So, It's 2024… What Now?

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National Update

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Supreme Court Updates

Affirmative Action
Overtime Pay
Religious Accommodation

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Students for Fair Admissions Inc. v. Harvard College (June 29, 2023)

- The Supreme Court severely restricted higher educational institutions from using race or ethnicity as part of their admissions process, curbing the practice and principles of affirmative action

Impacts of the ruling:

- Less diversity in applicant pools
- More legal challenges and potential rise in "reverse discrimination" claims
- More focus on robust DEI programs

Next Steps for Employers:

- Develop a strong message from your leadership team
- Expand your applicant pool
- Review for compliance
- Account for state and local nuances
- Train your staff

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Helix Energy Solutions Group, Inc. v. Hewitt (Feb. 22, 2023)

What happened?

- An oil rig supervisor who was paid a daily rate of at least $963 – rather than weekly salary – argued he was entitled to overtime pay under the FLSA. The Supreme Court agreed, holding highly compensated employees may be entitled to overtime pay if they are not paid on a salary basis.

How does this impact employers?

- Review overtime exemptions for compliance
- Spotlight on weekly guarantee
- Note that state rules vary
- Watch for changes from the labor department

Groff v. DeJoy (June 29, 2023)

What happened?

- A Jewish USPS mail carrier refused to work on Sundays as he observed Sabbath. As demand increased, his employer would not accommodate his request to have Sundays off. The Supreme Court ruled that an employer must provide religious accommodations unless it would result in substantial increased costs. The ruling heightened the burden of proof for employers.

What should employers do now?

- Train your managers
- Adjust any policies, practices, and written materials
- Coordinate with your legal counsel
- Identify any recent religious accommodations
- Create a proactive plan
- Take local and state laws into account

Changes to the EEOC

An Uptick in Litigation

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The Equal Employment Opportunity Commission (EEOC)

- In three separate lawsuits, the Commission has sued employers for race, national origin, and disability discrimination.
  - **Lawsuit #1**: Retaliation against an African American employee for raising concerns about diversity & inclusion
  - **Lawsuit #2**: Hostile work environment for three minority employees
  - **Lawsuit #3**: ADA violation for rejecting qualified applicant because of her disability and need for prescribed medication

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Recent Changes to the EEOC

- The democratic party has regained a majority on the EEOC with confirmation of Kalpana Kotagal
- First time the EEOC has had democratic majority since President Biden took office

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"There will be an agenda that is consistent with the values of the Democratic administration."

– Chai Feldblum, former Democrat EEOC Commissioner

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Recent Changes to the EEOC

New Priorities

1. Sexual harassment guidance with focus on LGBTQ+ community
2. Expanding existing pay disclosure requirements for employers
3. Return litigation power to the commission's general counsel
4. Regulation of AI tools for hiring and employment

What This Means for Employers:

1. Assess your sexual harassment policies
2. Comply with the new agency rules and EEO-1 form requirements
3. There may be an increase in litigation
4. Speak with counsel if using AI technology in hiring staff

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Ensure Your EEOC Workplace Roster is Updated

- Businesses with at least 15 employees need to replace their workplace discrimination poster with a new poster that can be found at https://www.eeoc.gov/poster.
- It is important that you post this updated EEOC poster as soon as possible.

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The Remote Worker

What is Changing?

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Remote Work and the ADA

- Disability community has long pushed for remote work as a "reasonable accommodation" under the ADA
- COVID-19 pandemic resulted in a serious uptick in litigation surrounding the issue
- ADA states that reasonable accommodations should not pose "undue hardship" on employer
- Result? **Remote work *may* be a reasonable accommodation – fact specific.** In determining whether a request for remote work is feasible, EEOC guidelines recommend that employers go through interactive process with individual employees and their remote work requests to analyze job requirements, qualifications, practicality, and potential alternatives.
  - Employers maintain significant leeway in processing these requests – although qualified employees with covered disabilities are entitled to reasonable accommodations, this does not mean remote work will necessarily be the solution.

