



Administrator Program
Monday, November 17, 2025
10:15am-11:45am

1a. Employment Law

Presented by:

Brian Aslin, Jackson Lewis

Employment Law Update

Brian A. Aslin

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Jackson Lewis P.C. | Austin

512-362-7403 | Brian.Aslin@jacksonlewis.com

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Agenda

- Equal Employment Opportunity Commission
- National Labor Relations Board
- Pay Transparency Laws
- Accommodations in Action: PWFA and Beyond
- Executive Orders And “Illegal DEI”
- AI in the Workplace
- Practical Tips for Avoiding Litigation

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Equal Employment Opportunity Commission

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New EEOC Acting Chair,
Andrea R. Lucas



Stated priorities include “rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces; protecting workers from religious bias and harassment; and remedying other areas that have been historically under-enforced by the agency.”

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How Does the Lack of Quorum Impact the EEOC and Employers?

- On February 1, the EEOC published: [The State of the EEOC and Frequently Asked Questions](#).
- Does not impact intake, investigation, or resolution of charges or the issuance of right to sue notices. The field offices still have authority to issue subpoenas.
- The Commission needs a quorum to vote on rulemaking, issue new policies, pursue systemic practices or rescind guidance documents.

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National Labor Relations Board

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NLRB Currently Lacks a Quorum

- In January, President Trump fired Member Gwynn Wilcox, a Democrat, leaving only two Members, Marvin E. Kaplan and David Prouty, both Republicans
 - Kaplan's term expired in August (he has since joined Jackson Lewis)
 - Member Wilcox has challenged the President's authority to fire her—case is pending
- Currently only one active member of the NLRB—David Prouty (Democrat). Hundreds of cases are waiting to be ruled upon. ALJ decisions are currently unenforceable.
- President Trump has nominated James Murphy and Scott Mayer to fill two vacancies. If they are confirmed it would return the Board to a Republican majority
 - James Murphy is a career NLRB attorney. Scott Mayer is chief in-house labor counsel at Boeing

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Immediate Changes to Policy

- President Trump also fired the NLRB's General Counsel—Jennifer Abruzzo. The interim GC has already rescinded certain policies implemented by Abruzzo, and has avoided prosecuting certain alleged violations, including those related to:
 - Consequential damages
 - Remedies in settlement agreements
 - Electronic monitoring and algorithmic management of employees
 - “Stay-or-pay” in employment agreements, such sign-on or relocation bonuses, educational repayment contracts, and training repayment agreement provisions (TRAPs)

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Later Changes to Expect

A Republican NLRB will likely return to employer-friendly policies and decisions including those related to:

- Ordering union recognition without an election
- Work rules and handbook policy enforcement standards
- Independent contractor test
- “Quickie election” rules and other procedural changes
- Prohibitions on “captive audience” meetings

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Key Takeaways

- In the short term, delays in proceedings at the NLRB
- A return to more employer-friendly labor policies
- Likely return to standards providing more consistency and predictability for employers
- Changes expected in how unions are recognized, making it harder to unionize *without* an election win
- Organizing activity will likely continue rising
 - Political divisions, along with President Trump’s support for organized labor, support likelihood of continued uptick in organizing and strike activity
 - Organizing activity remains at a high level in certain private sector industries, including health care, higher education, hospitality, and transportation/warehousing

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Pay Transparency Laws

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Varying State Law Obligations

- In general, pay transparency laws require disclosure of wage/salary and benefit information
- Disclosure to applicants seeking open positions and/or employees seeking promotion, transfer, or other new position
- Affirmative obligation to disclose vs. disclosure upon request
- Differing state law requirements regarding timing of disclosure
- As more states implement pay transparency laws, the national trend moves toward the more aggressive employer requirements.
- Some of the earliest states to implement these laws have already amended their laws, adding to the requirements.

