



17TH ANNUAL EMPLOYMENT LAW FORUM

OCTOBER 7, 2025



PORZIO

Bromberg & Newman

Oct. 7, 2025 | 17TH ANNUAL
EMPLOYMENT LAW FORUM

AI JUST CAN'T STOP LOVING YOU

AI Use In Employment Decisions

DAVID L. DISLER



MEET THE DISLERS



PRESENTERS



David Disler



Jordan Disler



AGENDA

- AI In the Workplace
- Discrimination Potential
- Wage and Hour Issues
- Union Protections
- Federal Laws
- State Laws
- Recommendations



BEAT IT



AI Applications in the Workplace

AI APPLICATIONS IN THE WORKPLACE

- Modern workplaces increasingly rely on AI for HR functions
- Rapid growth in AI screening and recruiting
- Most employment laws are **not** designed for these technological developments



AI APPLICATIONS IN THE WORKPLACE

- **Sourcing and screening candidates**
- **Scanning resumes using keywords**
- Scheduling interviews
- Virtual assistants/chatbots
- Creating job descriptions
- **Analyzing candidate skills through games**
- **Video interview analysis**
- Measure individual performance
- **Select promotion candidates**
- Analyze sales calls
- **Monitor keystrokes and productivity**
- Predict equipment failures
- Identify pay equity issues



SMOOTH CRIMINAL



Discrimination Potential

ANTI-DISCRIMINATION FRAMEWORK



- **Disparate treatment:** Intentional discrimination
- **Disparate impact:** Facially-neutral policies with discriminatory effect
- AI use doesn't eliminate employer liability.

DISPARATE TREATMENT EEOC V. ITUTORGROUP, INC.

iTutorGroup

- iTutorGroup provides English-language tutoring services to students in China.
- The group hires thousands of applicants based in the US to provide remote tutoring services.
- Program its online recruitment software to automatically reject female applicants age 55 or older and male applicants age 60 or older.

DISPARATE TREATMENT EEOC V. ITUTORGROUP, INC.

iTutorGroup

- The EEOC filed a lawsuit against iTutorGroup alleging that the company violated the ADEA
- In August 2023, the parties entered into a consent decree for payment of \$356,000 and injunctive relief

DISPARATE IMPACT THE AMAZON STORY



- AI hiring tool to locate the best candidates
- Examining the characteristics of Amazon's current hiring data over a 10-year period
- The problem – software engineers tended to be historically male.
- Penalized resumes that had women's sports or sororities.

DISABILITY DISCRIMINATION



- The Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified individuals with a disability in all employment-related decisions, such as hiring, promotion, or job termination.
- The ADA also requires employers to provide a reasonable accommodation to qualified individuals when needed to perform or apply for a job

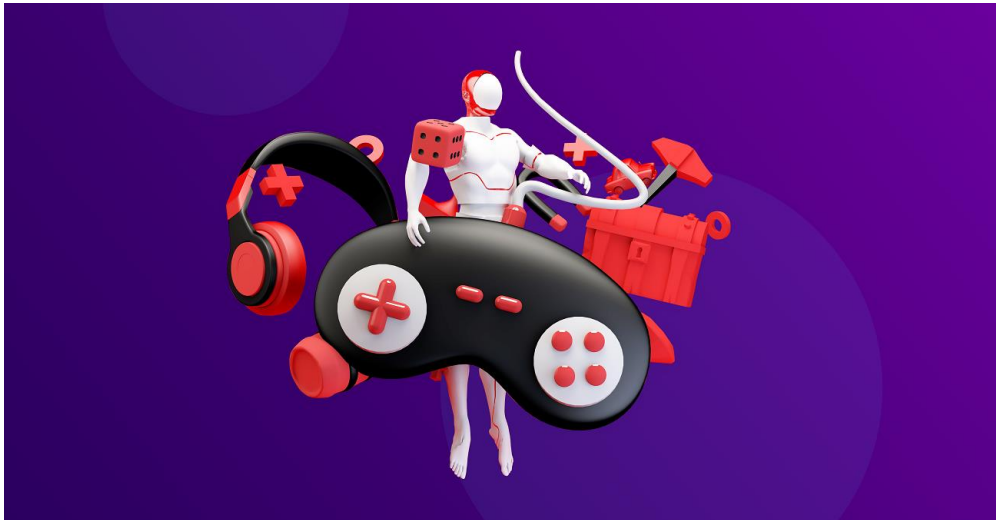
EXAMPLES OF PROBLEMATIC AI CORRELATIONS



Employment Gap

- Algorithm may screen out candidates who have one- or two-year gaps in their employment histories.
- May disparately impact women who have taken time off for maternity leave or because of family care responsibilities.

EXAMPLES OF PROBLEMATIC AI CORRELATIONS



Gaming Tools:

- An AI tool that evaluates applicants' performance on a computer game
- May disproportionately eliminate candidates in a given protected class or discriminate against individuals with disabilities

DISABILITY DISCRIMINATION



Speech Analysis:

- AI tools that analyze an individual's speech pattern in a recorded interview
- May negatively rate individuals with a speech impediment or hearing impairment
- AI may negatively rate speech impediments

DISABILITY DISCRIMINATION

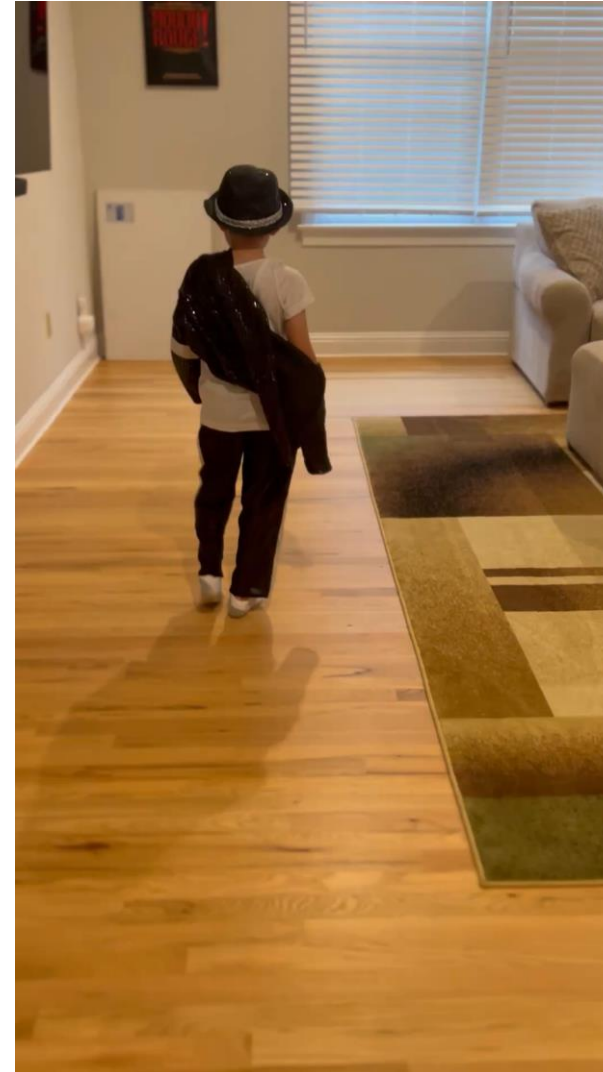


Facial Expression Analysis:

- AI tool that analyze a candidate's facial expressions.
- Certain facial patterns may correlate to individuals with genetic diseases or other disabilities



THRILLER



Wage and Hour Issues



FLSA COMPLIANCE

Time Tracking

- Systems that measure activity.
- Keystrokes, mouse movements, internet browsing, or other activity may not accurately capture all compensable time.

FLSA COMPLIANCE

- For example, if someone is physically idle, but still mentally working
- Employers cannot rely solely on these metrics
- Must ensure that AI systems do not automatically deduct hours for time that should be paid and that they accurately count all hours worked

FLSA COMPLIANCE

Break Time Monitoring

- Some timekeeping systems now incorporate AI to make predictions and to auto-populate time entries based on a combination of prior time entries, regularly scheduled shift times and break times, business rules, and other data.
- However, short breaks of 20 minutes or less are compensable time under the FLSA





DON'T STOP 'TIL YOU GET ENOUGH



Union Protections

CONCERTED ACTIVITY



- All employees have right to engage in protected concerted activity
- Can share information, meet, threaten to organize about AI changes
- Can raise concerns with management or complain publicly
- Protections apply equally to unionized and non-unionized workplaces

BARGAINING WITH THE UNION



- Effect of automation on bargaining unit
- Worker displacement and layoffs from AI
- Decision to implement AI technology (case-specific analysis)

EXAMPLE



- On May 19, 2025, the Screen Actors Guild-American Federal of Television and Radio Artists (SAG-AFTRA) filed an unfair labor practice charge
- Llama Productions used AI technology, which was trained on the voice of the late James Earl Jones to create and use a voice for Darth Vader in the video game *Fortnite*.
- Jones's estate had approved the use of his voice

EXAMPLE



The central argument:

- Llama Productions made unilateral changes to employment terms by using AI voices instead of actors.
- They failed to notify the union or give it a chance to bargain over the use of AI-generated voices.
- This infringes on their right to bargain and replace actors' work, even though the agreement for the voice itself was with the actor's estate

OFF THE WALL



Federal Laws



FEDERAL AI LANDSCAPE

- Significant policy shifts following the 2025 administration change
- Most Biden-era AI guidance and directives have been revoked or removed
- No specific federal law governing AI in the workplace currently exists

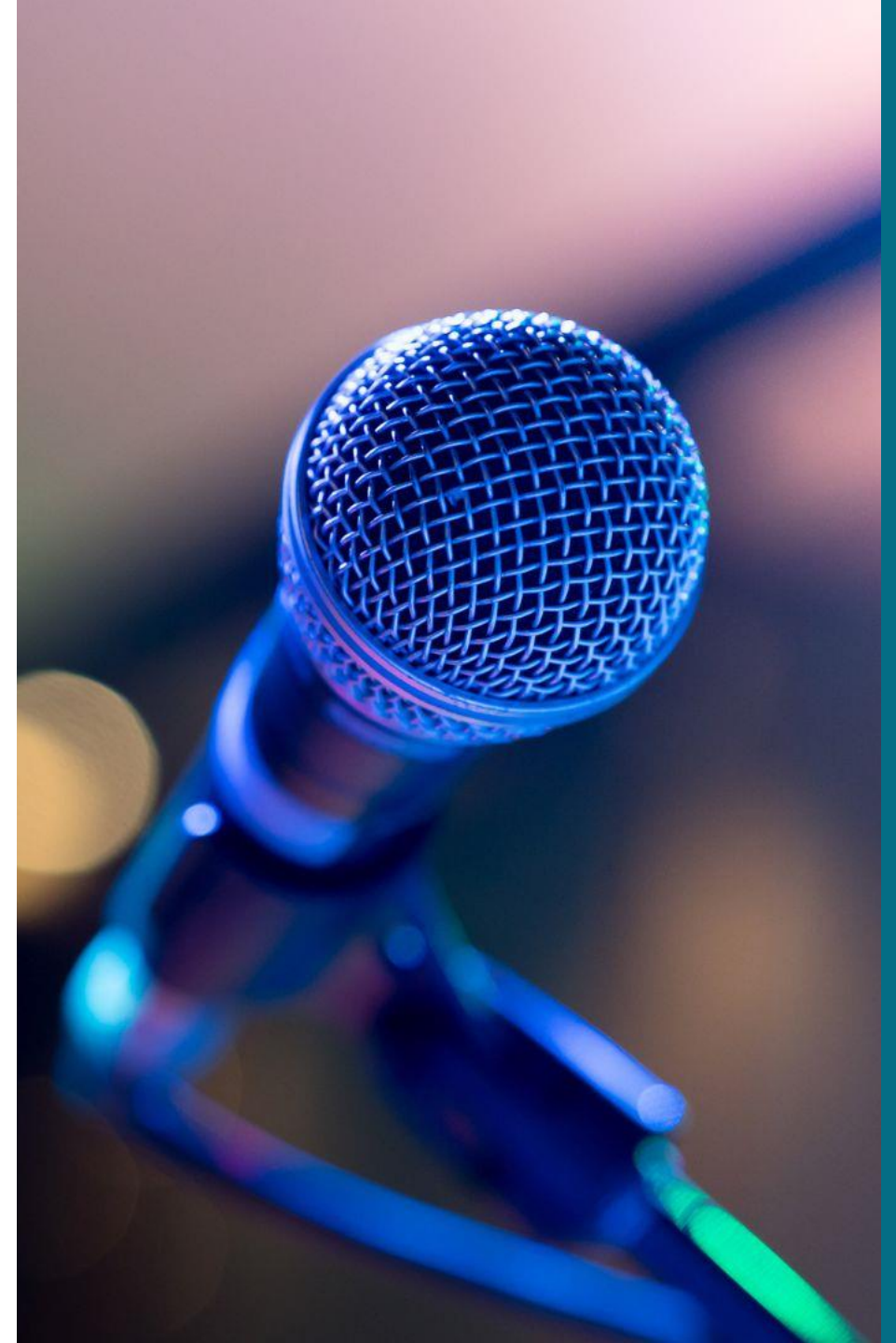
FEDERAL AI LANDSCAPE

- Trump administration has issued new AI executive order with different priorities
- New administration focusing on "American AI dominance" and removing barriers to innovation
- Regulatory uncertainty as policies are being restructured



EEOC GUIDANCE (RESCINDED)

- EEOC launched AI and Algorithmic Fairness Initiative (October 2021)
- Technical guidance on ADA compliance and disparate impact
- DOL principles for AI and worker well-being



EEOC GUIDANCE (RESCINDED)

- All major guidance documents removed in January 2025
- DOL AI principles and best practices removed
- Key Takeaway: Previous employment law framework no longer exists



EXISTING LAWS STILL APPLY

- Title VII (employment discrimination)
- Americans with Disabilities Act
- Fair Labor Standards Act
- State and local AI laws (where applicable)

