

“Anchorman” - 2023 Employment Law Update



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The information contained in this presentation or on the Fisher Phillips website is not and does not constitute legal advice.

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EEOC Update

EEOC Update

- EEOC's 2023 budget increased \$35M
 - 8.3% increase compared to 2022's 3.8% increase
- Increased funding will be directed to:
 - racial justice and combating systemic discrimination;
 - pay equity; and
 - addressing continuing civil rights impact of COVID-19.
- Number of charges trending is down since 2016
 - BUT...\$ recovered is trending up
 - More monetary benefits recovered through litigation than ever before

New EEOC Poster for 2023

- EEOC has also updated its “EEO is the Law” poster
- “Must display poster in a conspicuous location at the worksite
 - Must replace old poster within “a reasonable amount of time”
 - Spring 2023 probably is about the outside limit of “reasonable”
 - Available in English and Spanish now





Wage Posting Requirements

Wage Postings

- Vary state by state
 - CA, WA, CO, NY and more
- Can require posting wage ranges on all job postings
- Can allow employees to request wage information for their position
- Can allow applicants to request wage information for the position to which they are applying
- Some laws reach outside of the state, so be aware of the laws if posting for remote work

Pay Scale Information

Job Posting	Upon Request	With Conditional Offer	Other
Colorado	California (after first interview)	Connecticut	Nevada (after first interview)
Jersey City, NJ (4/13/22)	Maryland	Cincinnati, OH (upon request)	
Ithaca, NY (9/1/22)	Connecticut	Toledo, OH (upon request)	
New York City (11/1/22)	Rhode Island (1/1/23)		
Westchester, NY (11/6/22)			
Washington (1/1/23)			
California (1/1/23)			
NYS (TBD)			

And laws are proposed in Alaska, Massachusetts, Michigan, South Carolina, Vermont and more....

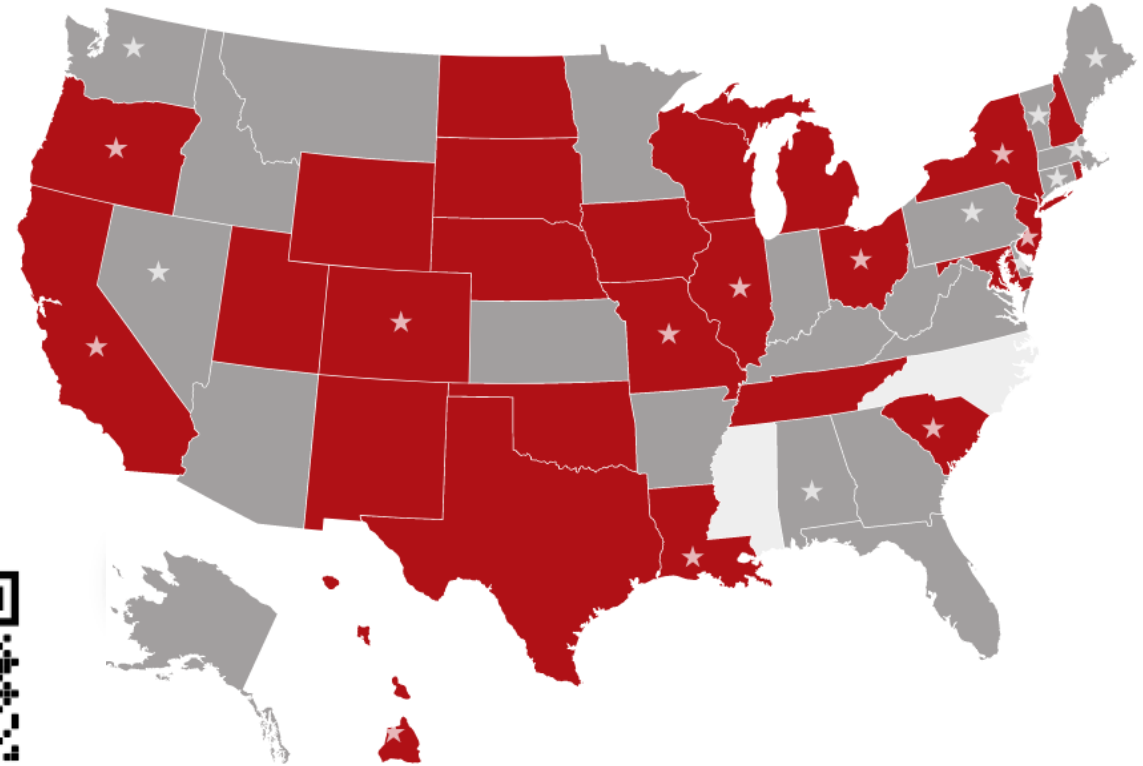
Pay Equity and Transparency

- Consider limits on if or when employers are able to inquire regarding salary history
- Consider privileged self-audits
 - This can help unearth whether there are any significant discrepancies
 - May provide a safe harbor in certain states



