Current Changes and Exciting Updates in Federal Employment Law

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Overview

- US Supreme Court Cases
- Agency Updates (EEOC, NLRB, FTC)
- Federal Legislation

US Supreme Court

- *Groff v. DeJoy*
- *Helix Energy Solutions v. Hewitt*
- *Coinbase, Inc. v. Bielski*
- *Glacier Northwest, Inc. v. International Brotherhood of Teamsters*
- *Axon v. FTC*

Groff v. Dejoy

600 U.S. 447 (2023)

Background

- Title VII of the Civil Rights Act of 1964 requires employers to accommodate the sincerely held religious practices of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business."
- The statute doesn't define "undue hardship."

Trans World Airlines v. Hardison (1977)

- In *Hardison*, an employee sued his employer for not allowing him to take Saturdays off.
- In holding for the employer, the Supreme Court articulated what many lower courts deemed a "de minimis" standard for religious accommodation cases.

Groff v. Dejoy

- Plaintiff Gerald Groff worked as a rural carrier associate for the U.S. Postal Service, a position responsible for covering for absent employees.
- In 2017, the Postal Service began requiring Groff to work certain Sundays in accordance with a memorandum of understanding (MOU) with Groff's union.
- Groff observes a Sunday Sabbath. As a result, he missed over 20 Sunday shifts, was disciplined, and resigned in 2019.

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Groff v. Dejoy

Takeaway: The Supreme Court clarified the undue burden standard. Employers "must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."

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Helix Energy Solutions Group, Inc. v. Hewitt

598 U.S. 39 (2023)

Takeaway: Daily-rate employees do not qualify for the bonafide executive, administrative or professional exemption to the FLSA because they are not guaranteed a full salary without regard to the number of days or hours worked.

Coinbase, Inc. v. Bielski

599 U.S. 736 (2023)

Takeaway: District courts must stay proceedings during interlocutory appeals on motions to compel arbitration.

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Glacier Northwest, Inc. v. Intl. Brotherhood of Teamsters Local 1174

598 U.S. 771 (2023)

Takeaway: The NLRA does not preempt claims for intentional destruction of property against a union for property destroyed during a labor strike.

Axon Enterprise, Inc. v. Federal Trade Commission

598 U.S. 175 (2023)

Takeaway: Federal district courts can consider constitutional challenges to administrative proceedings before such agencies issue final rulings.

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Agency Updates

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NLRA Decision in McLaren Macomb

- On February 21, 2023, the NLRB issued a decision in *McLaren Macomb, 372 NRLB No. 58 (2023)* applying Section 7 and finding that the employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by including confidentiality and non-disparagement provisions in severance agreements offered to a group of furloughed workers.

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NLRA Decision in McLaren Macomb

- **Section 7** of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."
- **Section 8(a)(1)** of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA.

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NLRA Decision in McLaren Macomb

The Severance Agreement Provisions At-Issue:

6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

NLRA Decision in McLaren Macomb

- The NLRB held that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights. Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances."
- The Board reasoned that the confidentiality and non-disclosure/non-disparagement provisions violated the NLRA because they restricted employees from making any statements to coworkers or the public and because the "agreement conditioned the receipt of severance benefits on the employees' acceptance of those unlawful provisions."

FTC on Non-Competes

- In January, the Federal Trade Commission proposed a new rule.
- If adopted, the rule would prohibit any contractual term between an employer and a worker that "prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."
- The proposed rule also prohibits "de-facto" non-compete agreements.


"Upset at you for breaching the non-compete? Of course not."

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FTC on Non-Competes

- The rule would apply to both current and future contracts and would prohibit employers from claiming or representing to an employee that they were bound by such an agreement.
- If adopted, the proposed rule will require all employers that use any agreement with a non-compete clause to take action to rescind the clause and to provide notice to the employee or former employee.