STRATEGIC RECOMMENDATIONS

- Monitor development of new Trump administration AI policies
- Implement internal AI governance based on established employment law principles
- Prepare for potential new federal guidance with different focus





WANNA BE STARTIN', SOMETHIN'



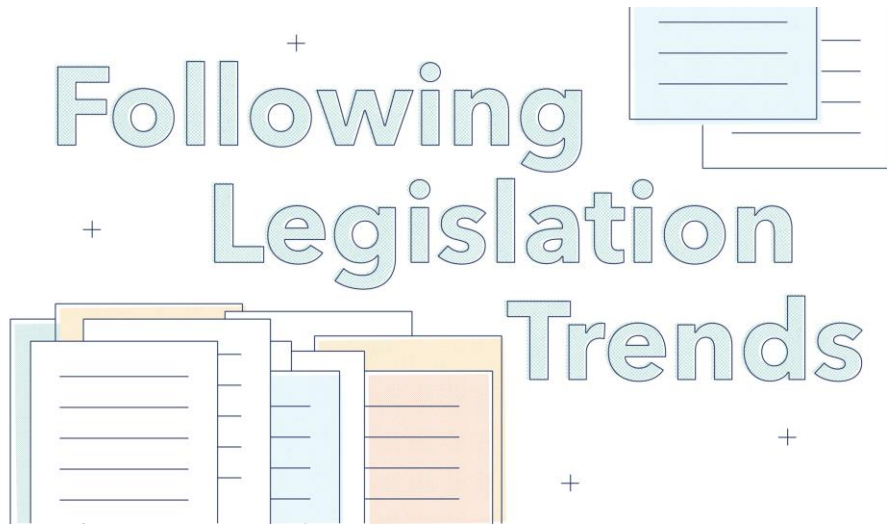
State Laws

STATE LEGISLATION



- **States moving ahead with comprehensive AI regulation in absence of federal framework**
- No federal preemption - states free to regulate AI in employment
- **Focus on employment discrimination, bias auditing, and transparency requirements**

PROPOSED LEGISLATION TRENDS



- **Notification requirements** for AI use in employment decisions
- **Bias audit** and disparate impact analysis requirements
- Public disclosure of audit results
- Right to opt out of automated processes
- Accommodation requirements for disabled applicants

ILLINOIS ARTIFICIAL INTELLIGENCE VIDEO INTERVIEW ACT (2020)



Requirements for AI-based video interviews:

- Notify applicants AI will be used
- Explain how AI works and evaluation criteria
- Obtain applicant consent
- Delete videos within 30 days upon request

ILLINOIS AI BIAS IN HIRING LAW



- Prohibits AI that discriminates based on protected classes
- Bans using postcodes as proxy for protected characteristics
 - Can lead to indirect discrimination because postcodes are often correlated with socioeconomic status, ethnicity, or health
- Requires notice to employees when AI is used
- Covers full employment lifecycle (recruiting through termination)

NYC AUTOMATED EMPLOYMENT DECISION TOOLS LAW



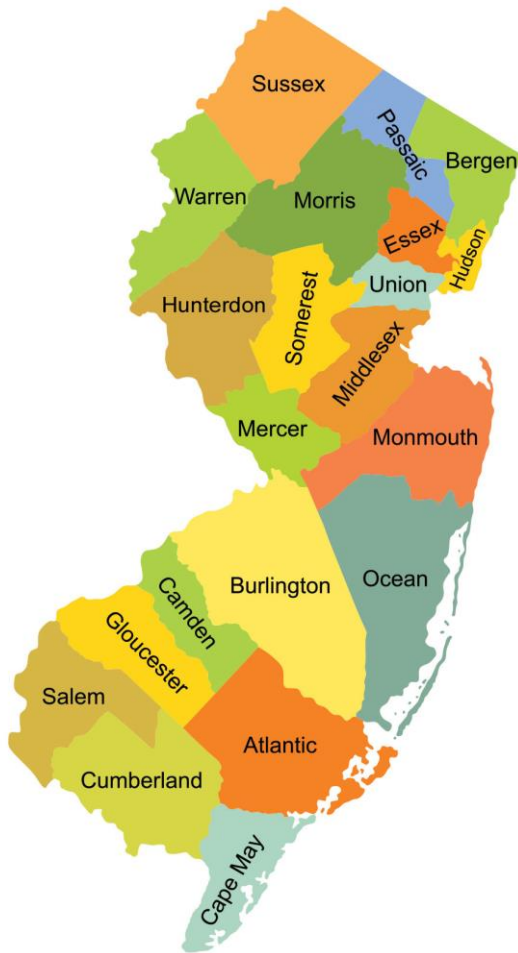
- Strictest requirements in the US
- **Mandatory bias audits (annually)**
- **Public disclosure of audit results**
- 10-day **advance notice** to candidates/employees
- Data collection and retention policy disclosure

TEXAS RESPONSIBLE AI GOVERNANCE ACT (EFFECTIVE JANUARY 2026)



- Prohibits **intentional** AI discrimination based on protected characteristics
- Clarifies disparate impact alone insufficient for discrimination claims
- Primarily targets government agencies and healthcare

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)



- Joint guidance from Attorney General's Office and Division of Civil Rights Clarifies how existing New Jersey Law Against Discrimination applies to AI tools
- No new legislation - interpretation of current anti-discrimination law

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)



Key Message:

- The NJ LAD prohibits algorithmic discrimination in the same way it has long applied to other discriminatory conduct - technology doesn't change legal obligations

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)



Strict Liability Approach

- ***No intent required*** - employers liable even without discriminatory purpose
- ***Third-party vendor use provides no protection*** - employers remain responsible
- ***"Black box" defence rejected*** - lack of understanding doesn't excuse discrimination

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)

Types of Claims Covered



- ***Disparate treatment*** - direct discrimination based on protected characteristics
- ***Disparate impact*** - neutral policies with discriminatory effects
- ***Reasonable accommodation failures*** - AI systems that don't account for disabilities

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)



Risk Management Strategies

- Conduct pre- and post-employment **bias audits** by independent parties
- Implement quality control measures for training data

NEW JERSEY – ATTORNEY GENERAL GUIDANCE (JANUARY 2025)



Risk Management Strategies

- Perform impact assessments before deployment
- Provide **notice** of automated decision-making tool use
- Include affected communities in tool development

YOU ARE NOT ALONE



Recommendations



AI GOVERNANCE FRAMEWORK

- **Identify legal requirements**
- Establish **staff oversight roles**
- Work with vendors to address needs
- Use **human** professional to regularly monitor AI results and modify algorithms or data sets if discriminatory results are discovered

LEGAL COMPLIANCE

- Anti-discrimination laws may impose liability on employers regardless of whether recruiting and hiring tasks are performed by human employees or AI-powered tools
- **Monitor the processes and results of AI tools** to ensure that they are not screening out potential candidates who need accommodation



IMPLEMENT BIAS PREVENTS & MONITORING

- Regularly audit the output processes conducted by AI tools
- Ensure **human oversight** when AI tools are involved in employment decisions

WAGE AND HOUR COMPLIANCE

- Do not rely solely on AI metrics measuring activity such as keystrokes or mouse movements for calculation of hours worked
- Exercise sufficient oversight over AI tools to ensure that employees are paid correctly under applicable law when using AI tools to calculate wage rates





QUESTIONS?



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DON'T STOP BELIEVIN'

Navigating employment storms before the final
curtain

RACHEL A. PARISI

RAHOOL PATEL





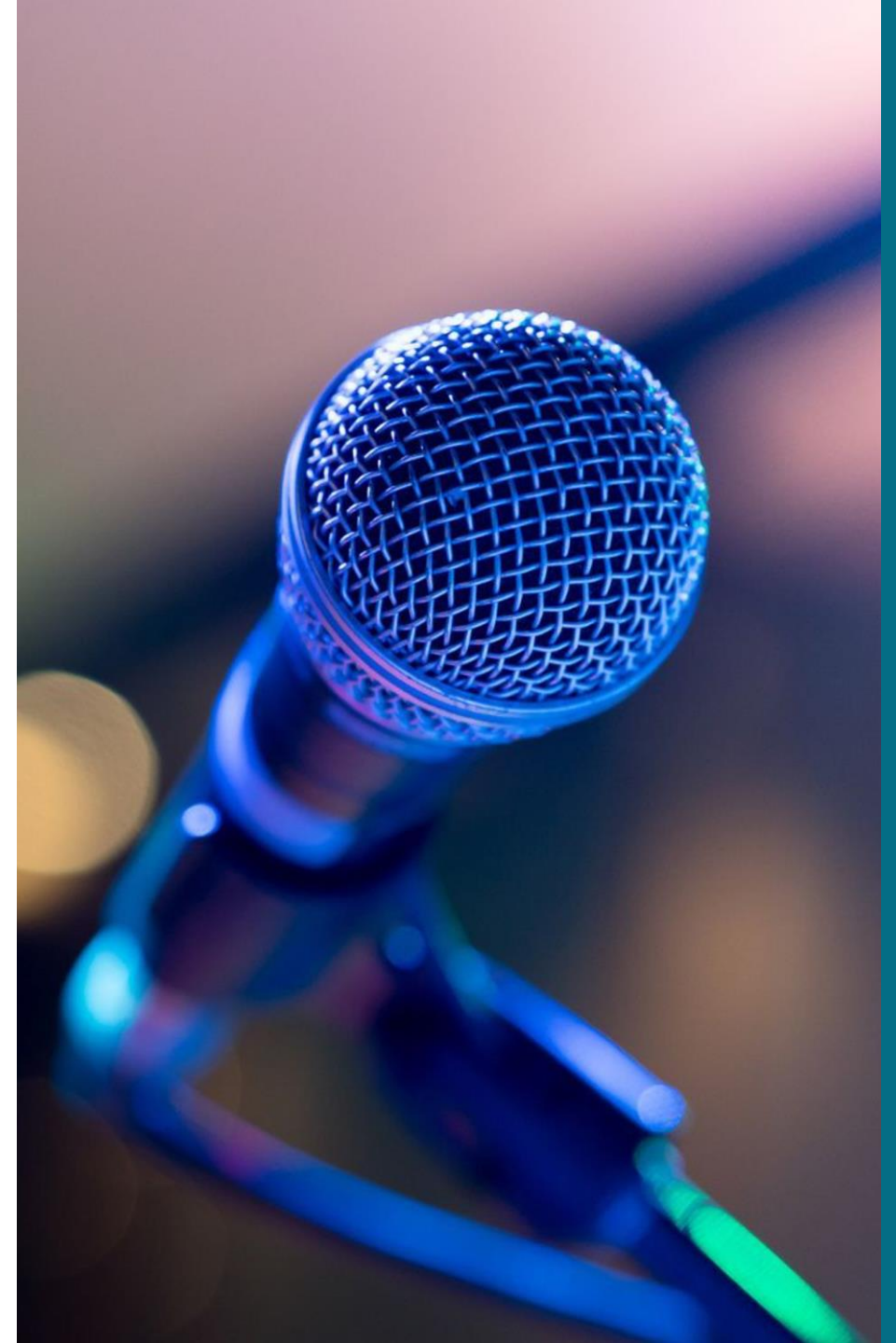


AGENDA

- Workforce Planning:
Navigating the Legal and
Practical Implications of RIFs
- Compensation / Benefits /
Employment Agreements:
Avoiding Landmines
- Takeaways / Best Practices
- Q&A

RIFs: “Under Pressure”

- Reductions in Force
- Identify legal requirements / understand constraints
- Proactively prepare a strategic plan / evaluate alternatives
- Address important intangible aspects
 - Coordinate with partners (lenders, investors, etc.)
 - Engage with key stakeholders
 - Prepare and execute clear and empathetic messaging
 - Ensure consistent / coordinated team effort (HR, legal, finance, PR, etc.)
 - Disclosure and transparency are often key!



CASE STUDY: AMERICAN AIRLINES VS. TOYS 'R' US



Chapter 11 Reductions in Force (RIF): Successful vs. Unsuccessful

Factor	AMR (Successful RIF)	Toys 'R' Us (Unsuccessful RIF)
Planning	Planned early as part of a business plan; court-approved	Abrupt, reactive; no time to structure
Funding	Had DIP financing to fund buyouts, severance, and operations during restructuring	DIP lenders cut off liquidity; no severance pool
Labor Engagement	Negotiated concessions with unions, offered voluntary buyouts	Employees largely blindsided; minimal negotiation
Outcome	Emerged as larger airline via merger	Liquidated; massive job losses, WARN litigation

TAKEAWAYS / LESSONS LEARNED??

