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2025 Labor and Employment Law Update

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Agenda

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- Labor and employment law under the new administration
- Key labor and employment litigation
- Enforcement priorities of the federal agencies—the EEOC, DOL, NLRB, and more
- Sweeping expansion of the obligation to accommodate—religion, disability, pregnancy, childbirth, and related medical conditions

Executive Orders and IE&D

Introduction

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Executive Orders are being issued and rescinded at a dizzying pace

Tracker: Littler.com/publication-press/publication/executive-order-tracker

"Ending Illegal Discrimination and Restoring Merit-Based Opportunity"

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- Seeks to ensure the enforcement of federal civil-rights laws and terminates policies that involve race- and sex-based preferences under diversity, equity, and inclusion (DEI) and diversity, equity, inclusion, and accessibility (DEIA) initiatives.
- REVOKES EO 11246!
  - However, Section 503 of Rehabilitation Act and VEVRAA is still in force, for now, so the obligation to maintain affirmative action programs for veterans and individuals with disabilities, including preparation of the annual plans, is unchanged (though enforcement is unclear).
  - EEO-1 and VETS-4212 reporting is still required.
  - There are arguments that obligations under existing federal contracts survived the revocation of EO 11246 as legal contractual commitments. There are also arguments that because OFCCP no longer has jurisdiction to enforce these obligations, they no longer apply. The government is taking the latter position.
  - The Secretary of Labor's order states that OFCCP must "immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246, Equal Employment Opportunity (September 24, 1965), and the regulations promulgated under it. DOL no longer has any authority under the rescinded Executive Order 11246."
  - Consider what you will do with your AAPs for the upcoming year.

Organizations Responding to What's Next in IE&D

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- Recent Littler research shows that nearly half (49%) of C-suite leaders surveyed say they are not considering new or further rollbacks of their IE&D programs at this point, and only 8% are seriously considering changes.
- More than half (55%) say they are more worried about the risks of IE&D lawsuits and fear that it will be more widespread for visible targets (federal contractors, public companies, large employers).
- Organizations *are* working to avoid unnecessary risks—such as published benchmarks, metrics, etc. —but are still pushing forward with activities that support inclusion/expanded outreach (all lawful).
- 63% said they are considering whether and how to remove or reduce IE&D-related language from websites, proxy statements, and/or outward-facing communications.
- Remember: Lawful IE&D efforts to expand outreach and secure the best possible pool of candidates are still lawful.

Supreme Court Decisions

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Muldrow v. City of St. Louis (2024)

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Court's Decision

An employee challenging a job transfer under Title VII must show that the transfer brought about some harm, but that harm need not be significant.

Old Standard

Employees had to show that a job transfer caused "materially significant disadvantage" – like change in title, salary, or benefits – to challenge it under Title VII.

New Standard

Employees need only demonstrate that the transfer caused "some harm" to an identifiable term or condition of employment.

Muldrow Meets "Reverse" Discrimination and IE&D

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- Muldrow v. City of St. Louis has had a big impact on discrimination claims under Title VII (the lower "some" harm standard)—and opens the floodgates for various types of adverse actions we have not had to defend before.

- Ames v. Ohio Department of Youth Service (at the United States Supreme Court this term): The Court will decide the standard for "reverse" discrimination claims under Title VII and what a majority-group plaintiff must show to support an inference that the employer is that "unusual employer who discriminates against the majority."

- There is a significant increase in claims that an employer's DEI program, initiative, or training is discriminatory based on race or religion.
  - At least 30 new lawsuits have been filed since January 1, 2024, alleging some form of reverse discrimination.

- Pay special attention to employee resource groups (ERGs), affinity groups, mentorship and sponsorship programs, hiring/recruitment efforts, managers being reviewed/evaluated based on IE&D, metrics of any kind, etc.

- Given the new administration's laser focus on this issue, it's time to work with G&A Partners and/or your legal counsel to conduct a privileged audit of your current programs.

