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Employment Law Updates from Washington

Ohio Hospital Association Annual Meeting

May 20, 2025

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Agenda

1. Religious Accommodation, Reverse Discrimination, and Retaliation Standards
2. Pregnant Workers' Fairness Act and EEOC Enforcement Efforts
3. FTC Non-Compete Ban and Non-Profits
4. EEOC Harassment Guidance
5. Trump Administration 2.0

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Religious Accommodation, Reverse Discrimination, and Retaliation Standards

Religious Accommodations: Title VII

Sincerely-Held Religious Beliefs

- Protects workers from employment discrimination based on their race, color, **religion**, sex (including pregnancy, sexual orientation, and transgender status) and national origin
- Includes accommodation of "all aspects of religious observance and practice, as well as belief"
- **Unless** "an employer demonstrates that [it] is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business."

Religious Accommodations: Key Concepts

Religion

The test is whether the beliefs are, in the individual's "own scheme of things, religious."

Includes beliefs that are new, uncommon, not part of a formal church or sect, only followed by a small number of people, or that seem illogical or unreasonable to others

Sincerely-Held

Even if a person's belief is religious, it must also be "sincerely-held" to be protected

Largely a question of the employee's credibility (is it really for a religious reason?)

Undue Burden

Even if the employee's belief is religious and sincerely-held, an employer need not reasonably accommodate it if it would cause an undue burden

Supreme Court has defined undue burden as a substantial burden in the overall context of the employer's business

Groff v. DeJoy, 143 S. Ct. 2279 (2023)

Notable Recent U.S. Supreme Court Decision

The Court rejected earlier interpretations of the undue hardship burden, which suggested employers only needed to show more than a *de minimis* cost

Now, employers must show a "**substantial burden**" in the overall context of the employer's business

Current EEOC undue hardship factors:

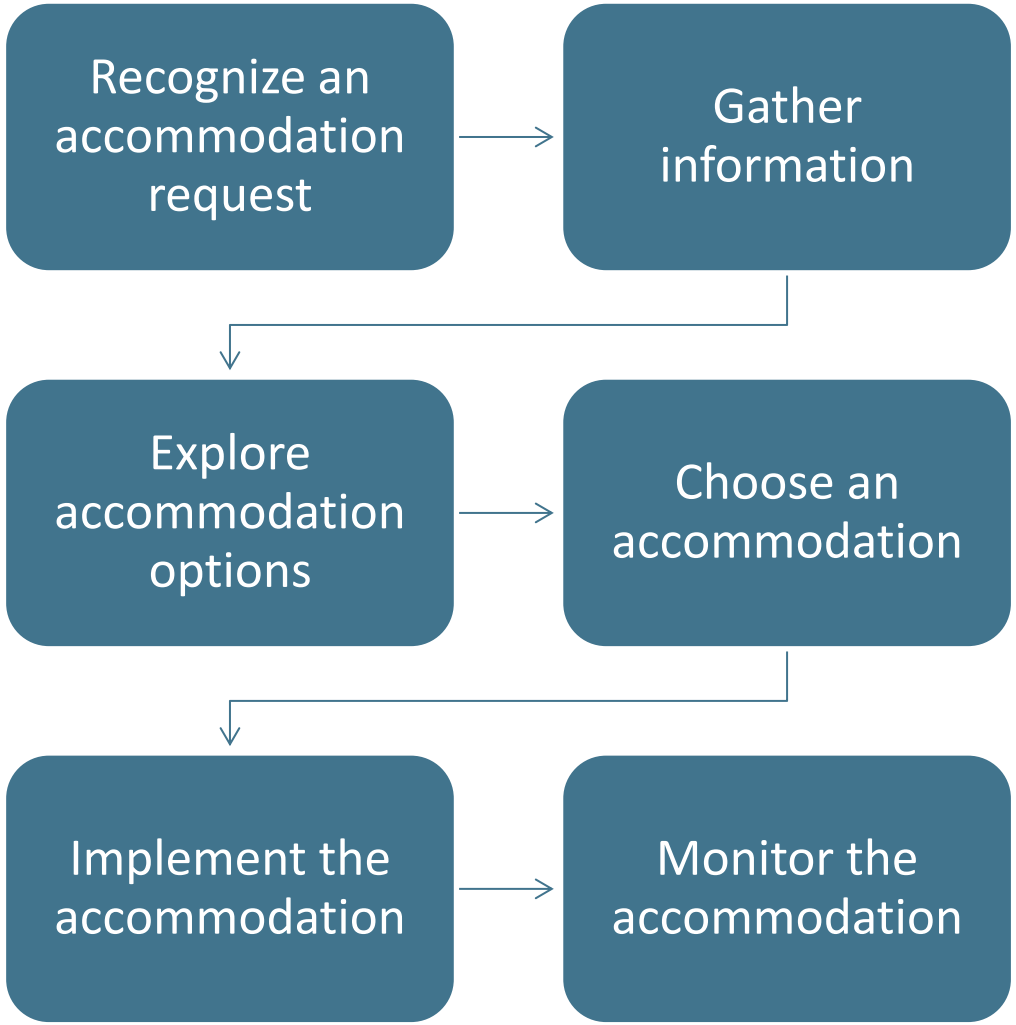
- Costly
- Compromises workplace safety
- Decreases workplace efficiency
- Infringes on other employees' rights
- Requires other employees to unwillingly do more than their share of potentially hazardous or burdensome work