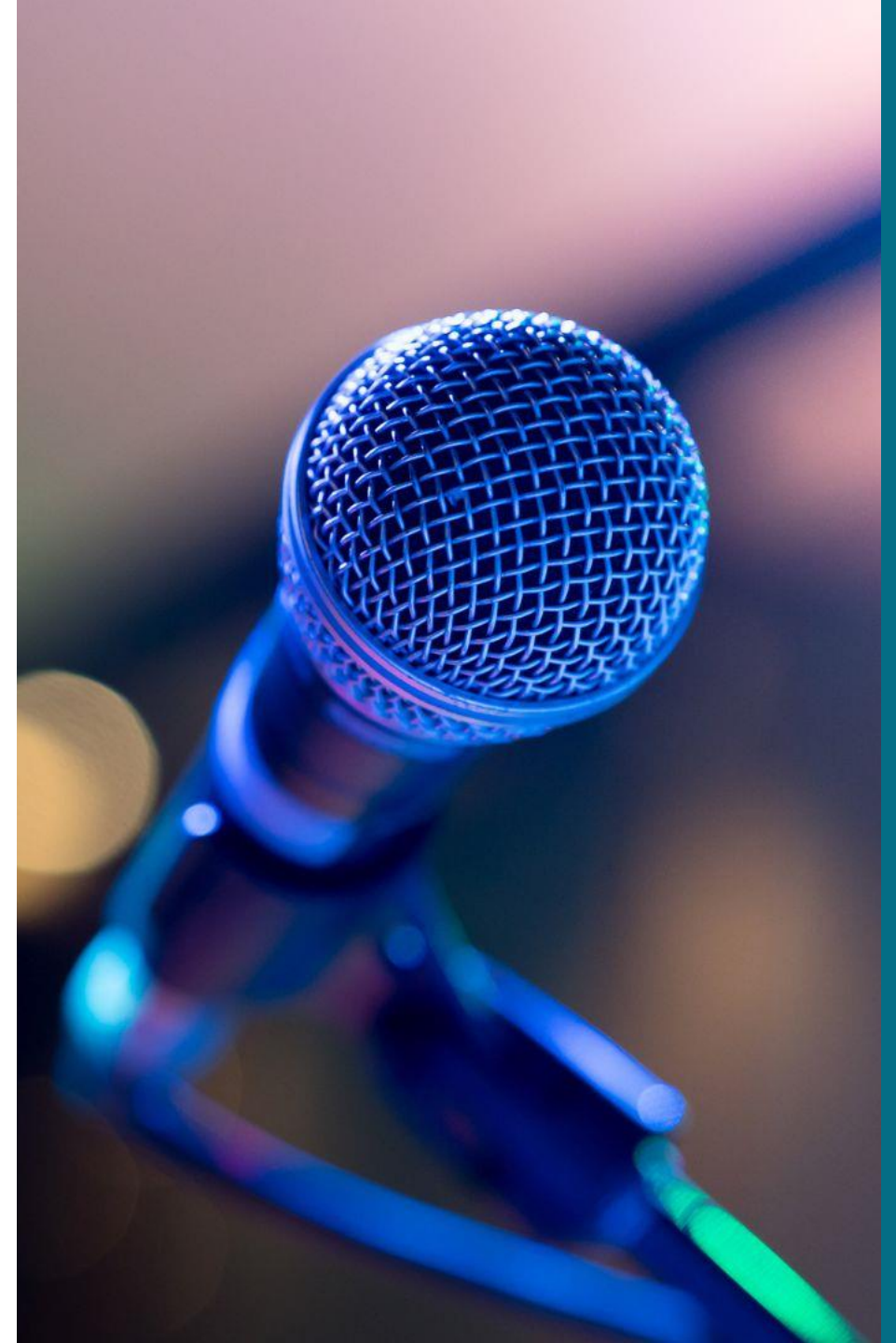
FEDERAL WARN ACT: “CLOSING TIME”

- **Worker Adjustment and Retraining Notification Act**
- Applies to companies with 100 or more full-time workers or companies with 100 or more workers who work at least a combined 4,000 hours per week.
- A WARN notice is required when:
 - 50+ people at a single site of employment are laid off because of a facility closing
 - 500+ employees are laid off at a single site of employment within a 30-day period
 - 50-499 employees constituting at least 33% of the work force at a single site of employment are laid off



FEDERAL WARN ACT

- 90-day lookback period for a series of smaller terminations or layoffs, none of which individually would trigger a WARN notice
- 60 days' notice requirement when WARN Act requirements are met
- Failure to provide notice renders employer liable for back pay and benefits for the period of violation (up to 60 days) reduced by any wages paid during notice period
- Enforced in United States District Court



NEW JERSEY WARN ACT

- Millville Dallas Airmotive Plant Job Loss Notification Act
- Applies to companies with 100 or more employees (Part-time employees are included in the calculation to determine whether a company is a “covered employer” and whether the WARN Act applies)
- Notice period is 90 days instead of 60
- Mass layoff occurs when 50+ employees are laid off within a 30-day period at any site of employment in New Jersey regardless of what percentage of the workforce they represent



NEW JERSEY WARN ACT

- Mandatory severance pay: One week for each full year of employment with no cap
- Severance pay cannot be waived
- Penalty for failure to provide 90 days' notice is an additional four (4) weeks of severance pay

Even **in crisis**, employers must provide WARN notices that are not just timely—but also **factually complete and legally compliant**.

Exceptions Were Plausible: The judge acknowledged that Yellow’s situation—rapid financial collapse, failed refinancing efforts, and a threatened strike—made the unforeseeable business circumstances and faltering company defenses plausible.

Notices Were Inadequate: However, the WARN notices sent to employees lacked sufficient factual detail. They didn’t clearly explain why Yellow was invoking those exceptions or what circumstances justified the shortened notice.

Public Knowledge ≠ Legal Compliance: Yellow argued that the reasons for its shutdown were widely known and communicated informally. Judge Goldblatt rejected this, stating that statutory compliance requires formal written notice, not just general awareness.

Technical Violation Still Matters: Even though the violation was “purely technical,” the judge emphasized that the WARN Act’s procedural safeguards are essential and must be followed.

CASE STUDY: **YELLOW** **CORPORATION**



TAKEAWAYS / LESSONS LEARNED??

RETAINING TALENT IN THE FACE OF UNCERTAINTY: “I’M STILL STANDING”

- Identify critical employees early
- Design pre-bankruptcy retention strategies consistent with company policies
 - Stay bonuses
 - Enhanced compensation (consider stock if cash is tight)
 - Enhanced severance or change in control protections
 - Non-monetary retention tools
- Consider timing and optics
- Ensure market reasonableness
- Work with key stakeholders, which may include investors, lenders, etc.
- Transparent messaging



BANKRUPTCY TOOLS: KERP AND KEIP

- **Key Employee Retention Plan** (stay bonus)
 - Plan must be essential because employee has bona fide job offer from another employer at same or higher rate of compensation
 - Employee's services are essential to (temporary) survival of the business
 - The bonus cannot be more than 25% higher than the bonus the employee earned the prior year and cannot exceed a 10-1 ratio of a similar bonus paid to a non-management employee
- **Key Employee Incentive Plan** (performance bonus)
 - Must be in the ordinary course of business made in good faith upon a reasonable basis
 - When outside the course of business, must be justified by the facts and circumstances of the case, which include (1) reasonable relationship between plan proposed and results desired, (2) cost of the plan, (3) consistency with industry standards, (4) fair and reasonable to other employees, (5) due diligence efforts undertaken, and (6) independent counsel used



CASE STUDY: HERTZ

Hertz paid top executives \$16 million in bonuses ahead of its bankruptcy filing



By Chris Isidore, CNN Business

🕒 2 min read · Published 2:46 PM EDT, Tue May 26, 2020



COMPENSATION / BENEFITS / EMPLOYMENT AGREEMENTS: “SHE WORKS HARD FOR THE MONEY”

- Regular market benchmarking
- Ensuring pay equity and fairness
- Aligning programs with business goals
- Offering a comprehensive benefits package
- Maintaining transparency through clear communication and accessible information
- Employment agreements should be clearly defined and regularly updated



Q&A: “I STILL HAVEN’T FOUND WHAT I’M LOOKING FOR”



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MO' MONEY, MO' COMPLIANCE

EMPLOYER REQUIREMENTS FOR KEEPING
IN COMPLIANCE (IN 2025)

KERRI A. WRIGHT

WESTON J. KULICK



MUSE



COMPLIANCE
PURPLE DISCO MACHINE REMIX



**WHEN YOU
HEARD OUR
TITLE, YOU
MAY HAVE
BEEN
THINKING...**



**BUT, WHAT
ABOUT...**

TROLLS!



**NOW, YOU
MIGHT BE
ASKING
YOURSELF...**





SO YES . . .



2025 COMPLIANCE OVERVIEW:

- New Jersey Pay Transparency Act
 - Equal Pay
 - Proposed regulations
- Pay Audits
- Tips and Overtime
- Minimum Salary Thresholds



LET'S GET STARTED!

Fair Labor Standards Act Final Rule: Threshold Increases

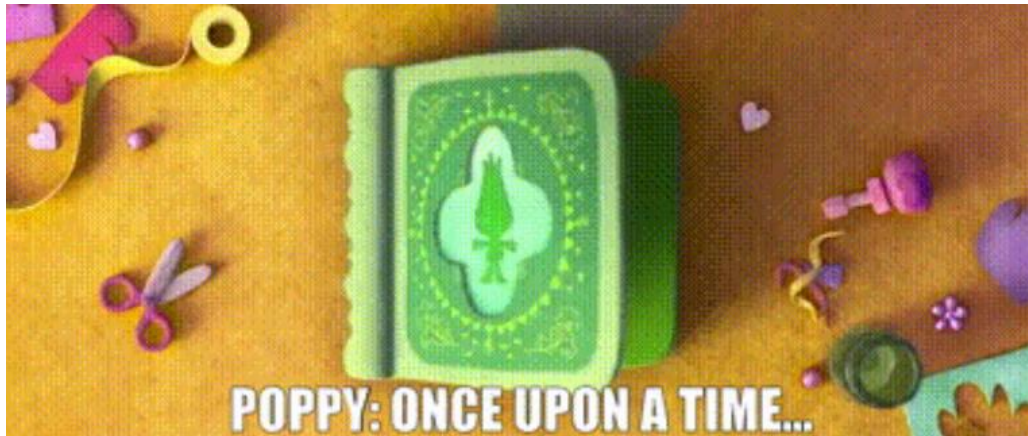
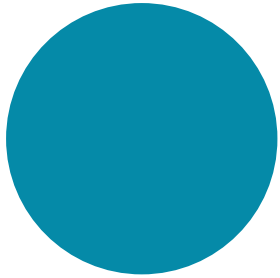
- Minimum salary required to exempt a salaried executive, administrative or professional employee
- Minimum salary to qualify as a highly compensated employees
- Currently in limbo!

New Federal Tax Exemptions

- No tax on tips
- Federal income tax deduction for overtime pay



DIANE B. ALLEN EQUAL PAY ACT



- Employers cannot pay an employee who is a member of a protected class less compensation than employees who are not members of the protected class and who are doing ***substantially similar*** work.
 - Skill
 - Effort
 - Responsibility
- Applies to employers with **at least one employee** located in New Jersey
- Employers must **increase differentials to comply** with law, don't decrease
- **Private right of action:** employees can sue!

EQUAL PAY: PROTECTED CLASSES

- Race
- Religion
- Color
- Age
- Nationality
- Ancestry
- Sex
- Pregnancy
- National Origin
- Marital Status
- Domestic partnership or civil union status
- Affectional or sexual orientation
- Gender identity or expression
- Atypical hereditary cellular or blood trait
- Genetic information
- Military service
- Mental or physical disability



NEW JERSEY PAY AND BENEFITS TRANSPARENCY ACT

N.J.S.A. 34:6B-23

- Went into effect June 15, 2025
- Requires compensation transparency for (1) job listings and (2) promotional opportunities
- **Rationale:** Jobseekers/workers right to know the pay, benefits, and other compensation programs that an employer is offering **before** applying for a job or transfer opportunity
- Covers **job postings in any format**, including job search websites, print advertisements, company newsletters, emails, social media, and more



We promise we will lead you through
all of this...

PAY TRANSPARENCY: COVERED EMPLOYERS

- Covered employers include any person, company, corporation, firm, labor organization, or association which:
 - 1) Has 10 or more employees over 20 or more calendar weeks; *and*
 - 2) Does business, employs persons, or **takes applications for employment within New Jersey.**
- **Public employers are covered employers**
- Under the proposed regulations, **“employer” includes employment agencies**



PAY TRANSPARENCY: REQUIREMENTS

- **Employers must:**
 - Disclose **salary or wage ranges** and **benefits** in job postings.
 - Make **reasonable efforts** to notify current employees of promotional opportunities.



PAY TRANSPARENCY: JOB POSTINGS

Employers must provide the following information in any posting for new jobs or promotional opportunities that it advertises externally or internally:



- The hourly wage or salary of the position, or a range of the hourly **wage or salary**;
- A general description of the **benefits**; *and*
- Any **other compensation programs** for which the employee would be eligible.

JOB POSTINGS: WAGE OR SALARY REQUIREMENTS

Job postings can include the

- **Exact** hourly wage/salary, or
- **A range** of the hourly rate/salary being offered.
 - A range should have a start and an end point
- Under the proposed regulations, pay ranges cannot exceed *more than 60% of the pay range starting point.*



JOB POSTINGS: BENEFITS

- Proposed regulations define “benefits” to mean employee fringe benefits including, but not limited to, the following:
 - Health insurance
 - Life insurance
 - Disability insurance
 - Paid time off (including vacation, holidays, personal leave and sick leave)
 - Training
 - Retirement benefits and/or pension benefits



JOB POSTINGS: OTHER COMPENSATION PROGRAMS

Under the proposed regulations, “**other compensation programs**” would mean methods of compensation other than the payment of traditional wages, such as:

- Commissions
- Bonuses
- Profit-sharing



“POP” QUIZ!



“POP” QUIZ

Poppy just can’t stop the feeling . . . that something is missing from the job posting she is considering. It says that she can earn up to \$150,000 per year as Queen of the trolls, with great benefits, and the opportunity to earn more than just a base salary based on performance.

What’s wrong with this job posting?

- A) The salary is not specific
- B) The “great” benefits are not listed
- C) The other compensation is not delineated
- D) All of the above



D: ALL OF IT!



PAY TRANSPARENCY: PROMOTIONS

Employers must use **reasonable efforts** to make current employees in its **affected departments** aware of promotion opportunities.



PAY TRANSPARENCY: PROMOTIONS

- Proposed regulations define “**reasonable efforts**” to mean:
 - Posting notification of the promotional opportunity in places within the employer’s workplace where all employees in affected department(s) can see them, *and*
 - Posting notification of the promotional opportunity on the employer’s internet site or intranet site, in the event the employer has one.



“POP” QUIZ, AGAIN!



“POP” QUIZ:

Crimp is tired of working 9 to 5 just to make a living. With all her service and devotion you would think she deserves a fair promotion, from her job as executive assistant to the ultra popular boy band, BroZone. Crimp finds out that Tiny Diamond just got promoted from sound technician to talent manager. Crimp had no idea that BroZone was even looking for a talent manager! Tiny Diamond told Crimp that he heard about the talent manager opening directly from BroZone’s leader, John Dory, during a sound mixing session.

