Dancin' in the Rain

Labor and Employment Law Update

RTCAC – ACC Lunch & Learn Presented by

MORNINGSTAR LAW GROUP

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"The only way to make sense out of change is to plunge into it, move with it, and join the dance." Alan Watts.

Speakers:

- Amie Flowers Carmack, Partner, Morningstar Law Group
- Harrison Gates, Partner, Morningstar Law Group
- Britney Weaver, Associate, Morningstar Law Group
- Elizabeth Ramirez-Washka, Associate General Counsel, Duke University & Duke University Health System

1. 2024 election forecast
2. DEI
3. Pay Transparency
4. FLSA Overtime Rule
5. NLRB: Confidentiality, Non-Disparagement, Work Rules
6. Evolving Independent contractor rules)
7. Non-compete, Joint Employment legislation
8. EEOC’s warnings regarding AI discrimination Risk

2024 Election Forecast

Elections are never about one thing. These days, because of how divided the candidates and their bases of support are, they are about everything.

ADMINISTRATION CHANGES

Federal, State, Local

Democrats: regulating worker's rights, minimum wages, safety and health, expanding access to benefits (more employees with more rights & more benefits)

Republicans: deregulation, business-friendly policies, reversing social safety net policies, regulating moral conservatism & traditional values

Split control: political posturing, stalemates, compromises

Changes, they are a comin' – *One Way or Another*

Election year scurry:

- EEO & DEI
- Minimum wage
- Pay transparency
- Time off
- Non-competes
- Worker Classification
- NLRB

Election Results:

- EEO & DEI
- Minimum wage
- Pay transparency
- Time off
- Non-competes
- Worker Classification
- NLRB

Diversity, Equity, and Inclusion (DEI)

- *June 29 Students for Fair Admissions v. President and Fellows of Harvard College* – Equal Protection Clause
- *June 29* America First Legal asserts: *"all DEI programs" are now "illegal"*
- *June 29* EEOC weighs in: *"It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."*
- Inflammatory News Headlines, e.g.,: "The Supreme Court ruling on affirmative action may impact workplace hiring practices" (July 7, CNN)
- A wave of lawsuits, and more inflammatory headlines, follow

TAKEAWAYS FROM STUDENTS FOR FAIR ADMISSIONS AND ITS AFTERMATH:

- **Employer DEI programs are not illegal**
- **No impact on OFCCP Affirmative Action**
- **Caution areas:** program criteria and special accommodations
- **Red flags:** programs that facially appear to provide a zero-sum advantage based on protected characteristics, including race or gender, or that are open only to applicants with certain protected characteristics.
- **Green Light:** Programs that focus on eliminating bias, cultivating a broad view of diversity and promoting equal opportunity among employees

Change Watch

Muldrow v. St. Louis

"adverse action" under Title VII does/does not require significant disadvantage to the employee (arguments were Dec 6, opinion TBD)

- scholarships for diverse candidates
- selecting interviewees partially due to diverse candidate slate policies;
- tying executive or employee compensation to the company achieving certain demographic targets.

State Legislation/Cases

FL's Stop WOKE Act – would regulate private employers' employee training

TX House Bill 3399 – contracts with public entities would prevent contracting with a company that requires other companies to commit to DEI standards as a condition of doing business together

STRATEGIES

- Articulate Goals that advance your company's mission - big picture, then specifics
- Wide lens –beyond legally protected categories
- Provide safe spaces for dialogue, learning, mistakes
- Create Inclusive recruiting pipeline
- Interrupt biases in systems to level the playing field
- Avoid exclusivity in opportunities and resources
- Holistic policies that mitigate or remove barriers and challenges
- Be prepared to show gaps followed by improved outcomes
- Carefully consider diverse slates & AA policies and practices

Pay Transparency Rules

Rules that are gaining tractions throughout the US

What You Need to Know

- Pay equity is crucial for organizations to remain competitive and compliant.
- Imperfect pay practices can lead to new compliance issues.
- Successful pay equity strategies require alignment and investment from all stakeholders.

The Importance of Collaboration

- **Collaborative Efforts**:
  - Legal and HR stakeholders must align
  - Unified approach is required for compliance and risk mitigation
- **Potential Hurdles**:
  - Siloed approaches
  - Delayed involvement of legal stakeholders

Proactive partnership between legal and HR mitigates risks and fosters fair compensation practices.

In Recent News… Advancing Pay Equity: Biden Administration's Executive Orders

- The Biden administration announced executive orders to increase pay transparency and advance pay equity for federal government workers and employees of federal contractors .
- Commemorates the 15th anniversary of the Lilly Ledbetter Fair Pay Act.

More on Pay Transparency for Federal Contractors

- Federal Acquisition Regulatory (FAR) Council proposed rules:
  1. Prohibiting consideration of compensation history.
  2. Mandating inclusion of pay ranges in job postings.
  3. Requiring notification of these requirements.

- Rules applicable to contracts exceeding the government's $10,000 micro-purchase threshold.

- Public comment open until April 1, 2024.

The Importance of Compliance

- Avoid potential legal repercussions.
- Prevent damage the organization's reputation and financial stability.
- Demonstrate commitment to fair labor practices.

