HR 2023

42nd Annual Labor & Employment Seminar

Lynchburg, VA

October 25, 2023

WOODS ROGERS
VANDEVENTER BLACK

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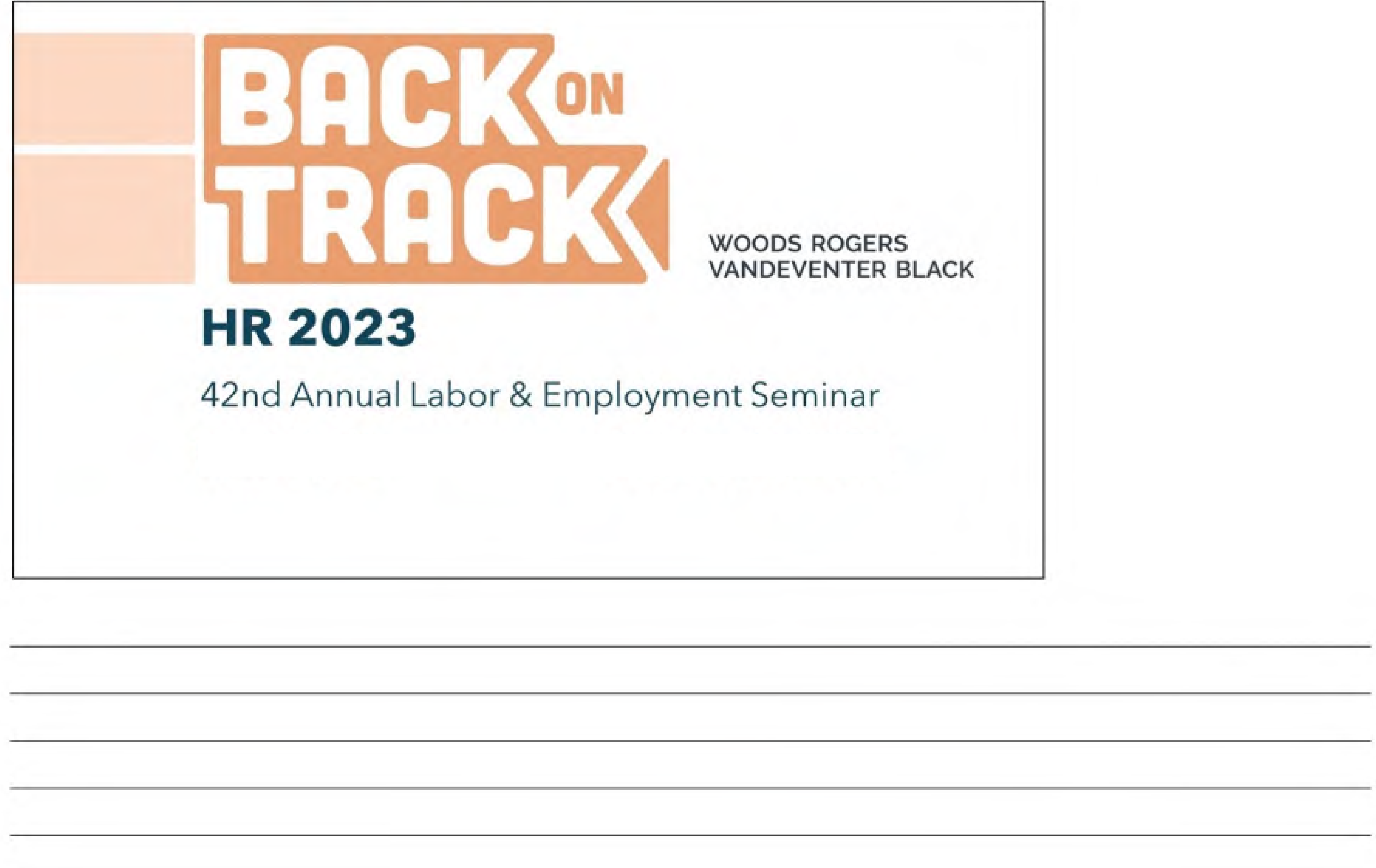
Agenda

- Check In and Continental Breakfast: 8:15 am – 8:55 am
- Seminar Begins: 9:00 am
  1. Training Day: Legal Updates & Hot Topics
     - Break
  2. Starting Block: Hiring the Right Way
- Lunch
  3. Home Straight: Return to Office Issues
  4. Jumping Hurdles: DEI After Affirmative Action
     - Break
  5. Open High: Medical Marijuana & Drug Testing
  6. Wrap Up and Final Q&A
- Seminar Ends: 3:30 pm

Seminar Resources

wrvblaw.com/LEresources
or scan QR code

Slides & Notes


BACK ON TRACK
WOODS ROGERS
VANDEVENTER BLACK
HR 2023
42nd Annual Labor & Employment Seminar

Seminar Agenda

1. Training Day: Legal Update & Hot Topics
   - Short Break
2. Starting Block: Hiring the Right Way
   - Lunch
3. Home Straight: Return to Office Issues
4. Jumping Hurdles: DEI After Affirmative Action
   - Short Break
5. Open High: Medical Marijuana & Drug Testing
6. Final Q&A

Training Day
Legal Updates & Hot Topics

Agenda

1. Virginia Legal Updates
2. Federal Cases & Regulations
3. EEOC
4. DOL & OSHA
5. NLRB

Virginia Legal
Updates

Minimum Wage for the Disabled

As of 7-1-2023

- No new subminimum wage allowances for certain individuals with disabilities
- After July 1, 2030, must pay all EEs with disabilities regular minimum wage

VEC Requires Electronic Registration

- VA ERs must register and submit unemployment insurance claim information through VEC's Employer Self-Service (ESS) portal
- VEC trying to reduce claim backlog and wait times
- ERs already enrolled in State Information Data Exchange System (SIDES) are also in compliance

NDAs and Sexual Misconduct

VA General Assembly amends ban effective 7-1-2023

- Bans pre-dispute agreements that cover up workplace sexual harassment and assault
- Applies to confidentiality, non-disclosure, non-disparagement agreements
- For current and prospective EEs
- Mirrors federal law
  - Speak Out Act, effective 12-7-2022
  - But does not apply to severance or post-termination agreements

Social Security Number as Identification

As of 7-1-2023

- For current and future EEs, ER cannot use full or partial SSNs as a form of ID
- Does not include former EEs
- According to VDOL, purpose is to eliminate any use of SSN on ID cards, access cards, badges, etc.
- Violators will be fined $100/violation

Organ Donation Leave

As of 7-1-2023 - Required for ERs with 50 or more EEs

- Up to 60 days of annual unpaid leave for organ donation
- Up to 30 days for bone marrow donation
- Can't be treated as a break in continuous service
- EEs must be reinstated to previous position or equivalent
- EEs retain health benefits
- Monetary penalties for violations

Other VA Laws Effective July 2023

- Weekly wage for "low-wage worker" is now $1,343 ($69,836/yr) for purposes of the non-compete ban for low wage employees
- Some VA ERs that don't offer a qualified retirement plan must register with RetirePath

Federal Case Law Updates

Religious Accommodation Policies

United Airlines (EEOC) 11-8-2022

- Buddhist pilot diagnosed with alcohol dependency; lost FAA medical cert.
- UA required AA attendance for recert.
- Pilot requested to attend a different group as an accommodation because of religious objections to AA content
- UA refused
- UA settled with EEOC for $305,000

"Employers have the affirmative obligation to modify their policies to accommodate employees' religious beliefs."

Undue Hardship

Groff v. DeJoy (USPS) 6-29-2023

- Christian EE requested religious accommodation for Sundays off after USPS began delivering Amazon packages in 2013
- Request denied; EE quit after being disciplined for missing work on Sundays
- Previous case law said ERs don't need to accommodate if it would impose a "de minimis" burden

SCOTUS imposed new threshold of "undue hardship"

- Substantial increased costs

How Should You Respond?

Prepare for possible increase in religious accommodation requests

- Train HR staff and frontline managers about new accommodation standard
- Ensure interactions with EEs are **interactive** and **respectful**
- Review and revise policies on religious accommodation

Contact an attorney for advice!

Federal Legislation & Regulations

PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act, effective 12-29-2022

- Extends FLSA pumping/nursing protections to exempt workers (previously only applied to non-exempt).
- Exception for ERs with fewer than 50 EEs if "undue hardship."
- For one year after child's birth, ER must provide reasonable break time and a private place to pump.
- For wages, treated like other breaks.

PUMP Act Violation

Spa failed to comply with pumping protections 9-18-2023

- EE asked for private place to pump breast milk
- Supervisors took nearly 4 months to ID a space
- Manager's office lacked privacy; other workers entered
- Gave EE a written counseling for leaving without permission when EE advised she needed to leave to pump
- Also found ER allowed eight 14- and 15-year-olds to work shifts longer than permitted by law
- Paid $6,810 in civil penalties

Pregnant Workers Fairness Act

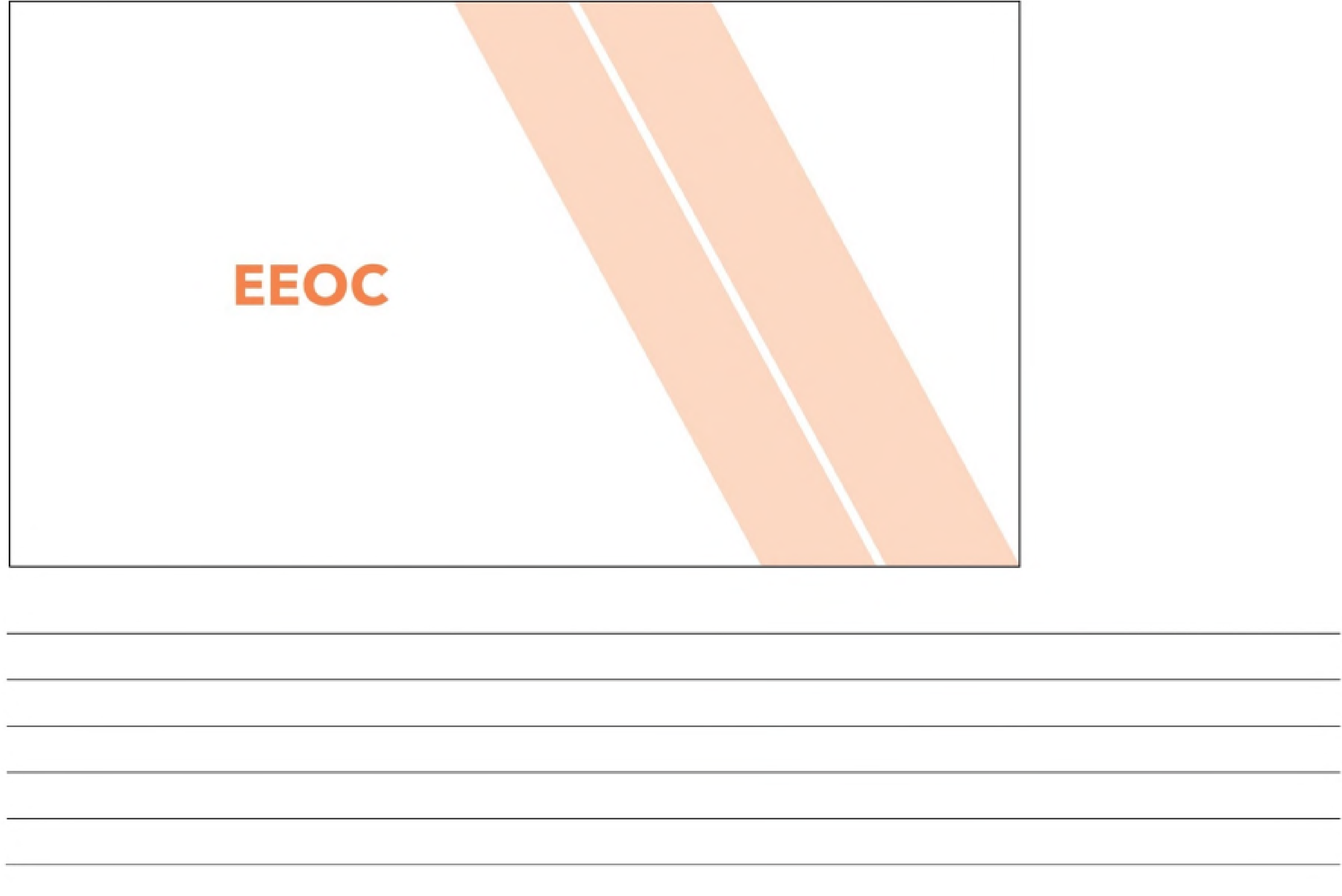
Effective 6-27-2023

- Applies to ERs with 15+ EEs
- Requires reasonable accommodations for EEs with temp. limitations due to pregnancy, childbirth, or related medical conditions
- Closely modeled after ADA
- Does NOT require condition to meet ADA definition of disability
- Does require interactive process

Compare VA's Existing Protections

Virginia Human Rights Act (VHRA)

- Provides similar protections for pregnancy, childbirth and nursing EEs
- Applies to ERs with 5 or more EEs
- ERs must give notice of the law, post it, and update handbooks


EEOC

Litigation Levels

- Filed 50% more lawsuits in 2023 than prev. year
- Filed largest # of systemic lawsuits in past 5 years

- Systemic lawsuits: broad effect on industry, profession, location
- Targeted industries:
  - Hospitality
  - Retail
  - Healthcare
  - Construction

Strategic Enforcement Plan (2024-28)

1. Eliminating barriers in recruitment, hiring
2. Protecting vulnerable workers from employment discrimination
3. Addressing emerging issues
   - Disability and pregnancy discrimination, COVID-19, technology-related discrimination, etc.
4. Advancing equal pay for all workers
5. Preserving access to legal system
6. Preventing and remedying systemic harassment

HR's Use of Artificial Intelligence (AI)

EEOC issues guidance **5-18-2023**

- ER may be liable for discriminatory impact of AI tools
- Nondiscrimination burden is on the ER, not the AI vendor
- Includes selection of new EEs, performance monitoring, pay, promotions

Are AI-driven decisions job-related and consistent with business necessity?

Hearing and Visual Disabilities

EEOC updated guidance 1-24-2023 and 7-26-2023

- Outlines pre- and post-job offer questions.
- Examples of free or low-cost reasonable accommodations.
- Handling safety concerns.
- Anti-harassment and discrimination examples.

Exemption not Accepted

EEOC v. Werner Enterprises (D.NE) 09-01-2023

- ER failed to hire or accommodate deaf applicant for truck driving job after completing training at truck driving school and obtaining a CDL
- EE had exemption from hearing regulation from DOT
- VP of Safety told EE they would not hire him because he could not hear
- Jury awarded EE $75,000 in compensatory damages, ***$36,000,000*** in punitive damages

Self-Assessment

EEOC v. Surfside Realty (D.SC) 3-30-2023

EEOC sued on behalf of former EE, alleging age discrimination

- EE was community manager for 25 years before she was fired
- ER alleged Logan failed to meet its expectations in her duties
- Logan argued she was doing well because she was given discretion in managing her clients
- Court sided with ER
  - "...in determining whether an employee has met an employer's legitimate job expectations, it is the employer's perception that is relevant, not the employee's self-assessment"

The Grudge

EEOC v. Key Management Partners (D.Md.) 7-5-2023

- CEO asked co. contract attorney, McKenzie, to meet in private, called her many times trying to convince her to have sex
- McKenzie told him she was not interested, ended calls, notified supervisor
- Also emailed CEO that his phone calls were "not invited nor welcome" and made her uncomfortable
- CEO fired her for "poor performance" ~3 mos. later
  - Had received favorable performance evaluations for those 3 mos.
- KM denied unemployment because McKenzie terminated for "gross misconduct"
- KM provided negative reference leading to delayed start date for another job
- Court granted default judgment on retaliation claim

GINA Charges Increasing

EEOC v. ResourceOne **9-29-2023**

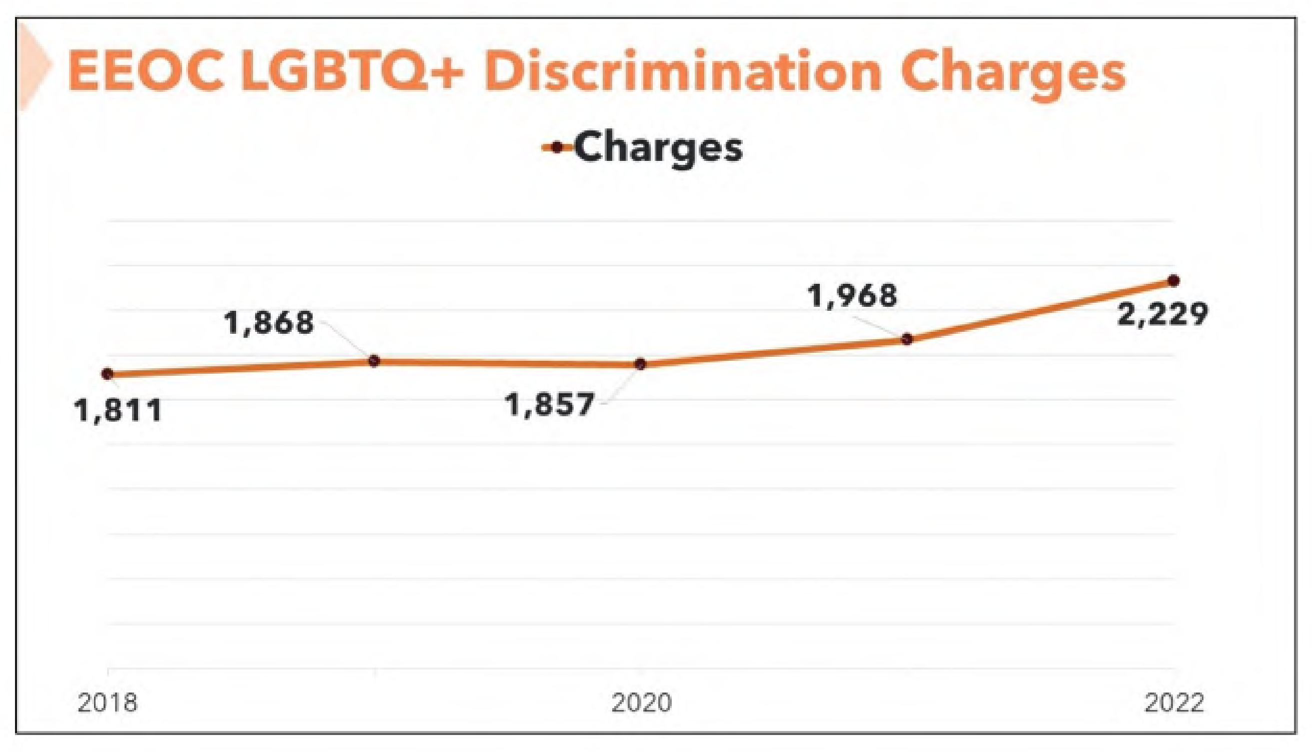
- EE received results from home DNA test kit showing ancestry from Cameroon and Congo
- Supervisor learned about results and began calling her names like "ape" and "Congo," and other mocking phrases
- Requests to stop were ignored; EE complained to higher-level manager but he participated in harassment
- Harassment was so intolerable EE felt forced to resign
- Supervisor obtained phone #, sent her text calling her "Congo" after she quit
- EEOC sued for discrimination on basis of genetic information, race, and national origin

Three Years Since Bostock v. Clayton Co.

