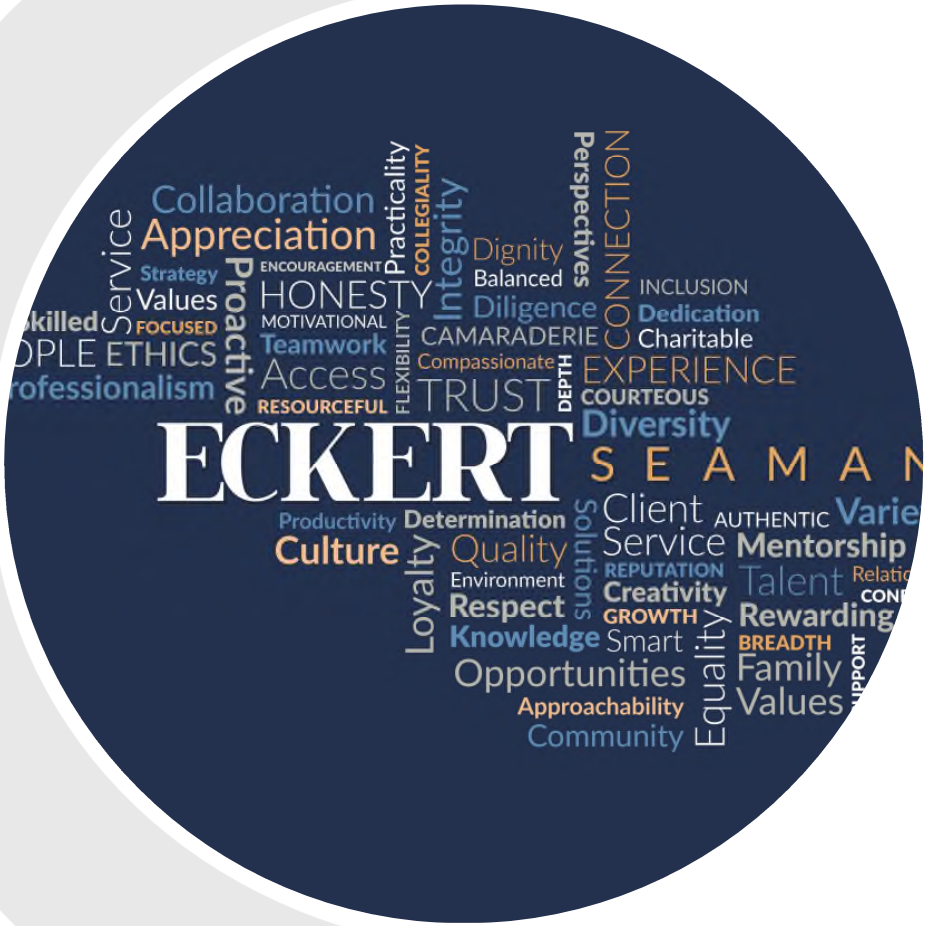

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News You Can Use
Buckle Up, Lots to Discuss

May 15, 2024

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Agenda (Is there any good news?)

- Supreme Court's New Standard for Title VII Transfer Cases - *Muldrow v. City of St. Louis*
- NLRB's Revised Election Rules
- NLRB's Advice Memo on Outside Employment
- Pregnant Workers Fairness Act New Regs
- FTC's Final Rule on Noncompetes
- DOL's Final Rule on Salary Thresholds
- Update on *McLaren McComb* (NLRB case impacting release agreements)
- NLRB's Joint Employer Rule, now what?
- EEOC's Enforcement Guidance on Harassment in the Workplace
- Recent Developments involving Service Animals

Supreme Court Issues New Standard for Title VII Transfer Cases

***Muldrow v. City of St. Louis*, No. 22-193**

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Muldrow v. City of St. Louis, No. 22-193

Question Presented to Supreme Court: What harm must an individual show to challenge a job transfer as discriminatory under Title VII?

The Facts: Sergeant Jatonya Clayborn Muldrow worked as a plainclothes officer in the St. Louis Police Department's specialized Intelligence Division. A new captain involuntarily reassigned Muldrow to a uniformed job outside of her division.

The Facts (cont.):

- Her Old Role:
  - Plain clothes in the Intelligence division.
  - Investigated public corruption and human trafficking and oversaw the Gang Unit.
  - She had FBI credentials, an unmarked car to take home, and a Mon- Fri schedule.
- Her New Role:
  - Uniformed role.
  - She was moved to an administrative role – supervising neighborhood patrol.
  - Placed on rotating schedule including weekends.
- In each role, her rank and pay were the same.