The Rise of Pay Transparency Laws

- State laws continue to spread throughout US (e.g., a pay transparency law in the District of Columbia to take effect June 30)
- You must understand jurisdictional requirements and adapt, and
- Remember that compliance with transparency laws is crucial, especially in remote work scenarios where multiple jurisdictions may apply.

Take Action!

- Conduct a pay audit
- Check for compliance
- Deliver transparent communication

US Department of Labor's Proposed New FLSA Overtime Rule

A quick look at proposed changes coming this year

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What's Happening?

Salary Threshold Increase

The Department of Labor (DOL) has proposed significant changes to the salary threshold for the Fair Labor Standards Act's (FLSA) white-collar exemptions.

The Goal

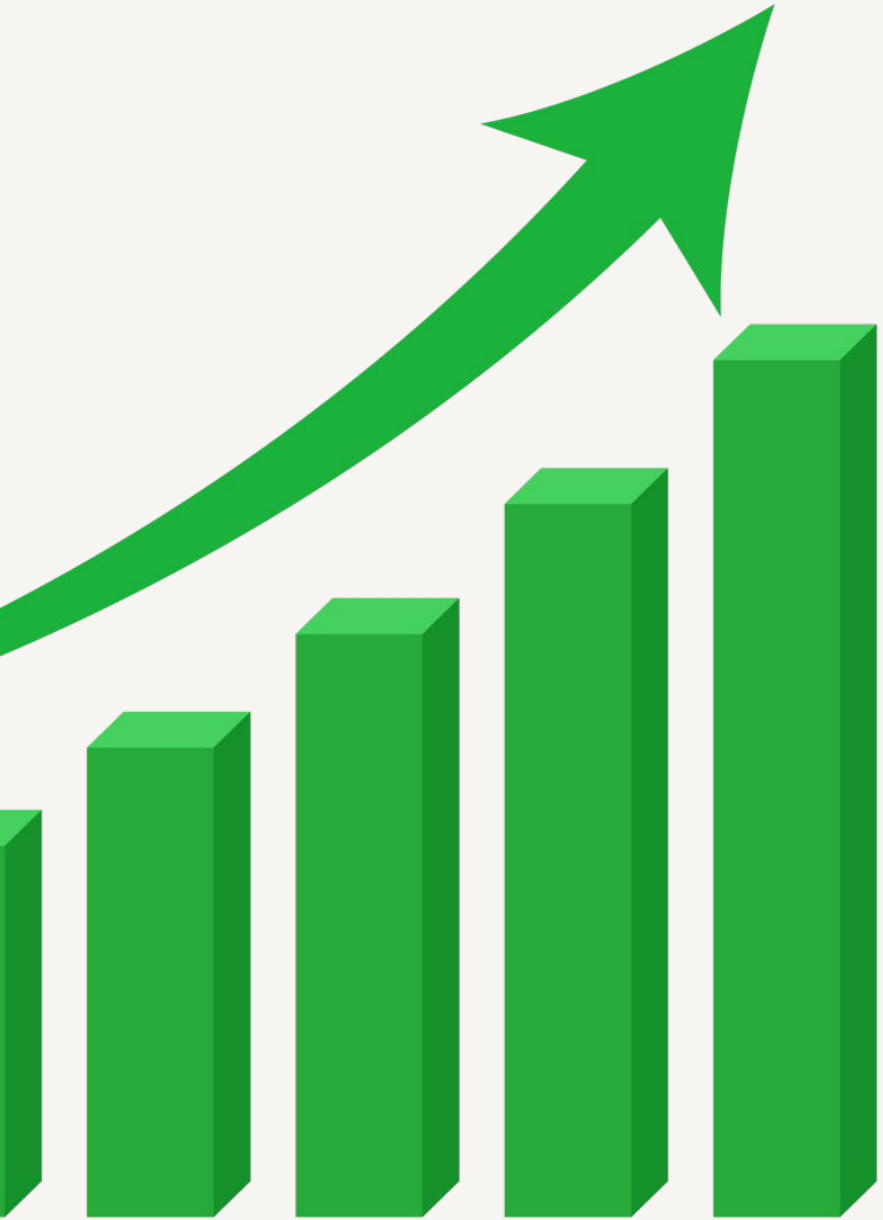
The proposed changes are aimed at updating regulations governing overtime pay eligibility.

Get Ready

These changes could have substantial implications for employers and employees alike.

Expected Implementation Timeline

- Open for public comment until November 7, 2023.
- The DOL aims for a final rule release next month in April.
- If implemented, changes could take effect soon after publication.



Proposed Salary Threshold Increase

- Minimum salary threshold requirements for these **white-collar exemptions** to apply from **$35,568 to $55,068** per year – the threshold in the final rule may be higher.
- Minimum salary for application of the highly compensated employee exemption from $107,432 per year to $143,988 per year.
- Expanding overtime pay eligibility to more employees.

Impact on Employers

- Need to reevaluate the classification of currently exempt employees.
- Adjustments to salaries or reclassification may result in increased labor costs.
- Properly managing these changes is crucial to maintaining legal compliance and avoiding penalties.

Key Takeaways

- The proposed changes to FLSA's white-collar exemptions represent a significant shift in overtime pay eligibility criteria.
- Employers must carefully assess their current practices and prepare for potential regulatory changes.
- By staying informed and proactive, organizations can ensure compliance and mitigate risks associated with non-compliance.

Take Action!