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Affect on Multi-State Employers

- **Recruiting**
 - Nearly 1 in 3 workers in the US will be affected by some pay transparency law when they look for a job or see the employer's job postings (PayScale Research)
- **No one standard for how employers must disclose pay information**
 - Practical approach for multi-state employers: comply with the state that has the most stringent requirements
- **Issue with hiring remote workers**
 - Example: State of Washington considers all employers subject to the state's pay transparency law if they are advertising for a role that potentially could be filled by a resident of Washington
- **Laws continue to expand**
 - Be cognizant of new laws passed in states where you have current employees

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Accommodations in Action PWFA and Beyond

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The PWFA and PUMP Act

- PWFA requires employers accommodate employees *limited* by pregnancy, childbirth, and *related medical conditions*
 - *Limitations* is a lower threshold than *impairments*—have an obligation to accommodate more
- “*Related medical conditions*” is not defined by the Act. The EEOC’s interpretation is extremely broad, but the future of that interpretation is unclear
 - Post-childbirth recovery, cesarean sections, complicated deliveries
 - Post-partum depression, breaks to express breast milk (PUMP Act also covers breastfeeding accommodations)
 - Limitations due to fertility treatment, miscarriage, early pregnancy termination

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Employers Cannot:

1. Fail to reasonably accommodate known limitation due to an employee's pregnancy, childbirth, or related medical conditions, unless it causes undue hardship
2. Require an employee to accept accommodations without engaging in the interactive process
3. Discriminate against employees based on their need for reasonable accommodations
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation
6. Only permitted to request documentation in “reasonable” circumstances

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The Magic Four

- 1 Allowing an employee to carry water and drink, as needed
- 2 Allowing an employee whose work requires standing to sit and whose work requires sitting to stand
- 3 Allowing an employee additional restroom breaks
- 4 Allowing an employee breaks, as needed, to eat and drink

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Where Do We Go from Here?

- Wait for a quorum
- Continue to litigate under the current Act and guidance
- Respond to EEOC's efforts to delay or stay litigation

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What is the PUMP Act?

- **Important requirements**

- Covered entity
- “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.”
- Temporary
- Non-exclusive

- **Important limitations**

- One year after the child’s birth
- Duration – “reasonable”
- Paid or unpaid?
- Undue hardship

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Executive Orders and “Illegal DEI”

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EO 14168: Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

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What Did the EO Say?

- EO states it is the “policy of the United States to recognize two sexes, male and female.”
- Directs the Attorney General, DOL, and EEOC to “prioritize investigations and litigation to enforce the rights and freedoms identified.”
- Directs the Attorney General to issue guidance:
 - to agencies to reverse Biden administration’s interpretation of *Bostock*, which required gender identity-based access to single sex spaces.
 - to ensure the “freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964.”

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What Did the EO Attempt to Do:

The EO attempts to rescind the EEOC's "Enforcement Guidance on Harassment in the Workplace" (April 29, 2024), which defined sex-based discrimination and harassment under Title VII to include discrimination based on sexual orientation and gender identity (or expression in the case of harassment) and characterized using incorrect pronouns or denying of access to a bathroom or other sex-segregated facility as unlawful harassment.

... BUT THE EEOC DOES NOT HAVE A QUORUM ...

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EO14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

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Ending Illegal Discrimination and Restoring Merit-Based Opportunity cont.

- Revokes Executive Order 11246 of September 24, 1965 - Equal Employment Opportunity (AAP for women and minorities) along with other various executive orders from previous administrations
- EO 11246 – Covered contractors were required to take affirmative steps to ensure equal employment opportunity with respect to race, color, religion, sex, sexual orientation, gender identity, and national origin.
- Denounces “illegal DEI and DEIA policies”
- Orders agencies to terminate all “discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements”
- Orders agencies “to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities”
- **Does not change the law – Title VII of the Civil Rights Act and other federal and state anti-discrimination laws prohibit discrimination in employment and require equal employment opportunity**

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EO 14173 – Impact on Federal Contractors

- **Rescinds EO 11246 (affirmative action for federal contractors).**
- Federal contractors are now required to certify that they do not operate any “illegal” DEI programs (undefined term).
- Eliminates affirmative action plan obligations for race and gender, and ends OFCCP enforcement of these obligations
- Does NOT impact obligations towards veterans or people with disabilities
- Does NOT impact Title VII and other anti-discrimination laws
- EO now allows private whistleblowers to bring False Claims Act suits against federal contractors who operate “illegal” DEI programs.
- **Meaning: Employees of federal contractors who are dissatisfied with their employer’s DEI programs can sue and collect damages!**