What did BroZone do wrong?





PAY TRANSPARENCY: ENFORCEMENT

- No private right of action
- Complaints processed through the DOL
- Proposed regulations provide for appeal procedures



PAY TRANSPARENCY: PENALTIES



Penalties:

- Civil penalties of **up to \$300 for a first violation**, and **up to \$600 for each subsequent violation**
- Each noncompliant job posting counts as a separate violation

Under the proposed regulations, the Commissioner will consider certain factors for determining an appropriate penalty:

- 1) The seriousness of the violation(s);
- 2) The past-history of previous violations by the employer;
- 3) The good faith of the employer;
- 4) The size of the employer's business; and
- 5) Any other factors which the Commissioner deems appropriate.

ENFORCEMENT: HEARINGS

Under the proposed regulations, when penalties are assessed, employers have a right to the following procedures:

- Commissioner provides written notification of violation and penalty amount →
- Employer can request formal hearing →
- Division of Wage and Hour Compliance reviews hearing request and can require an informal settlement conference →
- If informal settlement conference unsuccessful → case forwarded to OAL for formal hearing →
- Commissioner makes final decision →
- Appeals considered by Appellate Division



PAY TRANSPARENCY: PROPOSED REGULATIONS

The New Jersey Department of Labor is still finalizing **Departmental rules** to clarify enforcement.

- Proposed regulations issued on 9/15/25
- Public comments accepted until November 14, 2025, so...



PAY TRANSPARENCY: ELSEWHERE

- States with laws requiring pay transparency **in job postings**:
 - California, New York, Colorado, Washington, Hawaii, Illinois, Maryland
- States requiring disclosure after interview, upon hire or **upon request**:
 - Connecticut, Nevada, Rhode Island
- States with **local requirements**
 - Ohio, New York, New Jersey





DreamWorks Trolls © 2016 DWA LLC.



RECOMMENDATIONS: WE PINKY PROMISED!



LET'S GET REAL: RECOMMENDATIONS



- **Create a template** for job postings (both internal and external)
- Review **where** you are posting
- If you use **hiring agencies/recruiters**:
 - Review your agreements with them
 - Confirm they are posting your information accurately
 - Consider occasional audits/spot checks and/or require them to provide proof of compliance

LET'S GET REAL: RECOMMENDATIONS



- Draft and/or update **policies regarding hiring practices and promotional opportunities**
- Establish a process for identifying promotional opportunities and what you will post
- **Review your handbook**

LET'S GET REAL: RECOMMENDATIONS



- Conduct a company-wide **compliance check** (especially if you have a multistate presence!)
- Perform **salary audits prior to advertising** for job postings
- Maintain current information via Intranet sites
- Monitor ongoing litigation regarding new overtime thresholds

QUESTIONS?



THANK YOU!



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ALL THE SMALL THINGS (YOUR HANDBOOK NEEDS)

A Pop Punk Guide to Employment Policy

Updates for 2025

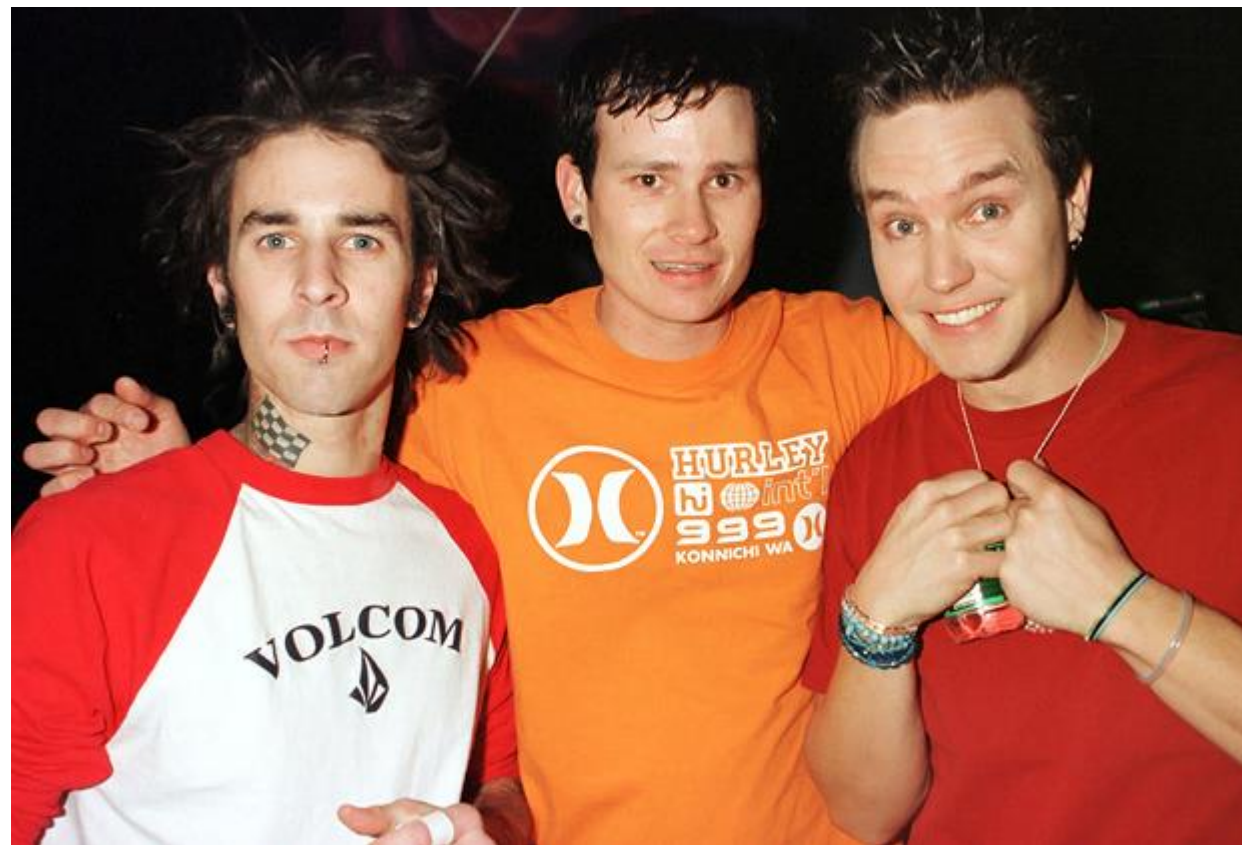
THOMAS J. REILLY



WHO BETTER
TO TELL YOU
ABOUT
EMPLOYMENT
LAW THEN...



OR THEM...



OR THIS GUY...

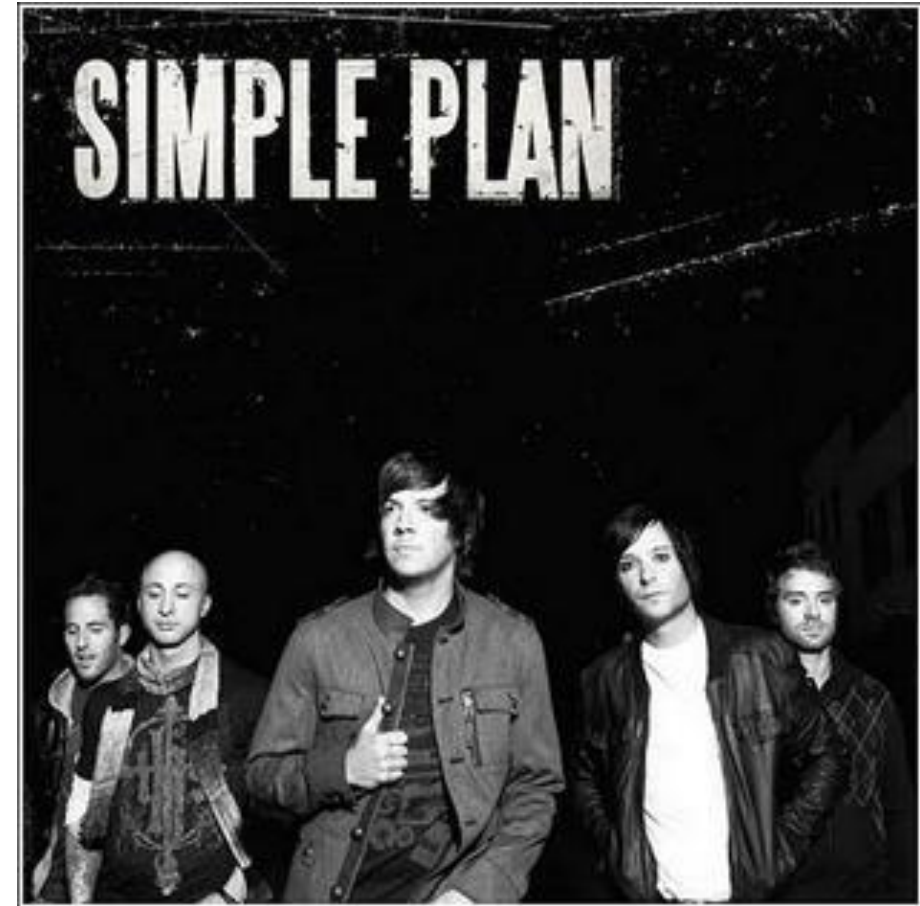






THE SIMPLE PLAN:

- Virtual Employees
- Arbitration and other binding terms
- Dress codes and gender
- Pregnant Employees
- Reimbursement



VIRTUAL EMPLOYEES

(DASHBOARD PROFESSIONALS)

NJLAD:

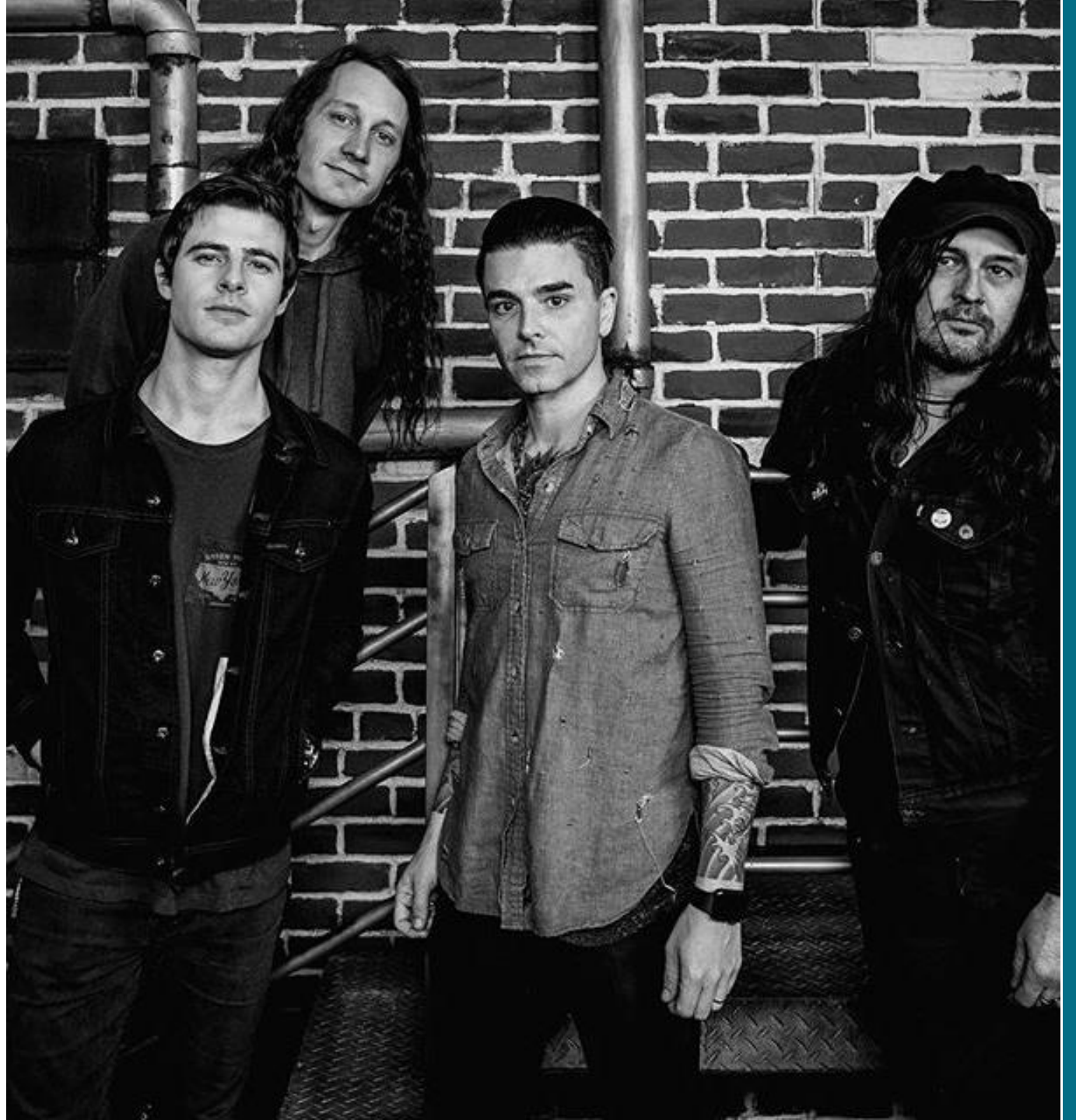
Applies to virtual employees of NJ employers, regardless of where they reside (NJ Attorney General and DCR).

Hostile Work Environment:

Can occur from conduct occurring virtually if on employer systems. *And in some cases, on social media* (EEOC).

What does it mean for you?

Handbooks must contain provisions for virtual employees, should contain express provisions for virtual conduct, and should contain warnings regarding social media usage.



