

WPI Labor Day Report

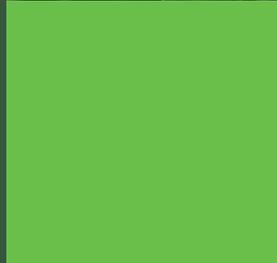
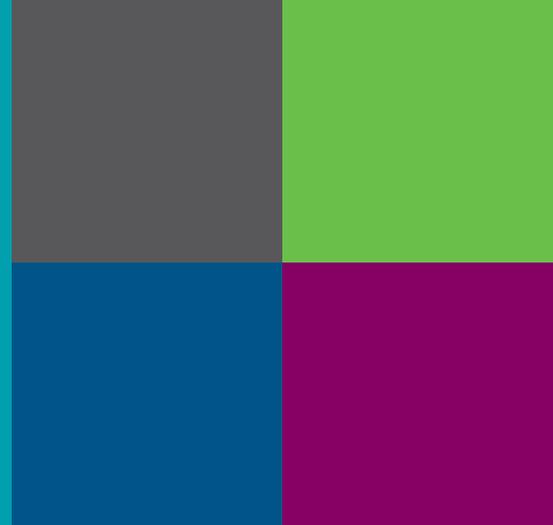
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Drawing on deep relationships with government officials and industry associations, WPI works on behalf of employers to influence the laws, regulations and policies that have critical implications on their operations and future growth. We collaborate with business leaders and trade associations to not only navigate real-time changes in labor and employment law, but to address their most pressing business issues and impact the legislation of tomorrow.

WPI serves as a strong voice for employers and their workplaces. By harnessing Littler's global depth of knowledge and expansive resources for tracking emerging issues that affect the workplace, WPI brings employers' interests to the forefront of today's rapidly evolving regulatory landscape, rising above the noise of partisan politics.

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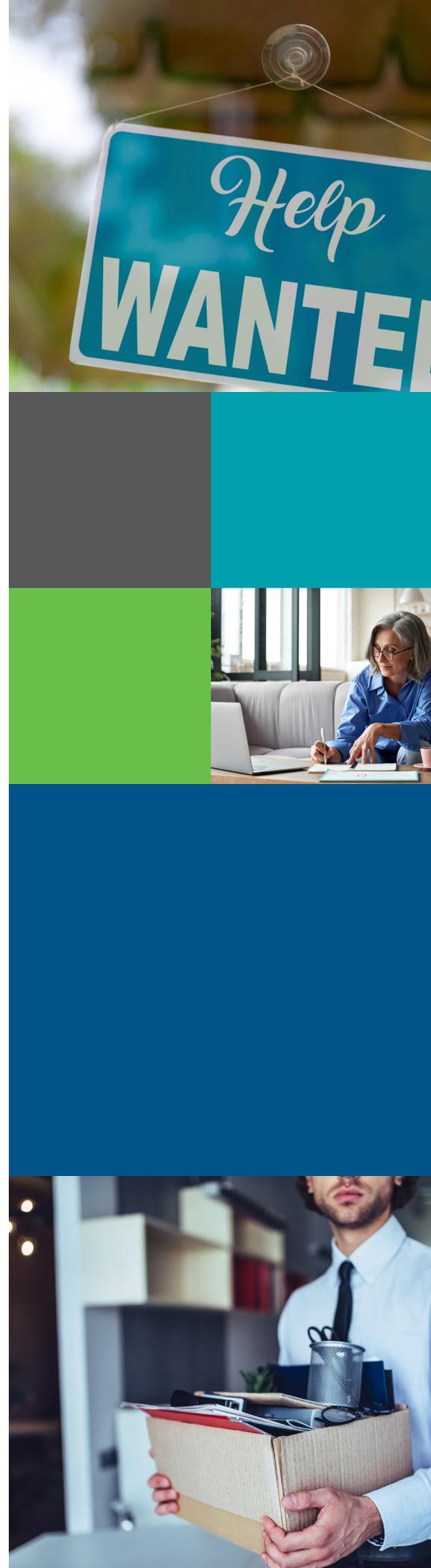
I. Introduction

The post-pandemic labor market remains tight, although there are signs of its loosening. For much of the past year, there were approximately two job openings per unemployed individual,¹ but in July that ratio fell to 1.5 job openings.² This labor supply and demand gap has, in some industries, helped shift the balance of power from employers to workers, contributing to increased union organizing efforts³ and notable strike activity,⁴ even while the overall union membership rate continues to decline.⁵ “Loud quitting” is gaining on “quiet quitting” as workers become more actively than passively disengaged at work.⁶ At the same time, the rates at which employers are hiring and employees are leaving their jobs have decreased slightly in recent months, indicating employees may be becoming more cautious about their employment decisions, and the balance of labor market power might be gravitating back to employers.⁷

While the pandemic and its after-effects certainly played a role in the tight labor market, underlying demographic and policy shifts were already underway. The aging workforce has and will continue to impact hiring and decrease labor force participation rates. In addition, declining immigration has reduced the aggregate labor supply.⁸

Effectively addressing these and other workforce issues has been challenging. Congressional gridlock at the federal level means that many significant labor and employment changes are occurring through state

- 1 See [Economic Report of the President](#), Annual Report of the Council of Economic Advisors, p. 183 (Mar. 2023).
- 2 U.S. Bureau of Statistics, News Release, [Job Openings and Labor Turnover – July 2023](#) (Aug. 29, 2023).
- 3 See, e.g., Mitchell Hartman, [Workers are staging more labor actions, thanks in part to the strong job market](#), Marketplace (Feb. 23, 2023); National Labor Relations Board, News Release, [Unfair Labor Practices Charge Filings Up 16%, Union Petitions Remain Up in Fiscal Year 2023](#) (Apr. 7, 2023) (in FY 2022, 2,510 union representation petitions were filed, up 53% from the 1,638 petitions filed the prior fiscal year).
- 4 In 2022, the number of individuals involved in major work stoppages increased nearly 50% over the prior year. See U.S. Bureau of Labor Statistics, Economic News Release, [Work Stoppages Summary](#) (Feb. 22, 2023). Note that the BLS data includes only “major” work stoppages, defined as those involving 1,000 or more workers that last at least a full work shift. The majority (58%) of private-sector workers are employed by businesses with fewer than 1,000 employees.
- 5 U.S. Bureau of Labor Statistics, Economic News Release, [Union Members Summary](#) (Jan. 19, 2023).
- 6 Gallup, [State of the Global Workplace: 2023 Report](#). Of the 122,415 workers surveyed, 59% are quiet quitting—i.e., putting in minimal effort at work—while 18% are loud quitting, or actively disengaged and harming their employers when exiting. See, e.g., Alan Persaud and Rocio Blanco Garcia, [LOUD QUITTING! The New Emerging Global Resignation Trend Taking the Workplace by Storm](#), Littler Insight (July 6, 2023); Ariel Perez and David Jordan, [Quiet Quitting, Mouse-Jigglers, Career Polygamy?? Should Employers Be Worried?](#) Littler Insight (Sept. 22, 2023).
- 7 U.S. Bureau of Statistics, News Release, [Job Openings and Labor Turnover – June 2023](#) (Aug. 1, 2023); [Job Openings and Labor Turnover – July 2023](#) (Aug. 29, 2023).
- 8 See Economic Report of the President, *supra* note 1, p. 209.



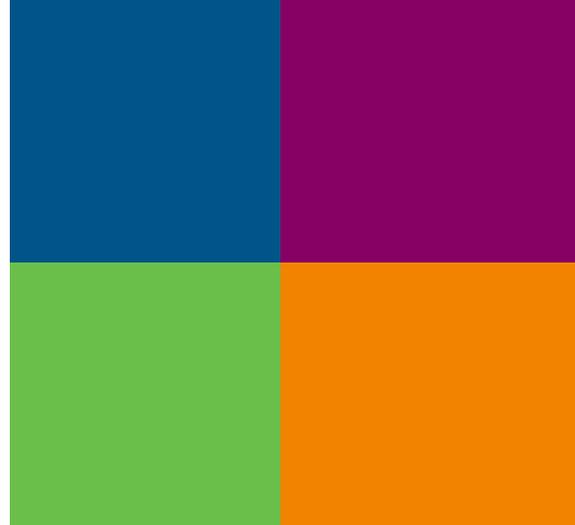
and local legislative bodies, federal agency regulations and policies, and Supreme Court opinions.

Meanwhile, the rise of artificial intelligence and automation in the workplace has highlighted the urgent need for re- and up-skilling for the economy to remain competitive in a global market, while at the same time it has stoked new anxieties for workers.

This Labor Day Report addresses the following questions:

- What is the current state of the U.S. workforce, and why are so many strikes suddenly making headlines?
- Which federal agency actions have been most significant for employers this year, and what can we expect from the National Labor Relations Board, Equal Employment Opportunity Commission, Department of Labor, and the Department of Homeland Security in the months ahead?
- How has the U.S. Supreme Court revised employment law this year, and what major questions are ahead for the 2024-2025 term?
- Which state legislatures have been most active this year, and what are the trending topics for new local laws?

We hope this WPI Report provides some insight.



II. State of the U.S. Workforce

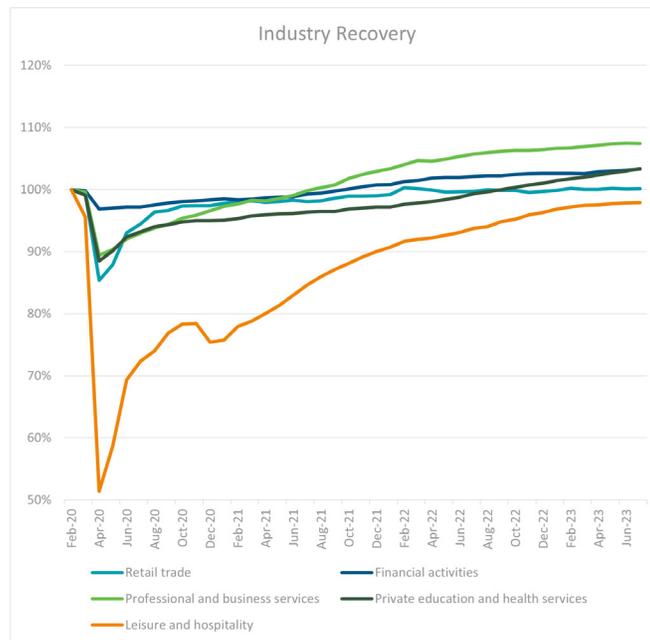
A. Status of the Post-Pandemic Economy

By the start of 2023, the U.S. economy had, by some economic measures, largely rebounded from the COVID-19-induced recession.⁹ Until a recent rise in August, the unemployment rate had remained relatively unchanged from the record low set in April,¹⁰ inflationary pressures have been tempered, and the economy has sustained positive growth from 2021 through the present, although the rate of growth has slowed,¹¹ and the potential for a short recession remains.¹²

At the same time, the labor force participation rate continues to trail pre-pandemic levels. According to the Bureau of Labor Statistics (BLS), total labor force participation in August was 62.8% versus 63.3% in February 2020.¹³ Moreover, hours worked decreased 1.3% in the second quarter of 2023.¹⁴

Despite last year’s fanfare about the “Great Resignation,” the quit rate fell slightly from 2.6% to 2.3% from July 2022-July 2023, while layoffs and discharges remained relatively unchanged (1%) during this period.¹⁵

While job levels in the aggregate continue to exceed pre-pandemic levels, certain industries have yet to fully recover. For example, the leisure and hospitality and retail industries have either just barely surpassed February 2020 levels or have yet to catch up. By contrast, the professional and business services, financial industries, and private education and health services have shown modest job growth.



9 See Economic Report of the President, *supra* note 1, p. 91.

10 U.S. Bureau of Labor Statistics, Economic News Release, [Employment Situation Summary](#) (Sept. 1, 2023).

11 U.S. Department of Commerce, Bureau of Economic Analysis, [News Release](#) (June 29, 2023); U.S. Federal Reserve, [The Beige Book](#), National Summary (July 12, 2023).

12 Erik Lundh, [Economic Forecast for the U.S. Economy](#), The Conference Board, (Aug. 2, 2023).

13 U.S. Bureau of Labor Statistics, [Civil labor force participation rate](#).

14 U.S. Bureau of Labor Statistics, News Release, [Productivity and Costs](#) (Aug. 3, 2023).

15 Job Openings and Labor Turnover – July 2023, *supra* note 7.

In July 2023, the number of unemployed individuals per job opening, seasonally adjusted, was lower (0.7) than it was in February 2020 (0.8).¹⁶ That said, changing workforce demographics means there are simply fewer workers available for open positions.

One reason for this is the aging workforce.¹⁷ U.S. Census Bureau data indicate that the median age of the U.S. population as a whole increased by 0.2 years to 38.9 years between 2021 and 2022.¹⁸ A third of U.S. states had median populations over 40 years of age, and this number is expected to continue increasing.¹⁹ By way of comparison, in 2000 the median age was 35; in 1980, it was 30. Approximately 90% of the Baby Boom generation is projected to stop working by the year 2030.²⁰

Stalled immigration also factors into the lack of workers. According to the Population Reference Bureau, between 2010 and 2018, immigrants and their children born in the United States accounted for 28% of all U.S. workers and contributed to 83% of labor force growth.²¹

Immigration policies over the past several years have contributed to a systemic backlog in visa processing. This shortfall has been particularly hard on the hospitality and service industries.

The COVID-19 pandemic also changed the employment landscape. In addition to an increase in the death rate of working-age adults during the pandemic, COVID-19 has created lasting effects. Long COVID and the desire for more work-life balance have resulted in many leaving the workforce entirely or changing career paths. For example, while fewer people on the whole are discouraged over job prospects now than they were last year, BLS data indicate that fewer people who are currently out of work actually want a job.²²

Of note, although women's increased participation in the labor market was a significant contributor to economic growth in the second half of the 20th century, women's labor force participation rate leveled off around the year 2000 and has declined since then, although the current participation rate is slightly higher than it was a year ago.²³ One factor in the overall decline is that women often bear the brunt of child and elder care duties.²⁴ Nearly triple the number of women than men cited "family responsibilities" as the reason they were not working in August 2023.²⁵

The rise in remote work has helped some employees maintain a better work/life balance. Over 70% of respondents to The Littler Annual Employer Survey Report® indicated their employees are on a hybrid work schedule, while another 13% have workforces that are either fully remote (6%) or can choose where to work (7%).²⁶ The U.S. Bureau of Labor Statistics

16 *Id.*; see also U.S. Bureau of Labor Statistics, Number of unemployed persons per job opening, seasonally adjusted, available at <https://www.bls.gov/charts/job-openings-and-labor-turnover/unemp-per-job-opening.htm>.

17 Lundh, *supra* note 12.

18 U.S. Census Bureau, Press Release No. CB23-106, [America Is Getting Older](#) (June 22, 2023).

19 *Id.*

20 See Diana Elliott, PhD, Presentation: Population trends and implications for the U.S. labor force, Population Reference Bureau (PRB) (May 23, 2023).

21 *Id.*

22 U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [Chart A-38](#), Persons not in the labor force by desire and availability for work, age, and sex.

23 Economic Report of the President, *supra* note 1, p. 35 (Mar. 2023); see also U.S. Bureau of Labor Statistics, [Women in the labor force: a databook](#), BLS Reports (Apr. 2023).

24 Economic Report of the President, *supra* note 1, p. 37. See also U.S. Bureau of Labor Statistics, [American Time Use Survey chart](#), finding that on average, women spent 0.64 hours per day caring for and helping household members, while men spent 0.31 hours doing so.

25 Labor Force Statistics from the Current Population Survey, [Chart A-38](#), *supra* note 22.

26 [The Littler® Annual Employer Survey Report](#), p. 5 (May 2023).



American Time Use Survey found that the percentage of employed workers who spent time working at home has decreased a bit (34% in 2022, down from 38% in 2021), but that this share is still much greater than in pre-pandemic times (24% in 2019).²⁷ As expected, the ability of those who can work from home is extremely industry-dependent.

B. Skills Gap and the Evolving Nature of Work

Prolonged remote learning during the pandemic left many young adults without basic skills, particularly “soft skills,” necessary for even entry-level jobs.²⁸ This has contributed to the difficulty employers have had in filling service-related positions.²⁹ Many employers have had to provide more on-the-job training on effective communication, time management, and interpersonal skills.

Moreover, it has been especially hard for employers to find qualified applicants for high-skilled positions.³⁰ In a survey of 600 HR professionals by Wiley University Services, an online provider of higher education, 69% said their organization has a skills gap, which has led to staffing challenges.³¹

The problem is exacerbated by what the National Association of State Chambers (NASC) calls “skill mismatches.” Whereas pre-pandemic 66% of high school graduates were enrolled in college following high school graduation, current projections are that approximately only one quarter of jobs are likely to require a four-year college degree, while 40 to 50% will be “middle-skill” jobs requiring some post-high school education or training.³²

This skills mismatch will continue to be a problem as technological advances will necessarily affect most workplaces. According to the latest Economic Report of the President, while computer and information technology occupations account for only 3% of all U.S. employment, the number of these jobs is projected to increase by 15% over the next decade.³³ Moreover, the World Economic Forum 2023 Future of Jobs report lists artificial intelligence (AI) and Machine Learning Specialists at the top of the list of fastest-growing jobs and predicts the demand for skills in AI and big data analytics will increase 30-35% in the next five years.³⁴ A recent IBM report indicates that the “AI revolution has reached an inflection point.”³⁵ Participants in this survey of 3,000 global C-suite executives indicated that about 40% of their workforce will need to be reskilled as they incorporate AI and automation into their operations over the next three years.³⁶

27 U.S. Bureau of Labor Statistics, Economic News Release, [American Time Use Survey Summary](#) (June 22, 2023).

28 See, e.g., Douglas Belkin et al., [‘How Do I Do That?’ The New Hires of 2023 Are Unprepared for Work](#), The Wall Street Journal (Aug. 2, 2023); Michael O’Dwyer, [Pandemic-era graduates are struggling at work because they lack basic professional skills](#), Financial Times (May 8, 2023).

