



2024 TUETH KEENEY HIGHER EDUCATION SEMINAR

Materials

<https://bit.ly/TKHES2024>



Schedule

- **11:30am:** Ethical Issues When Using AI in Litigation
- **1:00pm:** Welcome and Introduction
- **1:10pm:** DOL Regulatory Update
- **1:45pm:** Title IX Update
- **2:40pm:** Refreshment Break
- **2:50pm:** Hot Topics in Immigration
- **3:25pm:** Speech on Campus
- **4:10pm:** Employment Law Update





TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

Ethical Issues When Using AI in Litigation



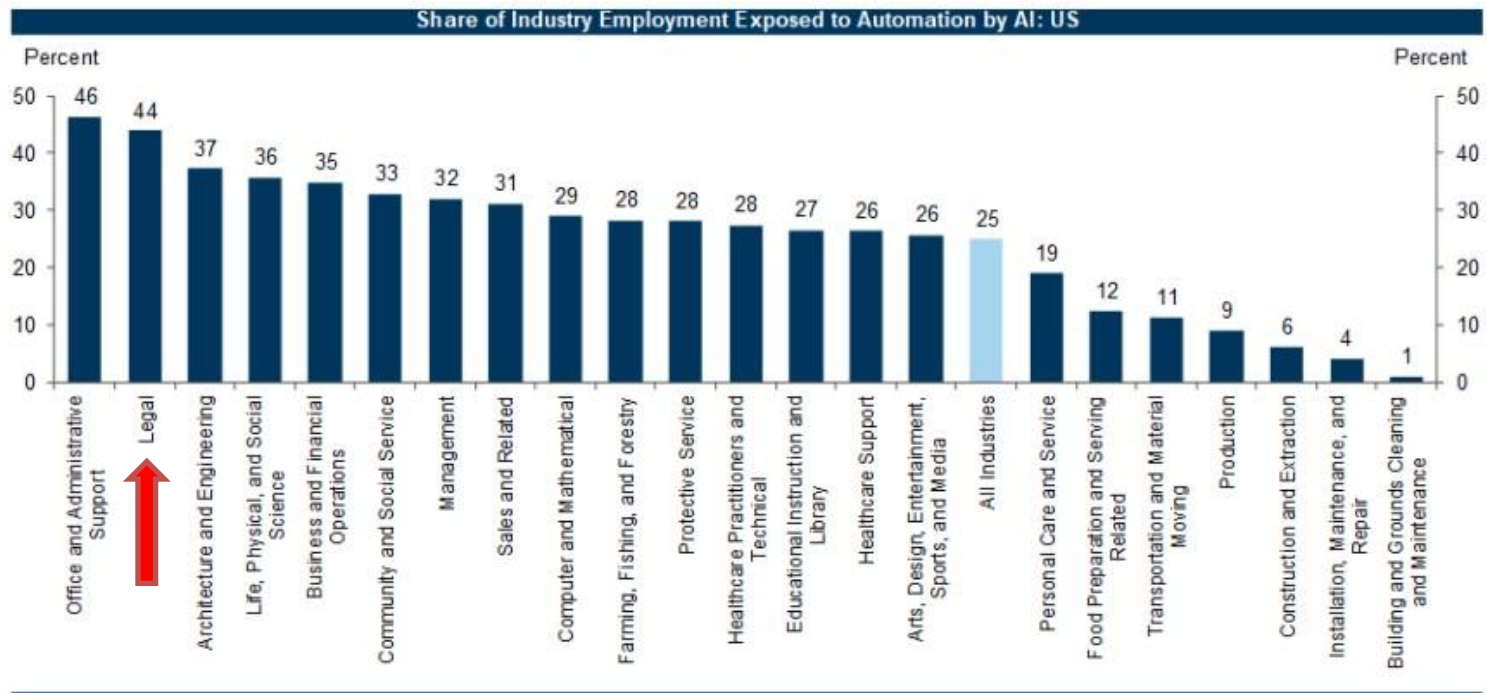
Presented by:
James R. Layton
Mollie G. Mohan

Date:
June 6 and 7, 2024

DIFFERENT
BY DESIGN

Why Does It Matter?

Exhibit 5: One-Fourth of Current Work Tasks Could Be Automated by AI in the US and Europe



Source: Goldman Sachs Global Investment Research

Why Does It Matter?



Latest version of ChatGPT aces bar exam with score nearing 90th percentile

Law Firms Start Training Summer Associates on Using Generative AI

Why Does It Matter?

Top 10 ways lawyers are using AI

The main ways that legal professionals are using generative AI in their practice are:

1. Drafting/templating communications (e.g., memos, emails, correspondence to opposing counsel, etc.): 58%
2. Conducting legal research: 53%
3. Summarizing legal narratives: 42%
4. Reviewing legal documents: 34%
5. Drafting/templating legal contracts: 23%
6. Conducting due diligence: 21%
7. Reviewing discovery: 15%
8. Negotiating/redlining contracts: 11%
9. Preparing case filings (e.g., pleadings, motions, jury instructions, etc.): 8%
10. Estate planning: 2%

Why Does It Matter?

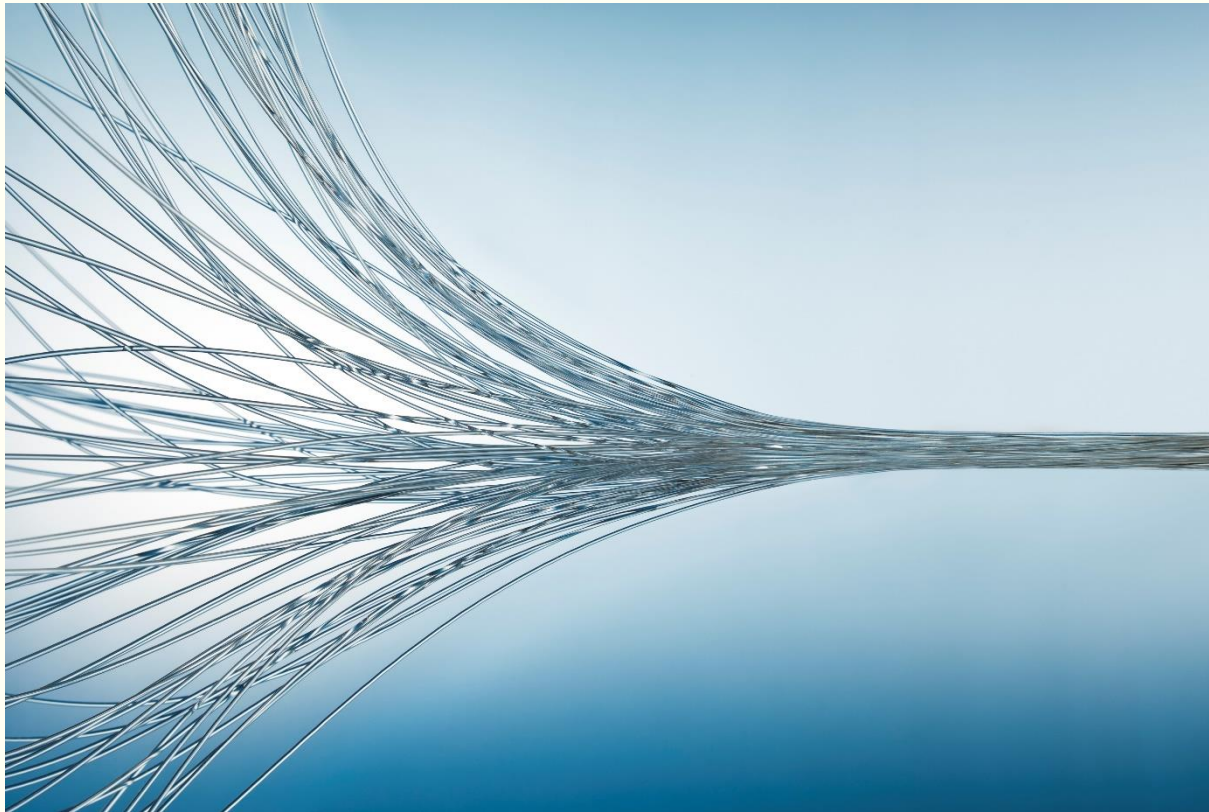
- *Kruse v. Karlen*, ED111172, 2024 WL 559497 (Mo. App. E.D. 2024)



Agenda

- What is AI?
- What ethical issues are implicated when using AI?
- Real word examples/hypotheticals
- Best practices





WHAT IS AI?

What is AI?

- “AI”
 - Advanced algorithms
 - Machine learning applications
 - Process automation
 - Text analytics
- “Generative AI”
 - Algorithms utilized to create text, images, and other content in response to prompt or question
 - Large language models, trained with databases of information

What is AI?

- Machine Learning
 - Supervised machine learning – application seeks and recognizes patterns within predefined data sets, typically created by human domain experts who act as guidance counselors of sorts
 - Unsupervised machine learning – creation of data sets without known outputs or predefined data, typically where the software “learns” and adapts to inputs on its own
 - Reinforced learning – “rewarding” the application that creates correlations using an algorithm that incorporates data feedback and learns from it to uncover ultimate processing path

What is AI?

- Examples of AI:
 - Google search
 - Amazon or other website recommended products
 - Siri
 - Alexa

What is AI?

- Examples of Generative AI:
 - ChatGPT
 - Co-Counsel
 - Microsoft Co-Pilot
 - Westlaw Practical Law (and other Westlaw predictive search features)

What is AI?

- Legal Uses
 - E-discovery
 - Predictive searches
 - Suggested search terms
 - Potential privilege
 - Answering legal questions
 - Drafting memos and filings
 - Westlaw Drafting Assistant

What is AI?

- Legal Uses
 - Summarizing materials
 - Depositions
 - Medical or other records
 - Document production indexes
 - Transcription
 - .rev.com
 - Contract review

What is AI?

In which of the following ways, if any, have you **used Gen AI in your practice?**

Drafting or templating communication (e.g. memos, emails, correspondence to opposing counsel, etc.) 58%

Legal **research** in general 53

Summarize legal narratives 42

Review legal documents 34

Draft/templating legal contracts 23

Due Diligence 21

Other 19

Review **discovery** 15

Negotiating/redlining contracts 11

Case Filings (Pleadings, Motions, Jury Instructions, etc.) 8

Estate Planning (Wills, Trusts, etc.) 2

What is AI?

- “What are ethical concerns for lawyers using AI in litigation?”

ChatGPT

When lawyers utilize AI in litigation, several ethical concerns arise, including:

1. **Accuracy and Reliability:** Lawyers must ensure that AI tools used in litigation, such as predictive analytics or document review systems, are accurate and reliable. Relying on flawed or biased AI predictions could lead to unjust outcomes for clients.
2. **Disclosure of AI Use:** Lawyers have an ethical obligation to disclose to opposing parties and the court when AI technology is employed in the litigation process. Transparency about the use of AI ensures fairness and allows opposing parties to assess and challenge its validity.
3. **Preservation of Attorney-Client Privilege:** AI systems may analyze vast amounts of data, including privileged communications between lawyers and their clients. Lawyers must take measures to safeguard attorney-client privilege and confidentiality when using AI tools for data analysis.
4. **Bias and Fairness in Decision-Making:** AI algorithms can inherit biases present in the data they are trained on, potentially leading to unfair outcomes. Lawyers need to assess and mitigate bias in AI systems to ensure that litigation decisions are fair and impartial.
5. **Competence and Supervision:** Lawyers have a duty to provide competent representation to their clients. When using AI tools, lawyers must possess the necessary knowledge and skills to understand and effectively utilize these technologies. Additionally, lawyers are responsible for supervising AI systems to ensure they are used appropriately and ethically.

What is AI?

- “What are ethical concerns for lawyers using AI in litigation?”

6. **Understanding Limitations of AI:** Lawyers should be aware of the limitations of AI technology and not overstate its capabilities. It's essential to recognize that AI tools are tools, not substitutes for human judgment and legal expertise.

7. **Data Security and Confidentiality:** AI systems often require access to sensitive client data. Lawyers must implement robust data security measures to protect client confidentiality and comply with privacy regulations.

8. **Adherence to Legal and Ethical Standards:** Lawyers using AI in litigation must adhere to legal and ethical standards governing the legal profession. This includes maintaining integrity, honesty, and professionalism in all aspects of their practice, including the use of AI technology.

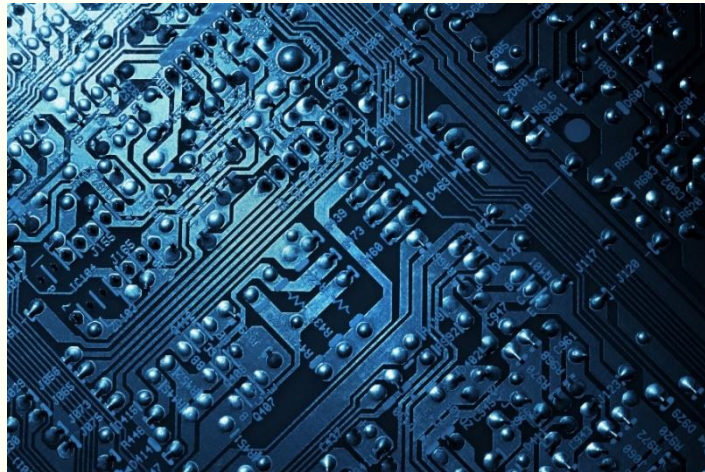
By addressing these ethical concerns, lawyers can harness the benefits of AI technology in litigation while upholding their ethical obligations to clients, the legal system, and society.