- Review employee classifications.
- Review pay for your exempt employees.
  - Raise exempt employees' salary to meet the proposed minimum salary level; or
  - Reclassify the employees as non-exempt, which will subject employees' pay to minimum hourly wage requirements and overtime.
- Update policies and procedures.
- Communicate changes to employees.
- Provide training on overtime pay eligibility criteria.

Confidentiality, Non-Disparagement, and Work Rules in Light of Recent NLRB Opinions and Guidance

A discussion of last year's NLRB game changer for employers

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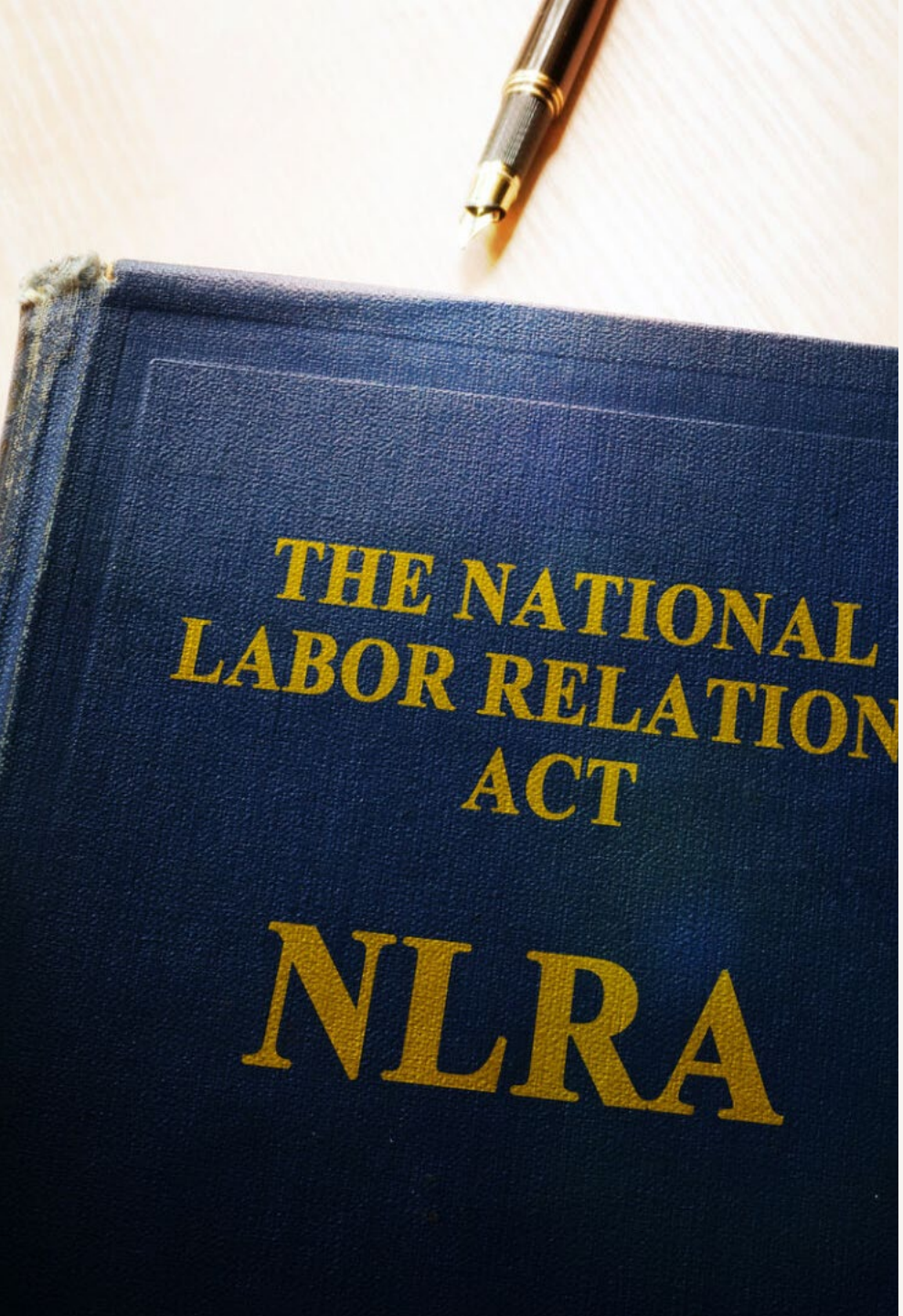
Background and Overview of NLRA Section 7 and 8(a)(1)

- 2023 – The National Labor Relations Board (NLRB) overturned prior precedent by ruling confidentiality and nondisparagement provisions in severance agreements as unlawful.
- **NLRA Section 7**: Guarantees employees the right to engage in concerted activities for mutual aid or protection, including discussing terms and conditions of employment.
- **NLRA Section 8(a)(1)**: Prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

Prior Precedent

- Permitted inclusion of confidentiality and nondisparagement clauses
- Emphasized voluntariness of agreements and lack of impact on terms and conditions of employment.
- Allowed employers to include such clauses if the agreements were *voluntary* and **did not infringe upon employees' NLRA rights**.



2023 McLaren Macomb Decision

- Broad confidentiality and nondisparagement provisions found unlawful.
- Overturned prior precedent – highlighting the **broad reach** and *potential to chill employees' exercise of their Section 7 rights*.

