties were to provide customer service and scheduling to customers over a "soft phone" operated through their employer-provided computers. On average, the workers estimated that the boot-up time was between six and twelve minutes, and the boot-down time was between 4.75 to 7.75 minutes. The employees asserted that they should have been compensated for this time as it was an integral and indispensable part of their primary job responsibilities.

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Gender dysphoria is protected under the ADA

An appellate court ruled for the first time that **gender dysphoria is protected under the ADA** and Rehabilitation Act. *Williams v. Kincaid* (4th Cir., August 16, 2022)

Transgender female with gender dysphoria was incarcerated in men's housing in a Virginia correctional facility. During her incarceration, she alleged that she experienced delays in medical treatment because of her gender dysphoria, harassment by inmates, and misgendering and harassment by prison officials. After her release, she sued the correctional facility under the ADA and Rehabilitation Act.

Court held that gender dysphoria met the ADA definition of a disability and was not a "gender identity disorder" excluded from coverage under the ADA. Court relied on studies showing that gender dysphoria is not based on transgender status alone but, rather, whether an individual experiences distress or other disabling symptoms, such as depression, substance abuse, self-mutilation, and self-harm.

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Creeper alert! One severe act may be enough to support harassment claims

Appellate court ruled that a supervisor's single unwanted kiss supported an employee's sexual harassment and retaliation claim. According to the court, a Georgia police lieutenant's unwanted kiss of a subordinate was "close enough" to sexual harassment to support the officer's claim that she was unlawfully fired for complaining about the romantic overture. Overturned district court ruling that a single kiss was not severe or pervasive enough to be harassment. *Alkins v. Gwinnett County Sheriff's Office* (11th Cir. 2022).

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More 2022 cases of interest

Discussing an employee's retirement plans – in the context of considering the employee's termination for inappropriate conduct -- **is not per se age discrimination**. *Sims-Madison v. Dana Commercial Manufacturing, LLC*, (6th Cir., March 28, 2022). Company's decision not to fire employee because she said she planned to retire in five months was not pretext for age discrimination; company fired employee following more complaints and employee requested to retire immediately.

Beware **work celebrations and a disability**. *Berling v. Gravity Diagnostics* (Ky., jury verdict March 29, 2022) 10-month employee who asked to opt out of company's birthday celebration (due to his anxiety disorder) was awarded $450,000 in his disability lawsuit alleging his employer neglected to inform the person who handled birthdays; the company threw him a birthday party, triggering a panic attack; he got upset in a meeting with his supervisors the next day when discussing the psychological impact of the surprise party; and was fired for his "violent" behavior.

FACT

US SUPREME COURT IS ACTIVE

Employers must sort out 2022 holdings and anticipate 2023

US Supreme Court 21-22 term: Religion and public employees

In *Kennedy v. Bremerton School District* (2022), the Court held that public employees can pray briefly and quietly in non-working moments on the job site. A public employer may not prohibit an employee from making religious statements when the statements are made as a private citizen, and not as a public employee. In this case, a public school football coach's post-game prayers with students were permissible, as long as participation was not coerced, because he was not "acting within the scope of his duties as a coach" when he led the prayers.

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US Supreme Court 21-22 term: No federal right to an abortion

In *Dobbs v. Jackson Women's Health Organization* (2022), the Court held that the U.S. Constitution "does not confer a right to abortion" and returned the right to regulate abortion to the states. Although *Dobbs* is not an employment case, the ruling does raise a host of questions for employers.

Contraceptive care coverage in employer benefit plans, See *Griswold v. Connecticut* (US 1965)(established right of marital partners to use contraceptives based on a right to privacy)

Travel benefits for non-life-threatening medical care away from state of residence? Leave rights under FMLA?

Gender plus issues related to state "personhood" initiatives, e.g., ectopic pregnancies, miscarriage care, status of IVF care

Discussions of the issues in the workplace, impact in female labor force

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US Supreme Court 21-22 term: State employers can be sued under USERRA

In *Torres v. Texas Department of Public Safety* (2022), the Court decided that an Army Reservist who developed serious illness due to toxic exposure in Iraq could sue his former employer, the Texas Department of Public Safety (DPS), under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) after the DPS would not accommodate his medical conditions by employing him in a different role other than a state trooper. Court held that state employers cannot invoke sovereign immunity as a defense to suits brought under USERRA.

State employers should review USERRA's requirements regarding reemployment and accommodations of Reserve and Guard employees.

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US Supreme Court 21-22 term: Gun rights

In *New York State Rifle & Pistol Association v. Bruen* (2022), Supreme Court significantly limited a state's ability to restrict citizens' right to carry firearms publicly for their self-defense. *Bruen* does not explicitly address the workplace or the rights of employers to restrict weapons on their premises.

However, the Court's decision recognizing a constitutional right to bear arms in public for self-defense could lay the foundation for challenges to private restrictions, including workplace bans on guns. In the meantime, employers will continue to follow state law restrictions.

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US Supreme Court 22-23 term: Four cases to watch

Helix Energy Solutions Group, Inc. v. Hewitt, whether a "highly-compensated" employee making over $200,000/year is entitled to overtime pay. Employer paid the supervisor a set amount each day ("day rate"). Does method of payment qualify under the "salary basis" component required for the employee to qualify as exempt under FLSA?

Mallory v. Norfolk Southern Railway Co., whether the due process clause of the 14th Amendment prohibits a state from requiring a corporation to consent to personal jurisdiction to do business in the state. Cancer victim is attempting to sue employer in a state that company registered to do business and argues company voluntarily consented to personal jurisdiction in that state

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US Supreme Court 22-23 term: Four cases to watch

Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; will affect affirmative action in higher education and employment. Companion case involving UNC-Chapel Hill.

303 Creative LLC v. Elenis, whether applying a public accommodation law to prohibit a business from announcing its intent to deny service to LGBTQ+ customers violates the free speech clause of the First Amendment. Graphic design firm refuses to design websites for weddings of same-sex couples on 1st Amendment and religious grounds in violation of Colorado law prohibiting discrimination against LGBTQ+ customers.

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Questions?

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