What are the ethical concerns?

- Informal Opinion Number 2024-11
 - Competence – Rule 4-1.1
 - Confidentiality – Rule 4-1.6.a
 - Duty to follow court orders and rules – Rule 4-3.4.c
 - Professional independence – Rule 4-5.4
 - Nonlawyer assistants – Rule 4-5.3
 - Supervisory responsibilities – Rule 4-5.1
 - Reasonable fees – Rule 4-1.5.a
 - Candor toward the tribunal – Rule 4-3.3

Rule 4-1.1 - Competence

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”



Rule 4-1.1 - Competence

- Comment No. 6
 - A lawyer “should keep abreast of the changes in the law and its practice, ***including the benefits and risks associated with relevant technology.***”
- Opinion No. 2024-11
 - “Not all generative AI platforms and services are intended for use by lawyers, and Lawyer must understand the risks and benefits of implementing use of these technologies.”

Rule 4-1.6 – Confidentiality

- Rule 4-1.6(a)
- “A lawyer shall not reveal information relating to the representation of a client” unless certain exceptions apply.

Rule 4-1.6 – Confidentiality

- Rule 4-1.6(c)
- “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”
- Opinion 2024-11
 - “That means that Lawyer needs to carefully assess any generative AI platforms or services . . . to ensure confidentiality of client information is maintained.”

Rule 4-1.6 – Confidentiality

- Rule 4-1.6, Comment 15
 - A lawyer is required to “act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”

Rule 4-1.6 – Confidentiality

- Comment 15
 - A lawyer must make “reasonable efforts to prevent the access or disclosure.”
- Rule 4-1.0 (h)
 - Reasonable = “conduct of a reasonably prudent and competent lawyer”

Rule 4-1.6 – Confidentiality

- Comment 15
 - Factors to determine reasonableness:
 1. Sensitivity of information
 2. Likelihood of disclosure if additional safeguards are not employed
 3. Cost of employing additional safeguards
 4. Difficulty of implementing the safeguards
 5. Extent to which the safeguards adversely affect the lawyer's ability to represent clients

Rule 4-1.6 – Confidentiality

- Comment 16
 - Factors to determine reasonableness of lawyer’s expectation of confidentiality:
 - Sensitivity of the information
 - Extent to which privacy of communication is protected by law or confidentiality agreement

Rule 4-3.4 – Court orders and rules

- Rule 4-3.4(c)
- “A lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.”
- Rules requiring counsel to affirmatively disclose or file certifications regarding use of AI
- Jurisdictions/courts with AI/generative AI disclosure/certification requirements:
 - Texas
 - Illinois
 - New York

Rule 4-3.4 – Court orders and rules

- Ethical rules related to AI
- Jurisdictions with ethical rules/guidance related to AI:
 - New York
 - DC
 - New Jersey
 - Florida
 - California
 - Michigan
 - Texas
 - Fifth Circuit
 - Missouri
 - EDMO – “No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence.”

Rule 4-5.4 – Professional independence

- Requires that the lawyer not rely on third parties or non-lawyers when practicing law
- Opinion 2024-11
 - “Lawyer and Law Firm must protect and maintain professional independence and independent professional judgment as required by Rule 4-5.4 and not rely solely on content created by a generative AI platform or service.”

Rule 4-5.3 – Nonlawyer assistants

- Rule 4-5.3 (b)
- A lawyer “having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”



Rule 4-5.3 – Nonlawyer assistants

- Rule 4-5.3 (c)
- A lawyer “shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Rule 4-5.3 – Nonlawyer assistants

- Opinion 2024-11
 - “Lawyer is ethically responsible for conduct that would be a violation of the Rules of Professional Conduct if engaged in by Lawyer if Lawyer orders or with specific knowledge of the conduct ratifies it, or knows of the conduct at a time when its consequences could have been avoided or mitigated, but Lawyer failed to take reasonable remedial measures.”

Rule 4-5.1 – Supervisory responsibilities

- Requires managers or supervisors to ensure other lawyers comply with ethical rules.
- 4-5.1(c)
- “A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

Rule 4-5.1 – Supervisory responsibilities

- Opinion 2024-11
 - “An ethical framework should be developed, and, just as with any other resource or tool used in the practice of law, appropriate training should be provided to educate lawyers and nonlawyers.”

Rule 4-1.5 – Reasonable fees

- Rule 4-1.5(a)
 - “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”
- Opinion 2024-11
 - “Lawyer and Law Firm should consider how use of generative AI may impact the reasonableness of fees pursuant to Rule 4-1.5(a).”

Rule 4-3.3 – Candor toward tribunal

- Rule 4-3.3 (a)
 - “A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”
- Opinion 2024-11
 - “At this point, generative AI tools are not always accurate, thereby requiring the careful attention to competence and supervision as outlined above to avoid any false statement of material fact or law to a tribunal.”

Kruse v. Karlen, 2024 WL 559497

- Only 2 out of 24 cases were genuine citations
- Two “real” cases did not stand for proposition asserted
- Missouri statutes and rules cited erroneously
- Appellant apologized in reply brief and explained that he hired a consultant to prepare the brief
- “Flagrant violation of the duties of candor.”
- “Citing nonexistent case law or misrepresenting the holdings of a case is making a false statement to a court.”
- “Submission of fictitious cases constitutes an abuse of the judicial system.”

In re Neusom, 2024 WL 982508

- Florida case – lawyer cited fictitious cases and cases that did not support proposition asserted
- Admitted that he “may have used artificial intelligence to draft the filings”
- Court referred to grievance committee, which found violations of numerous ethical rules
- Rule 4-1.3 – Diligence
 - “Whereas we understand that artificial intelligence is becoming a new tool for legal research, it can never take the place of an attorney’s responsibility to conduct reasonable diligence and provide accurate legal authority to the Court that supports a valid legal argument.”

Mata v Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

- New York case – lawyers submitted non-existent judicial opinions and fake quotes created by ChatGPT
- “Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”

Mata v Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

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Is varghese a real case



Yes, Varghese v. China Southern Airlines Co Ltd,
925 F.3d 1339 (11th Cir. 2019) is a real case.



Mata v Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

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Are the other cases you provided fake



No, the other cases I provided are real and can be found in reputable legal databases such as LexisNexis and Westlaw.

Mata v Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

- If lawyers had “come clean about their actions, . . . the record now would look quite different.”
- Sanctions of individual attorneys and jointly against law firm
 - Required to write each individual judge identified in the fake opinions
 - \$5,000 penalty

Mata v Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023)

- Type of harms that flow from the submission of fake opinions:
 - Opposing party wastes time and money in exposing the deception
 - Court’s time is taken from other important endeavors
 - Client may be deprived of arguments based on authentic judicial precedents
 - Potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of the party attributed with fictional conduct
 - Promotes cynicism about the legal profession and American judicial system
 - Future litigants may be tempted to defy judicial rulings by disingenuously claiming doubt about its authenticity

Park v Kim, 91 F.4th 610 (2nd Cir. 2024)

- Only two cases cited, one of which was fake
- Lawyer admitted to using ChatGPT
- “At the very least, the duties imposed by Rule 11 require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely.”
- No other way to ensure that arguments are “warranted by existing law” or otherwise “legally tenable.”
- Attorney referred to disciplinary committee

U.S. v. Michel, Case No. 1:19-CR-00148

- Found guilty on 10 counts of conspiracy
- Motion for new trial
- Counsel “generated his closing argument – perhaps the single most important portion of any jury trial – using a proprietary prototype AI program in which he . . . appeared to have had an undisclosed financial stake.”
- Closing argument conflated legal issues and failed to mention strongest defense

Hypothetical No. 1

- Opposing counsel sends you keyword searches
- Beta testing shows that search and review would take approximately 2000 hours of attorney time
- Opposing counsel argues in court that, with predictive searches and privilege screening, attorney does not need to review
- “Should be as simple as clicking a button.”
- Judge asks whether you can simply rely on the ediscovery software to screen for privilege?

Hypothetical No. 2

- You receive a draft motion from an associate that looks fishy.
- You haven't heard of several of the cases cited.
- The associate usually does extremely thorough research, so you assume the associate simply found more cases based on his/her depth of research.
- You're under a filing deadline, so you briefly skim the motion and file it.
- Ethical violation?



BEST PRACTICES

Best Practices

- Close review of technology contracts
- Attorney oversight on all work
- Training for all attorneys and staff
- Policy regarding use of AI
- Stayed tuned

Other Legal Pitfalls

- Employment law concerns
 - Wage and hour
 - Discrimination
- Intellectual property
- Data and privacy
- Bias
 - Junk in, junk out



THE FUTURE



QUESTIONS???



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Department of Labor Update: Biden Administration Two Step Overtime Plan

Presented by:
Aigner S. Carr
Robert A. Nickel

Date:
June 6-7, 2024

DIFFERENT
BY DESIGN

Agenda

- Review of FLSA Basics
- DOL Final Overtime Rule
- Challenges to Overtime Rule
- Practical Tips For Preparation
- Common Exemptions in Higher Education



FLSA Basics

- **The Fair Labor Standards Act (FLSA)**

- Federal law that establishes minimum wage, overtime pay, recordkeeping, and child labor standards
- The FLSA is administered and enforced through the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL)
- Creates two classifications of employees for purposes of minimum wage and overtime
 - “Exempt” v. “Non-Exempt”

FLSA Basics

- **Guarantees to Non-Exempt Workers:**
 - **Minimum Wage**
 - Current federal minimum wage is \$7.25 (since 2009)
 - Current Missouri minimum wage is \$12.30 – **BUT the Missouri minimum wage law does not apply to public entities.**
 - **Overtime**
 - Under the FLSA, employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek — unless they fall under an exemption

FLSA Basics

- **What is Compensable Time Under the FLSA?**
- **What is a workday?**
 - Time between when an employee starts “principal activity” and when they cease that principal activity
 - Can be longer than the employee’s scheduled shift/hours
- **What is “employ”?**
 - “To suffer or permit to work”
 - For example, an employee who voluntarily continues work at the end of a shift to finish an assigned task must be paid. “The reason is immaterial” and the “hours are work time and compensable.”

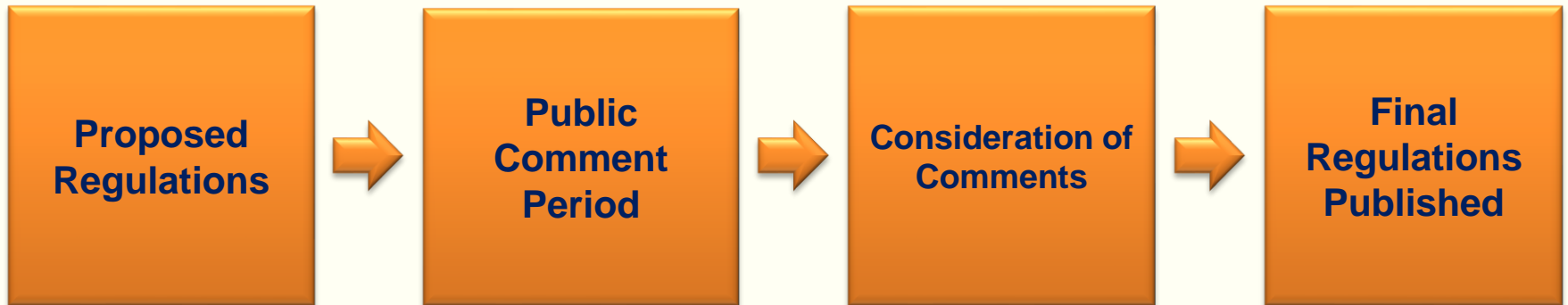
FLSA Basics

- **What is work?**
- On-Call Time (on ER's premises = work)
- Rest and Meal Periods (20min or less = work)
- Lectures, Meetings, and Trainings ≠ not work only if: 1) outside normal hours; 2) voluntary; 3) not job related; AND 4) no other work is concurrently performed).