The Charge:

Muldrow brought a Title VII action against the City of St. Louis to challenge the transfer as discriminatory based on her sex.

District Court:

Said Muldrow needed to show that her transfer effected a "**significant" change in working conditions producing a "material employment disadvantage**."

- She could not meet this heightened standard:
  - No change in salary or rank.
  - Did not prove the loss of networking opportunities harmed her career.
  - Change in responsibilities was immaterial because she remained in a supervisory role.

Eight Circuit - Affirmed:

Muldrow needed to demonstrate a "materially significant disadvantage" – she had experienced "only a minor change in working conditions."

CITY'S DEFENSE

Court should continue to require a heightened level of harm based on:

Textual Argument: The harm from "otherwise . . ." discriminating against an employee must meet the same level of harm as "fail or refuse to hire" or "discharge."

Precedential Argument: Retaliation claims require a "materially adverse action," so should discrimination claims.

Policy Argument: A significant injury requirement is needed to prevent transferred employees from "swamp[ing courts and employers" with insubstantial lawsuits requiring "burdensome discovery and trials."

THE SUPREME COURT

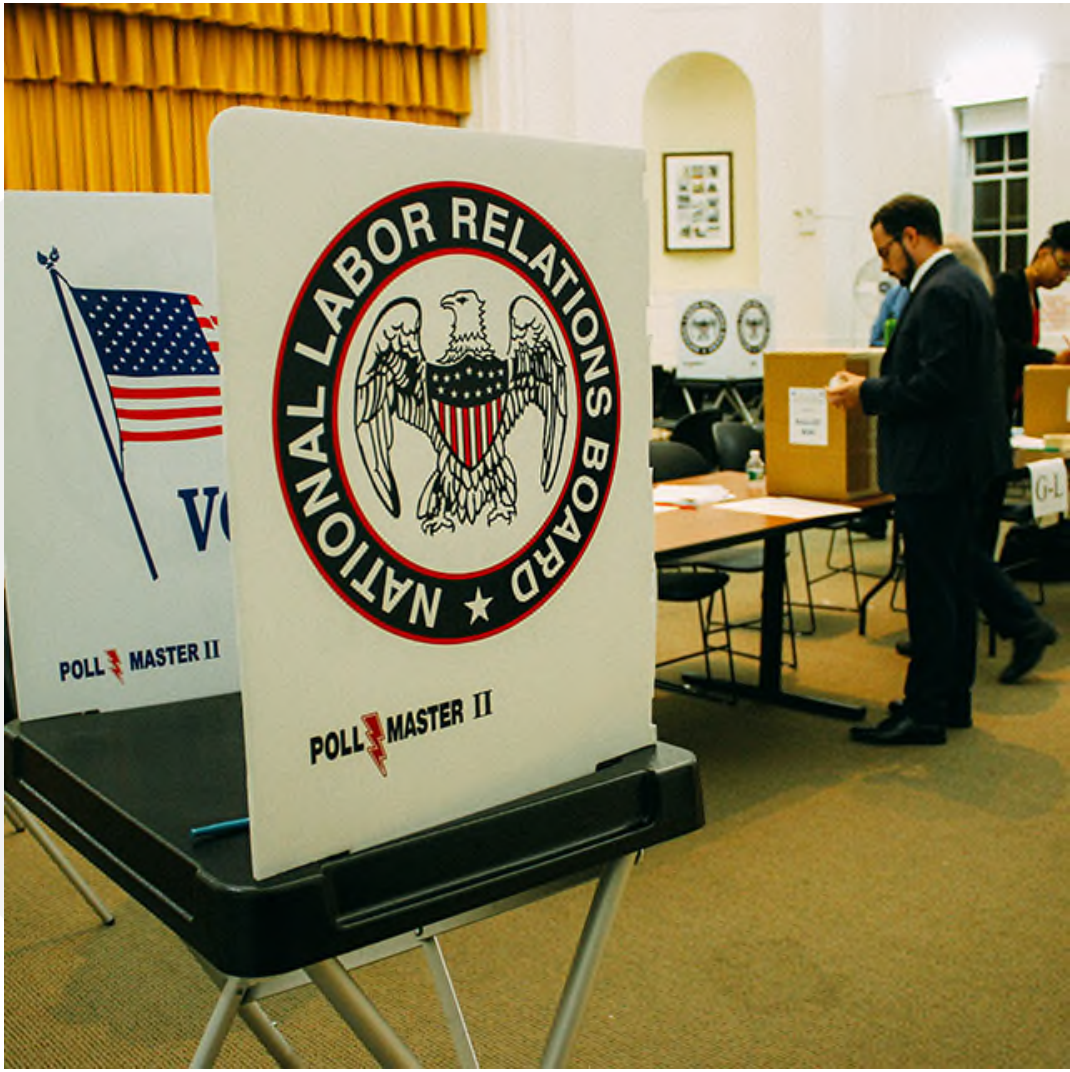
The Supreme Court relied on the text of the statute itself:

- The applicable language prohibits "discriminating against" an individual "with respect to" the "terms [or] conditions" of employment because of that individual's sex.
- Plaintiffs do not need to show that the harm was "significant" or "serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar."
- Muldrow need show only "some injury" respecting her employment terms or conditions.
  - "Worse off" but not "significantly so"
- Additionally, "terms [or] conditions" includes more than the "economic or tangible."

Implications

- Effect on lower court tests
  - The Third Circuit requires the resulting harm be “serious and tangible enough”
- More claims challenging any change to conditions of employment
- Easier for plaintiffs to survive summary judgment
- Speculation that ruling will lead to challenges against Diversity, Equity and Inclusion initiatives
- Best HR practices - document all legitimate reasons for any and all changes to employment, including schedules, work assignments, and perks of employment

NLRB REVISED ELECTION RULES



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BACKGROUND & UPTICK IN REPRESENTATION PETITIONS

- NLRB issued a final rule changing election procedures for representation petitions in 2023
- Representation petitions are petitions filed by employees, unions, or employers seeking to have the NLRB conduct an election to determine if employees wish to be represented for purposes of collective bargaining with their employer
- The Rule became effective 12/26/2023, so the new election rules apply to representation petitions filed after that date
- Representation petitions are up 35% in the first half of FY 2024

WHAT HAS CHANGED IN THE NEW ELECTION RULES?

- Scheduling of Pre-election Hearing
  - Occurs 10 days earlier
- Postponement of Pre-election Hearing
  - Can only be postponed under limited circumstances and only for up to two business days
- Due dates for Employer Statement of Position
  - Due earlier and can only be postponed under limited circumstances
- Elimination of Responsive Statement of Position
  - Petitioners no longer have to file responsive statements of position

WHAT HAS CHANGED IN THE NEW ELECTION RULES?

- Posting of election notices
  - Employers only have 2 days to post notices
- Litigation of Issues in Pre-election Hearing
  - Only able to litigate questions of representation, not individual inclusion issues
- No briefing after Pre-election Hearing without special permission
- Elimination of waiting period for election
  - Elections will be scheduled for “earliest date practicable”

Takeaways from New Rule

- Aggressively expedites time between filing of petition and election
- Eliminates opportunities for employers to gain time in the process to understand or litigate unit composition issues
- Application of rules makes it more difficult for employers to run a campaign and educate employees prior to the election
- Restricts regional director and hearing officer discretion on many issues

NLRB ADVICE MEMORANDUM ON OUTSIDE EMPLOYMENT

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Refresher on Employee Rights Under NLRA

- NLRA protects employees' rights to self-organize (i.e., join or seek to join a union) and to engage in **protected, concerted activities**.

- Protected concerted activities can include:
  - talking to co-workers about wages, benefits, workplace safety, or other working conditions
  - participating in a concerted refusal to work in unsafe conditions
  - joining with coworkers to talk directly to your employer, to a government agency, or to the media about problems in your workplace.

- Employers are prohibited from taking any action, including implementing terms and conditions of employment, that could **reasonably chill employees from exercising their rights under the NLRA**.

ADVICE MEMORANDUM – RELEASED JAN 31, 2024

- Employment agreement at issue had a "duties of employee" provision that required:
  - Employee to "devote her full time to the conduct of the business of the employer."
  - Employee to promise not to, "during the course of her employment, directly or indirectly **engage in any activity competitive with or adverse** to the corporation's business or welfare…as an individual or **as an employee of any other business**."
- The Board found this provision was unlawful because it:
  - May deter employees from being a "union salt" at another business.
  - Prohibited moonlighting, which the Board proclaimed it finds "generally unlawful."

What Now?