US Supreme Court ruled Title VII prohibits discrimination based on sexual orientation or gender identity because both are forms of sex discrimination

EEOC Enforcement

- Proposed strategic enforcement plan expands vulnerable and underserved worker priority to include LGBTQ+ individuals


EEOC LGBTQ+ Discrimination Charges
Charges
1,811
1,868
1,857
1,968
2,229
2018
2020
2022

EEOC & DOL Join Forces!

Memorandum of Understanding **9-13-2023**

- Agencies will share information and conduct joint investigations, training, and outreach
- Field staff empowered to coordinate efforts on individual matters *and* larger investigations
- Will make complaint referrals to each other
- Will share complaint or investigative files, EEO-1 reports, FLSA records, and "statistical analyses or summaries"

This new power to gather information paired with 2024-2028 SEP gives teeth to EEOC priorities

Department of Labor

New Overtime Rule Proposal

DOL Releases Proposed Rule 8-30-2023

- Would raise OT threshold to $55,068/yr ($1,059/wk)
  - Currently $35,568/yr ($684/wk)
- Highly compensated to $143,998 (currently $107,432)
- Includes automatic updates every 3 years based on current earnings data
- 60 day public comment period

New OSHA Recordkeeping Rule

New rule applies to 2023 reporting period submitted by 3-2-2024 deadline

- ERs with 100+ EEs in certain industries to submit Forms 300 and 301 (Workplace Injuries and Illnesses)
- Expands lists of covered industries
  - https://www.osha.gov/recordkeeping/naics-codes-electronic-submission

Costly OSHA Violations

Manufacturer pays nearly half million **9-25-2023**

- PA dumpster manufacturer
- Willful, repeated, serious violations
- Didn't provide welders with protective equipment like goggles
- Insufficient respiratory protection and respiratory training
- Many electrical and heavy machinery hazards
- Faces $484,401 in OSHA penalties

OFCCP Rescinds Religious Exemption Rule

Effective 3-31-2023

- In 2020, OFCCP adopted religious exemption rule
  - Allowed some discrimination by for-profit ERs that promote religious values
- Recission returns to norm of exemption
  - Does not allow for-profit ERs to use religion to discriminate on basis of race, color, sex, sexual orientation, gender identity, or national origin

OFCCP Revises Self-ID Disability Form

Contractors must implement new form by 7-25-2023

- Updates preferred language for types of disabilities and includes new examples of disabilities

Cracking Down on Dangerous Child Labor

69% increase in illegal child labor between 2018-2022

- DOL has launched a task force
- Office of Inspector General investigating DOL's enforcement
- McDonald's paid $212,544 in civil penalties
  - 305 children working more hours than permitted and performing prohibited tasks across franchises
- DOL on lookout for "hot goods"
  - Minnesota meat manufacturer not allowed to ship goods after using oppressive child labor

Cracking Down on Dangerous Child Labor

Cleaning companies illegally employing minors

- Sanitation services paid $1.5M fine
  - More than100 kids cleaning dangerous meatpacking equipment overnight
- DOL evaluating whether corporations = ERs even if minors hired by cleaning company
- 13 y.o. lost use of arm cleaning Perdue chicken plant in Accomack
  - Tyson & Perdue being investigated by DOL
  - High numbers of migrant children

National Labor Relations Board

2023 NLRB

Pro-labor political and social attitudes have led to a more aggressive NRLB

Remember! NLRA applies to you, even if your workplace is not unionized

FY2023
Unfair Labor Practices Charge Filings Up 10%, Union Petitions Up 3%

Automatic Bargaining Without an Election

Cemex Construction Materials Pacific 8-25-2023

- Eliminates requirement for unions to file NRLB election petition before ER may be required to recognize union
  - Union can demand recognition by claiming majority support
- If union claims majority support, ER must:
  - Immediately grant recognition without NLRB election
  - or file own NLRB election petition
- If ER fails to take either step, NLRB will order mandatory union recognition
- Any unlawful ER conduct preceding election will prompt board to issue mandatory bargaining order requiring union recognition

All Handbook Policies May Be Unlawful

Stericycle, Inc. **8-2-2023**

- Work rule presumed unlawful if reasonable EE could interpret any word/phrase to restrict exercise of Section 7 rights
- ERs must show rule advances legitimate and substantial business interest that can't be advanced by narrower rule
- With *Cemex*, even one work rule that EE believes chills rights can lead to bargaining order
- Ex: Stericycle decision overruled prior decisions that held rules requiring EEs to maintain confidentiality of workplace investigations were categorically lawful
- Applies retroactively

Restored Protection for Outbursts

Lion Elastomers **5-1-2023**

Overturned 2020 General Motors Ruling

- Restores tests giving workers leeway for outbursts on the picket line, during confrontations with managers, and on social media
- Applies to protected concerted activity, not general workplace behavior
- Context-specific tests
  - "Conduct occurring during the course of protected activity must be evaluated as part of that activity – not as if it occurred separately from it and in the ordinary workplace context"

Button Bans Unlawful

NLRB Judge: Kroger Unlawfully Banned Buttons 5-3-2023

- Complaint alleged 2 Kroger subsidiaries violated NLRA by banning BLM buttons and masks
- Some EEs sent home without pay for not complying
- Administrative Law Judge determined actions were protected concerted activity
- Both ERs had written dress code policies, but they were not enforced
  - ER defense that buttons violated dress code therefore failed

Enforce your policies consistently

Non-Competes Unlawful

NLRB memo 5-30-2023

- Position: most non-compete agreements with non-managerial EEs are unlawful
- Argues non-competes limit EEs from engaging in "concerted activity" by
  - Limiting post-termination employment opportunities
  - Limiting prior workplace relationships

Who is a Manager/Supervisor?

Anyone with authority to do one or more of the following:

1. Hire, fire, layoff, recall, assign work, discipline, discharge, or make decisions affecting pay
2. Effectively recommend such actions
3. If independent judgment is exercised

New Independent Contractor Standard

Atlanta Opera Ruling 6-13-2023

- Rejected ruling of 2019 board that entrepreneurial opportunity for gain or loss should be the "animating principle" of the independent-contractor test
- Test now relies on "common law" principals as determined in earlier rulings
- Evidence must show workers render services as part of their own independent businesses

Protection of Future Workers

Miller Plastic Products **8-31-2023**

- Protects protests by individual workers that could prompt future group actions
- Prior rule protected solo protests only when accompanied by "evidence of 'group activities'"
- Unfortunately, anything can be argued to prompt future group actions

Non-Employees Protected

American Federation for Children **8-31-2023**

- Protects workers who advocate for non-EEs, such as interns, applicants
- In this case, EE pushed ER to rehire an immigrant who reapplied for job after regaining work authorization
- Principle of "solidarity" says workers stand to benefit from making common cause with non-EE colleague because they can expect colleague's help in future

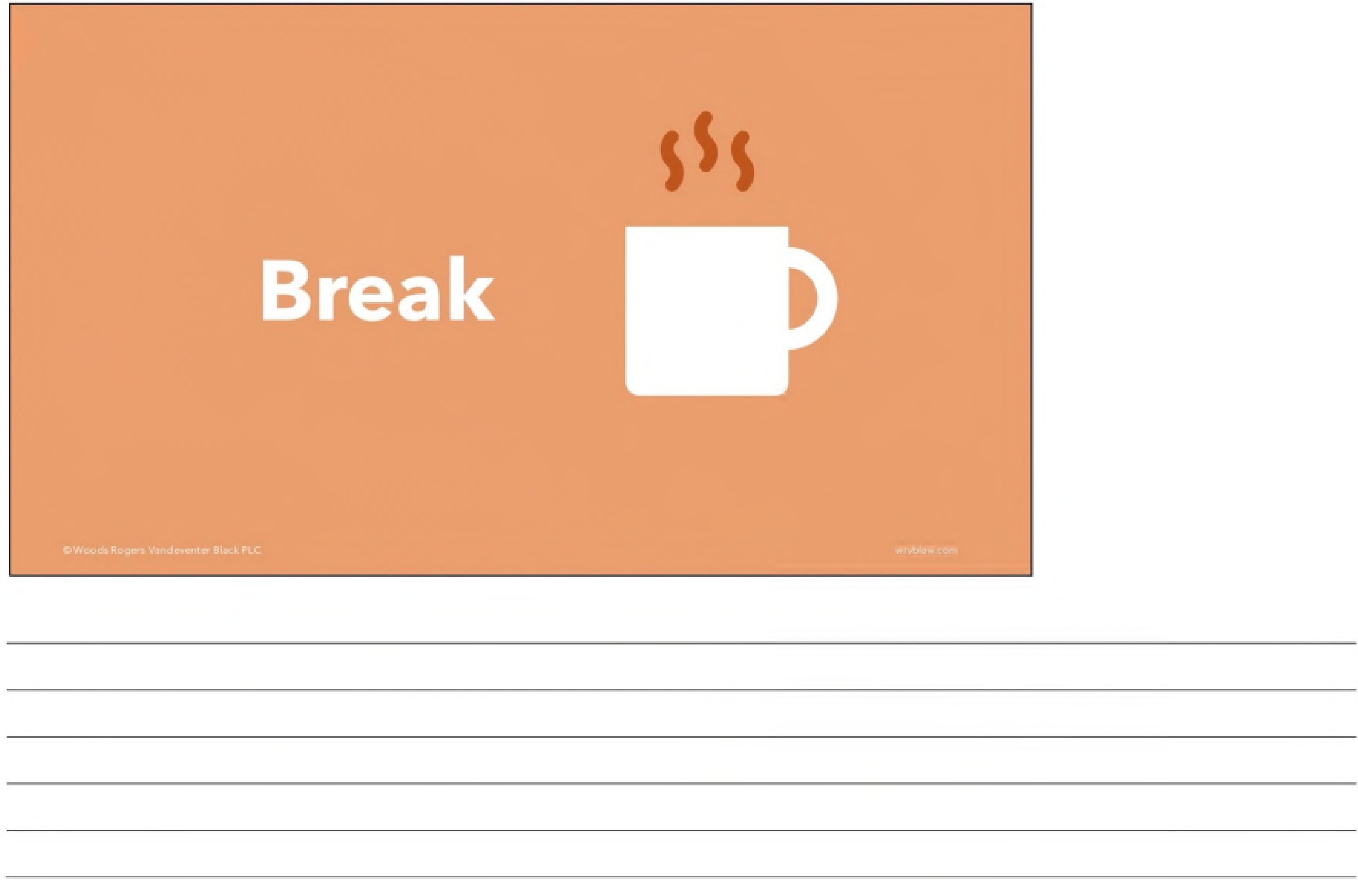
Prevent: Foster a Respectful Culture

- Be responsive
- Fairness
- Follow the law
- Be consistent
- Reward good performers
- Discipline / manage poor performers

Treat EEs with dignity and respect!

Prepare: Review Policies

- EE Handbook
- Problem Solving/Grievances
- EEO and Wage-Hour issues
- Solicitation/Distribution
- Visitors/trespass
- Wages/benefits


Break
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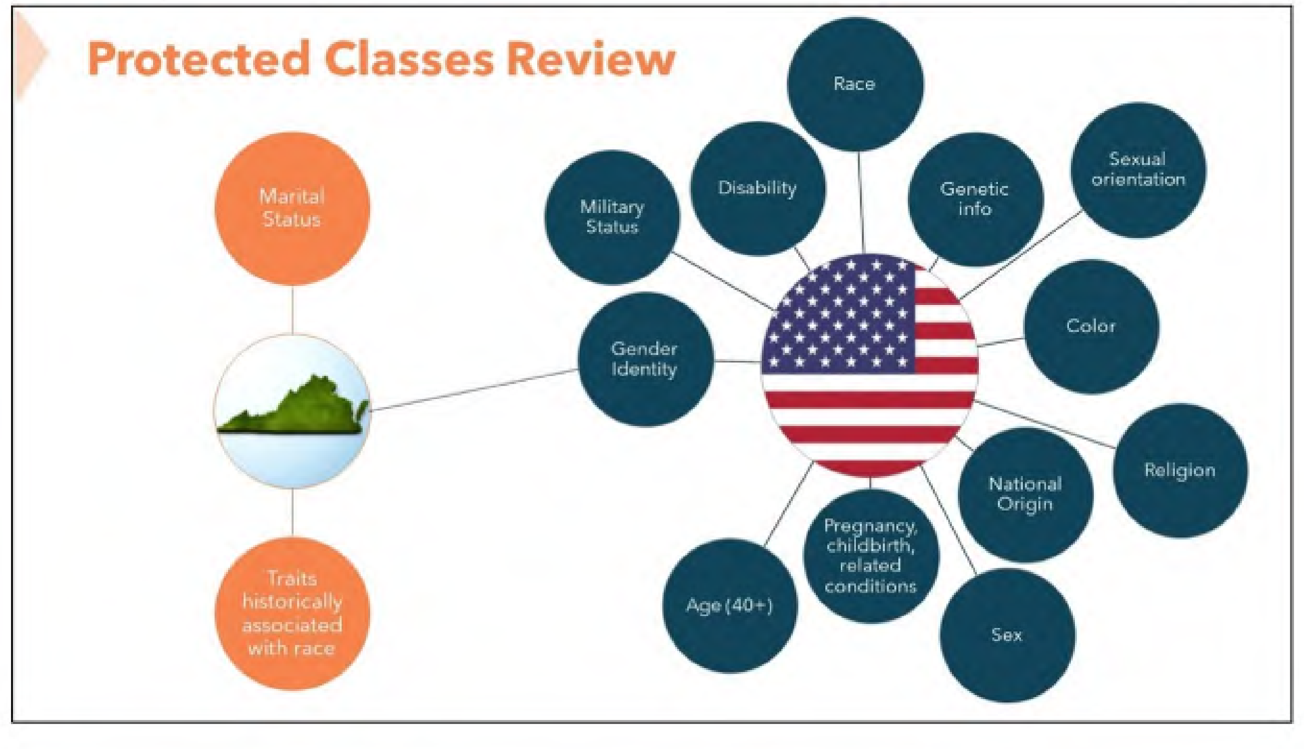
Starting Block
Hiring the Right Way

Agenda

1. Recruiting
2. Applications & interviews
3. Pre-employment inquiries
4. Background checks
5. AI in the hiring process

Recruiting

- Illegal for ER to recruit new EEs in a way that discriminates against them because of a protected characteristic(s)


Protected Classes Review
Marital Status
Traits historically associated with race
Race
Disability
Military Status
Genetic info
Sexual orientation
Color
Gender Identity
Religion
National Origin
Pregnancy, childbirth, related conditions
Age (40+)
Sex

"Culture Fit"

EEOC v. Facebook 2021 (pending)

- EEOC investigating Facebook's "culture fit" hiring
- Evaluations and referrals from mostly White, Asian EEs
- Disparately impacted Black, Hispanic applicants
- **Key takeaway:**
  - Can a candidate *contribute* something that is lacking?