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The Ending Illegal Discrimination and Restoring Merit-Based Opportunity: Messages to ALL Employers (Not Just Federal Contractors)

- Directs federal agencies, in coordination with the Attorney General to take action to implement the principles of the EO
- Requires the Attorney General in consultation with the agency heads to **submit a report within 120 days** that identifies:
 - “**key sectors of concern**,” “**egregious and discriminatory practitioners**,” and a **plan to deter illegal DEI programs**
 - “**up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of \$500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars**”
 - “**other strategies**” **to encourage the private sector to end illegal DEI discrimination and preferences, including appropriate potential litigation for the administration to pursue.**
- Ending “discriminatory” DEI programs a priority for new EEOC

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Why the EO Matters to All Employers

- Signals increased investigations and plans for private employer compliance
- Encourages whistleblowers
- More internal complaints, external complaints
- More request for religious accommodations
- Investigation priority of the EEOC

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Emerging AI + Related Tech Issues in the Workplace

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Exploring Some Use Cases

Recruiting and talent acquisition

Link performance ratings and promotional movements with employee education and skillset at hire to assist in recruiting

Personnel matters – training, employee engagement

Identify areas of high attrition rates, charge filing, or customer feedback to focus training and development

Who is more likely to leave the organization, or worse, file a charge?

Using predictive analytics methodologies, employers may use past attrition and charge filing characteristics, for example, to predict likelihood of new events

What are remote employees up to?

Determining employee engagement and hours worked for remote workforces may be accomplished by looking at digital footprint data, for example

Using generative AI to create content

Creating templates, training materials, and other HR support

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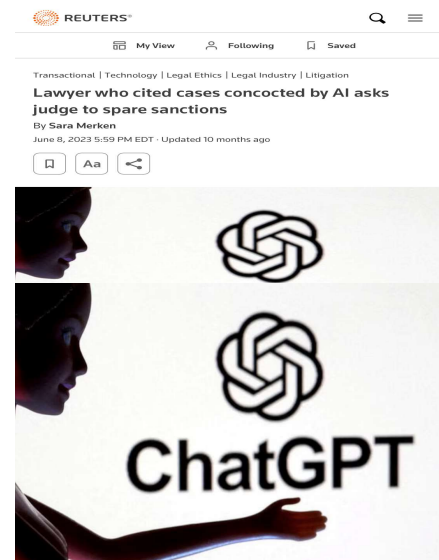
Should Data Alone or Algorithmic Results Drive Every Decision?

Algorithms could be tainted by bias — intentional or not

- Without safeguards, overreliance on algorithms to drive decisions could raise a host of issues
- Similarly, overreliance on generative AI outcomes could lead to consequences (e.g., hallucinations, inaccurate results, flawed outcomes)

It's a question of balance!

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Crafting an Effective AI Policy

- Goal is to develop clear, compliant, and comprehensive policy to guide use of AI technologies
 - Outline **approved** applications
 - Establish required **trainings**
 - Establish **strict protocols**
 - **Confidentiality**
 - **Data Privacy / Security**
 - **Overreliance**
 - Ensure **accuracy & lack of bias** in AI outputs
 - Establish company's right to **monitor employee use**
 - Establish individual as designated personnel for **questions and reporting of violations**
- No "one policy fits all" approach

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Conclusion & Key Takeaways

- Monitor legal developments
- Press internal and external program developers
- Test algorithmic tools to avoid impermissible bias and disability discrimination
- Watch for changes in technology
- Privacy by design
- Establish an AI Policy

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Avoiding Legal Risk in the Workplace

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Topics

1. Avoid Hiring Hiccups
2. Initiate the Interactive Process: The ADA and the PWFA
3. Consider Religious Accommodations
4. Have and Maintain Job Descriptions
5. Don't Delay Documentation
6. Avoid Retaliation
7. Properly Terminate Problem Employees
8. Watch for Wage and Hour Violations
9. Manage Employee Speech and Behavior
10. Engage Your Multi-Generational Workforce

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Why Employees Visit an Attorney

A plaintiff is created when an individual feels they were treated with disrespect, unfairly and/or inhumanely