29 Belkin, *supra* note 28.

30 U.S. Federal Reserve, [The Beige Book – June 2023](#), p. 1 (July 12, 2023).

31 Anthony Amiano, [Skills Gap Rapidly Widening, According to Wiley Survey](#), Business Wire (Jan. 24, 2023).

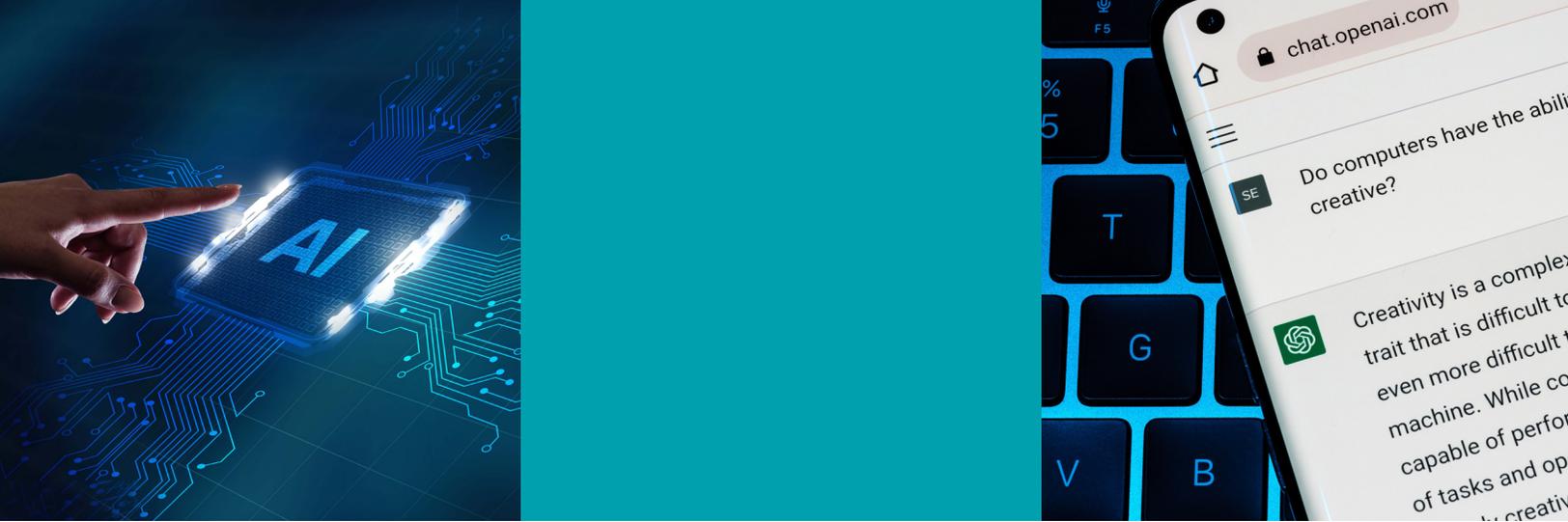
32 National Association of State Chambers, NASC Report, [Workforce: A Throttle on American Growth](#) (Aug. 30, 2023).

33 Economic Report of the President, *supra* note 1, p. 44.

34 Saadia Zahidi, [Future of Jobs Report 2023 Insight Report May 2023, World Economic Forum \(May 2023\)](#).

35 Jill Goldstein et al., [Augmented work for an automated, AI-driven world](#), IBM Institute for Business Value, Research Insights (Aug. 11, 2023).

36 *Id.*, p. 6.



C. The Role and Regulation of Artificial Intelligence

The rise of AI and automation will also fundamentally change hiring, the nature of work, and the labor market as a whole.³⁷

The use of AI “machine learning” in employment decision-making continues to create both opportunities and novel issues of concern while generating new questions about long-time problems. Today, employers can access more information about their applicant pool and workforce than ever before and have an ability to correlate data gleaned from an application itself, perhaps supplemented by publicly available social media sources, to determine how long a candidate is likely to stay on a particular job. Conversely, by combing through computerized calendar entries and email headers by way of AI, tools exist that can indicate which employees are likely to leave their employment within the next 12 months. These new tools and methods that rely on algorithms and the aggregation and analysis of a massive amount of data are becoming part of the daily landscape in human resource departments.

Similarly, the use of algorithms to review résumés and perform other recruiting functions is becoming far more commonplace. The promise of AI-based recruiting tools is to eliminate possible implicit bias of decision-makers and expand the pool of potential candidates. In this way, firms can leverage vast amounts of data to identify and recruit optimal candidates. Employers may also turn to predictive recruiting tools for reasons of efficiency and cost savings by automating at least part of the recruiting process and identifying quality candidates who will stay for the long term.

Equally important, AI-based tools have the potential to promote diversity, equity, and inclusion by expanding the applicant pool and focusing on candidates’ abilities versus well-worn proxies for talent such as academic achievement, work history, and employee referrals, all of which are capable of perpetuating historical biases.

Deploying algorithmic tools is not risk-free, however. Artificial intelligence offers a potent antidote to *intentional* discrimination. Antidiscrimination laws, however, also prohibit practices that are facially neutral if they have a disparate impact on members of protected categories, unless those practices are “job-related” and “consistent with business necessity.” Even then, they must be narrowly tailored to achieve their goals, presenting a distinct compliance problem for many users of AI tools.

Given the complexity of amassing and then analyzing vast quantities of information, an employer would certainly not reverse engineer the process to intentionally discriminate against a protected group. It is far more probable that the use of algorithms may be challenged because it unintentionally yields a disparate impact on one or more protected groups. Both intentional and “disparate impact” discrimination are unlawful under Title VII and other non-discrimination laws. Moreover, the use of AI raises numerous issues under the Americans with Disabilities Act (ADA) regarding access, accommodation, and a tool’s ability to accurately assess a candidate with a covered disability. Algorithmic analysis also has new implications

³⁷ See, e.g., [An Overview of the Employment Law Issues Posed by Generative AI in the Workplace](#), Littler Report (May 11, 2023).



for background checks and employee privacy, data security obligations, new theories of liability, and new defenses based on statistical correlations, to name but a few.

Federal agencies and lawmakers at the state and federal levels are scrambling to address the myriad issues the rise of AI has brought to the fore. Given the rapid development and spread of AI across multiple industries and sectors of the economy, the Biden administration and congressional leaders are focusing on how best to prepare the U.S. workforce for the jobs of the future, in addition to setting important guardrails to protect against potential misuse and associated risks. Last year, the White House published its “Blueprint for an AI Bill of Rights,” which sets out voluntary provisions on the use of artificial intelligence.³⁸ More recently, the White House released an updated strategy to coordinate and focus federal investments in AI, and organized meetings with employers and labor representatives to discuss its use. On May 4, 2023, Vice President Kamala Harris, Secretary of Commerce Gina Raimondo, and other senior Biden administration members met with the CEOs of American companies that are working with and developing artificial intelligence technology, with Biden administration officials urging the companies to operate consistent with the administration’s Blueprint.³⁹ The White House also hosted a July 3, 2023 listening session with union leaders to discuss the impact of AI on workers, job quality, and civil rights.⁴⁰

Federal agencies, including the Department of Commerce (DOC) and Federal Trade Commission (FTC), have attempted to respond to AI through potential rule considerations and other existing regulations. The National Telecommunications and Information Administration at the DOC received over 1,400 responses to its request for comment on its Artificial Intelligence Accountability Policy.⁴¹ This included a letter submitted by a bipartisan coalition of 23 state attorneys general calling for independent standards for transparency, testing, assessment, and audits, and for state attorneys general to have concurrent enforcement authority on federal regulations governing AI.⁴²

Earlier this year, the FTC along with the Equal Employment Opportunity Commission (EEOC), Consumer Financial Protection Bureau (CFPB), and the Department of Justice (DOJ), issued a “Joint Statement on Enforcement,” in which these

38 The White House, Office of Science and Technology Policy, [Blueprint for an AI Bill of Rights](#) (Oct. 2022).

39 The White House Briefing Room, [Readout of White House Meeting with CEOs on Advancing Responsible Artificial Intelligence Innovation](#) (May 4, 2023).

40 The White House, [Readout of White House Listening Session with Union Leaders on Advancing Responsible Artificial Intelligence Innovation](#) (July 3, 2023).

41 National Telecommunications and Information Administration, Press Release, [NTIA Receives More Than 1,400 Comments on AI Accountability Policy](#) (June 16, 2023).

42 [Comment on Artificial Intelligence \(“AI”\) system accountability measures and policies](#)—Docket Number NTIA–2023–0005, 88 FR 22433 (June 12, 2022).

agencies “pledge to vigorously use [their] collective authorities to protect individuals’ rights regardless of whether legal violations occur through traditional means or advanced technologies.”⁴³

The Office of Federal Contract Compliance Programs (OFCCP) recently proposed an update to its Supply and Service Scheduling Letter and the accompanying Itemized Listing, which the agency sends to covered federal contractors as part of its compliance audit process. Of note, the itemized listing includes a new Item 21: “Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.”⁴⁴ According to the OFCCP, the impetus for this change is that contractors are increasingly adopting automated technologies in their hiring and recruiting practices, which could lead to instances of screening or selection bias. “Addition of this requirement will allow OFCCP to assess the contractor’s use of such technology to determine whether these tools are creating barriers to equal employment opportunity.”⁴⁵

To date, the activities of the EEOC have been primarily focused on information-gathering. For example, on January 31, 2023, the Commission held a public hearing examining the implications of AI and machine learning in employment decisions, entitled “Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier.” At that hearing, the Commission heard testimony from a range of stakeholders, including academics, representatives of employers, privacy advocates, and others. Notably excluded from the witness list were: (a) any actual employer using AI tools in practice; and (b) the vendors or creators of AI employment tools. This absence was noted by both Republican commissioners.

The Commission has also published technical assistance documents related to AI, including a 2022 document relating to AI tools and the Americans with Disabilities Act, and in May 2023, another relating to the use of AI in employee selection procedures, and concerns those practices raise under Title VII of the Civil Rights Act of 1964.⁴⁶ This guidance document focuses on potential disparate or adverse impacts resulting from the use of automated decision-making tools and does not address issues of *intentional* discrimination via the use of AI-driven tools in making employment selection procedures. Another technical assistance document issued in July 2023 addresses how using AI and algorithms to make employment decisions can impact individuals with visual disabilities.⁴⁷

As discussed elsewhere in this report, the ability of the EEOC to move forward on bold new policy initiatives in line with President Biden’s agenda, including initiatives related to AI in the workplace, has been hampered by the fact that throughout his administration, the agency, while chaired by a Democrat, has had a majority of Republican commissioners (or, for most of 2023, a two-two split). That changed recently, and the Commission now has, for the first time in the administration, a Democratic voting majority. We expect that the Commission may now move more aggressively to regulate in this space.

43 EEOC, Press Release, [EEOC Chair Burrows Joins DOJ, CFPB, And FTC Officials to Release Joint Statement on Artificial Intelligence \(AI\) and Automated Systems](#) (Apr. 25, 2023).

44 OFCCP, Federal Contract Compliance Manual, [Figure F-3: Combined Scheduling Letter and Itemized Listing](#).

45 OFCCP-2022-0004-0002, [Supporting Statement 1250-0003](#), p. 15.

46 See Jim Paretti, Marko Mrkonich, and Niloy Ray, [EEOC Issues Guidance on Use of Artificial Intelligence Tools in Employment Selection Procedures Under Title VII](#), Littler Insight (May 18, 2023).

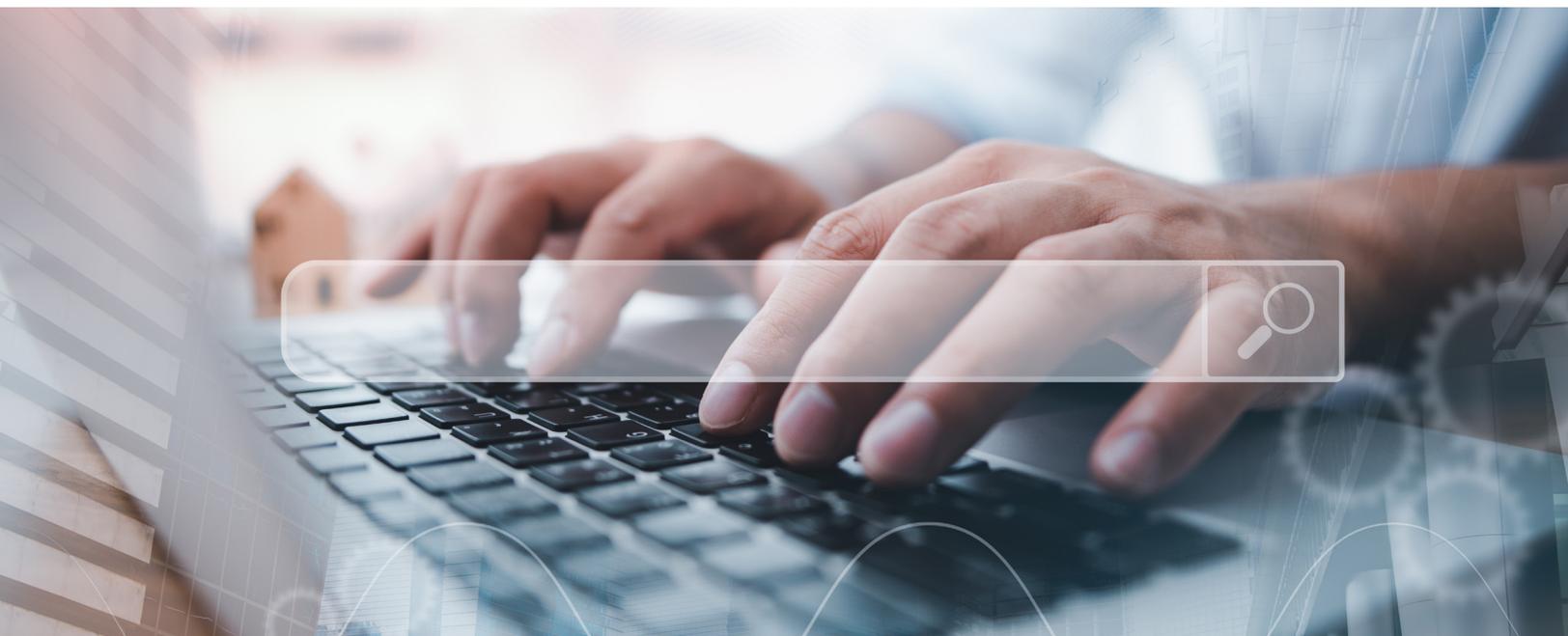
47 EEOC, [Visual Disabilities in the Workplace and the Americans with Disabilities Act](#), EEOC-NVTA-2023-3 (July 26, 2023).

More targeted legislative efforts to address AI have come from Senate Majority Leader Chuck Schumer (D-NY), who formed a congressional task force to lay the groundwork for bipartisan legislation on regulating AI. Leader Schumer launched the “SAFE Innovation Framework” on AI, which outlines five central policy objectives intended to form legislation.⁴⁸ Those objectives include (1) Security – to address national security risks and provide economic security for workers; (2) Accountability – to address misinformation and bias, copyright concerns, intellectual property, and liability; (3) Foundations – to ensure AI systems align with American values, and to prevent China from setting the rules on AI; (4) Explain – to determine what information the government and public needs; and (5) Innovation – to support U.S. innovation and leadership.

In July, Sen. Bob Casey (D-PA) introduced two bills in Congress to regulate the use of AI in HR decision-making. The No Robot Bosses Act would prevent employers from relying completely on automated systems in making employment decisions, and would require employers to train employees on their use. Another bill, the Exploitative Workplace Surveillance and Technologies Task Force Act, would create an oversight body comprising representatives from various federal agencies, including the EEOC, DOC, and FTC, to review AI in HR decision-making and workplace surveillance, and report to Congress. More such bills are expected to follow, although their chances of enactment this term are unlikely.

As will be discussed in Section V of this Report, meaningful efforts to regulate the use of AI in employment have fallen to state and local legislatures. A potential patchwork of state and local regulation (not always consistent with one another) could, however, create massive compliance burdens.

At the same time, the use of AI in the workplace has contributed to new workplace anxiety,⁴⁹ which in turn has helped fuel the general labor unrest we have seen this past year.



⁴⁸ Chuck Schumer, [SAFE Innovation Framework](#), Senate.gov.

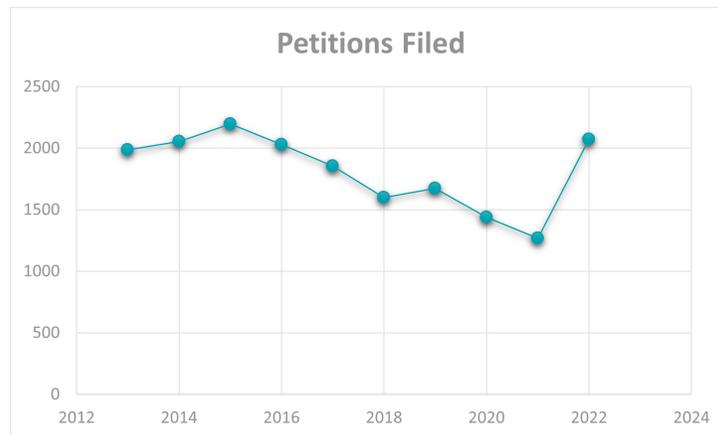
⁴⁹ A recent survey by the American Staffing Association found that 74% of U.S. adults are concerned about rising unemployment due to advances in AI; 47% indicated automation could easily replace their jobs. See American Staffing Association, Press Release, [Vast Majority of Americans Pessimistic on How AI Will Affect Employment](#) (Aug. 17, 2023).

D. Labor Turbulence this Labor Day

The changing nature of work, decreased employee engagement, dissatisfaction with pay and benefits, and concerns about workplace safety, among other factors, have all created an environment ripe for organizing activity. According to a recent Gallup poll, only about a quarter of U.S. workers strongly believe their employer cares about their wellbeing.⁵⁰ Yet, employees who feel their employers care about them are much likelier to be engaged at work, less likely to actively search for new employment, and less likely to feel the need to seek union representation.

An earlier poll asked union members their top three reasons for joining a union. The most common reasons were better pay and benefits (65%), employee rights and representation (57%), job security (42%), better pension and retirement benefits (34%), improving the work environment (25%), and fairness and equality at work (23%).⁵¹

These factors combined with the current administration’s labor-friendly policies and strong labor market have contributed to the relatively recent rise in high-profile strikes and organizing drives. In 2022, the number of representation election petitions filed with the NLRB jumped by a staggering 53% as compared to 2021. While 2023 has not seen quite the same red-hot pace as last year, the number of petitions year-to-date still far exceeds those filed in 2021. As such, while organizing might appear to have cooled somewhat, it still remains a significant concern for companies of all sizes.



While overall union membership is down,⁵² public approval of unions has risen.⁵³ According to a Gallup poll, the percentage of American workers who view unions favorably is at a 50+ year high.⁵⁴ Specifically, from 1972 through 2016, polls showed that support for unions rarely rose above 60%.⁵⁵ By August 2022, Gallup found that no less than 71% of Americans approve of labor unions, with support levels among Millennial and Generation Z workers registering even higher levels of support.⁵⁶

Understanding the motivations of Gen Z is particularly important because the U.S. Bureau of Labor Statistics estimates that by 2030, this age cohort will make up approximately 30% of the national workforce.⁵⁷

50 Jim Harter, [Leaders: Ignore Employee Wellbeing At Your Own Risk](#), Gallup (July 6, 2023).
 51 Justin McCarthy, [U.S. Approval of Labor Unions at Highest Point Since 1965](#), Gallup (Aug. 30, 2022).
 52 U.S. Bureau of Labor Statistics, Economic News Release, [Union Members Summary](#) (Jan. 19, 2023).
 53 McCarthy, *supra* note 51.
 54 *Id.*
 55 *Id.*
 56 *Id.*
 57 Emily Freehling, [To Win the Talent Race, It’s Time to Get to Know Gen Z](#), The Darden Report (Aug. 10, 2022).