The New Rule

- "Mere proffer" of severance agreement with unlawful provisions violates Section 8(a)(1).
- Offering an agreement with conditions that forfeit statutory rights is unlawful.

General Counsel Memo Highlights

- Memo from General Counsel Jennifer Abruzzo clarifies application of McLaren Macomb decision.
- Retroactive application to previously signed agreements.
- Supervisors also protected against retaliation for refusal to offer unlawful agreements.

Take Action!

- Review and revise severance agreements, and other agreements with employees.
- Revision options: removing, tailoring, or adding disclaimers to provisions.
- **Caution!** General Counsel cautioned in her memo that the addition of disclaimers and savings clauses ***may not be sufficient to save an otherwise overbroad severance agreement***.

Non-Compete Legislation & Regulation

PROPOSED FTC RULE, NLRB ACTIVITY AND STATE AND LAW UPDATE

SOME QUICK FACTS

- 20% of U.S. workers are subject to non-competes
- = ~30 million
- 98% of private employers require executive/management level employees to sign non-competes

Increasing Public Policy Concerns About Non-Competes

Stifling worker mobility

Depressing wages

FTC estimates $300 billion per year

Depriving businesses of talent

Stifling entrepreneurship

Proposed FTC Rule

- Announced January 5, 2023
- Provides that non-competes are “unfair method of competition” under FTC Act
- Applies to most U.S. employers

PROPOSED FTC RULE

KEY PROVISIONS

- Prohibits employers from imposing non-competes on workers
- Includes de facto non-competes
- Applies to employees, independent contractors, and unpaid workers

- Applies to most employers, except those exempt from FTC jurisdiction
- Applies retroactively
- Supersedes all contrary state laws
- Provides for fines, penalties and injunctive relief

STATUS OF PROPOSED FTC RULE

- No final rule issued
- FTC vote anticipated in April 2024
- Once final rules issues, multiple legal challenges anticipated
  - U.S. Supreme Court

NATIONAL LABOR RELATIONS BOARD

Do Non-Competes Interfere with Section 7 Rights?

Recent NLRB Activity Related to Non-Competes

- NLRB has not yet issued any ruling on non-competes
- On May 30, 2023, General Counsel Jennifer A. Abruzzo issued Memorandum 23-08
- Non-Competes violate NLRA if they "reasonably tend to chill employees" from engaging in Section 7 activity
  - Ability to quit or change jobs
- Employers must show that non-compete "is narrowly tailored to special circumstances justifying the infringement of employee rights."
- "[D]esire to avoid competition from a former employee" is not a legitimate business interest
- "[S]pecial investments in training

STATUS OF STATE LEGISLATION

Summary of Status as of 2024

As of 2024, States fall into one of three categories in how they treat non-competes

Effective Total Ban

- California
- Colorado
- Minnesota
- North Dakota
- Oklahoma

Partial Ban

Statutory Wage Threshold and/or Notice Requirement

- District of Columbia
- Illinois
- Maine
- Maryland
- Massachusetts
- Nevada
- New Hampshire
- Oregon
- Rhode Island
- Virginia
- Washington

Statutory and Common Law Rules of Reasonableness

- Remaining states

Washington, D.C.

- As of October 2022, new statute prohibits non-competes for many D.C. employees
- Prohibits non-competes on most District employees who make under $150,000 per year
- Employees making over $150,000 can only be subject to a one-year noncompete, and only if the worker is notified in advance

NEW YORK

- June 2023 bill would have banned new non-compete agreements
- Surprise veto by Gov. Hochul after 6 months
- Widely seen as a victory for Wall Street

California

- New law makes most non-competes unenforceable regardless of where signed
- Prohibits employers from enforcing non-competes even for employees outside of CA
- New private right of action
- Notice requirements