Religious Accommodations Post-*Groff v. DeJoy*

- Two **Ohio hospitals** have been successful asserting undue hardship with respect to COVID-19 vaccine exemption requests
  - Unvaccinated employee rejected hospital's requirement that employee undergo twice-weekly nasopharyngeal testing; court found employee's proposed accommodation of self-screening caused undue hardship because of risk to employees and patients
  - Refusal to undergo COVID-19 testing created a "heightened health risk that constitutes…an undue hardship"
- Employers can confine undue hardship analysis to the information available to employer at the time.
- Fact that heightened risks didn't actually materialize did not mean no undue hardship

Religious Accommodations: Key Steps

- Generally contemplated that employer and employee will discuss what accommodation the employee will need to perform the essential functions of the job (**interactive process**)
- Might need additional information to evaluate accommodation
- Employer does not have to accept employee's proposal but may insist on another accommodation that will work (so long as reasonable)
- Employers may refuse an accommodation if it will cause an **undue hardship**; employer has burden of proof
- Ensure policies and processes are applied **consistently**
- Periodically monitor accommodation to ensure it's working



Reverse Discrimination

- *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023)
- U.S. Court of Appeals for the Sixth Circuit addressed a heterosexual woman's claim that she was discriminated against based on her sexual orientation
- Alleged her employer: (1) demoted her and replaced her with a homosexual man and (2) denied her a promotion in favor of a homosexual woman

"Ames is heterosexual, however, which means she must make a showing in addition to the usual ones for establishing a prima-facie case. Specifically, Ames must show 'background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.' "

Reverse Discrimination

- Sixth Circuit view aligns with the Seventh, Eighth, and Tenth Circuits
- Other circuits disagree
- Ames appealed, and the United States Court Supreme Court granted certiorari
- Reasonable to anticipate the conservative SCOTUS majority will overrule the background circumstances requirement, especially in light of increased scrutiny over diversity, equity, and inclusion programs and legal principles

Title VII

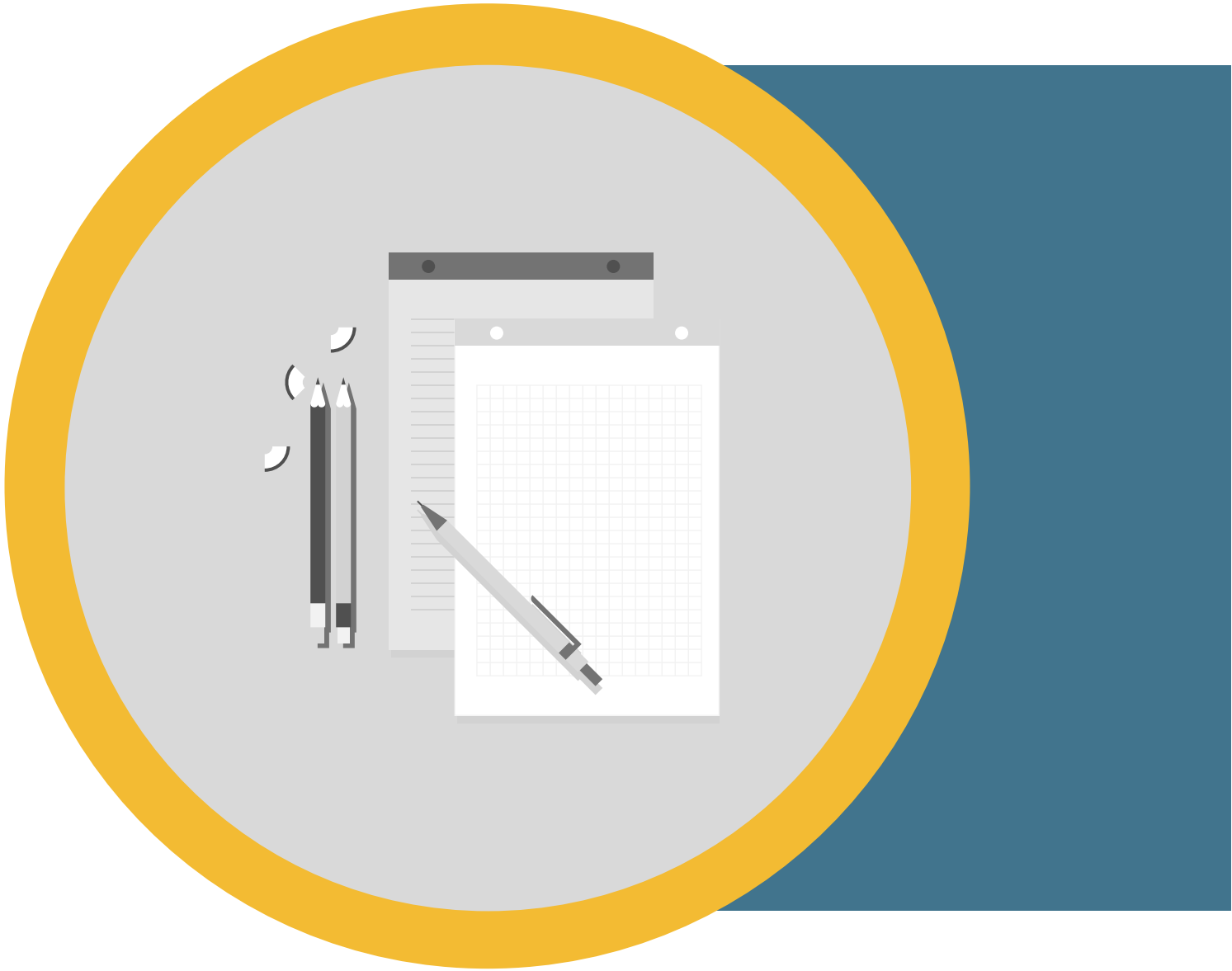
What is an Adverse Employment Action?