Talking to an attorney is an emotional decision, driven by things such as:

- Different treatment for the same offense
- Humiliating or surprising performance feedback
- Employer Lack of flexibility in the “new normal” post-COVID era
- Personal dislike for a supervisor
- “Nickel-and-diming”
- **NOT** money

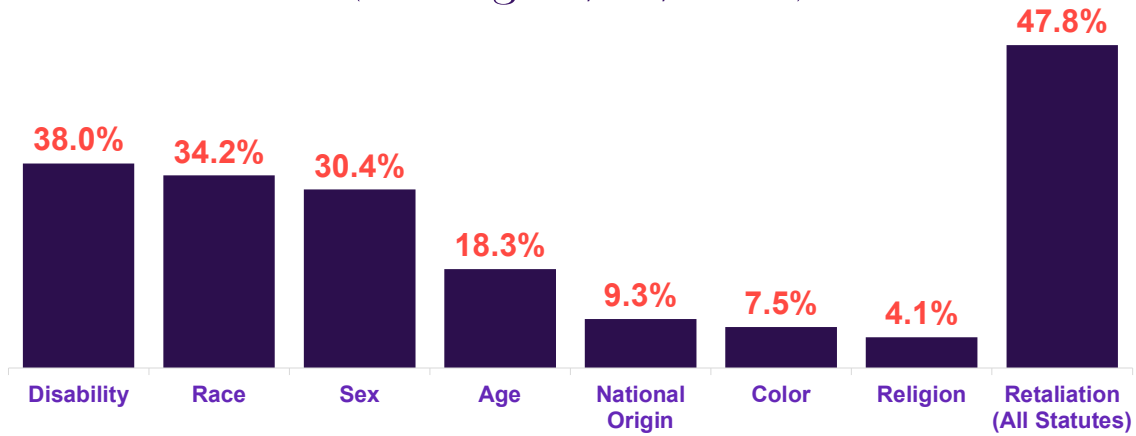
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EEOC Percentage of Total Charges Filed FY 2024 (ending 09/30/2024)



Fiscal Year Ending 09/30/2024 (most recent date through which breakdown by charge is available)

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Avoid Hiring Hiccups

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Discrimination and Topics to Avoid

An interview is the first experience a manager has with a prospective employee where there is potential for discrimination

Best way to avoid trouble is to have a structured interview plan and stick to it

All managers who interview applicants must be trained in federal and state laws

Ask only questions which are job-related

The following are some protected classes under federal and state laws and **should neither be discussed in an interview nor used in making an employment decision:**

- Age
- Gender
- Race/Color
- Ethnicity/National Origin
- Religion
- Disability Status/Medical Condition
- Military Status
- Marital Status

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Recognize Reasonable Accommodation Requests: The ADA

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The ADA: Basics

An individual with a disability
Who is otherwise qualified for the job
May be entitled to a reasonable accommodation

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Who is Qualified?

Able to perform all of the essential functions of the job
with or without an accommodation
Job function is essential if removing it would
fundamentally alter the position

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Reasonable Accommodation

The law requires an employer to reasonably accommodate an employee's disability unless there is an **undue hardship** which is "an action requiring significant difficulty or expense," when considering various factors, such as:

- nature and cost of the accommodation
- employer's financial resources
- size of employer's workforce
- impact of the accommodation on employer's business operations (operational impact generally most important factor)

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Examples of Requests for Accommodation

Leaves of absence
 Excused intermittent absences
 Light duty
 Work at home
 Modified equipment
 Modified work schedule
 Reallocating marginal job functions
 Reassignment to vacant positions
 Service animals

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What is Not a Reasonable Accommodation?