Marketing Purposes

EEOC v. Meathead Movers **9-29-2023**

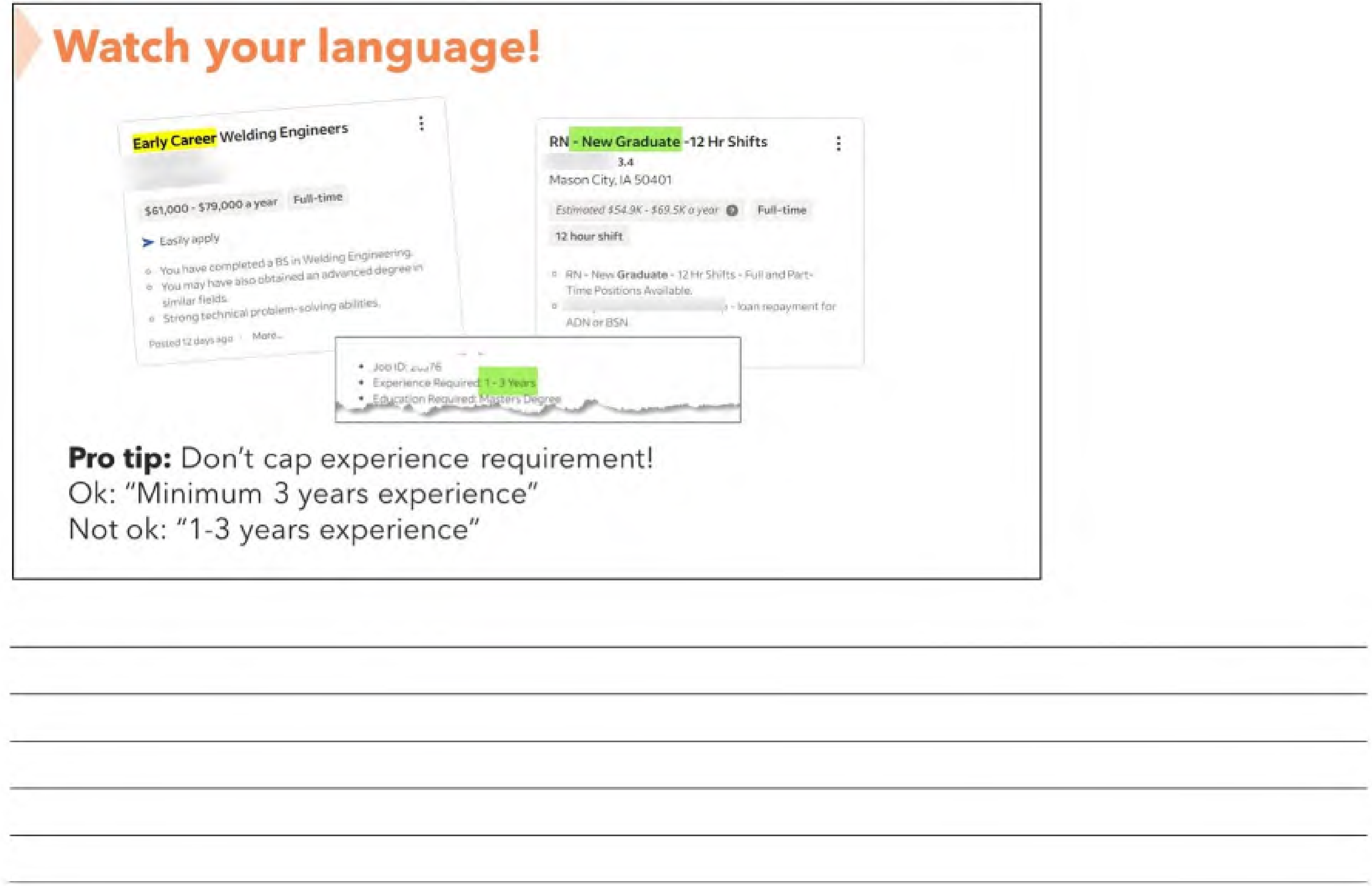
- Company advertises "college athlete" movers
- Allegedly failed to recruit/hire applicants 40+ into moving, packing, cust. service
- Alleged pattern of recruiting, hiring college students, excluding able older workers

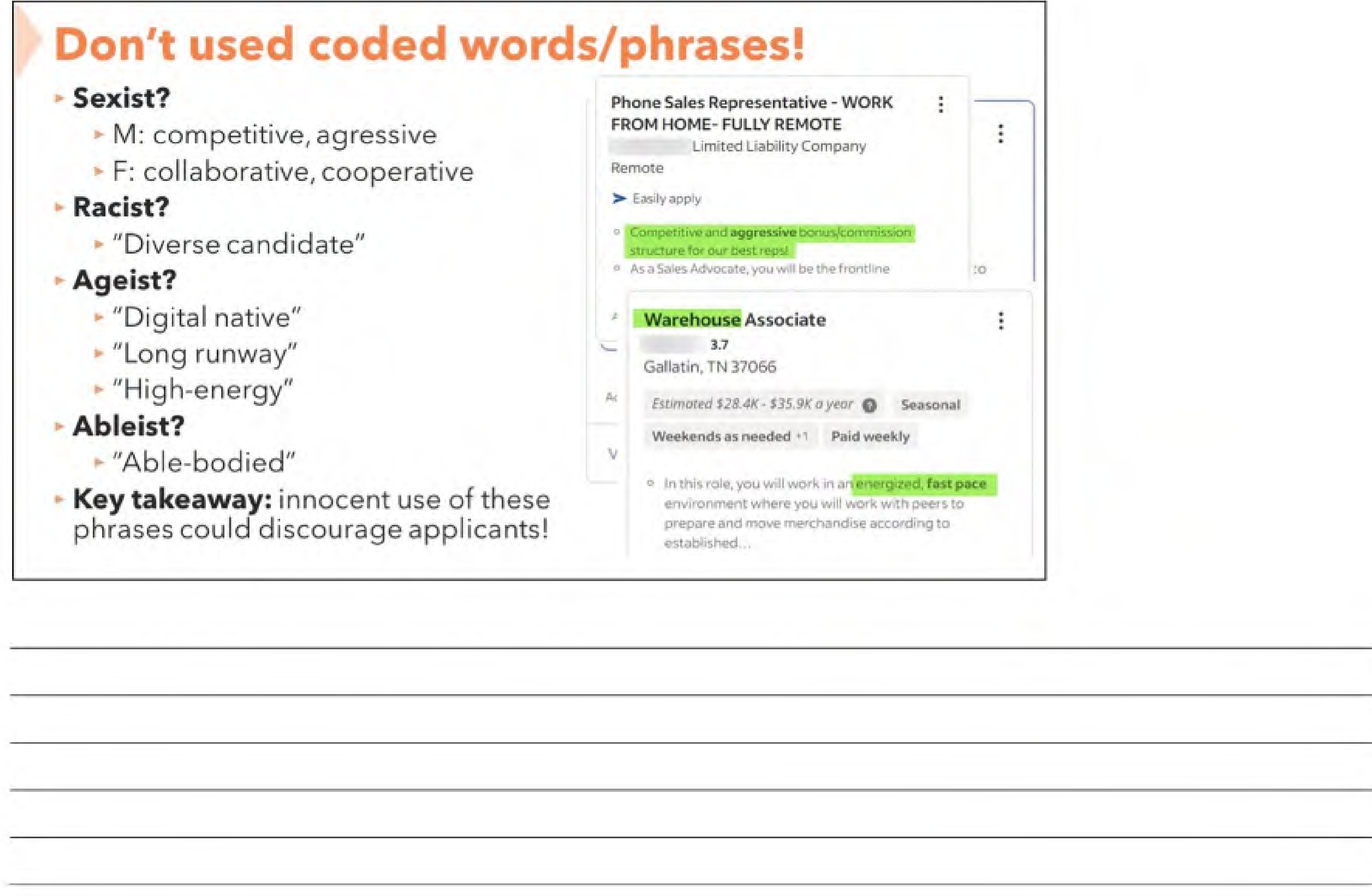
Screen capture from meatheadmovers.com 10-10-2023

Recruitment Quotas

EEOC v. Eli Lilly **6-5-2023**

- Lilly changed hiring preferences to meet goal of 40% of new hires being "early career"
- Intentionally under-hired older candidates for sales representative positions in favor of younger candidates
- **$2.4 million to settle**


Watch your language!
Early Career Welding Engineers
$61,000 - $79,000 a year
Full-time
Easily apply
You have completed a BS in Welding Engineering.
You may have also obtained an advanced degree in similar fields.
Strong technical problem-solving abilities.
RN - New Graduate -12 Hr Shifts
3.4
Mason City, IA 50401
Full-time
12 hour shift
RN - New Graduate - 12 Hr Shifts - Full and Part-Time Positions Available.
ADN or BSN
Experience Required: 1 - 3 Years
Pro tip: Don't cap experience requirement!
Ok: "Minimum 3 years experience"
Not ok: "1-3 years experience"


Don't used coded words/phrases!
Sexist?
M: competitive, agressive
F: collaborative, cooperative
Racist?
"Diverse candidate"
Ageist?
"Digital native"
"Long runway"
"High-energy"
Ableist?
"Able-bodied"
Key takeaway: innocent use of these phrases could discourage applicants!
Phone Sales Representative - WORK FROM HOME- FULLY REMOTE
Limited Liability Company
Remote
Easily apply
Competitive and aggressive bonus/commission structure for our best reps!
As a Sales Advocate, you will be the frontline
Warehouse Associate
3.7
Gallatin, TN 37066
Estimated $28.4K - $35.9K a year
Seasonal
Weekends as needed +1
Paid weekly
In this role, you will work in an energized, fast pace environment where you will work with peers to prepare and move merchandise according to established...

Expand your applicant pool!

- Local employment offices
- Local colleges, universities, trade schools
- Trade organizations
- Newspapers of general publication
- Minority-focused newspapers

Applications & Interviews

- Cannot deny application to someone due to protected characteristic(s)
- Must provide accommodation as part of application process
  - Unless undue hardship

Interpreter Request

EEOC v. Digital Arbitrage (Cloudbeds) 8-15-2023

- Cloudbeds denied qualified deaf candidate ASL interpreter for interview and terminated his candidacy
- CEO: wouldn't offer job to deaf candidate in any event
- **Key takeaway: interactive process, accomodations required at interview stage**

Best Practices - Application "Musts"

Signed authorization

- At-will status, drug screening, credit checks, etc.
- *Do not ask about simple marijuana possession convictions*

Questions to obtain complete history of prior employment

- Dates of employment
- Reasons for leaving
- *Do not ask about salary history*

EEO statement

Statement of consequences for misinformation/incomplete information

Pre-employment Inquiries

- Should be limited to essential questions for determining if a person is qualified for job
- No pre-offer inquiries about disability

Medical History as Application Criteria

EEOC v. Radiant Services, BaronHR 9-13-2022

- Applicants required to have no medical conditions or history of injury
- *"Staffing agencies and employers have a dual-employer relationship, which makes both responsible for ensuring a discrimination-free workplace"*
- **Key takeaway**
  - Vet your temp. agencies!
  - Their questions are your questions
  - Their job reqs. are yours

"What's Wrong with You?"

EEOC v. GMRI, Inc./Olive Garden 8-17-2023

- During busser position interview
- GM asked candidate about his use of a cane
- "What's wrong with you?"
- "How bad is it?"
- GM did not hire candidate

Key takeaway: genuine offer of employment must come before questions that could reveal a disability

Work Authorization

DOJ v. Treacy Enterprises/Domino's Pizza 6-8-2023

- Domino's required non-citizen worker to provide more documents than necessary to prove authorization to work
- DOJ brought claim of national origin discrimination
- Domino's will pay $2,000 in civil penalties

Key takeaway: your recruiters need this type of training!

What can you ask about abilities?

Bad:

Are you sure you can handle this job?

Instead:

Can you lift 50 lbs?

What can you ask about citizenship?

Bad:

Are you a US citizen?

Instead:

Can you provide proof of authorization to work in US?

What can you ask about age?

Bad:

When did you graduate college?

Instead:

Tell me about your educational background.

What can you ask about ethnicity?

Bad:

What language do you speak at home?

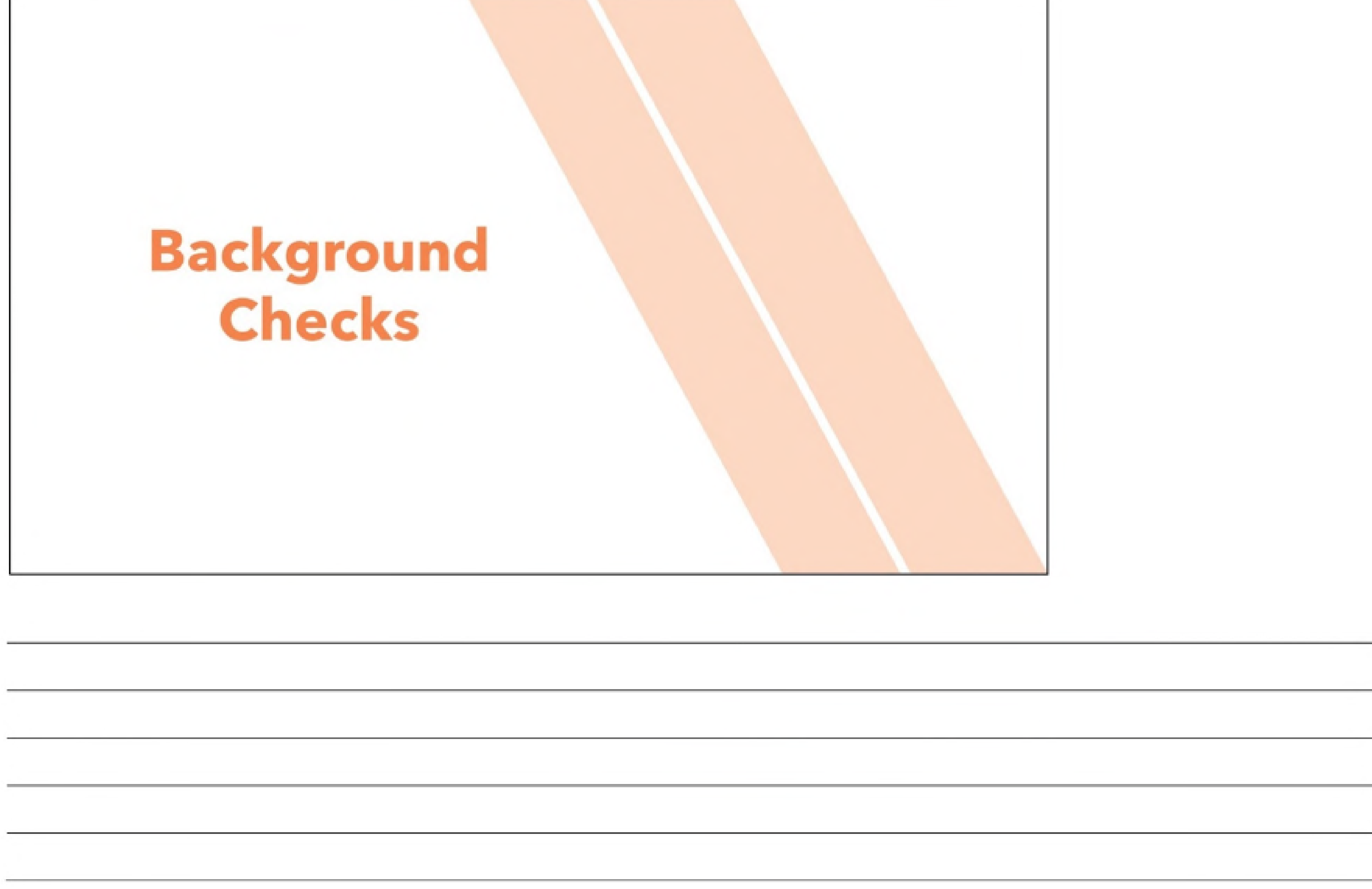
Instead:

Speaking Spanish is an essential function of this job; are you fluent?

Just Don't Ask!

Which church do you attend?

Do you plan to have children in the next year?


Background
Checks

Using Background Checks

- Not illegal to ask questions about applicant's or EE's background or to require background check
- Exceptions:
  - Questions related to medical and genetic information
  - Cannot use information to discriminate based on protected characteristic(s)

Background Check Pro-tips

- Same criminal background = same outcome, regardless of protected class
- Focus on job connection:
  - Nature of the crime
  - Nature of the job
  - Time since offense
- Arrest record ≠ conviction record
- Give applicants opportunity to explain

Automatic Rejections

Pickett v. Exel, Inc/DHL (N.D.Ill.) 3-20-2023

- Policy automatically rejected some criminal offenses without analysis of applicant or offense's relation to job
- One plaintiff, already working at DHL as forklift driver, denied different forklift job at due to prior criminal history
- Disproportionately affected Black, Hispanic applicants

Settled for $2.7 million

Religious Accommodations

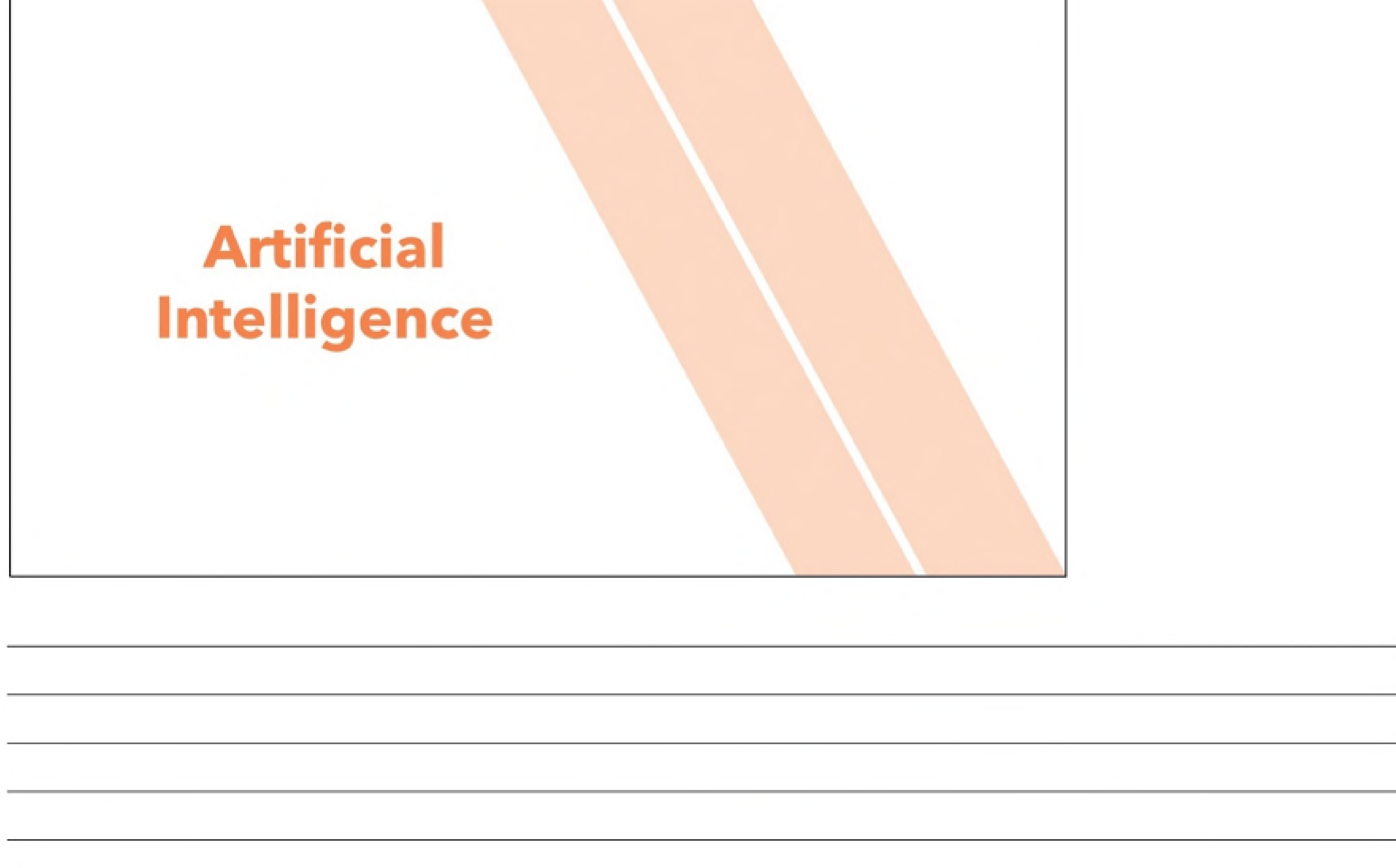
Kaite v. Altoona Student Transportation (W.D.Pa.) 2017