EXAMPLE:

DON'T SPEAK

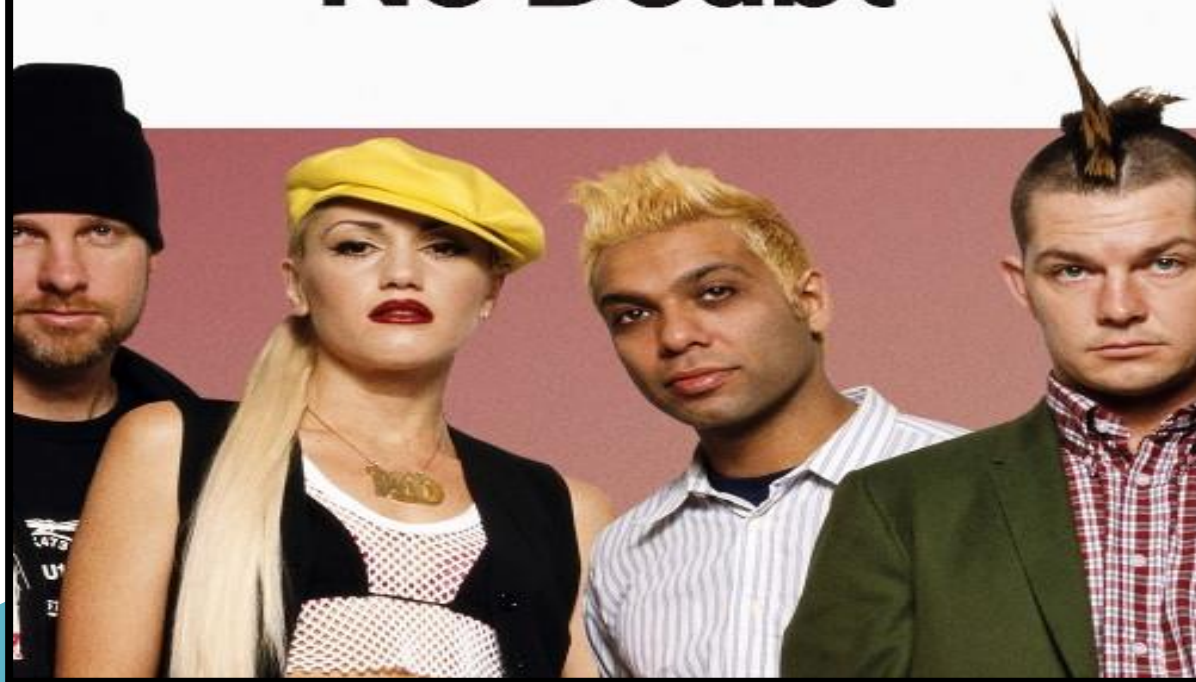
Gwen works for “Hollaback, Inc.” She lives in California, but Hollaback is based in NJ. A coworker comments on X that Gwen is “not cut out for rock and roll because she’s ‘just a girl.’” Hollaback does not have a policy regarding social media use.

Is there a problem here?



NO DOUBT!

THIS IS **No Doubt**



- NJLAD probably applies to Gwen
- X post could be harassment if disruptive
- No policy!



BINDING TERMS

(BURIED) IN TOO DEEP

- *Cornelius v. CVS Pharmacy* (3rd Cir. 2025)
 - Arbitration policy introduced through training course ruled unenforceable.
 - Content and tone of arbitration agreement must be “unmistakable.”
 - Big picture: If a term is important, **put it in the handbook.**

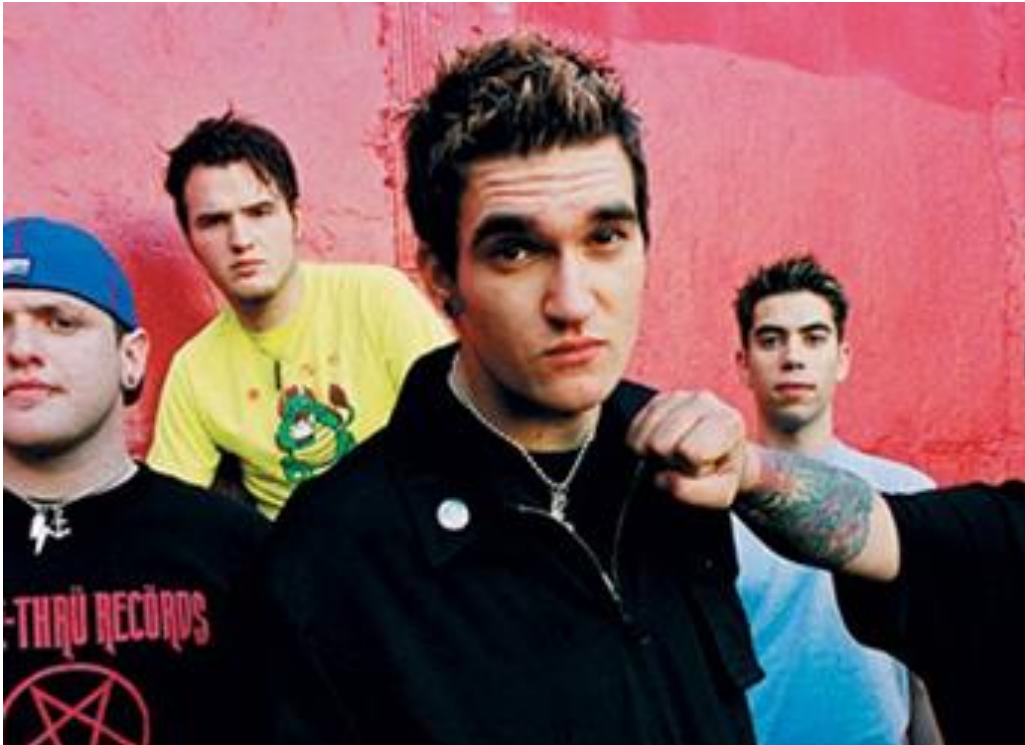


ALL TIME DRESS CODE

- Gender binary dress codes are now unlawful (NJ Attorney General)
- *Bostock v. Clayton Cty.* (U.S. 2020) – trans persons protected by federal law
- EEOC: harassment can include intrusive questions about gender identity or transition
- Handbooks should guard against misgendering, comments on appearance, etc.

PREGNANT EMPLOYEES

NEW FOUND (BABY)



EEOC final rule on PWFA:

- Accommodations that should be granted in “virtually all cases”: keep/carry water; additional restroom breaks; standing/sitting; eat and drink breaks as needed.
- Other accommodations: suspension of essential job functions; reserved parking; equipment, uniform, office modifications.
- Extremely broad definition of “pregnancy.”
- Critical difference from ADA re essential job functions.
- Very difficult to meet “undue hardship” test.
- Paid Prenatal Leave and lactation breaks (NY only).

EXAMPLE:

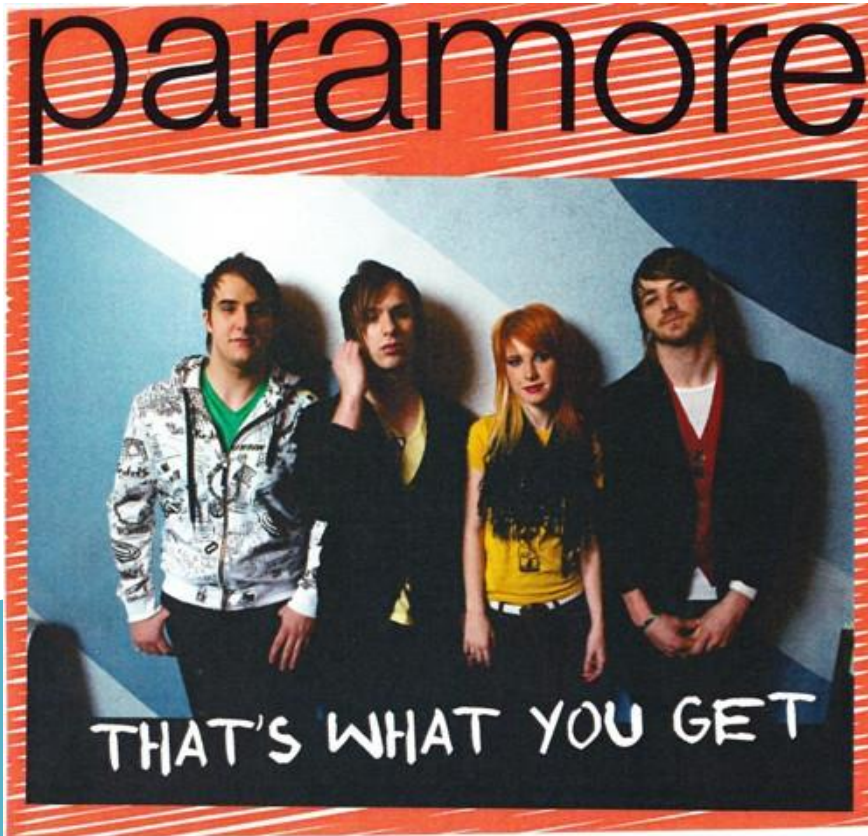
MISERY BUSINESS

Hayley and her “paramour” (spouse) are expecting their first child. Hayley is employed as a singer in a nightclub. She now has gestational diabetes and no longer can perform her physically intensive routine. Her employer terminates her, claiming she no longer can perform her essential job functions.

Is there a problem here?



(SUED) – THAT'S WHAT YOU GET



- Critical difference between PWFA and ADA
- Change hinges on *temporary* nature of condition.
- What if Hayley's disability was related to IVF treatments?

EMPLOYEE REIMBURSEMENT TAKING BACK RECEIPTS, OR THINKS FR TH RMBS

- Failure to reimburse for business expenses may violate the NJWPL.
- *Sands v. Bd. of Review* (App. Div. 2024):
 - Plaintiff property manager used his personal vehicle without reimbursement.
 - Employer cannot transfer its own operating expenses to an employee and “divert his wages to pay those costs.”



WHAT'S MY AGE (AND NAME) AGAIN?



Thomas J. Reilly

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QUESTIONS?

Thnks fr the
Mmrs!