- Removing essential job functions
- Diluting uniformly enforced productivity standards
- Excusing or forgiving past misconduct or poor performance
- Promotion
- Bumping an employee from a job
- Creating another position or job
- Changing an employee's supervisor (as compared to changing supervisory techniques)

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The Interactive Process:

- HR takes the lead on engaging in the interactive process
- HR, in most cases, will request medical documentation from the employee
- Medical documentation should not go to managers
- Questions about medical documentation should be handled by HR
- Both the Company and employee are required to engage in the interactive process in good faith

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Consider Religious Accommodations

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Religious Accommodations

Under Title VII, employers are required to reasonably accommodate employees whose sincerely held religious beliefs conflict with work requirements, unless doing so would create an **undue hardship** for the employer

- According to the U.S. Supreme Court's decision in *Groff v. DeJoy*, “‘undue hardship’ is shown when a burden is **substantial in the overall context of an employer’s business**”

Employers must engage in the interactive process

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Common Requests for Religious Accommodations

Not working a specific day of the week or time of day

Time away for faith-related activities

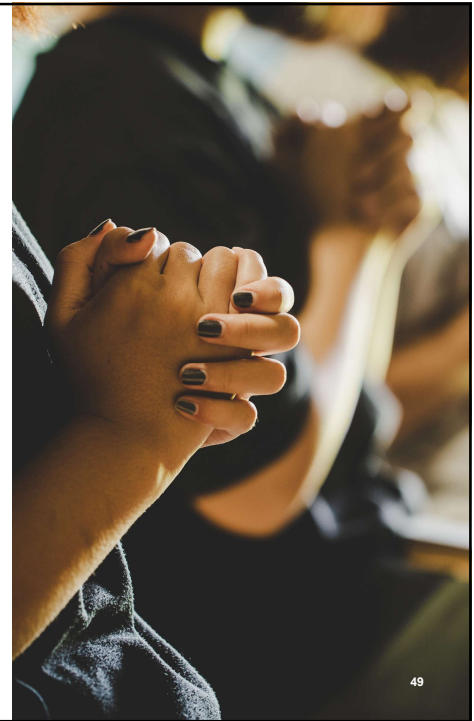
Time at work to observe practices mandated by faith

Refusal or inability to perform job duties due to faith

Religion-based tattoos, attire, jewelry, icons in the workplace

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Keep Updated Job Descriptions

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Why Job Descriptions?

They can be very useful to employers, employees and job applicants when carefully written and kept up-to-date

They outline the responsibilities for an employee's work

They serve as a tool to help employers gauge employee performance and for recruiting/selecting candidates

They are an effective tool in defending claims/lawsuits

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Make Sure You Have Specific, Job-Related Reasons For All Actions

Develop accurate, effective job descriptions for all jobs

Use job descriptions in hiring, promotions and transfers

Use job descriptions in performance management

Use job descriptions in firing

Use job descriptions in defending claims

Use job description in ADA claims (reasonable accommodations)

Use job description in FLSA claims (exempt vs. non-exempt)

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Categories to Include in Job Descriptions

Primary Duties and Responsibilities

- Core functions of position

Essential Job Functions

- Fundamental duties
- The reason the job exists

Attendance and punctuality – essential?

- Depends on job positions
- Telecommuting

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Categories to Include in Job Descriptions

Position Qualifications

- Education
- Licensure/Certifications
- Experience
- Knowledge
- Skills
- Abilities

Working Conditions

- Environmental
- Mental
- Vision and Hearing
- Physical Demands

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Don't Delay Documentation

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Why Documentation is Important

To have a consistent, complete record of each aspect of employee's performance and behavior - good and bad - from complaints to poor performance to overuse of sick time

For historical reference

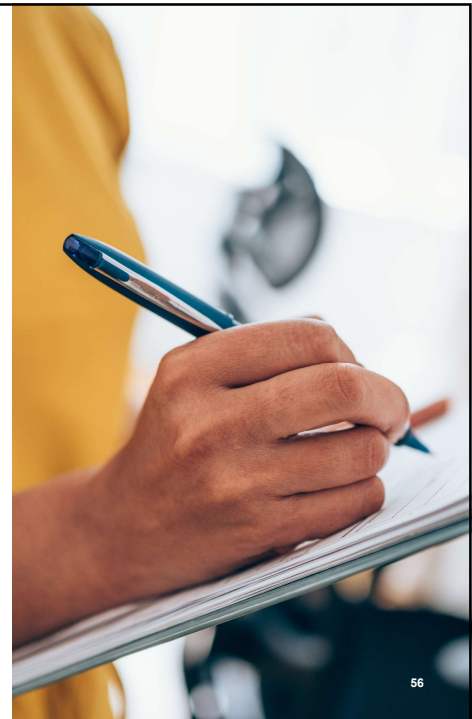
- Memory aid for manager/HR
- Detecting performance or conduct patterns

To help prevent and/or survive employment litigation

- Jury research shows: if the supervisor didn't bother putting it in writing, it must not have been important

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Proper Documentation For Warnings

How to word it?

