NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

LOOKING BACK AND LOOKING FORWARD: EMPLOYMENT LAW COMPLIANCE AND LEGAL OBLIGATIONS FOR 2023

JANUARY 31, 2023

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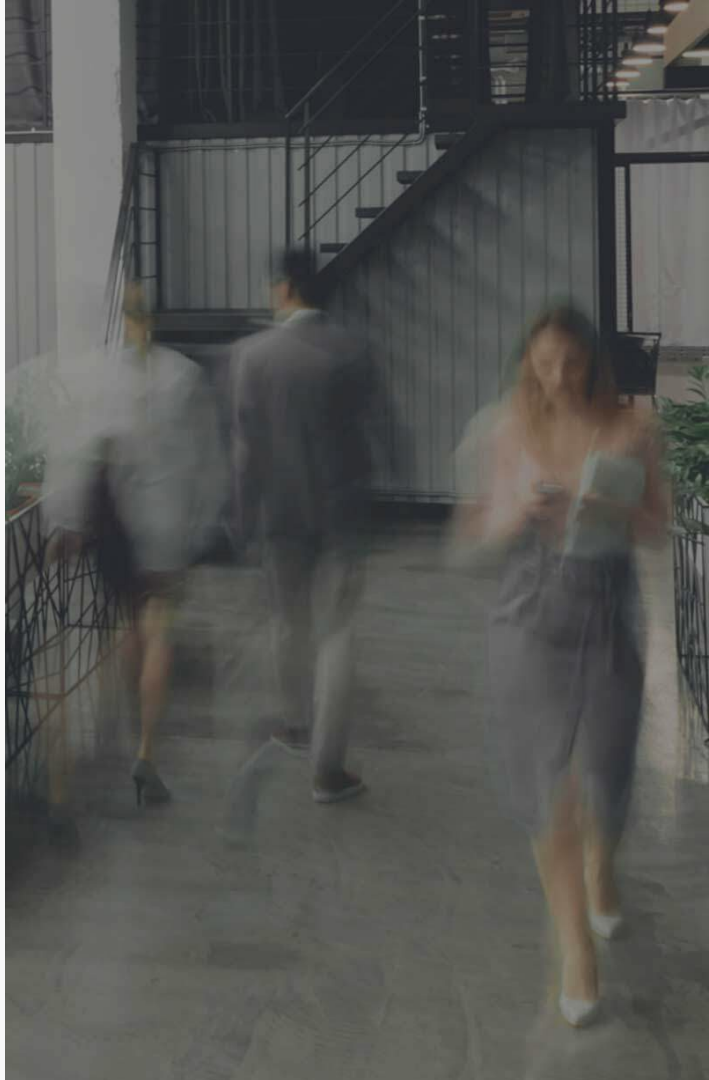
***Certified Specialist in Employment and Labor Law**



MAYNARD COOPER & GALE AND NEXSEN PRUET ANNOUNCE MERGER

MAYNARDNEXSEN.COM

As of April 1, 2023, Nexsen Pruet will merge with Maynard Cooper & Gale. Together we are Maynard Nexsen. The merger combines two client-centered firms that will focus on further expansion in high-growth, high-opportunity markets, bolstered by the increased depth and breadth of client service offerings, including on the ELL team.

OUR NEW FOOTPRINT

WE LOOK FORWARD TO SERVING OUR CLIENTS FROM 23 OFFICES AND WITH 550 ATTORNEYS COAST-TO-COAST.

N | P

ELECTIONS MATTER

Impact of Midterms

EMPLOYMENT LAW IN A POLARIZED ENVIRONMENT AND SHIFTING POLITICAL WINDS

- Polarized electorate and politicians (and employees)
- Cable news and social media amplification
- Political ping-pong in 2 and 4 year increments
- Midterm effect (no “red wave”) + equally divided Congress + filibuster in the Senate = not much impactful legislation expected
- Backdrop: coming out of pandemic, high inflation, labor shortage, maybe recession, geopolitics, 2024 election

LEGISLATING THROUGH EXECUTIVE ORDERS AND REGULATIONS

Case Study: Mandatory Vaccines/Testing

- **Only Congress has power to legislate**
- **But in 2021 the Biden administration rolled out three vaccine mandates, including OSHA's COVID-19 ETS**
- **Challenged in court based on agency authority**
- **Jan. 2022: Supreme Court stayed implementation of OSHA ETS**

Take away: Expect increased administrative agency activity (EEOC, DOL, NLRB, FTC, etc.)

STATE LAW INITIATIVES
CONTINUED LEGISLATIVE ACTIVITY

- Free speech/political speech issues (e.g., FL and Disney)
- Pay equity/salary history/wage transparency legislation
- Expansion of paid leave statutes
- Curbing criminal background checks
- More restrictive covenant scrutiny

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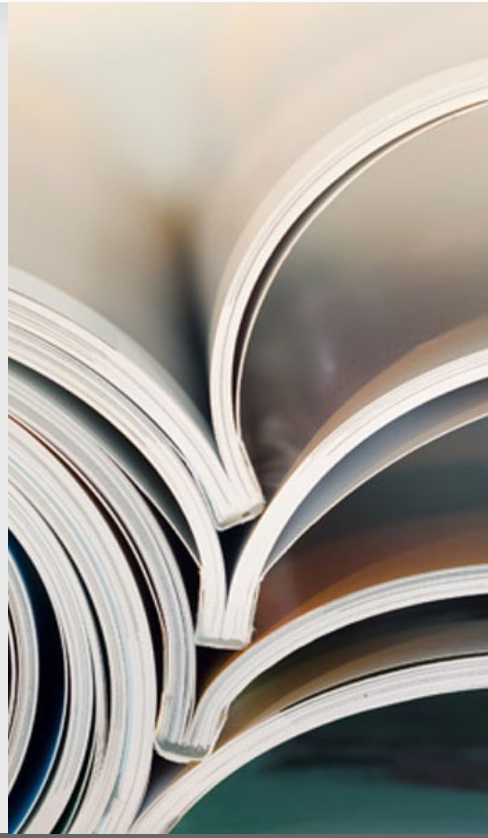
NONCOMPETES & THE FTC