- "[T]he statutory language applicable to this case prohibits 'discriminat[ing] against' an individual 'with respect to' the 'terms [or] conditions' of employment because of that individual's sex" or other protected characteristic under Title VII.
- A plaintiff needs to "show only **some** injury respecting [the plaintiff's] employment terms or conditions." (emphasis added).
- "[T]his decision changes the legal standard used in any circuit that has previously required 'significant,' 'material,' or 'serious' injury. It lowers the bar Title VII plaintiffs must meet." "**[B]ecause it does so, many cases will come out differently**." (emphasis added).

Adverse Actions Post-*Muldrow v. St. Louis*

Ohio Judicial Activity

- Paid 60-day suspension was an adverse action due to a loss of overtime
- Relentless scrutiny for minor violations, assignment to menial tasks outside normal job duties, onerous routines (e.g., frequent status reports) had a cumulative effect of being an adverse action
- Voluntary leave to address PTSD triggered in the workplace was not an adverse action



Adverse Actions Post-*Muldrow v. St. Louis*

Takeaways to Minimize Risk

- New, lower standard for adverse actions will make it easier for employees to challenge employment decisions
- Train supervisors to:
  - Follow employer's policies and procedures, including discipline
  - Timely address and correct problematic behavior
  - Document rationales for employment decisions
  - Treat employees consistently
  - Avoid microaggressions or petty or unprofessional behavior
  - Seek the advice of HR or legal when dealing with contentious employees

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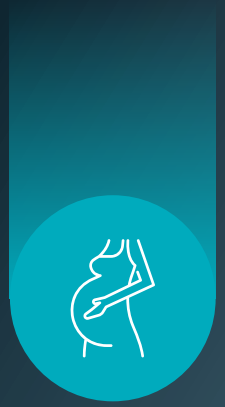
Pregnant Workers' Fairness Act and EEOC Enforcement Efforts

Pregnancy Accommodation



Pregnant Workers Fairness Act (PWFA)

- Federal law mandating that employers with 15 or more employees provide reasonable accommodations for qualified employees who have limitations related to pregnancy, childbirth, or related medical conditions.
- An employee or applicant is qualified if they meet the traditional definition of "qualified" under the ADA or:
  - the inability to perform the essential function is for a temporary period
  - the employee will be able to perform the essential function in the near future; and
  - the employer can reasonably accommodate the employee's inability to perform the essential function.

Revise existing accommodation policies to address reasonable accommodation related to pregnancy

Pregnancy Accommodation

Pregnant Workers' Fairness Act

EEOC v. Wabash National Corporation, Case No. 5:24-cv-00148-BJB.

- The EEOC alleged violations of the PWFA, ADA, and Title VII on behalf of a pregnant employee against her employer.
- Employer allegedly denied the employee's accommodation request to transfer to a role that did not require lying on her stomach. Employer forced her to take unpaid leave and ultimately gave her no choice but to return to her position without modification.
- Employer's decision to deny the accommodation request allegedly caused her to fear for the health of her pregnancy, the EEOC said, and she was forced to resign nearly eight months pregnant.
- Allegedly the employer also improperly sought medical documentation.