- Bus driver required to undergo background check that involved getting fingerprinted
- EE refused because she believed being fingerprinted is a "mark of the devil" and would prevent her from going to Heaven
- EE terminated for failing to have background check
- **Court allowed EE's religious discrimination lawsuit to go forward**
  - Found she had sincere religious belief regarding fingerprinting and was able to establish possibility of employment discrimination

Marijuana Possession

VA "ban the box" rule for possession of marijuana

- Part of 2020 VA law that decriminalized possession
- ERs prohibited from requiring applicants to disclose arrest, criminal charge, or conviction for simple possession
- Third-party reporting agencies should not report data to ERs
- Willful violators can be charged with a misdemeanor


Artificial
Intelligence

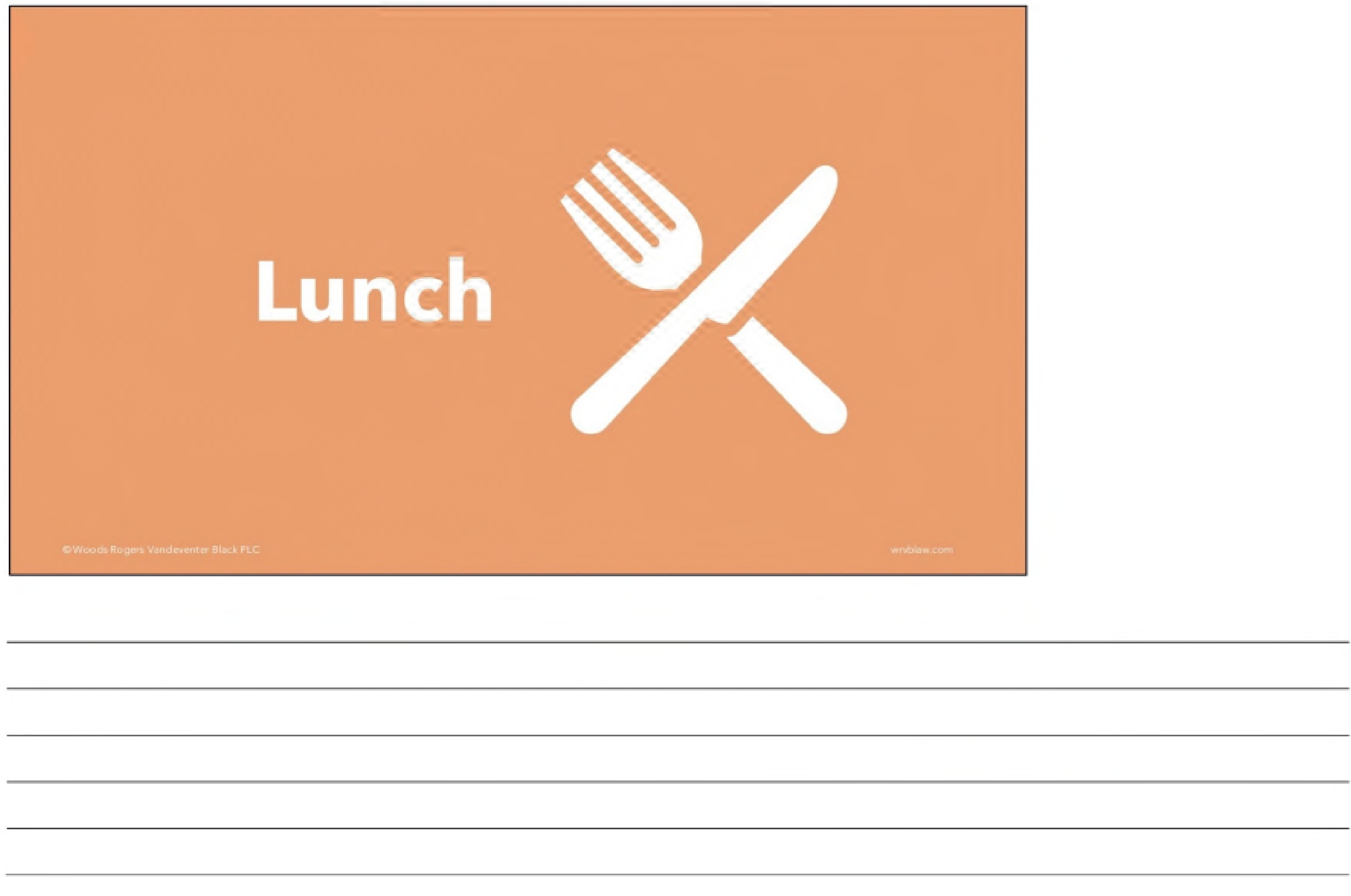
AI Discrimination

EEOC v. iTutorGroup Inc — 8-9-2023

- EEOC settled its first-ever AI discrimination in hiring lawsuit
- iTutorGroup used recruitment software
- Software automatically rejected older applicants (40+)
- iTutorGroup will pay $365,000 to a group of rejected job seekers age 40+

Best Practices as a Defense

- Keeping records can guard against "discriminatory hiring" claims
- Accurate records detail essential functions
- Importance of job descriptions
  - ADA
  - FLSA
  - Regular review
- Show company has established and adhered to valid selection guidelines


Lunch
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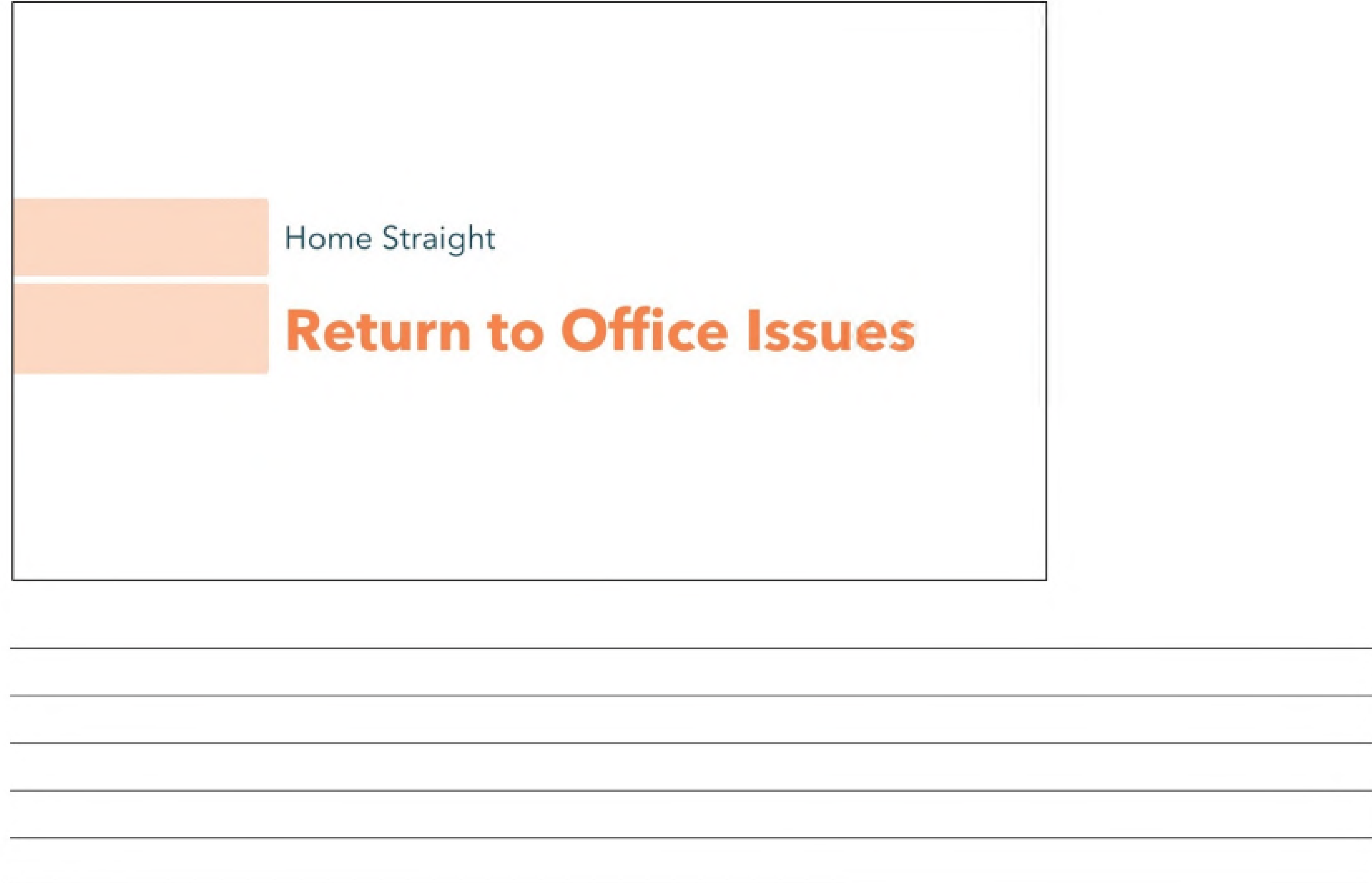
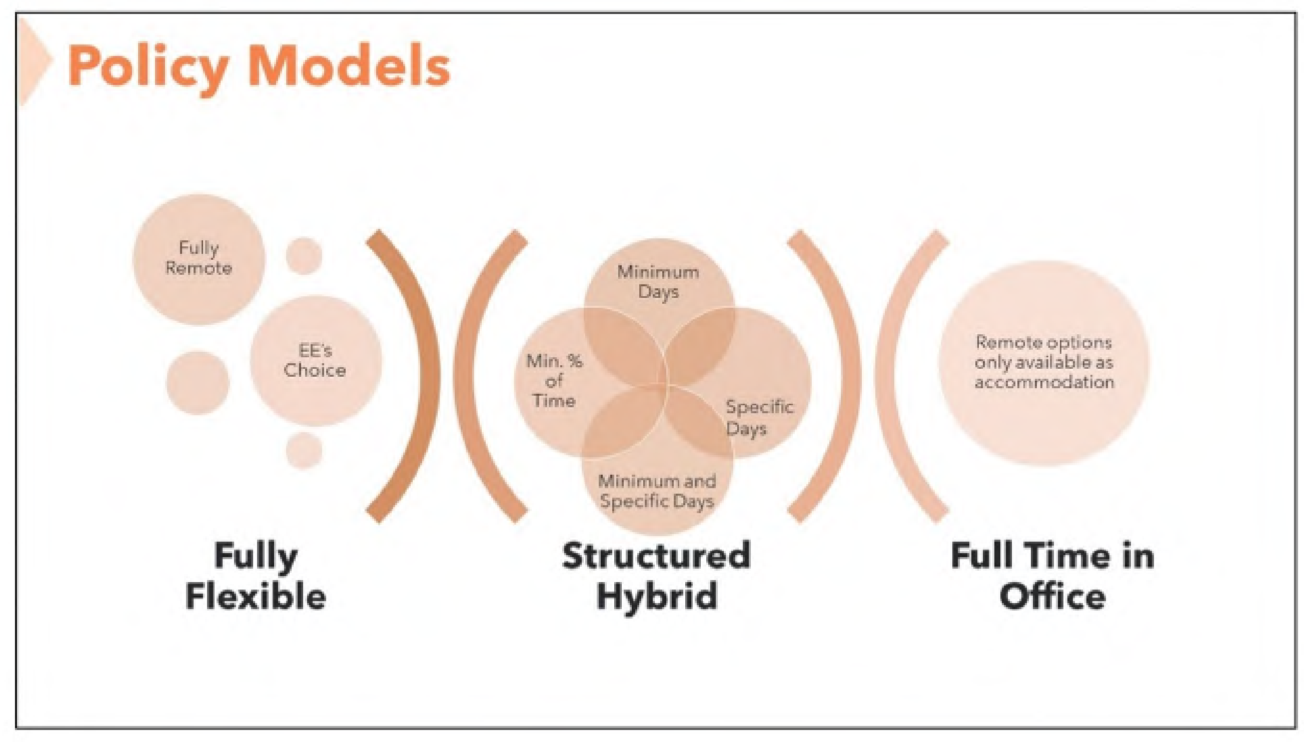
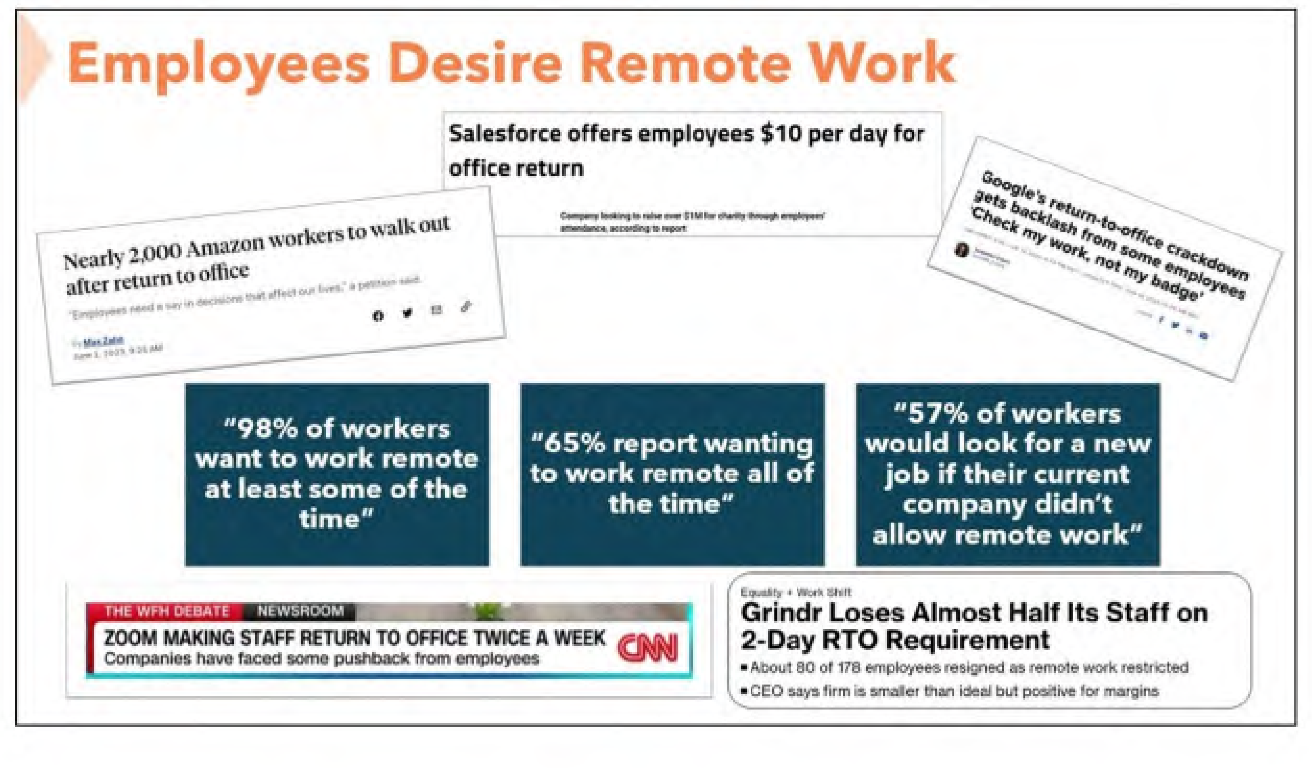

Home Straight
Return to Office Issues


Policy Models
Fully Remote
EE's Choice
Minimum Days
Min. % of Time
Specific Days
Minimum and Specific Days
Remote options only available as accommodation
Fully Flexible
Structured Hybrid
Full Time in Office


Employees Desire Remote Work
Salesforce offers employees $10 per day for office return
Nearly 2,000 Amazon workers to walk out after return to office
Google's return-to-office crackdown gets backlash from some employees 'Check my work, not my badge'
"98% of workers want to work remote at least some of the time"
"65% report wanting to work remote all of the time"
"57% of workers would look for a new job if their current company didn't allow remote work"
THE WFH DEBATE
NEWSROOM
ZOOM MAKING STAFF RETURN TO OFFICE TWICE A WEEK
Companies have faced some pushback from employees
CNN
Equality + Work Shift
Grindr Loses Almost Half Its Staff on 2-Day RTO Requirement
About 80 of 178 employees resigned as remote work restricted
CEO says firm is smaller than ideal but positive for margins

Telecommuting / Remote Work Policies

Sets expectations and responsibilities for EE & ER

- Define remote work eligibility
- Provide a specific procedure for requesting approval to work remotely
- EE performance and work-time accessibility requirements
- Home set up requirements, if any
- Expenses ER will reimburse
- Equipment/services ER will provide
- Remind EEs they are expected to comply with all ER policies while remote
- Know where your remote workers are working

Fair Labor Standards Act

Exempt Employees Working Remotely

- Regardless of *where*, if an exempt EE works any part of week (even just part of single day), must be paid entire weekly salary
- Only engage in docking for specific exceptions recognized in regulations
  - Whole day absences due to sickness, after paid leave is exhausted
- Improperly docking exempt EE's salary could jeopardize EE's (AND all similarly situated EEs') exempt status

Paying Non-Exempt Remote EEs

- Non-exempt EEs paid for time they actually perform work
- If ERs have non-exempt EEs work from home, timekeeping methods must ensure EEs paid properly
- Expenses incurred by EEs while teleworking shouldn't cause wages to fall below minimum wage
  - Best practice is to reimburse all reasonable expenses incurred for ER's benefit

When is Time Compensable?