FLSA Basics

- **What is work?**
- Home to Work Travel \neq work
- Special Assignment: Deduct the regular commute time, include everything else.
- Travel from one job site to another = work
- Travel that keeps employee away from home overnight = work
- See DOL Fact Sheet #22: <https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked>

Steps of the rulemaking process



DOL Overtime Rules Past, Present, and Future

- **2004:** Federal salary level threshold increased to \$455/week (\$23,660) and \$100,000/yr for HCEs
- **2016:** Obama administration issued final rule to increase salary level to \$913/week (\$47,476) and \$147,414 for HCEs; also included automatic triennial increases—effective date December 1, 2016
- **Nov. 2016:** Federal Texas Court issued preliminary injunction 10 days before effective date. Overtime rule stricken on August 31, 2017
- **2019:** Trump administration rescinded the 2016 Final Rule and proposed salary level increase to \$684/week (\$35,568); \$107,432 for HCEs—effective Jan. 1, 2020

DOL Overtime Rules Past, Present, and Future

- **Nov. 2023:** Biden administration announced proposed rule to increase salary level to \$1,059 /week (\$55,068) and \$143,988/yr. for HCEs
- The proposed rule included automatic triennial updates
- **April 23, 2024:** Published final rule included a two wave increase AND automatic triennial increases

DOL Final Overtime Rule

- Applies to exempt (or “salaried”) employees in a “bona fide executive, administrative, or professional role (“white-collar” or “EAP”)
- **July 1, 2024**, the minimum salary level for EAP employees will increase from \$35,568 to \$43,888 per year (\$844 per week)
- **January 1, 2025**, the minimum salary level for EAP employees will increase from \$43,888 to \$58,656 (\$1,128 per week)
- Automatic increase on July 1, 2027, and every 3 years thereafter in an amount to be determined (circumvents rulemaking process)

DOL Final Overtime Rule

For Highly Compensated Employees (“HCE”):

- **July 1, 2024**, the minimum salary is increased from \$107,432 to \$132,964 per year.
- **January 1, 2025**, the minimum salary is increased from \$132,964 to \$151,164.
- Automatic increase on July 1, 2027, and every 3 years thereafter in an amount to be determined

DOL Final Overtime Rule

6.7 Schedule of Changes to the Standard Salary Level and HCE Thresholds

DATE	STANDARD SALARY LEVEL	HCE TOTAL ANNUAL COMPENSATION THRESHOLD
Before July 1, 2024	\$684 per week (equivalent to \$35,568 per year)	\$107,432 per year, including at least \$684 per week paid on a salary or fee basis.
July 1, 2024	\$844 per week (equivalent to \$43,888 per year)	\$132,964 per year, including at least \$844 per week paid on a salary or fee basis.
January 1, 2025	\$1,128 per week (equivalent to \$58,656 per year)	\$151,164 per year, including at least \$1,128 per week paid on a salary or fee basis.
July 1, 2027, and every three years thereafter	To be set using the methodology in effect at the time of the update based on current earnings data.	To be set using the methodology in effect at the time of the update based on current earnings data.

DOL Final Overtime Rule

- New salary levels represent an approximate 60-65% increase from the current weekly earnings for full-time salaried employees.
- The DOL estimates that roughly 4 million more employees will be eligible for overtime pay under the new rule if salaries are not increased to meet the new salary minimum.

DOL Overtime Exemption Tests

- The EAP exemption regulations require three conditions to be met for an employee to qualify:
- Salary Basis Test - The employee must be paid on a salary basis that is not subject to reduction based on the quality or quantity of work rather than, for example, on an hourly basis; **AND**
- Salary Level Test - The salary amount must meet a minimum specified amount; **AND**
- Duties Test - The job duties must **primarily** involve executive, administrative, or professional duties as defined by the regulations.

DOL Overtime Exemption Tests

- The “HCE” exemption regulations require that:
 - The employee earns total annual compensation of the annual salary minimum, paid on a salary or fee basis; **AND**
 - The employee’s primary duty includes performing office or non-manual work; **AND**
 - The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an EAP employee.

DOL Final Overtime Rule- Teachers

Special Rule for Teachers (aka professors)

- The final rule does not change existing rules for teachers
- Teachers at “educational establishments” are exempt if primary duty is “teaching tutoring, instructing, or lecturing in the activity of imparting knowledge”
- Professors, instructors, and adjunct professors typically qualify for this exemption
- **Salary basis test does not apply!!**



DOL Final Overtime Rule- Teachers

•Teachers

- Teachers remain exempt, regardless of their salary levels
- Employee’s primary duty must be “teaching”
- A staff member who teaches online or remotely may also qualify for this exemption.



DOL Overtime Rule- Previous Challenges

Previous Challenges to Overtime Rule Increases:

- The Obama administration proposed an increase to the salary threshold from \$23,660 to \$47,476
- The rule also provided for triennial adjustments
- Twenty-one states challenged the rule and claimed that the DOL exceeded its authority by raising the salary threshold too high and by providing for automatic adjustments to the threshold every three years.
- A federal judge in Texas issued an order halting the rule 10 days before the implementation date (December 1, 2016)

DOL Overtime Rule- Previous Challenges

The Court ruled as follows:

- The FLSA applies to state governments.
- The DOL exceeded its authority by setting a salary level test that effectively created a de facto “**salary-only test**” that eliminated the need to consider the specific duties of the employee.
- The automatic triennial updates were unlawful for similar reasons.

DOL Overtime Rule- Previous Challenges

Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39 (2023):

- Employee earned daily rate of at least \$963, and more than \$200,000 a year.
- Employee paid exclusively with a day rate cannot satisfy the **salary basis test**, even if that day rate exceeds the required weekly salary level.
- Court held that the employee was not exempt from the FLSA's overtime requirements.
- Justice Kavanaugh's dissent argued that the FLSA's regulations—to the extent that they require that an employee be paid on a salary basis to be exempt under the EAP exemptions — are an impermissible exercise in regulatory action.

DOL Final Overtime Rule— Current Challenge

- **Current Challenges**
- Lawsuit filed May 22, 2024, by over a dozen business groups in the Eastern District of Texas (same District that struck down Obama-era Rule).
- Suit argues that the DOL overstepped its authority under the FLSA and that the three-year update violates the APA's notice and comment requirement.
- Also cites a currently pending 5th Circuit case that's examining the Trump-era rule.

DOL Final Overtime Rule— Current Challenge

- **Current Challenge**
- The 5th Circuit case “argues that the DOL doesn’t have the authority to consider a worker’s earnings at all when determining whether they are exempt from overtime.”
- The E.D. Texas suit notes that if the Plaintiffs succeed in the 5th Circuit, then the new rule should be blocked on those grounds as well.

DOL Final Overtime Rule- Preparation

•Review Current Pay Data:

- Create a list of exempt employees who currently earn between \$35,568 and \$58,656 a year
- Based on the list, evaluate actual hours worked
- Decide whether to increase salary to new threshold or convert to non-exempt status
- Determine if you will do one roll out or two
- Ensure that any current and future exemptions meet all three criteria (salary basis, salary level, and duties)

DOL Final Overtime Rule- Preparation

•If You Decide to Reclassify, Consider:

- **How much to pay:** Will you divide the employee's weekly salary by 40 hours to determine their hourly rate, or will you factor in the employee's estimated overtime and adjust accordingly?
- **Regular Rate Calculations:** Overtime premiums are based on the employee's "regular rate of pay" based on "all remuneration" earned from employment with the exception of eight specific exclusions contained in section 7(e) of the FLSA.
- **Incentive or Bonus Pay:** Includes non-discretionary bonuses, commissions, payments for undesirable shifts or duties, or potentially non-cash payments (note: Missouri prohibits bonuses for public employees)

DOL Final Overtime Rule- Preparation

•Note!

- Public universities or colleges that qualify as a “public agency” under the FLSA may compensate nonexempt employees with compensatory time off (or “comp time”) in lieu of overtime pay.
- Most employees may not accrue more than 240 hours of comp time
- Seasonal, public safety, or emergency response employees may up to 480 hours of comp time.

DOL Final Overtime Rule- Preparation

•If You Decide to Reclassify, Consider:

- **Tracking Non-Exempt Employment:** Examine technology for record keeping. Consider reconfiguration of workflow and implementation of new processes or technology to ensure that you are accurately recording work time.
- **Benefits:** Be mindful of different vacation, sick leave, and other policies for exempt vs non-exempt employees.
- **Explore Options:** Before converting, consider whether the employee qualifies for a different exemption that does not require a minimum salary threshold.

DOL Final Overtime Rule- Preparation

•If You Decide to Reclassify, Consider:

- **Notice to employees:** How will the change be communicated to specific employees?
- Written communication regarding specific changes to compensation and new responsibilities, such as timekeeping, meal and rest breaks, and other requirements.
- Some states require advance notice of wage changes, so check local requirements and communicate the new terms of employment before they take effect.

DOL Final Overtime Rule- Preparation

• Training Managers and Newly Reclassified Employees:

- scheduled hours
- overtime approval policies
- timekeeping procedures
- recordkeeping requirements
- meal and rest breaks
- prohibition on off-the-clock work

DOL Final Overtime Rule- Preparation

- **Stay Updated on Legal Challenges:**

- Be prepared for change, but anticipate a successful challenge to some or all parts of the rule
- Two roll outs might be less efficient but more cost beneficial in the long run if rule is struck down

DOL Final Overtime Rule- Common Exemptions

- **Exemptions for employees at Higher Education Institutions:**
 - Professors
 - Professional Employees
 - Administrative Employees
 - Executive Employees
 - Athletic Coaches (whose primary duties are instructing student-athletes in how to perform their sport may qualify for teaching exemption)
 - Student Employees (Graduate Teaching Assistants, Research Assistants, and Student Residential Assistants)

DOL Final Overtime Rule- Common Exemptions

- Executive employees must satisfy the following duties test:

1. Primary duty must be **managing the enterprise or a department**;
2. Must direct the work of at least **two or more** other full-time employees or their equivalent (for example, one full-time and two half-time employees); and
3. Must have hiring/firing authority OR weight given to recommendations for hiring/firing.

DOL Final Overtime Rule- Common Exemptions

- Common executive employees in higher ed:

- Deans
- Department heads
- Directors
- Any other manager or supervisor whose job duties and compensation satisfy the criteria

DOL Final Overtime Rule- Common Exemptions

- Administrative exemption duties test:

1. The employee's **primary duty** is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers;
and
2. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

DOL Final Overtime Rule- Common Exemptions

- Various positions in higher education might qualify for the administrative exemption:
- Admissions counselors
- Student financial aid officers

DOL Final Overtime Rule- Common Exemptions

- To be exempt as an “academic administrative professional”:
 1. The employee must satisfy the salary basis and salary level tests **or receive a salary of at least the entrance salary for teachers in the same educational establishment**; and
 2. The employee’s **primary duty** must be to perform administrative functions directly related to academic instruction or training in an educational establishment.

DOL Final Overtime Rule- Common Exemptions

Various positions in higher education might qualify for the **academic administrative exemption**:

- Department heads
- Intervention specialists who respond to academic issues
- Coaches (whose primary duty consists of academic advising to players or responsibility for administration of an academic department)

DOL Final Overtime Rule- Common Exemptions

- **Various categories for professional exemptions:**

- Teachers
 - Learned professionals
 - Creative professionals
 - Employees practicing law or medicine
- **In higher education, employees eligible for the professional exemption are often either teachers or learned professionals

Professional Employees- Learned Professional

Learned professional must satisfy three requirements:

1. The employee must primarily perform work requiring advanced knowledge;
2. The advanced knowledge must be in a field of science or learning; and
3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Professional Employees- Learned Professional

- Exempt non-teacher learned professionals generally include:
 - Certified public accountants
 - Psychologists
 - Certified athletic trainers
 - Librarians
 - Postdoctoral fellows who conduct research at a higher education institution after completing doctoral studies generally meet the duties requirements

DOL Final Overtime Rule- Common Exemptions

• Student Employees

- **Graduate Teaching Assistants.** Qualify for the teacher exemption if primary duty is teaching.
- **Research Assistants.** Graduate or undergraduate students who perform research under a faculty member's supervision while obtaining a degree are generally exempt even if the student receives a stipend for performing the research.
- **Student Residential Assistants.** Students enrolled in bona fide educational programs who are residential assistants and receive reduced room or board charges or tuition credits are not entitled to minimum wages

and overtime under the FLSA.



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DIFFERENT
BY DESIGN

QUESTIONS?



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COOPER MOHAN JACKSTADT P.C.

2024 Title IX Regulations – They're Here!



Presented by:
Kate L. Nash
Veronica E. Potter

Date:
June 6 and 7, 2024

DIFFERENT
BY DESIGN

Agenda

- Overview of new regulations
 - New definitions
 - Requirements for complaints of sex discrimination
 - Requirements for complaints of sex-based harassment where a student is a party
 - Pregnant and parenting students
 - Training
- Options for implementation (what about injunctions??)
 - What if our existing process is working for us?
 - What if we want to make some changes?

Background

- May 2020 – Current regulations released.
- August 2020 – Current regulations went into effect.
- July 2021: Dept. of Education releases Title IX Q&A.
- June 2022: Notice of Proposed Rulemaking published.
- September 2022: Comment period closed –240,000+ public comments received.
- April 2024: New regulations released.
- August 1, 2024: Effective date for new regulations.



OVERVIEW OF NEW REGULATIONS

New Definitions - § 106.2

Complaint means an oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.

No longer requires that it be in writing and signed by complainant.

New Definitions - § 106.2

- *Sex-based harassment* prohibited by this part is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:
 - Quid Pro Quo,
 - Hostile Environment Harassment, or
 - Specific Offenses

New Definitions - § 106.2

(1) *Quid pro quo harassment.* An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

New Definitions - § 106.2

(2) *Hostile environment harassment.* Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so **severe or pervasive** that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

New Definitions - § 106.2

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

(iv) The location of the conduct and the context in which the conduct occurred; and

(v) Other sex-based harassment in the recipient's education program or activity;

New Definitions - § 106.2

(3) *Specific offenses.*

(i) ***Sexual assault*** meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;

(ii) ***Dating violence*** meaning violence committed by a person:

- (A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (1) The length of the relationship;
 - (2) The type of relationship; and
 - (3) The frequency of interaction between the persons involved in the relationship;

New Definitions - § 106.2

(iii) **Domestic violence** meaning felony or misdemeanor crimes committed by a person who:

- (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
- (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
- (C) Shares a child in common with t(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- he victim; or

(iv) **Stalking** meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- (A) Fear for the person's safety or the safety of others; or
- (B) Suffer substantial emotional distress.