- Advice memo – not ruling of law
- Foreshadows the directives coming to Regional Directors and down to Investigators processing ULP charges
- Review employment agreements, handbooks, policies, etc. for any provision that could be deemed to chill employees from exercising rights under NLRA

PREGNANT WORKERS FAIRNESS ACT

FINAL REGULATIONS

PREGNANT WORKERS FAIRNESS ACT (PWFA) FINAL REGULATIONS EFFECTIVE JUNE 18, 2024

- PWFA requires employers to "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the accommodation will cause the employer an "undue hardship." An undue hardship is defined as causing significant difficulty or expense.
- Like the ADA, a qualified employee is an employee who can perform the essential functions of the job with or without reasonable accommodation.
- However, employees who cannot perform the essential functions can still be qualified if that inability is temporary.
  - For pregnant employees, "temporary" is 40 weeks.
  - For conditions unrelated to a current pregnancy, "temporary" is determined on a case-by-case basis.
- If the inability is temporary, employers must accommodate that inability (absent undue hardship). For example:
  - Suspending the job functions at issue
  - Transferring the employee to another job temporarily
  - Assigning light or modified duty

Known Limitations

- Employers need only make reasonable accommodations for known limitations.
  - "Known" means that the employee or employee's representative has communicated the limitation to the employer.
  - Limitation is a "physical or mental condition ***related to, affected by, or arising out of*** pregnancy, childbirth, or related medical conditions . . . ."

- Pregnancy, childbirth, or related medical condition does not need to be the sole, original, or substantial cause of the limitation.
  - The EEOC clarifies that whether the condition is a qualifying limitation can usually be determined through the interactive process.
  - Preexisting conditions exacerbated by the pregnancy, childbirth, or related medical condition can qualify.

- Known limitations need not necessarily be a disability under the ADA.

- Employers need not provide reasonable accommodations when an employee's partner, spouse, or family member has a related medical condition.

Reasonable Accommodations

- The rule provides several examples of possible reasonable accommodations, including remote work, change in worksites, frequent breaks, schedule changes, job restructuring, light duty, space to pump or nurse, and more.
- Remote work and changes in worksite are new to the final rule.

- The final rule differs from the proposed rule in that it allows employers to seek **only** the minimum documentation necessary to confirm the condition, confirm that the condition is related to pregnancy, childbirth, or a related medical condition, and describe the needed accommodation.

- It is unreasonable to seek documentation when the condition and need for accommodation is obvious and the employee confirms that through self attestation.
    - Employee late in pregnancy needs a larger uniform.
    - Employee provides doctor's note indicating morning sickness is caused by pregnancy. Employer cannot require employee to submit a note after every absence due to morning sickness.

- Employers can require that the documentation comes from a health care provider. This expressly includes a wide variety of professionals from doctors to doulas.

FTC'S FINAL RULE ON NON-COMPETES

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FTC Non-compete Rule - Highlights

- Scheduled effective date – September 4, 2024 (published in Federal Register on May 7, 2024).
- Already being challenged in court.
- Rule explicitly states that it includes a worker who is "an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service."
- Rule prohibits employers from entering into new non-competes with anyone upon effective date of the Rule. Extremely limited exceptions:
  - Non-competes entered into as part of a bona fide sale of a business entity.
  - Non-competes where a legal claim has accrued under that clause **prior to** the effective date of the Rule.
  - Not an unfair method of competition under the Rule for an employer to attempt to enforce a non-compete clause if the employer has a good-faith belief that the clause is not covered by the Rule.
- Current non-competes with senior executives (as defined in the Rule) are still enforceable if in place prior to the Rule's effective date (9/4/24).
- Employers must provide workers with existing non-competes notice that the clauses are no longer enforceable.

FTC Non-compete Rule - Details

- **Non-compete Clauses** – defined as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

  1. Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or
  2. Operating a business in the United States after the conclusion of the employment that includes the term or condition.

- **Notice Requirement** – Employers must inform covered individuals in writing, in detail, and in clear and conspicuous language, that their existing non-compete clauses are no longer enforceable.
  - Must deliver that notice on or before the effective date of the Rule
  - Rule includes "model language"
  - Key: Employer must discern which contract provisions, among the many agreements it may have with current or former employees, require the notice. Analysis must take into account not only the language and period of the agreements—whether they fit the definition of a "non-compete" under the Rule—but also whether they fall within any of the exceptions.

DOL'S FINAL RULE ON SALARY THRESHOLDS

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New Salary Thresholds for White Collar Exempt Status

- The 2024 Final Rule increases the threshold salary levels included in the DOL's test for minimum wage and overtime exempt status from the current $684/wk. ($107,432/yr. for highly compensated employees) as follows:

Effective Date	Standard Salary Level*	Highly Compensated
July 1, 2024	$844/wk. ($43,888/yr.)	$132,964/yr., including $844/wk. paid on a salary or fee basis
Jan. 1, 2025	$1,128/wk. ($58,656/yr.)	$151,164/yr., including at least $1,128/wk. paid on a salary or fee basis
July 1, 2027, and every 3 yrs. thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update

*Salary levels in U.S. territories remain at $455/wk. and in American Samoa remain at $380/wk.