FEDERAL TRADE COMMISSION PROPOSED RULE

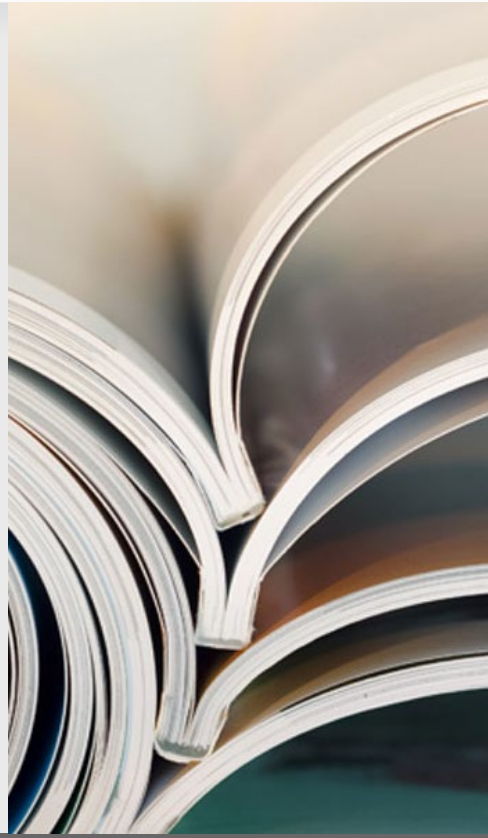
JANUARY BOMBSHELL ANNOUNCEMENT ON NONCOMPETES

- Jan. 5, 2023: issued proposed national ban on noncompete agreements with employees
- Restrictive covenants historically province of states and courts (patchwork of laws/level of uncertainty)
- Intent is to "curtail the unfair use of noncompete clauses" that "may unfairly limit worker mobility"



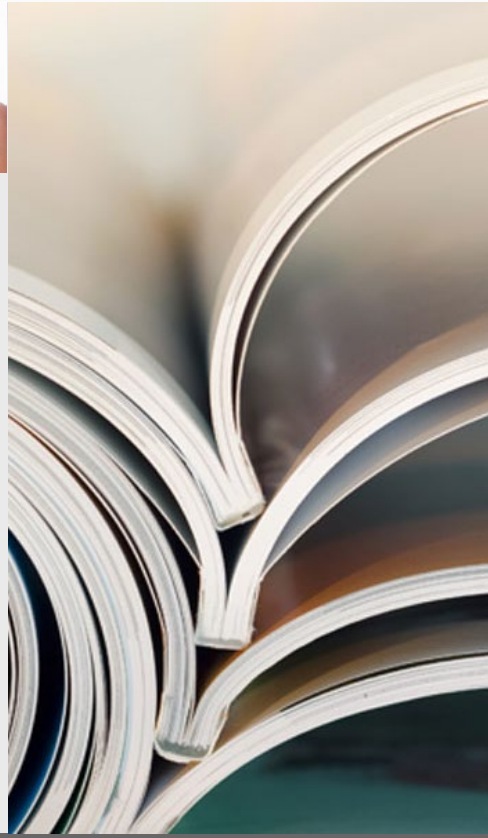
PROPOSED FTC RULE VERY BROAD

- Covers all noncompete agreements, including broad restrictive covenants (e.g., NDAs)
- Covers all employees, workers, independent contractors, etc.
- Impact on employers:
  - Ban on new noncompetes
  - Rescind existing noncompetes with notice to current and former employees under existing agreements
  - Prohibit representations that workers are subject to noncompetes
- Supersedes and preempts any inconsistent state laws, cases, and regulations
- One limited exception: sellers of a business



WHAT'S NEXT FOLLOWING THE FTC PROPOSED RULE

- 60 day comment/180 day enforcement period
- Recommend waiting before making significant changes
  - Rule may be modified before it is finalized
  - Undoubtedly subject to legal challenges
- Enter into new noncompetes with intentionality
  - E.g., may not want to offer significant new consideration for noncompete revisions that could be prohibited or rescinded
- Monitor both federal and state developments

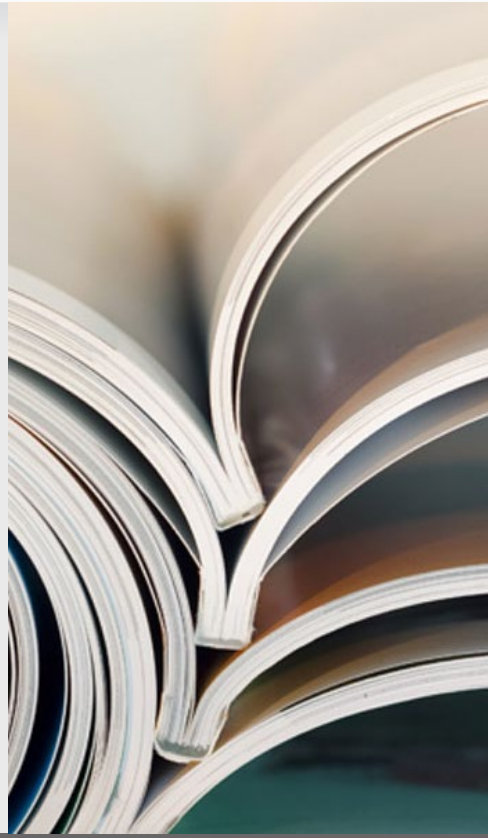


CURRENT NONCOMPETE REFRESHER FOR NC/SC EMPLOYERS

In the meantime – still enforceable if certain factors are met

- Limited to what is necessary for protection of "legitimate interest" of the employer
- Reasonably limited with respect to time
- Reasonably limited with respect to geographic territory
- Not unduly harsh and oppressive (re: employee's ability to earn livelihood)
- Reasonable from standpoint of sound public policy
- Supported by valuable consideration
  - Commencement of employment
  - Additional consideration needed for continued employment

Courts "strictly construe" restrictive covenants against employers



INDEPENDENT CONTRACTOR CLASSIFICATION

CLASSIFICATION OF INDEPENDENT CONTRACTORS IN 2023

- Oct. 11, 2022: DOL announced proposed new IC rule
- Will rescind IC rule published in Jan. 2021
- Reinstates six-part “totality-of-the-circumstances” test to determine if worker is IC or employee under FLSA