Loper Bright Enterprises v. Raimondo (2024)

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Court's Decision

Federal courts cannot defer to agencies on questions of law, overruling Chevron v. APA.

New Standard

Courts must exercise “independent judgment” and give a statute its “best meaning” rather than accepting “reasonable” agency interpretations.

Impact

Overrules Chevron deference, requiring courts to interpret laws independently without relying on agency expertise.

Why it matters for labor and employment law in particular (FMLA, FLSA, ADA, PWFA, and more).

Legislative Update

The Pregnant Workers Fairness Act (PWFA)

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Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related medical conditions.

Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

Intends to prevent employees from being forced out on unpaid leave or out of their jobs.

Final EEOC Regulations (April 2024): 29 C.F.R. Part 1636

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Full Rule: *https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act*

EEOC Summary: *https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa*

Broadly Defining "Pregnancy, Childbirth, and Related Conditions"

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- Current Pregnancy
- Past Pregnancy
- Potential Pregnancy
- Lactation including breastfeeding or pumping
- Contraception
- Menstruation
- Infertility and Fertility Treatment
- Endometriosis
- Miscarriage
- Stillbirth
- Abortion

PWFA – Temporary Elimination of Essential Job Functions

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PWFA does not disqualify those who temporarily cannot perform one or more essential job functions, if, (i) they expect to be able to perform them in the near future; and (ii) the temporary inability can be reasonably accommodated.

The final regulations say:

- "Temporary" = not permanent, could last longer than "in the near future"
- "In the near future" = generally up to 40 weeks with respect to a current pregnancy, and case by case with respect to childbirth and other conditions, though not indefinite
- Postpartum LOA does not count in the calculation of how long the employer must consider waiving the function; employer must renew the analysis when the employee returns to work

So wait … what does that even mean?!?!

PWFA – Seeking Documentation from a Healthcare Provider

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- Can only be requested when it is reasonable under the circumstances to determine whether the employee has a qualifying “limitation” and needs an adjustment or change.

- Provider need not be treating the condition at issue; they just need to be in a position to opine on the matter.

- Employer cannot require a different provider (unlike under the ADA, which permits that in some circumstances).

Required “Predictable Assessments”

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01

Allowing an employee to carry or keep water and drink, as needed, in or nearby the employee’s work area;

02

Allowing an employee to take additional restroom breaks, as needed;

03

Allowing an employee whose work requires standing to sit, and vice versa, as needed;

04

Allowing an employee to take breaks, as needed, to eat and drink.

Limits on Seeking Documentation Under PWFA

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Employers may not seek supporting documentation AT ALL when:

1. The limitation and need for a reasonable accommodation is obvious;*
2. The employer already has sufficient information to support a known limitation related to pregnancy;
3. The request is for one of the four "predictable assessment" accommodations;*
4. The request is for a lactation accommodation at work;* or
5. Employees who do not have known limitations under the PWFA receive the requested modification under existing employer policy or practice without submitting documentation.

** In these situations, can only require "self-confirmation" from employee.*

More About PWFA

EEOC charges and lawsuits under PWFA so far:

- In Fiscal Year 2024, the EEOC filed at least five lawsuits under the PWFA.
- We expect far more in FY 2025.
- The PWFA went into effect on June 27, 2023.
- Charges filed with the EEOC under the PWFA were the most prevalent in Texas (22), Georgia (16), and Illinois and North Carolina (14 each).

So, what's the punchline?

- You should not be using your regular ADA paperwork for this (and you may not be able to get paperwork at all).
- You need to revisit your policies that address accommodation and pregnancy—EEO, anti-discrimination, accommodation, leaves of absence, return to work, and more.
- Your supervisors/managers need to be trained to recognize these issues and cooperate with HR/G&A Partners.

The PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act

Remember PUMP Act Obligations

Employers must provide employees with reasonable break time to express breast milk for up to one year after the birth of a child (though PWFA picks up when PUMP Act obligations expire).

- Break times may vary significantly by individual and factors such as the age of the child.
- Can't make the employee "make up" the time missed for pumping.
- Whether breaks are paid or unpaid depends on what paid breaks other employees get and your jurisdiction.

Employers must provide a place, other than a bathroom, shielded from view and free from intrusion from coworkers and the public for employees to express breast milk.

Undue hardship exception only for employers with fewer than 50 employees

Additional Priorities of the Federal Agencies

EEOC: Diversity, Equity, and Inclusion (DEI)

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Prior Standard

- Broad interpretation of Title VII

What to Expect

- Narrower interpretation of Title VII
- Rise in reverse discrimination claims
- Increase in religious claims
- Fewer sexual orientation/gender identity charges pursued

EEOC: ADA Litigation Alive and Well

Press Release – August 29, 2024: EEOC Sues Three Employers for Disability Discrimination

- EEOC General Counsel: “The EEOC will continue to step in and enforce the law when **inflexible employer policies** or outdated stereotypes prevent disabled workers from reaching their full potential.”

A Remote Work Policy is Just Such a Policy

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- Query: Can an employer decide where it wants employees to perform their jobs (i.e., can we say we are an “at-work” company or a hybrid company, etc.)?
- Extensive return-to-office efforts by many organizations (preliminary studies show many employers are requiring more in-office days than they did one year ago).
- But keep in mind: If employees are eligible for accommodations under ADA, PWFA, and/or similar state or local laws—they may ask for and provide documentation from a healthcare provider in support of—exceptions to that policy.
- What the WFH case law tells us so far.
- So, what does it all mean?

Religious Accommodation

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New Standard for Religious Accommodation Undue Hardship

- Title VII requires reasonable accommodation of sincerely held religious beliefs/practices unless it poses an undue hardship.
- Historical standard = employers don't have to accommodate if it poses more than a *de minimis* burden.
- ***Groff v. DeJoy*, 600 U.S. 447 (2023)**
  - New, higher standard for undue hardship: Employers assessing religious accommodation requests may deny such requests only if there is evidence that providing the accommodation would result in "substantial increased costs in relation to the conduct of (an employer's) particular business."
  - Insufficient: speculative concerns, coworker morale, inconvenience. In a large organization, cost alone is unlikely to rise to the level of undue hardship.

EEOC: The Battle Between Social and Religious Norms at Work

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- Pronouns, pronouns, pronouns
- Signature blocks or office displays of religious or anti-religious messaging, and associated complaints from coworkers
- DEI and training programs, particularly with respect to issues of sexual orientation and gender identity
- Restrooms/locker rooms and transgender employee rights
- Abortion laws and benefits and employer responses to same post-Dobbs

DHS/ICE Audits

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- Current ICE I-9 audits have some additional twists.
- Within three to six months, we expect ICE I-9 audits will ramp up.
- In the first Trump administration, I-9 audits were 5,981 (FY18), 6,450 (FY19), and goal of 12,000-15,000 in FY20 before COVID hit.
- By comparison, the Biden Administration averaged fewer than 500 per year and audits under Presidents Bush and Obama were around 3,000-3,500 per year.
- It is anticipated that the Trump Administration will increase ICE I-9 audits to 12,000 a year with 100 plus ICE worksite raids a year.

Enhanced I-9/Enforcement Initiatives

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- Prepare for heightened scrutiny of hiring practices and ensure you follow state/federal immigration laws.
- Conduct regular I-9 audits to ensure you are timely/properly completing I-9s.
- Expect increase in immigration enforcement activities.
- Potential civil and criminal penalties.