Scope - § 106.11

- . . . this part 106 applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States.
- For purposes of this section, conduct that occurs under a recipient's education program or activity ***includes but is not limited to***
 - conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution,
 - and conduct that is subject to the recipient's disciplinary authority.
- A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

Response to Sex Discrimination - § 106.44

(1) A recipient with *knowledge* of conduct *that reasonably may constitute sex discrimination* in its an education program or activity must respond promptly and effectively; and

(2) A recipient must also comply with this section to address sex discrimination in its education program or activity.

Reporting Obligations - § 106.44(c)

- **Must** report sex discrimination to Title IX Coordinator:
 - **Any employee who is not confidential and either:**
 - Has authority to institute corrective measures, or
 - Has responsibility for administrative leadership, teaching, or advising.
- **May either** report to Title IX Coordinator or provide contact information:
 - **All other employees who are not confidential employees.**



Confidential Employees - § 106.44(d)

- Confidential employees must inform those who report sex discrimination:
 - That the employee is confidential,
 - How to contact the Title IX Coordinator,
 - How to make a complaint, and
 - That the Title IX Coordinator may be able to offer supportive measures, as well as initiate an information resolution or investigation.



Title IX Coordinator Responsibilities - § 106.44(f)

- Lists required actions Title IX Coordinator must take when receiving report of sex discrimination:
 - Treat parties equitably,
 - Offer and coordinate supportive measures,
 - Notify complainant of grievance procedures,
 - Initiate grievance procedures when complaint is received,
 - Determine whether to initiate complaint,
 - Other appropriate prompt and effective steps to ensure sex discrimination does not continue or recur.

NOTE: Discretion

- “(2) A Title IX Coordinator is **not required** to comply with paragraphs (f)(1)(i) through (vii) of this section upon being notified of conduct that may constitute sex discrimination if **the Title IX Coordinator reasonably determines that the conduct as alleged could not constitute sex discrimination** under Title IX or this part.”
- One of several places in the regulation that provide **DISCRETION** to the Title IX Coordinator.
- NOTE: With more reports constituting complaints, policies should include a review by the TIX Coordinator before the process proceeds.

Title IX Coordinator Decision to Initiate Complaint - § 106.44(f)

(A) To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

- (1) The complainant's request not to proceed with initiation of a complaint;
- (2) The complainant's reasonable safety concerns regarding initiation of a complaint;
- (3) The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- (4) The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
- (5) The age and relationship of the parties, including whether the respondent is an employee of the recipient;
- (6) The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
- (7) The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
- (8) Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

Supportive Measures - § 106.44(g)

- Similar to requirements from 2020 regulations – must offer supportive measures that do not burden either party, free of charge.
- Clarifies that supportive measures can end after grievance process or can be continued.
- New requirement to allow party to appeal decision related to supportive measure applicable to them to an impartial employee.

Informal Resolutions - § 106.44(k)

Does not require the complainant to file a formal complaint to offer informal resolution.

Recipient has discretion to determine when it is appropriate to offer informal resolution.

Cannot require parties to participate in informal resolution.

Must provide **notice** to parties before informal resolution.

Facilitator cannot be the same person as the investigator or decisionmaker in the grievance process.

NOTE: There are many, specific requirements related to informal resolution; institutions should review and prepare for this option.

Grievance Procedures

§106.45 – Grievance procedures for ALL complaints of sex discrimination

- Including complaints of sex-based harassment where both parties are non-students

§106.46 – Additional grievance procedures for complaints of sex-based harassment involving a STUDENT

- Either student respondent or student complainant

106.45: General Requirements

Treat parties equitably

Presumption
respondent is not
responsible

Reasonably prompt
time frames for major
stages of process with
available extensions for
good cause

Protect privacy, while
not limiting the ability
of parties to speak with
witnesses, family
members, advisors

Exclude certain types of
evidence (privileged
information, rape shield
provision)

Dismissal- § 106.45

- A complaint may be dismissed for the following reasons:
 - Unable to identify respondent,
 - Respondent is not participating in education program or activity and is not employed by recipient,
 - Complainant voluntarily withdraws the complaint,
 - Conduct, even if proven, would not constitute sex discrimination,
- Must notify complainant (and respondent, if applicable) of basis for dismissal.
- Dismissal can be appealed.
- Only required to notify respondent of dismissal if respondent already received notice of allegations.

Notice of Allegations - § 106.45

Notice of Allegations must include:

- Copy of grievance procedures,
- Sufficient information to allow parties to respond to allegations (i.e. identities of parties, date, location, conduct),
- Statement retaliation is prohibited,
- Statement the parties have an equal opportunity to access relevant evidence or an accurate description of it

Must provide amended notice if investigating additional allegations

Investigation - § 106.45

- Must provide an adequate, reliable, and impartial investigation:
 - Burden is on the recipient, not the parties, to gather information,
 - Parties have equal opportunity to provide witnesses and evidence,
 - Review evidence to determine if it is relevant and not otherwise impermissible,
 - **Provide equal opportunity for parties to access evidence or an accurate description of evidence***,
 - *But then must provide access on request of either party,
 - **Parties have a reasonable opportunity to respond to evidence**

Determinations - § 106.45



Must provide a process for the decisionmaker to question parties and witnesses to assess credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations.



Must use preponderance of the evidence unless recipient uses clear and convincing standard for all comparable proceedings.



Notify the parties of the determination including a rationale and how to appeal.



If discrimination is found to have occurred, coordinate remedies and sanctions.

Appeals - § 106.45

- Appeals –
- In addition to an appeal of a dismissal consistent with paragraph (d)(3) of this section, a recipient must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

Sex-based harassment - § 106.45

- (l) Provisions limited to sex-based harassment complaints. For complaints alleging sex-based harassment, the grievance procedures must:
 - (1) Describe the range of supportive measures available to complainants and respondents under § 106.44(g); and
 - (2) List, or describe the range of, the possible disciplinary sanctions that the recipient may impose and remedies that the recipient may provide following a determination that sex-based harassment occurred.

Grievance Procedures - § 106.46

- If student complaint OR student respondent, then must include:

§ 106.45 Procedures

+

§ 106.46 Procedures

- For student employees, conduct fact specific determination based on the person's primary relationship and context of the alleged harassment.

Dismissal - § 106.46

- Dismissal is permissible under same bases as § 106.45; also:
- “Provide the parties, simultaneously, with written notice of the dismissal and the basis for the dismissal, if dismissing a complaint under any of the bases in § 106.45(d)(1), ***except if the dismissal occurs before the respondent has been notified of the allegations***, in which case the recipient must provide such written notice only to the complainant. . .”
- If dismissal is based on complainant’s voluntary withdrawal, it must be withdrawn in writing.

Notice of Allegations - § 106.46

- Additional statements to include in Notice of Allegations:
 - Respondent presumed not responsible,
 - Parties have an opportunity to present relevant, not impermissible evidence to the decisionmaker,
 - Parties may have an advisor of their choice, and advisor *may* be an attorney,
 - Parties have an equal opportunity to access evidence or an investigative report that accurately summarizes evidence (with access to evidence upon request),
 - Code of conduct prohibits knowingly making false statements (if applicable).

Investigations- § 106.46

- Investigation:
 - Written notice of all meetings/interviews with sufficient time to prepare,
 - Opportunity to be accompanied by advisor (who may be an attorney), but may limit the participation of the advisor,
 - Same opportunities to have others present for meetings or to present expert witnesses,
 - Reasonable extensions of time frames for good cause, and
 - **Equal opportunity to access relevant, not impermissible evidence and to respond to the evidence** (if there is a hearing, the access to evidence must be before the hearing).

Questioning - § 106.46

- Questioning to evaluate allegations and assess credibility:
 - A hearing is NOT required, but is allowed (can be in person or virtual, must be recorded).
 - Decisionmaker can be the same person as investigator (single investigator model permitted).
 - Must have a process that allows the decisionmaker to question the parties and witnesses to adequately assess credibility.
 - If no hearing, the parties must be able to propose questions for the other party and witnesses **and** institution must provide parties with recording/transcript of the questioning to allow for follow-up questions.

NOTE: The process for questions without a hearing is likely to be very time consuming.

Questioning - § 106.46

- At a hearing, questioning can:
 - be proposed by parties and done by decisionmaker, or
 - be done by party's advisor.

Questioning - § 106.46

- Decisionmaker must determine whether proposed questions are relevant and not otherwise impermissible prior to the question being posed.
- Must explain decisions to exclude a question.
- Must allow questions that are relevant and not otherwise impermissible, but can exclude questions that are unclear or harassing.
- *Can place less or no weight on statements by a party or witness who does not answer questions, but cannot draw an inference as to whether the harassment occurred.*

Determinations- § 106.46

- Simultaneous, written notification of the determination to the parties that includes:
 - Description of alleged harassment,
 - Policies and procedures used to evaluate allegations,
 - Evaluation of relevant, not otherwise impermissible evidence,
 - If determined harassment occurred, remedies and sanctions,
 - Procedures for appeal.

Appeals - § 106.46

- Appeals – acceptable bases –
 - Procedural irregularity that would change the outcome,
 - New evidence that would change the outcome and was not available during the determination,
 - Conflict of interest or bias that would change the outcome
- Can permit other grounds, if available equally to both parties.

Training - § 106.8

- Requires training upon hire, starting new Title IX duties, and annually for:
 - *All employees* on what constituted sex discrimination and notification requirements;
 - *Employees involved in Title IX grievance process* on obligations under regulations, grievance procedures, serving impartially, and relevance of evidence;
 - *Facilitators of informal resolutions* on rules associated with informal resolution process and serving impartially;
 - *Title IX Coordinators and designees* on responsibilities under regulations, recordkeeping, and anything else required to coordinate Title IX compliance.
- Training materials no longer need to be published online, but must be made available upon request

Pregnancy and Related Conditions

- Definition: § 106.2
- Pregnancy or related conditions means:
 - (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
 - (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
 - (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Pregnancy and Related Conditions

- Students: § 106.40
 - Must not discriminate against any student based on current, potential, or past pregnancy or related condition.
 - Must ensure that when a student or other person with a right to act on student's behalf informs an employee of a student's pregnancy, the employee provides the person with the Title IX Coordinator's contact information.
 - Title IX Coordinator must coordinate actions to prevent discrimination and ensure equal access, including reasonable modifications, voluntary leaves of absence.
 - Must inform the student of the obligations under these regulations.
 - Provide a clean, private lactation space for students.
 - Treat pregnancy or related conditions the same as other temporary medical conditions.

Pregnancy and Related Conditions

- Employees: § 106.57
 - Must not treat employees differently on the basis of parental, family, or marital status or because head of household.
 - Must not discriminate based on current, potential, or past pregnancy or related condition.
 - Must treat pregnancy or related conditions as temporary medical conditions for all job related purposes.
 - If employer does not have a leave policy for employees or for employees with insufficient accrued leave, must treat pregnancy or related conditions as grounds for a voluntary leave of absence without pay.
 - Must provide breaks to express breastmilk and a clean, private lactation space.



OPTIONS FOR IMPLEMENTATION

What about injunctions?

- Court proceedings are progressing, but unlikely to have any decisions until July (at earliest).
- Consider the process for policy approval – does your campus require approval from board? From administration?
- Consider including language about the effect of an injunction on the effective date of the policy.

Considerations

- How is your current process working for you?
- What process did you use before 2020 regulations?
- Are you able to staff your current process?
- Does your campus expect there to be a hearing?
- What challenges do you have with your current process?

Minimal Changes

- If your grievance process for Title IX sexual harassment is working well on your campus, you can largely keep the same process and make a few changes to bring it into compliance.
- Necessary changes:
 - New definition of sex-based harassment
 - Separate out employee on employee complaints
 - Appeal process for supportive measures
 - New definition/process for complaint
 - Preliminary assessment

Minimal Changes

- You may need more changes to your sex discrimination grievance process.
- Process must include:
 - Notice of allegations
 - Access to evidence (or description of evidence)
 - Decisionmaker assessing credibility
 - Appeal for dismissal
- Can use same process for other discrimination complaints as well

Other Changes to Consider

- If you are keeping a hearing process, do you want to continue to have questioning done by advisors?
 - Are you able to provide advisors when needed?
 - Has requiring advisors to do questioning been an impediment to recruiting advisors?

Change in Process

- If your current process is not working for your campus, you have the option to make larger changes.
- Single investigator model is allowed.
- Make sure to consider the questioning requirements:
 - Ask questions in individual meetings with parties/witnesses,
 - Allow parties to propose questions to be asked at the individual meetings,
 - Provide party with recording/transcript of meeting so the party can propose follow up questions
 - Again, this is likely to be a time-consuming process.

Other considerations

- Do you have a pregnant and parenting students policy?
- Do you have a lactation space that is accessible to students?
- Consider training for employees on how to refer students to Title IX if they report pregnancy.



Refreshment Break





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BEST PRACTICES AND TIPS FOR H-1B SITE VISITS AND IMMIGRATION HOT TOPICS

Presented by:

Melanie Gurley Keeney, Luke Phillips &
Calvin Bill

Date:

June 6 and 7, 2024

DIFFERENT
BY DESIGN

Which Employees are Subject to a Site Visit?

- H-1B nonimmigrant temporary employees:
 - Professors
 - Administrators
 - Researchers
 - Scholars
- And all other H-1B beneficiaries!

Who Conducts Site Visits?