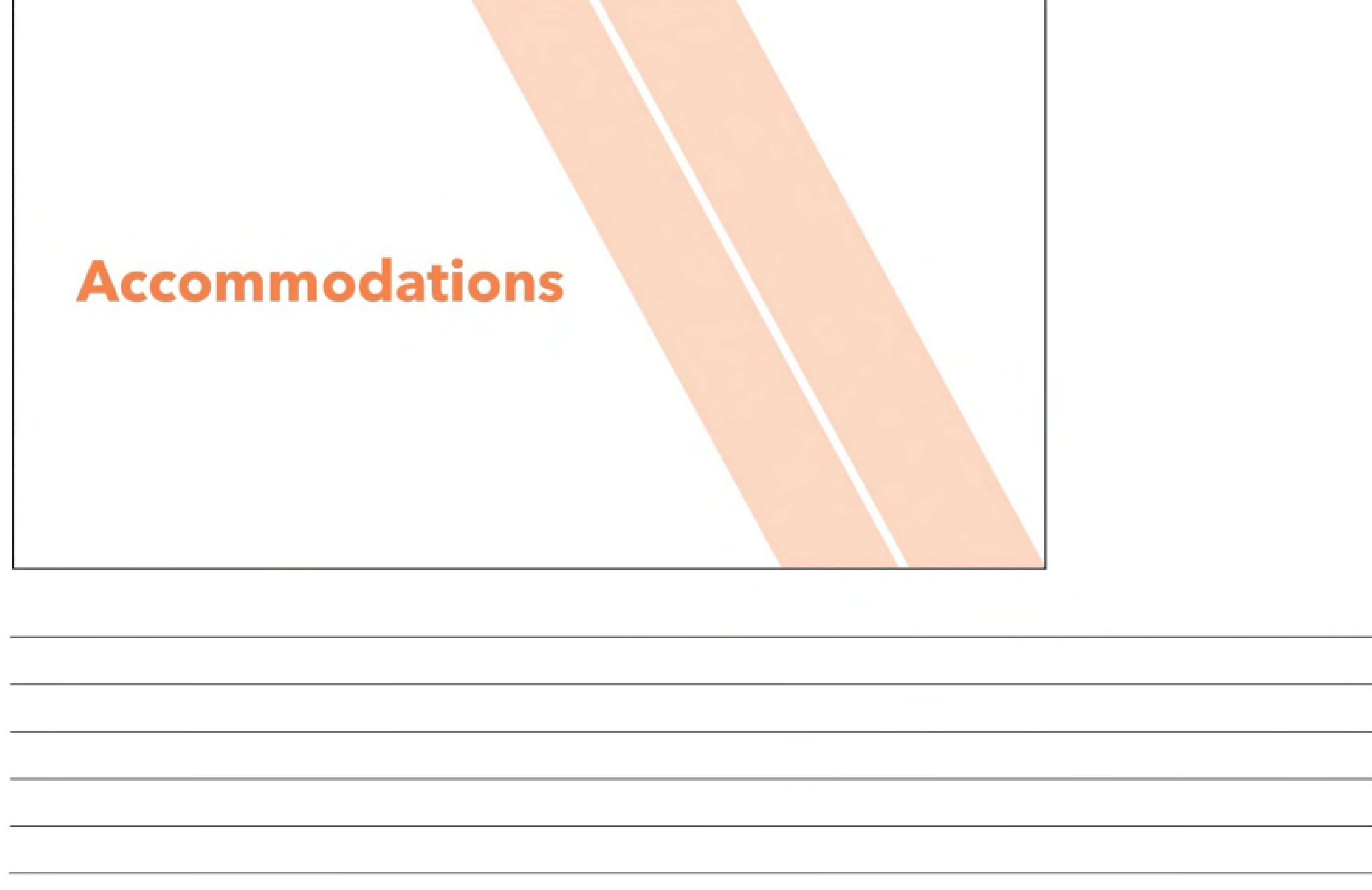
- Waiting time
- On-call time
- Rest periods
- Meal time
- Training time
- Travel time
- Starting/quitting time

This is true whether your EE is in the office or at home!

Short Breaks Are Compensable Time

DOL Field Assistance Bulletin 2-9-2023

- FLSA requires breaks of <20 minutes be paid
- Applies to remote workers
- Protections for nursing/pumping mothers also apply to remote workers


Accommodations

No Health Exceptions

United Labor Agency **8-29-2023**

- ULA required EEs to return to in-person work after a long period of COVID-related telework.
- Long-time EE had breast cancer, requested temp. remote work for several months during radiation treatments
- ER denied request and subjected her to intolerable work conditions that resulted in her constructive discharge

ULA paid $32,371 to settle

EEOC Guidance for ADA Compliance

- Remote work can be reasonable accommodation
- No right to remote work
- Never required to eliminate an essential function
- Temporarily allowing nonperformance does not equal permanent change of essential function
- Treat all WFH requests equally through interactive process

Pregnant Workers Fairness Act

PWFA requires accommodations

- Conditions rising out of pregnancy, childbirth, or related medical conditions
- EEOC regulations propose telework is reasonable accommodation

FLSA Breaks for Nursing Mothers

- Must still provide location for nursing mothers who work from another site, such as a client's site
- Shielded from view and free from observation, including a computer camera, security camera, or web conferencing platform

FMLA

- For FMLA purposes, EE's personal residence is not a worksite
- Worksite equals location where EE receives assignments or reports to

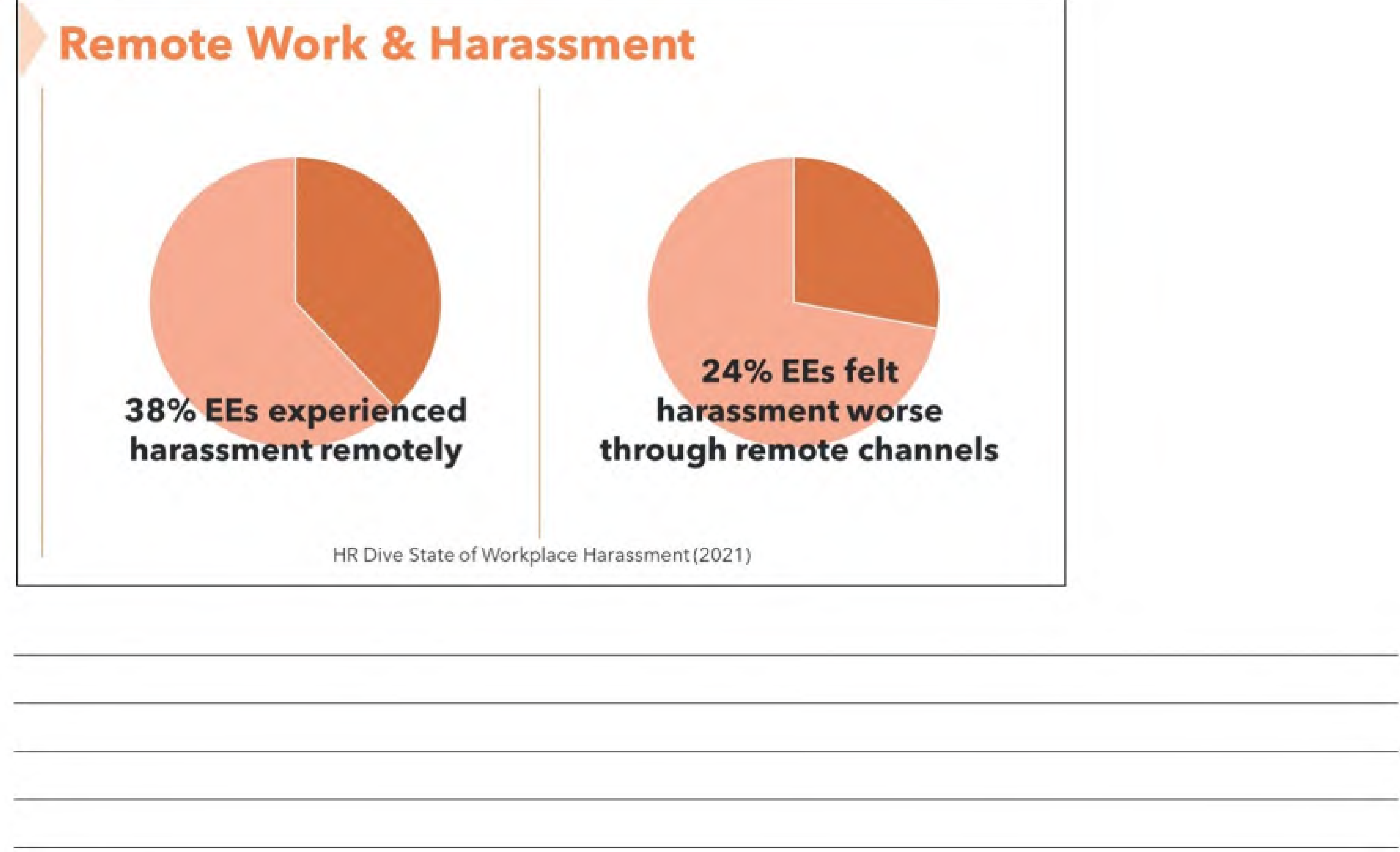
Workers Compensation Claims

May still be compensable at home

To avoid liability for injuries that are not work-related, make sure your telework arrangement designates:

- EE's specific job duties
- Work area/location
- Break times

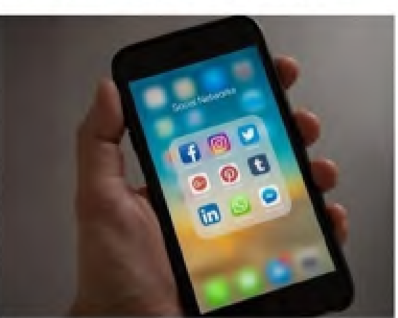
Remote
Harassment


Remote Work & Harassment
38% EEs experienced harassment remotely
24% EEs felt harassment worse through remote channels
HR Dive State of Workplace Harassment (2021)

Online Harassment

Two main categories:

1. Received/seen by victim
2. Posted about victim



Can happen through many channels:

- Text
- Social media
- Chat programs / apps
- Email
- Forums

Watch Your Work Environment

- Cyberstalking
- Sexual requests
- Sexting
- Displaying or sharing explicit material
- Inappropriate jokes or cartoons
- Inappropriate emails
- Sexual innuendo
- Name calling
- Rumors
- Gossip
- False information

Workplace Policies

Educate EEs that policies also apply to online conduct

- Harassment & discrimination
- Workplace violence
- Social media policy
- Bring your own device policy
- Confidentiality & proprietary information

Take Action

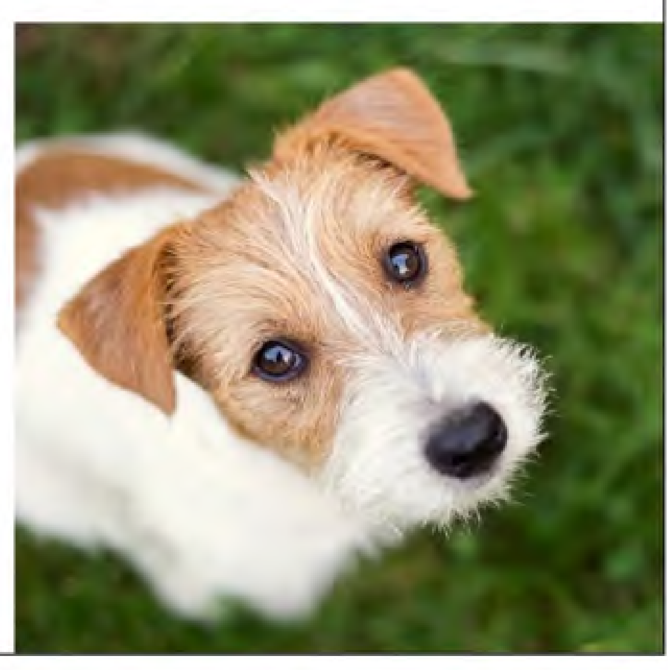
1. **Training:**
   - Managers should know how to address issues
   - Anti-harassment & discrimination training for all
2. **Investigate:**
   - Complaint / reporting procedure should make reporting easy
   - Don't dismiss claims as unimportant
3. **Enforce:**
   - Apply standards consistently

Monitoring Remote Employees

Second Job

Norfolk animal shelter manager allowed to work remotely from FL

- Serving as manager remotely until replacement could be found
- Got second job managing another shelter in FL
- EE drew annual salary for weeks after getting new job



Electronic Communications Systems

Electronic Communications Privacy Act generally allows ERs to monitor EEs on ER-owned devices/systems

- Monitoring can be useful to measure productivity and performance
- Implement and distribute clear electronic communications systems policy
- Notify EEs that they have no expectation of privacy and their electronic communications may be monitored

Common Monitoring

- Software used
- Websites visited
- Devices used
- Logins/logouts
- Documents/data accessed
- Active and idle time
- Key logging
- Email, messaging, voice reviewing
- Location tracking
- Screen capture

Surveillance Software Case

Kraemer v. Crossover Market (WD.Tx.) Filed 5-5-2021

- EE required to download monitoring software on personal computer
- Monitored keystrokes, took webcam and screen photos randomly within 10-min. blocks
- Not paid for any 10-min. period that showed "paused" activity
- Created OT issues and failed to account for offline job tasks

Weigh Pros & Cons of Remote Monitoring

Can potentially lead to:

- Increased accountability
- Process improvement
- Helpful performance feedback
- Workload management

Can potentially violate:

- Privacy rights
- NLRA
- Team's trust and morale

Best Practices

1. Disclose monitoring to EEs
2. Do not expect EEs to work every second
3. Monitor EEs equally and consistently
4. Document issues

Jumping Hurdles
DEI After Affirmative Action

Agenda

- What is Affirmative Action?
- Affirmative Action in education
- *SFFA, Inc. v. Harvard*
- Affirmative Action in employment
- DEI in the workplace

What is Affirmative Action?

- First used (related to race) in Pres. Kennedy's EO 10925:
  - *"The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."*
- Concept expanded in Pres. Johnson's Civil Rights Act (1964)
- Policies and procedures aimed at increasing opportunities for people who are historically underrepresented in certain areas of society
- Goal: equal opportunity

Affirmative Action in Education

Commonly used in higher education

- Especially admissions
- Considered student characteristics as factor in deciding whether to admit an applicant
- Goal to diversify student population

8 States Banned Affirmative Action Before 2023							
Arizona	California	Florida	Michigan	New Hampshire	Nebraska	Oklahoma	Washington

The Case

Students for Fair Admissions v. Harvard & UNC 6-29-2023

- Court found schools' admission policies that included race as a factor were unconstitutional
- Ruling: considering race as "standalone factor" violates 14th Amendment and Title VI of Civil Rights Act
- Allows for student's discussion of race to be considered in context of "how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university."

Consequences of SFFA on Education

- Colleges and universities must take "colorblind approach" to college admissions – no more consideration of race
- Also: could signal an attack on gender-based admissions initiatives

Impact of SFFA on Employers

So far: None

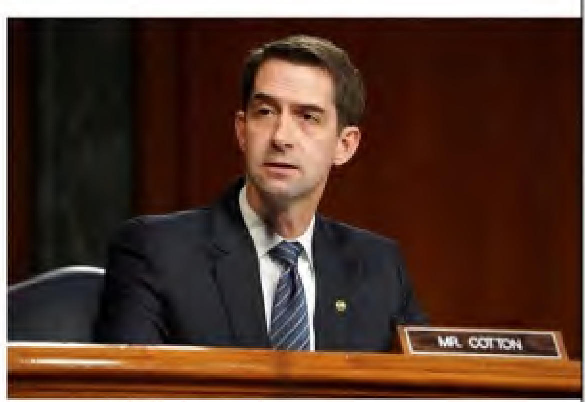
- SFFA limited to college admissions

However: signals Court's willingness to address affirmative action and could lead to challenges to race-conscious programs

The Law Firm Letters

Sen. Tom Cotton (R-AR) sent letters to 51 law firms advising them to preserve documents relevant to DEI practices

"Congress will increasingly use its oversight powers–and private individuals and organizations will increasingly use the courts–to scrutinize the proliferation of race-based employment practices."



Diversity Fellowships

Morrison & Foerster

- Fellowship for first-year law students designed to support students from "historically underrepresented groups in the legal industry"

Perkins Coie

- Fellowship for first- and second-year law students that supports "students of color," "students who identify as LGBTQ+," or "students with disabilities"

Sued by American Alliance for Equal Rights for discrimination

Diversity Scholarships from Private ERs

Gibson, Dunn & Crutcher

- Changed eligibility criteria for its diversity scholarships
- Scholarship supported students "who identified with an underrepresented group"
- New eligibility criteria: students "who have demonstrated resilience and excellence on their path toward a career in law"

Affirmative Action Plans (AAPs)

Required of federal contractors and subcontractors

- But anyone can use them!
- Outlines efforts to provide equal employment opportunities regardless of gender, race, disability, or veteran status
- Quotas are prohibited – no requirement to meet target representation
- OFCCP responsible for reviewing, auditing, investigating AAPs for federal contractors

AAPs Can Look a Lot Like DEI

AAPs consist of:

- **Analysis:** gender and race/ethnicity of each EE by job group
- **Availability comparison:** % of target minorities at company compared to eligible labor pool
- **Corrective actions and internal auditing/reporting systems:** action-oriented steps for diverse recruiting and tracking progress/effectiveness

DEI in the
Workplace

Affirmative Action in the Workplace

- Remains lawful for ERs to implement DEI programs
- So long as they avoid using plus-factors, preferences, or quotas
- EEOC Chair Charlotte Burrows released a statement:

  "It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

What is DEI?

Diversity, Equity, and Inclusion

- Policies and programs that seek to make people of various identities feel welcome and supported to perform to the best of their abilities

Let's break it down ▸

Diversity

- Presence of differences (race, ethnicity, gender, gender identity, sexual orientation, age, ability, etc.) within a given setting

Workplace diversity programs

- Intentionally recruiting workers of marginalized backgrounds
- Others?

Equity

- Process of ensuring every individual has opportunity for equal possible outcomes

Workplace equity programs

- Standardizing procedures
- DEI workshops
- Training opportunities
- Others?

Inclusion

- Practice of ensuring people feel a sense of belonging in the workplace

Workplace inclusion programs

- Offering mentorship and support to EEs of diverse backgrounds
- Others?