Documentation and the Pregnant Workers' Fairness Act

Pregnant Workers' Fairness Act – EEOC Regulations and Interpretative Guidance

- An employer is **not required** to obtain documentation from an employee requesting an accommodation.
- EEOC encourages employers to grant interim accommodations as a best practice if an employee indicates they are experiencing a delay in obtaining documentation.
- Reasonable documentation:
  - "Documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason."
- Employers may only require documentation if it is **reasonable under the circumstances** to determine whether to grant the accommodations.
- Not reasonable to request documentation:
  - When both the limitation and the need for reasonable accommodations are obvious.
  - If the worker has already provided the employer with sufficient information.
  - For the four per se reasonable accommodations.
  - For accommodations involving lactation.

Pregnant Workers Fairness Act

EEOC Guidance for Health Care Providers – December 18, 2024

The EEOC released guidance for health care providers on how they can help their patients obtain accommodations under the PWFA. The guidance specifies:

- The types of physical or mental conditions for which a patient may obtain a reasonable accommodation under the PWFA.
- The physical or mental condition must only be "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" and it does not need to be the sole cause, a major cause, or even a substantial cause of the condition.
- A temporary suspension of a main job duty can constitute a reasonable accommodation.
- The documentation does not need to include a diagnosis but should include (i) a simple statement of the patient's physical or mental condition, (ii) a confirmation that the condition is related to, affected by, or arising out or pregnancy, childbirth, or related medical conditions, and (iii) describes the adjustment or modification needed at work because of the limitation, as well as the expected duration of the adjustment or modification.
- ADA or FMLA forms may not be relevant and may seek disclosure of more information than is necessary under the PWFA.
- The PWFA does not set a hard limit on the number of accommodation requests or their duration.

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FTC Non-Compete Ban and Nonprofits

The FTC Noncompete Rule

Overview

FTC first proposed its noncompete rule on January 5, 2023.

FTC voted 3–2 on party lines to issue the final rule on April 23, 2024.

Originally scheduled to go into effect September 4, 2024

If the rule were to go into effect, it would ban virtually all post-employment noncompetes nationwide.

- Only exception—existing noncompetes with "senior executives"
- Requires written notice to all affected employees on or before effective date

The rule does not cover:

- noncompetes entered into with sellers in connection with the bona fide sale of a business;
- causes of action accrued prior to the effective date;
- non-solicits, NDAs, training cost repayment requirements, garden leave provisions (***but,*** *it could cover these things if they are too broad*);
- certain industries the FTC does not have authority over: nonprofits, banks, etc. (***but,*** *the FTC may challenge nonprofit status*); or
- good-faith (but failed) attempts to comply are not unfair business practices.

The FTC Noncompete Rule

Nonprofits

- Tax-exempt status alone isn't enough to avoid the FTC's noncompete ban.
- Organization must show:
  - An adequate nexus between an organization's activities and its alleged public purposes; and
  - Its net income is properly devoted to recognized public, rather than private, interests.