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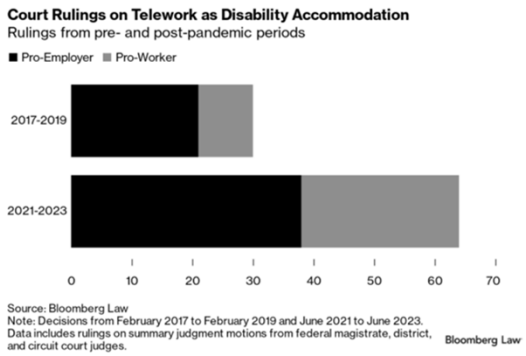
Remote Work and the ADA

- **Recent decisions**. Although judges have shown a willingness to consider COVID-19's effect on telework when evaluating an accommodation request, many continue to apply a de facto presumption against allowing remote work
- **Victory for Employers?** Employers prevailed in nearly **60%** of federal ruling over the past two years.
  - From June 30, 2021 – June 29, 2022, employers won **77%** of rulings with about 1 in 5 opinions mentioning the pandemic.
  - From June 30, 2022 – June 30, 2023, employers won only **42%** with more than ½ of the opinions mentioning the pandemic.
- **Missing Statistics**. These are only the accommodations that were litigated. Countless accommodation requests are denied or granted without going to court.



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Remote Work and Potential Tax Implications

- Employers withhold applicable state and local income taxes based on where the employee performs services and sometimes based on where the employee lives
  - Temporary presence rules vary by state – be sure to remain aware of each state's specific rules and thresholds as taxing authorities continue to enforce withholding requirements
- Be aware that state corporate or other business activity taxes can apply if even a single employee is working in a particular state (even if the employer does not have a recognized office in that state)
  - During the height of COVID-19, many states waived the nexus test for employees working from home, but these provisions have generally expired
  - Companies considering permitting employees to work anywhere should consult with tax counsel and their respective tax departments to ensure no additional tax obligations apply
- Also consider potential unemployment taxes

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Remote Work and Other Potential Implications

- Privacy Concerns
  - Employers need to be able to ensure that wages are paid for all time worked and also need to be able to monitor productivity to ensure efficiency for those working remotely
  - While employers have a legitimate interest in and duty to monitor employee activities, some monitoring may be viewed as intrusive
  - Be aware of evolving privacy laws that may restrict employers' ability to monitor employees
- Wage and Hour
  - Generally, employees working remotely become subject to the laws of the state in which they work
  - Employers need to be aware of potential liability for diverse state programs or mandates such as paid leave requirements, minimum wage, disclosure/posting laws, overtime pay, etc.
- Workers' Compensation
  - Employers generally need to cover employees under Workers' Compensation policies based on where the employees are working – if employees are working remotely in another state, a policy addendum may be needed
    - Be aware of potential additional expenses regarding coverage
- Other employer considerations:
  - New hire notices
  - Required handbook policies
  - Distribution of required employment posters
  - Restrictive covenants laws may vary from current employer agreement

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Monitoring Remote Work – Should You Do It?

Benefits of Monitoring Software

- Increases accountability
- Helps track the efficiency and productivity of remote employees
- Assists in realizing each employee's work schedule and when burnout is foreseeable
- Provides robust analytics for process improvement
- Paints a comprehensive picture of a worker's contributions

Pitfalls of Monitoring Software

- Employees may be skeptical of employer-imposed monitoring software
- Stored Communications Act
- Various state laws may limit benefit
  - GPS monitoring limitations
  - Wiretap laws
  - Notice requirements
  - Employees working in other states could activate other laws

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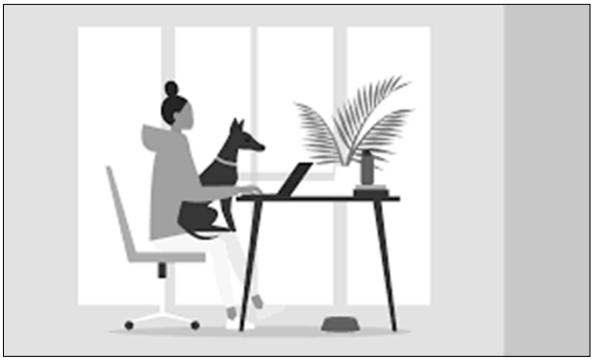
If You Choose Software Monitoring…



- Communicate WHY electronic software monitoring is being implemented, what it does, and how it works
- Transparency is key
- Work with an attorney to ensure compliance with state and federal law
- Explore less invasive means
  - Timekeeping system
  - Daily or weekly employee check-ins
  - Create task completion page

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I-9 Workers

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I-9 Rules for Remote Workers

- Department of Homeland Security has announced a **new I-9 Form** for employment verification and now allows qualified E-Verify employers to conduct **remote verification**.
- All employers must use the new I-9 Form as of **Nov. 1, 2023**.
- Employers should:
  - Evaluate E-Verify advantages and disadvantages with your immigration counsel to determine if your company should take advantage of the remote verification option for E-Verify employers.
  - Enlist outside immigration counsel to conduct an attorney-client privileged audit of your I-9s that were completed from March 20, 2020, through July 31, 2023.
  - Provide updated training for all managers, human resources personnel, and staff involved in the I-9 and E-Verify process.