- Accuracy – do not sugar coat
- Objectivity – state facts, not opinions, and no legal conclusions
 - “Bob engaged in illegal sexual harassment. . .”
 - “Claire was obviously lying . . .”
 - “Joe asked for a special chair. I provided him with one since he has a disability.”
- Consistency – same documentation for all similar offenses

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Examples of Poor, Delayed, or Lack of Documentation

Wanting to terminate an employee for poor performance or misconduct following only verbal discussions that were not documented

Focusing only on conclusions

- e.g., “bad attitude,” “not a good fit,” “excessive absenteeism,” “not a team player,” “misses deadlines,” “unprofessional,” or “makes too many mistakes”

Late documentation

Not giving examples

Failing to include the details (e.g., dates, names, places, times, locations)

Using legal conclusions or referencing protected characteristics

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Avoid Retaliation

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Retaliation

The fastest-growing area in employment-related lawsuits

- In FY 2024*, **47.8%** of all charges filed with the EEOC included a retaliation claim
- Relatively steady increase from 34% in 2008

There were more retaliation charges filed than any other type of charge

**Period ending 09/30/2024. The most recent year for which the EEOC has provided a breakdown by type of charge filed*

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Recognizing Protected Activity

Protected Activity:
Opposition to an
employment practice that
the employee reasonably
believes to be unlawful

Examples:

- Filing of/threat to file complaint/charge with EEOC, HRC, DOL
- Whistleblower activities
- Injury or filing a workers' comp claim
- Participation in an interview, investigation, hearing, trial or other proceeding (as a witness or complainant)
- Employees discussing or complaining about the wages, hours, working conditions (including on social media)
- Complaints about "hostile work environment," alleged discrimination or harassment
- Requesting or taking a leave of absence, ADA leave, etc.
- Requesting a reasonable accommodation for religion, disability

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Timing is key in the evaluation of retaliation claims

- Taking an adverse action close in time to when an employee engaged in protected activity may suggest retaliatory intent, even if well-intentioned

Documentation is the best way to defeat temporal proximity

Document all decisions and employee-management issues

Timing is
Everything

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Properly Terminate Problem Employees

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Examples of Problem Terminations

Failing to have a legitimate business reason that's supportable

Failing to provide a reason for the termination decision

Giving incorrect reasons (e.g. job elimination or restructuring) because it is softer

Shifting reasons for decision

Failing to document reason

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Termination Considerations

- Is there a legitimate, non-discriminatory, reason
- How strong is the proof (documentation, witnesses, etc.)?
- Was the employee on notice of rule/policy/expectation?
- Consider statutory protections (i.e., jury duty, whistleblower, etc.)
- Any prior disciplinary history (will the termination come as a surprise?)
- Review for consistency and comparators
- Consider protected categories and retaliation issues
- Review performance evaluations (are there mostly "meets expectations"?)
- Timing (i.e., any retaliation issues?)
- Document termination reason in consultation with HR

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Watch For Wage & Hour Violations

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FLSA/NH Pay Violations

DOL data suggests that **72%** of all employers are violating the FLSA in some significant manner

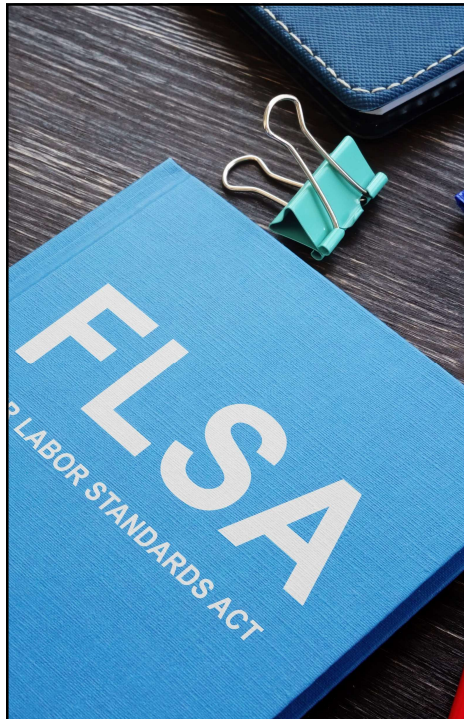
Among the most common are:

- “Off the Clock” violations
- Meal/rest periods
- 2-hour minimum pay rule
- Misclassifying employees
 - Exempt/Non-Exempt; Independent Contractors

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Examples of FLSA Violations

Non-exempt employee on their own works overtime but does not report it

You ask a non-exempt employee to work overtime but not report it so that your team can meet deadlines without breaking the budget

Non-exempt employee eats lunch at desk and responds to work calls during lunch

Non-exempt employee takes work home over the weekend

Non-exempt employee takes work calls and responds to work emails after hours

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Legal Issues

The default under FLSA is employees are non-exempt = they are eligible for overtime

Employees must accurately record all hours worked

Over 40 hours in a work week = OT

Meal breaks 30 minutes or longer = unpaid

Rest breaks under 20 minutes = paid

FLSA provides for liquidated damages and attorneys' fees in addition to back pay

NOTE: Employers can discipline employees for violating written policies, e.g., working OT without prior approval, off-the-clock work, etc., but the employees must be paid nonetheless

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Manage Employee Speech/Behavior

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Incivility is More Common Than You Think

Incidents of incivility in the workplace rose **21.5%** in Q1 2025 vs. Q1 2024

- 71% of employees said their manager could have done more to prevent incivility
- Workplace incivility can cause about \$2 billion/year in lost productivity/absenteeism
- Workplace incivility takes many forms: rude comments, shaming, interrupting, gaslighting

Top 5 contributors to workplace incivility:

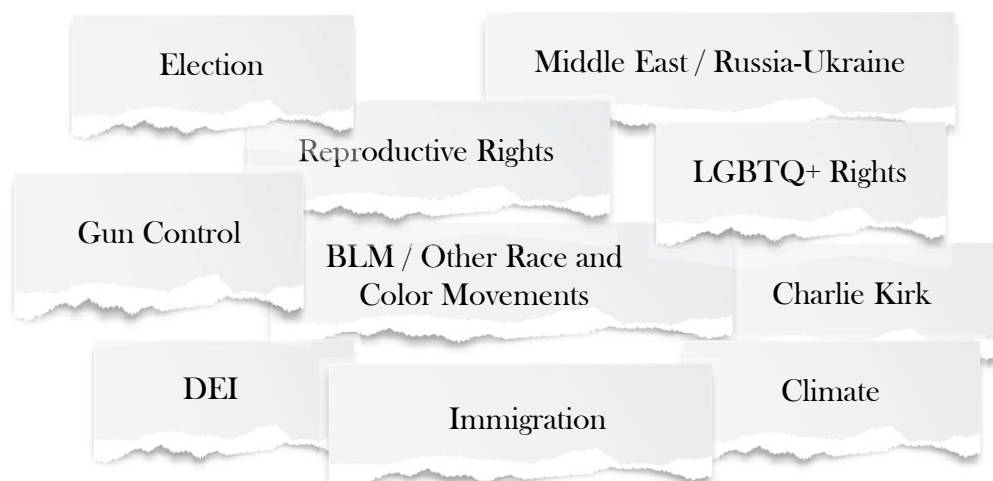
- Political viewpoint differences
- Differences of opinions related to social issues
- Racial or ethnic differences
- Gender differences
- Age or generational differences

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“Political” Issues Polarizing the Workplace



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But the First Amendment!

Unless you are a government employer, your employees generally do NOT have a First Amendment right to say whatever they want in the workplace

The First Amendment right to free speech is particular to government actors, not private employers

An employer may enforce its anti-harassment, non-discrimination, and social media policies and practices

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Tips for Managing Political Tension in the Workplace

Policy implementation and review

- Code of professional conduct/civility in the workplace
- Bullying
- Include in job description and performance management

Preparation

- Anticipate issues in advance
 - Generally, an uptick in complaints depending on current events
- Plan responses to different political issues
- Stay connected to HR

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Engage Your
Multi-generational Workforce

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Generational Issues:
Often Overlooked

Most employers focus solely on diversity with regard to
gender and ethnicity

Why focus on generational issues?