The FTC Noncompete Rule

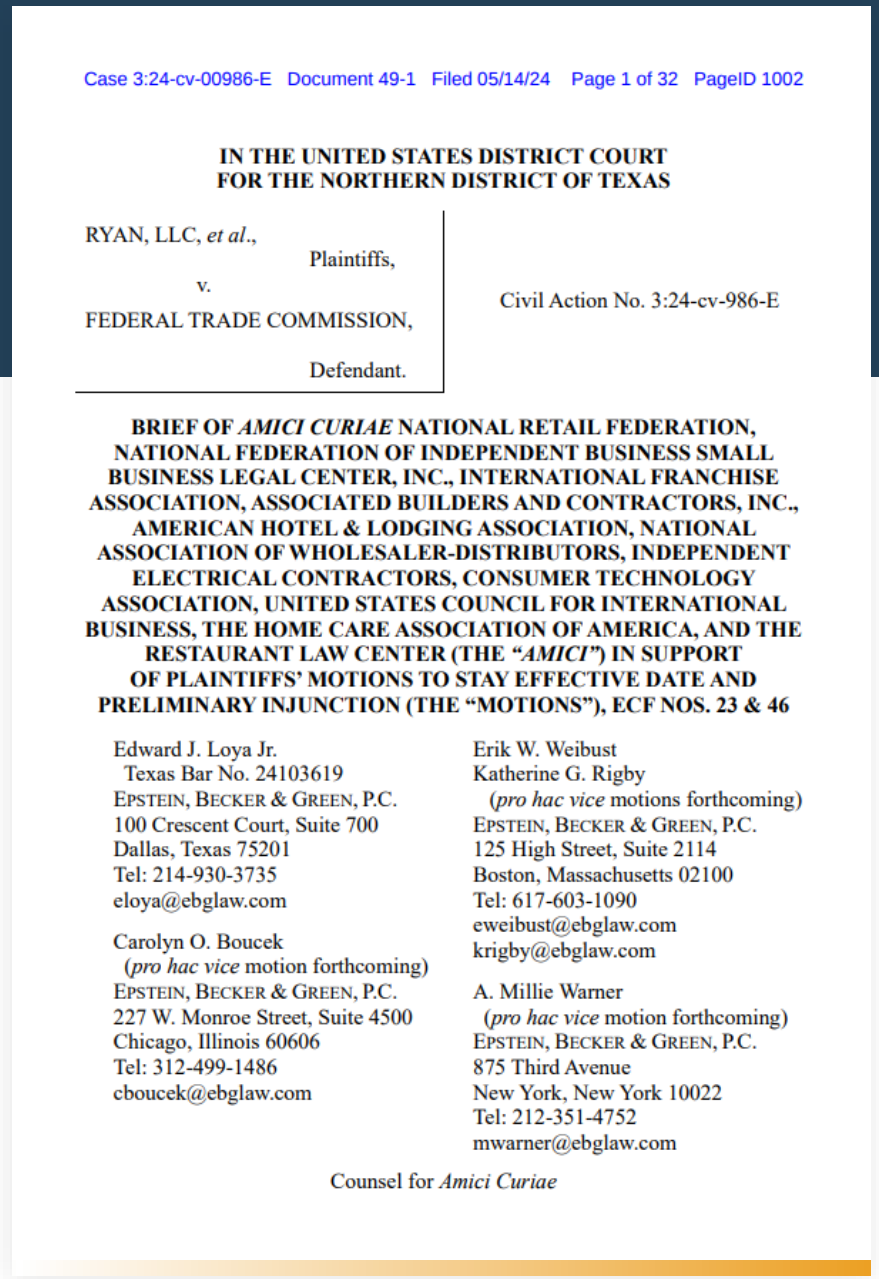
Enjoined (for now)

Ryan, LLC, et al. v. FTC (N.D. Tex.) (Final Merits Ruling)

- **Substantive Rulemaking Authority:** "Section 6(g) of the [FTC] Act does not expressly grant the FTC authority to promulgate substantive rules regarding unfair methods of competition."

- **Arbitrary and Capricious:** "[T]he Rule is based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of noncompete agreements, and disregards the substantial body of evidence supporting these agreements."

- **Remedy:** "[T]he Court must 'hold unlawful' and 'set aside' the FTC's Rule as required under § 706(2) . . . setting aside agency action under § 706 has nationwide effect, is not party-restricted, and affects persons in all judicial districts equally. . . . The Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter."



Case 3:24-cv-00986-E Document 49-1 Filed 05/14/24 Page 1 of 32 PageID 1002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

RYAN, LLC, *et al.*, Plaintiffs,
v.
FEDERAL TRADE COMMISSION, Defendant.

Civil Action No. 3:24-cv-986-E

BRIEF OF *AMICI CURIAE* NATIONAL RETAIL FEDERATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., INTERNATIONAL FRANCHISE ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AMERICAN HOTEL & LODGING ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, INDEPENDENT ELECTRICAL CONTRACTORS, CONSUMER TECHNOLOGY ASSOCIATION, UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, THE HOME CARE ASSOCIATION OF AMERICA, AND THE RESTAURANT LAW CENTER (THE "*AMICI*") IN SUPPORT OF PLAINTIFFS' MOTIONS TO STAY EFFECTIVE DATE AND PRELIMINARY INJUNCTION (THE "MOTIONS"), ECF NOS. 23 & 46