Wage & Pay Transparency Developments

Pay Transparency

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- These laws aim to reduce pay disparities based on factors **like gender, race, and ethnicity; require employers to disclose wage scale/salary range for open positions.**

- In effect: **California, Colorado, Connecticut, Hawaii, Maryland, Nevada, New York, Rhode Island, Washington, and District of Columbia**

- Going into effect in 2025: **Illinois, Massachusetts, Minnesota, New Jersey, and Vermont**

New Pay Transparency Laws

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Date	Law	Description of Date/Deadline
January 1, 2025	**Illinois Pay Transparency**	Makes it unlawful for an employer with 15 or more employees to fail to include the pay scale and benefits for a position in any job posting.
January 1, 2025	**Minnesota Pay Transparency**	Requires employers to disclose the pay range for a position in a job description.
June 1, 2025	**New Jersey Pay Transparency**	Requires employers to disclose the compensation and benefits for a job position in each job posting; requires employers to announce known promotion opportunities to employees.
July 1, 2025	**Vermont Pay Transparency**	Requires most written job advertisements to include certain information regarding the type and range of monetary compensation that an employer expects to offer. The act also requires the Attorney General's Office to publish guidance on the law's requirements for both employers and employees.
July 31, 2025	**Massachusetts Pay Transparency**	Requires employers with 25 or more employees in the state to include pay ranges in job postings and disclose to applicants and incumbents upon request. Contains data reporting requirement for employers subject to federal EEO reporting.

EEOC Charge Filings Based on Pay Discrimination Increasing

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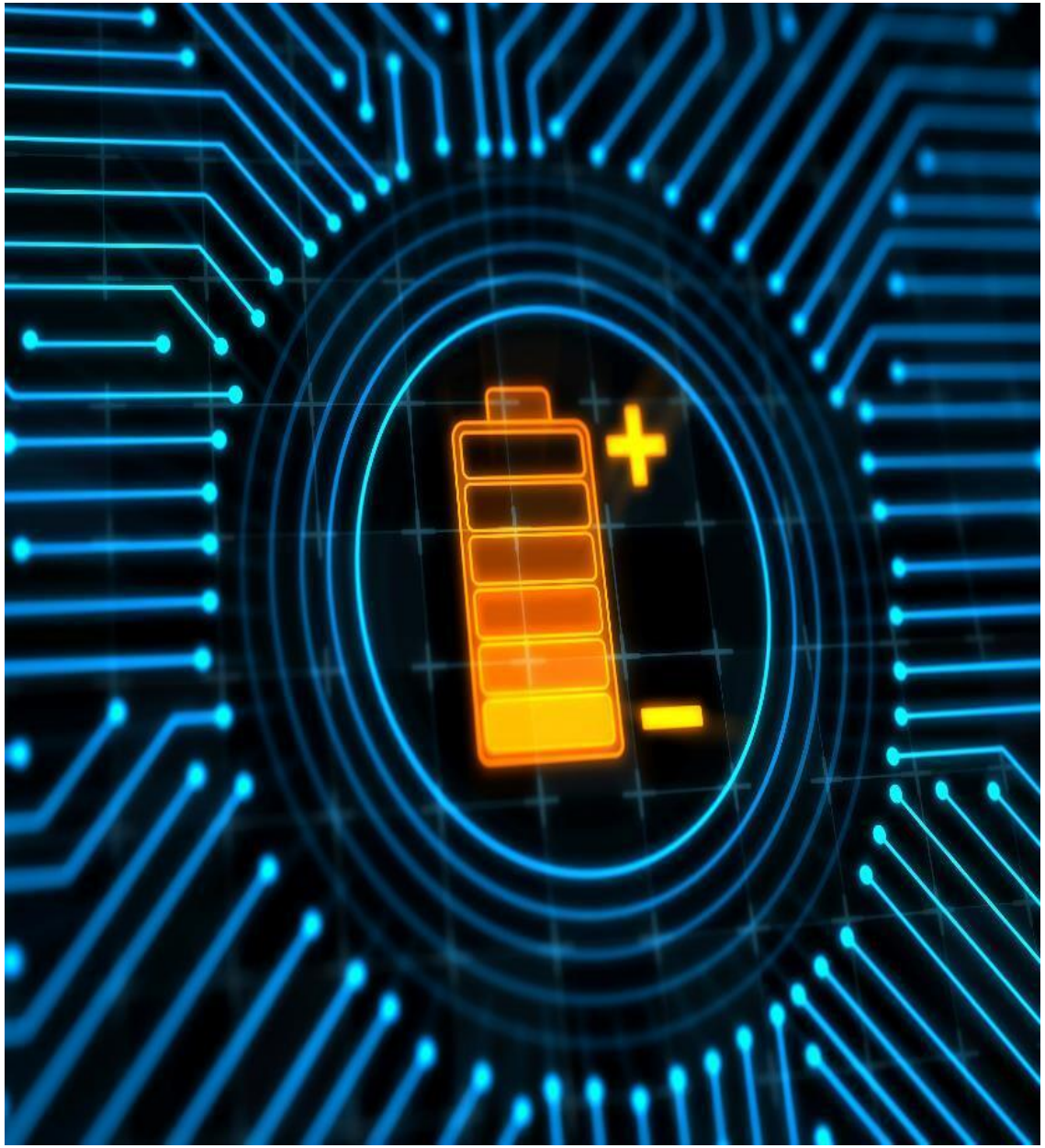
- In FY 2023, there were 1,012 charges filed with the EEOC alleging pay discrimination.
- FY 2024 saw a 9.2% increase in overall charges filed, so expect that number to increase for FY 2025.
- The most equal pay charges were filed in Texas (88), New York (81), California (65), and Pennsylvania (58).