The public support for unions has led some to more readily gain members' approval to strike. For example, on July 13, 2023, the national board of SAG-AFTRA authorized its 160,000 members to go on strike after contract talks stalled with major Hollywood studios. Members of the Writers Guild of America have been on strike since May. Although pay is a major issue, the use of AI and how actors' digital images and likeness can be used or manipulated is reportedly a key concern.⁵⁸

Earlier this year, the Teamsters warned that its members were prepared to strike if an agreement with UPS over its 340,000 workers was not made by August 1, and asked the White House not to intervene should this transpire.⁵⁹ Fortunately for all parties, agreement was reached at the eleventh hour, and a potentially calamitous strike was narrowly averted. At the same time, the UAW has expressed a willingness to strike at three major automakers after contracts with these entities expire in September. Such a strike would impact approximately 150,000 workers.⁶⁰ And in June a strike by West Coast port workers was narrowly averted, which would have had a devastating impact on national and international supply chains.

As noted, major work stoppages—those involving 1,000 or more workers—have increased in recent years. In the first half of 2023 alone, there were at least 16 major work stoppages.⁶¹

Taking smaller labor events into account, Cornell University ILR School's Labor Action Tracker recorded 230 strikes at 346 locations nationwide from January 1 through August 15 of this year.⁶² Looking at 2022 as a whole, there were 417 strikes and seven lockouts in 2022, involving approximately 224,000 workers and resulting in approximately 4,447,588 strike days (duration of strike multiplied by the number of workers).⁶³ The number of work stoppages, including major strike activity, increased over 50% compared to 2021, and the total number of workers involved in work stoppages increased by about 60% from 2021 to 2022.⁶⁴ Work stoppages in the accommodation and food services industry accounted for a third of all events.⁶⁵

The financial impact of these current and potential strikes is enormous. The actors' strike, for example, has downstream effects throughout the entertainment industry, and the local L.A. economy itself. Forbes reported that the cost of the strike could exceed \$3 billion.⁶⁶ Strikes that involve hundreds of thousands of workers for a prolonged period could also rekindle inflation concerns and exacerbate already-strained supply chain issues.

58 Anousha Sakoui, [What To Know About An Actors' Strike: Five Questions Answered](#), Los Angeles Times (July 14, 2023).

59 Alex Gangitano, [Teamsters chief asks White House not to intervene if UPS workers strike](#), The Hill (July 17, 2023).

60 David Shepardson, [UAW president says union prepared to strike Detroit Three](#), Reuters (July 11, 2023).

61 U.S. Bureau of Labor Statistics, [Work Stoppages](#) (as of July 2023).

62 Labor Action Tracker, Cornell University School of Industrial and Labor Relations, available at <https://striketracker.ilr.cornell.edu/>.

63 Johnnie Kallas, et al., [Labor Action Tracker Annual Report 2022](#), Cornell University ILR School, p. 5 (2022).

64 *Id.* p. 3; see also Azul Cibils Blaquier, [Strkes in US at Decades High Predict More Industries at Risk](#), Bloomberg Government (July 20, 2023).

65 Kallas, *supra* note 63, p. 3.

66 Dana Feldman, [The Hollywood Strike Could Exceed \\$3 Billion In Economic Fallout. Here's Why](#), Forbes (July 13, 2023).



Meanwhile, the current administration continues to promote unionization. On August 28, 2023, for example, the Treasury Department released a report entitled, “The State of Labor Market Competition,” which was touted as the “first-of-its-kind” report on the alleged benefits of unions to the American economy.⁶⁷ The report is one of over 70 actions taken by the White House Task Force on Worker Organizing and Empowerment, which plays a critical role in the Biden administration’s “whole of government” approach to aggressively promote unions.

A more in-depth discussion of the NLRB’s policies and decisions influencing these efforts is set forth the next section of this Report. And even current events not directly related to the workplace, such as extreme heat, have become rallying cries for workers. What is clear throughout is that both anecdotally and objectively, organized labor activity is trending upwards across all measures, bucking recent trends.

⁶⁷ U.S. Dept. of the Treasury, Press Release, [FACT SHEET: Treasury Department Releases First-Of-Its-Kind Report on Benefits of Unions to the U.S. Economy](#) (Aug. 28, 2023).



III. Federal Agency Activity

Midway through the third year of the Biden administration, some federal agencies are just hitting their stride, while others have been active since day one. The U.S. Department of Labor (DOL) and key departments with the DOL, such as the Wage and Hour Division (WHD) and Office of Federal Contract Compliance Programs (OFCCP), are operating without confirmed leadership. The Equal Employment Opportunity Commission (EEOC) just recently gained a Democratic majority, while the National Labor Relations Board (NLRB) has been operating with a Democratic majority for some time now. This section discusses key activities and initiatives these agencies have undertaken over the past year, and what is in store for the months ahead.

A. National Labor Relations Board

Over the last year, we have seen a continued effort by NLRB General Counsel (GC) Jennifer A. Abruzzo to advance President Joseph R. Biden, Jr.'s labor-friendly agenda. GC Abruzzo has continued to push regional offices to seek unprecedented remedies in many cases, pursue §10(j) injunctions, and advance an agenda that seeks to overturn decades of well-established NLRB precedent.

Until very recently, the Board was comprised of a 3-1 Democratic majority. At the helm of the Board is Chair Lauren McFerran, originally appointed as a member by former President Barack Obama, renominated by President Donald J. Trump, and later tapped by President Biden to serve as the chair. Also in that Democratic majority were President Biden's two appointees—Gwynne A. Wilcox and David M. Prouty. Member Prouty's term will last until August 2026, but Member Wilcox's term ended on August 27, 2023.

Before the Senate began its monthlong August recess, however, Senate Majority Leader Chuck Schumer (D-NY) filed cloture on the nomination of Member Wilcox to be a member of the NLRB. This procedural move will set the Senate up to vote on confirmation when the chamber returns the week of September 5. If reconfirmed, her term will be extended to August 27, 2028. The Republican seat vacated by former Chair John Ring remains open.

Both Member Wilcox and Member Prouty came to the Board after having served as counsel to two of the largest Service Employees International Union (SEIU) locals in the country—1199 and 32BJ, respectively.

On the other side is Republican appointee Member Marvin E. Kaplan, whose term does not expire until August 27, 2025. At present, there is one open seat, which belonged to former Member Ring, whose term ended on December 16, 2022.



With a Democratic Board majority and the continued push by GC Abruzzo to rework U.S. labor law, employers, more than ever before, should be prepared for more pro-union rulings and changes to longstanding Board precedents affecting both union and non-union workplaces.

1. Significant NLRB Decisions

The last 12 months has been jam-packed with several notable and consequential Board decisions for the employer community, including the following representative examples:

McLaren Macomb, 372 NLRB No. 58 (2023) – Prior to *McLaren*, in *Baylor Univ. Med. Ctr. and IGT d/b/a Int'l Game Tech.*, 370 NLRB No. 50 (2020), both 2020 Board decisions, the Board held that an employer could lawfully include in a separation agreement confidentiality and non-disparagement clauses, and clauses prohibiting employees from participating in claims brought by any third party against the employer, in exchange for severance payments. The *McLaren* decision significantly limited both of these rulings.

In *McLaren*, the Board held that the “mere proffer” of a severance agreement that conditions receipt of benefits on the “forfeiture of statutory rights” (e.g., the acceptance of overbroad confidentiality and non-disparagement provisions) violates the NLRA.⁶⁸ According to the Board, “a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.”

Following the Board’s complicated decision, which left many questions unanswered, GC Abruzzo published a memorandum providing guidance. Important for employers to note is the following: (i) the *McLaren* decision applies retroactively; (ii) agreements should not be found to be void in their entirety because they include unlawful provisions; (iii) overly broad confidentiality or non-disparagement provisions are unlawful no matter who requests them; and (iv) disclaimer language is not necessarily a cure-all.⁶⁹

68 See Jonathan Levine, Maura A. Mastrony and Lindsay M. Rinehart, [NLRB Decision Addresses Interaction between Confidentiality and Nondisparagement Provisions in Severance Agreements and Section 7 Rights](#), Littler Insight (Feb. 27, 2023).

69 See Jonathan Levine, Maura A. Mastrony, and Lindsay M. Rinehart, [NLRB General Counsel Provides Guidance on Non-Disparagement and Confidentiality Provisions in Severance Agreements](#), Littler Insight (Mar. 24, 2023).

Stericycle, Inc., 372 NLRB No. 113 (2023) – The Board adopted a strict new legal standard for evaluating whether an employer work rule is lawful to maintain under the NLRA.⁷⁰ In this decision, the Board overturned its prior decision in *The Boeing Co.* and others interpreting it, which had broadened the scope of rules, policies, and handbook provisions that lawfully may be maintained under the NLRA, making it easier for employers to operate their business without the threat of an unfair labor practice charge or lawsuit. The new Board decision will make it much harder for employers to maintain such policies without running afoul of the NLRA, and represents a drastic change from prior law.

The Board now considers an employer’s work rule presumptively unlawful if it “could” (rather than “would”) be interpreted to limit employee rights, meaning rules may be invalidated even if there are alternative interpretations that are consistent with employee rights. Whether a rule implicitly limits protected activities under the new standard will not be considered from the standpoint of a “reasonable” employee, but instead based on the perspective of someone “economically dependent” on the employer who considers engaging in activity protected by the Act. As a result, rules that are appropriate under ordinary workplace circumstances may be found improper by the Board specifically in the context of a theoretical employee considering organizing or engaging in other concerted activities but fearful of doing so.

The Atlanta Opera, Inc., 372 NLRB No. 95 (2023) – The NLRB, in *The Atlanta Opera*, overturned prior law (*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)) and reinstated a narrower test for “independent contractor” (as opposed to “employee”) under the NLRA.⁷¹

In *The Atlanta Opera*, the Board purported to apply the common-law agency test for determining worker status found in the Restatement (Second) of Agency §220, but did so in a manner expressly rejected by the D.C. Circuit in *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), denying enforcement of *FedEx Home Delivery*, 361 NLRB 610 (2014). Under the reinstated test, the Board will look at the following factors, assessing and weighing them, with no one factor being decisive:

- The extent of control, which by agreement, the employer may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.

⁷⁰ See Frederick Miner and Melissa Shingles, [NLRB Adopts Tough New Standard for Workplace Rules](#), Littler ASAP (Aug. 8, 2023).

⁷¹ See Jim Paretti, Fred Miner, and David Ostern, [Third Try’s the Charm? National Labor Relations Board \(Again\) Narrows Definition of “Independent Contractor” Under the National Labor Relations Act](#), Littler Insight (June 14, 2023).

- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.

The practical effect of this decision is that more workers are likely to be classified as employees—who, unlike independent contractors, are permitted to form and join a union, and otherwise enjoy the workplace protections of the Act—than under prior law.

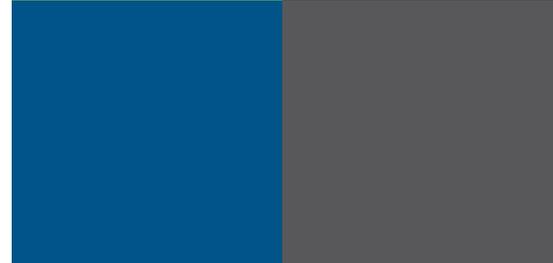
Lion Elastomers LLC II, 372 NLRB No. 83 (2023) – In *Lion Elastomers LLC II*, the Board reinstated specific standards for determining whether an employer’s response to “abusive conduct” by an employee in the course of their exercising Section 7 rights is lawful.

By way of background, in 1979, the Board, in *Atlantic Steel*, 245 NLRB 814 (1979), set forth a four-part test to be applied in cases where the issue is whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of activity otherwise protected under the NLRA. The balancing test that arose from *Atlantic Steel* examines “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees’ outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practices.”

In 2020, however, the Trump Board, in *General Motors LLC*, 369 NLRB No. 127 (2020), modified the standard for making such a determination. Under *General Motors*, the NLRB held that employers could respond to abusive misconduct, such as making profane, discriminatory, harassing, or disparaging statements, assuming there was no evidence of discriminatory motivation or treatment for the Section 7 activity, under the *Wright Line* analysis, which asks whether the employer had treated similar misconduct the same way.

The Board’s return to the application of the *Atlantic Steel* test in *Lion Elastomers* represents yet another back-and-forth switch in precedent; as a consequence, it will now be harder for management to rely upon profanity and other similar misconduct for discharge when it is arguably in the context of Section 7 activity, and there will likely be fewer cases where such conduct crosses the line such that it becomes unprotected.

Cemex Construction Materials Pacific, LLC, 372 NLRB No. 130 (2023) – On August 25, 2023, the Board reduced the ability of employers to insist on secret-ballot elections. According to the Board, under a new





framework, “when a union requests recognition on the basis that a majority of employees in an appropriate bargaining unit have designated the union as their representative, an employer must either recognize and bargain with the union or promptly file an RM petition seeking an election. However, if an employer who seeks an election commits any unfair labor practice that would require setting aside the election, the petition will be dismissed, and—rather than re-running the election—the Board will order the employer to recognize and bargain with the union.”⁷² By placing the burden to file an election petition on the employer, and then dramatically broadening the circumstances under which an employer may be ordered to bargain with a union even absent an election, the Board’s decision is likely to result in significantly more unions being recognized on the basis of authorization cards. *Cemex* plainly rejects the Board’s long-standing principle that a Board-conducted secret ballot election is the gold standard and preferred method for determining union support.

American Steel, 372 NLRB No. 23 (2022) – As with many NLRB decisions, this one has experienced a back-and-forth shift as the Board’s majority has changed from Democratic to Republican to Democratic over the last 12 years. In *American Steel*, the Board revived a concept created through its 2011 decision, *Specialty Healthcare*, 357 NLRB 934 (2011), which gave rise to what are commonly referred to as “micro-units.”⁷³ This comes in response to the Trump Board’s 2017 decision, *PCC Structurals*, 365 NLRB No. 160 (2017), which overruled *Specialty Healthcare*.

Generally, when a representation petition is filed, a major factor in determining whether the petitioned-for unit is an appropriate unit is the community of interests of the employees involved. Relevant factors include functional integration, common supervision, the nature of the employee skills and functions, employee interchange, fringe benefits, employer’s administrative organization, and work situs. Using these factors, employers can demonstrate that certain classifications belong within the petitioned-for unit, which sometimes dilutes the union’s support. In practice, labor organizations are sometimes successful at avoiding having more job classifications added to the petitioned-for unit, but other times they are forced to either withdraw the petition because they cannot establish the requisite 30% showing of interest; in limited situations, the Region will dismiss the petition.

72 NLRB, Press Release, [Board Issues Decision Announcing New Framework for Union Representation Proceedings](#) (Aug. 25, 2023); See also Michael J. Lotito, Rachel Ring, and Michelle Devlin, [NLRB’s Cemex Decision – Not Exactly Card Check, but Awfully Close](#), Littler Insight (Aug. 28, 2023).

73 See Rachel Ring, Christopher Henderson and Maura Mastrony, [With American Steel, Micro-Units Are Again a Likely Possibility](#), Littler Insight (Dec. 15, 2022).

“Micro-units” provide an alternative route for labor organizations by making it easier for them to organize employees. Under the doctrine of “micro-units,” employers seeking to enlarge the scope of a petitioned-for bargaining unit must demonstrate that excluded employees share an “overwhelming” community of interest with the group the union seeks to represent.

The decision in *American Steel* returns the NLRB standard for appropriate units to that which was in effect under *Specialty Healthcare*. The new standard is not limited to one industry or area, so all types of employers can be expected to see a rise in union petitions for smaller sub-groups of employees.

***Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160 (2022)** – In *Valley Hosp. Med. Ctr.*, the Board overruled a 2019 case of the same name that gave employers the right to stop collecting union dues after the expiration of the collective bargaining agreement containing that requirement.⁷⁴ This action is another reversal of longstanding precedent.

As a general matter, the employer’s duty to bargain with the exclusive bargaining agent of employees pursuant to Section 8(d) of the NLRA prohibits the employer from unilaterally changing the terms and conditions of employment without first bargaining with the union.⁷⁵ As with any law, there are exceptions, which the Board has previously recognized. One such exception was that certain provisions of an expired collective bargaining agreement need not be honored because the contract is no longer in effect. In *Bethlehem Steel*, 136 NLRB 1500 (1962), the Board stated that dues checkoff provisions were one of these exceptions; in 2015, the Board rejected this 50-year-old precedent,⁷⁶ but then revived it in 2019.

Now, however, the law has changed once more. Under *Valley Hospital*, an employer’s obligation to deduct union dues from an employee’s wages and remit to the union under a collective bargaining agreement must continue *after* the expiration of that collective bargaining agreement. The Board’s decision also made clear this change in the law applies retroactively for all pending cases where dues checkoff is at issue. Practically, the effect of this decision on management is a loss of an economic tool that could otherwise incentivize the union to enter into a new or successor agreement.

***Thryv, Inc.*, 372 NLRB No. 22 (2022)** – In *Thryv, Inc.*, the Board significantly expanded relief available to workers who allege unfair labor practices by their employers.⁷⁷ More specifically, the Board expanded the scope of these remedies, such that aggrieved workers will now be able to recover compensation for “any other direct or foreseeable pecuniary harm incurred.” Prior to *Thryv, Inc.*, the make-whole remedy was limited to reinstatement and backpay.

In its 3-2 decision, the Board held that to “best effectuate” the NLRA, “[the] make-whole remedy shall expressly order [employers] to compensate affected employees for all direct or foreseeable pecuniary harms that these employees suffer as a result of [an employer’s] unfair labor practice.” In other words, employees may now recover far more than simply reinstatement or backpay, and may now request that the Board hold an employer responsible for any “direct and foreseeable” financial harm they allege to have suffered as a result of an employer’s actions.

***Bexar County Performing Arts Center Foundation d/b/a Tobin Center*, 372 NLRB No. 28 (2022)** – In *Bexar County II*, the Board held that “off-duty contractor employees will enjoy a Section 7 right to access the property at which they regularly work when the property owner fails to demonstrate that the access would significantly interfere with the use of its property or that it had another legitimate business reason for denying them access.” The practical effect of *Bexar County II* is that off-duty, third-party employees will have more access to workplaces. And the access that these individuals will have will not be merely for meetings, but also will allow them to engage in a wide array of Section 7 activity.

⁷⁴ See Christopher Henderson, [NLRB Holds Dues Continue Beyond Contract’s Expiration](#), Littler ASAP (Oct. 4, 2022).

⁷⁵ *NLRB v. Katz*, 369 U.S. 736 (1962).

⁷⁶ See *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015).

⁷⁷ See Jim Paretto and Dru Selden, [National Labor Relations Board Expands Make-Whole Remedy](#), Littler Insight (Dec. 15, 2022).



For management, this means that challenging access by off-duty, third-party employees will be more difficult. Specifically, employers will now bear the burden of demonstrating that the activity by these individuals would be a “significant interference” or that there is some other “legitimate business reason” to prohibit it.

2. General Counsel Memos

During a general counsel’s tenure, they may publish memoranda setting forth policy guidance for Regions across the country to follow when handling cases. Since last Labor Day, GC Abruzzo has published nine memos. Collectively, the memos each set forth policy positions with serious implications for the management community.