Fisher Phillips' Pay Equity Map

- Fisher Phillips' Online **Pay Equity Interactive Map** shows the various pay equity laws by simply clicking on each state
- Located at <https://www.fisherphillips.com/pay-equity-map/index.html>



Rise in Pay Equity Claims and Class Action Suits

Pay Equity Claims

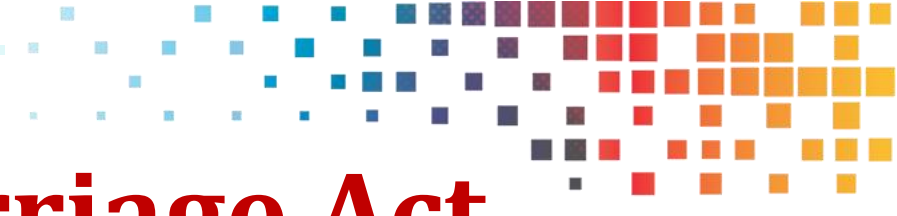
- Currently, the average working woman in the U.S. is paid 85 cents to every dollar paid to a white male
 - COVID-19 pandemic and tightened labor market only created additional barriers for women, which added to the rise in pay equity claims being brought as both class actions and single-plaintiff suits
 - Heightened awareness, social media, and shareholder demands have also influenced the rise in claims
- States, cities, and localities are currently enacting laws and ordinances to try and close the “pay gap”
 - 45 states have some sort of pay equity legislation on the books
 - This has resulted in a patchwork of pay equity laws depending on the jurisdiction

Class Action Suits

- COVID-19 pandemic has also led to increase in amount of class action suits being filed
 - Labor shortages resulting in increased willingness of employees to participate in class actions
 - Increased wage and hour and FLSA issues in presence of COVID-19
 - Forced vaccine mandates and religious discrimination claims
- Biden Administration’s pro-worker, pro-regulation stance has also led to increase in claims



Federal Law Update

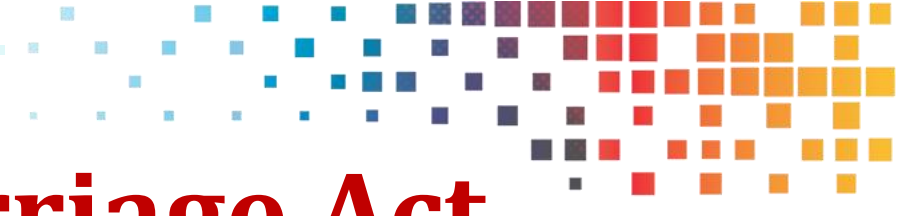


Federal Respect for Marriage Act

**Effective December 13, 2022*

What did it do?

- Overrides Defense of Marriage Act (DOMA), which defined marriage between one man and one woman
- Protects rights of same-sex marriage
- Does not require states to grant marriage licenses to same sex-couples but requires states to fully recognize marriages that are legally formed in other states
- Exceptions: nonprofit organizations and religious liberties

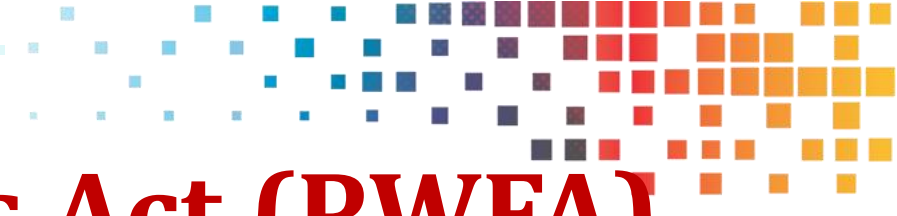


Federal Respect for Marriage Act

**Effective December 13, 2022*

So, does anything change?