EVOLVING INDEPENDENT CONTRACTOR RULES

U.S. DEPARTMENT OF LABOR, NATIONAL LABOR RELATIONS BOARD & STATE LAW

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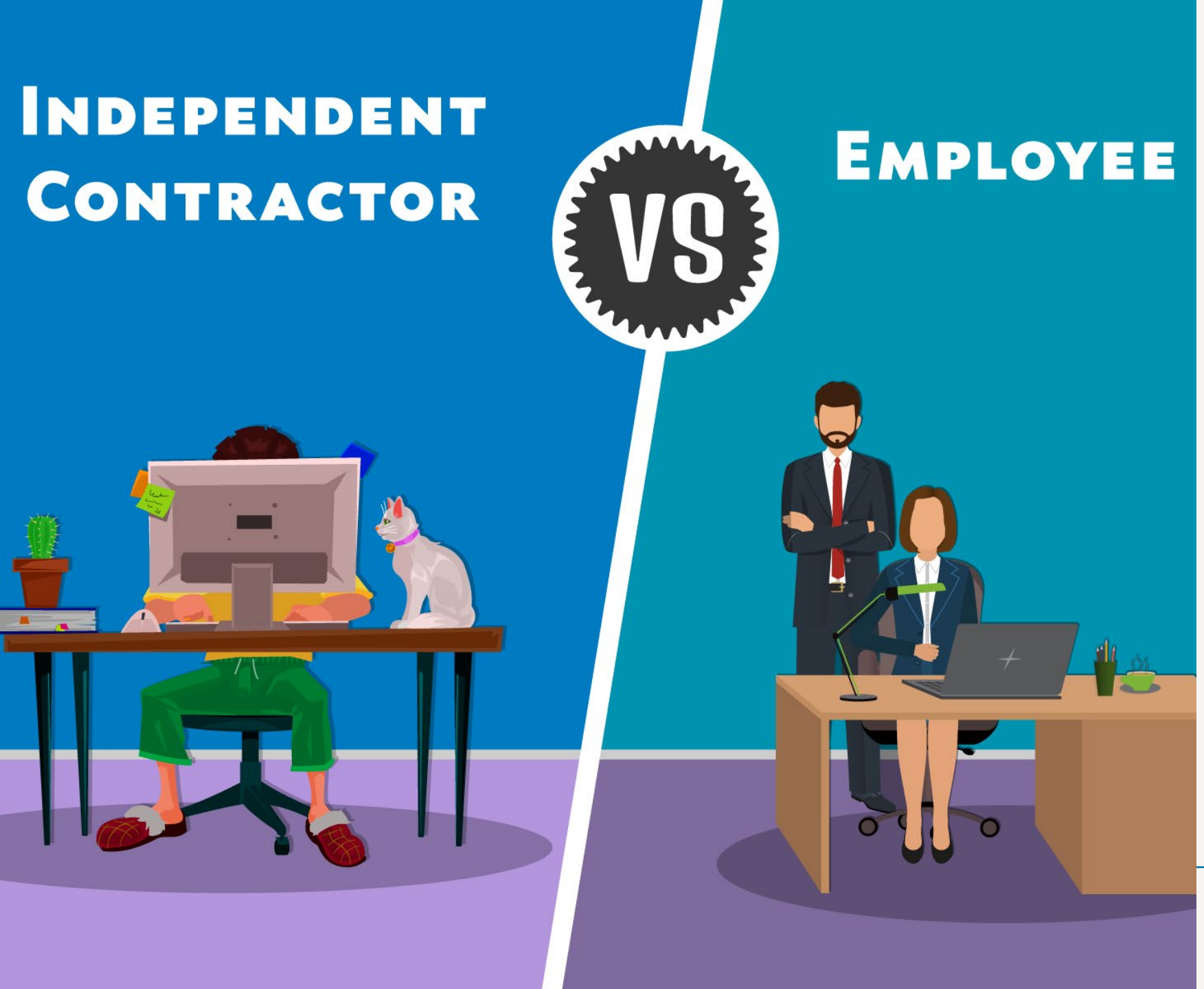


GENERAL TRENDS

- Turning back the clock to the Obama Era
- More complex, multi-factor standards
- Stricter standards weighted towards finding of employee status
- More litigation

NEW DOL REGULATIONS: INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS UNDER FLSA

- Fair Labor Standards Act, 29 U.S.C. § 203 *et seq.*
- Minimum Wage and Overtime requirements
- Potentially serious exposure for employers
- Independent contractors excluded from coverage
- Major significance in construction, transportation, and gig economy

Independent Contractor vs. Employee Status under FLSA: Longstanding Multi-Factor "Economic Realities" Approach

Are You An Employee Or An Independent Contractor?

Indicators of an Employee	-OR-	Indicators of an Independent Contractor
Working for someone else's business		In business for themself
Generally, can only earn more by working additional hours		Can increase profit through business decisions
Typically uses the employer's materials, tools and equipment		Typically provides their own materials, tools and equipment and uses them to extend market reach
Typically works for one employer or may be prohibited from working for others		Often works with multiple clients
Continuing or indefinite relationship with the employer		Temporary relationship until project completed
Employer decides how and when the work will be performed		Decides how and when they will perform the work
Employer assigns the work to be performed		Decides what work or projects they will take on

These are general concepts. All relevant facts about the work relationship should be considered as a whole, and the existence or absence of any particular fact does not require a particular outcome.

dol.gov

NEW DOL REGULATIONS: INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS UNDER FLSA

TRUMP ERA—2021 FLSA REGULATIONS

- Multi-factor test
- Streamlined version
- Two "Core Factors"
- Weighted toward independent contractor finding

- Five factor test
- Two Core Factors:
  - Nature and degree of individual's control over work
  - Individual's opportunity for profit and loss
- Less Probative Factors:
  - Amount of skill required
  - Degree of permanence in relationship
  - Whether work is part of integrated unit of production

NEW DOL REGULATIONS: INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS UNDER FLSA

2024 FLSA REGULATIONS

- Effective March 11, 2024
- More complex totality-of-the-circumstances approach
- No factor dispositive
- Ultimate inquiry: Economic Dependence
- Weighted toward employee finding

- Non-Exhaustive Six Factor Test
  1) Opportunity for profit or loss depending on managerial skill
  2) Relative investments by worker and company
  3) Degree of permanence of work relationship
  4) Nature and degree of company's control
  5) Extent to which work is "integral" part of company's business
  6) Specialized skill and business initiative

2024 FLSA Regulation: Guidance Six Factor Test

Opportunity for Profit & Loss

- Ability to earn profits/suffer losses through independent effort and decision making
- Meaningful negotiation and discretion

Nature & Degree of Control

- Scheduling, supervision of performance, control over economic terms
- Reserved control counts
- Employer actions for sole purpose of legal compliance not dispositive

Relative Investment

- Capital or entrepreneurial investments
- Worker making similar types of investments as company

Integral Part of Business

- Whether function is critical, necessary, or central to primary business
- Focus is on the nature of the work, not the employee

Degree of Permanence

- Whether work is definite in duration, non-exclusive, project-based, or sporadic vs. indefinite, continuous, and exclusive

Skill & Initiative

- Use of specialized skills that contribute to a business-like initiative.
- Specialized training alone not dispositive

KEY TAKEWAYS FOR NEW DOL REGS

- New Regs are NOT the "ABC" Test
  - But in many (if not most) cases, they will compel the same result
- Existing case law continues to control
- Companies should hire counsel and conduct internal audits of workers classified as independent contractors
- Transportation & logistics industries and gig economy likely to be most impacted
- Brace for litigation!