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**“AND YOU STILL
HAVEN’T FOUND
WHAT YOU’RE
LOOKING FOR”**

Janelle Edwards-Stewart

Kevin craig



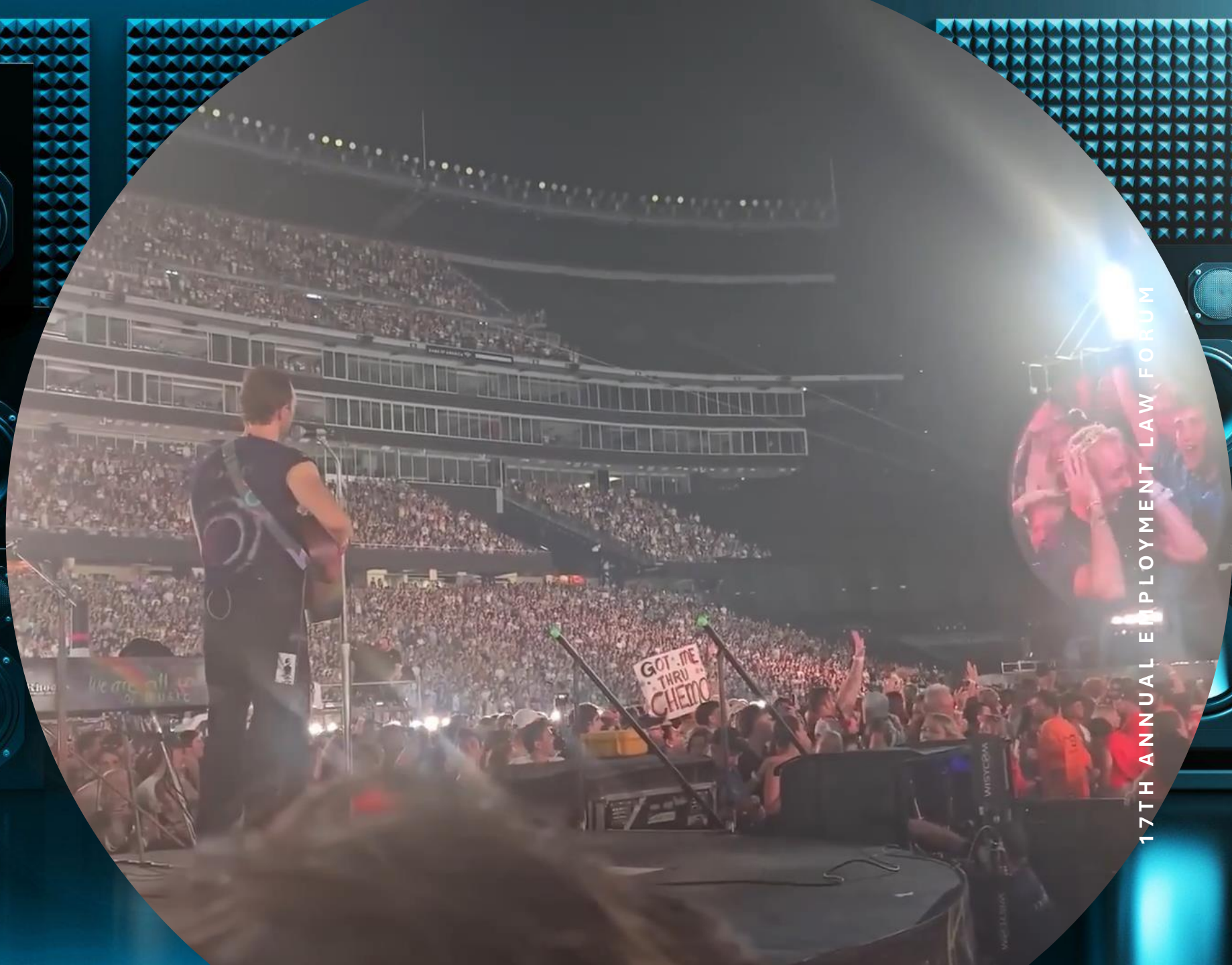
PLAYLIST

🎵 *Song 1:* Pre-Investigation Planning

🎵 *Song 2:* Interviewing

🎵 *Song 3:* Report Drafting

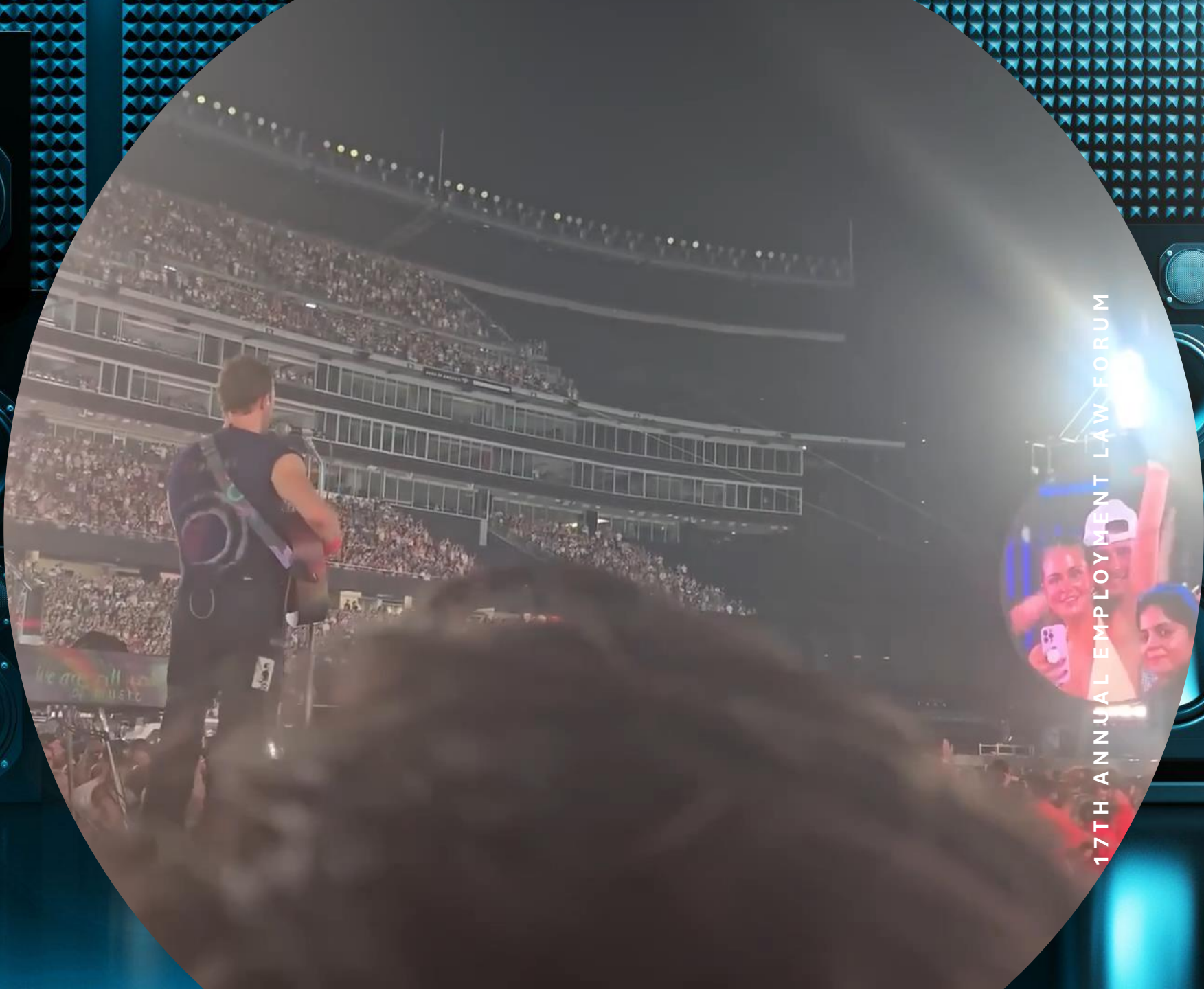




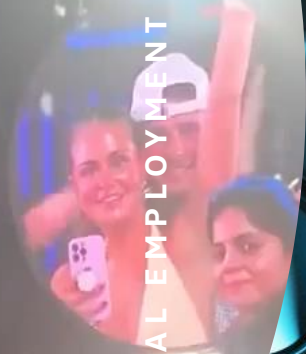
17TH ANNUAL EMPLOYMENT LAW FORUM



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INTRO...



Andy Byron



Kristin Cabot

DISCLAIMER

The following case study is a work of fiction, created for educational purposes. While it features two real individuals, the events, dialogues, and scenarios depicted do not reflect actual events or actions taken by the persons portrayed. The narrative, events, and interactions described are entirely fictional and constructed to explore theoretical or investigative concepts. This work is intended solely for scholarly discussion and learning. No harm, defamation, or misrepresentation is intended.



PRE-VERSE...

Astronomer's BOD wants to know how this could have possibly happened? Were there **policy violations** that occurred? Did other employees **know about the relationship** and **fail to report** it? In the course of their affair, did they **impact the work environment** or other employees negatively, perhaps **favoring** those who helped them to conceal the affair and **disfavoring** others? Were either of them subject to **blackmail** internally or externally, perhaps by a competitor? If so, did they give anything up?

Where do we begin?



SONG 1: “PRE-INVESTIGATION PLANNING”



CLIENT CONSIDERATIONS

- Obtain written complaint/witness statements
- Define legal and policy framework
- Assess capacity and timeframe
- Assess conflicts of interest
- Appoint an experienced, neutral investigator
- Clarify scope

INVESTIGATOR CONSIDERATIONS

- Assess complexity of the investigation
- Evaluate timeline and urgency
- Establish a point of contact/client facilitator
- Plan logistics
- Determine approach to confidentiality
- Collect and Preserve Preliminary records/evidence
- Review history of those involved
- Review applicable standards

SONG 2: “CONDUCTING INTERVIEWS”



FIRST VERSE...

During your investigation planning and record review, you came across some interesting pieces of information. A review of Cabot's **resume and references** reveals that Byron may have known Cabot prior to her hiring. A woman by the name of Melissa Byron is the second reference Cabot listed. Buried deep in Byron's **personnel file** is a mention that he was once accused of **flirting** with his assistant and **requiring her to work late**. An investigation into these allegations was never seen through because the assistant resigned shortly after making the allegations, and the **investigation was halted**.



SECOND VERSE...

A comparison of Byron and Cabot's calendars over the prior 8 months showed that Cabot had accompanied Byron on **three of his last four work trips**.

Indeed, the two were on a work trip in Boston when they attended the Coldplay Concert before heading back to NY the next day.

The smiling woman in the video seen standing next to Byron and Cabot was Cabot's assistant. After seeing the video online, the assistant came forward to confess that **Byron had invited her** to attend the trip and concert to thank her for being such a **"loyal employee"**.





CONDUCTING EFFECTIVE INTERVIEWS

- Identify relevant witnesses (key and peripheral)
- Determine interview format (remote/in-person)
- Determine interview sequence
- Schedule interviews for precision, accuracy, and efficiency
- Discuss confidentiality
- Begin with focused, open-ended questions that are carefully sequenced
- Document and summarize information

SONG 3: “WRITING REPORTS”



C O D A ...

A number of discoveries were made in interviewing and related evidence gathering. **Text messages and social media likes** confirmed that Byron and Cabot knew each other long before Cabot's arrival at Astronomer. Byron had **fired the prior HR Head** (of 17 years) days before Cabot submitted her resume for the unposted position. Last year, two witnesses overheard Byron **flirting** with his old assistant. Reportedly, she used to reciprocate but stopped once she got engaged. Byron continued to flirt, the assistant reported it then **suddenly was no longer with the company**. Several personnel members in HR had received anonymous **reports about Byron and Cabot**. Some were given special benefits, like trips and time off, so they opted to keep quiet. **None attempted to investigate.**



REPORTING

DON'T

- Mix facts and opinion
- Omit credibility rationale
- Fail to explain findings
- Use emotionally-charged language

REPORTING

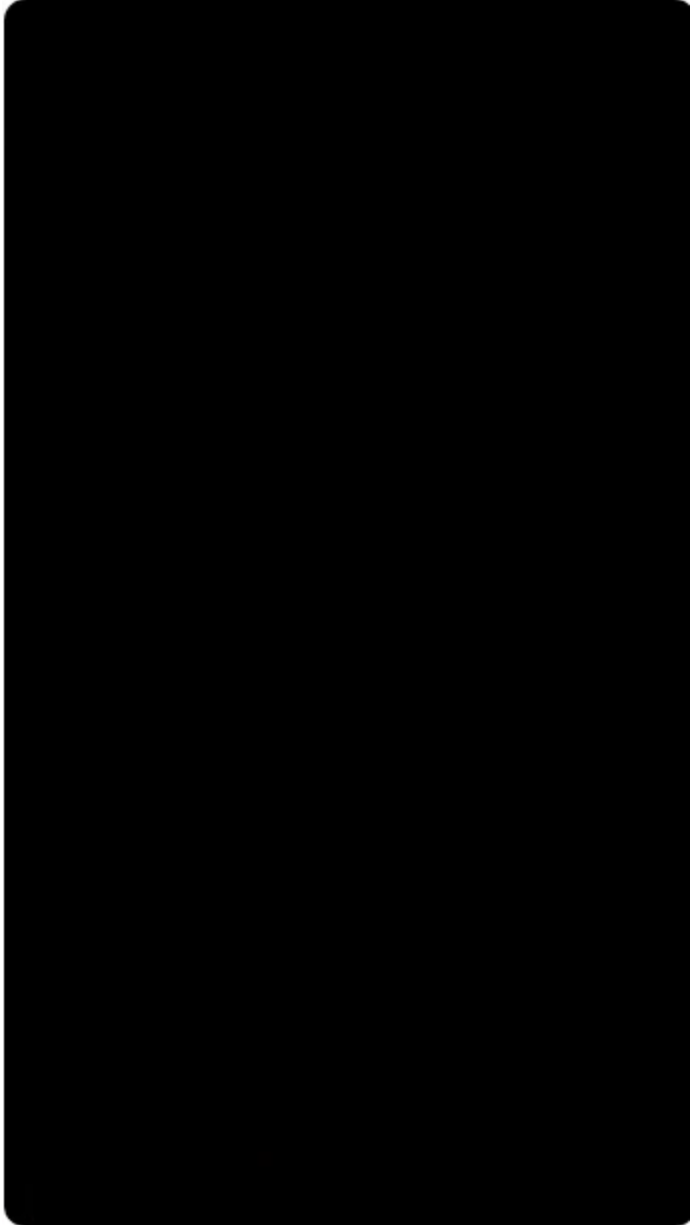
DO

- Create an executive summary
- Apply proportionality to disciplinary recommendations
- Discuss potential remedial measures
- Warn regarding retaliation

OUTRO...



- Obtain and review all relevant records before interviewing
- Plan interview strategies and sequencing
- Gather and preserve new evidence
- Document investigation activities
- Detail conclusions and findings supported by investigation activities in investigation report



QUESTIONS?



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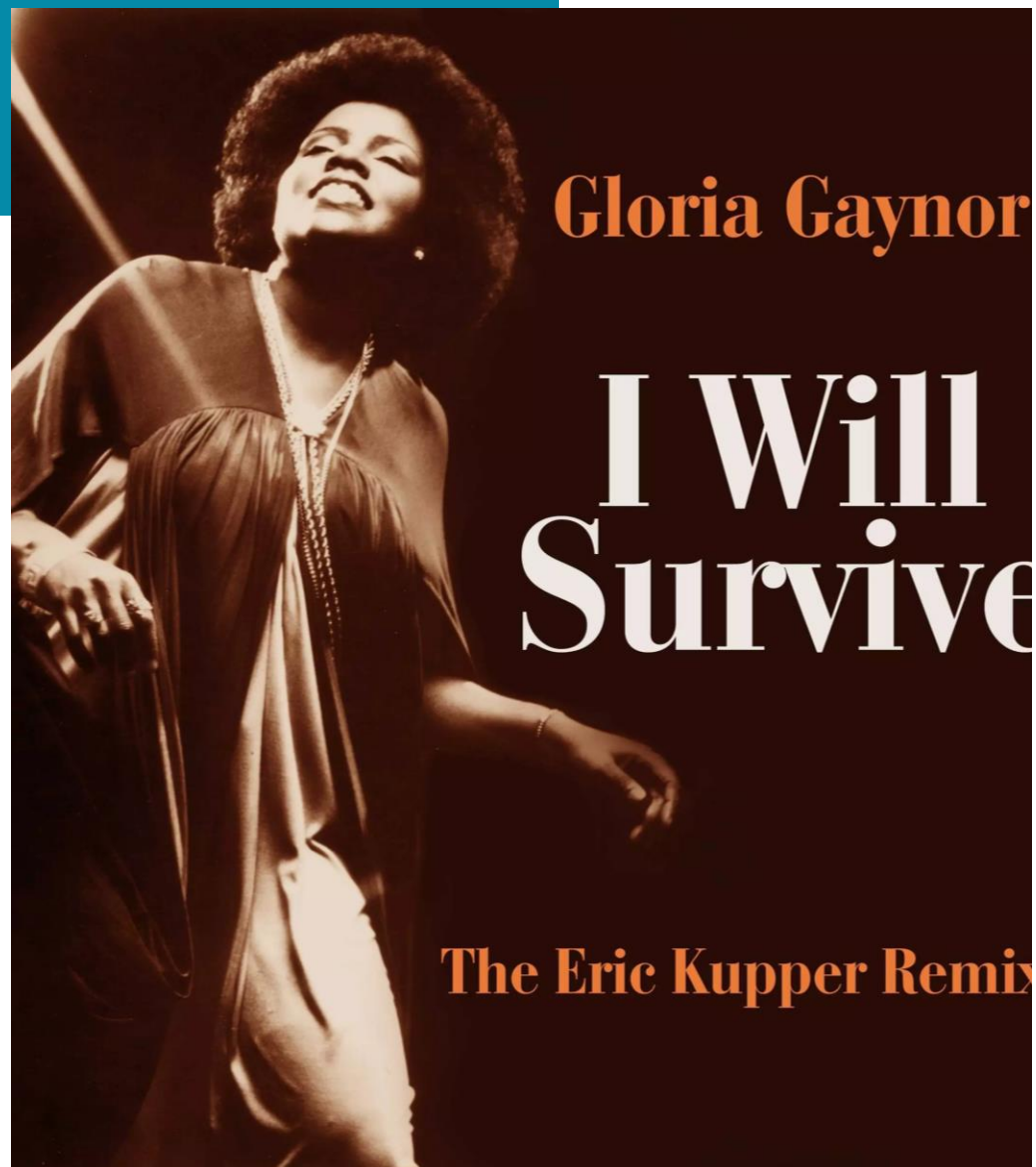
D - E - I - WILL SURVIVE

2025 and beyond

MELANIE D. LIPOMANIS

RAHOOL PATEL





AGENDA

- Background on DEI
- Recent Legal Developments
- Ramifications
- Recent Litigation Overview
- Lawful/Compliant DEI Initiatives



DEI BACKGROUND AND RECENT DEVELOPMENTS

PREVIOUS EEOC GUIDANCE ON DEI INITIATIVES



2006 guidance from the Equal Employment Opportunity Commission (EEOC) approved the use of diversity programs and stated:

- “Workforce diversity is a business management concept under which employers voluntarily promote an inclusive workplace.”
- “Many employers have concluded that a diverse workforce makes a company stronger, more profitable, and a better place to work, and they implement diversity initiatives for competitive reasons rather than in response to discrimination, although such initiatives may also help to avoid discrimination.”