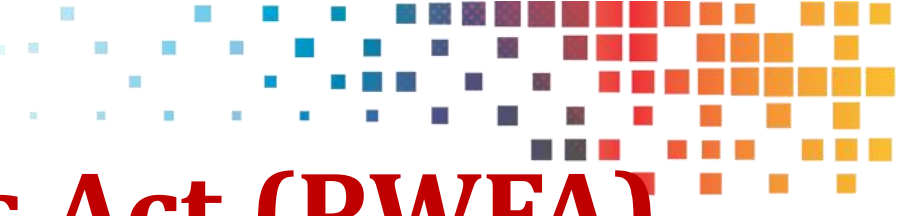
- Not really...but employers should take this opportunity to ***review their benefits offerings – as well as their diversity, equity, and inclusion (DEI) policies***
 - Remember: Civil Rights Act protects from discrimination based on sexual orientation and gender identity



Pregnant Workers Fairness Act (PWFA)

(signed by Pres. Biden on 12/29/2022; Effective June 27, 2023)

- Applies to employers who have 15 or more employees
- Protects a “qualified employee” - defined as “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions”
- *In effect requires employers to consider employee and applicant accommodation requests related to pregnancy, childbirth, or related medical conditions the same as accommodation requests under the ADA, which does not define disability to include pregnancy or pregnancy-related conditions.*



Pregnant Workers Fairness Act (PWFA)

(signed by Pres. Biden on 12/29/2022; Effective June 27, 2023)

It Prohibits:

- Failing to make reasonable accommodations to known limitations of qualified employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Requiring a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Denying employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- Requiring such employees to take paid or unpaid leave if another reasonable accommodation can be provided; and
- Taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.



PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act

- Effective December 29, 2022
- Extends workplace protections for nursing mothers previously adopted in the 2010 Affordable Care Act (provided non-exempt employees an entitlement to unpaid breaks to express milk).
 - Expands the break time to exempt employees.
 - Clarifies that if the employee is still on the clock or not completely relieved from duties then this time will be considered “hours worked” and compensable.

PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act

- Does not apply to small employers (employers with fewer than 50 employees) if they can establish an undue hardship, involving significant difficulty or expense.
- Violations of the PUMP Act fall under the FLSA, and penalties can include unpaid wages, reinstatement, liquidated damages, and attorney's fees.



Arbitration Agreements and Sexual Harassment

- Arbitration agreements have become commonplace in the employment context. Sometimes as part of their onboarding paperwork, employers ask workers to agree to arbitrate any claims against the company.
- In February 2022, however, Congress passed the **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act** (H.R. 4445).
- The new bipartisan law now prohibits employers from unilaterally enforcing arbitration agreements for disputes involving sexual harassment or sexual assault.
- All employees subject to arbitration agreements have the right to unilaterally choose to bring covered claims in arbitration or in court.
- Employers who have arbitration agreements may, therefore, wish to revise their agreements to exclude sexual misconduct from the scope of arbitrable issues.

Arbitration Agreements and Sexual Harassment

Does this new law apply to existing arbitration agreements?

- Yes. But the language of the statute appears to state that the law will apply prospectively, meaning that claims that arose *before* the law's enactment could still be subject to arbitration.

Are all arbitration agreements now void?

- No. But parts of all existing agreements may be void. If a sexual harassment claim accrues *after* enactment of this law, an employer cannot enforce arbitration of that claim, even with an otherwise valid agreement.

Has arbitration law changed in any other way?

Yes - *Southwest Airlines Co. v. Saxon* (June 6, 2022)

Speak Out Act

- Signed into law Dec. 7, 2022 – immediately effective
- Prevents enforcement of pre-dispute non-disclosure and non-disparagement agreements relating to sexual assault and harassment
 - Broad NDAs signed at the commencement of employment, for example, may now be unenforceable
 - Prohibits granting “gag orders” based on such agreements



Speak Out Act



- Expect a broad interpretation of “sexual harassment”
- Purportedly, applies to independent contractors
- **Does not** apply to confidentiality clauses in severance and settlement agreement