CLASSIFICATION OF INDEPENDENT CONTRACTORS IN 2023

- The 2021 rule was based on a different five-part "economic dependence" test
- Obama-Trump-Biden administrations back-and-forth
- Issue: Is a worker classified as IC in business for himself/herself or not?
- New rule will make it harder to classify worker as IC
- Comment period has ended and DOL is working on final rule

TOTALITY-OF-THE-CIRCUMSTANCES TEST

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

IMPACTS AND BEST PRACTICES

- Impacts
  - Investigations and DOL audits
  - Court decisions
- Best Practices
  - Independent contractor agreements
  - Conduct routine self-audits to identify any potential weaknesses
  - Do not treat independent contractors like employees
  - Do not direct the means by which the contractor performs the work
  - Make sure worker supplies own equipment and has own facilities
  - Worker should have ability to increase profits or incur loss
  - Do not let independent contractors supervise employees
  - Do not restrict contractors to working solely for your operation

EEOC INITIATIVES AND FOCUS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Charge Statistics by Claim 2021

- Total Charges Filed: 61,331 charges
- Retaliation: 34,332 charges (56%)
- Disability: 22,843 (37%)
- Sex: 22, 843 (37%)
- Race: 20,908 (34%)

Charge Statistics by State 2021

- South Carolina: 1,007 charges filed (1.5%)
- North Carolina: 2,958 charges filed (4.4%)

Total Monetary Recovery

- $735 million in FY 2021

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STRATEGIC ENFORCEMENT PLAN 2023-2027

- Eliminating barriers in recruitment and hiring
- Protecting vulnerable workers and persons from underserved communities from employment discrimination
- Protecting individuals affected by pregnancy, childbirth, and related medical conditions
- Addressing discrimination associated with the COVID-19 pandemic and other threats to public health

TAKEAWAYS

- Increase in enforcement efforts through investigations and litigation
- Be prepared for investigations
- Self-audit hiring practices and Equal Employment Opportunity and Harassment policies and procedures
- Train HR, managers, supervisors, and employees

ADA ACCOMMODATIONS IN A POST-COVID WORLD

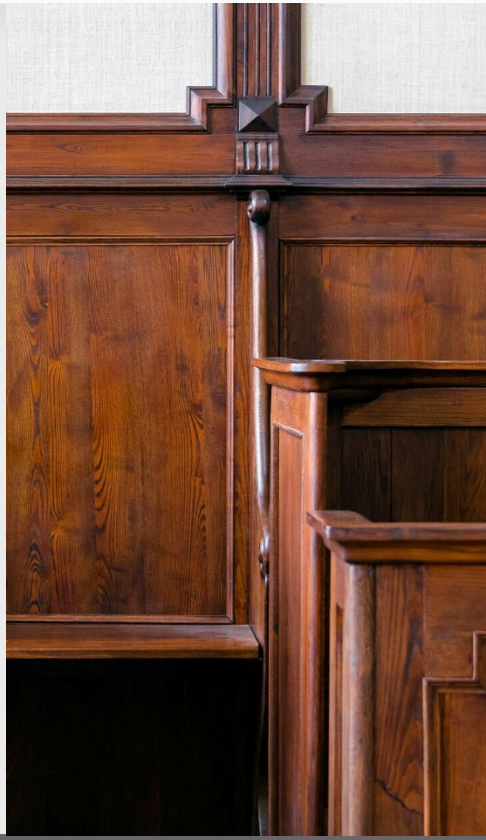
THE AMERICANS WITH DISABILITIES ACT

REMOTE WORK ACCOMMODATION REQUESTS

Requests based on COVID-19 and "Long COVID"

Requests based on pre-existing physical conditions that heighten risk of contracting COVID-19

Individuals with Long COVID and at heightened risk may be disabled for purposes of the ADA and entitled to reasonable accommodation depending on circumstances



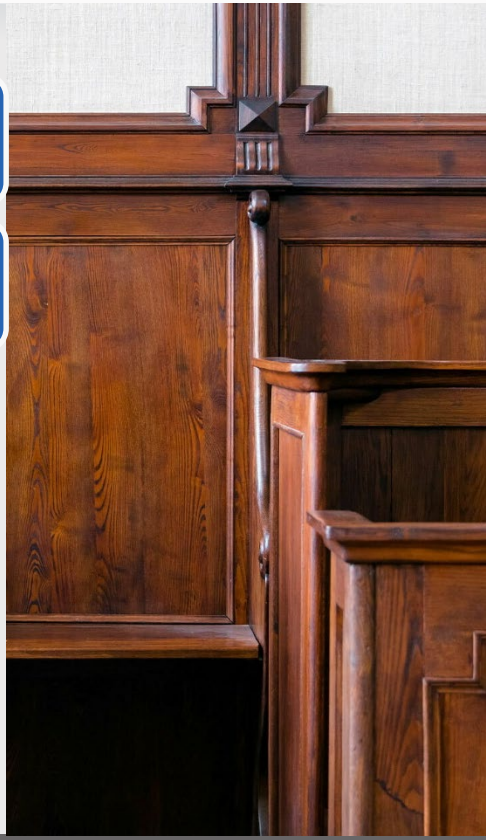
AMERICANS WITH DISABILITIES ACT

EVALUATING ON A CASE-BY-CASE BASIS

Engage in the “interactive process”

Factors to consider:

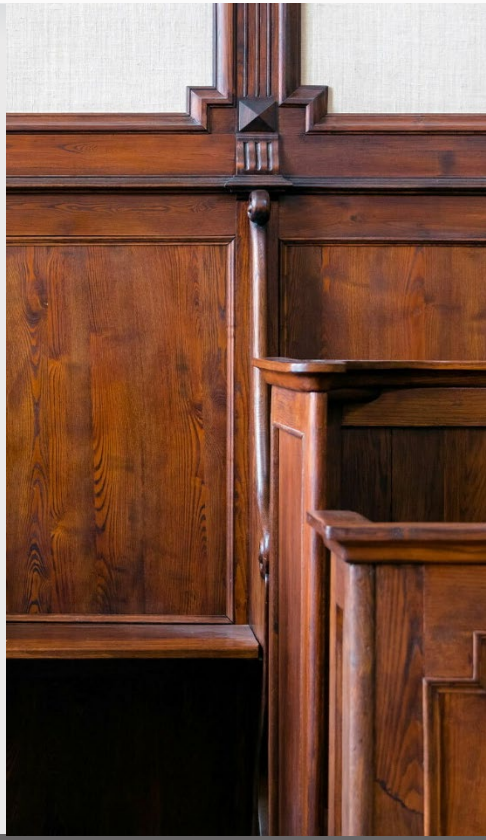
- The medical reasons for the request
- The job position and whether working in person is an “essential function” of the job
- Whether other similarly situated employees are permitted to work remotely
- Whether the remote work request would create an undue hardship for the employer