Keeping DEI as a Priority

- Diversity is here to stay
- ER risks discrimination claims by walking back policies/programs intended to combat workplace bias and discrimination
- Discrimination against minorities still happening often

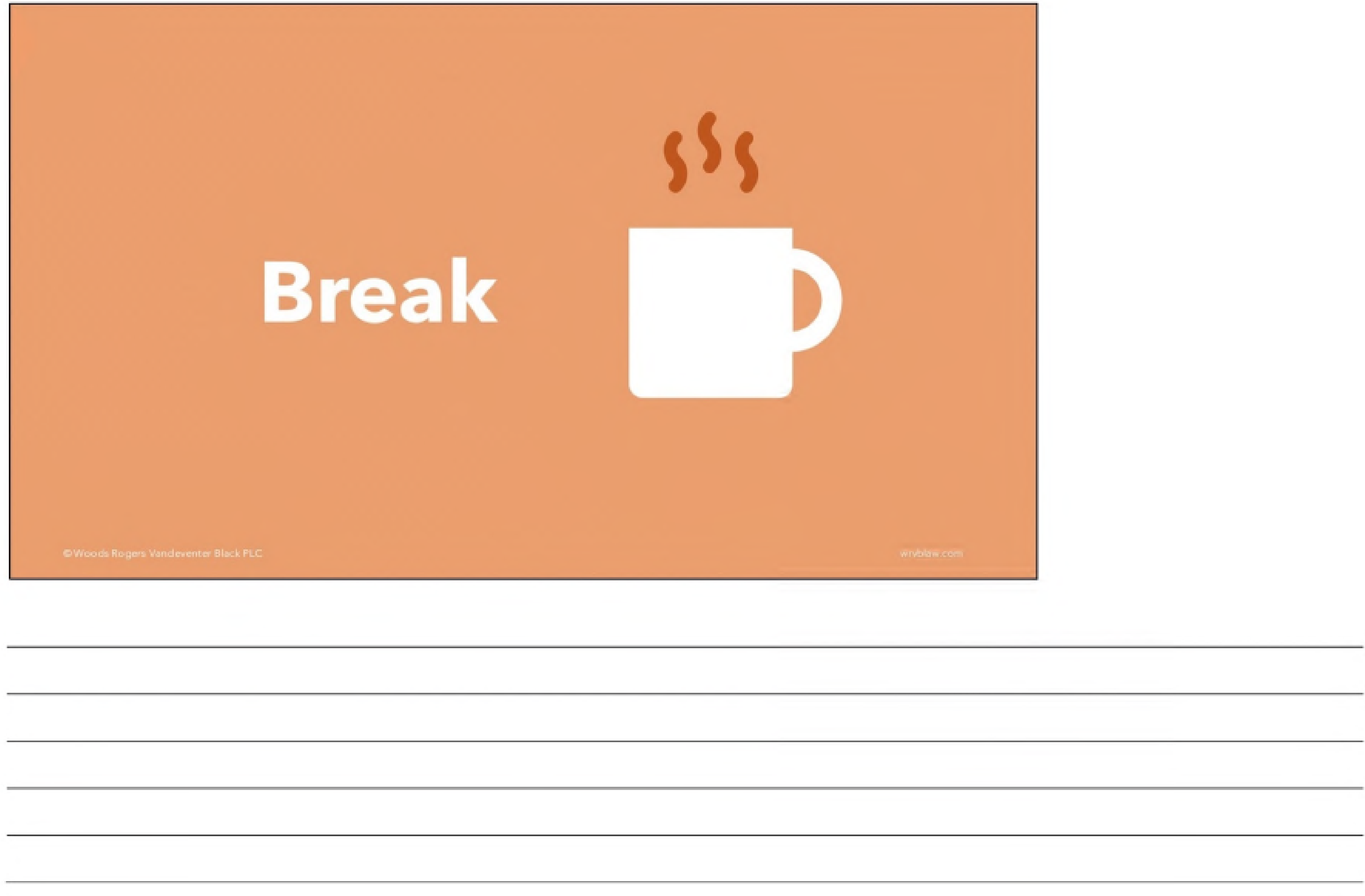
In 2022, EEOC received
20,992
complaints of race discrimination

Benefits of DEI Programs

- Better collaboration between diverse EEs
- Help EEs feel respected and understood
- Recruitment
- Increase morale

How to Move Forward

- Make decisions based on legitimate business needs
  - Document those needs (with evidence)
- Consider focusing on DEI programs that combat bias and increase opportunities for all
- Educate and train
- Have an attorney audit your policies and conduct a risk assessment


Break
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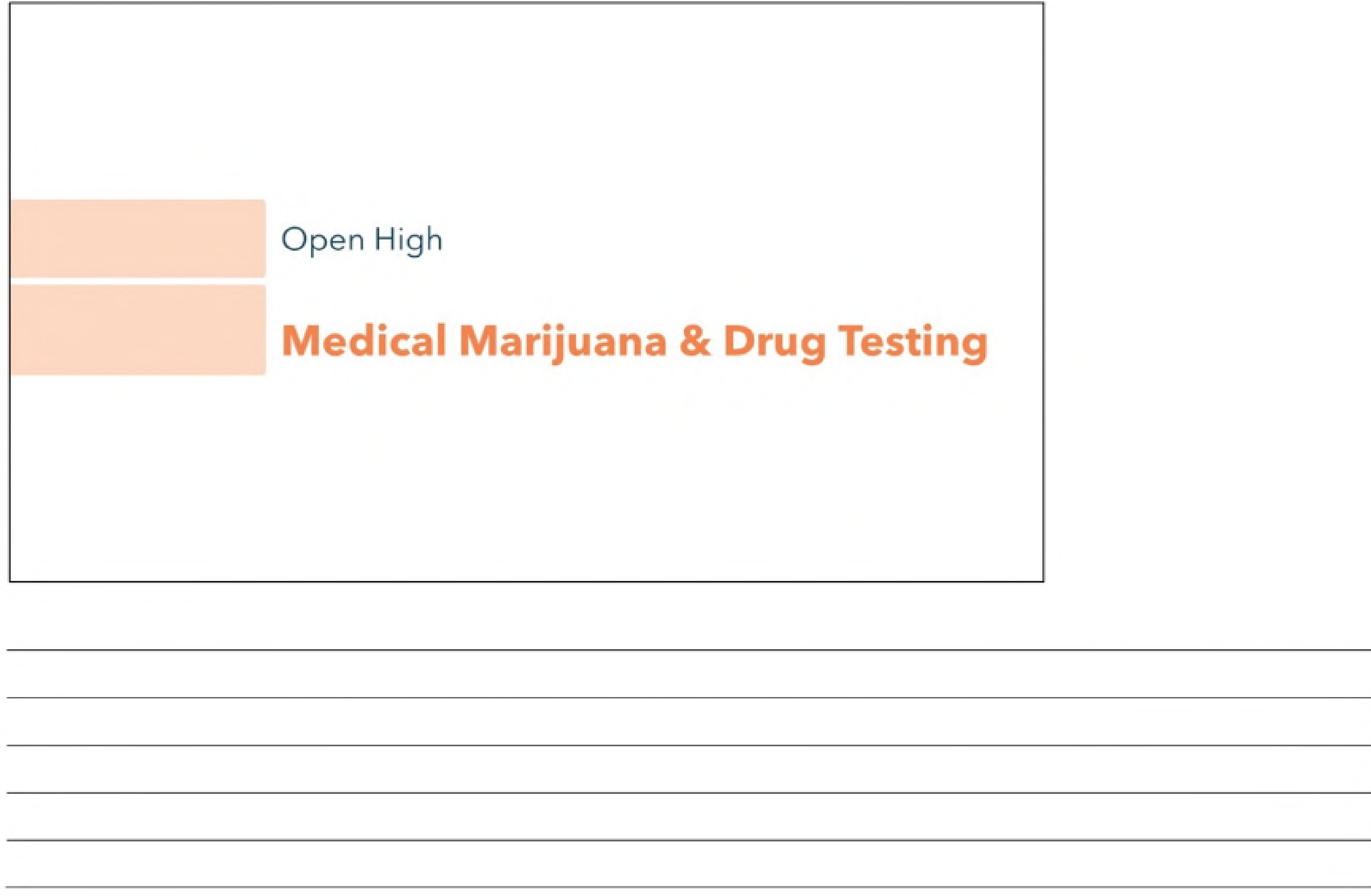

Open High
Medical Marijuana & Drug Testing

Agenda

1. Changes in Marijuana Law
2. ADA & Marijuana
   - Addiction
   - Medical Marijuana
3. Drug Testing & Workplace Policies
4. Future of Testing & Policies

Terms for Marijuana

- Cannabis, marijuana, and THC used interchangeably
- Terms vary from state to state
- Virginia statutes call it cannabis
- Testing terminology is THC

Positive Tests Rise

Quest Diagnostics:

Highest marijuana positivity rate since 1997

% of positive tests after on-the-job accident up 204% since 2012

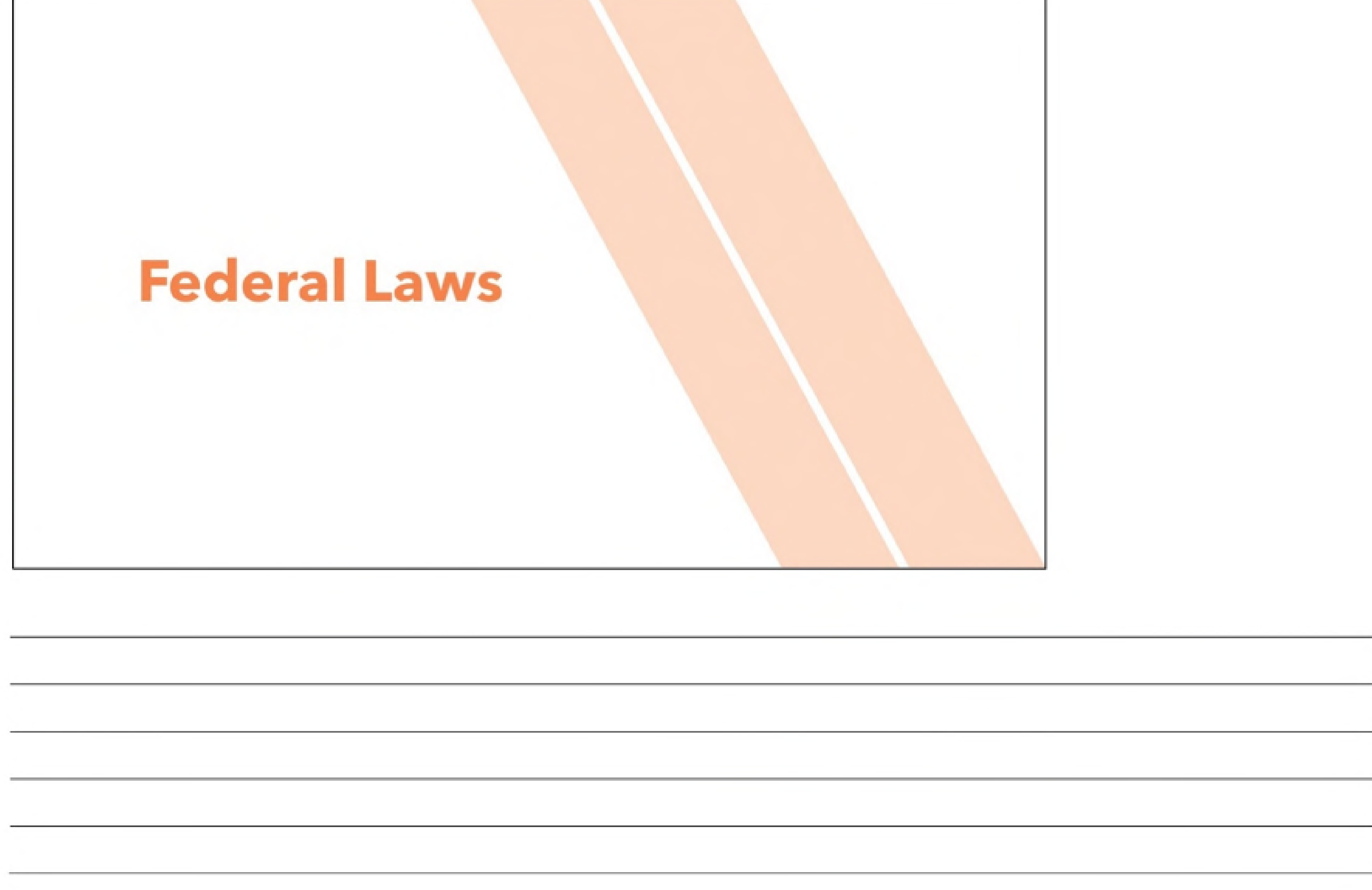
- Positivity rates highly dependent on type of testing

Easy to Obtain!

Hey Virginia! Have your Med Card yet? Why pay upwards of 45% more when you can save a bundle... remotely meet with a licensed doctor from the comfort of your home and qualify for your card in less than 5 minutes!

Virginia
GOT YOUR MED CARD?
veriheal

veriheal.com
Apply For Your Virginia Medical Marijuana Card Now


Federal Laws

Federal Law

Federal Controlled Substances Act

- Marijuana still illegal for any purpose

Drug-Free Workplace Act

- Does not prohibit off-duty consumption
- Prohibits consumption "in the person's workplace"
- Does not require drug testing

US Dept. of Transportation

DOT's Drug and Alcohol Testing Regulation

- Does not recognize "medical marijuana" under state law as valid medical explanation for EE's positive drug test

DOT requirement prevails over state law

OSHA

- ERs have general duty to keep workplace free of recognized hazards likely to cause serious harm
- Unclear whether the general duty preempts state law
- No direct guidance from OSHA
- VA Attorney General not yet weighed in
- Area of law will continue to develop

ADA & Medical Marijuana

ADA and Medical Marijuana

General Overview:

- ADA does not protect medical marijuana use, even if legal under state law and approved by physician
- Marijuana still illegal under Controlled Substances Act
- Permitting medical marijuana not a reasonable ADA accommodation
- ERs may have to accommodate under state law

Direct Threat to Safety

Does EE impose a direct threat to safety because of marijuana use?

- If EE poses safety risk, may not be qualified EE under ADA
- EE may not be able to safely perform job functions, becomes unqualified

Anti-Retaliation

Snow v. Autozoners (D.Ut.) **09-05-2023**

EE harassed about his medical marijuana use

- EE disclosed he suffered multiple disabilities
- Had medical marijuana card
- Co-workers & management asked to buy marijuana, said he was unfit for promotion, "useless" due to using med. marijuana
- EE said he experienced retaliation for protected use

ADA protects good faith opposition to disability discrimination, even if conduct did not violate ADA

VA Laws

VA Medical Marijuana

Legal

- Available to adults and minors
- Requires written certification
- Practitioners can issue certification via telemedicine
- Good for one year

Illegal

- Discharging, disciplining, or discriminating against EE for lawful cannabis oil use

Marijuana as Treatment

- No rulings yet from VA State or Federal Courts
- Marijuana as medical treatment more common
  - Some courts leaning towards accommodation for use
- Not a conventional prescribed medication
  - Doctors cannot prescribe cannabis
  - Not FDA-approved and still federally illegal

A marijuana certificate is not the same as a prescription

Medical Marijuana at Work

ERs Can

- Prohibit consumption in workplace
- Prohibit impairment during work hours
- Require drug testing
- Require updated medical certificate if EE's expired

Some Say ERs Cannot

- Discipline EE for medical off-site use, if not impaired at work
- Discipline EE solely on basis of test, if no signs of impairment

Anti-Retaliation in VA

- VA's antiretaliation cannabis oil statute does not give right of action against ER
- No specified penalties for ERs found in violation
- EEs could make whistleblower or public policy-type claim

Remember: VA's anti-retaliation law only protects cannabis oil use, not recreational!

Scenario: Zero Tolerance

- ER operates scrap metal manufacturing plant
- Has zero-tolerance policy for THC due to safety reasons

Can ER have zero-tolerance policy, regardless of whether EE has medical certificate, due to the safety-sensitive nature of the plant?

Scenario: Job Duties

- EE is foster care case manager
- Assesses homes for suitability
- Can remove child if safety concerns are pressing
- EE tested positive and has medical certificate
- ER believes EE's job duties are inconsistent with marijuana use

Can ER discipline or terminate EE?

Considerations When Enforcing Policies

- Did EE display signs of impairment?
- Evenhanded enforcement?
- Ability to staff workforce

Communicate!

Make sure EEs understand a medical marijuana card is not a get-high-on-the-job card!

Drug Policies & Testing

Hiring Challenges

- Amazon & Butterball Farms among ERs now excluding marijuana from pre-employment drug screening
- US Air Force and National Guard now offer second chance for applicants to retake drug screening following positive THC result
  - Sea change: was lifetime ban on enlisting

Why?

- Hiring and recruiting barriers

If you change policy:

- Check with insurer first before removing from testing panel

Drug & Alcohol Policies

ERs can and should ban intoxication and use of intoxicants in workplace as a matter of workplace safety

- Include reasonable accommodations for medical marijuana?
  - Do not have to accommodate where DOT implicated
  - Exceptions for safety-sensitive positions

Impairment at Work

Train managers to spot and report impairment

- Reasonable basis for belief
  - Performance problems?
  - Noticeable impairment?
  - Physical symptoms?

Document impaired behavior <u>before</u> disciplinary action

Scenario: Different Polices for Different Departments?

- EE is a sales manager
- Tested positive and has medical certificate
- 12-year EE with good track record; HR doesn't want to lose
- Drives frequently as part of job duties
- HR doesn't want to allow manufacturing EEs to use marijuana due to safety reasons

Can HR allow sales EE's use of marijuana and not manufacturing EE's?

Can you still drug test in VA?

Drug testing not prohibited

- Reasons to Test:
  - Pre-employment testing
  - Reasonable suspicion testing
  - Post-accident testing (requires reasonable possibility of drugs / alcohol as contributing factor)
  - Periodic and unannounced testing
  - Random testing
  - Rehabilitative testing

Scenario: No Testing Needed?

- ER operates retail store
- No safety-sensitive duties
- EEs must cross railroad tracks to access parking lot at store
- ER wants to refrain from testing for THC in drug screens, effectively permitting EEs' recreational and medical marijuana use

Does ER incur any liability by not testing for THC?

What policies work for you?