GC Memorandum 23-08: Non-Competes

On May 30, 2023, GC Abruzzo issued a new memorandum urging the Board to make new law declaring the proffer, maintenance, and enforcement of employee non-compete agreements by employers unlawful under the Act.⁷⁸ Abruzzo’s unprecedented foray into regulating non-competes follows the Federal Trade Commission’s recent controversial proposal to ban virtually all non-compete agreements with only limited exceptions.⁷⁹

According to GC Abruzzo, non-competes “chill” employees from engaging in five specific types of activity protected under Section 7:

1. Concertedly threatening to resign to demand better working conditions;
2. Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;
3. Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;⁸⁰
4. Soliciting their co-workers to work for a local competitor as part of a broader course of protected concerted activity; and
5. Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer’s workplace.

By proclaiming that the Board has authority to outlaw employer agreements that have been legal since 1935, the GC seeks an unprecedented expansion of her and the Board’s authority.

78 See Tyler Sims, Melissa McDonagh, and Michelle Devlin, [NLRB General Counsel Abruzzo Targets Employee Non-Competes under NLRA](#), Littler ASAP (June 1, 2023).

79 See Colton Long, Melissa McDonagh, and James Witz, [FTC Proposes Rule Banning Non-Competes](#), Littler Insight (Jan. 5, 2023).

80 The GC acknowledges that current Board law does not unequivocally recognize a Section 7 right of employees to concertedly resign from employment.

GC Memorandum 23-02

On October 31, 2022, GC Abruzzo issued a memorandum announcing that she will urge the Board to adopt a new framework that seeks to hold employers accountable for use of what she calls “omnipresent surveillance and other algorithmic-management tools” if they tend to impair the exercise of Section 7 rights under the NLRA.⁸¹

While these terms are not defined, the GC refers to GPS tracking devices, cameras, wearable devices, radio-frequency identification badges, keyloggers and other monitoring software, phones or other devices with tracking capability, and artificial intelligence and algorithm-based decision-making tools, such as applicant personality tests.

Under the GC’s proposed legal framework for evaluating the use of electronic management technologies, an employer would presumptively violate Section 8(a)(1) of the Act where its surveillance and management practice, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in protected activity. If an employer establishes that the practices at issue are narrowly tailored to address a legitimate business need – *i.e.*, that its need cannot be met through means less damaging to employees’ rights – the GC will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer’s practices.

GC Memorandum 22-04

On April 7, 2022, GC Abruzzo set forth her position that she will urge the Board to hold that so-called “captive audience” meetings are unlawful and doing so is “necessary to ensure full protection of employees’ statutory labor rights.”⁸² Relatedly, GC Abruzzo also states she will work to ensure that employees understand that their attendance at employer meetings is “truly voluntary.” Since 1947, the right of employers to exercise freedom of speech on the subject of unions has been upheld numerous times by the Board and U.S. Supreme Court, including in *Babcock & Wilcox Co.* According to GC Abruzzo, however, the Board in *Babcock & Wilcox Co.* “incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation.”

GC Memorandum 21-04

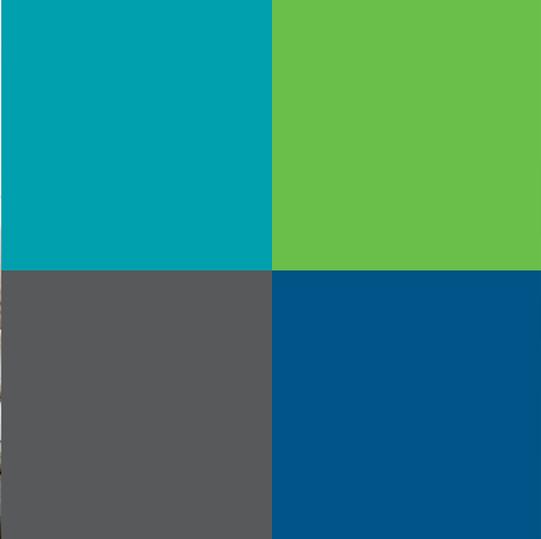
While GC Memorandum 21-04, which was GC Abruzzo’s Mandatory Submission to Advice memorandum, was published back in August 2021, many of the topics discussed therein are the subject of ongoing litigation. One case in particular involves the applicability of *Ex-Cell-O Corp.*, 185 NLRB 107 (1970).

By way of background, in *Ex-Cello*, the Board held it was not empowered by the Act to award prospective compensatory make-whole relief for the period when an employer refuses to bargain while testing the union’s certification in court. Further, the Board correctly concluded that compelling employers “to accede to terms never mutually established by the parties” would violate the plain language of Section 8(d) of the Act, as applied by the Supreme Court in *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970) (holding that Section 8(d) “does not compel either party to agree to a proposal or require the making of a concession” and limiting the Board’s powers to include such a remedy for refusals to bargain).⁸³

81 See James A. Paretti, Jr. Christopher R. Henderson, and Michelle L. Devlin, [NLRB General Counsel Calls for Board to Crack Down on Electronic Surveillance and Automated Management Practices](#), Littler Insight (Nov. 3, 2022).

82 NLRB, Office of the General Counsel, Memorandum GC 22-04, The Right to Refrain from Captive Audience and other Mandatory Meetings (Apr. 7, 2022); see also See Michael J. Lotito, Maury Baskin, and David S. Ostern, [NLRB General Counsel Abruzzo Seeks to Limit Long-Standing Employer Free Speech Right](#), Littler ASAP (Apr. 7, 2022).

83 See 185 NLRB at 110.



Now, in *ArrMaz Products Inc. and Int'l Chem. Workers Union Council of the United Food and Com. Workers*, NLRB Case No. 12-CA-294086, GC Abruzzo is proposing the radical remedy of “mak[ing] the bargaining unit employees whole for the lost opportunity to engage in collective bargaining” during the period when the employer refuses to bargain in order to test the union’s certification in the courts.

3. NLRB Rulemaking

Changes to Joint Employer Status

Shortly after Labor Day 2022, the NLRB issued a proposal to revise the standard for determining joint-employer status under the NLRA.⁸⁴ The Board’s proposal largely reestablishes the broad Obama-era standard of joint employment, under which one company may be deemed the joint employer of a second company’s employees not only where it directly or immediately exercises control over the second company’s workforce, but where the first company’s putative control is indirect, or even simply reserved but not ever actually exercised.

The proposed rule provides that two or more employers will be held to be joint employers where either employer “share(s) or codetermine(s) those matters governing employees’ essential terms and conditions of employment.” More specifically, the Board defines “share or codetermine” to mean “possess the *authority* to control (*whether directly, indirectly, or both*) or to exercise the power to control (*whether directly, indirectly, or both*) one or more of the employees’ essential terms and conditions of employment” (emphases added).

At present, a final rule is expected soon, and litigation is likely to surface thereafter.

Changes to the Board’s 2019 Election Rules

On January 17, 2023, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit struck down three provisions of the Board’s 2019 final rule on representation case procedures related to union elections, while upholding two challenged provisions.⁸⁵

The majority panel affirmed the district court’s May 2020 decision to invalidate three of the Trump-era election changes that were promulgated without a notice and comment period, finding that they dealt with substantive rather than procedural rights. Namely, the panel struck down the 2019 rule provisions regarding:

84 See Jim Paretti, Michael J. Lotito, and Maury Baskin, [NLRB Proposes New Joint-Employer Standard That Would Dramatically Expand Scope of “Joint Employment” Under the National Labor Relations Act](#), Littler Insight (Sept. 6, 2022).

85 See Kevin E. Burke, Ashton Hupman, and Michelle L. Devlin, [D.C. Circuit Issues Mixed Ruling Regarding Major Provisions of the NLRB’s 2019 Election Rule](#), Littler Insight (Jan. 20, 2023).

- The timeline for submission of employee voter lists;
- The timeline for certification of election results; and
- Eligibility of election observers.

The panel found those provisions were “substantive” and thus the NLRB was required to provide for notice and comment prior to issuance. However, the panel reversed the lower court with respect to two other provisions regarding:

- Pre-election litigation of certain voter eligibility issues; and
- The time period for scheduling elections.

The panel ruled that these provisions of the 2019 final rule are “procedural,” and therefore were properly enacted.

On March 9, 2023, the Board rescinded the provisions of the 2019 rule that the D.C. Circuit Court had struck down. On August 24, 2023, the NLRB announced it had adopted a final rule on revised election procedures, substantially reverting to the procedures put in place in 2014.⁸⁶ The net effect of these changes is that the timeframe from a petition for union representation to an election, and from an election to the certification of election results, will be drastically shortened. Employers will therefore have less time to respond to representation petitions.

Blocking Charges

On November 3, 2022, the Board published a Notice of Proposed Rulemaking seeking to change the 2020 election rule on blocking charges.⁸⁷ According to the NPRM, the Board would return to its pre-April 2020 blocking charge policy by permitting regional directors to decline to process an election petition at the request of the party filing an unfair labor practice charge alleging conduct that would interfere with the laboratory conditions of an election and the free choice of the employees. If adopted, the proposed rule would allow unions to delay a pending election by filing unfair labor practice charges with an allegation that employees cannot exercise their free choice under the alleged coercive conditions. This maneuver would enable a union to postpone an election it expects to lose and gain additional time to campaign. It could also delay decertification petitions filed by employees who want to remove the union that currently represents them.

The NLRB will no doubt continue to forge ahead with policies, decisions, and rulemaking efforts that significantly change existing labor law in the year ahead.

86 NLRB, [Representation-Case Procedures](#), 88 Fed. Reg. 58076 (Aug. 25, 2023); NLRB, Press Release, [National Labor Relations Board Issues Final Rule to Restore Fair and Efficient Procedures for Union Elections](#) (Aug. 24, 2023); NLRB Fact Sheet, [Representation Case Procedures](#).

87 Christopher Henderson, Maura Mastrony, and Jason Stanevich, [Potential Rescission of NLRB's 2020 Election Protection Rule](#), Littler Insight (Nov. 10, 2022).

B. Equal Employment Opportunity Commission

1. EEOC Leadership

After more than two and a half years, the Equal Employment Opportunity Commission (EEOC) for the first time in the Biden administration has a majority of Democratic members. With the Senate's confirmation in July of Commissioner Kalpana Kotagal for a term ending in July 2027, the Commission now has three seated Democratic members. Currently, the Commission is chaired by Democratic Commissioner Charlotte A. Burrows, whose term expires in July 2023; she has been renominated for another five-year term and is allowed under Title VII to "hold over" in her seat for the remainder this year pending Senate confirmation. Jocelyn Samuels, also a Democrat, is serving her second term, which will expire in July 2026, as vice chair. The remaining two commissioners are Republican Commissioners Keith Sonderling, whose term expires in July 2024, and Commissioner Andrea R. Lucas, whose term expires in July 2025.

The general counsel's position has remained unfilled since former General Counsel Sharon Fast Gustafson was removed from the position by the White House in March 2021; career Associate General Counsel Gwendolyn Reams served as acting general counsel from March 2021 until her term in that position expired on December 30, 2021. Deputy General Counsel Christopher Lage now oversees operation of the Office of General Counsel, and in the absence of a designated acting officer, any authority vested solely within the general counsel may be exercised by the chair. In January of this year, President Biden again nominated Karla A. Gilbride, a senior attorney at the legal advocacy non-profit firm Public Justice, to serve as general counsel. Her nomination is currently pending in committee in the Senate, which failed to act on her prior nomination in the previous session of Congress.

The chair of the Commission exercises significant control over the administrative duties and operations of the agency and its 53 offices around the country, which perform the vast majority of day-to-day operations, such as investigation, mediation, and litigation. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not—as well as scheduling meetings of the Commission to examine issues or vote on disputed matters. Significant policy changes, however, require the approval of a majority of the full Commission. Since until recently Chair Burrows has not had a Democratic majority on the Commission during her tenure as chair, as practical matter, the agency has been limited in its ability to revisit policies from the prior administration, or to move forward on new substantive policies in line with the Biden administration's agenda. Now with a Democratic majority, we expect the agency to begin to move aggressively on new policy priorities of the chair and the administration more broadly.

2. Delegation of Litigation Authority

One significant policy we expect the Commission will soon revisit is the limitation adopted near the very end of the prior administration on the general counsel's authority to file suit without the approval of the Commission. As it currently stands, the delegation of authority provides that the full Commission must vote to approve all:

- cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;



- cases presenting issues on which the general counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;
- other cases reasonably believed to be appropriate for Commission approval in the judgment of the general counsel, including but not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and
- all recommendations in favor of Commission participation as *amicus curiae*.

Perhaps more notable, even where cases do not fall within the above criteria, the current delegation provides that before filing any case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means that, as a technical matter, a majority of commissioners can effectively “veto” the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit), although with a Democratic majority unlikely to vote against proposed litigation, we think those instances will be extremely rare.

3. EEOC and COVID-19

COVID-19 Technical Assistance

The EEOC has, throughout the pandemic, maintained updated guidance as to employers’ and employees’ rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.⁸⁸ In May of this year, as the declaration of a COVID-19 public health emergency expired, the Commission updated its COVID guidance to address issues relating to “long COVID” and potential disability issues under the ADA.

Previously, in July 2022, the Commission updated its COVID guidance regarding employer testing of employees for the COVID-19 virus.⁸⁹ Most notably, with respect to requiring employees to be tested for COVID as a condition of returning to or remaining at work, the EEOC’s updated guidance makes clear that an employer’s ability to require such a test is not unlimited. Rather, an employer can require such testing only where it is “job-related and consistent with business necessity” under the ADA.

⁸⁸ EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), last updated May 15, 2023 (EEOC COVID-19 Guidance).

⁸⁹ See Jim Paretti and Devjani Mishra, [EEOC Updates COVID-19 Guidance, Potentially Limiting Employers’ Ability to Screen Employees for COVID-19](#), Littler Insight (July 14, 2022).

Based on this update, it appears that the EEOC plans to take the position that a COVID-19 screening test for employees entering the workplace is not *per se* or presumed permissible. Rather, an employer must be able to demonstrate that such a test is necessary for the safety of the workplace, and consistent with the job in question. However, the EEOC also advises employers to keep current with CDC recommendations regarding COVID exposure and infection, as well as those of state and local public health authorities. As the possibility of a COVID surge in this fall and winter remains a concern, employers are reminded that keeping abreast of current CDC and public health guidance remains crucial.

COVID-19 & Remote Work

Over the last few years, the EEOC has brought suits against employers alleging they violated the ADA by failing to allow employees to work remotely as a reasonable accommodation. In September 2021, the EEOC brought its first case alleging that an employer failed to accommodate an employee who alleged an underlying pulmonary condition that made breathing difficult and placed her at heightened risk of COVID-19.⁹⁰ She requested to continue to work remotely after the employer resumed on-site work, but the request was denied, and her employment was ultimately terminated. This case settled at the end of 2022.

Even prior to COVID, the issue of remote work has been one in which the EEOC is particularly interested, as shown by a pre-COVID claim filed on behalf of an individual charging party who suffered from anxiety and depression and was denied requested remote work.⁹¹ While the lawsuit was based on an individual claim, the settlement agreement in this case, which included broad-based injunctive relief, included a finding that the “[d]efendant...and all others acting on its behalf... are enjoined from refusing to allow qualified individuals with disabilities from teleworking when telework is a reasonable accommodation for the employer’s disability.”⁹²

Most recently, in March of this year, the agency brought suit against a financial processing company based in Columbus, Georgia, again alleging that the company violated the ADA when in 2020, during the course of the COVID pandemic, it denied a request to telework as a reasonable accommodation from an employee who faced increased risk if she contracted the virus.⁹³ The lawsuit alleges that at the time of the denial, most of the coworkers in her department were working remotely, and that following an exposure to COVID in the company’s workplace, she was forced to resign when her existing leave expired. That case is currently pending in district court.

While it is too early to tell how far EEOC will push the envelope with respect to employees requesting telework as a reasonable accommodation in light of COVID-19 (and each case will turn on its own facts), employers should be aware that the agency has started down this road. While courts came to differing conclusions as to whether “physical attendance” was an essential requirement of some jobs prior to the pandemic, it is likely that they will be more sympathetic to employee requests for remote work, particularly where they and others were able to telework successfully during the pandemic.

90 *EEOC v. ISS Facility Services, Inc.*, No. 1:21-cv-03708 (N.D. Ga.) (Filed: Sept. 7, 2021); EEOC, Press Release, [EEOC Sues ISS Facility Services for Disability Discrimination](#) (Sept. 7, 2021).

91 See *EEOC v. Design & Integration, Inc.* Case No. 1:20-cv-02350 (D. Md., Baltimore Division) (Filed: Aug. 14, 2020).

92 *Id.*, Docket No. 13 (Filed: Apr. 22, 2021).

93 EEOC, Press Release, [EEOC Sues Total Systems Services for Disability Discrimination and Retaliation](#) (Mar. 29, 2023).

4. New Agency Priorities

As the agency now has a Democratic majority, we expect activity around a number of items the new chair and administration have articulated as priorities.

Compensation Data Reporting

Narrowing the pay gap continues to be a key EEOC priority, and we expect one the agency will revisit during this administration. During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful and ordered the agency to collect two years of pay data).

Subsequently, a National Academy of Sciences (NAS) panel evaluated the compensation data collected by the EEOC to determine its utility and in July of 2022 published its report analyzing the EEOC's previous pay data collection effort.⁹⁴ Chair Burrows emphasized the NAS's findings that, done properly, pay data collection could assist the agency in rooting out pay discrimination. In response, then-Commissioner Janet Dhillon, a Republican, highlighted a number of flaws NAS discussed in its analysis of the agency's prior effort, as well as NAS's conclusions that the EEOC's pay data collection had used a faulty measure of pay measurement, outdated job categories, and pay bands that were overly broad, thus limiting the collection's utility. Republican Commissioner Sonderling likewise noted NAS's conclusions that the EEOC had used flawed methodology, failed to conduct a pilot program, and had issues with the quality of the data collected.

The EEOC had previously suspended collection of EEO-1 data in 2020 in light of the pandemic; in 2021, pursuant to court order, it collected compensation data for calendar years 2019 and 2020. In 2022, the agency resumed its collection of EEO-1 data (which lists the number of workers in each of 10 specified job bands, sorted by race, ethnicity, and gender) for the year prior.