NLRB Update

McLaren Macomb – February 22, 2023

- **What happened?**
 - Unionized teaching hospital in Michigan laid off a portion of its staff during the pandemic. Employer included standard confidentiality and non-disparagement provisions in the severance agreements.
- NLRB determined that the provisions deemed unlawful because too broad and tended to “chill” the exercise of employees’ Section 7 rights.
- **How Does it Effect Employers?**
 - Promise of non-enforcement is no longer enough
 - Mere “proffering” of an agreement with the two problematic policies is enough
 - Disclaimers need to affirmatively allow employees to:
 - Participate in Section 7 activity
 - File ULP Charges
 - Assist others in doing so
 - Otherwise cooperate with the Board’s investigative process



Pending Changes to Watch

Antitrust

- Federal antitrust authorities have stepped up their enforcement activities against restraints in the labor market.
- Red flags to be on the lookout for throughout your organization:
 - Discussions by anyone at your company with a competitor about salary, benefits, or other elements of compensation, either at a specific level or within a range
 - Communications with another company about refusing to solicit or hire that other company's employees
 - Any direct or indirect message to your competitors that your companies should not compete too aggressively for employees
 - The exchange of company-specific information about employee compensation, benefits, or terms of employment with another company
 - Participation in a meeting, such as a trade association meeting, where the above topics are discussed – unless key safeguards have been implemented
 - Discussions about any of the above topics with former colleagues, family members, and friends employed by a competitor, including during social events or in other non-professional settings
 - Receiving documents that contain another company's internal data about employee compensation

Workplace Safety: OSHA Update

Occupational Safety and Health Administration (OSHA) Flexed its Muscles

- It hit 400% of budgeted inspections for heat stress this summer;
- It has issued more subpoenas and made more criminal referrals than we have seen in the last decade or so.





Workplace Safety: OSHA Update

- Our forecast for what we can expect out of OSHA in 2023 can be summed up in one word: **aggressive**
 - **Expect to be inspected.** Decided to cast a wider net to include even more workplaces in its enhanced inspection program known as the “Severe Violator Enforcement Program” or SVEP
 - **Increased Penalties.** We expect the agency to announce an initiative to require all state-run OSHA plans to increase their penalties to the same level as federal OSHA
 - **Heat Stress Standard.** OSHA’s advance notice of proposed rulemaking that notes the agency is considering creating, for the first time, a federal standard to prevent heat illness.