AMERICANS WITH DISABILITIES ACT

PREPARING FOR REQUESTS

- Advanced communication with employees about return to in-person work
- Update job descriptions
- Evaluate requests on a case-by-case basis
- Document company's good faith efforts to interact with an employee requesting an accommodation

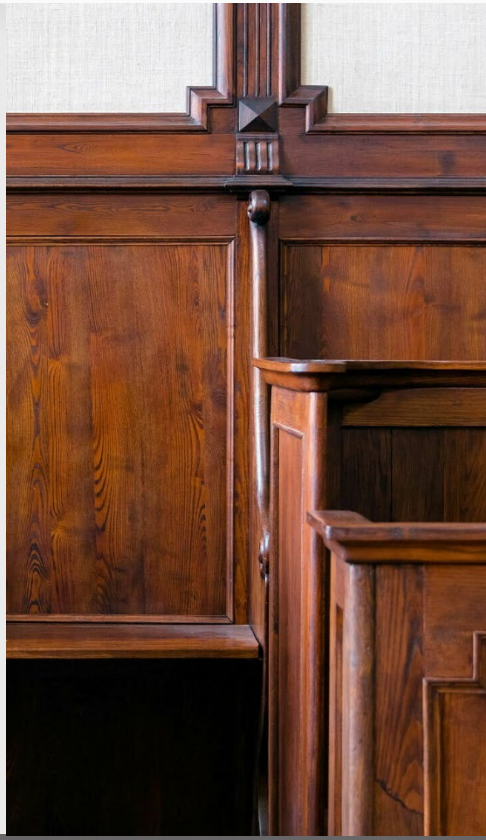


AMERICANS WITH DISABILITIES ACT

EEOC V. ISS FACILITY SERVICES, INC.

NO. 1:21-CV-03708-SCJ-RDC (N.D. GA. 2021)

- H&S manager diagnosed with "chronic obstructive lung disease"
- Put her at high risk of contracting COVID-19 at work
- Requested to work remotely two days per week and take breaks while on site as reasonable accommodation
- Employer denied request and terminated employee

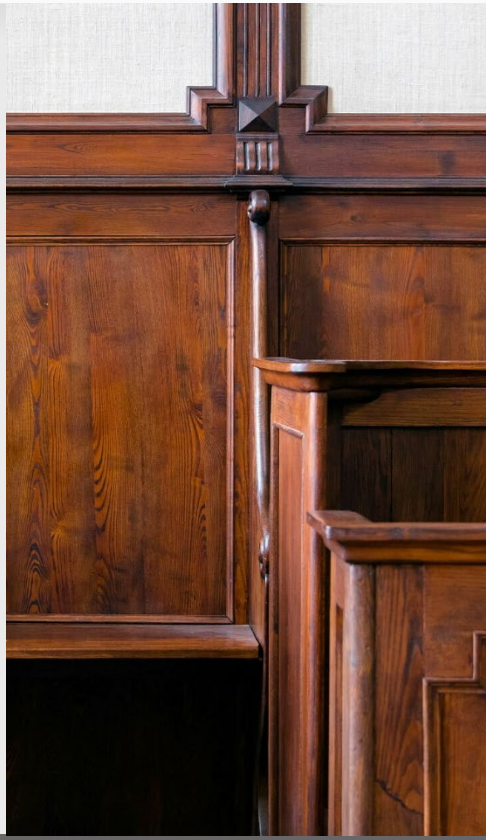


AMERICANS WITH DISABILITIES ACT

EEOC V. ISS FACILITY SERVICES, INC.

NO. 1:21-CV-03708-SCJ-RDC (N.D. GA. 2021)

- EEOC's main allegations:
  - Employer did not provide reasonable accommodation even though it allowed other employees to work remotely
  - And retaliated for accommodation request
- Employer's main defenses:
  - No ADA disability
  - Offered reasonable accommodation
  - Granting requested reasonable accommodation would constitute undue hardship
  - Termination was for legitimate, non-discriminatory reason
- Case settled for $47,500 in Dec. 2022



SEXUAL ASSAULT & HARASSMENT LAWS IN 2022

SEXUAL ASSAULT/HARASSMENT - RECENT LEGISLATION

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

- Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the “Act”) in 2022
- Bipartisan measure
- Amends the Federal Arbitration Act by banning mandatory arbitration of sexual assault and sexual harassment claims
- Prohibits employers from enforcing pre-dispute agreements with their employees that would require the parties to arbitrate claims of sexual assault and sexual harassment.

SEXUAL ASSAULT/HARASSMENT - RECENT LEGISLATION

SPEAK OUT ACT – PASSED IN LATE 2022

- Prohibits employers from enforcing non-disclosure and non-disparagement clauses in employment agreements if employee wants to speak out about sexual assault or harassment claims in workplace
- Applies only to nondisclosure and non-disparagement clauses in agreements that were entered into *before* any dispute arose with respect to an employee's sexual assault or sexual harassment claims
    - IMPORTANT: if employee signs agreement to specifically settle sexual assault/harassment claims, Speak Out Act does not prohibit enforcing non-disclosure/non-disparagement clauses in this agreement
- Impact likely negligible, but employers should consider ensuring that all new and existing employment and independent contractor agreements do not contain the type of broad nondisclosure/confidentiality or non-disparagement provisions covered by the law.