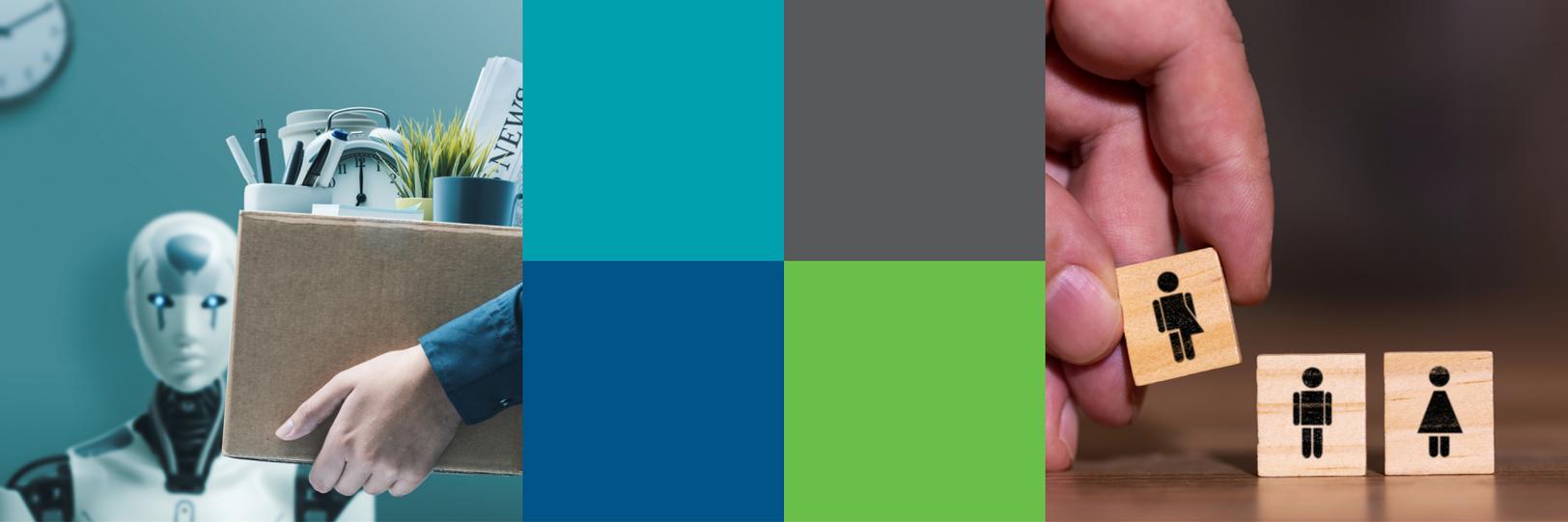
We predict it is likely that the Biden EEOC will attempt again to require employers to submit employee compensation data to the agency in a future, revised iteration of the EEO-1; whether the collection mirrors what was previously done or adopts a different approach that takes into account NAS recommendations remains to be seen. While the EEOC has delayed starting the EEO-1 reporting cycle for this year (which will require reporting standard EEO-1 data for calendar year 2022), we think it unlikely that the agency will adopt a pay data reporting scheme in this cycle. It is highly possible, however, that 2024 filings (covering 2023 data) will be subject to heightened pay-data reporting requirements.

Artificial Intelligence in Employment Decision-Making

In October 2021, the EEOC launched an initiative relating to the use of artificial intelligence (AI) in employment decision-making.⁹⁵ As stated by the agency, the initiative is intended to examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws. Since that time, as discussed in Part II.C of this Report, the agency has issued a number of technical assistance documents, and held a lengthy public meeting examining the use of AI in the workplace and its interaction with federal civil rights laws.

94 EEOC, Press Release, [EEOC Announces Independent Study Confirming Pay Data Collection is a Key Tool to Fight Discrimination](#) (July 28, 2022).

95 EEOC, Press Release, [EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness](#) (Oct. 28, 2021).



The agency also recently settled its first lawsuit alleging discrimination in hiring based on a company's use of AI. The EEOC claimed the defendants, providers of English-language tutoring services, illegally programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60, in violation of the Age Discrimination in Employment Act (ADEA).⁹⁶

We continue to expect that the agency will ramp up its activity in this space, whether through additional hearings, sub-regulatory guidance, or technical assistance, in the coming year.

Sexual Orientation and Gender Identity Issues

In June 2021, the agency updated its website⁹⁷ and issued a "technical assistance document" regarding issues relating to LGBTQ workers, and what the EEOC is now terming "SOGI (Sexual Orientation/Gender Identity) Discrimination."⁹⁸ This was the first substantive update of EEOC guidance in this area since the Supreme Court's 2020 decision in *Bostock v. Clayton County*, in which the Court held that Title VII's prohibition on sex discrimination extends to include discrimination on the basis of sexual orientation and gender identity. Most notably, the document makes clear the EEOC's position that where an employer maintains separate restrooms for men and women, Title VII requires employers to allow employees to use the facility that corresponds to their gender identity, rather than assigned sex at birth. In addition, on March 31, 2022, the EEOC announced that it had revised its discrimination charge intake process to include a non-binary gender option.⁹⁹

In the absence of a Democratic majority, the chair had been limited to publishing technical assistance on these issues; documents of this sort do not require Commission approval and may be issued solely on the authority of the chair. That said, technical assistance documents are *not* supposed to create new Commission policy, and purport to be limited to applying existing law and policy to new sets of facts (although the SOGI technical assistance has been criticized as perhaps going beyond this line). With a firm majority in place, we expect this may be an area where we see more robust guidance from the agency in the future. Employers navigating these issues in their workplaces should consult with counsel to ensure that legal and practical considerations are adequately met.

⁹⁶ *EEOC v. iTutorGroup, Inc.*, Case No. 1:22-cv-02565, E.D.N.Y. (Complaint Filed: May 5, 2022; Joint Notice of Settlement Filed Aug. 9, 2023).

⁹⁷ EEOC, [Sexual Orientation and Gender Identity \(SOGI\) Discrimination](#).

⁹⁸ EEOC, OLC Control No. NVT-2021-1, [Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity](#) (June 15, 2021).

⁹⁹ EEOC, Press Release, [EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process](#) (Mar. 31, 2022).

Pregnant Workers Fairness Act

In December 2022, as part of the year-end budget bill, Congress passed and President Biden signed into law the Pregnant Workers Fairness Act (PWFA).¹⁰⁰ Modeled after the ADA, the PWFA expands the protections for pregnant employees and applicants by requiring employers with 15 or more employees to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions. Employers must do so by engaging in an interactive process with a qualified employee or applicant covered by the PWFA to determine a reasonable accommodation, provided it does not impose an undue hardship on the employer. Additionally, an employer may not require an employee covered by the PWFA to take paid or unpaid leave if another reasonable accommodation is available. The PWFA also protects employees covered by the PWFA from retaliation, coercion, intimidation, threats, or interference if they request or receive a reasonable accommodation.

The PWFA directed the EEOC to issue regulations within one year of the date the law was enacted that provide examples of reasonable accommodations that address known limitations related to pregnancy, childbirth, and related medical conditions. On August 11, 2023, the EEOC published its proposal in the *Federal Register*.¹⁰¹ Among the proposed regulations is the requirement for employers to consider eliminating one or more essential functions of a job for up to 40 weeks during an employee's pregnancy and for 40 to 52 weeks after an employee returns to work after childbirth unless doing so poses an undue hardship. The EEOC also proposes that four common requests for accommodation be deemed reasonable and not impose an undue hardship absent unusual circumstances. The proposed rule also includes restrictions on when employers may ask for documentation to support a request for reasonable accommodation and what information they may request.¹⁰² Comments on this proposed rule must be submitted by October 10, 2023.

5. The Months Ahead

As the era of a restrained EEOC has come to an end, and as the balance of political power at the agency shifts, we likely can expect more aggressive regulation and enforcement for the balance of the Biden administration. As the thousands of charges of discrimination arising out of the COVID-19 pandemic, vaccination mandates, and return-to-work requirements are investigated and processed administratively, we will be monitoring to see trends in litigation (both EEOC-instituted and brought by private parties), as well as how the courts now deal with the thorny legal questions raised by nearly three years of a pandemic that has reshaped much of the employment landscape.

¹⁰⁰ See Mark T. Phillis and Jessica L. Craft, [Congress Expands Protections for Pregnant Employees and Employees Who Are Nursing](#), Littler ASAP (Dec. 28, 2022).

¹⁰¹ EEOC, Proposed Rule, [Regulations to Implement the Pregnant Workers Fairness Act](#), 88 Fed. Reg. 54714 (Aug. 11, 2023).

¹⁰² See Mark T. Phillis, Jeff Nowak, and Jessica L. Craft, [EEOC Releases Expansive Proposed Regulations to Implement the Pregnant Workers Fairness Act](#), Littler Insight (Aug. 9, 2023).



C. Department of Labor

President Biden nominated Deputy Labor Secretary Julie Su to succeed Marty Walsh after he vacated the position earlier this year to lead the National Hockey League Players Association. That nomination, however, has been stalled, as several key senators have failed to express their commitment to vote for her confirmation. President Biden has signaled his intention to keep Ms. Su in an acting position indefinitely pursuant to a law which allows the deputy labor secretary, to which Su was confirmed by the Senate in 2021, to perform the duties of the secretary on an acting basis until one is appointed. Su previously served as the secretary of the California Labor and Workforce Development Agency under Governor Newsom. Prior to that, under Governor Brown, Su headed California's Division of Labor Standards Enforcement.

Other subagencies with the DOL are likewise operating without confirmed leadership.

1. Wage and Hour Division

The DOL's Wage and Hour Division (WHD) still does not have a confirmed WHD administrator after Dr. David Weil's nomination was voted down last year. Jessica Looman is currently the principal deputy administrator but in January of 2023, President Biden re-nominated Looman to become the next administrator of the WHD after her August 2022 nomination expired at the end of last year's congressional term. Prior to joining the DOL, Looman worked as executive director of the Minnesota State Building and Construction Trades Council. No confirmation hearing has been set for this nomination.

Despite the lack of leadership at the DOL in general and WHD specifically, a handful of regulatory efforts have advanced.

Davis-Bacon Regulations

The DOL recently published final revisions the Davis-Bacon Act (DBA) that are expected to impose higher wage rates on DBA-covered construction projects.¹⁰³ The DBA governs wage payment for contractors and subcontractors working on federal and federally assisted construction projects, and has been incorporated by reference in the Inflation Reduction Act.¹⁰⁴ Among other changes, the final rule restores the "30% rule," which was eliminated under the Reagan DOL in 1982. The rule redefines the word "prevailing" to mean wage rates paid to just 30% of workers, and declares that "weighted average" wage rates are undesirable outcomes. As a result of this and other significant revisions to the

¹⁰³ See Maury Baskin and David S. Ostern, [USDOL Finalizes Rule Making Big Changes to Davis-Bacon Enforcement](#), Littler Insight (Aug. 10, 2023).

¹⁰⁴ See Maury Baskin, [New Federal Tax Credits Require Compliance with New Prevailing Wage and Apprenticeship Mandates on Clean Energy Construction](#), Littler Insight (Oct. 13, 2022); Maury Baskin and Francis Kenny, [Treasury Department Issues Guidance on the Inflation Reduction Act's Prevailing Wage and Apprenticeship Requirements](#), Littler ASAP (Dec. 1, 2022).

DBA regulations, although unions represent less than 12% of construction workers nationally, upcoming DOL wage determinations are expected to declare union wage scales to be “prevailing” in a substantial majority of civil subdivisions throughout the country.

Overtime Rule/White Collar Exemptions

On August 30, 2023, the DOL issued a proposed rule that would increase the minimum salary an executive, administrative, or professional worker must be paid to be considered “exempt” from minimum wage and overtime requirements under the Fair Labor Standard Act (commonly referred to as the “white collar overtime exemption”).¹⁰⁵ The proposed rule would increase the current threshold of \$684 per week, or \$35,568 annually, to \$1,059 per week (\$55,068 annually), an increase of almost 55 percent. The DOL claims, however, that when it promulgates the final rule it will use the most recent data then available. This could result in a salary level much higher than \$55,068. For example, the DOL projects that by the fourth quarter of 2023, the salary threshold could be as high as \$1,140 per week (\$59,285 annualized), and that by the first quarter of 2024, the salary threshold could be as high as \$1,158 per week (\$60,209 annualized). In addition, the proposed rule would set the highly compensated employee annual compensation threshold at \$143,988 (up from the current \$107,432). Finally, the proposed rule would adopt an automatic indexing mechanism that would adjust the minimum salary upward for inflation every three years. The Department will accept public comments on the proposal for 60 days following its publication in the *Federal Register*; after that, it will review and analyze the comments received and is expected to publish a final rule setting a new white collar exemption minimum standard.

Independent Contractor Classification Standard

The Department of Labor is expected to issue a stricter rule for classifying workers as independent contractors under the Fair Labor Standards Act this fall. The comment period on the proposed rule closed in December 2022 and a final rule was originally scheduled to issue in May 2023 but again appears to have been delayed. If the final rule resembles the proposal, this rule would employ a six-part totality-of-circumstances test considering: the opportunity for profit or loss, investment by worker and employer, degree of permanence of a work relationship, nature and degree of control, skill and initiative and the extent to which the work performed is an integral part of an employer’s business.¹⁰⁶ This differs significantly from the current rule issued in January 2021, which focused on two core factors when determining independent contractor status: a worker’s control over the individual’s work and the person’s opportunity for profit or loss.¹⁰⁷

Nondisplacement of Qualified Workers Under Service Contracts

In late 2021, President Biden’s Executive Order 14055 reinstated the requirement that successor contracts on Service Contract Act contracts offer positions to the employees of the predecessor contractor.¹⁰⁸ The executive order required the DOL to issue regulations implementing the terms of the order.¹⁰⁹ The DOL proposed regulations in July of 2022 requiring agencies subject to the Federal Property and Administrative Services Act to include a nondisplacement clause for when contractors or subcontractors succeed a contract for performance of same or similar work. A final rule was expected in June 2023, but has not yet been issued.

¹⁰⁵ See Rob Pritchard, Jim Paretti, and Brad Kelley, [DOL Proposes to Significantly Increase the Minimum Salary Level to Qualify for the “White Collar” Overtime Exemptions](#), Littler ASAP (Aug. 30, 2023).

¹⁰⁶ Jim Paretti, Michael J. Lotito, and Maury Baskin, [Department of Labor Proposes New Rule for Independent Contractor Status](#), Littler ASAP (Oct. 25, 2022).

¹⁰⁷ *Id.*

¹⁰⁸ Exec. Order No. 14055, 29 C.F.R. 9 (2021).

¹⁰⁹ *Id.*



Tipped Credit 80/20 Rule

In 2021, the DOL issued a final rule resurrecting the 80/20 rule, which permits employers to utilize the federal subminimum wage and tip credit for tipped workers so as long as 80% of the work performed is tip-producing. In doing so, employers must evaluate whether a tipped employee's work duties fall within three categories: (1) tip-producing work; (2) directly supporting work; and (3) work that is not part of a tipped occupation.¹¹⁰ Under the rule, not more than 20% of the work can be "directly supporting work," or work that is preparatory or otherwise assists tip-producing customer service work.¹¹¹ This ruling has been met with challenges to its validity. In the Fifth Circuit, the Restaurant Law Center and the Texas Restaurant Association brought suit to challenge whether the 80/20 rule could be a permissible interpretation of the Fair Labor Standards Act.¹¹² While a federal judge rejected their claim, the parties have appealed. As of now, the 80/20 rule remains in effect.

DOL Field Assistance Bulletin Providing Guidance on Telework-Tracked Hours

In February 2023, the Department of Labor issued a bulletin providing guidance on tracking hours worked by employees who telework.¹¹³ The bulletin reiterated the standards under the Fair Labor Standards Act, clarifying that meal breaks are not hours worked, short breaks are compensable hours, off-duty periods longer than 20 minutes may be excluded, and time spent pumping breast milk must be provided though not necessarily compensated.¹¹⁴

DOL Guidance on the PUMP Act

In May 2023, the DOL issued a bulletin providing guidance on the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which expanded the Fair Labor Standards Act to provide lactating employees additional protections in the workplace.¹¹⁵ Specifically, the PUMP Act requires employers to provide such employees with reasonable time and non-bathroom private space to express breast milk.¹¹⁶ The bulletin reiterates that there cannot be a one-size-fits-all application of this rule, explaining that a break schedule can be agreed upon between an employee and an employer and that locking doors and door signage should be used for private lactating spaces.¹¹⁷

¹¹⁰ Daniel B. Boatright, [DOL Publishes Final Rule to Resurrect 80/20 Rule for Tipped Employees](#), Littler Insight (Oct. 29, 2021).

¹¹¹ *Id.*

¹¹² Daniel B. Boatright, [Legal Challenge to FLSA 80/20 Rule Headed Back to Fifth Circuit](#), Littler ASAP (July 7, 2023).

¹¹³ Robert W. Pritchard and Dimitrios Markos, [DOL Issues Guidance on Tracking Hours Worked by Teleworkers Who Take Breaks](#), Littler ASAP (Feb. 14, 2023).

¹¹⁴ *Id.*

¹¹⁵ Mark T. Phillis and Jessica L. Craft, [DOL Issues Guidance on the PUMP Act and Updates the Minimum Wage Poster](#), Littler ASAP (May 22, 2023).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

2. Occupational Safety and Health Administration

The Biden Occupational Safety and Health Administration (OSHA) has continued its post-pandemic momentum by pursuing regulatory changes, increasing resources, and ramping-up enforcement efforts both nationwide and in certain areas. OSHA has several far-reaching regulatory proposals planned.

Injury and Illness Tracking Expansion Rule

On July 21, 2023, OSHA formally published a final rule in the *Federal Register* amending its regulation governing the tracking of workplace injuries and illnesses.¹¹⁸ The final rule becomes effective on January 1, 2024. Currently, establishments with 250 or more employees must submit information from their Form 300A Injury and Illness Logs electronically, and only certain types of establishments (e.g., construction, manufacturing, department stores, warehouses) with 20 to 249 employees are required to submit such data to OSHA in this fashion.¹¹⁹

The final rule requires workplaces with 100 or more employees from workplaces listed in a new Appendix B of the regulations to submit their 300 Log, corresponding 301 Incident Reports, and 300A Annual Summary Data. Workplaces listed in Appendix A with 20-249 employees will have to submit their 300A Annual Summary Data. Workplaces with 250 or more employees in any industry will have to submit their 300A Annual Summary Data. OSHA stated it will use the data to intervene with strategic outreach and enforcement to reduce worker injuries and illnesses in high-hazard industries. Thus, the increased data reporting will assuredly result in inspections in areas or establishments with high injury and illness rates, potentially subjecting employers in certain industries to additional inspections and regulatory scrutiny. OSHA believes by gathering this data it can have a more calculated approach to address specific hazards in workplaces.

Employers should exercise the utmost care in completing their OSHA recordkeeping forms as such information will be available to both OSHA inspectors, as well as potentially members of the public under the Freedom of Information Act. OSHA has stated that there are significant benefits associated with the collection and publication of Forms 300 and 301 data that outweigh the risk to employee privacy. OSHA intends to post the collected establishment-specific, case-specific injury and illness information online. Covered employers should be prepared to post their 300A summaries from February 1 through April 30, 2024. Covered employers should also be prepared to electronically submit their 300, 300A, and/or 301 incident reports by March 2, 2024.¹²⁰

Heat Safety Rules in the Forecast

On May 19, 2023, OSHA presented at the Small Business Administration (SBA) OSHA Small Business Labor Safety Roundtable about OSHA's heat illness rulemaking. OSHA stated that it is working towards initiating the Small Business Regulatory Enforcement Fairness Act (SBREFA) process, hoping that the process will be complete with a final rule in the following 10-12 months. On July 27, 2023, the House Education and Labor Committee approved the Asuncion Valdivia Heat Illness and Fatality Prevent Act of 2021, which directs OSHA to develop a workplace heat standard within two years of the passage of the bill. The legislation includes provisions concerning training and education on prevention and response to heat illness along with whistleblower protections.