THE SUPREME COURT WEIGHS IN



- The Supreme Court’s 2023 decision in *Students for Fair Admissions, Inc. v. Harvard* has been a game changer not just in college admissions but in employment as well.
- While there, the issue before the Court was DEI in college admissions, the EEOC specifically relied upon this holding in preparing its two Technical Assistance documents for employer sponsored DEI programs issued on March 19, 2025.
- In his concurring opinion, Justice Neil Gorsuch highlighted the parallels of Title IX and Title VII, noting both statutes “codify a categorical rule of individual equality, without regard to race.”

The Supreme Court’s decision has influenced corporate DEI strategies, leading some companies to reevaluate, redesign, or eliminate their DEI programs due to fears of legal repercussions.

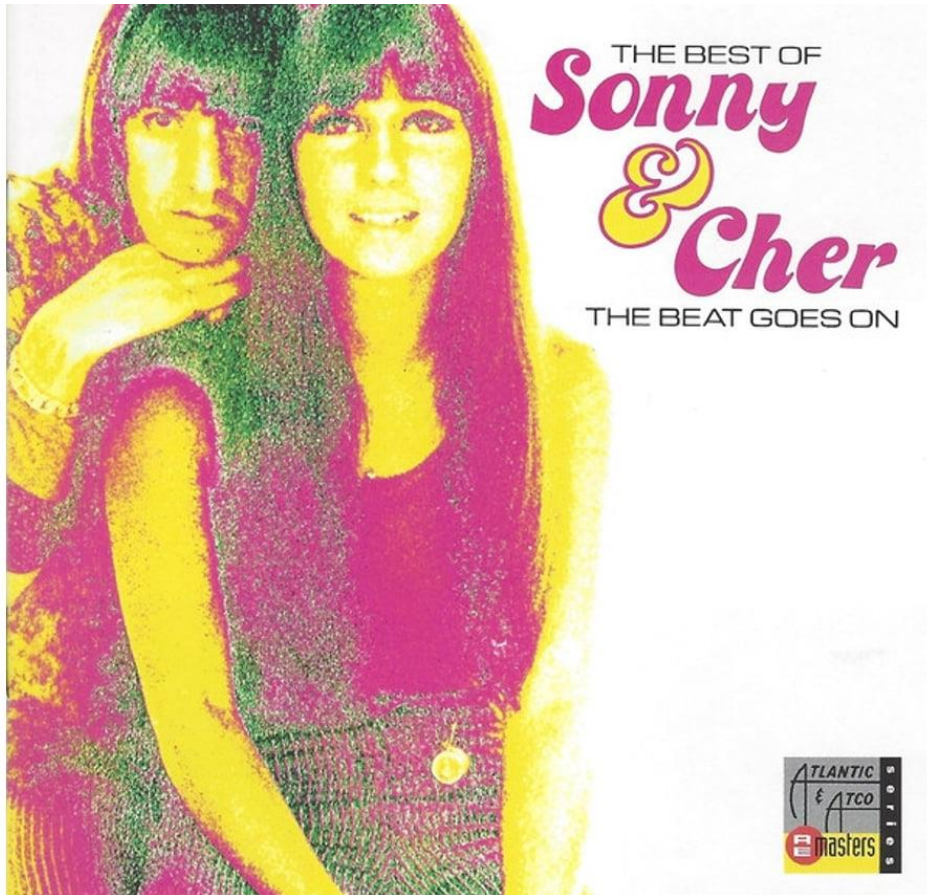
THE EEOC 2025 UPDATES TO DEI GUIDANCE



In Spring 2025, the EEOC issued two technical assistance documents on “DEI-related discrimination” that stated:

- “Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated—in whole or in part—by an employee’s race, sex, or another protected characteristic.**”
- Title VII bars discrimination against applicants or employees in the terms, conditions, or privileges of employment, including, “**fringe benefits, exclusion from training, exclusion from mentoring or sponsorship programs, exclusion from fellowships, and selection for interviews** (including placement on candidate slates)”

MORE FROM THE EEOC



According to the EEOC’s latest guidance, employers are prohibited from:

- “Limiting, segregating, or classifying employees based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities.”
- “Limiting membership in workplace groups, such as Employee Resource Groups (ERG) or other employee affinity groups, to certain protected groups”
- “Separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources”

EXECUTIVE ORDERS

Recent executive orders have called for the termination of DEI programs in federal agencies and among large corporations, citing concerns over illegal discrimination. These orders mandate a review of DEI policies to ensure compliance with civil rights laws.





WHAT ARE WE SEEING ON THE LEGAL FRONTLINES?



DEI Litigation: A growing number of companies are facing lawsuits related to their DEI policies. For instance, the Meltzer Center for Diversity, Inclusion, and Belonging, a research center at New York University's School of Law, recently released a DEI litigation tracker following more than 100 anti-DEI cases that are “likely to affect workplace DEI practices,” according to its site.

Notable organizations are involved in legal battles over their DEI initiatives, including CBS, McDonalds, IBM, PayPal, Starbucks, Hewlett Packard, Southwest Airlines, Citigroup, American Airlines, Walt Disney, to name a few.

REVERSE DISCRIMINATION CLAIMS

There has been a notable increase in reverse discrimination lawsuits, where plaintiffs argue that DEI initiatives unfairly disadvantage white and/or male candidates.

Remember, it has **always** been unlawful to discriminate or show a preference in employment decisions based upon sex, race, national origin, religion, sexual preference, military status, etc.



LITIGATION SNAPSHOT

Walt Disney

Case Category: Diversity Quota Complaint

Status: Disney Made Major Changes

Date: 2/14/2024

Headquarters: California

“America First Legal (AFL) filed a formal complaint with the EEOC alleging that Disney maintains programs that facilitate the classifying of employees or applicants for employment and new business in ways that tend to deprive, white, male, or straight individuals of employment, training, or promotions because of their race, color, sex, or national origin. ”



JOHNSON & JOHNSON

Case Category: Workplace Discrimination

Status: Dismissed

Date: 3/6/2024

Headquarters: New Jersey

A plaintiff is suing Johnson & Johnson alleging that the company discriminated against him in pursuit of its DEI program aiming to eliminate older white male employees. He also claimed that the DEI messaging vilified white men, leading to a hostile work environment.



WORTHINGTON STEEL

Case Category: Workplace Discrimination

Status: Ongoing

Date: 10/24/2024

Headquarters: Ohio

A former employee sued Worthington Steel for religious discrimination and retaliation claiming the company's policy requires staff to use individuals' preferred pronouns, while Plaintiff claims that his sincerely held religious beliefs require him to use pronouns that align with a person's biological sex.



PAYPAL



Case Category: Targeted Programs Complaint

Status: Ongoing

Date: 1/1/2025

Headquarters: California

An Indian American businesswoman accused Paypal of racial bias for restricting part of a \$535 million investment program to Black and Hispanic applicants. The plaintiff claims the company told multiple other businesswomen they were ineligible for funding because of their Asian descent.

MCDONALD'S

Case Category: Targeted Programs Complaint

Status: Settled

Date: 1/12/2025

Headquarters: Illinois

The American Alliance for Equal Rights (AAFER) filed a lawsuit against McDonald's challenging the legality of its HACER scholarship program claiming that it discriminates against non-Hispanic people.



PFIZER



Case Category: Targeted Programs Complaint

Status: Settled – Pfizer opened fellowship to everyone

Date: 9/15/2022

Headquarters: New York

Do No Harm sued Pfizer challenging the company's Breakthrough Fellowship Program (a competitive fellowship open to applicants that meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic and Native Americans). The plaintiff accused the company of racially excluding whites and Asians from its Fellowship.

EXCLUSION OF OTHERS



Not Inclusion, is the common denominator in all of these litigation cases.

COMMON BELIEFS ABOUT DEI

1. DEI results in lower standards
2. DEI is divisive
3. DEI is designed to include some individuals at the expense of other individuals
4. DEI is only about race
5. DEI is too expensive



FORBES REPORTS “MOST EMPLOYEES SUPPORT DEI, REVEALING TALENT RISK FROM DEI RETREAT” *September 3, 2025*

1. Happier employees
2. Increased employee engagement
3. Better employee retention
4. Better collaboration
5. Fewer workplace disagreements
6. Enhanced decision-making
7. Successful business outcomes
8. Reduced likelihood of legal issues



DO IT YOUR WAY

- If your organization wants to implement or maintain an existing DEI program, do not be afraid – it can be done lawfully.
- We can help ensure your DEI program complies with the latest laws, guidance, and executive orders and limit liability pitfalls that can arise from such programs.



**DON'T YOU BE AFRAID; AND DON'T
BE PETRIFIED:**

*WE ARE HERE AND READY TO HELP
YOU THRIVE WITH DEI*



DEI programs must be reassessed for compliance.

Organizations are advised to ensure that their DEI programs are compliant with legal standards to avoid litigation. This includes being transparent about eligibility criteria for DEI-related programs and ensuring that they do not discriminate against any group.

LAWFUL PRACTICES

- **Focus on Merit**: employment decisions must be merit-based and supported by objective, quantifiable criteria.
- **Provide Equal Access**: Employers should ensure that employees of all backgrounds have equal access to training, mentoring, and networking opportunities to develop the quantifiable skills and experience needed to advance.
- **Avoid Segregation**: Do not create employee groups or programs that segregate or exclude based on protected characteristics.
- Avoid the numbers game (quotas) and strive for diversity in a holistic/organic approach.



UNLAWFUL PRACTICES

- Make decisions, offers, or exclusions based upon any protected characteristic.
- Use language that may alienate certain groups.
- Make employment decisions based upon strict numerical criteria tied to membership in a protected group. No quotas.
- Neglect to assess programs for unintended disparate impact(s).
- Segregating or excluding employees from training, mentorship, or networking opportunities based on a protected characteristic, even if the intent is positive.
- Affinity groups designed to benefit one group and exclude others.



A WORD ABOUT AFFINITY GROUPS



- You can still maintain lawful affinity groups in your workplace. You must ensure that the workplace groups:
- Do not exclude - from membership or group benefits and opportunities - people based upon a protected characteristic, i.e., race, sex, sexual orientation, etc.
- Example 1: A Woman's Initiative group may promote women's interests but must not exclude men from membership or planned events offering a benefit (speaker, training, networking, etc.)
- Example 2: An LGBT group may not exclude – from membership or group benefits and opportunities – people who do not belong to the LGBT community.

QUESTIONS?



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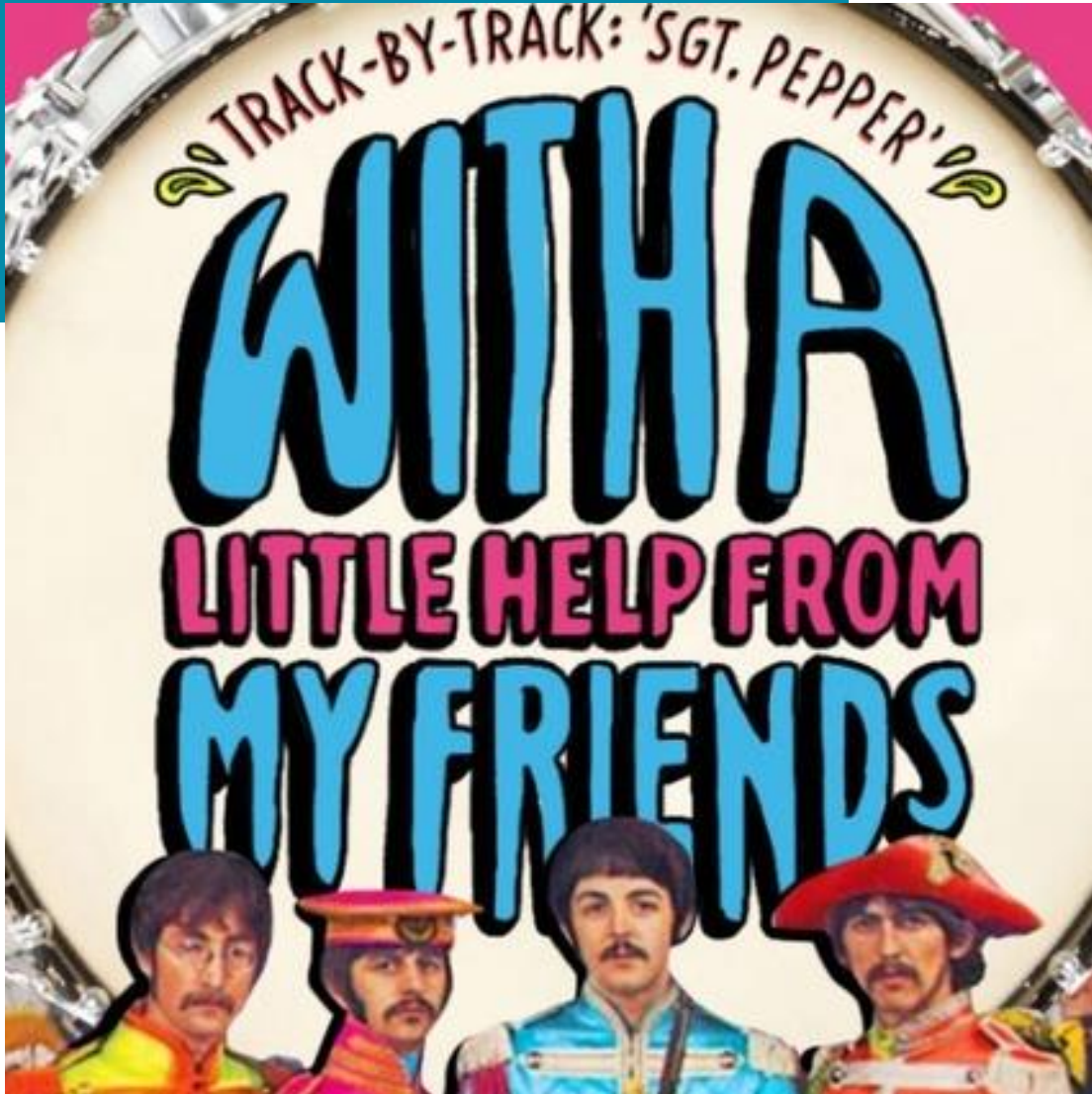
TALKING TO EMPLOYEES-WHAT YOU CAN AND CAN'T SAY