NEW PREGNANCY & LACTATION PROTECTIONS IN THE WORKPLACE

NEW PREGNANCY PROTECTIONS IN THE WORKPLACE

PREGNANT WORKERS FAIRNESS ACT

- On December 29, 2022 President Biden signed the 2023 Consolidated Appropriations Act, which includes the Pregnant Workers Fairness Act (PWFA)
- PFWA requires employers to make temporary and reasonable accommodations for pregnant workers ("common sense protections" to ensure continued work)
- Takes effect on June 27, 2023
- Like the ADA, it covers private employers with fifteen or more employees and certain other public employers
- Employers: 1) must reasonably accommodate "known limitations" of pregnancy, childbirth, or related medical conditions of a qualified employee; and 2) cannot discriminate against pregnant workers

NEW PREGNANCY PROTECTIONS IN THE WORKPLACE

PREGNANT WORKERS FAIRNESS ACT

Pursuant to the PWFA, It shall be an unlawful employment practice for a covered entity to–

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 102(7);

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

NEW PREGNANCY PROTECTIONS IN THE WORKPLACE

PREGNANT WORKERS FAIRNESS ACT CONTINUED

- Similar to what employers must already provide under the ADA – a reasonable accommodation that does not impose an undue hardship, but under the PWFA accommodations must be provided for "known limitations."
    - A "known limitation" is a "physical or mental condition related to the pregnancy, childbirth, or related medical conditions of a qualified employee" that has been communicated to the employer but does not have to rise to the level of a disability under the ADA.
- Another distinction: under the PWFA, employers cannot require a qualified employee to take paid or unpaid leave if another reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions could be provided.
    - Could be interpreted as more stringent than what is allowed under the ADA – i.e., leave should only be a last resort

NEW PREGNANCY PROTECTIONS IN THE WORKPLACE

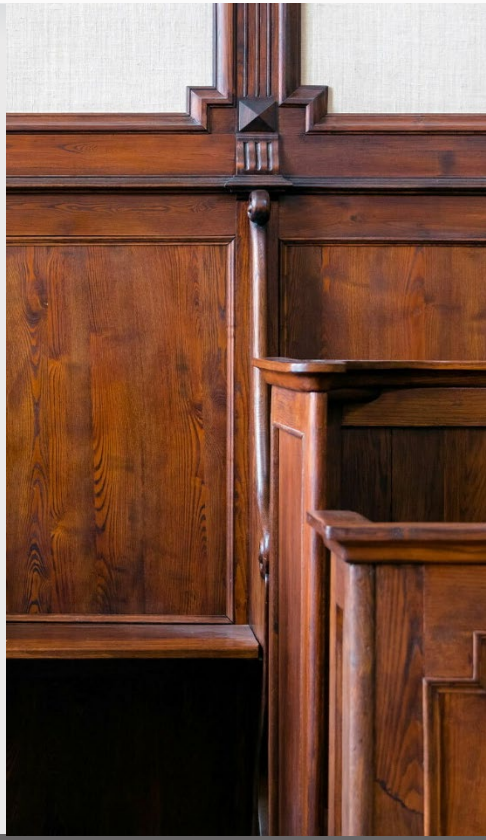
PREGNANT WORKERS FAIRNESS ACT CONTINUED

- Will this new law change much for SC employers?
- If there is not a state law already adding extra protections, employers in those states need to make sure they are in compliance with these increased protections for pregnant workers

ADDITIONAL PROTECTIONS FOR NURSING MOTHERS

THE PUMP FOR NURSING MOTHERS ACT

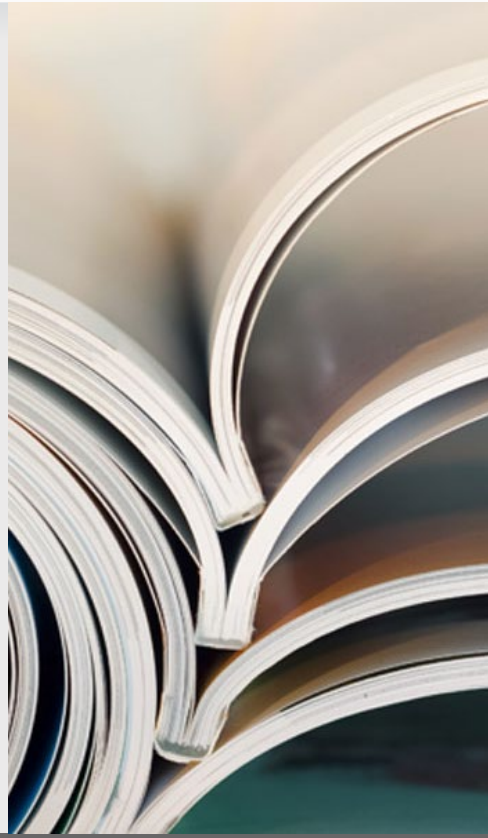
- The 2023 Consolidated Appropriations Act also includes the "Providing Urgent Maternal Protections for Nursing Mothers Act" or the "PUMP for Nursing Mothers Act."
- Legislation went into effect immediately when signed, but enforcement provision not effective until April 28, 2023.
- Provides for:
  - the right to break time and space to pump breast milk at work to millions more workers, including teachers and nurses
    - Federal Break Time for Nursing Mothers law (2010) previously excluded many workers (i.e., most salaried employees) from protections
  - Makes it possible for workers to file a lawsuit to seek monetary remedies in the event that their employer fails to comply
  - Clarifies that pumping time must be paid if an employee is not completely relieved from duty



ADDITIONAL PROTECTIONS FOR NURSING MOTHERS

PUMP ACT CONTINUED

- South Carolina law already affords numerous protections to nursing mothers with the South Carolina Lactation Support Act, enacted in 2020.
- So, PUMP Act should not provide a big change for SC employers.
- One thing to note – under federal law, employers need to provide more than simply a private restroom for purpose of expressing breast milk – this is technically permitted under SC law, as employers have to simply provide more than a "toilet stall."
  - If employers have not been previously providing a separate room other than a private bathroom, now is the time to make a change.