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Independent Contractor v. Employee

The DOL's New Rule and Federal Wage Impacts

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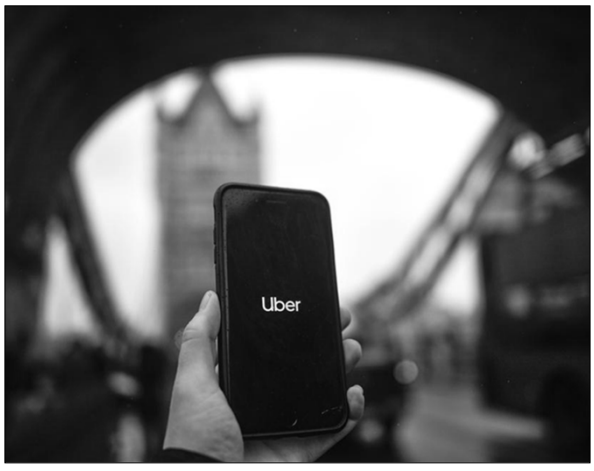
New Difficulty in Classifying Workers as Independent Contractors

- The Biden administration officially rescinded a rule that made it easier to classify workers as independent contractors under FLSA
- The new rule will follow an outdated standard that will likely result in more workers being classified as **employees**.
- When does the rule take effect? **March 1, 2024**.
- Employers who rely on independent contractors should:
  - **Conduct audits**
  - **Determine any classification changes**
  - **Update policies and procedures**
  - **Train managers**
  - **Work with Counsel**



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NLRB

Keeping an eye on workplace rules

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Stericycle, Inc. – August 2nd NLRB Decision

The National Labor Relations Board, NLRB, articulated a new standard for evaluating whether an employer's workplace rules or policies tend to interfere with and therefore violate employees' rights under the NLRA Sections 7 and 8, the National Labor Relations Act provisions that allows and encourages concerted conduct among employees in regard to work conditions, pay, and related matters.

Why does this matter? It applies to all employers, non-union and union alike.

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Section 7 of the NLRA

Employees Shall Have the Right:

- To self-organize, form, join, or assist labor organizations
- To bargain collectively through their chosen representatives
- To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or
- To refrain from any or all such activities….

Traditional Section 7 Rights

- Forming or attempting to form or join a union
- Assisting a union to organize employees
- Going out on strike to secure better working conditions
- Refraining from union activities
- Banding together for mutual aid or protection regarding employment terms and conditions

"Modern" Section 7 Rights

- Complaints about the workplace (including complaints about other employees' terms/conditions of employment) whether made in-person, email, and social media
- Repeated disruptive complaints regarding pay and benefits
- Organized and concerted work stoppages and walk-outs
- Discussions of confidential internal investigations
- Discrimination and retaliation for engaging in protected concerted activities (PCA)
- Other activities commonly regulated by handbook policies

NLRB's Application of Section 7

- During the "Obama Board" years, the NLRB dramatically expanded application of Section 7
- Lawfulness of handbook policies and work rules governing non-union employees
- During the "Trump Board" years, the NLRB aggressively rolled back many of the prior Board's changes
- Employers are seeing and should continue to expect a return to Obama Board doctrine (and potentially an even further pendulum swing toward labor)

Stericycle Decision

- The General Counsel prosecuted a case against Stericycle for maintaining certain handbook rules in violation of Section 7.
- In 2015, the employer in *Stericycle* distributed a revised employee handbook to its employees, which included a rule restricting the use of personal electronic devices to break times own. The union filed an unfair labor practices charges and the NLRB's general counsel (GC) issued a complaint under the theory that the rule unlawfully infringed on employees' Section 7 rights.
- The administrative law judge (ALJ) disagreed and held that any impact on Section 7 activity was outweighed by Stericycle's desire to ensure employees did not use their cell phones in hazardous work areas.
- The GC appealed the ALJ's decision to the board, and argued, among other things, the Board's then-current framework which deemed a given rule lawful where its potential impact on Section 7 rights was outweighed by the employer's business justifications – should be thrown out and replaced with a more employee-friendly standard

Stericycle – The Outcome

- The NLRB will once again analyze work rules from the perspective of the employee.
- If the Board determines an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumptively unlawful.
- The employer may then rebut the presumption by proving the rule advances a legitimate and substantial business interest which the employer is unable to advance with a more narrowly tailored rule.