2023 NLRB DECISION

INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS UNDER NLRA

- National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
- NLRA recognizes and protects employee's right to engage in "protected activity" related to terms and conditions of work:
  - Join or organize union
  - Engage in collective bargaining
  - Engage in concerted action (e.g., strike)
- Independent contractors excluded from NLRA protection

2014 NLRB DECISION: *FedEx Home Delivery (FedEx II)*

STANDARD FOR INDEPENDNT CONTRACTOR VS. EMPLOYER STATUS

- Restatement (Second) of Agency § 220 (1958)
- Non-exhaustive multi-factor test
- No single factor dispositive
- Rejected D.C. Cir. test: "significant entrepreneurial opportunity" overriding factor
- Favors finding of employee status and narrower exclusion from NLRA
- Second Restatement's Multi-Factor Test:
  1. Extent of control over details of work
  2. Engaged in distinct occupation or business
  3. Kind of occupation
  4. Skill Required
  5. Supplying of tools and place of work
  6. Length of time employed
  7. Method of payment (time or job)
  8. Part of regular business
  9. Belief of parties
  10. Whether principal is in business

2019 NLRB DECISION: *SuperShuttle DFW, Inc.*

STANDARD FOR INDEPENDNT CONTRACTOR VS. EMPLOYER STATUS

- Restatement (Second) of Agency § 220 (1958)
- Adopted D.C. Cir. test: "significant entrepreneurial opportunity" overriding factor
- Favors finding of independent contractor status and broader exclusion from NLRA
- Same 10 factor test
- But, where factors demonstrate workers have "significant entrepreneurial opportunity," they likely are independent contractors
- NLRB: "Control and entrepreneurial control are two sides of the same coin; the more of one, the less of the other."

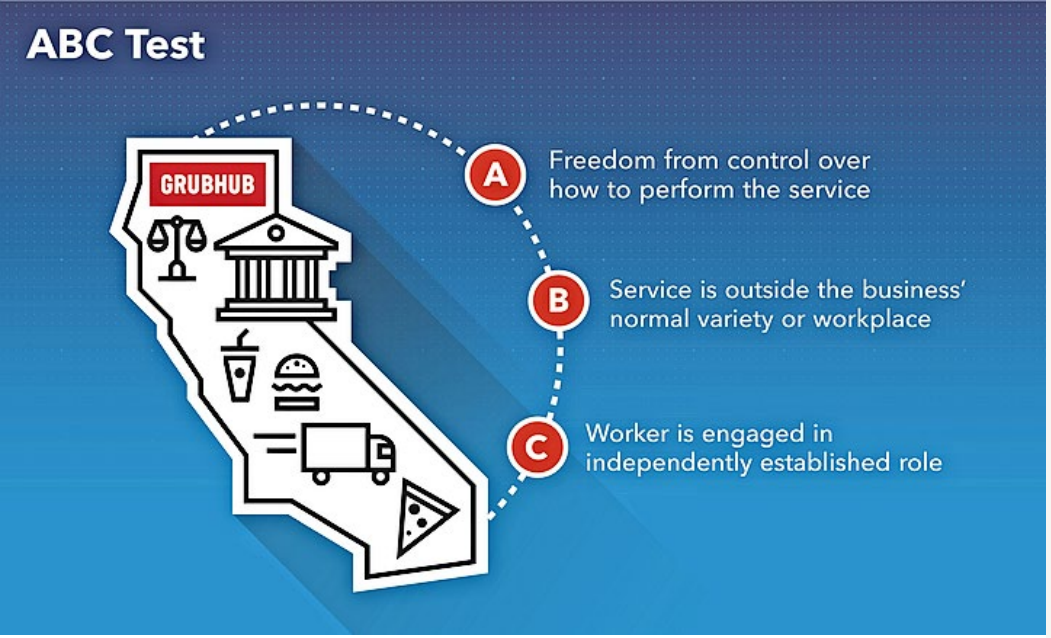
2023 NLRB DECISION: *The Atlanta Opera, Inc.*