Artificial Intelligence (AI) in the Workplace

How Are Employers Using AI in the Workplace?

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- Resume scanning and filtering and video interviews
- AI-Powered Chatbots
- Productivity monitoring and reporting
- Scheduling/Staffing
- Generative AI Tools

Artificial Intelligence and Associated Risks

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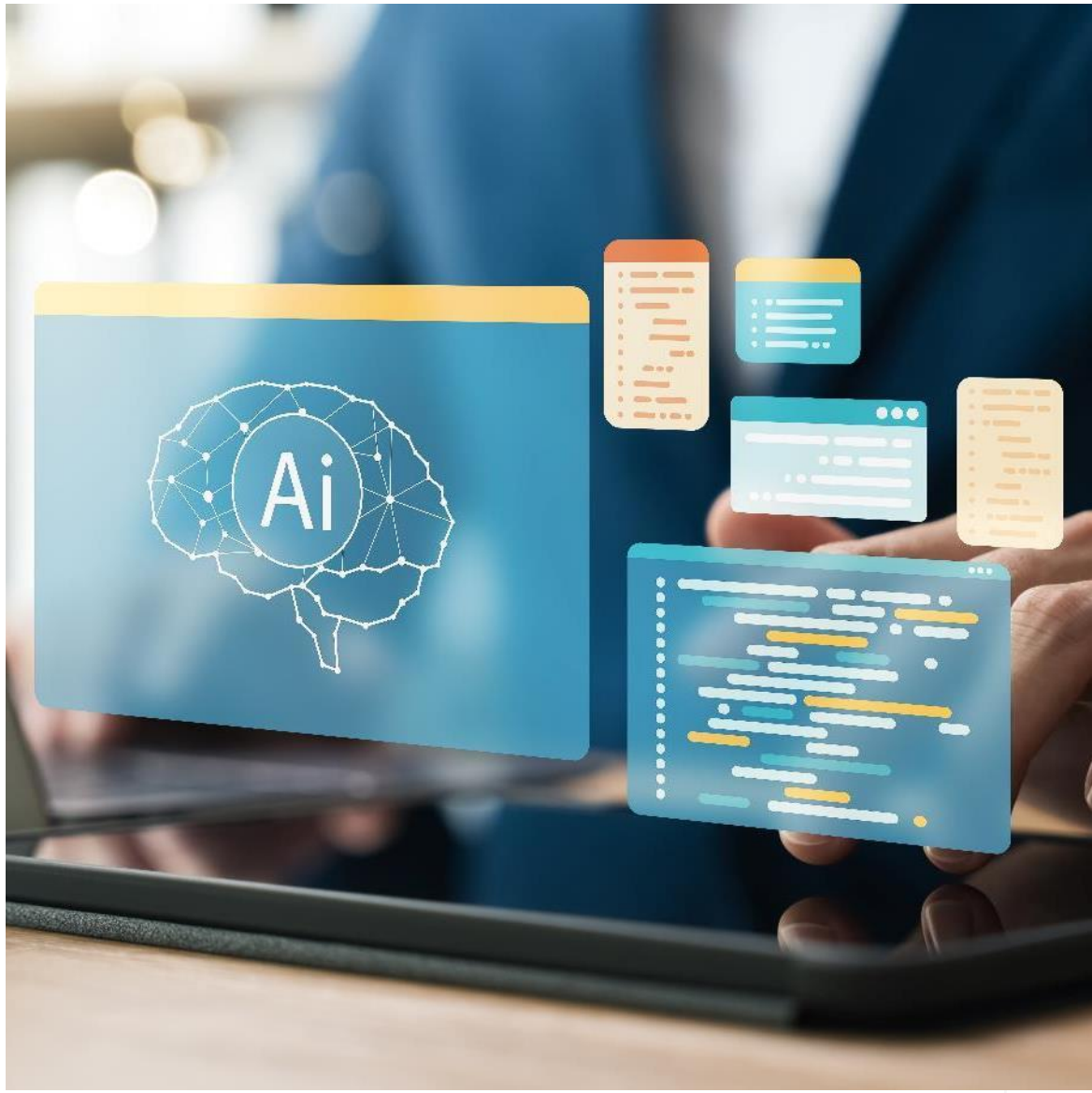
- Discrimination concerns
- No federal legislation has advanced
- This year, 45 states considered almost 700 legislative proposals
- States/city with laws regulating AI in employment context**:** **Colorado, Illinois, and NYC**



NLRB: Joint-Employer Standard

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Prior Standard

- Joint employer status applies if two or more entities share **direct, indirect, or reserved control** over employment terms like wages, benefits, hours, hiring, supervision, and discipline
- Broader interpretation

What to Expect

- Joint employer status requires **substantial, direct, and immediate control** over terms
- Indirect or reserved control is not sufficient
- Greater flexibility
- Uncertain if regulation can issue without presidential approval

NLRB: Employer Handbook Scrutiny

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Prior Standard

- A policy is unlawful if it could be interpreted as limiting an employee's rights

What to Expect

- A policy is presumptively lawful if it does not interfere with NLRA or any interference is outweighed by legitimate business purpose

DOL: Labor Union Oversight

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Prior Standard

- Focus on anti-union employers

What to Expect

- Focus on oversight of unions and union officials

DOL: Independent Contractor Classification

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Prior Standard

- Emphasizes totality of circumstances
- Focus on level of control exercised by employer and economic dependency
- More workers classified as employees

What to Expect

- Greater emphasis on entrepreneurial opportunity as the primary factor
- More workers classified as independent contractors

DOL: Overtime Exemptions

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Prior Standard

- Increase in salary threshold for overtime eligibility
  - –July 1, 2024: $43,888/year
  - –January 1, 2025: $58,656/ year
- Both increases planned and scheduled but then vacated by a Texas court in November 2024—so back to $35,568 for now

What to Expect

- Salary threshold for overtime eligibility may be reduced or reverted
- More flexible approach

Resources

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For additional resources, including our on-demand webinars, visit

gnapartners.com/resources