118 OSHA, [Improve Tracking of Workplace Injuries and Illnesses](#), 88 Fed. Reg. 47254 (July 21, 2023).

119 See Jamie Spataro, Alka Ramchandani-Raj, Maayan Dekar and Matthew Holmes, [Your Recordkeeping Data Is About to Steal the Spotlight –How to Prepare for OSHA's Expanded E-Recordkeeping Rule](#), Littler ASAP (Aug. 14, 2023).

120 See OSHA, Injury Tracking Application, available at <https://www.osha.gov/injuryreporting/ita/>.



OSHA continues its enforcement focus on heat-related complaints and hazards through a National Emphasis Plan.¹²¹ This plan expanded OSHA's heat-related injury program by prioritizing enforcement and inspections on days when the heat index is higher than 80 degrees. Citing to increased fatality levels due to heat, while noting its belief that many such fatalities go unreported, OSHA offices have been instructed to prioritize heat-related complaints received on days in which the heat index exceeds 80 degrees to enable OSHA to intervene and prevent illness or injury.¹²²

While several states, including California, Oregon, Colorado, Minnesota, and Washington, have adopted rules or standards for heat safety, no OSHA standard on heat safety yet exists and enforcement is currently limited to the General Duty Clause, which does not impose any specific standard or requirements for employers to follow. Nevada and Maryland are currently developing new standards. California is working on a proposed indoor heat illness standard to protect indoor employees from heat hazards and a standard to address "ultrahigh heat" protections. Employers should remain cognizant of the dangers of heat and should consider a plan to address heat safety and reduce the risks to employees.

Time for OSHA's Infectious Disease Standard?

OSHA has announced plans to resuscitate a rulemaking that started in the early years of the Obama administration which would impose standards for the protection against airborne infectious diseases, including SARS, MRSA, tuberculosis, and COVID-19, among others. The rulemaking process began in May 2010, and had been inactive since December 2014, until the DOL announced its intent to publish a Notice of Proposed Rulemaking by the middle of next year. OSHA recently updated its proposed rulemaking target date for a permanent infectious disease standard to March 2024. The new description of the rule now includes COVID-19. The agency could not agree on issuing a final rule for COVID-19 for healthcare and has instead decided to combine COVID-based protections into a broader infectious disease rule that covers other types of communicable diseases such as MRSA, tuberculosis, SARS, and Ebola. OSHA has withdrawn its intent to issue a final rule for COVID-19 for healthcare. This rule is likely to have critical importance and may contain the Biden administration's vision for infectious disease prevention for COVID-19 and beyond.

Prevention of Workplace Violence in Healthcare and Social Assistance

On March 1, 2023, OSHA presented at a Small Business Advocacy Review (SBAR) panel in an initial step to formulate a new standard regarding violence in the healthcare and social assistance fields. The workplace violence panel comprises small entity representatives selected from hospitals, emergency rooms, psychiatric hospitals, home healthcare agencies, emergency medical services, and social assistance providers, excluding child daycare centers, to discuss feasibility of enforcement and implementation. The panel examined a number of issues including potential workplace violence

¹²¹ OSHA, [National Emphasis Plan – Outdoor and Indoor Heat-Related Hazards](#), CPL 03-00-024 (Apr. 8, 2022).

¹²² See Sarah Martin, Lauren Bridenbaugh, Brad Hammock, and Alka Ramchandani-Raj, [OSHA Announces Increased Focus on Heat-Related Hazards](#), Littler ASAP (Sept. 21, 2021).

programs, hazard assessments, control measures, training, investigations, and recordkeeping. Even though it does not have a national emphasis program directed towards workplace violence, OSHA is aggressively citing employers for violations under the General Duty Clause.¹²³

Worker Walkaround Representative Designation Process

During the Obama administration, through a 2013 letter of interpretation known as the “Fairfax Memo,” OSHA declared—without going through a formal rulemaking process—that “workers at a worksite without a collective bargaining agreement [may] designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative.” The rule was rescinded during the Trump administration.

Through the Fairfax Memo, OSHA took the position that its regulation allows the agency’s compliance officer to decide to allow a non-employee to participate in an inspection of an employer’s worksite if it “is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace.” OSHA went further in the Memo to say that, in its view, these representatives are “reasonably necessary” whenever they will make a positive contribution to a thorough and effective inspection. OSHA rescinded the Fairfax Memo after business groups challenged it and OSHA’s use of non-employee representatives.

This year, OSHA signaled that it would revive its position announced in the Fairfax Memo via a rule to purportedly clarify the right of workers and certified bargaining units to specify a worker or union representative to accompany an OSHA inspector during the inspection process/facility walkaround, regardless of whether the representative is an employee of the employer, if in the judgment of the Compliance Safety and Health Officer such person is reasonably necessary to an effective and thorough physical inspection. OSHA followed through with that intention on August 30, 2023, when it published its proposed rule on this topic in the *Federal Register*.¹²⁴

Other Regulatory Items on OSHA’s Agenda

In addition to the rulemakings discussed above, throughout the past year OSHA has continued to announce news relating to regulatory changes being proposed and considered, including a renewed focus on specific hazards in the workplace with national emphasis programs. For example, last year the agency announced that it is considering amendments to the 2016 Walking Working Surfaces rule that affects a wide range of workers under Part 1910 of the OSH Act standards and includes requirements to address slip, trip, and fall hazards. This year it launched a national emphasis program that targets fall-related injuries and fatalities for people working at heights in all industries.

OSHA has also launched a national emphasis program in warehouses and national distribution centers. The national emphasis program for warehouses is focused on common workplace hazards including powered industrial trucks, material handling/storage, walking-working surfaces, exits and fire protection. Inspections under this provision will likely cover heat-related issues and ergonomic hazards.

Whether and when these programs materialize remains to be seen.

123 Alka Ramchandani-Raj and Chuck Trowbridge, [OSHA Moves One Step Closer to Proposing a Rule Addressing Workplace Violence in the Healthcare and Social Assistance Industries](#), Littler ASAP (Mar. 15, 2023).

124 OSHA, [Worker Walkaround Representative Designation Process](#), No. 2023-18695 (Aug. 30, 2023).

3. Office of Federal Contract Compliance Programs

The OFCCP is currently without a confirmed director. Former OFCCP Director Jenny Yang is now at the White House as Deputy Assistant to the President for Racial Justice & Equity. The now-acting director is Michele Hodge, who served as deputy director from August 2021 to April 2023. Prior to that, Hodge was a regional director for over a decade, promoted from compliance officer.¹²⁵ Deputy Director of Enforcement Sean Ratliff remains in place.

Hodge has 39 years of civil rights and nondiscrimination enforcement experience with OFCCP, starting with her first role as a compliance officer in the New Jersey District Office. She also has significant construction enforcement experience, which is consistent with OFCCP's renewed interest over the past two years regarding enforcement efforts on construction projects.

OFCCP's Contractor Portal Turns Two

In December 2021, OFCCP implemented a new requirement that all covered federal contractors and subcontractors annually certify that they have current affirmative action plans in place for each of their establishments or functional units as applicable. The Process for Certification, which was to be made through a new Contractor Portal, was rolled out over a five-month period beginning on February 1, 2022. OFCCP stated that contractors that failed to certify by June 30, 2022, would be at a higher risk for audit. OFCCP more or less made good on this threat when it published its 2023 list of contractors to be audited, limiting audits to just those contractors that had failed to certify through the portal by December 1, 2022.

After this initial implementation of the portal, it was unclear as to when contractors should next re-certify. Since most contractors probably have calendar affirmative action plans and others have plans beginning at other times of the year, a June 30 deadline for certification did not seem to make much sense going forward. Many contractors, therefore, assumed that future certifications would be timed to correspond to their plan year, and some contractors have already proceeded to recertify.

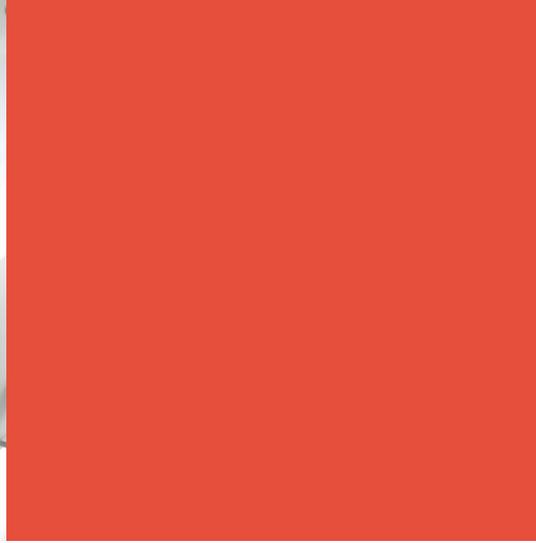
Under these circumstances, many were surprised when, on March 20, 2023, OFCCP announced an expectation that all existing covered federal contractors and subcontractors must again certify that they have developed and maintained an affirmative action plan for each of their establishments or functional units as applicable, within a specific window.¹²⁶ In particular, OFCCP stated that the certification must be made through the agency's Contractor Portal between March 31, 2023 and June 29, 2023.

OFCCP warned that contractors that had not certified by June 29, 2023, would be more likely to appear on OFCCP's scheduling list than those that certified they are meeting their AAP requirements. As OFCCP followed through on this same threat in developing its first scheduling list of 2023, this warning should be taken seriously.

Construction contractors that are not also supply and service contractors remain exempt from the certification requirement, at least for the time being.

¹²⁵ See OFCCP, Leadership Biographies, available at <https://www.dol.gov/agencies/ofccp/about/leadership-bio/Deputydirector-Michele-Hodge>.

¹²⁶ OFCCP, News Release, [US Department of Labor Will Open Online Portal for Federal Contractors, Subcontractors to Certify Affirmative Action Program Compliance](#) (June 29, 2023).



Companies that are new federal contractors or subcontractors this year have 120 days to develop their AAP(s) and must register and certify compliance through the Contractor Portal within 90 days of developing them.

Changes to the Scheduling Letter and Itemized Listing

OFCCP's scheduling letter and itemized listing are used to initiate compliance reviews, and the listing describes the documents and information that contractors must produce at the beginning of a review. OFCCP recently revised the scheduling letter and itemized listing, which seek significantly more information and documents than did the prior versions.¹²⁷ At the time of publication of this report, these final changes had not yet been formally published in the *Federal Register*.

New Invitation to Self-Identify Disability Status

On April 25, 2023, the Office of Management and Budget approved OFCCP's updated form prospective and current employees must use to voluntarily self-identify as an individual with a disability. The form is applicable to federal contractors and subcontractors subject to Section 503 of the Rehabilitation Act, which requires contractors to invite applicants to self-identify as disabled at the pre-offer stage, and to invite new hires and incumbent employees to self-identify. Federal contractors use this self-identification information to support required affirmative action programs.

The updated form contains several revisions that seek to update the preferred language for disabilities and includes additional examples of disabilities. These changes include:

- *Listing additional disabilities.* The revised form includes, for example: alcohol or other substance use disorder (not currently using drugs illegally); mobility impairment benefiting from the use of a wheelchair, scooter, walker, leg brace(s) and/or other supports; neurodivergence, for example, attention-deficit/hyperactivity disorder (ADHD), autism spectrum disorder, dyslexia, dyspraxia, other learning disabilities; partial or complete paralysis (any cause); pulmonary or respiratory conditions, such as tuberculosis, asthma, emphysema; short stature (dwarfism); and traumatic brain injury.
- *More descriptive and inclusive examples of disabilities.* The previous version of the form lists the following as disabilities: cancer, deaf or hard of hearing, epilepsy, and intellectual disability. The revised form is more inclusive by listing the following as disabilities: cancer (past or present); deaf or serious difficulty hearing; epilepsy or other seizure disorder; and intellectual or developmental disability.

¹²⁷ [Figure F-3: Combined Scheduling Letter and Itemized Listing](#), *supra* note 44.



- *Simplifying and broadening the response options to:*
 - Yes, I have a disability, or have had one in the past
 - No, I do not have a disability and have not had one in the past
 - I do not want to answer

Of note, the revised form explains that “completing this form is voluntary.” The previous version of the form states, “identifying yourself as an individual with a disability is voluntary.”

Pre-enforcement Notice and Conciliation Procedures

On August 3, 2023, the DOL published the final rule to modify procedures and standards the OFCCP uses when issuing pre-enforcement notices and securing compliance through conciliation.¹²⁸ The final rule modifies the agency’s earlier rule, “Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination,” which took effect on December 10, 2020. In OFCCP’s announcement of the final rule, it stated, “the 2020 rule imposed inflexible evidentiary requirements early in the agency’s compliance evaluation process and attempted to codify complex definitions for ‘qualitative’ and ‘quantitative’ evidence and other standards.”

The final rule largely rescinds many of the transparency measures that were implemented by the 2020 rule. Although it retains the requirement that OFCCP issue a Predetermination Notice (PDN) and Notice of Violation to contractors in all matters in which the agency has made preliminary findings of potential discrimination and findings of discrimination, respectively, the final rule changes the standard for OFCCP in issuing a PDN, by replacing the term “indicators of discrimination” with “preliminary findings of potential discrimination” to describe what is necessary in order to issue a Predetermination Notice.

Among other things, the final rule also provides that the agency may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review, or refuses to provide access to witnesses, records, or other information.

The 2023 final rule is effective as of September 5, 2023. The 2023 final rule applies to any pre-enforcement notices and actions issued on or after the effective date. Companies that are unsure of their status as federal contractors or subcontractors should consult with legal counsel.

¹²⁸ OFCCP, Final Rule, [Pre-enforcement Notice and Conciliation Procedures](#), 88 Fed. Reg. 51717 (Aug. 4, 2023).

D. Department of Homeland Security

1. Impact of Immigration Policies and Practices on U.S. Employers

In the past year, employers have faced various hurdles in the ever-changing world of immigration compliance. The challenges range from correctly implementing the end of the Form I-9 COVID-19 exception using virtual verification, whereby physical reverification of employees' documentation is required, to moving to an alternative procedure of permanent virtual verification using a new one-page Form I-9. Additionally, Immigration Customs and Enforcement (ICE) has resumed I-9 audits, the Immigrant & Employee Rights Section (IER) of the Department of Justice continues its record pace of investigations of citizenship status discrimination and document abuse, and the U.S. Citizenship and Immigration Services (USCIS) has modernized its PERM process,¹²⁹ and has assisted Ukrainians and Afghans with employment authorization. Finally, the slow speed of the USCIS in processing applications for green cards and Employment Authorization Documents (EADs) appears to have contributed to the chronic labor shortages in the United States.

2. End of COVID-19-Related Virtual Verification of Form I-9 Documentation

Since March 20, 2020, employers have been allowed to inspect employees' Form I-9 documentation remotely through a virtual connection (e.g., video link, fax, or email), where employers and workplaces are operating totally remotely due to COVID-19. Thereafter, the Department of Homeland Security (DHS) relaxed the definition of a *remote employee* and stated: "If employees hired on or after April 1, 2021 work exclusively in a remote setting due to COVID-19 related precautions, they are temporarily exempt from the physical inspection requirements associated" with the Form I-9 "until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier."

On May 4, 2023, DHS and ICE announced that the I-9 flexibilities, as described above, would end on July 31, 2023. Furthermore, all employees onboarded using virtual verification, must have in-person physical verification of their identity and employment eligibility documentation by August 30, 2023. Effective August 1, 2023, qualified employers were provided another avenue to reverify already-existing Form I-9s, which were virtually verified during COVID-19 flexibilities.

One of the issues that many employers faced is how to physically reverify documents when employees are still working remotely. Immigration law has long held that employers may utilize authorized/designated representatives to complete Section 2 of the Form I-9. The designated representative may be an adult family member or friend, notary public (with California being an exception in that the notary must be a bonded immigration consultant) or another similar designated person. Thus, many employers have utilized this method to accomplish the physical reverification of the Form I-9 documentation. In using this method, it is important to follow the protocols set forth by DHS.¹³⁰

Another issue that some employers have discovered is that they implemented the virtual verification policy even though they did not meet the criteria for such – either all employees did not work remotely due to COVID-19 in the period from March 20, 2020 to March 31, 2021, or employees hired as of April 1, 2021, did not engage in remote work exclusively. In these cases, the Form I-9s should be fully completed again – Section 1 and Section 2 – because the original Form I-9 was completed incorrectly. After both are completed, both old and new Form I-9s should be retained.

¹²⁹ See Tasneem Zaman, [New Era for Permanent Employment Certifications \(PERM\)](#), Littler ASAP (May 23, 2023).

¹³⁰ See Bruce Buchanan, [Employers Have 30 Days to Reach Compliance after I-9 COVID Flexibilities End on July 31, 2023](#), Littler ASAP (May 19, 2023); Jorge Lopez and Elizabeth Whiting, [What Does the End of Title 42 and I-9 Flexibility Mean for Employers?](#), Littler ASAP (May 15, 2023).



Yet another issue that many employers have faced is that their electronic I-9 provider will not provide access to the authorized/designated representative in order to complete Section 2 in the physical reverification of the employees' documentation in Section 2 of the Form I-9. If that occurs, the company should obtain a paper copy of Section 2 that has been physically verified. Upon receipt, it should upload Section 2 into the electronic I-9 system and retain the paper Section 2 of the Form I-9. Alternatively, the electronic I-9 provider may provide access for a new Form I-9 to be completed and the new Form I-9 should be attached electronically to the existing Form I-9.

Alternatively, employers may use an authorized/designated representative to complete a new Section 2 if the employee presents new documentation or the representative is different from the initial company representative. If the documentation and the company representative are the same, a notation in Section 2, "Additional Information" field may be completed.

3. Alternative Procedure Option - Permanent Virtual Verification

Effective August 1, 2023, the USCIS has given employers an option on the way they may verify employment eligibility.¹³¹ This option is referred to as an alternative procedure (also referred to as "permanent virtual verification") whereby qualifying employers may inspect employees' Form I-9 documentation virtually as opposed to physical verification, which was required for all new hires until the COVID-19 exception was created in March 2020. This alternative virtual verification procedure is available only to qualified employers that:

1. Are in good standing in the E-Verify program;
2. Are enrolled in E-Verify for all hiring sites in the United States, for which they seek to use the alternative procedure;
3. Have complied with all E-Verify requirements, including verifying the employment eligibility of newly hired employees in the United States; and
4. Have completed an E-Verify tutorial/training concerning fraud awareness and anti-discrimination.

Qualified employers have the choice to use the alternative Permanent Virtual Verification procedure or not. Additionally, qualified employers may opt to use this process for remote employees only, and not for employees who work onsite or in hybrid capacity. If an employer is not currently an E-Verify participant, it may enroll in E-Verify, take the tutorial course, as mentioned above, and begin to utilize the alternative virtual verification procedure.

¹³¹ See Angel Valverde, Bruce Buchanan, and Jorge Lopez, [USCIS Announces Alternative Procedure for Completion of Form I-9 – Permanent Virtual Verification](#), Littler ASAP (July 24, 2023).