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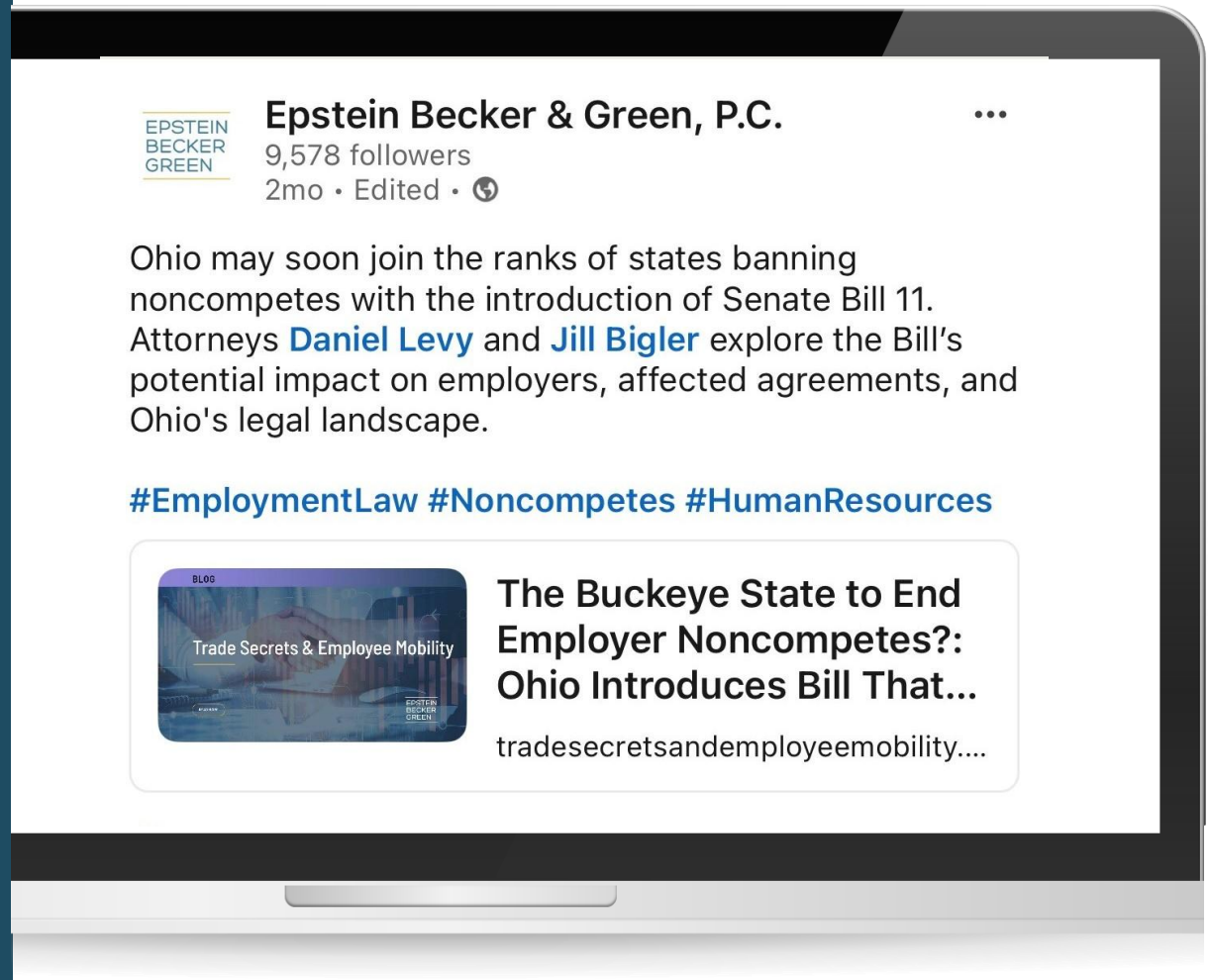
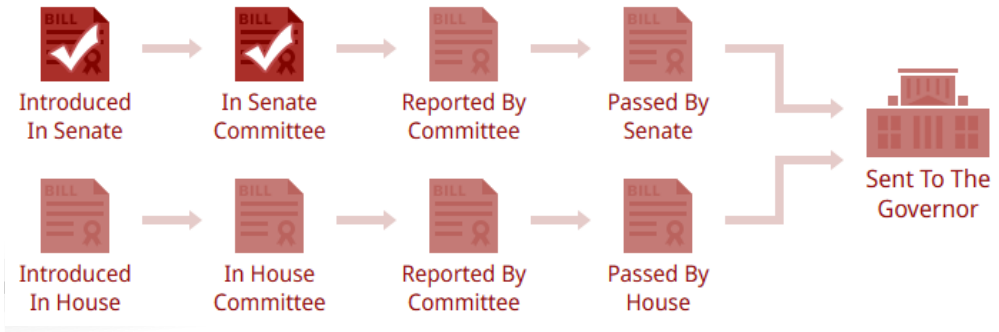
Ohio's Noncompete Legislation – Senate Bill 11



- Prohibited agreements/provisions:
  - Traditional noncompete
  - Requiring worker pay for lost profits, lost goodwill, or liquidated damages
  - Imposing a fee/cost on worker for terminating relationship
  - Requiring worker to reimburse expenses for training, orientation, or other services
- Does not address confidentiality or non-solicitation agreements
- Unclear whether SB 11 will be retroactive



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EEOC Harassment Guidance

U.S. Equal Employment Opportunity Commission

On April 29, 2024, the EEOC finalized its Enforcement Guidance on Harassment in the Workplace, which updated the Commission's position on its enforcement of laws prohibiting harassment in the workplace for the first time in over 20 years.