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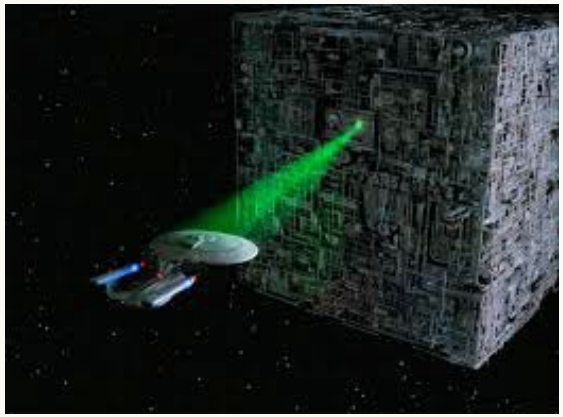
EEOC– Artificial Intelligence

- Companies are increasingly using artificial intelligence (AI) to streamline processes, including the hiring process.
- The Equal Employment Opportunity Commission (EEOC) and others have taken steps to ensure that the use of AI complies with federal law.
- EEOC Chair: a "new civil rights frontier" that might threaten "basic values and principles" and carry a risk of discrimination in employment or hiring decisions



EEOC v. iTutorGroup, Inc.

- An applicant submitted two applications to iTutorGroup that were identical in all aspects except birth date.
- The candidate allegedly received an interview only when using the more recent date of birth.
- In May 2022, the EEOC filed a complaint against iTutorGroup alleging that the company violated the Age Discrimination in Employment Act (ADEA) by implementing a software hiring program that "intentionally discriminated against older applicants because of their age."

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Federal Legislation

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Pregnant Workers Fairness Act (PWFA)

Went into effect on June 27, 2023

Applies to:

- private employers with > 15 employees
- federal government, congressional offices, state government, and appointees of elected officials.

PWFA– Prohibits Pregnancy Discrimination

42 U.S. CODE § 2000GG–1

It shall be an unlawful employment practice 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 an employee to accept an accommodation that was not arrived at through the interactive process]
(3) [deny employment opportunities to a qualified employee because they are pregnant]
(4) [require a pregnant employee to take leave when other reasonable accommodations can be provided]
(5) [take adverse action in terms, conditions, or privileges of employment because of pregnancy]

42 U.S. Code § 2000gg–2(f) prohibits retaliation against employees opposing unlawful practices or against employees for participating in EEOC process.

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PWFA – Key Provisions

"qualified employee "

"known limitation "

"reasonable accommodation "

"undue hardship "

Providing Urgent Maternal Protections Act (PUMP)

Went into effect on December 29, 2022

Applies to nearly all workers

- Provides new protections

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PUMP Provides New Protections

29 U.S. Code § 218d(a)

An employer shall provide—

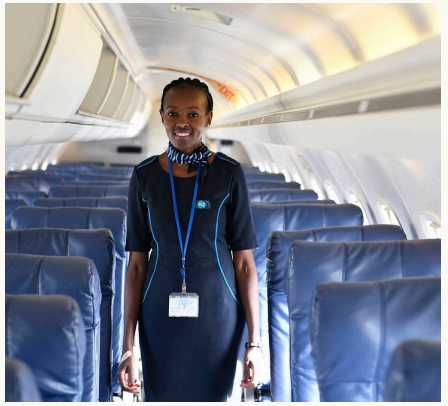
- (1) a **reasonable break time** for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
- (2) a place, other than a bathroom, that is **shielded from view and free from intrusion** from coworkers and the public, which may be used by an employee to express breast milk.

29 U.S. Code § 218d(c) Exemption for small employers

- An employer that employs less than 50 employees shall not be subject to the requirements of this section, if such requirements would impose an **undue hardship** by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

PUMP- Exceptions

- Specific exceptions for Rail Carriers and Motorcoach employment
- Broad exception excludes crewmembers of air carriers
- Notification requirement



The Speak Out Act

42 U.S. Code § 19403:

(a) In general. With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law.

Questions?

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