4. New Form I-9

On August 1, 2023, the USCIS released a revised version of the Form I-9, Employment Eligibility Verification, which may be used now and must be used for all new hires and rehires as of November 1, 2023.¹³² It is a major change from prior Form I-9s in that it has returned to a one-page version, which had been used from 1986 until 2013. This one-page version, however, has two Supplements, A and B. Thus, this Form I-9 is “one-page plus.”

This update brings several improvements to the Form I-9, including a new checkbox for employers enrolled in E-Verify to indicate remote, virtual examination of identity and employment authorization documents. The most notable changes are that the revised form: (1) reduces Sections 1 and 2 to one page; (2) includes a checkbox that allows employers enrolled in E-Verify to indicate that they have examined the employee’s identity and employment authorization documents remotely; (3) creates a separate page for Supplement B, formerly known as Section 3, concerning reverification and rehiring; and (4) creates a separate page for the Preparer/Translator Certification area, which is now Supplement A.

5. ICE I-9 Audits/Notices of Inspection Are on the Rise

After a period from March 2020 to spring of 2022, when virtually no ICE I-9 audits/Notices of Inspection (NOI) occurred due to COVID-19, ICE has been gradually increasing these audits over the past few months. Although ICE has not released any numbers on the audits, substantial evidence shows the increase, which is traditionally not uncommon as we approach a presidential election year. An employer must be aware of the potential cost in penalties if its Form I-9s have substantive errors. If an employer has 50% or more in substantive errors, the ICE matrix calls for \$2,701 per Form I-9 with an error. This can lead to some outrageously high penalties. Currently, one of the focuses of ICE in its Form I-9 audits is the audit trail of an electronic I-9 provider. Even though the standards for an adequate audit trail are unclear, ICE is vigorously pursuing many of these cases and seeking \$1 million or more in fines. Currently, ICE is pursuing a case against a big-box retailer seeking \$24 million for alleged faulty audit trails at a number of the retailer’s Pennsylvania stores. The retailer is challenging in federal court whether the Office of Chief Administrative Hearing Officer’s (OCAHO) Administrative Law Judge (ALJ) has the authority to hear the matter.



¹³² See Angel Valverde, Bruce Buchanan, and Jorge Lopez, [Changes in the New Form I-9, Employment Eligibility Verification](#), Littler ASAP (Aug. 15, 2023).

6. IER Investigations/Settlements

Another hot topic in the world of immigration compliance is investigations and settlements before IER. A major issue before the IER is the use of electronic systems to recruit, screen, and hire applicants. IER has said it is evaluating electronic software systems, based on complaints of discriminatory hiring practices, and their effect in recruiting, screening, and/or hiring applicants. IER has identified several software platforms with dropdown menus that resulted in many employers inadvertently posting job advertisements with unlawful immigration status restrictions. In 2023, there have been 21 IER settlements, 16 of which involved ads/postings related to restricting the positions to certain immigration status – U.S. citizens, permanent residents, temporary non-immigrant visas – H-1B visas, and OPT/F-1 visas. In 2022, 23 of 40 IER settlements involved such ads/postings. The penalties average about \$50,000 per settlement. Of course, that does not consider attorney fees and bad publicity (IER issues a press release on every settlement it reaches.)

7. Modernization of PERM

On June 1, 2023, the long-anticipated new and modernized PERM Form 9089 was introduced to the public by the U.S. Department of Labor, Foreign Labor Certification unit. The PERM process permits an employer to hire a foreign worker to work permanently in the United States. Petitioners and their attorneys may now file PERM Applications through the Foreign Labor Application Gateway (FLAG) portal, which is also used for filing Labor Condition Applications (LCA) for H-1B petitions and wage requests for PERM, H-2A, H-2B and CW-1 petitions.

Some notable features and modifications in the new PERM form and filing through the FLAG include filtering of the Prevailing Wage Determination in the Form 9089 for the specific position, incorporating the required “magic language” through a specific question prompt, and requiring business necessity to be submitted when responses to certain questions pertaining to the PERM position are in the affirmative.

8. Employment of Ukrainian or Afghan Parolees

As more Ukrainians and Afghans are legally entering the United States, the USCIS made it easier for them to be work-authorized. On November 21, 2022, the USCIS announced that Ukrainians paroled into the United States under Uniting for Ukraine or Afghans paroled into the United States under Operation Allies Welcome (OAW) and Operation Enduring Welcome (OEW) are employment-authorized incident to status. This means that if one is paroled into the United States under Uniting for Ukraine, an unexpired Form I-94, Arrival/Departure Record, with a class of admission (COA) of “UHP” is an acceptable List A document that shows their identity and work authorization for Form I-9. For Afghan parolees, their unexpired Form I-94, Arrival/Departure Record, contains a class of admission of “OAR,” if their parole has not been terminated. The Form I-94 satisfies the Form I-9 requirement for 90 days from the date of hire. After the 90-day period, parolees must present an unexpired Employment Authorization Document (EAD), or unrestricted Social Security card and acceptable List B identity document from the Lists of Acceptable Documents.

9. Slow USCIS Processing Times’ Effect on Chronic Labor Shortages

Over the past few years, the USCIS has fallen farther and farther behind in processing permanent resident (green cards) petitions and Employment Authorization Documents (EADs). This has also been occurring in consular processing (processing related to foreign nationals’ interviews at U.S. consulates). Due to this, employers are having to wait longer for foreign nationals to be able to legally work. This is especially unsettling when employers are facing chronic labor shortages.

IV. The Supreme Court

The U.S. Supreme Court delivered several notable decisions that were either directly labor- or employment-related, or are likely to impact employers, this past year.

A. Opinions This Term

1. Inclusion, Equity & Diversity Efforts

One decision that has left employers unsure of its employment implications is the June 29, 2023, opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina*.¹³³ The Supreme Court in this decision held that the two universities' race-conscious admissions practices were unconstitutional. Employers have been left wondering what impact this decision has on their inclusion, equity, and diversity (IE&D) efforts.

It bears emphasis that this decision focused on the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act's application to student-admission decisions in the higher education context only. Most employers are governed by Title VII of the Civil Rights Act and similar state and local civil rights laws. While higher education could previously use race as a factor in admissions decision-making in certain cases, Title VII has invariably prohibited the use of race and other protected characteristics in employment decision-making. Specifically, under Title VII, as interpreted by the courts and the EEOC, employers may only consider race as a factor in making selections: (1) on a voluntary basis where an employer can show (a) a manifest imbalance between groups in underrepresented job categories as evidenced by structured statistical analysis, (b) narrowly tailored measures to address specific imbalances; and (c) such programs are temporary/limited duration; or (2) when legally mandated.

This second exception does not apply to affirmative action programs implemented by government contractors pursuant to OFCCP's rules or similar state or local requirements. While the equal employment-related requirements that apply to federal contractors are generally referred to under the rubric "affirmative action," these requirements do not involve, or even permit employers to consider, race or ethnicity in making employment-related decisions. For this reason, such requirements do not raise the types of concerns that were at issue in the *Harvard/UNC* case. On the other hand, there are some state or local governments that purport to require their vendors to establish goals and timetables for the utilization of protected classes in a manner that may be unconstitutional in light of the Supreme Court's decision in these cases. State and local contractors should exercise caution when faced with such demands.

For all practical purposes, the exception for legally mandated preferences has no continuing relevance, and employers are very unlikely to be able to satisfy the conditions required to justify voluntary preferences. Therefore, the implementation of voluntary IE&D initiatives requires considerable tact and legal vetting to avoid actual, or perceived, diversity quotas and impermissible employment decisions based on a protected category. Employers should continue to consult with employment counsel regarding their IE&D efforts, as one size does not fit all.

As a result of the *Harvard/UNC* decision, employers in every industry should anticipate a meaningful shift in the way the public, employees, the judiciary, government agencies, and the plaintiff's bar evaluate affirmative action efforts in employment and voluntary IE&D initiatives. As the consequences of these decisions continue to reveal themselves,

¹³³ See Jim Thelen, Alysha Asghar Dotson, Kelli Fuqua, and Lysette Roman, [U.S. Supreme Court Strikes Down Race-Conscious Admissions – What Does it Mean for Employers?](#) Littler Insight (June 30, 2023).

employers should keep a close eye on legislative, legal, and regulatory developments across the country to ensure that their affirmative action and IE&D initiatives comply with continually evolving federal and state anti-discrimination laws.

2. Discrimination Decisions

The Court issued opinions on other hot-button topics this term. In a unanimous decision in *Groff v. DeJoy*, the Court upended nearly 50 years of precedent by “clarifying” the undue hardship standard in religious accommodation claims under Title VII of the Civil Rights Act.¹³⁴ In doing so, the Court effectively created a much more stringent standard for an employer to show it would be an undue burden to accommodate an employee’s religious beliefs and/or practices. The heightened standard requires employers assessing religious accommodation requests to deny such requests only if there is evidence that providing the accommodation would result in “substantial increased costs in relation to the conduct of [an employer’s] particular business.” This is a markedly enhanced requirement for an employer assessing whether religious accommodation requests constitute an undue hardship.

What types of accommodations would prove too much to be reasonable? It is unclear, and it likely will be left up to the lower courts to flesh this out. The Court specifically declined to apply the “significant expense or difficulty” analysis and precedent established in cases decided under the Americans with Disabilities Act, and conceded that the application of the “clarifying” standard requires case-by-case factual analysis. Therefore, employers are left without clear guidance on how to apply this new standard when confronted with religious accommodation requests.

In another discrimination-related case, *303 Creative, LLC v. Elenis*, the Supreme Court held that the First Amendment’s free speech protection bars Colorado from requiring a website designer to create expressive designs that convey messages with which the designer disagrees.¹³⁵ The ruling is important for businesses that serve the public and provide goods and services that may be deemed to express the owner’s views because the Court clarified that public accommodation laws, while based on compelling state interests, can run afoul of business owners’ constitutional rights.



134 See Dionysia Johnson-Massie, Laura Saracina, N. Brenda Adimora, and Jim Paretti, [Nearly 50 Years Later, the Supreme Court “Clarifies” the Undue Hardship Standard in Religious Accommodation Claims](#), Littler Insight (June 30, 2023).

135 See Gregory Henninger, Sean O’Brien, Jim Paretti, and Mark T. Phillis, [Express Yourself – Supreme Court Rules that Businesses May Deny “Expressive Services” to the Public Based on Their Owner’s Beliefs](#), Littler Insight (June 30, 2023).

3. Ability to Strike

In *Glacier Northwest v. Teamsters*, the Supreme Court addressed whether the National Labor Relations Act “preempts an employer’s state tort claim against a union for property damage that allegedly occurred because workers failed to take reasonable precautions to protect the employer’s property before going on strike.”¹³⁶ The Court held that the NLRA does not preempt state law tort claims alleging intentional destruction of property, particularly where the union fails to take reasonable precautions to protect against foreseeable and imminent harm. This decision slightly restricts the right to strike by obliging striking unions to mitigate or eliminate risk of harm to employer property, especially when perishable products are involved, as they were in this situation.

4. Overtime

Earlier in the term, the Court issued its opinion in *Helix Energy Solutions Group, Inc. v. Hewitt*, holding that paying an employee a “day rate” does not satisfy the salary basis test under the white-collar exemptions to the Fair Labor Standards Act. Because of this ruling, even highly compensated employees may be eligible to receive overtime if they are paid solely on a day-rate basis.¹³⁷ Going forward, employers should be careful paying on a day-rate basis those employees they claim to be exempt, and, if they do, work to ensure that the overall compensation arrangement is in compliance with the salary basis requirement as articulated by the Supreme Court in *Helix*.

5. Arbitration

In arbitration news, the Court in *Coinbase Inc. v. Bielski* held that lower courts must stay their proceedings while the question of whether the matter should be before an arbitrator in the first instance is on appeal. This case may be welcome news for employers trying to enforce their arbitration agreements without delay.

B. Upcoming Decisions

During the next term, the Supreme Court agreed to resolve a circuit split on the degree of harm required to show discrimination in employee transfers. In *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022), the plaintiff claimed that a transfer that altered her scheduling and responsibilities but did not change her title, salary, or benefits, constituted gender discrimination in her “terms, conditions, or privileges of employment” under Title VII. The Eighth Circuit disagreed, holding “[a] transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action.” The D.C. and Sixth Circuits have reached different conclusions in similar cases holding that shift changes are generally actionable under Title VII, even when they are unaccompanied by reductions in pay or benefits.

The initial question before the Court had been much broader, asking the Court to consider not just transfer decisions, but *any* employer conduct courts found causes materially significant disadvantages for employees. The Court on June 30, 2023, agreed to review this matter, but limited its consideration to whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage. The Court’s decision in this case could still, however, have broader implications for other types of workplace practices, including IE&D efforts.

¹³⁶ See Sam Wiles and Kathryn E. Siegel, [Supreme Court Holds Employers Can Sue for Strike Damages](#), Littler Insight (June 7, 2023).

¹³⁷ See David Jordan, Allison Williams, Kelcy Palmer, and Nicole LeFave, [Supreme Court Holds Day Rate Pay Cannot Satisfy the Salary Basis Test](#), Littler ASAP (Feb. 23, 2023).

The issue before the Court in *Acheson Hotels, LLC v. Laufer*, is whether a self-appointed Americans with Disabilities Act “tester” has standing to challenge a place of public accommodation’s failure to provide disability accessibility information on its website, even if they lack any intention of visiting that place of public accommodation. The number of Title III public accommodation lawsuits continues to rise,¹³⁸ so employers should keep watching this case closely.

In *Murray v. UBS Securities, LLC*, the Court will consider whether under the burden-shifting framework that governs Sarbanes-Oxley cases, a whistleblower must prove that their employer acted with a “retaliatory intent” to advance a claim or if a lack of “retaliatory intent” is part of the affirmative defense on which the employer bears the burden of proof.

While not an employment matter, *Loper Bright Enterprises v. Raimondo* could have important employment law implications, as it will test the so-called *Chevron* doctrine, or how much deference a court must give a federal agency’s interpretation of the laws it is charged with enforcing. This doctrine, a product of the Court’s decision in *Chevron v. Natural Resources Defense Council*, holds that a federal agency’s interpretation of an ambiguous statute is accorded deference if the interpretation is deemed reasonable. If the Court overrules *Chevron* or limits its scope, federal agencies like the NLRB, EEOC, or DOL will have less authority to establish policy when enforcing an ambiguous law.



138 See Matt Gonzales, [Record Number of Lawsuits Filed Over Accessibility for People with Disabilities](#), SHRM (Mar. 23, 2022).

V. State of the States

Over 420 state and local-level bills have been enacted since the last WPI Labor Day Report in September 2022. In that time, a few clear trends in labor and employment-related legislation have emerged. Major topics of interest this year include workplace freedom of speech, reproductive health, the use of artificial intelligence in personnel decisions, pay transparency, and regulation of noncompetition agreements. Notably, unlike in 2022 in which about a quarter of all enacted legislation concerned the pandemic, COVID-19 is not the legislative priority this year that it was in 2021 and 2022, though there have been a few pandemic-related bills enacted. These largely concern prohibitions on mandatory vaccinations.

In addition to the major topics of interest this year, a few other trends have materialized. We have seen a number of workplace safety initiatives focused on laws and administrative regulations requiring employers to implement worker protection plans for heat exposure. There is a push in some states to overhaul child labor laws to make it less onerous to employ minors by modifying the types of work activities a minor may perform, the hours a minor may work, and the process for obtaining a work permit. Leave of absence entitlements remain popular, with additional states enacting new paid family and medical leave benefits programs. Many states have also enhanced their existing antidiscrimination statutes by adding new protected classifications, with a particular focus on prohibiting discrimination on the basis of a person's sexual orientation and gender identity.

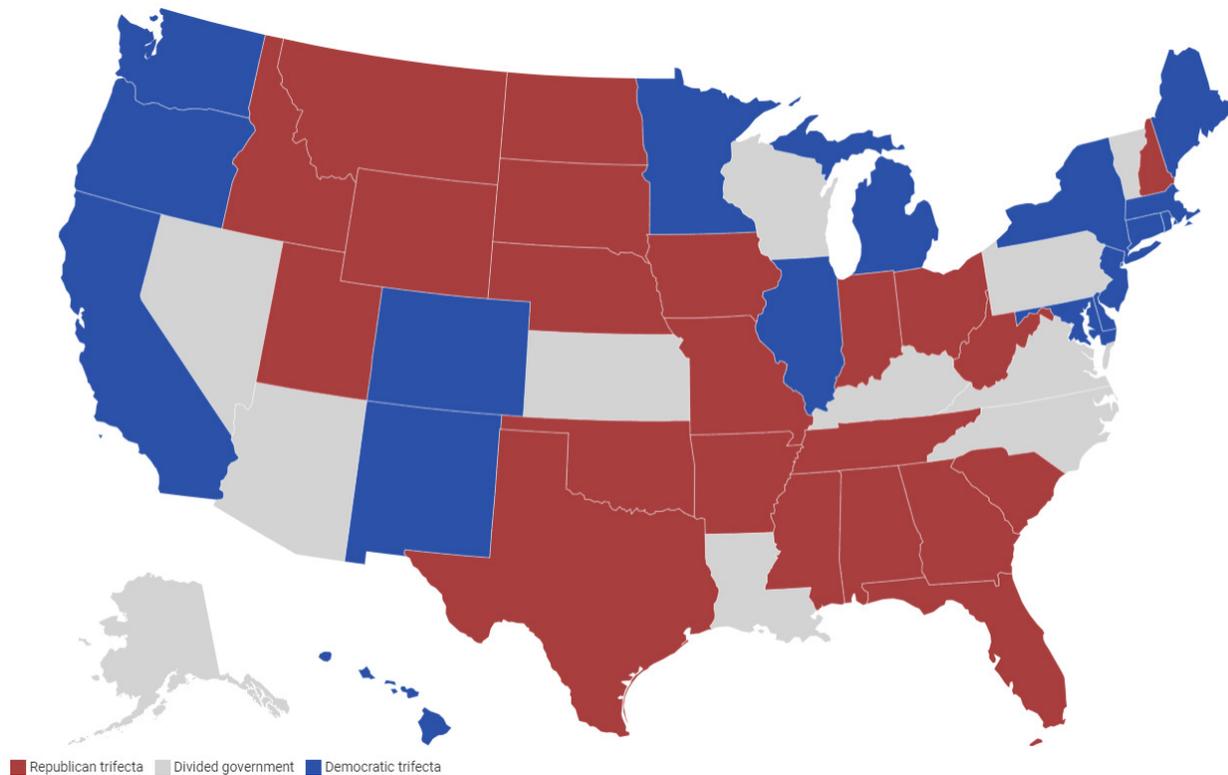
Four states shifted to "trifecta" status beginning in 2023, meaning that as a result of the 2022 election cycle, one political party in those states holds the governorship and majorities in both chambers of the state legislature. Maryland, Massachusetts, Michigan, and Minnesota changed to Democratic trifectas; for Michigan and Minnesota, the 2023 legislative session reflected that change. Michigan repealed its right-to-work law and its law prohibiting abortion, and made several amendments to the Elliot-Larsen Civil Rights Act to extend antidiscrimination protections on the basis of sexual orientation, gender identity, gender expression, and decision to terminate a pregnancy. Minnesota's massive Omnibus Jobs Bill¹³⁹ created statewide paid sick and safe time obligations, rendered most non-compete agreements in Minnesota unenforceable, prevented mandatory employer-sponsored meetings, mandated various wage and hour protections for warehouse workers, increased protections for pregnant and breastfeeding workers, and enacted the Safe Workplaces for Meat and Poultry Processing Workers Act. In separate legislation, the state also legalized recreational cannabis use,¹⁴⁰ enacted a paid family and medical leave law,¹⁴¹ and limited an employer's ability to inquire into and consider a job applicant's wage history during the hiring process.