- Outright ban of marijuana in EE's system?
- Ban on intoxication or use at work?
- Last chance agreements?
- Process for having physician sign off on safety of use while performing duties?

Future of Marijuana Testing & Policies

How to Test for THC

Most common tests currently

- Urinalysis
- Hair tests

New, more precise testing methods

- Saliva tests
  - Better for determining active impairment
  - Approximately detect THC use in past 24-72 hours
  - Now allowed for DOT-regulated industries

Best Practices

- Have a drug use and testing policy
- Evaluate type of test you use
- Remember federal laws regulate testing for certain EEs
- Educate EEs about your use policy and consequences for failed drug test
- Train managers to identify signs of impairment on the job

Thank you!

Labor & Employment Practice Team

WOODS ROGERS
VANDEVENTER BLACK

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Additional Reading

September 5, 2023

Department of Labor Proposes Increasing Minimum Overtime Exemption Salary to $55,068

Authors: Anne G. Bibeau | Victor O. Cardwell | Emily Kendall Chowhan

On August 30, the Department of Labor proposed a new rule that would make 3.6 million more U.S. workers eligible to receive overtime pay. The proposed rule would require employers to pay overtime to salaried employees whose primary duties are executive, administrative, or professional but who make less than $1,059 per week, or $55,068 per year.

Proposed Changes to the Current Overtime Exemption Salary Requirements

Under the Fair Labor Standards Act, most hourly workers are entitled to receive overtime compensation after they have worked 40 hours in a week at no less than time-and-a-half of their regular rate of pay; however, salaried employees primarily performing executive, administrative, or professional duties are exempt from receiving overtime pay unless their income is less than a certain amount. Currently, the salary cutoff for overtime eligibility is $35,568, and the proposed increase would constitute a fifty-five percent increase. Notably, the proposed rule would also require automatic updates to the salary level for overtime eligibility every three years based on wage data.

Additionally, the proposed rule would also make more employees eligible to receive overtime by raising the Highly Compensated Employee (HCE) exemption annual compensation level. Currently, some highly

compensated employees are exempt from overtime benefits even if their employment responsibilities do not meet the criteria for administrative, professional, or executive duties. For example, if an employee meets some criteria for a standard exemption, such as someone who routinely directs multiple other workers, and the employee makes more than $107,432 per year, they are likely exempt from receiving overtime, even though they do not meet all the requirements necessary to be classified an executive employee under the standard test. The Department's proposed rule would increase the salary threshold for HCE employees from $107,432 to $143,988 per year, a thirty-four percent increase.

If enacted, the new rule would likely heavily affect hospitality, manufacturing, and retail industries. The Department also estimates that in its first year the new rule would impose $1.2 billion of direct costs on employers.

What Happens Next?

The proposed rule is only a proposal at this time. It has not been officially enacted and is subject to a public comment period. Many employers may recall a similar significant proposed escalation under the Obama administration in 2016. That proposed rule would have more than doubled the overtime exemption threshold, raising it from $23,660 to $47,476. After significant preparation in anticipation of the proposed change, the rule was blocked by a permanent injunction and the Department of Labor eventually formally rescinded it. That could happen again here, but it is far from certain. Recent inflation and nationwide increased costs of living may mitigate the reaction and concern that halted the Obama administration's proposed increase. The exemption salary threshold was eventually raised to $35,568 in 2019 under the Trump administration, a more modest increase than the Obama-era proposal.

To be certain, if the rule does become effective, it will mark a sea change with a significant impact on many businesses. The Department of Labor has invited public input, stating that it "encourage[s] continued stakeholder input during the public comment period." Notably, the Department is required to review and address all substantive public comments, and it will likely face legal challenges if the proposed rule is enacted. In 2019, the Department received over 300,000 comments after unveiling its proposed overtime salary threshold increase. Stakeholders can comment on the proposed rule here until November 7, 2023.

To that end, we encourage employers who would like to provide feedback to the Department of Labor regarding the impacts of this proposed rule to contact the Labor and Employment attorneys at WRVB to discuss how to best make your voice heard.

In these times of uncertainty, you can count on the Labor and Employment team at WRVB to monitor legal developments and keep you up to date on this and other changes that affect employers.

June 16, 2023

Do Non-Compete Agreements Violate the NLRA?

Authors: Leah M. Stiegler | Anne G. Bibeau | R. Patrick Bolling

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On May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memorandum stating her position that non-compete agreements violate the National Labor Relations Act (NLRA) and encouraging the NLRB to adopt this position.

Background on the NLRA

The NLRA applies to employers whether or not their employees are unionized. With few exceptions, employees in any workforce have the right to engage in protected activity under the NLRA to try to improve their working conditions. This is commonly referred to as Section 7 activity or "protected concerted activity" (PCA).

How Abruzzo Claims Non-Compete Agreements Violate the NLRA

The full text of Abruzzo's memo can be found on the NLRB's website.

Abruzzo made two general arguments for concluding that non-compete agreements violate the NLRA:

1. Non-compete provisions are overbroad and the denial of access to other employment opportunities chills employees in exercising Section 7 rights (i.e., engaging in PCA). She reasons this is true because employees know they will have a harder time finding employment if they are discharged for engaging in PCA.
2. Employees are unable to leave employer A and start work for employer B and then "leverage their prior relationships" to encourage each other to engage in PCA to improve working conditions in their new workplace.
3. Abruzzo claims non-competes chill employees from engaging in 5 specific types of PCA:
    a. Concertedly threatening to resign to demand better working conditions. Employees could fear retaliation in the form of threats to enforce the non-compete agreements (i.e., face legal action), which she says violate the NLRA.
    b. Carrying out their concerted threats to resign to secure improved working conditions.

c. Seeking or accepting employment with a local competitor to obtain better working conditions.

d. Soliciting their coworkers to work for a local competitor as part of a broader course of PCA. Abruzzo seems to imply further that prohibiting an employee from soliciting coworkers to work for a competitor would also violate the NLRA.

e. Seeking employment, at least in part, to engage in PCA with other workers at an employer's workplace (i.e., trying to extend this to multi-employer workplaces).

When Non-Compete Agreements are Appropriate

The memo states that "the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in [PCA] ... violate Section 8(a)(1) [of the NLRA] unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights."

Abruzzo went further by preemptively stating her belief that "a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense." Her suggested work-around was to offer "longevity bonuses" in lieu of non-competes.

The memo did specify that protections of proprietary or trade secret information can be appropriate, but an employer would have to show the worker had access to trade secrets and proprietary information. She inferred this would not be the case for low- or middle-wage workers.

The memo also stated that not all non-competes violate the NLRA and noted, for example, that provisions that clearly restrict only individuals' managerial or ownership interests in a competing business would not seem to violate the NLRA because an employee would not misconstrue that to infringe on their rights to accept competing employment.

It is also worth mentioning that managers and supervisors do not have the same PCA or other NLRA rights as

other workers, and therefore the General Counsel's memo does not apply to those categories of employees.

Does this apply to non-competes that were signed before the memo?

Abruzzo did not say whether she intends to pursue non-compete agreements entered into before the issuance of the memo—in other words, whether her enforcement position would apply retroactively to non-competes executed months or years ago. Employers should note that in a prior memo concerning severance agreements, she argued that "maintaining and/or enforcing a

previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the [limitations] period would not be time-barred." It would be safe to assume she will take the same position on non-competes and pursue previously existing agreements as violations of the NLRA.

Key Takeaways for Employers Using Non-Compete Agreements

While this is a memo and not binding law, it is certainly information you need to be mindful of when assessing the reasonableness of your non-compete agreements. Coming from the General Counsel for the NLRB, it also signals the administration's enforcement priorities, so you may see more complaints and enforcement actions on non-compete agreements.

If you are unsure whether your non-compete agreements could lead to NLRB scrutiny, or whether they comply with Virginia law or the proposed FTC rules, please contact a member of our Labor & Employment team to discuss your concerns.

May 23, 2023

Virginia's New Minimum Salary Level for Non-Compete Agreements

Authors: R. Patrick Bolling Joshua F.P. Long

We're here to bring you the latest news that directly impacts your business operations in the great

Commonwealth of Virginia. It's time to take note: Virginia has a new minimum salary level for non-compete agreements. This affects how employers can enter into, enforce, or even consider enforcing non-compete agreements with their employees.

Let's dive into the specifics of Virginia's non-compete law.

Employers in Virginia cannot "enter into, enforce, or threaten to enforce a covenant not to compete" with any "low-wage employee." Who falls into this category? A low-wage employee currently means any worker, including independent contractors, who earns an average of less than $1,343 per week, or $69,836 annually. The Virginia Employment Commission (VEC) calculates this amount based on data collected from employers across the commonwealth. VEC analyzes the data regularly to ensure it aligns with current economic conditions and trends.

The threshold for identifying low-wage employees can change as Virginia's average weekly wage fluctuates. To stay up to date on any modifications to the threshold, we strongly advise checking the Virginia Department of Labor and Industry (DOLT) website or consulting with an experienced employment law attorney. It is important to note that the annual mean wage for all occupations in Virginia stands at $65,590, according to Occupational Employment Statistics (OES) survey data for Virginia by the U.S. Bureau of Labor Statistics (BLS).

Virginia's New Minimum Salary Level for Non-Compete Agreements This means a significant number of Virginia employers could be impacted by the revised salary threshold. If you use non-competes, you should review them to determine if they remain lawful after the threshold increase.

Let's address the consequences of non-compliance.

Employers found in violation of this law can face a slew of legal repercussions, including lawsuits seeking damages, attorneys' fees, and liquidated damages. The Commissioner of the Virginia DOLT can impose civil monetary penalties of up to $10,000 per violation. It's a costly path to tread, so ensure your business is on the right side of the law.

Compliance is key.

You must prominently display a copy of the code or an approved summary provided by Virginia DOLT in the

same location where other employee notices required by state or federal law are posted. Think of it as an opportunity to showcase your commitment to adherence and create an informed workplace environment.

When can you enforce non-compete agreements?

Remember Virginia's non-compete law only applies to low-wage employees as defined by the statute. This means that for employees earning more than $1,343 per week, employers can still enter into and enforce non-compete agreements. Regardless of salary level, a "low-wage employee" does not include "any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee." This commission exception is an important limitation that should be evaluated in each case. However, it's paramount to ensure any non-compete agreements with employees who do not fall under the low-wage employee definition are reasonable in geographic and functional scope and duration. Virginia remains vigilant against overly broad or excessively lengthy non-compete agreements, which may be deemed unenforceable.

To navigate these changes smoothly, we recommend employers review their existing non-compete agreements and practices. It's crucial to ensure compliance with this new law, protecting both your business interests and your valued employees. If you have any questions or concerns about how this law affects your business, don't hesitate to seek guidance from a member of the WRVB Labor & Employment team. We're here to support you every step of the way!

April 13, 2023

NLRB Targets Severance Agreements

Authors: King F. Tower | Emily Kendall Chowhan

In a decision that affects union and non-union employers, the National Labor Relations Board (NLRB) recently found that certain provisions often used in severance and release agreements violate the rights of employees under the National Labor Relations Act (NLRA). The case is McLaren Macomb, 372 NLRB No. 58 (2023). The new decision was followed by a Guidance memorandum issued by NLRB General Counsel, Jennifer Abruzzo, who explained how she interprets the ruling.

The NLRA applies to non-supervisory employees, whether or not the employer is unionized. Among other things, it forbids employers from coercing or chilling employees' exercise of their rights under the act. For example, employers may not prohibit employees from discussing wages, hours and working conditions. Similarly, employers must allow employees to criticize the employer's working conditions, so long as the employee does not engage in "maliciously false" speech.

Applying these principles, the Board concluded that McLaren Macomb, a Michigan hospital operator, violated the NLRA when it offered several employees a severance agreement containing broad confidentiality and non-disparagement clauses. The Board rejected the contention that the violation was prevented by either the voluntary nature of the offer or the fact that the employees would no longer work for the employer once they accepted the agreement. Significantly, although the McLaren Macomb case arose in the context of other alleged unfair labor practices, the Board held that no such context is required for an employer to violate the NLRA - the mere offer of such an unlawful agreement, whether accepted or not, is sufficient.

Employer Takeaways

In the time since the Board released its decision, there has been much debate in the employer community about how to respond. Among the topics of discussion:

- Is it possible that McLaren Macomb will successfully appeal? It's possible, maybe even likely, that a U.S. Circuit Court of Appeals would reach a different decision, but keep in mind that: (a) many Board cases are settled before an appeal goes forward, and (b) unless a court issues a stay, the Board's decision remains the law of the land until it is overturned.

- What about the General Counsel's position? General Counsel Abruzzo believes the Board's decision should be retroactive. In other words, she believes it should apply to prior agreements, possibly even those entered into beyond the NLRA's statute of limitations of six months. She also indicated that a confidentiality agreement would need to be limited to restricting only trade secrets for a limited period of time. Unlike the Board's decision, the General Counsel's interpretations are not legally binding, but it does indicate that this likely will not be the end of regulation in this area.
- Is there any other new law affecting severance agreements? Employers were already updating severance agreement language to ensure they comply with the Speak Out Act, a federal statute restricting confidentiality related to sexual harassment or assault claims.

What should employers do now?

Even realizing the board's decision may not be the final word, employers should take steps to comply with the ruling. First, we recommend employers ensure their release language clearly carves out participation in government investigations. We believe there is confidentiality and non-disparagement language that would comply with the board's ruling, although it will likely be less thorough than what was considered standard prior to McLaren Macomb. In summary, employers should consult with an attorney and used revised language for all non-supervisory employee severance agreements. Contact a member of our Labor & Employment team if you have any questions about your current severance agreements.

March 16, 2023

Are Your Highly Compensated Employees Exempt Under FLSA?

Authors: Anne G. Bibeau | King F. Tower | Raven C. Burks

On February 22, 2023, the Supreme Court of the United States issued an important decision under the Fair Labor Standards Act (FLSA). In Helix Energy Solutions Group Inc. et al. v. Michael J. Hewitt, the Court determined that an employee, under the highly compensated employee (HCE) exemption, was not exempt from overtime pay even though he earned over $200,000 annually. The HCE exemption requires that an employee's total annual compensation is at least $107,432, which includes at least $684 per week paid on a salary or fee basis. In this case, however, the employee was paid on a daily-rate basis which failed to satisfy the FLSA's definition of salary for HCEs. Thus, the Supreme Court confirmed that an employee is entitled to overtime pay if that employee's pay varies based on how often he or she works during each pay-period.

Important Reminders on the FLSA HCE Exemption

The FLSA's HCE exemption requires that employees be paid on a "salary basis," and perform certain job "duties."

First, a "salary basis" means "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. [i] One of the primary reasons for the "salary basis" is to establish "a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week." [ii] An employee paid on a "salary basis" must receive his or her "full salary for [that] week" whenever the employee works at all during a week. If an employee's earnings are computed by the hour, day, or shift, then the employer must guarantee that the employee will be paid at least $684-per-week to satisfy the "salary basis" requirement. [iii] When computing the employee's earnings, there must be a reasonable relationship between the guaranteed $684 amount and the amount the employee actually earns. In the Helix case, the employee was paid a daily rate without any guaranteed minimum weekly amount. As a result, even though the employee's annual compensation exceeded $200,000, his pay did not satisfy the salary basis test and he was therefore not exempt from overtime pay.

Second, the job "duties" test focuses fundamentally on the nature of the worker's job responsibilities. The HCE has a lower bar for satisfying the "duties" component than the requirements for the traditional executive, administrative, or professional FLSA

exemptions. For an HCE, the employee's primary duty must include performing office or non-manual work, and the employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee. Thus, the HCE's duties must consist of either (1) managing the enterprise; (2) directing other employees; or (3) exercising power to hire and fire.

Conclusion

The HCE exemption is one of many different exemptions from the FLSA's overtime provisions. If you have questions or concerns about complying with the FLSA, please contact a WRVB Labor & Employment attorney.

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i. 29 CFR § 541.602(a).

ii. Helix Energy Sols. Grp., Inc. v. Hewitt, 598 U.S. --, 2023 WL 2144441, at *5 (2023).

iii. 29 CFR § 541.604(b).

February 9, 2023

New Federal Laws Strengthen Protections for Pregnant and Postpartum Workers

Authors: Olivia S. Moulds | Anne G. Bibeau | Raven C. Burks

In December 2022, Congress enacted two new federal laws that protect employees and applicants who are pregnant or postpartum: the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act).

Pregnant Workers Fairness Act (PWFA)

The PWFA, which goes into effect June 27, 2023, requires employers with 15 or more employees to provide reasonable accommodations to employees and applicants with known temporary limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The PWFA is closely modeled after the Americans with Disabilities Act (ADA).

The PWFA does not require the pregnant or postpartum condition to meet the definition of disability under the ADA. However, it does require employers to follow the ADA's requirement of engaging in the interactive process with employees and applicants to determine if the employer can reasonably accommodate the individual's needs without undue hardship.

Under the PWFA, employers cannot require an employee to take leave if another reasonable accommodation is available. Finally, the PWFA protects employees from discrimination and retaliation based on requests for accommodation. The PWFA falls under the authority of the Equal Employment Opportunity Commission (EEOC), meaning individuals must file a charge with the EEOC for alleged violations of the law.

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

The PUMP Act went into effect on December 29, 2022. As the name suggests, the PUMP Act protects nursing employees by allowing them to pump at work. An employee must be given reasonable break time to express milk, in a private place other than the bathroom, for up to one year after a child's birth. For employers with more than 50 employees, employers must ensure the private place is shielded from view and free from intrusion from coworkers and the public.

While these protections are not new for non-exempt employees under the Fair Labor Standards Act (FLSA), the PUMP Act extends the FLSA pumping protections to cover exempt employees (who were previously excluded from the FLSA's protections for nursing mothers). The PUMP Act has an exception for employers with fewer than 50 employees if providing the break time and private space is an undue hardship.

Virginia's Protections

The Virginia Human Rights Act (VHRA) provides similar protections for pregnant and nursing employees. It applies to employers with five or more employees, prohibiting them from discriminating against employees and applicants for pregnancy-related conditions. It also requires employers to provide reasonable accommodations for pregnancy, childbirth, or related medical conditions, including lactation.