Before *Stericycle*, These Policies Were Already Invalidated by the NLRB

- No profanity or abusive behavior toward co-workers
- No disclosure of "confidential" information
- No surreptitious audio or video recording in the workplace
- No conducting "personal business" on employer premises
- No "false, disparaging [or] misleading" statements about the employer online
- Employees must behave in a "positive and professional manner"
- No unauthorized use of employer logos, insignia, or trademarks

Other Rules That Will Be Vulnerable under *Stericycle*

- Requiring civility and courtesy or prohibiting offensive behavior;
- Limiting protected complaints by prohibiting damaging statements;
- Restricting lawful protest or disruptive activities;
- Punishing inaccurate reports, complaints, or "false" statements;
- Limiting off-duty conduct that is disloyal or contrary to business interests;
- Prohibiting use of intellectual property and copyrights even for fair uses;
- Restricting political activities that may have a nexus to employee interests;
- Exclusive complaint mechanisms or reporting procedures;
- Anti-loitering rules and off-duty access restrictions; and
- Confidentiality provisions restricting "sensitive" or "personal" information.

What Does This Mean for Employers?

- Employers should review all workplace policies governing employee conduct in light of *Stericycle*.
- *Stericycle* adds an emphasis on the business need for policies.
- This provides an opportunity for employers to consider the business purpose of each policy and to tailor the policy to narrowly meet that need.

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Employee Drug Testing

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Marijuana

- Cannabis Administration and Opportunity Act (CAOA) – new Senate bill introduced July 2022 calling for federal regulation of marijuana. It is still pending as of early 2024.
  - Legislation would end federal cannabis prohibition by removing cannabis from Controlled Substances Act and allow states to implement their own cannabis laws
  - Would additionally ensure federal regulation of marijuana under the FDA
    - Would mandate that states keep cannabis out of reach for those under 21 years old
    - Would require U.S. Department of Veterans Affairs and Indian Health Service to provide recommendations and opinions regarding medical use of cannabis by VA and IHS patients

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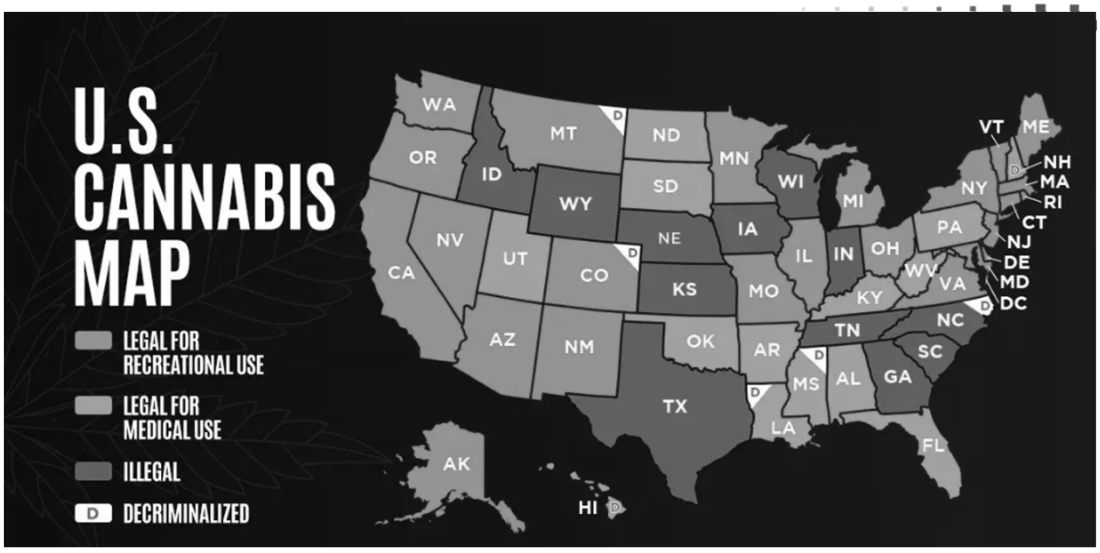