- The U.S. Citizenship and Immigration Service’s (“USCIS”) **Fraud Detection and National Security Directorate** (“FDNS”) is the agency that conducts site visits.
- Site visits may occur at your main campus or at the campus where the H-1B employee is assigned.

What Happens on a Site Visit?

- FDNS Officers record their observations in a Compliance Review Report (“CRR”).
- The FDNS officer forwards the CRR to USCIS to review for indications of fraud or noncompliance.
- FDNS officers may refer their report directly to U.S. Immigration and Customs Enforcement (“ICE”) if they believe their findings warrant a criminal investigation.

Will You Receive Advance Notice of Site Visits?

- Typically, NO!
 - The University may receive an email, phone call, or other notification regarding a site visit or seeking information regarding a particular employee on a visa.
 - Whomever receives notification of the site visit or inquiry should immediately contact Legal and HR regarding the communication.

Will You Receive Advance Notice of Site Visits?

- When an FDNS officer arrives without notice, what should you do?
- Do Not Panic!
 - Site visits are fairly common.
 - Always contact Legal and HR immediately upon notice of a site visit.

Who Should be Informed about Site Visits?

- The University should educate receptionists, security, HR, and other public-facing employees about potential site visits and provide them with procedures.
- Designate a point person to represent the University during site visits.
 - This individual could be the person who typically signs visa petitions or someone on-site familiar with the visa process.

What to do when an FDNS Officer arrives for a site visit?

- Confirm the Identify of the FDNS Officer:
 - Most FDNS officers will present a badge or other identification credential.
 - Ask for a copy of the officer's card.
 - As part of preparing for site visits, confirm who will be calling the government to verify the officer's identity.

What to do when an FDNS Officer arrives for a site visit?

- Inform the appropriate personnel of the FDNS Officer's arrival.
- The officer will usually ask to meet with the signatory of the petition or another employee whom FDNS believes is an appropriate University representative.
- The receptionist (or other appropriate University official) should escort the officer to a conference room or other private area where they will meet with the designated University representative.

Who will the FDNS Officer Interview?

- The officer may ask to meet with the H-1B employee.
- If the FDNS officer requests to meet directly with the foreign national employee, the receptionist should state that such a meeting will be facilitated by the appropriate University official.
- Legal and HR should take responsibility to provide documentation to FDNS.
- The employee who receives the officer should state that policy requires that they be put them in contact with an appropriate University representative.

What do FDNS Officers Ask?

- **Remember**, only the designated University representative should answer substantive questions.
- Officers often focus their questions on the foreign national employee, such as:
 - the employee's credentials.
 - the employee's salary/rate of pay.
 - whether the employee is currently working or is on a leave of absence.
 - the employee's job title.
 - the employee's physical worksite location(s).
 - the employee's job duties.
 - the actual degree/experience requirements for the position

What do FDNS Officers Ask?

- Sometimes, the FDNS officer will ask questions about the University, such as:
 - the number of filed H-1B petitions and the number of H-1B employees on staff.
 - verification of the authenticity of the signature on the H-1B petition.
 - copies of the employee's W-2s and paystubs to verify employment and appropriate wage.

Should the Foreign National be Notified of the Site Inspection?

- **Yes** – The foreign national should be informed that FDNS conducts site visits.
- The University representative may ask the officer if they may remain with the employee during the interview.
 - If they are allowed to do so, that person should take notes of the questions/responses in the interview.

Should the Foreign National be Notified of the Site Inspection?

- Typical questions for the employee include:
 - duties and requirements of the position.
 - start date.
 - work location(s).
 - salary.
- The officer may also question the employee about their qualifications, including work experience and credentials.

What do I do if the FDNS Officer Asks to Tour the Campus?

- The officer may ask to tour the campus, the employee's department, or the employee's workspace.
- The officer should be accompanied at all times.
- The officer may ask to review certain documents, including a copy of the H-1B petition, the employee's paystubs, or the company's annual or financial reports.

What Documents Are Employers Required to Maintain?

- In preparation for site visits, employers should maintain accessible copies of all filed visa petitions.
- Maintain copies in a central location so that they are easily accessible to HR representatives.
- Universities with multiple campuses or facilities should consider keeping copies at their main campus as well as with a designated representative at the employee's worksite(s).
- Remember, officers can visit either the main campus and/or the employee's work location(s).

What Documents Are Employers Required to Maintain?

- What happens if the FDNS officer asks for documents that are not readily accessible or seems unusual?
- If the University representative does not know the answer to an officer's request, they should not "guess" and instead should advise the officer that they do not know and will need to verify the same with an appropriate official.
- Likewise, if the University representative is uncertain if they should release certain non-public school/employee information to the officer, it would be appropriate to politely ask that such request be referred to Legal.
- The University representative or Legal counsel will provide a supplemental response to FDNS after the site visit.



OTHER IMMIGRATION HOT TOPICS

Immigration Hot Topics

- Recent changes to I-9 and Remote Examination Policy
- Name, Image, and Likeness (NIL) for International Students
- USCIS Filing Fee Increases
- 2024 Presidential Election – What policies are up in the air?

Recent Changes to I-9

- The U.S. Department of Homeland Security (“DHS”) issued a new version of the I-9 in August 2023.
- The new I-9 reduced Sections 1 and 2 to a single sheet and relocated the Reverification and Rehire section to a separate “Supplement B” page.
- Only the new I-9 has been acceptable since November 1, 2023.
- Employers had until August 30, 2023 to physically inspect all I-9 documents that were previously examined remotely using the COVID-19 flexibilities.

I-9 Remote Examination

- DHS is now allowing for remote examination of I-9 documents for E-Verify employers.
 - Employers that are not enrolled in E-Verify must physically inspect all I-9 documents.
- Going forward, employers that utilize the remote examination procedure must examine I-9 documents by conducting a live video interaction with each new employee.
- These employers must retain clear and legible copies of all I-9 documentation (front and back, if two-sided).

I-9 Remote Examination

Employers should check the box to indicate use of the alternative procedure in the Additional Information field in Section 2 of the I-9.

Additional Information	
<input checked="" type="checkbox"/>	Check here if you used an alternative procedure authorized by DHS to examine documents.

Name, Image, and Likeness (NIL) - History and Background

- **June 21, 2021**: Supreme Court issues decision in National Collegiate Athletic Association v. Alston, 594 U.S. ____ (2021) which held that NCAA restrictions on athletes receiving compensation for their name, image, and likeness (NIL) was a violation of antitrust law.
- **July 13, 2021**: Missouri passes SS#2 HS HB 297.
 - Generally prohibits state institutions of higher education from limiting student athlete's ability to participate in NIL agreements and play sports at the school.

Name, Image, and Likeness (NIL) - History and Background

- **June 16, 2022**: Missouri passes HCS SB 718.
 - Coaches and other employees at state institutions of higher education can identify or assist student athletes in participating in NIL agreements.
- **July 6, 2023**: Missouri passes SS SCS HCS HB 417.
 - Missouri high school students who have signed in-state letters of intent can begin participating in NIL immediately.
 - State institutions of higher education must adopt a process for granting athletes a license to use the institution's unique identifiers when earning compensation from NIL.

Name, Image, and Likeness for International Students

- What about international students who have immigration related restrictions on their employment?
- Most international student athletes are in F-1 visa status.
 - F-1 status allows for:
 - part-time on-campus employment (full-time during school breaks)
 - Curricular Practical Training (internships, co-op programs, work-study)
 - Optional Practical Training
- Risk of Status Violations

Name, Image, and Likeness for International Students

- Alternative options:
 - Engage in traditional NIL activities ONLY while outside the United States:
 - Example: a commercial in the athlete's home country or doing a photo shoot while competing in a third country during preseason
- Be aware of tax implications in U.S.!

Name, Image, and Likeness for International Students

- P-1 visa (may only be available to athletes in larger revenue sports, focused on competitions only).
- O-1 visa (higher standard and poor adjudication trends, but less restrictive once granted).
- TPS (available only to nationals of designated countries).
- Pending asylum applicants
- Maybe -Create entrepreneurship program at the university that allows for CPT and OPT opportunities.

Name, Image, and Likeness for International Students

- Recent developments and trends:
 - U.S. Immigration and Customs Enforcement Agency (“ICE”) released a broadcast message on the same day the *Alston* decision was issued claiming they were “actively monitoring proposed federal and state legislation” and would provide updated guidance on how they affect international student athletes.
 - Several U.S. Senators have sent letters (March 2023 and April 2024) to the Secretary of DHS asking for the agency to provide updated guidance.
 - **But -Radio Silence!**

Name, Image, and Likeness for International Students

- May 23, 2024: NCAA and Power 5 conferences announced a \$2.8 billion settlement which will provide compensation to thousands of former student-athletes who were unable to profit from their NIL.
- Risks for international students?!

USCIS Filing Fee Increases

- Effective April 1, 2024
- For 501(c)(3) nonprofit entities (including institutions of higher education), filing fees did not change drastically.
- I-129 H-1B petition: **no increase**; filing fee remains **\$460**
- H-4 dependent: \$370 → **\$470**
- I-129 O-1 petition: \$460 → **\$530**

USCIS Filing Fee Increases

- I-130 petition: \$535 → **\$675**
- I-485 application: \$1,225 → **\$1,440**
- N-400 application: \$725 → **\$760**
- In February 2024, premium processing fees increased.
 - \$2,500 → **\$2,805** (H-1B, O, TN, I-140)
 - \$1,500 → **\$1,685** (F-1 OPT)

USCIS Filing Fee Increases

- Other changes of note in the new fee rule:
 - Premium processing timeframes were changed from calendar days to business days.
 - 15 business days for most classifications (H-1B, O, EB-1B, PERM EB-2/EB-3, etc.).
 - 30 business days for Form I-765 (i.e., F-1 OPT applications) and Form I-539.
 - 45 business days for NIW and EB-1C I-140 petitions.

2024 Presidential Election

- **Deference:**
 - In 2017, the Trump administration ceased giving deference to previous USCIS petition determinations, including H-1B and O-1 extension requests, rescinding a USCIS policy that had been in place since 2004.
 - During those four years, extension petitions were reviewed with the same level of scrutiny as initial petitions.
 - In 2021, the Biden administration restored the 2004 USCIS deference policy.
 - If elected to a second term, the Trump administration may once again take aim at the deference policy.

2024 Presidential Election

- **Deferred Action for Childhood Arrivals (DACA):**
 - President Trump announced in September 2017 that he was cancelling the DACA Executive Order, planning to phase out the protection in March 2018.
 - The cancellation of the DACA program was put on hold by a court order, and the U.S. Supreme Court ruled in June 2020 that the Trump administration's decision to end DACA was arbitrary and violated the Administrative Procedure Act.
 - DACA remains a highly contested and litigated issue, and a second Trump administration would likely attempt to end the program yet again.



QUESTIONS???



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Speech on Campus

Presented by:

Kate L. Nash

Sarah P. McConnell and Patrick Simon

Date:

June 6-7, 2024

DIFFERENT
BY DESIGN

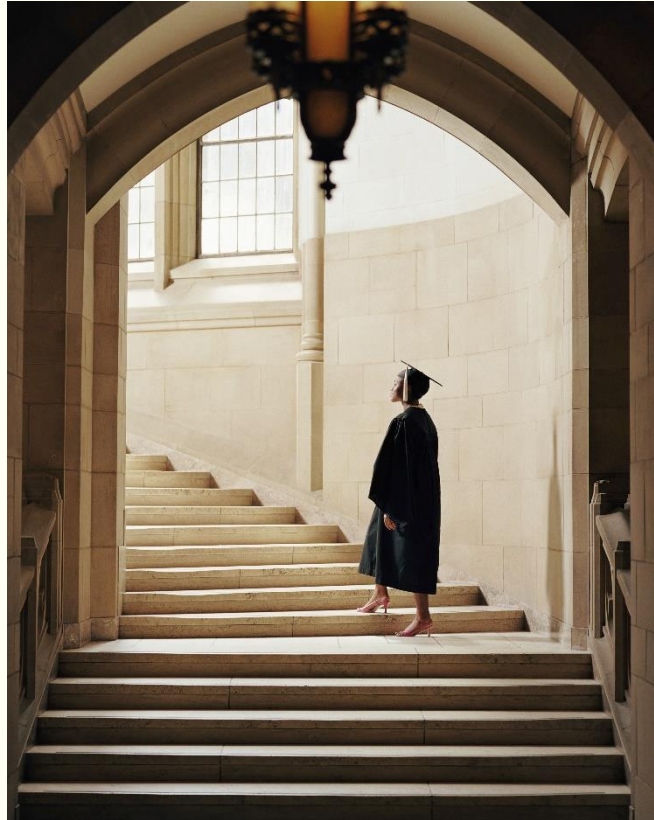


Today's Agenda

- ✓ Quick reminder – sources of law
- ✓ Issues related to “institutional” speech
- ✓ Review foundational legal principles regarding campus speech rights with focus on:
 - Student speech rights and limits; and
 - Employee speech rights and limits
- ✓ Practical guidance

Sources of Law and Guidance

- For Private Institutions:
 - Federal and state laws and regulations
 - Case law
 - Institutional policies
- For Public Institutions:
 - All of the above PLUS
 - United States Constitution
 - State Constitutions



Institutional Speech Issues

Prohibition Against Institutional Participation - Privates

(3) Corporations. . . organized and operated exclusively for . . . *educational purposes*. . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*

26 U.S.C. § 501(c)

Prohibition Against Institutional Participation - Publics

- For publics – similar restrictions that generally prohibit use of taxpayer dollars for campaigns
 - No endorsements
 - Non-partisan/non-advocacy education allowed

Institutional “Voice”

When do institutional prohibitions come into play?