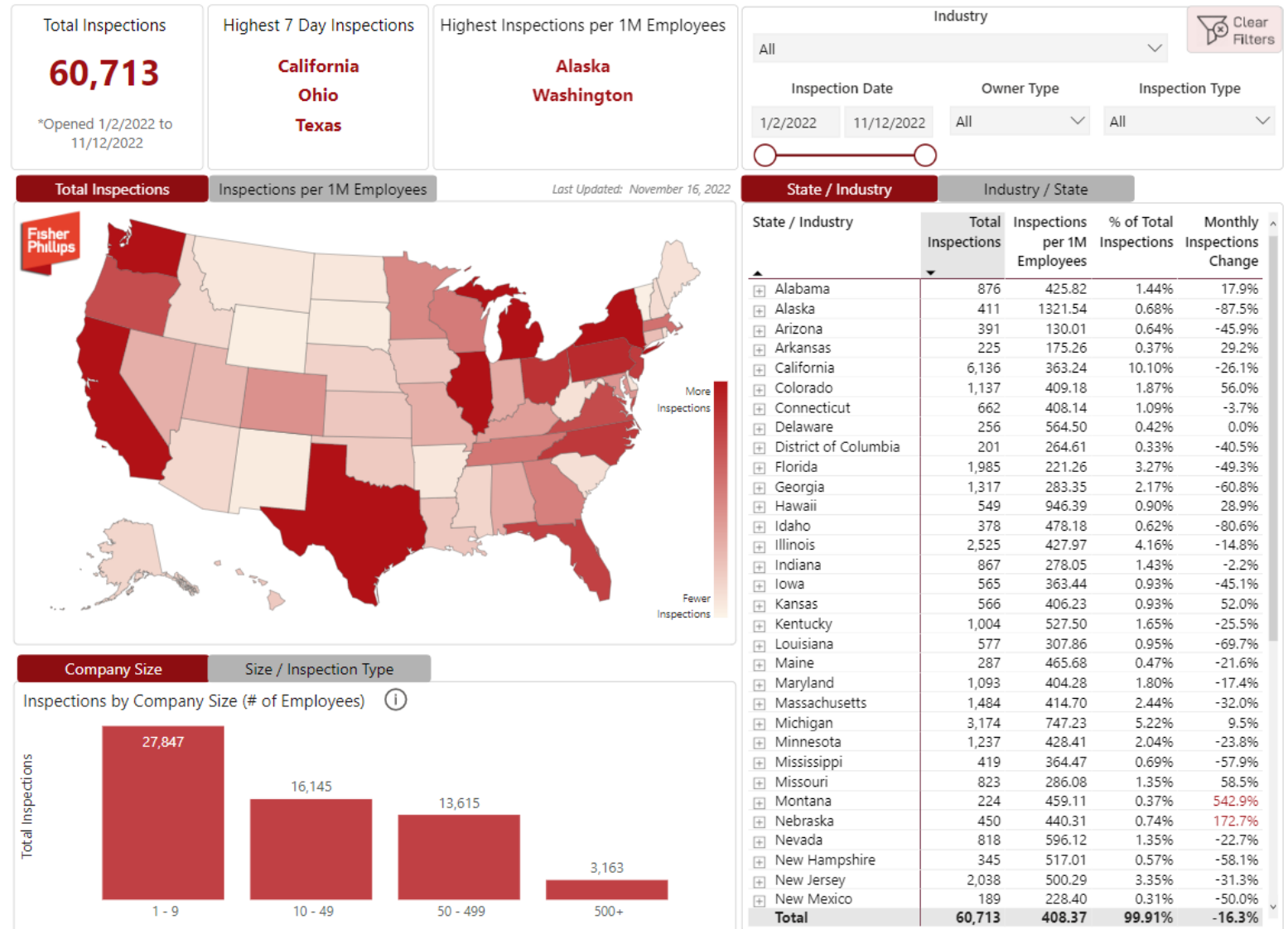


Workplace Safety: OSHA Update

So What Should Employers Do?

- Continue to train on safety and awareness
 - If you see something, say something
- Take action to correct risks before and after incidents
 - Largest penalties are for willful, repeated, or unabated violations
- Learn from others
- Monitor trends in OSHA inspections – check out Fisher Phillips' OSHA inspection tracker

OSHA Inspections Tracker





CROWN Act

- The Crown Act is law: Tennessee, Illinois, California, New York, Louisiana
- Legislation is filed or pre-filed: Florida (The Crown Act is Law in Broward County), Indiana, Michigan (The Crown Act is Law in Ann Arbor, Lansing, Flint, and Genesee County)
- Best Practices for Employers
 - Employers are advised to review and update any existing employee handbook and employee training material to ensure they follow both the letter and the spirit of the CROWN Act.
 - Pay attention to dress codes or policies, particularly those referring to either acceptable or prohibited hairstyles.
 - Supervisory employees should further be cautioned not to make hiring, disciplinary, or other employment decisions based on an employee's protected hairstyle.

Potential Issue: Federal Minimum Wage

- Continues to be a topic of interest
- Currently \$7.25
- Incrementally increase to \$15 by 2027
- **BUT** be aware of state minimum wage laws
 - Value
 - Wage notification
 - Wage payments
 - Frequency of payment



Potential Issue: Overtime Regulations

DOL *may* issue a new overtime regulation

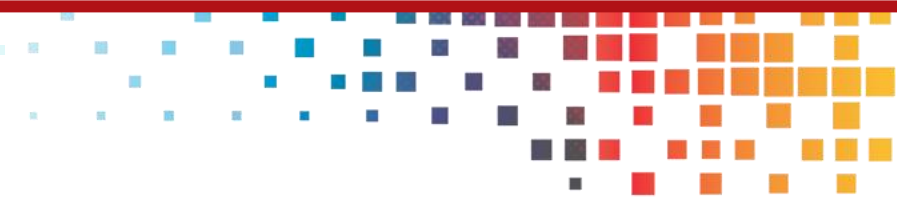
- Current minimum salary for exemptions =\$35,568 (\$684 per week)
 - Expected to increase substantially
 - May build in automatic increases
- Duties tests may change as they are currently under scrutiny
- Enforcement to focus on deductions that cut into minimum wage



Potential Issue: Overtime Regulations

What Can Employers Do To Prepare?