Under this law, Virginia employers must provide employees and applicants with notice of the law's key provisions, post a conspicuous notice of those provisions in the workplace, and update employee handbooks to inform employees of their pregnancy-related protections.

Please contact a WRVB Labor & Employment attorney if you have any questions about complying with these requirements.

January 27, 2023

FTC Proposes Rule Banning Non-Compete Clauses

Authors: Anne G. Bibeau | Raven C. Burks | Patice L Holland | Emily Kendall Chowhan | Olivia S. Moulds

On January 5, 2023, the Federal Trade Commission (FTC) proposed a rule to ban non-compete clauses in employment agreements, which it asserts hurts workers and harms competition. The proposed rule would prevent employers from using non-compete clauses with employees and would require employers to rescind any existing non-compete clauses within 180 days of the publication of the final rule.

The Proposed FTC Rule

The proposal is written broadly, prohibiting any "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

This provision is essentially a functional test to determine if a contractual term is a non-compete clause, even if that specific wording is not used. However, if the proposed rule is finalized, it would not affect the

enforceability of non-disclosure clauses, non-solicitation clauses, and other similar agreements that prevent employees from using confidential information against a former employer.

State Laws Covering Non-Compete Agreements

Virginia already has a law that restricts the use of non-compete agreements with certain employees. Section 40.1-28.7:8 of the Virginia Code prohibits employers from entering, enforcing, or threatening to enforce a non-compete with any low-wage employee. The statute broadly defines "low-wage employee" to encompass those whose average weekly earnings are less than the state average weekly wage as well as interns, students, apprentices, certain trade trainees, and certain independent contractors.

Virginia is not the only state to enact legislation regarding non-compete agreements. A review of state laws across the nation indicates that state legislatures are limiting the use of non-competes. Several states, including Maryland and Washington, D.C.,

have enacted laws similar to Virginia's, prohibiting non-competes for low-wage employees. Other states have codified the common law trend of allowing non-competes as long as the agreement is not too broad in its geographic scope and duration. Other states, such as North Carolina and Tennessee, have laws limiting non-compete agreements in the context of certain professions (typically attorneys and health care providers).

When Will the FTC Rule Take Affect?

The rule has no effect yet, as it is only a proposal. Further, if the proposed rule is finalized exactly as it is currently written, it likely will face legal challenges. Commissioner Wilson, one of several FTC commissioners, wrote a dissent to the notice of proposed rulemaking in which she pointed out the rule as proposed may exceed the agency's authority, and many other legal authorities agree.

What Happens Next?

The FTC invites the public to submit comments regarding the proposed ban on non-compete clauses and may take those submissions into consideration before releasing a final rule. Additionally, the FTC invited comments on possible alternatives to the ban, which could include treating non-compete clauses for senior executives differently than for other employees or giving job candidates advance notice that a position will require signing a non-compete agreement. The agency's request for alternative ideas may signal that it is open to scaling back the scope of its final rule.

Interested or impacted parties might consider leaving feedback at the link below, as the final rule could be directly affected by responses the FTC receives, and it is likely the only time that employers will be able provide input on this significant change to the American employment landscape. The comment portal is located on the FTC's website and is open to the public through March 10, 2023.

If you have any questions about how this proposed rule may impact your business, the WRVB Labor & Employment attorneys are available to assist you.

December 28, 2022

The Speak Out Act: What You Need To Know

Authors: Emily Kendall Chowhan | Olivia S. Moulds | Raven C. Burks

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On December 7, 2022, President Biden signed a bill into law to protect the voices of individuals who may experience sexual harassment and/or assault in the workplace. Titled the Speak Out Act, the law limits "the judicial enforceability of pre-dispute nondisclosure and non-disparagement contract clauses" in an effort to "make workplaces safer and more productive for everyone." The act follows the passage and enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act in February of 2022, which limited use of employment arbitration agreements or joint-action waivers regarding sexual harassment or sexual assault claims entered prior to a dispute in an effort to protect employees' ability to litigate sexual harassment or assault claims in court.

Similarly, the new Speak Out Act prevents enforcement of non-disparagement or nondisclosure agreements entered before any sexual harassment or sexual assault dispute has arisen. Practically speaking, the Speak Out Act only prevents employers from using mandatory nondisclosure or non-disparagement clauses as prophylactics before an employee has raised a claim or complaint; it still allows nondisclosure or non-disparagement clauses in settlement or separation agreements reached after a dispute regarding sexual harassment or assault has arisen. Due to its narrow scope, the Speak Out Act is unlikely to have a significant impact on employers.

While the law may not be as broad as certain similar state-level laws, its definitions of sexual assault dispute and sexual harassment dispute open the door to somewhat broad interpretations of the act. Further, it recognizes the use of agreements in a variety of circumstances – "between employers and current, former, and prospective employees, and independent contractors, and between providers of goods and services and consumers" – which creates a wide class of protected individuals.

Relevant Virginia Law

Virginia employers should be aware that a Virginia statute, Code 28.3-67.4, also places limitations on nondisclosure and confidentiality agreements regarding sexual assault. Virginia's statute prohibits employers from requiring employees to sign a nondisclosure or confidentiality agreement regarding any claims of sexual assault as a condition of employment. Unlike the

Speak Out Act, Virginia's law only pertains to sexual assault claims, which include rape, forcible sodomy, aggravated sexual battery, and sexual battery, but not sexual harassment. Further, because Virginia's law only implicates agreements that are "a condition of employment," it does not apply to separation or settlement agreements entered after a dispute has arisen and the employee is departing from the company.

Concluding Thoughts

Employers should review their employment agreements, arbitration agreements, and nondisclosure agreements to determine whether they include clauses that prohibit employees—or independent contractors—from bringing sexual assault or harassment claims. We also recommend that employers examine the state and local laws that they may be subject to and adjust their employee agreements accordingly.

November 14, 2022

HR Challenges to Managing Remote Workers

Author: Anne G. Bibeau

Whether the pandemic is actually over or we all just lost patience with it, it appears that society has largely returned to normal. Virtual events are giving way to in-person gatherings yet again, with most people delighting in a return to face-to-face engagement. Early in the pandemic, remote work was a necessity. Now, many businesses are returning workers to the office, but still dealing with individual employees who prefer to work remotely. Remote work presents several management challenges, as it can be difficult to keep remote employees engaged and to monitor their performance. In addition, there are legal risks in remote work that employers need to address.

Remote Workers and the Fair Labor Standards Act (FLSA)

For non-exempt employees (i.e., those entitled to overtime pay under the FLSA), there are wage and hour issues. The FLSA requires employers to keep accurate records of nonexempt employees' hours worked. Employers must have in place an accurate procedure to do that for remote workers and supervisors need to verify employees are working when they claim to be. Failure to address these issues on the front end can expose the business to significant risk under the FLSA and equivalent state laws regarding wages.

Remote Work as an Americans with Disabilities Act (ADA) Accommodation

If an employee asks to be allowed remote work based on a medical issue, the employer may need to analyze the request under the ADA. The ADA requires employers to offer reasonable accommodations for qualified employees with disabilities. Although not every medical issue is a "disability," the term is defined broadly under the ADA.

Employers need to determine if an employee's essential job functions can be performed remotely; if they cannot, that may be a basis for denying remote work. If the employer objects to the request for remote work, the ADA requires the employer to engage in the interactive process with the employee to find a reasonable accommodation that will work. The employer does not have to grant an accommodation that would cause an undue burden, however.

Employers also need to be consistent. If remote work is allowed for one or more employees, then the employer will need to be able to defend a decision to deny remote work to another employee. Otherwise, the employer may be exposed to liability for disparate treatment under the ADA and other discrimination laws.

Risks of Out-of-State Remote Workers

If the employees are working remotely from a different state than where the business is located, the business may have tax, insurance, and other considerations to address.

Because these issues are fraught with legal risk, employers should consult their employment law counsel when considering remote work. The employment law attorneys at Woods Rogers Vandeventer Black are experienced with these issues and available to assist.

About the WRVB Labor & Employment Team

Labor & Employment Team Members

Anne G. Bibeau
L&E Practice Co-Chair and Principal, Norfolk

Anne works closely with clients to guide employment decisions to minimize risk. She focuses her practice on labor and employment law, alternative dispute resolution, commercial litigation, tax litigation, and the emerging cannabis industry. She advises clients on the Fair Labor Standards Act (FLSA), discrimination and harassment, the Family and Medical Leave Act (FMLA), disability law, labor relations, employment agreements, and other labor and employment matters, and conducts workplace investigations. She is an experienced litigator who has been advising clients on labor and employment law matters for more than twenty years.

Full Bio

Victor O. Cardwell
L&E Practice Co-Chair, Principal, and Chairman, Roanoke

Victor practices labor and employment law throughout the U.S., focusing on diversity, the FLSA, labor/management relations, and workplace violence. Victor has significant experience before state and federal courts and administrative agencies, including the National Labor Relations Board. He offers counsel to executive and human resources managers on a wide range of employer concerns. Victor served as a past president of the Virginia Bar Association and serves on the Virginia State Bar's Board of Governors for its Diversity Conference.

Full Bio

Thomas M. Winn III
L&E Practice Co-Chair and Principal, Roanoke

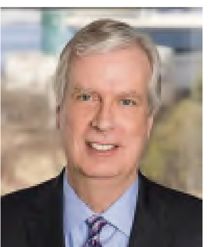
Tom's nationwide practice focuses on traditional labor/management issues, HR counseling, and employment litigation. Peers have commented that "he is one of the most recognized traditional labor lawyers in Virginia." He represents employers across the country in collective bargaining, grievances/arbitrations, NLRB litigation, union organizing and decertification campaigns, strike management, and other issues under collective bargaining agreements. Tom has extensive experience representing government contractors regarding collective bargaining, labor arbitrations, Service Contract Act compliance, and related issues. He regularly serves as chief spokesman in union negotiations and has handled more than 100 labor arbitration cases.

Full Bio

R. Patrick Bolling
Principal, Lynchburg

Patrick solves workforce issues in collaboration with human resource professionals and other company leaders. As part of the firm's Labor and Employment group, he helps his clients make day-to-day employment decisions, design and implement fair and effective employment policies, contracts and handbooks, conduct workplace investigations, and prevent disputes from becoming litigation. Patrick's additional experience in transactional business matters allows him to offer depth and context to decision-makers beyond the employment setting. When necessary, Patrick aggressively defends employers, primarily in state and federal regulatory actions and civil litigation related to discrimination, wrongful termination, harassment, and retaliation under equal employment opportunity laws.

Full Bio



Dean T. Buckius
Principal, Norfolk

Dean concentrates his law practice in all areas of labor and employment law and litigation. He advises and represents businesses on a broad range of employment issues including union avoidance, discrimination, wrongful discharge, wage and hour claims, VOSH/OSHA citations, trade secrets, employment contracts and covenants not to compete. Dean represents clients in state and federal courts, as well as in administrative forums and before arbitrators and mediators.

Full Bio

Agnis C. Chakravorty
Principal, Roanoke

Agnis counsels employers on human resources issues including non-compete agreements, employee handbooks, and company reorganization. His experience extends to litigation and dispute resolution, as well as local government and agency work. Agnis worked on model noncompetition agreements for a Fortune 500 company covering employees nationwide, drafted a handbook for one of Virginia's largest contractors, and helped one of Virginia's largest private medical practices reorganize its operations. In addition, he has written precedent-setting employee/employer relations legislation at the state level. This legislation now protects small and large businesses from frivolous lawsuits.

Full Bio

Michael P. Gardner
Principal, Roanoke

Mike focuses his practice almost exclusively on labor and employment issues and has represented clients large and small, public and private, in state and federal courts in the Mid-Atlantic and beyond. Mike has counseled employers on handling all aspects of employment claims, from internal management, proceedings with state and federal agencies such as the EEOC or DOL, and through litigation, trial and appeal. While litigation is sometimes unavoidable, Mike emphasizes a proactive and preventative approach to employment issues in an effort to minimize the costs and disruptions litigation can impose on a business.

Full Bio

Patice L. Holland
Principal, Roanoke

Patice focuses primarily on employment litigation defense and employment investigations. She has extensive experience litigating cases in state and federal courts as well as in mediation. Through her litigation experience, Patice has extensive knowledge in defending witness and document subpoenas and FOIA requests. As Chair of the firm's E-Discovery Practice Group, Patice advises clients on all aspects of E-discovery, including litigation holds, custodial interviews/data collection and preservation, and review and production of electronically stored information (ESI). Patice has been involved in extensive discovery matters in complex litigation in both state and federal courts.

Full Bio

Leah M. Stiegler
Principal, Richmond

Leah strategically advises employers on compliance with employment laws and defends actions before agencies including the EEOC, DOL, and NLRB. Leah has substantial federal trial experience, conducts workplace and board training sessions, and guides managers through workplace investigations. Leah's experience includes FMLA/ADA and employee medical leave or workers' compensation concerns, FLSA/wage and hour obligations, documentation and discipline, performance reviews/PIPs, Form I-9 best practices, and addressing employee conduct on social media. In every case, Leah works with her clients to create a custom training program that will address their unique workforce situations.

Full Bio

Daniel C. Summerlin
Principal and President

Dan's experience covers a scope of law from administrative and regulatory, with an emphasis on environmental, to labor and employment and litigation. His employment clients call upon him to provide training to their supervisors and workforce, provide guidance on human resource issues that arise during daily operations including discipline and termination advice and compliance issues with FLSA, ADA, Title VII, NLRA, and FMLA. Dan has extensive experience representing clients during EEOC investigations and unemployment proceedings at every level and represents clients in employment litigation in state and federal courts.

Full Bio

King F. Tower
Principal, Roanoke

King assists employers with employment law litigation, labor-management relations, and also offers counsel to businesses on employment-related matters. King's experience as a labor and employment attorney includes defending claims under the FLSA, the FMLA, the ADEA, the ADA, and Title VII. He has extensive experience providing strategic guidance to clients on conducting internal audits of corporate compliance, employment policies, and other critical decisions. King also assists federal contractors in preparing affirmative action programs and represents them during government audits. King has served as lead negotiator in collective bargaining and has represented employers in grievance and arbitration proceedings.

Full Bio

Raven C. Burks
Associate, Roanoke

Raven advises employers on compliance with FLSA, FMLA, ADA, and other federal and state regulations. As a recent addition to WRVB's Chambers-ranked labor and employment and litigation practice groups, she helps employers build better workplaces and navigate through day-to-day issues by answering questions on the credit union hotline.

Full Bio

Emily Kendall Chowhan
Associate, Richmond

Emily's practice includes advising employers on compliance with state and federal employment law, representing employers before agencies, and developing customized employment contracts, workplace policies, and employee handbooks.

Full Bio

Olivia S. Moulds
Associate, Roanoke

Olivia focuses her practice on employment/management issues and employment litigation. She devotes much of her time counseling, reviewing, and developing workplace policies for HR managers and employers. As part of WRVB's Chambers-ranked labor and employment practice, Olivia advises employers on compliance with federal and state employment laws.

Full Bio

About the WRVB Labor & Employment Practice

HR professionals need support from a legal team focused completely on workplace concerns. The attorneys in the WRVB Labor & Employment team help business leaders manage complex human resources matters. We partner with you to develop and execute HR policies and procedures that align with your business objectives and comply with the law.

Our team deals exclusively with management-side employment law. We understand your everyday concerns and know how to bring together executives, management, and staff to build better workplaces.

We find solutions to your most pressing workplace issues.

Employment Litigation Defense

Lawsuits and damage awards can debilitate most businesses. When litigation is a possibility, you need a practical and experienced legal team. We defend against all types of employment litigation, including wrongful discharge, discrimination, harassment and retaliation, wage and hour claims, employee benefit and leave issues, and whistle-blower claims. While our attorneys will always work to avoid costly litigation, it may be unavoidable. When a lawsuit happens, our attorneys handle cases from the first threat of litigation through trial and appeal, from individual actions to the most complex class actions.

Labor/Management Relations

For many years, employers were able to ignore the threat of unionization. That is no longer true. With a strong National Labor Relations Board and many high-profile unionization efforts, no employer can be sure their workers will not organize.

Whether you are dealing with an existing union or facing new organization efforts, you need an experienced attorney to guide you through negotiations. WRVB attorneys have built strong reputations in Labor/Management Relations representation through leading tough but fair negotiations on behalf of employers.

Human Resources, Management, and Staff Training Programs

Woods Rogers Vandeventer Black's (WRVB) trainings were developed to teach professionals how to safeguard their organizations from ruinous litigation. We are industry-leading employment defense attorneys, and we will use our experience for your benefit.

You will return from our trainings better able to recognize and respond to high-risk employment situations and teach others to do the same. We can develop training programs for your specific needs or customize one of our frequently requested programs.

- Employment Law Compliance and Updates
- Discrimination and Harassment
- Diversity and Inclusion
- Performance Management
- Hiring the Right Way
- Employee Relations and Conflict Resolution
- In-depth Training for Specific Laws and Regulations such as FLSA, FMLA, ADA Title VII, EEO, W&H, etc.

About Woods Rogers Vandeventer Black

Serving clients from five offices across the commonwealth, Woods Rogers Vandeventer Black (WRVB) offers high quality legal advice with a local touch.

As advocates, we walk beside our clients—advising, guiding, and listening. We help clients protect their interests, guide them in growth, and defend them in conflict. For more than a century, we have seen that having a trusted legal team at the ready is indispensable for institutions large and small.

Legal And Professional Excellence

When you sit down with us, we will bring the highest level of legal talent to the table with expertise that spans disciplines and industries.

Our attorneys have received accolades across a variety of practice areas. Three practice areas and six individual attorneys are Chambers USA ranked for Virginia. Eleven of our attorneys are Fellows of the Virginia Law Foundation. Women attorneys are represented in Martindale-Hubbell's Preeminent Women Lawyers, Virginia Lawyers Weekly's Influential Women of Law, and President Obama's Volunteer Service Award. Our team also includes "Leaders in the Law," "Go To Lawyers," "Super Lawyers," "Rising Stars," "Best Lawyers," and Virginia Business magazine's "Legal Elite."

Woods Rogers Vandeventer Black has been recognized by Corporate Counsel as a "Go-To Law Firm" for delivering "exceptional work" to Fortune 500 in-house legal departments.

For clients, this means legal excellence is at your service when and where you need it.