- Invitations to political candidates to speak on campus? In classrooms?
- Endorsements by institutional officials? Faculty? Staff?
- Institutional statements commenting on current events? (Institutional neutrality?)

What are the Rights of Individuals *Within* the Institution?

First Amendment – Reminder!

- The First Amendment usually only applies to state/public universities – where the government is acting to regulate speech – but private institutions may, and often do, import free speech ideals into their campus cultures.

First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances.”

Guiding Principles

- Courts interpreting the First Amendment:
 - Permit reasonable restrictions on the time, place, and manner of speech
 - Require neutrality by the government with regard to the content of speech
 - Distinguish between places where speech occurs – public spaces, spaces with limited access, and non-public spaces
 - Require tailoring of restrictions to legitimate institutional needs

Key Questions

- Is it “speech”?
- If so, who is the speaker? (i.e., student, employee, third party)
- What is the context? (location, timing, in-class)
- What is the speech about? (personal grievance or matter of public concern?)

Is it “speech”?



Guiding Principles

- Speech is not limited to just words – it includes the “fact of communication.”
- Speech includes, but is not limited to: what you wear, read, say, paint, perform, believe, protest, or even silently resist; activities can include leafleting, picketing, symbolic acts, wearing armbands, demonstrations, speeches, forums, concerts, motion pictures, stage performances, remaining silent, etc.

What is not protected?

- True Threats
- Fighting Words



Context/Location

- In a classroom?
- Outside on campus property?
 - Can anyone come to campus? For publics in Missouri, remember the Campus Free Expression Act!
- Social media?

Campus Free Expression Act

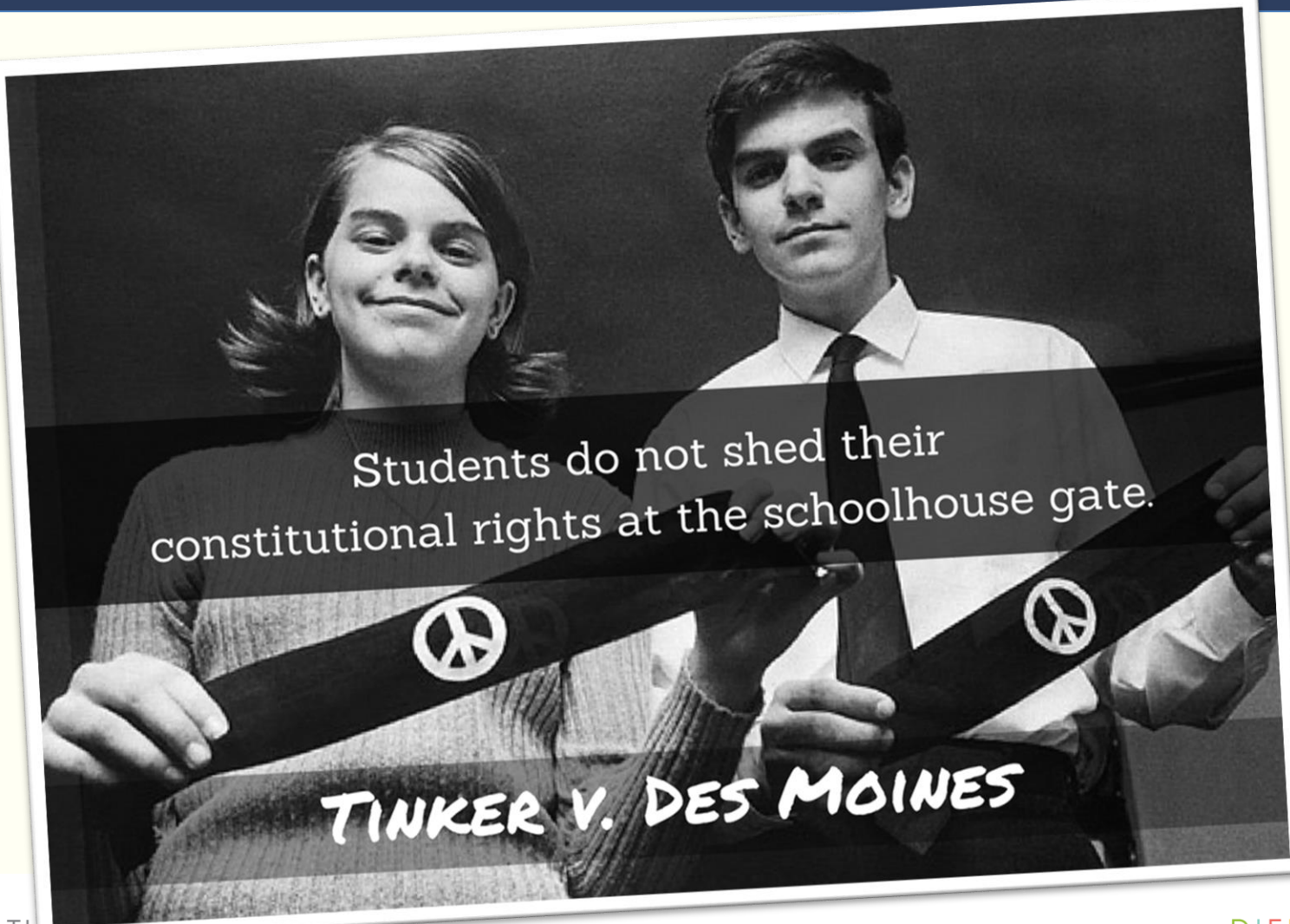
- In Missouri, outdoor areas at public institutions of higher education “shall be deemed traditional public forums”
- “Public institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content, and viewpoint-neutral criteria, and provide for ample alternative means of expression. Any such restrictions shall allow for members of the university community to spontaneously and contemporaneously assemble.”

Who is the speaker?





Student Speech



Students do not shed their constitutional rights at the schoolhouse gate.

TINKER V. DES MOINES



Tinker vs. Des Moines Indep. Cmty. Sch. Dist. (1969)

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

Tinker

“...the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental safeguards, to prescribe and control conduct in the schools.”

Tinker

- When can school/college officials regulate student speech?
- *Tinker* test: Does the speech cause material or substantial:
 - *Disruption* or
 - *Invasion of the rights of others*
- School/college officials must provide some evidence of disruption – not just speculation.

Healy v. James (1972)

- College president denied recognition to students attempting to form an independent chapter of SDS on campus
- Court's commentary: "...we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process."

Social Context



April, 1969



May, 1970

Healy

“A climate of unrest prevailed on many college campuses in this country. There had been widespread civil disobedience on some campuses, accompanied by the seizure of buildings, vandalism, and arson. Some colleges had been shut down altogether, while at others files were looted and manuscripts destroyed.”

Healy

“There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.”

Healy

“Associational activities need not be tolerated where they *infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.*”

Healy

“The College... may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”

Papish v. Bd. of Curators of Univ. of Missouri (1973)

- Grad student was expelled after distributing independent student newspapers that displayed foul language and a provocative/controversial political cartoon.
- Supreme Court held “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name along of ‘conventions of decency.’”



Employee Speech

Employee Speech - Issues

- *Generally*, public employees acting in their official capacities do not enjoy First Amendment protections
 - What about faculty and academic freedom?
- As private citizens, public employees enjoy First Amendment protections regarding “matters of public concern”

Freedom of Speech – Public Concern

Pickering v. Board of Education, 391 U.S. 563 (1968)

- Public employees have a First Amendment right to speak on **matters of “public concern”**
- Balancing Test



Freedom of Speech – Public Concern

Connick v. Myers, 461 U.S. 138 (1983)

- To determine whether an employee’s speech is a matter of public concern, courts examine the “**content, form, and context**” of a given statement



Freedom of Speech – Official Duty Speech

- *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
 - First Amendment protections do not apply when the employee is speaking pursuant to his or her **official duties**
- Some courts have applied this rule to teachers, but the *Garcetti* court specifically held that question open

First Amendment Analysis

Step One. Is the employee speaking as a citizen or pursuant to official duties?

- For employee to be speaking as a private citizen, speech itself cannot have been made in the course of the employee's ordinary duties.
- Does the speech relate to the employee's job duties?
- Was the speech made on or off duty?
- "Chain of command speech," speech made by an employee to his superiors, is typically "employee" speech.

First Amendment Analysis

Step Two. Is the speech relating to an issue of public concern based on content, form, and context? Or, is the speech related to the employee's private concern?

- *Connick* – touches on aspects of “political, social, or other concern in the community”
- Personal issues and grievances do not typically constitute issues of public concern
- Focus on identifying speech that may implicate broader public issues and current events

First Amendment Analysis

Step Three. If the speech is “protected,” balance the employee’s interests against those of the institution.

- Do the interests of the employee as a private citizen in commenting on matters of public concern outweigh the interests of the public employer in promoting the efficiency of the public services it performs?

First Amendment – Balancing Analysis

Considerations:

- Need for harmony in the workplace;
- Whether the government’s responsibilities require a close working relationship to exist between the employee and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
- Time, manner, and place of the speech;
- Context in which the speech arose;
- Degree of public interest in the speech;
- Whether the speech impeded the employee’s ability to perform his or her duties

Practical Considerations

- Consider being proactive, to the extent possible:
 - Consider institutional policies about how/whether the institution makes statements and how it responds to speech of its community.
 - While public institution outdoor spaces are public forums, private have more latitude in how they treat their open spaces.
 - Training or other activities that can help the campus community understand rights, limitations, and expectations regarding speech.

Practical Considerations

- When considering disciplining *students*, remember:
 - For public institutions, offensive/controversial speech by students is likely protected speech.
 - For private institutions, consider the speech at issue in the context of your policies.
- Identify nexus to educational environment.
- Document current environment to justify determination that substantial disruption is reasonable likelihood.
- Consider options for addressing the behavior – is discipline appropriate? Or something else?

Practical Considerations

- When disciplining **employees**, consider whether the employee has engaged in protected activity or protected speech.
- Carefully consider the impact of the speech on the operations and/or mission of the institution.
- Document reasons for taking action.
- Don't let your personal beliefs influence your decision.
- Be consistent.
- Seek help, if in doubt!

Practical Considerations

- In all situations -
- Document reasons for taking action.
- Don't let your personal beliefs influence your decision.
- Be consistent.
- Seek help, if in doubt!

QUESTIONS???





TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.



Employment Law Update

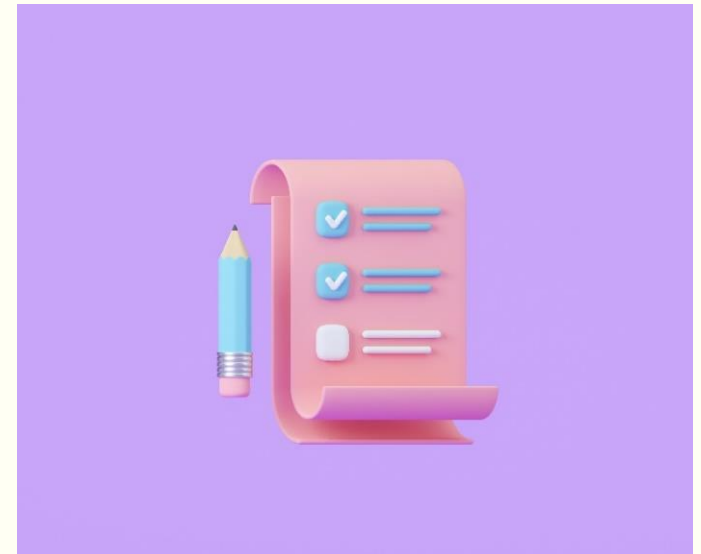
Presented by:
Mollie G. Mohan
Veronica E. Potter

Date:
June 6 and 7, 2024

DIFFERENT
BY DESIGN

Agenda

- Pregnant Workers Fairness Act
Final Regulations
- EEOC Harassment Enforcement
Guidance
- Missouri harassment decisions
- Best practices

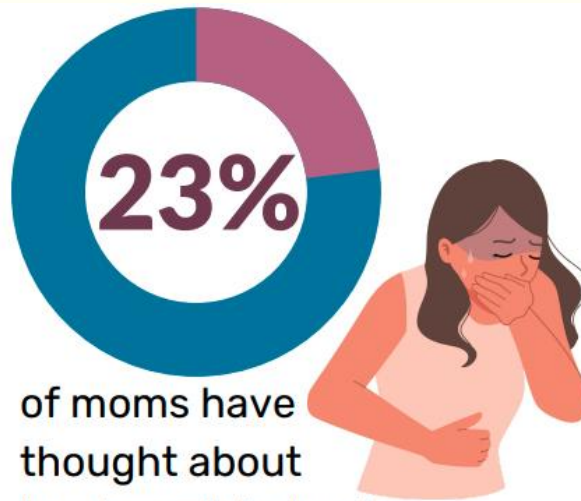


Pregnant Workers Fairness Act



of working women will become pregnant while employed at some time in their lives.