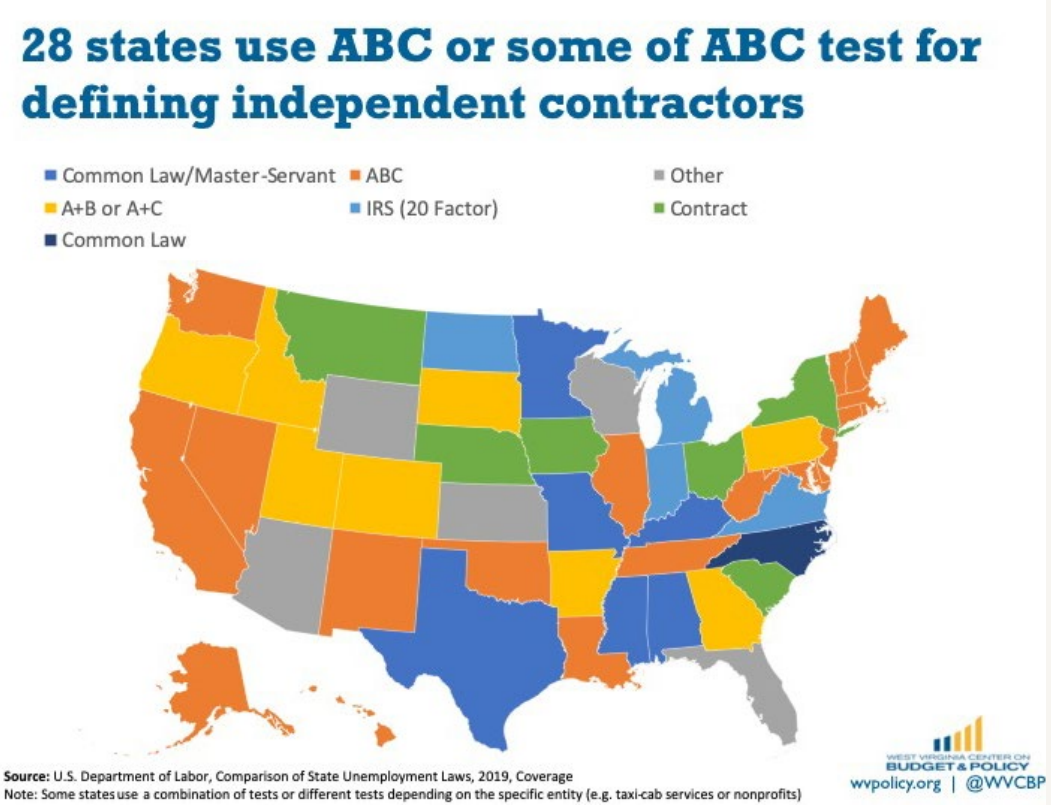
STANDARD FOR INDEPENDNT CONTRACTOR VS. EMPLOYER STATUS

- Restatement (Second) of Agency § 220 (1958)
- Return to *FedEx II* Standard
- Favors finding of employee status and narrower exclusion from NLRA
- Same 10 factor test
- Entrepreneurial opportunity should not be “animating principle”
- Inquiry turns on whether worker:
  1. Has realistic opportunity to work for other companies
  2. Has proprietary or ownership interest in work
  3. Has control over business decisions

KEY TAKEWAYS FOR 2023 NLRB DECISION

- More workers will be employees entitled to NLRA, including right to organize
- Gig economy, staffing agencies, and online businesses likely to be most impacted
- Companies should hire counsel, review contracts, and conduct fact-specific review of workforce





STATE LAW TRENDS

- State law continues to be a mishmash of different standards applied for different purposes
- Growing trend: adoption of the ABC test or some variant (A+B or A+C) of it for at least some purposes (unemployment insurance, workers' compensation, state wage and hour law, etc.)
- ABC states: Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Tennessee, Utah, Vermont, Washington, and West Virginia.
- ABC test is heavily weighted toward finding of employee