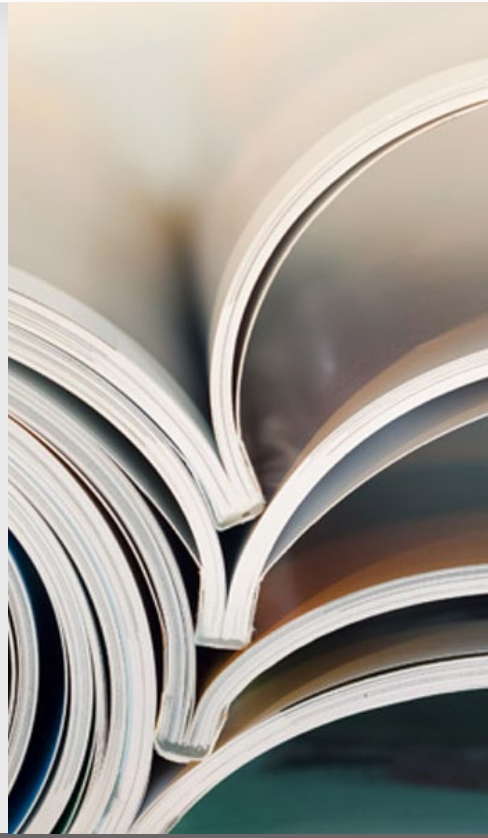


SEXUAL ORIENTATION & IDENTITY ISSUES

SEXUAL ORIENTATION AND IDENTITY

RECENT DEVELOPMENTS – FEDERAL LAW

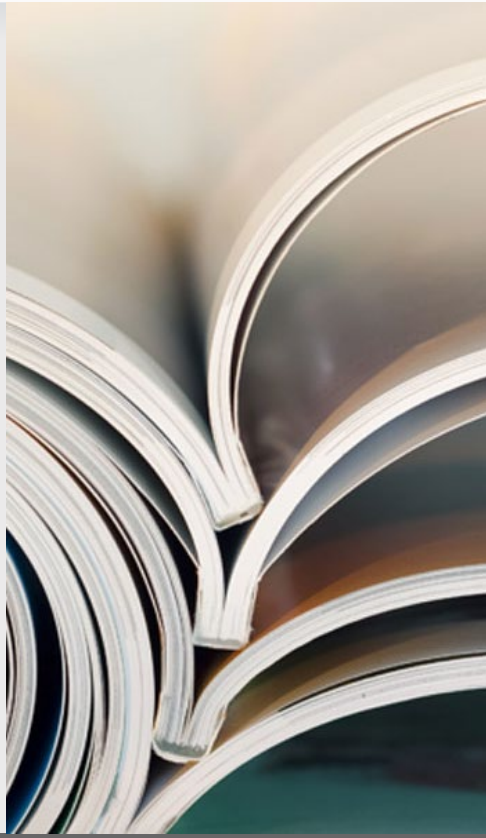
- Respect for Marriage Act
  - Makes clear that same-sex couples are entitled to the same federal benefits as any married couple
    - If employer offers retirement or insurance plans to married employees, it must treat all types of marriages equally.
    - If employer offers health benefits for an employee's spouse, it must offer them to all spouses, without regard to the type of marriage at issue.
    - Religious exemptions may still apply to nonprofit religious organizations, but tread carefully