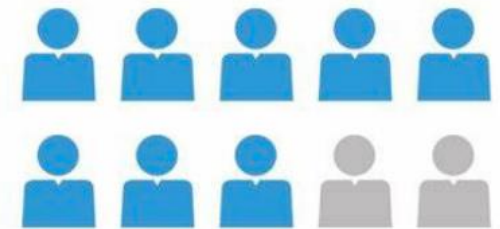
SOURCE: US Census Bureau, Maternity Leave and Employment Patterns: 1961-2008, 2011



of moms have thought about leaving a job due to a lack of reasonable accommodation or fear of discrimination from an employer during pregnancy, according to one survey.

SOURCE: Bipartisan Policy Center: Morning Consult Poll, February 11, 2022

8 IN 10



first-time pregnant women work until their final month of pregnancy.

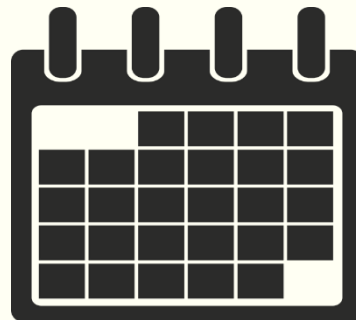
SOURCE: U.S. Congress, Pregnant Workers Fairness Act, 2021, www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf

Pregnant Workers Fairness Act

- Signed December 2022, went into effect June 27, 2023
- Requires employer to provide reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related medical conditions UNLESS doing so would be an undue hardship
- Applies to all Title VII employers (15+ employees)
- Damages = Title VII (compensatory, punitive, attorney's fees)

Regulations

- 29 CFR Part 1636
- EEOC issued a notice of proposed rule making on August 11, 2023.
- Final rule was published on April 19, 2024.
- Regulations go into effect 60 days after publication of the rule – June 18, 2024



Known Limitation

- Known = communicated to the employer (to supervisor/manager or to HR)
- Limitation = physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,
 - May be modest, minor, and/or episodic.
 - May be that an employee has a need or a problem related to maintaining their health or the health of the pregnancy.
 - Includes seeking health care related to pregnancy, childbirth, or a related medical condition itself.
 - Does not have to meet the definition of disability specified in the ADA

Pregnancy, Childbirth, and Related Conditions

- *Pregnancy, childbirth, or related medical conditions.* “Pregnancy” and “childbirth” refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current **pregnancy**; **past pregnancy**; potential or intended pregnancy (which can include infertility, **fertility treatment**, and the use of contraception); **labor**; and **childbirth** (including vaginal and cesarean delivery).

Non-Exhaustive List of Related Conditions

- Termination of pregnancy (including by abortion);
- Preterm labor;
- Gestational diabetes;
- Hyperemesis gravidarum;
- Nausea or vomiting;
- High blood pressure;
- Carpal tunnel syndrome;
- Chronic migraines;
- Frequent urination;
- Infection;
- Nerve injury;
- Vision changes;
- Edema;
- Ectopic pregnancy;
- Antenatal (during pregnancy) anxiety, depression, or psychosis;
- Postpartum depression, anxiety, or psychosis, and more.

Reasonable Accommodation

- Similar process to ADA
- Modifications or adjustments to job application process or work environment
- To enable a qualified employee to perform essential functions of the position
- To request only requires communicating need for adjustment or change – does not require any “magic words”
- Requires interactive process
- Can include temporary suspension of the essential functions

Reasonable Accommodations

- Examples of reasonable accommodations:
 - Job restructuring
 - Modified work schedules/ more frequent breaks
 - Acquisition or modification of equipment, uniform, or devices
 - Light duty or sitting
 - Paid and unpaid leave (up to 40 weeks!!)
 - Telework/WFH
 - Temporarily suspending the requirement to perform one or more essential functions

Reasonable Accommodations

- Includes reasonable accommodations for lactation
- Breaks to express breastmilk
- Lactation space
- Don't forget about the PUMP Act and state laws

Undue hardship

- Significant difficulty or expense, considering the following factors:
 - Nature and cost of accommodation,
 - Financial resources of the facility and overall employer,
 - Type of operation of the employer,
 - Impact of the accommodation on the operation of the facility.

Undue Hardship - Leave

- Employer is allowed to take into account leave already taken
- Factors from EEOC
- Leave typically means holding a position open (but employer can consider alternatives if undue hardship analysis requires)
- Indefinite/indeterminate leave???

Temporary Suspension of Essential Function

- If employee is a “qualified employee” and needs one or more essential functions temporarily suspended, the employer must make the accommodation unless it would impose undue hardship.
- Can consider:
 - Length of time for suspension of essential function
 - Whether there is other work for the employee to do
 - Nature/frequency of the essential functions
 - Have other employees had the essential function temporarily suspended
 - Can other employees, temps, or third parties perform the function
 - Can the essential function be postponed or unperformed

Supporting Documentation

- Can only request supporting documentation when it is reasonable. Not reasonable if:
 - Need is obvious (like larger uniform),
 - Employer already has information needed to determine whether employee has a limitation and needs accommodation,
 - Request is for access to water, additional restroom breaks, ability to sit/stand as needed, breaks to eat/drink,
 - Accommodations are for pumping/nursing at work,
 - Accommodation is available to others without supporting documentation.
- Only request minimum needed documentation.

Examples

- Two months into a pregnancy, Lydia, a delivery driver, is told by her health care provider that she should adhere to clinical guidelines for lifting during pregnancy, which means she should not continue to lift 30-40 pounds, which she routinely did at work when moving packages as part of the job. She discusses the limitation with her employer. The employer is unable to provide Lydia with assistance in lifting packages, and Lydia requests placement in the employer's light duty program, which is used for drivers who have on-the-job injuries.

Examples

- Tamara's position at a retail establishment involves working as a cashier and folding and putting away clothing. In her final trimester of pregnancy, Tamara develops carpal tunnel syndrome that makes gripping objects and buttoning clothing difficult. Tamara seeks the temporary suspension of the essential functions of folding and putting away clothing. The employer provides the accommodation and temporarily assigns Tamara to greeting and assisting customers, tasks that cashiers are normally assigned to on a rotating basis. When she returns to work after she gives birth, Tamara continues to experience carpal tunnel symptoms, which her doctor believes will cease in approximately 16 weeks.

Examples

- Avery works as an administrative assistant and is pregnant. Avery normally works in the office and commutes by driving and public transportation. Due to pregnancy, Avery is experiencing sciatica; commuting is painful because it requires Avery to sit and stand in one position for an extended period of time. Avery seeks the accommodation of teleworking or changing the start and end time of the workday in order to commute during less crowded times and reduce the commute time and thereby reduce the pain.

Best practices in handling accommodation requests

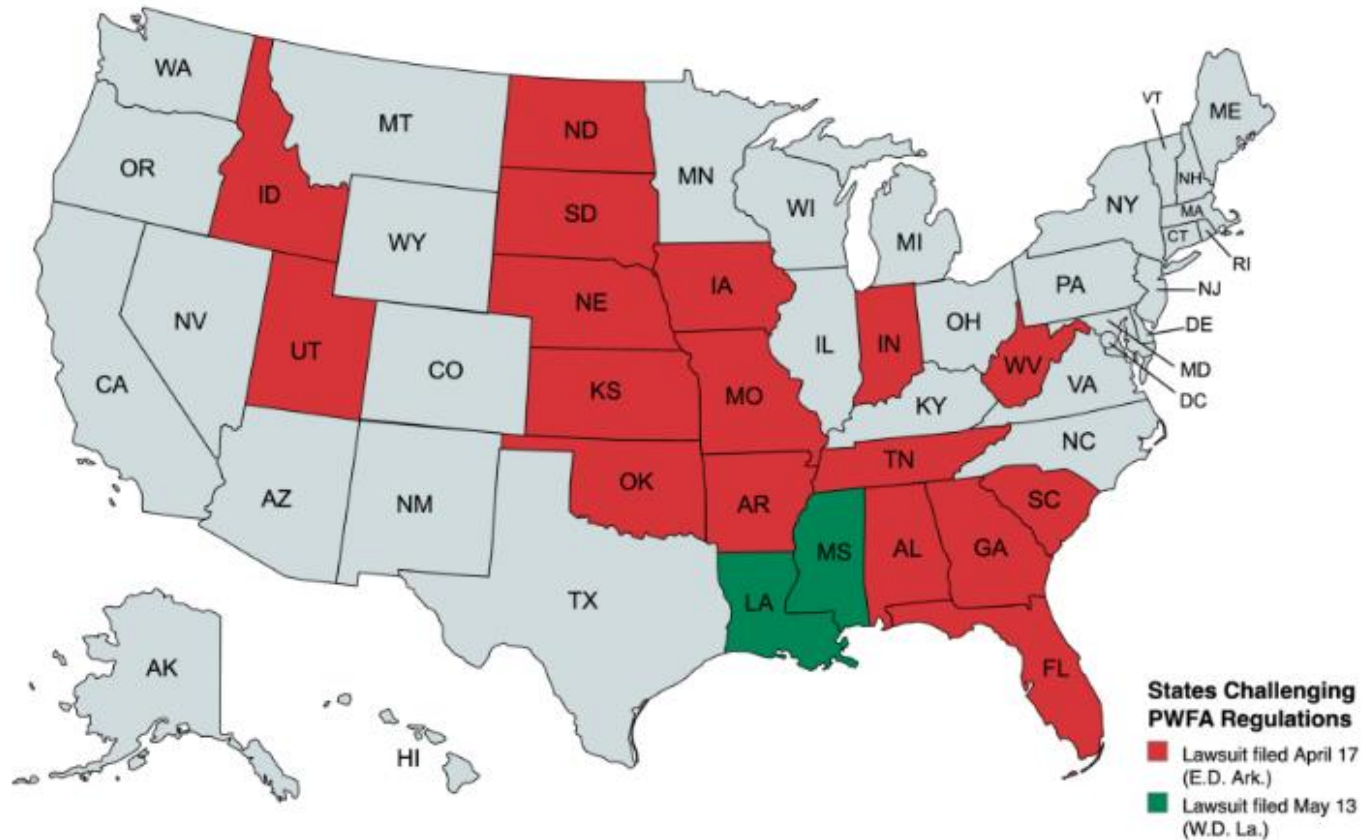
- Comprehensive accommodation request **policy**
- Comprehensive interactive process with **documentation** of each step
- Fully and regularly **train** all supervisory employees about what to do if they receive a request
- Fully and regularly **train** all decisionmakers about the policy and process
- Ensure **consistency** in both process and results and support by data

Challenge to Regulations

- Regulations are being challenged by Republican attorneys general challenging the scope of regulations and seeking to enjoin implementation.
- Primary objection is requiring accommodations for abortions.
- Claim the regulation infringes on the sovereignty of the States where States have banned abortion.



Challenge to Regulation



Challenge to Regulation



EEOC Harassment Guidance

- Proposed October 2nd, comment period closed November 1st
- Final guidance issued April 29th
- EEOC updated guidance to reflect “notable changes in law, including the Supreme Court’s decision in *Bostock v. Clayton County*, the #MeToo movement, and emerging issues, such as virtual or online harassment”

EEOC Harassment Guidance

- Harassment must be based on “legally protected characteristic”
 - Race
 - Color
 - National Origin
 - Religion
 - Age
 - Disability
 - Genetic Information

EEOC Harassment Guidance

- Harassment must be based on “legally protected characteristic”
 - Sex
 - Includes pregnancy or related medical conditions, including lactation, contraception, and abortion
 - Includes sexual orientation and gender identity*
 - Perceived protected class
 - Associational harassment

EEOC Harassment Guidance

- Harassment must be based on “legally protected characteristic”
 - Harassment from same protected class
 - Intersectional harassment
- Also, not a characteristic, but also cannot engage in harassment based on protected activity aka retaliation

EEOC Harassment Guidance

- Types of harassment
 - Quid pro quo
 - Impact to terms and conditions of employment
 - Must involve a change to the victim's employment
 - OR
 - Create a hostile work environment
 - Must be severe or pervasive
 - Objective and subjective hostile work environment

EEOC Harassment Guidance

- Examples of harassment
 - Physical or sexual assaults or threats
 - Offensive jokes, slurs, epithets, or name-calling
 - Intimidation, bullying, ridicule, mockery, insults, ostracisms
 - Offensive objects or pictures
 - Interference with work performance

EEOC Harassment Guidance

- Examples of harassment
 - Saying or writing an ethnic, racial, or sex-based slur
 - Forwarding an offensive or derogatory “joke” email
 - Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti)
 - Threatening or intimidating a person because of the person’s religious beliefs or lack of religious beliefs
 - Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos

EEOC Harassment Guidance

- Examples of harassment
 - Making comments based on stereotypes about older workers
 - Mimicking a person's disability
 - Mocking a person's accent
 - Making fun of a person's religious garments, jewelry, or displays
 - Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts
 - Groping, touching, or otherwise physically assaulting a person

EEOC Harassment Guidance

- Examples of harassment
 - Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim
 - Threatening a person's job or offering preferential treatment in exchange for sexual favors

EEOC Harassment Guidance

Highlights

- Stereotyping
 - Harassment “based on class-based assumptions”
 - Example: Harassing “feminine” male employee who does “not conform to traditional male stereotypes”
 - Example: Accusing Black employees of being “drug dealers” or committing crimes

EEOC Harassment Guidance

Highlights

- Sex discrimination includes discrimination/harassment based on sexual orientation and gender identity
- Includes:
 - Physical assaults
 - Epithets
 - Outing coworker
 - Misgendering
 - Denial of access to a bathroom or other sex-segregated facility consistent with gender identity

EEOC Harassment Guidance

Highlights

- Sex discrimination includes discrimination/harassment based on pregnancy, childbirth, contraception, or related medical conditions
 - INCLUDING reproductive decisions like “using or not using contraception” and “deciding to have, or not to have, an abortion”

EEOC Harassment Guidance

Highlights

- Mistaken identity harassment
 - Example: “[H]arassment of a Sikh man wearing a turban because the harasser mistakenly thinks he is Muslim is religious harassment.”
- Associational discrimination/harassment – harassing someone because he/she/they associates with someone in a protected class
 - Example: Harassing white employee for being married to a person of color.
- Harassment based on social/cultural expectations
 - Example: Harassing or discriminating against employee based on assumptions regarding “family responsibilities, suitability for leadership roles, or sex roles.”