AI TOOLS IN EMPLOYMENT: BENEFITS AND DANGERS IN UNCHARTED TERRITORY

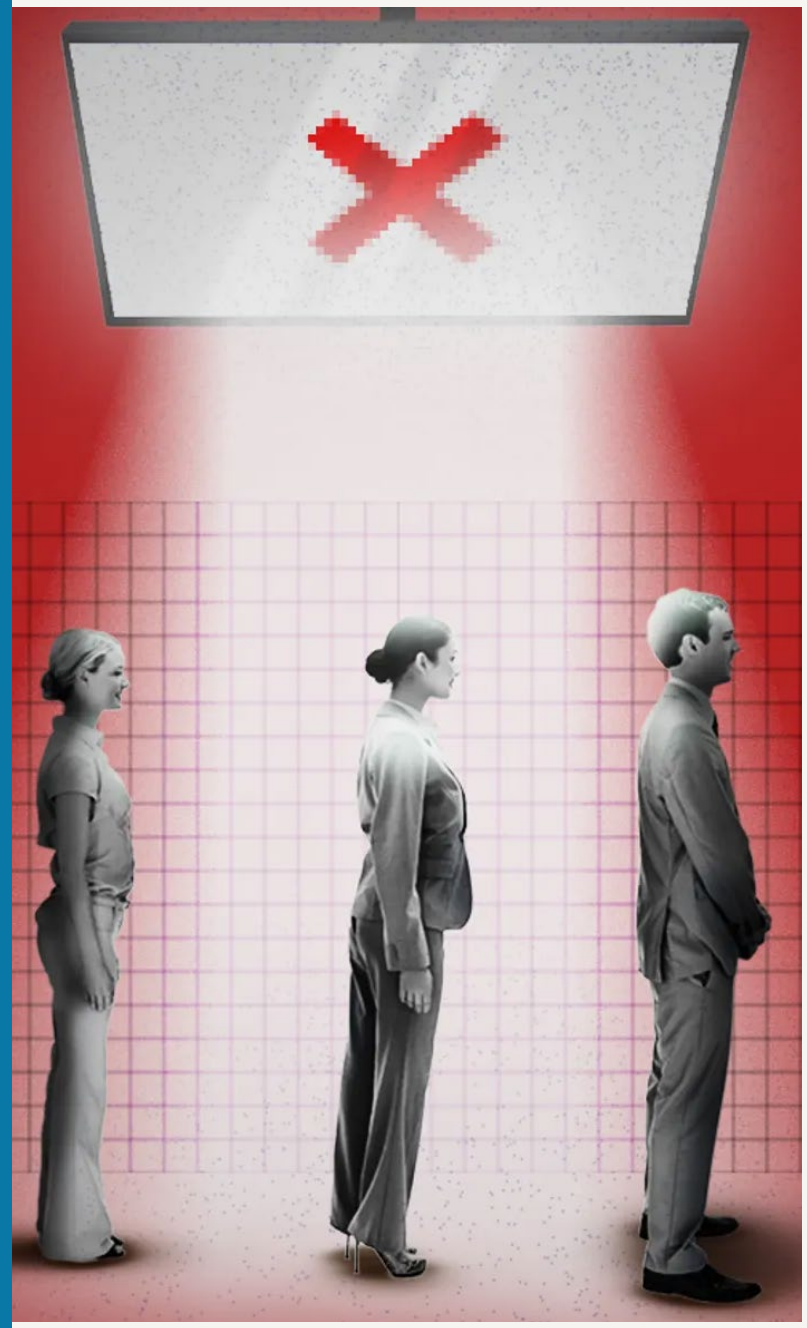
AI EMPLOYMENT TOOLS AND DISPARATE IMPACT DISCRIMINATION

EMPLOYERS INCREASINGLY ARE USING AI TOOLS IN THE RECRUITMENT AND PERFORMANCE EVALUATION PROCESS

- Resume scanners that prioritize applications using keywords
- Keystroke and monitoring software
- Virtual assistants or chatbots to filter job applicants
- Facial expression or speech pattern evaluation software
- “Job fit” scoring software based on personalities, skills, aptitudes

What Are the Dangers of Discrimination in AI?

- AI is only as good as the data that it relies on to make decisions.
- Datasets used to train AI often are skewed towards “mainstream” groups or existing employes
- If selection criteria inputted disfavor certain protected characteristics, AI will produce discriminatory outcomes.



Gender Discrimination

Hiring tools will exhibit gender bias if the sample CVs used to train the system come predominantly from males.

Race Discrimination

Tools like chatbots that simulate natural language conversation can learn and adopt hate speech from human sources

Age Discrimination

Hiring tools that filter based on educational requirements may discriminate against older applicants

Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in hiring, termination, or term and conditions of employment based on protected classifications
- Race, color, religion, sex, pregnancy, sexual orientation, gender identify, national origin, age (40 or older)
- Title VII prohibits not only disparate treatment, but also disparate impact
- Disparate impact: when a facially neutral employment practice falls more harshly on one group than another and that practice is not justified by business necessity

2023 Equal Employment Opportunity Commission Guidance

- In 2021, EEOC launched initiative to ensure AI complies with federal anti-discrimination laws
- On May 18, 2023, EEOC released non-binding technical assistance document
- “Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964” (“Title VII and AI: Assessing Adverse Impact”)

KEY TAKEAWAYS FROM 2023 EEOC GUIDANCE

1. EMPLOYER'S USE OF AI CAN VIOLATE TITLE VII

- Improper application of AI could violate Title VII, when used for recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, or dismissal
- This is especially true in "disparate impact" situations
- AI tool may violate Title VII prohibitions against disparate impact discrimination if:
  a) It has an adverse impact on individuals within a protected classification;
  b) Employer cannot establish that the use of the tool is related to the job and consistent with business necessity; or
  c) Less discriminatory tool was available but not used

KEY TAKEAWAYS FROM 2023 EEOC GUIDANCE

2. "80% RULE" CAN BE APPLIED TO AI SELECTIONS TO GAUGE POTENTIAL DISPARATE IMPACT

- Employers can use the "80% rule" as a general guideline to help determine whether an AI selection process has violated Title VII disparate impact standards
- Test compares selection rate of protected classification with selection rate of most successful group
  - If the selection rate is less than 80% of the most successful group, then the AI tool may be subject to a disparate impact challenge
- EEOC cautions that the 80% rule is "merely a rule of thumb" and not definitive proof that a selection process is lawful

KEY TAKEAWAYS FROM 2023 EEOC GUIDANCE

3. EMPLOYERS NOT SHIELDED FROM LIABILITY BY THIRD-PARTY VENDORS OF AI TOOLS OR SOFTWARE
   - Employers are responsible for any adverse impact caused by AI tools that are purchased from or implemented or administered third party AI vendors
   - Employers should ask vendors about what measures they have taken to determine if the tool might have an adverse impact
   - Third party's representations or warranties regarding compliance with Title VII will not necessarily shield employers from liability
   - Accordingly, employers should regularly monitor and assess the use of AI tools for potential disparate impacts

TIPS FOR AVOIDING LIABILITY

- Understand how your AI tools work
- Regularly audit outcome for compliance
- Train employees on proper use
- Involve humans at key points in process

Questions and Answers