- https://covercannabis.com

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Relaxing Drug Test Policies

- Businesses are scaling back pre-employment cannabis testing as a condition of employment as marijuana becomes increasingly legalized across states
- 24 states have legalized the recreational use of marijuana.
- Amazon and AutoNation are some of the largest companies that have dropped marijuana from their employee drug test
- NBA, MLB, and NHL also rolled out relaxed polices

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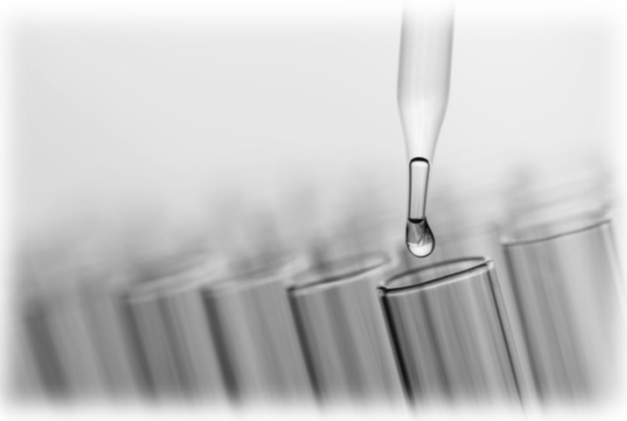
Employee Drug Testing

Controlled Substance Examination Regulation Act

When is testing permitted?

- Application for employment
- Random testing
- Reasonable suspicion
- Post Accident
- Follow-up Testing



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SB 616 – Paid Sick Days

- Increases paid sick days from three to **five** days (40 hours)
- Increases the accrual cap from 48 hours or six days to 80 hours or 10 days
- Employers that use an alternative accrual method must ensure employees accrue 24 hours by the 120th day of employment, and 40 hours by the 200th day of employment

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SB 616 – Paid Sick Days

- Preempts local paid sick leave ordinances that are less generous
- Provides that certain procedural and non-retaliation provisions of the law apply even to union employees that have a CBA that provides for different paid sick leave amounts

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SB 616 – Compliance Next Steps

1) Update your **written sick leave policies**, employee handbooks, and training materials
2) Train **managers and supervisors**
3) Train your **human resources and benefits specialists** on these changes to ensure that employees can begin accruing the correct amount of PSL
4) Make sure you are correctly **carrying over and capping** the appropriate amounts of PSL to which employees are entitled
5) Review the new law with your **company's payroll processor** to ensure that the accrual or frontloading allowances are correct and that wage statements accurately reflect the PSL to which each employee is entitled

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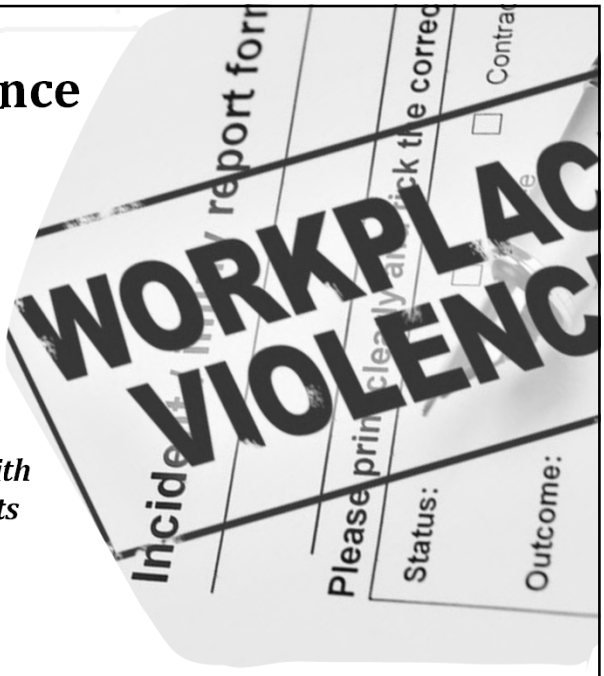
SB 553 – Workplace Violence

- Adopts a workplace violence prevention standard applicable to general industries (7/1/2024)
- Cal/OSHA Standards Board has been working on a general industry standard since 2017
- ***Requires employers to adopt workplace violence prevention plans and comply with recordkeeping and training requirements***



SB 553 – Workplace Violence

- Requires employers to develop and maintain written ***prevention plans*** tailored to their specific workplaces
- Mandates ***annual employee training***
- Employers are required to ***record*** specific information in a "violent incident log" about every incident, response, and the investigation performed and ***maintain records for at least five years***

Questions?

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