¹³⁹ Minnesota S.F. 3035 (May 24, 2023); see also Holly Robbins, Jeremy Sosna, Jeff Dilger, Emily McNee, Susan Fitzke, and Margaret Fitzpatrick, [Big Changes to Minnesota's Employment Laws Are Coming Soon](#), Littler Insight (May 18, 2023).

¹⁴⁰ See Grant Goerke and Jen Chierek Znosko, [As Minnesota Nears Broad Marijuana Legalization, Employers Should Anticipate Testing Policy Changes](#), Littler Insight (May 16, 2023).

¹⁴¹ See Holly Robbins, Jacqueline Mrachek, and Stephanie Mills-Gallan, [Minnesota Enacts Paid Family and Medical Leave Statute](#), Littler Insight (May 31, 2023).

State Government Trifectas



Source: [Ballotpedia](#)

In addition to the states, a number of cities or localities have enacted labor and employment-related legislation. For example, on January 20, 2023, San Francisco, California’s mayor signed the Military Leave Pay Protection Act, which will require employers with 100 or more employees to supplement the pay of covered employees during a qualifying military leave for up to 30 days in a calendar year.¹⁴² The Act requires employers to pay active military members the difference between their military pay and the amount they would have received from their employer working their regular schedule while they are on military duty.

The growth of state and local laws should remind businesses operating in multiple jurisdictions – whether they have locations in a single state, multiple states, or nationwide –that ensuring compliance companywide requires knowing about, and complying with, applicable laws enacted at all levels of government (federal, state, and local).¹⁴³

A. Reproductive Health and Gender-Affirming Care

The U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, which overturned *Roe v. Wade*, continues to reverberate in statehouses across the country. Several states have revived abortion bans that had been nullified under *Roe*, and others have passed new restrictions on abortions. States with new or enhanced abortion bans

¹⁴² See Sebastian Chilco and Wendy Buckingham, [New San Francisco Law Requires Supplemental Compensation During Military Leave](#), Littler Insight (Jan. 27, 2023).

¹⁴³ See Jennifer Harpole, Josh Kirkpatrick, and Sebastian Chilco, New Edgewater, [Colorado Minimum Wage Ordinance Highlights Compliance Challenge](#), Littler ASAP (Aug. 8, 2023).



since September 2022 include Florida, Iowa, Montana, Nebraska, North Carolina, North Dakota, South Carolina, West Virginia, and Wyoming. Some of these laws restricting access to abortions also criminalize providing financial assistance to an individual seeking an abortion, or contain an “aiding and abetting” clause—these restrictions may have the effect of limiting the type of benefits an employer may provide to employees, such as reimbursing travel or the cost of obtaining an abortion through insurance or other means.

Conversely, several other states have enacted new laws or have amended their state constitutions to codify the right to reproductive freedoms. These laws guarantee access to reproductive health services, including abortion, and some expressly prohibit discrimination against an individual based on the individual’s reproductive health choices. Michigan enacted a package of legislation that not only repealed its statute prohibiting abortion, but also prohibits discrimination against a person based on whether the person has terminated a pregnancy. A few cities have also recently amended their antidiscrimination ordinances to prohibit employment discrimination on the basis of a person’s reproductive health choices, including Austin, Chicago, Cincinnati, and Philadelphia.

Many of the states that have enacted laws to protect reproductive health rights have also enacted civil procedure “shield” laws, which aim to protect a person or an entity from out-of-state prosecutions related to abortion services. Shield laws instruct the jurisdiction’s courts and law enforcement agencies not to recognize interstate extradition requests, civil or criminal liability related to abortion services, subpoenas or summonses, or out-of-state investigations related to reproductive health care by states in which abortion is illegal. Shield laws are in place in California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, and the District of Columbia.

In a separate issue related to privacy and bodily autonomy, states have taken legislative action related to the availability of gender-affirming care, which is the medical component of gender dysphoria treatment and gender transitioning. As with abortion, some states have enacted laws restricting availability of gender-affirming care. Florida considered legislation that would require a health benefit plan that covers gender-affirming care to also cover the medical costs of detransitioning. Texas enacted a law that not only prohibits gender-affirming care for minors, but also prohibits public money from being directly or indirectly used, granted, paid, or distributed to any health care provider, medical school, hospital, or other entity, organization, or individual that provides or facilitates the provision of a prohibited procedure or treatment for a child. Other states have enacted laws protecting a person’s right to obtain gender-affirming care, including by requiring health benefit plans to cover it. Colorado, Illinois, Massachusetts, Nevada, New Mexico, Oregon, Vermont, and the District of Columbia expressly protect access to gender-affirming care.

B. Workplace Freedom of Speech and Mandatory Employer-Sponsored Meetings

As previously discussed, in April 2022, NLRB General Counsel Jennifer Abruzzo issued a memorandum intended to bar employers from holding employee meetings during working hours to address union representation unless employers provide employees specific assurances that participation in the meeting is strictly voluntary. A few states—Connecticut, Maine, and Minnesota—have enacted similar laws that restrict how employers may lawfully convey messages to employees about religious and political matters. California, New Mexico, New York, Rhode Island, Vermont, and Washington have similar bills pending, and mandatory employer-sponsored meetings will continue to be a hot-button legislative issue into 2024.

Importantly, because these bills typically include the decision to join or support a labor organization within the definition of “political matter,” they significantly curtail what communications an employer may make to employees related to unionization. Labor unions are behind the push to enact legislation to prevent mandatory employer-sponsored meetings during union election campaigns. While these laws do not entirely prevent an employer from conducting this type of meeting, the laws do provide that an employer cannot compel an employee’s attendance at a meeting or retaliate against an employee for not attending. At both the federal and state levels, these laws are currently being challenged on constitutional and federal preemption grounds.

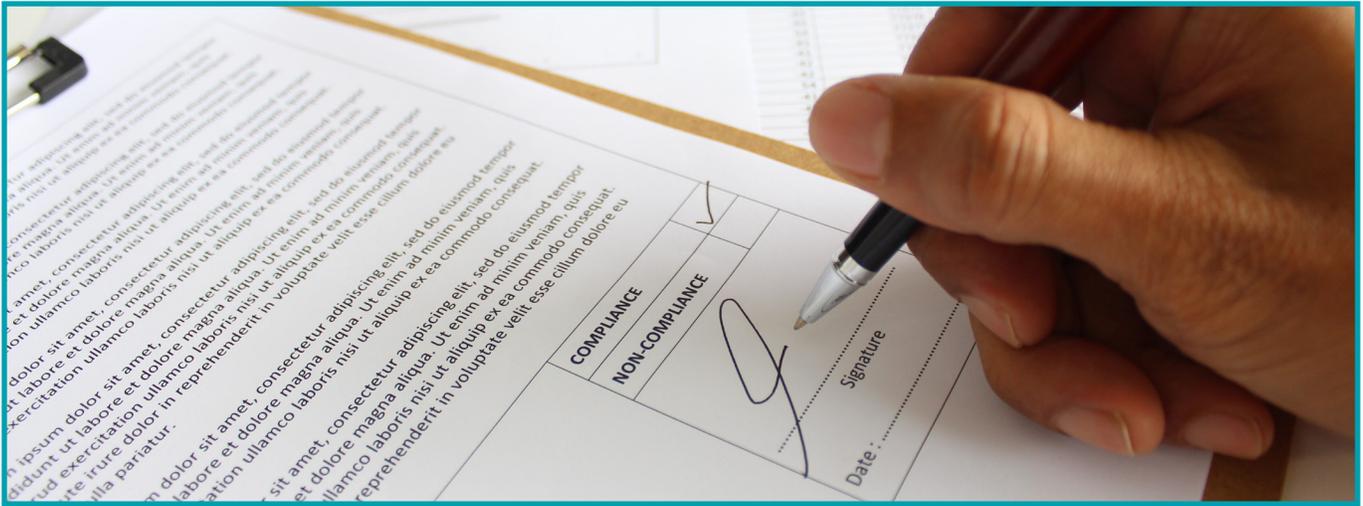
While not specifically addressing employer-sponsored meetings, some states are taking an employee-focused tack in protecting workplace freedom of speech. Montana enacted a law that prohibits an employer from discriminating or retaliating against an employee due to the employee’s political affiliation or expression of political views, including legal expressions of free speech in personal social media posts. Jurisdictions that considered similar bills this year that would prohibit political affiliation or political activity discrimination include Hawaii, Iowa, Utah, and Virginia.

C. Artificial Intelligence (AI) in Human Resources Decision-Making

The AI landscape has been drastically altered since the fall of 2022 with the rise of ChatGPT and other generative AI technologies now available and in wide use. Employment-related legislation in this area largely concerns an employer’s use of artificial intelligence, including an algorithmic or otherwise automated decision-making system or other data-driven statistical processes, to assist in taking personnel actions such as attracting and hiring qualified applicants and promoting current employees to new positions.

Some states, concerned that these tools could be applied in a discriminatory manner, are considering bills that would make it unlawful to use this technology in a way that is intentionally discriminatory or in a way that is facially neutral but nonetheless could result in discriminatory impact. For example, the District of Columbia is considering a bill that would prohibit discrimination in algorithmic eligibility decisions regarding employment and require an employer to notify applicants and employees about how personal information is used in algorithmic eligibility determinations. Massachusetts is considering a bill, the Act Preventing a Dystopian Work Environment, that would require an employer to notify workers if the employer implements an automated decision system and/or an electronic productivity system, and would also prohibit an employer from relying solely on output from an automated decision system to make hiring, promotion, termination, or disciplinary decisions.

Other states, including California, Connecticut, Illinois, Maryland, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Washington seek to regulate the use of AI in employment decision-making, but are taking a more measured approach by introducing legislation that would convene a state task force or working group to analyze and guide the use, design,



and deployment of automated systems in a way that would protect the rights of the public while leveraging the benefits of AI. The California legislature has also proposed a joint resolution urging the federal government to impose an immediate moratorium on the training of certain AI systems for at least six months to allow time for federal and state governments to develop AI governance systems.¹⁴⁴

New York City, however, has moved full speed ahead with its regulation of the use of automated decision-making systems in employment. In late 2021, the City enacted an ordinance setting limits on an employer's use of automated employment decision tools in making hiring and promotion decisions. Under the ordinance, employers that use these tools must commission an independent bias audit of the tool, publish a summary of the audit results, provide notice to applicants and employees of the tool's use and functioning, and provide notice that affected individuals may request an accommodation or alternative selection process. The City issued administrative regulations implementing the ordinance in the spring of 2023, along with a frequently asked questions guide, and enforcement of the law began in July 2023.¹⁴⁵

The use of AI in the workplace will only grow in the years to come. Whether and how legislators and policymakers will adopt a regulatory framework around this technology has yet to be seen, but increasingly it appears that the table is being set. Given the complicated and nuanced nature of the subject, and the vast range of territory it covers, savvy employers should pay close attention to federal, state, and local regulation in this area, and consider efforts to influence such policies before they are set in stone.

D. Noncompetition Agreements

In January 2023, the U.S. Federal Trade Commission (FTC) proposed new regulations that, if adopted, will ban all noncompete agreements with limited exceptions.¹⁴⁶ Then, as discussed in Section III.A.3 of this Report, in June 2023 NLRB GC Abruzzo issued a memorandum urging the National Labor Relations Board to make new law prohibiting the implementation and enforcement of employee noncompete agreements under the National Labor Relations Act. Restrictions on noncompetition agreements is part of the pro-worker legislative priorities of the Biden administration, but it is uncertain whether any concrete action will occur at the federal level.

144 See Alice Wang and Joy C. Rosenquist, [An "AI Summer" in California?](#), Littler ASAP (July 20, 2023).

145 See Niloy Ray, Monica Sislak, and Eli Freedberg, [NYC Department of Consumer and Worker Protection Issues Guidance on AI Regulations](#), Littler ASAP (July 5, 2023).

146 See Colton Long, Melissa McDonagh, and James Witz, [FTC Proposes Rule Banning Non-Competes](#), Littler Insight (Jan. 5, 2023).

On the state side, California has famously restricted the use of post-employment noncompetition agreements for many years, though a few other states have recently been willing to forge ahead in this area by considering or enacting similar legislation. Minnesota enacted a new law as part of its Omnibus Jobs Bill that prohibits all noncompete agreements with an employee or an independent contractor working for the employer, regardless of the person's income.¹⁴⁷ The prohibition has two limited exceptions. Noncompetition agreements will be valid and enforceable if they meet certain time and geographic parameters and are related to the sale or dissolution of a business. The law also excepts nondisclosure, confidentiality, trade secret, and non-solicitation agreements. The New York State legislature has passed legislation that would prohibit noncompete agreements with the exception of nondisclosure and client non-solicitation agreements.¹⁴⁸ Notably, the New York bill does not include a sale-of-business exception.

E. Pay Transparency

Since 2021, an increasing number of states have amended their pay equity laws to foster greater pay transparency by requiring employers to disclose the rate of pay or a range of pay rates in any job posting or advertisement for a position. In 2023, nearly a quarter of U.S. states and major cities introduced similar legislation. Hawaii enacted a new pay transparency law in July that requires that certain job listings disclose the hourly rate or salary range that "reasonably reflects the actual expected compensation" for the position being posted.¹⁴⁹ These changes will take effect on January 1, 2024. In Illinois, Governor Pritzker signed into law a bill that will make it unlawful for an employer with 15 or more employees to fail to include the pay scale and benefits for a position in any job posting. The Illinois law will not take effect until January 1, 2025.¹⁵⁰ Other states, including Massachusetts and New Jersey, have pay transparency bills pending that have a good likelihood of success in late 2023 or in 2024.

Moreover, two states that previously enacted pay transparency laws passed amendments to those laws in 2023 that expand current disclosure obligations to require an employer to provide additional compensation descriptions and other information related to hiring and pay. Colorado enacted a law requiring an employer to announce internal vacancies and promotion opportunities as well as the compensation range for those positions, along with detailed information about the hiring process.¹⁵¹ New York State enacted a law that amends its existing pay transparency provisions requiring employers to disclose compensation or range of compensation for a job, promotion, or transfer opportunity that will physically be performed in New York, including for any employee physically located outside the state who reports to someone in New York.¹⁵²

147 See Jeremy D. Sosna, Kurt J. Erickson, and Margaret Fitzpatrick, [Minnesota Is Poised to Enact a Law Banning Virtually All Non-Compete Agreements](#), Littler Insight (May 15, 2023).

148 See Shawn Matthew Clark, Miguel A. Lopez, and Michael Paglialonga, [Non-Compete Ban on the Horizon in New York?](#), Littler ASAP (June 20, 2023).

149 See Wayne Yoshigai, Judy Iriye, and Denise Visconti, [Hawaii Enacts Pay Transparency Law and Broadens Equal Pay Law](#), Littler ASAP (July 21, 2023).

150 See Joy C. Rosenquist and Victoria Vanderschaaf, [Pay Transparency Bill Headed to Illinois Governor](#), Littler ASAP (May 25, 2023).

151 See Jennifer Harpole, Grace McGuire and Luke Gilewski, [Colorado Amends Equal Pay Transparency Posting Requirements, Extends Recovery for Wage Discrimination Claims to Six Years](#), Littler ASAP (June 7, 2023).

152 See Eli Freedberg, Thelma Akpan and Liran Messinger, [New York Becomes the Latest State to Require Salary Transparency in Job Postings](#), Littler ASAP (Dec. 28, 2022).

F. On the Horizon: Legislation Concerning IE&D Initiatives

In 2021, President Biden rescinded the previous administration’s Executive Order 13950, which limited federal contractors and the recipients of federal grants from discussing “divisive” topics during workplace training related to inclusion, equity and diversity (IE&D), including what that EO 13950 termed “stereotyping” and “scapegoating” on the basis of race or sex. Many private-sector employers have also embraced workplace IE&D initiatives.

In 2022, Florida enacted the so-called “Stop-WOKE” Act, which limits an employer’s ability to include discussions of implicit bias or systemic racism in workplace training relating to diversity, non-discrimination, and non-harassment, and in 2023, enacted a law prohibiting the state’s public colleges and universities from spending state or federal money on programs or campus activities that advocate for diversity, equity, and inclusion.¹⁵³ The Stop-WOKE Act is currently subject to a partial injunction while a court challenge to its constitutionality plays out.¹⁵⁴ A few other states considered similar legislation in 2023, however, and—as discussed in Section IV of this Report—this topic may prove to be one of the bigger employment law stories in 2024 as a result of the U.S. Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina*. It is likely that states may try to legislate this issue either by passing laws similar to Florida’s or by enshrining protections for IE&D-focused hiring and training programs in the private employment sector.



¹⁵³ See Jim Paretto, Cindy-Ann Thomas, and Nancy Johnson, [Florida Limits Permissible Workplace Training on Diversity, Implicit Bias, and Systemic Racism](#), Littler ASAP (Apr. 22, 2022); Cindy-Ann Thomas, [Florida’s Governor Signs Bill to Defund DEI Initiatives at Colleges](#), Littler ASAP (May 16, 2023).

¹⁵⁴ See Nancy A. Johnson and Cindy-Ann L. Thomas, [Can Even Stranger Things Still Happen? Florida is Blocked From Enforcing “Stop-WOKE” Law... For Now](#), Littler Insight (Aug. 22, 2023).

VI. Conclusion

While the record-high unemployment rates and displacement that struck the global workforce during the pandemic have subsided, the labor market is far from receiving a clean bill of health. The widening skills gap, increased job dissatisfaction, and restrictive employment policies, among other labor concerns, are hurting workers and employers alike. The labor market participation rate remains below pre-pandemic levels, and today's job market has approximately 1.5 openings for every unemployed individual.

But highlighting the issues is only half of the equation. As the workplace continues to evolve, workers, employers, educators, and policymakers need to reevaluate what is needed to make the workplace thrive. In Washington, D.C., a divided government has resulted in legislative gridlock and increasing regulatory and executive action from the Biden administration. State and local legislatures are not waiting for Washington, resulting in myriad new policies for employers and workers to maneuver. Likewise, governments around the globe are navigating workplace policies, attempting to harness new technologies and workforce trends to foster economic growth.

Whether legislative and regulatory efforts at the federal level work fast enough to adequately address these issues remains to be seen. What is more certain is that the coming months will bring ramped-up federal regulatory activity, an incongruent patchwork of state-level employment laws, and intensifying political rhetoric as the 2024 election cycle begins. Buckle up.

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