- Carefully review positions and exemptions
- Ensure time records are accurate and certified by employees
- Discipline employees that fail to record time or work unauthorized overtime
- Do not permit “off-the-clock” work
- Assess new jobs closely to determine the exempt status and audit regularly
- Watch who receives stipends and extra pay



Supreme Court Updates 2022- 2023

Dobbs v. Jackson Women's Health Organization (June 24, 2022)

- Overturned *Roe v. Wade*; the authority to regulate abortion is returned to the people and their elected representatives (i.e., the states).

Impacts of the ruling:

- Anti-Discrimination Laws Protect Abortion-Related Decisions
- Interplay of Employment Discrimination Statutes
- Coverage under Health Insurance Plans
- Employers Providing Travel Benefits
- Job-Protected Leave May Be Available (PDA)

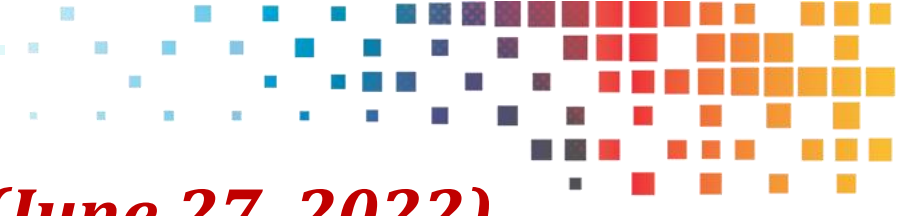
Can vary from state to state

- More than a dozen states have existing laws that were previously rendered unconstitutional under *Roe v. Wade* which have triggered (or will trigger) following *Dobbs*.



Next Steps for Employers

- Review state laws
- Review policies
- Review insurance coverage and impact on coverage
- Train managers
- If there are changes, prepare communications to clearly explain how reproductive health benefits will change
- Companies with employees located in various states must be mindful of the changing legal landscape, as many states are set to enact abortion limitations.
- Providing travel benefits outside of a group health plan raises tax, Affordable Care Act, and ERISA compliance issues. These decisions could implicate state laws, some of which may have criminal penalties. Employers should consult with employee benefits counsel.



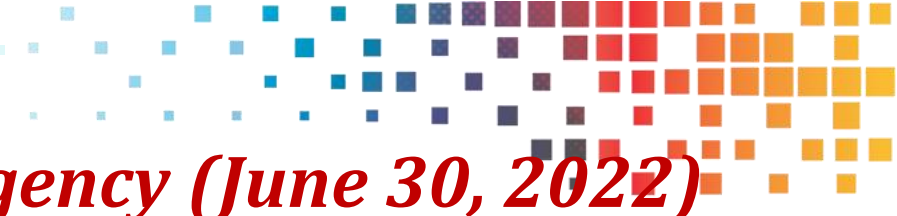
Kennedy v. Bremerton School District (June 27, 2022)

What happened?

- A football coach at a public high school was fired after conducting post-game prayers with his players in the middle of the football field. The Supreme Court held that prayer was protected private speech (rather than governmental speech), so the coach should not have lost his job.
- May erode the separate of church and state

How does this affect employers?

- Private versus public employers
 - Public employers must be aware of potential violations of the First Amendment rights of their employees.
- Private employers with 15+ employees not off the hook



West Virginia v. Environmental Protection Agency (June 30, 2022)

- **What happened?**

- The Supreme Court limited the broad power of the EPA, stating the agency lacked the authority to regulate greenhouse gas emissions
- EPA couldn't require power producers to shift energy generation from one energy sector (coal) to another (natural gas or solar) under the Clean Air Act.

What does this have to do with employment?

- Could have significant (and beneficial) ramifications for the workplace . . .we will have to wait and see

- **What Happened?**

- An oil rig worker was guaranteed a daily rate of \$963 dollars. Upon his termination, he claimed he was entitled to overtime because he was paid a guaranteed daily rate, rather than a weekly salary, **even though he earned more than \$200,000 a year**

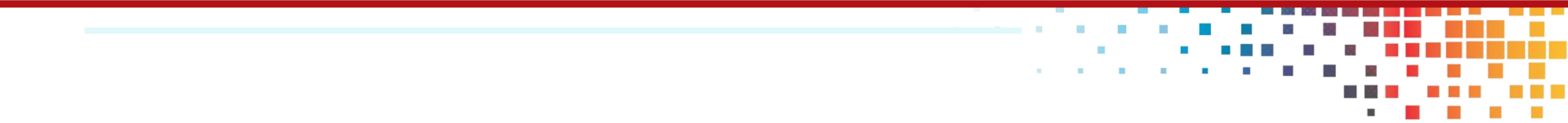
- **How does it affect employers?**

- Salary basis means weekly salary for exemption purposes
- Ensure employees are guaranteed a weekly salary
- Re-evaluate reliance on the “highly compensated exemption”

What Will the Supreme Court Do Next?