EEOC Harassment Guidance

Highlights

- Harassment not directed at employee
 - Example: Cubicle style office environment, coworkers in surrounding cubicles “frequently make derogatory comments about gay men and lesbians.” Gay employee who overhears comments “on a regular basis and is offended by them” is being harassed based on sexual orientation.

EEOC Harassment Guidance

Highlights

- Harassment outside of work (“work-related context”)
 - Example: Supervisor “drinks to excess and attempts to grope and kiss” employee at off-site, off-hours holiday party.
 - Example: Coworkers post derogatory picture on social media of coworker “juxtaposed with an image of the fictional ape Cornelius from the movie *The Planet of the Apes*, along with text explicitly comparing [coworker] to Cornelius.”


EEOC Harassment Guidance

Highlights

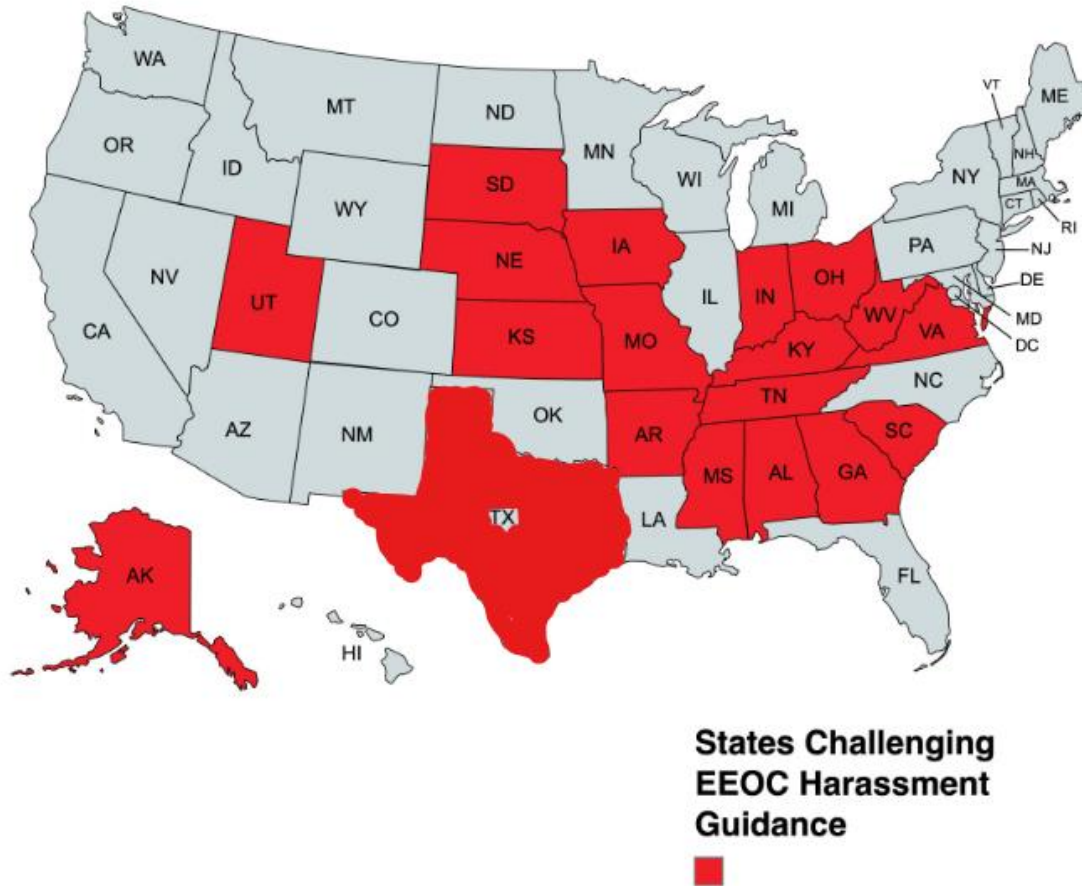
- Pattern or practice (aka systemic harassment or disparate impact harassment)
 - Example: Female employees frequently subjected to invasive conduct by male coworkers, including improper touching, comments, open displays of sexually offensive materials

EEOC Harassment Guidance

Highlights

- Pattern or practice (aka systemic harassment or disparate impact harassment)
 -  State/Federal split
 - While federal law permits pattern/practice and disparate impact claims, open question as to whether such claims are permitted under MHRA
 - See *Gill v. City of St. Peters*, 641 S.W.3d 733, 742 (Mo. App. E.D. 2022) (“Neither of the cases cited by Gill, nor any other Missouri law we can find, recognizes a disparate impact claim under the MHRA.”)
 - See *Cox v. Kansas City Chiefs*, 473 S.W.3d 107, 117 (Mo. 2015) (“[T]his Court has not even addressed whether Missouri law permits pattern-or-practice claims.”)

Challenge to Guidance



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Challenge to Guidance

- On May 3, 2024, 18 states filed challenge in Eastern District of Tennessee
- Texas AG also filed a request to invalidate in Texas
- Both accuse EEOC of using guidance “to extend Title VII’s protections against sex-based harassment to new contexts related to gender identity.”
- “An exemplar of recent federal agency efforts to enshrine sweeping gender-identity mandates without congressional consent.”

Challenge to Guidance

- Take issue with EEOC's interpretation of Supreme Court's 2020 *Bostock* decision
- In *Bostock v. Clayton County*, Supreme Court held that terminating employee “simply for being homosexual or transgender” was violation of Title VII
- Court expressly held that it did **not** “purport to address bathrooms, locker rooms, or anything else of the kind.”

Challenge to Guidance

- EEOC addressed this in guidance
- Said that, while Supreme Court did not address those issues, held that discrimination on basis of gender identity or sexual orientation was illegal.
- Accordingly, not allowed to harass employees based on these classes either, which includes discriminatory changes to terms and conditions of employment.
- Pointed to federal decisions finding that misgendering and restricting access to bathrooms could constitute harassment.

Challenge to Guidance

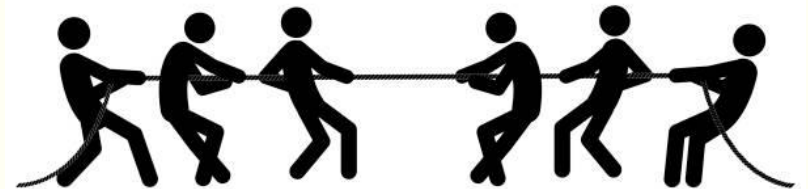
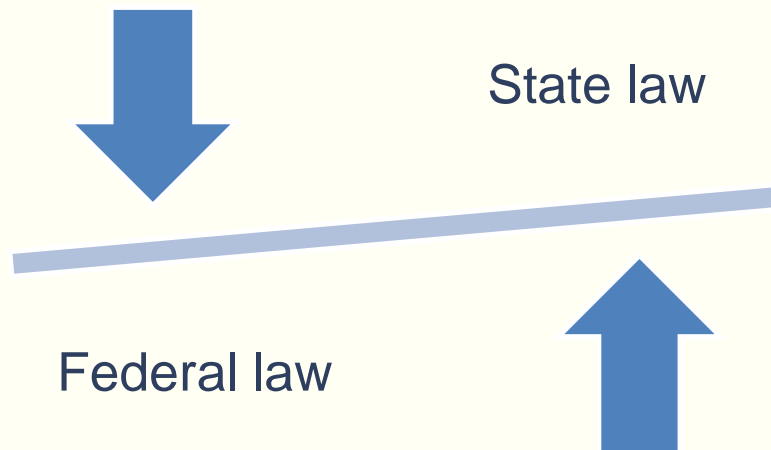
- Why Tennessee?
- In 2021, EEOC put out guidance related to “Protection Against Employment Discrimination Based on Sexual Orientation or Gender Identity”
- States sued, on similar grounds, and also challenged failure to go through notice and comment
- Tennessee granted injunction, finding that notice and comment was required (Texas came to similar conclusion in parallel challenge)
- So → EEOC went through notice and comment for this guidance

Challenge to Guidance



Recent Harassment Cases

- Recent Missouri appellate decisions regarding harassment
- Moving more toward federal standard



Harassment Cases

- *Bracely-Mosley v. Hunter Engineering Co.*, 662 S.W.3d 806 (Mo. App. E.D. 2023)
 - Male coworker “swiped” employee’s behind with cardboard box
 - Employee complained to supervisor, who banned coworker from employee’s work area
 - Year later, coworker was at workstation and “stood with his hand cupped near employee’s left breast”
 - Employee jumped back and said, “Don’t touch me.”
 - Coworker texted employee later and said, “Go home, get some sleep, and you need to stop watching porn.”
 - Employee again notified supervisor
 - HR investigated, found sexual harassment, suspended coworker

Harassment Cases

- *Bracely-Mosley v. Hunter Engineering Co.*, 662 S.W.3d 806 (Mo. App. E.D. 2023)
 - Summary judgment upheld
 - “Harassing conduct must be so intimidating, offensive, or hostile that it poisoned the work environment and that the workplace was permeated with discriminatory intimidation, ridicule, and insult.”
 - Cumulative effect of day-to-day events
 - Must be subjectively and objectively hostile

Harassment Cases

- *Matthews v. Harley-Davison*, 685 S.W.3d 360 (Mo. 2024)
 - Harley contracted with Syncreon to provide workers in plant
 - Most of Harley's employees were white, 90% of Syncreon's employees were Black
 - Syncreon hired a white supervisor who had previously been fired by Harley for race discrimination
 - Segregated by race – line Syncreon employees could not cross
 - Segregated bathrooms
 - Nooses, dolls hanging by noose, swastika, and racist graffiti (with n-word) found in bathrooms
 - Assault on Syncreon employee by male coworker, told to get back to work
 - Family photo with Confederate flags making racist hand gestures – again brushed off

Harassment Cases

- *Matthews v. Harley-Davidson*, 685 S.W.3d 360 (Mo. 2024)
 - Reversed dismissal of motion to dismiss
 - Noted that establishing harassment “must be severe and pervasive enough to create a hostile or abusive working environment as viewed subjectively by the claimant and as viewed objectively by a reasonable person.”
 - Allegations that all Black employees were targeted or preyed on
 - Thus, employees did not need to allege they personally witnessed or experienced incidents
 - Sufficient allegation they were “subjected to” unwelcome harassment

Harassment Cases

- *Shiffman v. Kansas City Royals*, 687 S.W.3d 443 (Mo. App. W.D. 2024)
 - In meeting, discussing obtaining Jewish Community Center’s consent to use logo
 - Coworker said, “Shifty, aren’t you a Jew?” and then indicated he was “having a problem with those people,” in reference to obtaining their logo consent
 - Court upheld summary judgment
 - Noted that standard to prove harassment is “demanding.”
 - One comment “may have resulted in an uncomfortable meeting,” but was not an abusive working environment

Harassment Cases

- *Young v. DOC*, 2024 WL 1392397 (Mo. App. W.D. 2024)
 - Liberian woman, male supervisor made comments that her “ethnic food smelled weird”
 - Supervisor would countermand her scheduling decisions and instructions to subordinates
 - HR investigated and suspended supervisor without pay for 3 days
 - Approx. 6 months later, a different coworker made comment to another coworker about Young
 - Fat a*s c**t
 - Heard about it later that day

Harassment Cases

- *Young v. DOC*, 2024 WL 1392397 (Mo. App. W.D. 2024)
 - Reversed jury verdict
 - Harassment claim was based on one comment
 - Found that comment was “undeniably offensive and inappropriate in the workplace”
 - But that “this single comment was not objectively sufficiently severe or pervasive that it altered the conditions of Young's employment, or created an abusive working environment.”

Harassment: Best Practices

- Update policies
- Effective policies (according to the EEOC):
 - Defines what conduct is prohibited
 - Widely disseminated
 - Comprehensible/easy to understand
 - Contains anti-retaliation and confidentiality protections

Harassment: Best Practices

- Effective policies (according to the EEOC):
 - Requirement that supervisors report harassment
 - Multiple avenues to report harassment
 - Should not require employee to use “chain of command”
 - Should have multiple points of contact
 - Include detailed complaint, investigation, and resolution process

Harassment: Best Practices

- Train all employees
 - Not enough to train supervisors
- Investigate all complaints
 - Consistency
 - Documentation
- Take reasonable steps to prevent and promptly correct harassment
 - Effective policy and procedure regarding harassment
 - Prompt corrective action upon notice of harassment

QUESTIONS???



THANK YOU FOR ATTENDING THE 2024 TUETH KEENEY HIGHER EDUCATION SEMINAR

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