The EEOC also released a Summary of Key Provisions document and a Q&A for employees.

The materials include information on:

Gender Identity and Sexual Orientation	Social Media	Hypotheticals

Enforcement Guidance on Harassment in the Workplace

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-CVG-2024-1
Concise Display Name:	Enforcement Guidance on Harassment in the Workplace
Issue Date:	04-29-2024
General Topics:	Harassment, Race, Color, Religion, Sex, National Origin, Age, Disability, Genetic Information
Summary:	This document addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced statutes and the analysis for determining whether employer liability is established.
Citation:	Title VII, ADEA, ADA, GINA, 29 CFR Part 1601, 29 CFR Part 1604, 29 CFR Part 1605, 29 CFR Part 1606, 29 CFR Part 1625, 29 CFR Part 1626, 29 CFR Part 1630, 29 CFR Part 1635
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

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Trump Administration 2.0

Gender Under Trump 2.0

On January 20, 2025, President Trump issued an Executive Order entitled "**Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government**."

- The EO declares that "[i]t is the policy of the United States to recognize two sexes, male and female."
- Defines sex as "an individual's immutable biological classification as either male or female" and it does not include the concept of "gender identity."
- Directs each federal agency and federal employees to enforce laws to "protect men and women as biologically distinct sexes."
- Requires agencies to remove statements promoting gender ideology, including the EEOC's guidance "Enforcement Guidance on Harassment in the Workplace."

On January 28, 2025, the EEOC released a Press Release "**Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace**" which identifies actions to roll back the "Biden administration's gender identity agenda," including:

- Ending the use of the "X" gender marker during the intake process for filing a charge of discrimination.
- Modifying the charge of discrimination and related forms to remove "Mx." from the list of prefix options.
- Review of the EEOC's "Know Your Rights" poster.
- Removing materials promoting gender ideology and noting that certain documents cannot be unilaterally removed because they require majority vote (E.g., Enforcement Guidance on Harassment in the Workplace).

Immigration

- On January 20, 2025, President Trump signed numerous executive orders related to his immigration policy objectives, including a declaration of a national emergency at the southern border.
- President Trump will also enact a mass deportation operation of undocumented immigrants in the U.S. and has vowed to initiate “the largest domestic deportation operation in American history.”

Preparing for ICE Raids

- Employers have been preparing for an increase of removal actions by ICE (known as “ICE raids” informally).
- ICE raids are not announced in advance.
- ICE agents are free to enter any public areas of a business; however, in order to enter non-public areas, agents must have a signed judicial search warrant or the employer’s consent.
- How can employers prepare?
  - Designate a person within Human Resources to be the primary point of contact.
  - Train the designated representative on the Company’s record and retention policy, what to expect during an ICE raid, and how to respond
  - Provide guidance to security or front desk staff
  - Audit I-9 files (ideally under attorney client privilege or attorney work product doctrine)
  - Ensure I-9 documentation is kept in a separate folder and contains only the relevant documents to ensure no accidental disclosure of employees’ personnel information

Changes within the EEOC

Andrea R. Lucas's Term Priorities:

U.S. Equal Employment Opportunity Commission

- On January 21, 2025, President Trump appointed Commissioner **Andrea R. Lucas** as Acting Chair of the EEOC.
- In a press release, Lucas stated her priorities will include:
  - "rooting out **unlawful DEI-motivated race and sex discrimination**";
  - "defending **the biological and binary reality of sex** and related rights, including women's rights to single-sex spaces at work";
  - "protecting workers from **religious bias and harassment**, including antisemitism; and remedying other areas of recent under-enforcement;" and
  - "protecting American workers from **anti-American national origin discrimination**"

EEO/Anti-Discrimination

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- EO 14173; Issued January 21, 2025
- Revokes several prior Executive Orders addressing diversity and equal opportunity in the workplace;
- Requires federal agencies to include terms in government contracts that (i) the entity's compliance in all respects with all applicable federal anti-discrimination laws is "material" to the government's payment decisions, and (ii) the entity certifies that it does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws;
- Revokes Executive Order 11246, which required federal government contractors and subcontractors to meet certain affirmative action obligations;
- Directs departments and agencies to enforce the country's long-standing civil rights laws and to combat "illegal" private-sector DEI preferences, mandates, policies, programs, and activities.
- Also requires the U.S. Attorney General and agency heads to propose a strategic enforcement plan that identifies: "sectors of concern" within each agency's jurisdiction