Rule Applies to White Collar Exemptions

- FLSA provides an exemption from both minimum wage and overtime pay for employees employed as *bona fide* executive, administrative, professional and outside sales employees ("white collar" exemptions).
- FLSA also exempts certain computer employees and highly compensated employees.
- To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than a minimum salary per week (currently $648/week).
- Employee's specific job duties and salary must meet the requirements of the regulations, *i.e.,* job titles and salary alone do not determine exempt status.

What to do?

- Identify those in your workforce who will be affected by the 2024 Final Rule
- Establish a contingency plan to implement the 2024 Final Rule by July 1, 2024, if there is no successful legal challenge to stop or delay implementation, for example:
  - Increase salaries where needed to meet the new threshold,
  - Designate those employees who will fall below the new threshold as nonexempt and eligible for overtime, and
  - Develop a communication strategy for implementation.
- Additionally, establish internal procedures to ensure review and compliance with the 2025 salary threshold and the automatic salary threshold increases beginning in 2027.
- Review the DOL's white collar exemptions to assess whether any of your salaried employees, currently designated as exempt, fail to meet the DOL's overtime exemption test based on the employees' duties already outlined in the regulations.
- Don't forget to review state overtime laws and regulations, which are sometimes more favorable to employees than the FLSA and its regulations.

LIGHTNING ROUND COMMENTS

- ***McLaren McComb* Update**
  - NLRB case impacting separation and release agreements.
  - 2023 NLRB decision finding that overly broad confidentiality and non-disparagement provisions in severance agreements interfere with workers' rights.
  - Appeal of NLRB's decision to 6th Circuit; argument held on April 30th.
  - Argument was to a 3-judge panel; what could be next?
- **NLRB's 2023 Joint Employer Rule**
  - Published October 26, 2023, with effective date that was scheduled for December 26, 2023.
  - Challenged, ED Texas; district court stayed implementation of the Rule.
  - Rule vacated by district court on March 8, 2024.
  - What's next? NLRB filed notice of appeal on May 7, 2024.

LIGHTNING ROUND COMMENTS

EEOC's Enforcement Guidance on Harassment in the Workplace (Issued 4/29/24)

- Replaces a number of previously issued EEOC guidance (including EEOC's Compliance Manual Section 615 on Harassment; 1990 Policy Guidance on Current Issues of Sexual Harassment; 1990 Policy Guidance on Employer Liability under Title VII for Sexual Favoritism; 1994 Enforcement Guidance on *Harris v. Forklift Sys., Inc.;* and 1999 Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors).
- Remember, guidance published by EEOC does not have the force and effect of law.
- However, the EEOC uses its guidance material when investigating charges and will rely on it as "clarification" of the Commission's view of existing legal and policy requirements.
- Guidance contains over 70 examples/scenarios; provides examples of all types of harassment based upon protected characteristics.
- Guidance addresses how virtual work environments, digital technology and social media can result in harassment in the work environment.
- Recommended reading - https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace

LIGHTNING ROUND COMMENTS

- **Recent Developments Involving Service Animals – *Hopman v. Union Pacific Railroad Co.***
- Hopman (conductor, then engineer) claimed an ADA violation (not reasonable accommodation) because Union Pacific refused his request to bring his service dog on board moving freight trains to ameliorate the effects of Hopman's PTSD and migraine headaches resulting from his prior service in the military. Hopman claimed a right under the ADA to enjoy equal benefits and privileges of employment enjoyed by non-disabled coworkers. UP denied Hopman's request to bring Atlas to work.
- Jury found for Hopman and awarded $250,000 in compensatory damages. District court granted UP's motion for judgment as a matter of law. Hopman appealed to the 8th Circuit. Circuit court affirmed lower court ruling (Case No. 22-1881 (5/19/23)), finding that the district court properly concluded that "benefits and privileges of employment" (1) refers only to employer-provided services; (2) must be offered to non-disabled individuals in addition to disabled ones; and (3) does not include freedom from mental or psychological pain. Moral of the story – Hopman sued under the wrong provision of the ADA because he did not claim a denial of a request for reasonable accommodation.
- Hopman petitioned for certiorari. Supreme Court declined to review decision.
- **Note**: If this were an accommodation case, most likely different result, unless UP could win the argument that Atlas posed a direct threat to Hopman or others. 8th Circuit distinguished this case from the accommodation cases. There are conflicting decisions across the circuit courts regarding reasonable accommodation claims, which are very fact specific.
- **Caution**: Cases involving service animals are on the rise. If presented to you, remember, you must engage in the interactive process. Call us before you make a final decision.

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