With a little help from my counsel

DAVID M. SCHLOSS

BRIAN GIARDINA





AGENDA

- Why is This so Important?
- Dos and Don'ts - A Legal Framework
- Topics That Are Safe for Work
- Topics to Avoid
- Tips for Navigating Conversations

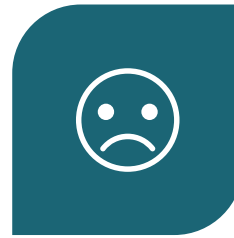
WHY IS THIS SO IMPORTANT?



**INCREASE
EMPLOYEE
MORALE**



**BOOST EMPLOYEE
PRODUCTIVITY**



**CREATES A
POSITIVE VIEW OF
THE COMPANY**



**AVOID EXPENSIVE
LAWSUITS**



**PERSONAL
LIABILITY**

WHAT EMPLOYERS CAN AND CAN'T SAY

Employer Dos and Don'ts

- How Offensive is What You Said?
- How Sensitive is the Topic?
- How Pervasive are the Comments?
- 1:1 or Group Setting?
- Co-Worker or Manager?
- Opportunity to Correct?



WHAT EMPLOYERS CAN AND CAN'T SAY



What is Unlawful Discrimination?

Treating an Employee Differently than Others Based on his/her Membership in a Protected Category

***Help me if you can, I'm feeling down
And I do appreciate your being
'round***

***Help me get my feet back on the
ground***

Won't you please, please, help me?

WHAT EMPLOYERS CAN AND CAN'T SAY-WHAT IS THE LAW?



- Title VII of the United States Civil Rights Act
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- New Jersey Law Against Discrimination

TOPICS THAT ARE SAFE FOR WORK (WE CAN WORK IT OUT)



Safe Work-Related Topics

- Work-Related Activities
- Performance Discussions
- Business Plans and Initiatives
- Team or Individual Challenges and Successes

TOPICS THAT ARE SAFE FOR WORK (WE CAN WORK IT OUT)



Safe Non-Work-Related Topics

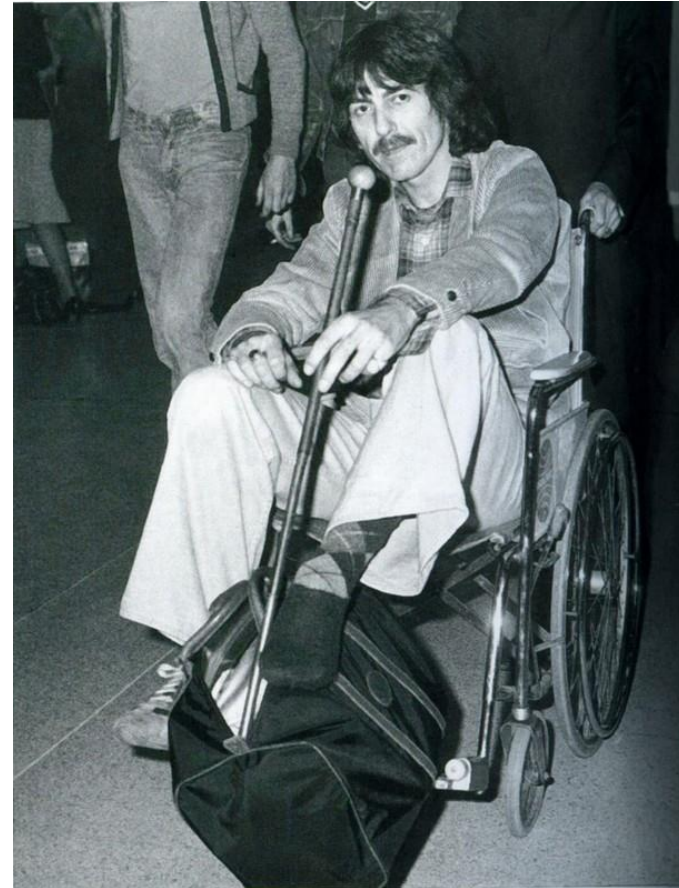
- Weather, Sports, Music, Movies, Hobbies
- Vacation Plans
- Family, Pets, Homes
- Favorite Restaurants or Venues

Think of What You're Saying-You Can Get it Wrong and Think It's Still Alright

WHAT EMPLOYERS CAN AND CAN'T SAY

Topics to Handle Carefully

- Disability & Medical Status
- Age, Race, & Gender Issues
- Offensive/Racy Jokes
- Religion
- Politics



WHAT EMPLOYERS CAN AND CAN'T SAY

Scenario

- New manager comes in and wants to shake things up.
- She says, “we don’t need a bunch of 50-year-old employees running things.”
- Over the course of the next three months, most older employees are transferred but retain their title and pay.



WHAT EMPLOYERS CAN AND CAN'T SAY

Tips for Navigating Sensitive Issues

- Be Proactive and Prepared
- Show Empathy, But Be Discreet
- Be Helpful But Know Your Boundaries
- Maintain Confidentiality
- Be Diligent and Follow-Up

I have to admit it's getting better (better), a little better all the time (it can't get no worse)



QUESTIONS?



THANK YOU!



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LAND OF CONFUSION:

Dramatic Changes in State and
Federal Law

VITO A. GAGLIARDI, JR.

SAL M. ANDERTON

SARAH A. WISNIEWSKI





AGENDA

- Updates from the National Labor Relations Board (“NLRB”)
- Changes to the “ABC” Rule
- The state of non-compete agreements
- Q&A



UPDATES FROM THE NLRB

TRUMP V. WILCOX (2025)

- Two members of the NLRB were terminated without cause
- The members challenged their terminations
- The United States District Court for the District of Columbia issued an order permitting the NLRB members to continue working while their challenges proceed
- The Government requested that the Supreme Court pause the District Court's Order
- The case was heard on the Supreme Court's Emergency Docket



TRUMP V. WILCOX

Holding

- The NRLB members are not permitted to remain in office while they challenge their termination without cause.

Reasoning

- NRLB members “exercise considerable executive power”
- “A stay is appropriate to avoid the disruptive effect of the repeated removal and reinstatement of officers during the pendency of litigation.”

TRUMP V. WILCOX– WHAT NOW?

Humphrey's Executor v. U.S. (1935)

- Congress has the power to limit the President's ability to fire officials at independent agencies
- If an official performs a quasi-legislative/quasi-judicial function they do not exercise executive power, and are insulated from Presidential control

Future

- Limit or overturn *Humphrey's Executor*



Nayvadius DeMun Wilburn
aka “Future”



ROCKET MAN FT. *SPACEX V. NLRB* (2025)

“Mars ain’t the kind of place to
raise your kids, in fact it’s cold as
hell.”

-Elton John

SPACEX V. NLRB



Background

- Three companies, SpaceX, Aunt Bertha, and Energy Transfer LP, sued to block complaints filed by the NLRB
- The companies challenged the constitutionality of the NLRB structure, i.e. dual for-cause removal protections

Separation of Power

- The 5th Circuit considered whether the President has authority to remove members of the NLRB conflicts with the Constitution's separation of power

Humphrey's Executor v. United States

- President can only remove officials of independent, quasi-legislative or quasi-judicial agencies "for cause"

Decision

- The 5th Circuit held that the "for cause" requirement of NLRB members is unconstitutional, as NLRB members have substantial executive power

SPACEX V. NLRB

Why is this important?

- Appears to guarantee that companies in the 5th Circuit can block unfair labor practice complaints filed against them by the NLRB
- SCOTUS interprets the executive power of NLRB members to be greater than that which was contemplated by the Supreme Court in *Humphrey's Executor*
- “When an agency’s structure violates the separation of powers, the harm is immediate – and the remedy must be too.”

AMAZON V. NLRB

Issue Presented

- Asked for a temporary stay of proceedings before the NLRB until *Trump v. Wilcox* is decided

Background

- The NLRB issued a complaint against Amazon for violating federal labor laws for terminating a relationship with a contractor who made deliveries in California

Amazon's Arguments

- “This insulation of executive officers from presidential oversight is contrary to the constitution, which vests all executive authority in the President of the United States – the head of the executive branch of government who, unlike the NLRB . . . , is directly accountable to the electorate.”

STATE INTERVENTION:

ESTABLISHING TRIGGER LAWS IF THE NLRB CANNOT ENFORCE FEDERAL LABOR LAWS

State	Bill	Triggers
New York	S8034-A/A08590-A	The NY Public Employment Relations Board will certify exclusive bargaining representatives if the NLRB does not assert jurisdiction
California	AB 288	Workers can petition the CA Public Employment Relations Board if they lose coverage under the NLRA
Massachusetts	H.2086/S.1327	Will allow the Mass. Dept. of Labor Relations to regulate private labor relations if the NLRA ceases

“THE TIMES THEY ARE A-CHANGIN’.”

–Bob Dylan

“ABC” TEST



NJ UNEMPLOYMENT COMPENSATION LAW

N.J.S.A. 43:21-19 (i)

- (6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter (R.S.43:21-1 et seq.) unless and until it is shown to the satisfaction of the division that:
 - **(A)** Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
 - **(B)** Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
 - **(C)** Such individual is customarily engaged in an independently established trade, occupation, profession or business.

43:21-2. DECLARATION OF STATE PUBLIC POLICY

.... economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. **Involuntary unemployment** is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the **unemployed worker and his family**. The achievement of social security requires protection against this greatest hazard of our economic life.

PROPOSED REGULATIONS FROM NJ DOL

- Carpet Remnant Warehouse, Inc. v. New Jersey Department of Labor (CRW), 125 N.J. 567 (1991)
- East Bay Drywall, LLC v. Dep't of Labor and Workforce Development (EBD), 251 N.J. 477 (2022)

THE “ABC” TEST

Prong A

- An employer must establish that it does not exercise control over a worker and does not retain the right to control the means or manner of work
- Factors for evaluating control :
 1. the individual has set hours;
 2. employer controls how services are performed
 3. services are provided personally
 4. employer negotiates the work for the individual
 5. individual has a fixed rate of pay
 6. individual bears the risk of loss
 7. individual can be called on by the employer to work during set times
 8. the employer restricts the individual’s ability to work for others
 9. the employer provides training

THE “ABC” TEST

Prong B

Clarifies the definitions for “place of business” and “usual course of business”

- Place of business: where a business has a physical location or conducts integral parts of its business, for example a customer's residence or a truck
- Usual course of business: includes all the employer's revenue generating activities
- Gig economy and remote work: where services performed now are different than where we were 10 years ago

THE “ABC” TEST

Prong C

Non-exhaustive list of factors to determine a worker's independence:

1. Duration, strength, viability of the business
2. Number of customers
3. Payment from the employer versus payment from other individuals
4. Number of employees
5. Extent the individual owns their own tools, equipment, vehicles, etc.
6. Whether individuals set their rate of pay
7. Advertises, maintains a business location, and available to work in the market

“ABC” AS EASY AS “123”



- New test risks classifying more individuals as regular employees, rather than independent contractors
- In preparation for the new rule, employers should:
 - Conduct audits of current independent contractors
 - Review policies, contracts, and internal procedures to ensure compliance
 - Elections have consequences



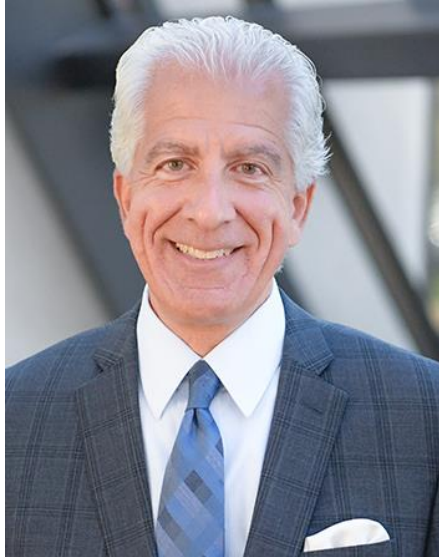
NON- COMPETE AGREEMENTS

UPDATE: NON-COMPETE AGREEMENTS



- August 2024: the Federal Trade Commission's (FTC) ban on non-compete agreements was struck down by a District Court in Texas
- September 5, 2024, the FTC dropped its appeal of the District Court's decision.
- FTC will prioritize case-by-case enforcement of "bad actors"

QUESTIONS?



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