SEXUAL ORIENTATION AND IDENTITY

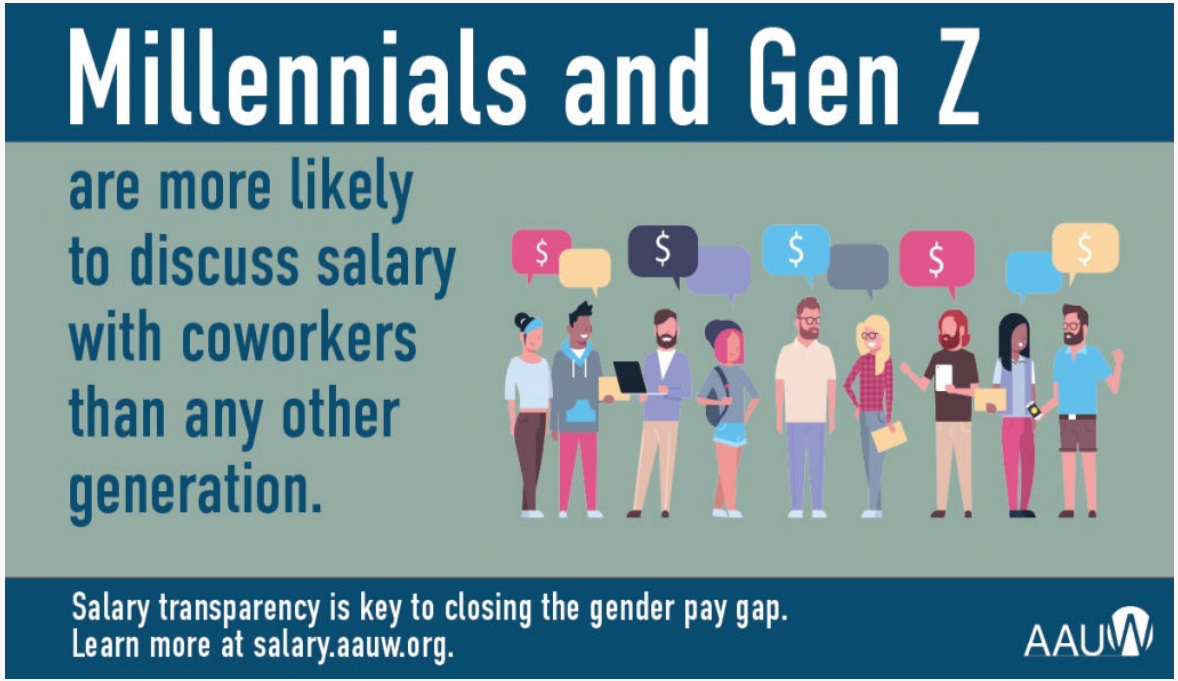
RECENT DEVELOPMENTS – 4TH CIRCUIT

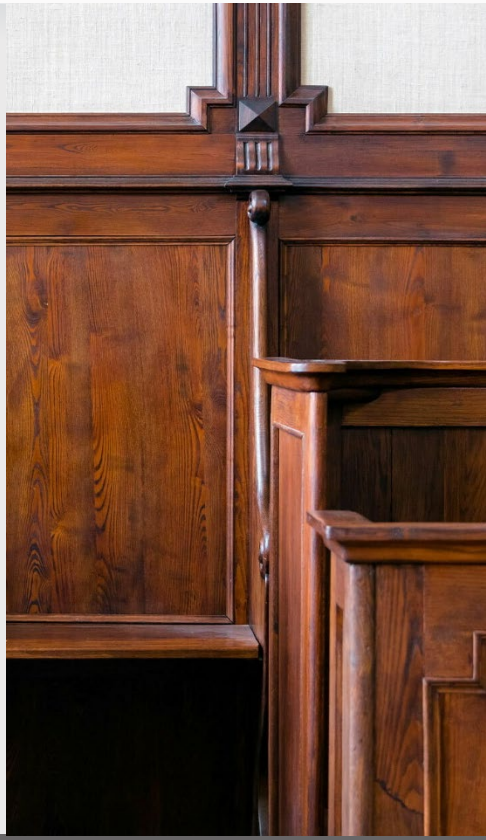
- In *Williams v. Kincaid*, the Fourth Circuit held that gender dysphoria is a qualified disability under the ADA
  - Definition of gender dysphoria recognized in case : the "clinically significant distress" felt by individuals who experience an incongruence between their gender identity and their assigned sex
  - Williams was an inmate who experienced discrimination/harassment while in prison as a result of her status as a transgender person experiencing gender dysphoria
  - 4th Circuit held that Williams could potentially establish that her gender dysphoria "resulted from a physical impairment" and therefore was protected by the ADA
    - Although not an employment case, case will still affect employers in the 4th Circuit (Maryland, Virginia, West Virginia, NC, and SC), as employees experiencing gender dysphoria may now be entitled to anti-discrimination protections under the ADA



PAY TRANSPARENCY & BIAS ISSUES

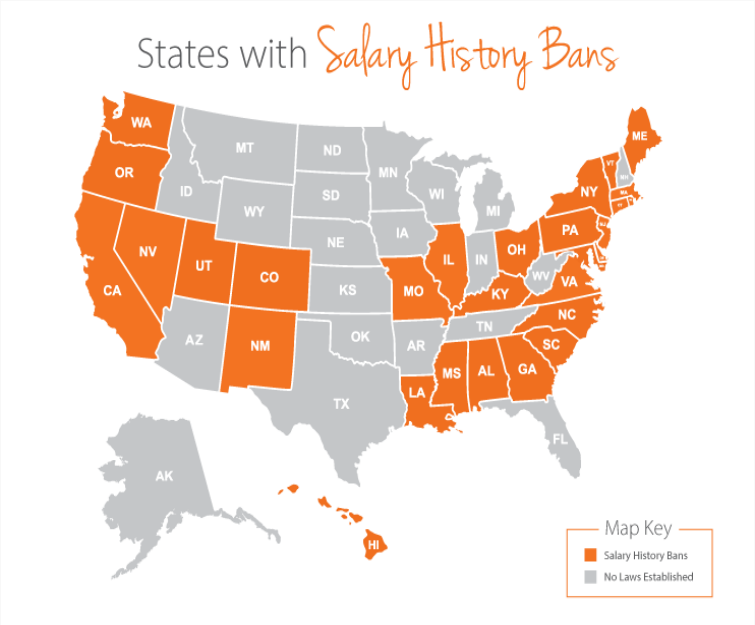
CHANGING PERCEPTIONS/DEMOGRAPHICS





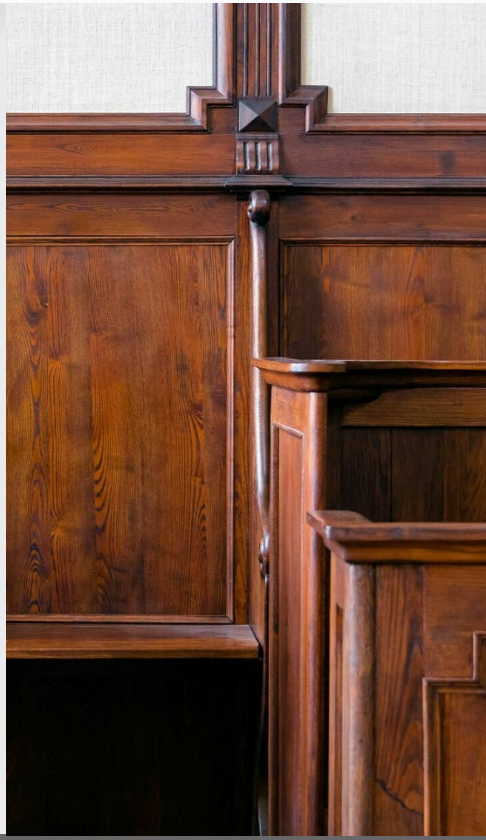
PAY BIAS ISSUES

INCREASED COMPENSATION TRANSPARENCY/BANNING SALARY HISTORY INQUIRIES



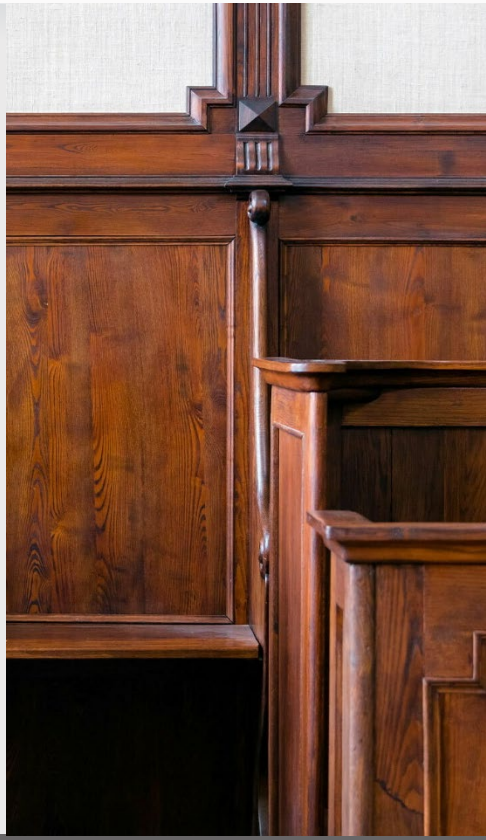
Growing number of states and localities have:

- Banned questions on salary history
- Expanded pay transparency laws
- Required pay range disclosures
- Collecting Pay Data