- Possibility of overturning affirmative action in the college admission process
 - Private employers generally are not allowed to consider race in employment
 - But the ruling *could* affect an employer's voluntary DEI program
- Battle of the civil liberties: religion vs. marriage
 - Employers will need to navigate these potentially conflicting viewpoints



Current Status of COVID-19

EEOC's New COVID-19 Testing Rules

- The EEOC Revised its guidelines on COVID-19 testing on July 12, 2022
- Bottom lines:
 1. State of pandemic has changed
 2. No more COVID-19 testing without worrying about the ADA
 3. Testing must be job-related and consistent with business necessity
 4. Employers must assess whether “current pandemic circumstances and individual workplace circumstances” justify testing



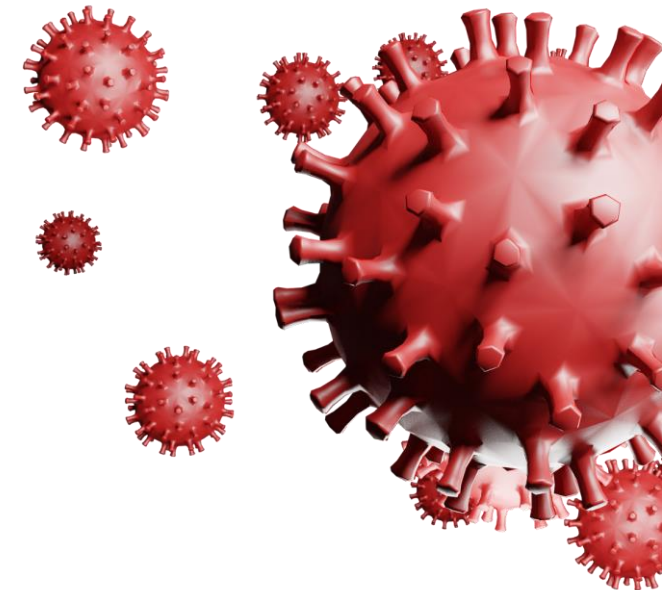
7 Takeaways from EEOC's New COVID-19 Testing Rules

1. Mandatory COVID-19 Screening is Still Permissible If Certain Criteria Are Met
2. Antibody Tests Are Not Permitted as a Condition of Re-Entering the Workplace
3. COVID-19 Screening Questionnaires Are Still Broadly Permitted
4. You May Require 'Return-to-Work' Confirmation from a Medical Professional
5. You May Screen Job Applicants for COVID-19 Symptoms
6. You Should Carefully Consider the Circumstances Before Withdrawing a Job Offer
7. You Should Review Compliance with Other Employment Laws



CDC Provides New COVID-19 Guidance

- After the EEOC's July revised guidelines, the CDC also provided new COVID-19 guidance on August 11.
- **Key Changes:**
 - The six-foot social distancing rule is no longer emphasized.
 - Routinely screening apparently for healthy employees for potential COVID-19 cases is no longer necessary.
 - Now only recommends case investigation and contact tracing in healthcare settings and certain "high-risk congregate settings" like nursing homes.
 - Quarantine of exposed persons is no longer recommended – regardless of vaccination status.
 - Instead, those exposed should wear a mask for 10 days around others when in public.



CDC Provides New COVID-19 Guidance

- Legal liability? This is the million-dollar question.
 - CDC has no enforcement authority and will not be the agency knocking on your door to inspect your workplace safety
 - Will fall on the Occupational Safety and Health Administration (OSHA) or its state equivalents across the country
- The bad news? OSHA has not updated its own COVID-19 workplace safety recommendations for almost a year
 - When in doubt, refer to CDC guidelines





Final Questions



Neither these slides nor anything said during this presentation is offered, or may be interpreted, as legal advice.



Thank You



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