EEO/Anti-Discrimination

AG Memo: Illegal DEI and DEIA Discrimination and Preferences

- Issued by USAG Pamela Bondi February 5, 2025
- Addresses EO 14173
- Directs DOJ to submit recommendations for enforcing federal civil rights laws and taking measures to "encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA."
- Among other things, the recommendations will identify the "most egregious and discriminatory DEI and DEIA practitioners in each sector of concern," propose criminal investigations and up to nine potential civil compliance investigations, and additional potential litigation activities the Department can take to "end illegal DEI and DEIA discrimination and preferences".
- Preliminary injunction issued in February 2025 enjoining portions of EO 14173; Trump Administration appealed; 4th Circuit stayed the injunction

EEO/Anti-Discrimination

EEOC and DOJ Technical Assistance Documents

- Issued March 19, 2025
- "**What To Do If You Experience Discrimination Related to DEI at Work**" and "**What You Should Know about DEI-Related Discrimination at Work**."
- The documents explain that DEI programs, policies, and practices may be unlawful if an employer makes employment decisions that are at least partially motivated by an employee's race, sex, or other protected characteristic. They also provide information on filing a charge of discrimination. Additionally, the documents indicate:
  - An employer's DEI training "may give rise to a colorable hostile work environment claim" under certain circumstances;
  - An employee's reasonable opposition to a DEI training could constitute protected activity if they believe the training violates legal protections under Title VII; and
  - Limiting access to mentoring, networking opportunities, trainings, internships, and membership to workplace resource groups based on a protected characteristic could be unlawful under Title VII.

EEO/Anti-Discrimination

Restoring Equality of Opportunity and Meritocracy

EO 14284; Issued April 23, 2025

- This order directs the EEOC and other agencies to deprioritize the enforcement of all statutes and regulations as they related to **disparate impact** liability.
- Title VII prohibits:
  - Disparate Treatment (treating someone different based on their protected class) and
  - Disparate Impact (a facially neutral policy that disparately impacts a protected class)
    - Example: A policy that any criminal conviction bars a candidate from being hired has a disparate impact on African Americans because they are arrested more often based on their percentage of the U.S. population.
- While this EO represents the present administration's enforcement priorities and interpretation of Title VII and related equal opportunity laws, it does **not** change the law for most private employers.
- However, the U.S. Attorney and EEOC is task with reviewing "all existing consent judgments and permanent injunctions that rely on theories of disparate-impact liability" with a view toward legally challenging the Title VII regarding disparate impact liability.

EEO/Anti-Discrimination

Restoring Equality of Opportunity and Meritocracy

EO 14284

- Determine whether any Federal authorities **preempt** State laws that impose disparate-impact liability based on a federally protected characteristic such as race, sex, or age, or whether such laws have "constitutional infirmities" that warrant Federal action and shall take appropriate measures consistent with the policy of this order.
- Some jurisdictions have adopted laws that rely on disparate impact theory to prohibit discrimination (not Ohio yet).
- Significant body of law regulating the use of AI in employment-related decision-making tools (as well as consumer protection laws) requires a disparate impact analysis to ensure the use of such systems does not result in disparate selection outcomes.

Considerations for Private Employers

- **Again, Title VII Remains the Law!**
  - President Trump's Executive Orders do not modify employers' obligations under Title VII.
- **DEI Messaging:** Consider auditing policies, procedures, recruiting contracts, and talking points around DEI, including external public-facing communications and materials (e.g., recruitment materials, job postings, and website messaging).
- **Employee Resource Groups and Affinity Groups**: Ensure that any ERG and Affinity Groups are open to all employees, not just members of a protected class.
- **Hiring/Promotions:** Employers cannot hire or promote on the basis of protected classes.
- **Pay & Benefits:** Consider conducting an equal pay audit to ensure compensation complies with the Equal Pay Act of 1963. Further, employers may wish to audit its benefit offerings – ensuring that the benefits are inclusive and are not based on a protected class.

Considerations for Private Employers

- **Reductions In Force - statistical adverse impact analysis**
- Such an analysis can merely be a risk measurement tool used to assess whether a potential discrimination litigation risk exists based on the foreseeable outcomes of an employer's layoff selection criteria and process.
- But the EO highlights the danger of misusing disparate impact analysis as the basis for making employment decisions to achieve balanced representation of employees in protected categories.
- Employers should consult with knowledgeable employment counsel to ensure that disparate impact analysis is utilized in a legally appropriate manner and performed in a way that reduces, rather than increases, the risk of potential discrimination claims.

The Trump Administration: Resources for Employers and Health Care Organizations

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Each change in federal or state administration or control of Congress can alter the regulatory, legislative, and enforcement landscapes, significantly influencing the business and compliance strategies of our clients.

Using our more than five decades of experience, Epstein Becker Green deploys critical problem-solving approaches for clients in anticipation of, and in response to, these changes. We embrace the challenges presented by past administrations and successfully navigate clients through untested waters of reform and compliance. You can count on Epstein Becker Green, once again, to be the legal guide for your complex issues.

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