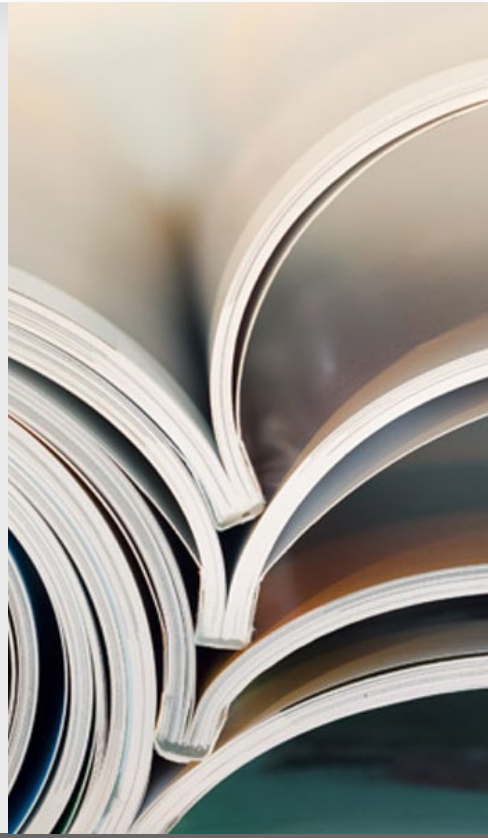
PAY BIAS ISSUES – FEDERAL ACTION

- Equal Pay Act (1963) – Equal Pay for Equal Work
- EEO-1 Data Collection Requirements
  - Employers with 100 or more employees (federal contractors with 50+)
  - Component 1: demographic workforce data (portal for 2022 data should open 4/23)
  - Component 2: pay/compensation data reporting
    - Collected in 2017-18; report issued in August 2022
    - Real questions as to the value of the report and burden on employers to comply
    - Rumblings and favorable political environment for future collection of pay data
- REMINDER NLRB PROTECTIONS: Employees have the right to communicate with other employees about their wages



EMPLOYER RESPONSE TO PAY BIAS LAWS AND INITIATIVES

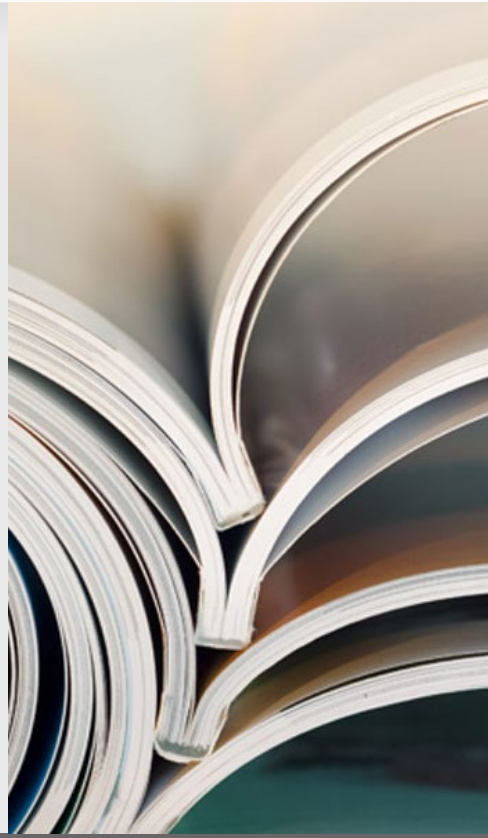
- Know whether your applicant/hire is in a no-salary-history jurisdiction (remote workers) or whether you are required to publicize pay ranges/salary amounts in ads
- Audit pay structure (overseen by legal counsel)
- Explain gaps/differences in pay contemporaneously
- Do not ignore subsequent inequities (regular monitoring)
- Correct proactively
- Respond constructively to comments and complaints



DOL SALARY THRESHOLD INCREASE

EXPECTED MINIMUM SALARY INCREASE FOR EXEMPT WORKERS

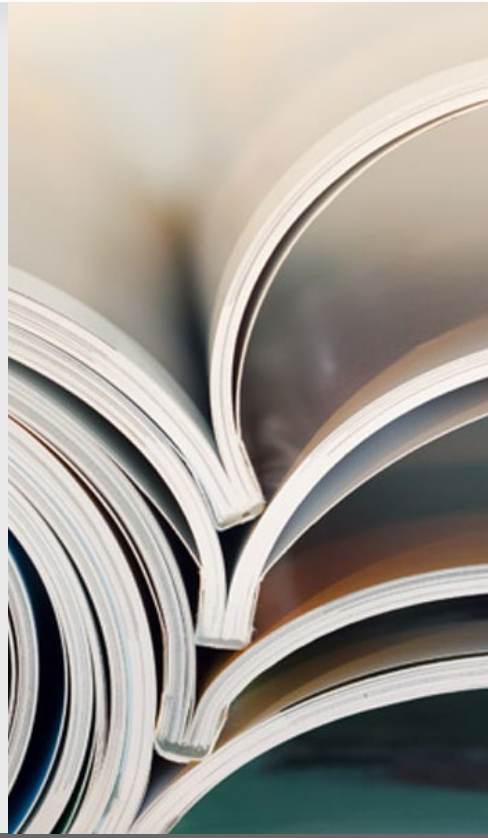
- Exemption from FLSA OT: Salaried Basis Test and Duties Test
  - Most focus: duties of white collar exemptions (prof/exec/admin)
  - Salary threshold: must receive minimum weekly salary
- Salary threshold history:
  - 2004-19, salary threshold $23,660
  - 2016 DOL rule pushed to $47,476 (Obama Admin) - overturned
  - 2019 DOL rule pushed to $35,308 (Trump Admin) (current)
- 2022 regulatory agenda includes
  - Widely expected to increase current minimum salary amount
  - DOL current proposal: $900-$1,000 per week ($46,800- $52,000 annually)
  - Notice of Proposed Rule extended from 4/22 to 10/22 to 5/23



EMPLOYER ACTION IN ANTICIPATION OF RULE CHANGES?

- Monitor and see what a) final rule is and b) whether it will be subject to legal challenges
  - Plan for 2023/2024 budgets to account for potential increases
- If significant increase, plan for considerable and intentional action
  - Raise salaries (effect on the workplace/compression of salary ranges)
  - Convert employees to non-exempt status
- Potential other proposed DOL rules:
  - Adjustment to exempt duties test
  - Increases for “highly compensated employees” exemption

REMINDER: Job Duties And Other Requirements Matter (not just salary)



QUESTIONS?

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