- More than **60%** of employees report experiencing generational conflict at one point in their career

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A photograph showing a young woman with dark hair and glasses, wearing a light-colored top, leaning over a desk and pointing at a laptop screen. An older man with white hair and glasses, wearing a dark vest over a light blue shirt, is sitting at the desk looking at the laptop. The desk has a laptop, some papers, and a small clear container.

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Common Complaints

They don't follow directions
 They don't dress appropriately for work
 They want to work from home
 They aren't committed to the job
 They are so set in their ways
 They won't retire and I can't advance

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Tips for Managing Multigenerational Employees

Employers must be prepared to mentor, educate, and manage a unique and much more diverse mix of employees to bridge generational gaps

Recognize differences in the generations and manage accordingly

Understand how each generation prefers to communicate and implement different methods of communication

- Paper Copies
- Online
- E-mail
- Podcasts

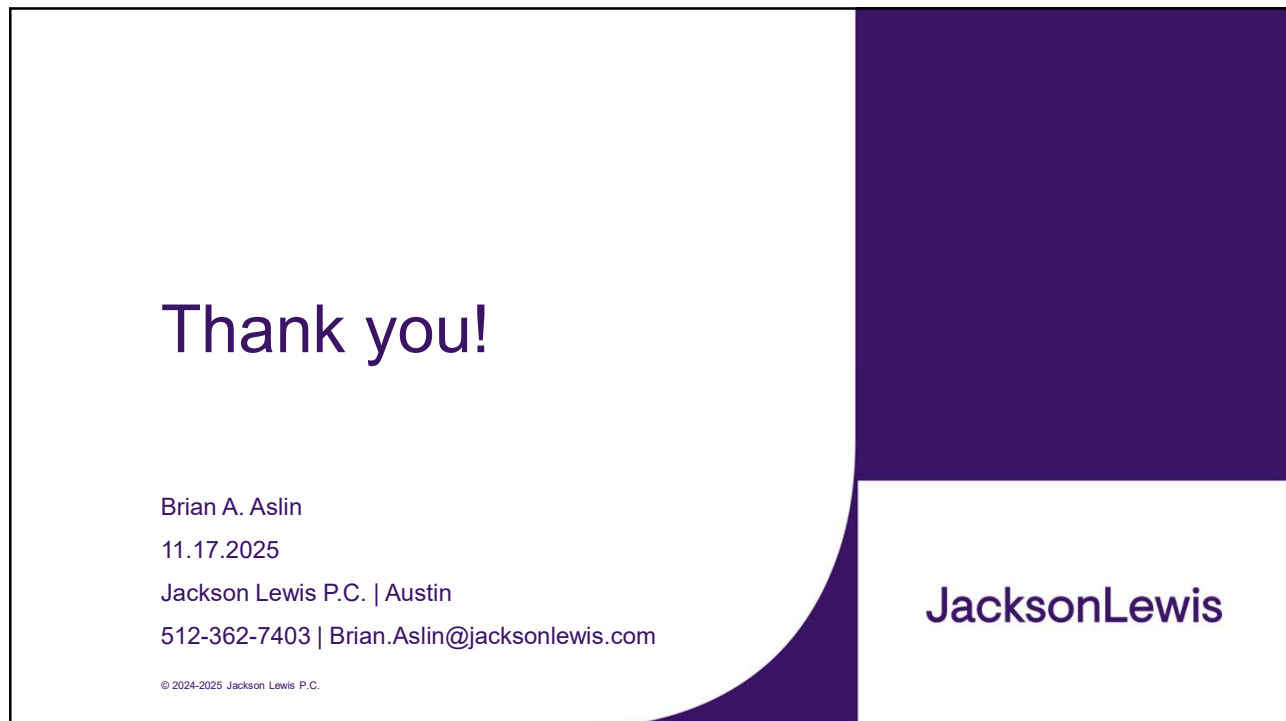
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