



# Having Employees in 2023

Cat Burgett | 2023



# COVID Update



## State of U.S. Workforce in a Post-Pandemic World

- Overall, U.S. job levels have recovered from the pandemic
- Eligible workers (labor force) participation rate is 1.3 percent below pre-pandemic levels
- 5.2 million more job openings than unemployed workers

# Workplace Issues in a Post-Pandemic World

- Employers are reporting a dearth of qualified talent or trouble retaining top talent
- Nearly 4.4 million Americans quit their jobs in March of 2022 according to the department of labor. That was about 100K more than in January of last year.
- The talent shortage is identified as the number one challenge that businesses are facing in 2022, with 55% of owners and recruiters admitting a struggle finding qualified applicants for positions they are trying to fill, according to the National Federation of Independent Business. Of this number, 29% said they found only a few qualified applications while 26% said they saw zero.

## Growing Industries by Net Change in Employment

(>100,000 net employment growth since Feb 2020)

	Total Employment (July 2022) (thousands)	Change since Feb 2020 (thousands)	% Change since Feb 2020
Warehousing and storage	1,793.30	585.5	48.0%
General merchandise stores, including warehouse clubs and supercenters except department stores	2,262.40	294.1	15.0%
Couriers and messengers	1,110.1	262.3	31.0%
Temporary help services	3,149.9	210.1	7.0%
Management and technical consulting services	1,767.1	206.0	13.0%
Computer systems design and related services	2,432.9	180.2	8.0%
Scientific research and development services	895.30	145.8	19.0%
Residential construction special trade contractors	2,267.20	142.5	7.0%
Offices of physicians	2,836.8	113.9	4.0%
Individual and family services (non-govt)	2,811.6	111.7	4.0%
Offices of other health practitioners	1,096.3	108.5	11.0%
Architectural and engineering services	1,643.7	103.9	7.0%
Nonstore retailers	652.2	101.0	18.0%

## Shrinking Industries by Net Change in Employment

(>100,000 net employment loss since Feb 2020)

	Total Employment (July 2022) (thousands)	Change since Feb 2020 (thousands)	% change since Feb 2020
Food services and drinking places	11,726.00	-577.1	-5.0%
Accommodation	1,714.30	-376.7	-18.0%
Local government education	7,765.80	-276.2	-3.0%
Local government, excluding education	6,387.00	-249.8	-4.0%
Nursing care facilities	1,361.10	-231.1	-15.0%
Clothing and clothing accessories stores	1,074.30	-214.8	-17.0%
Membership associations and organizations	2,811.90	-213.7	-7.0%
Amusements, gambling, and recreation	1,657.10	-128.4	-7.0%
Department stores	965.5	-113.0	-10.0%
Transit and ground passenger transportation	407.50	-100.7	-20.0%

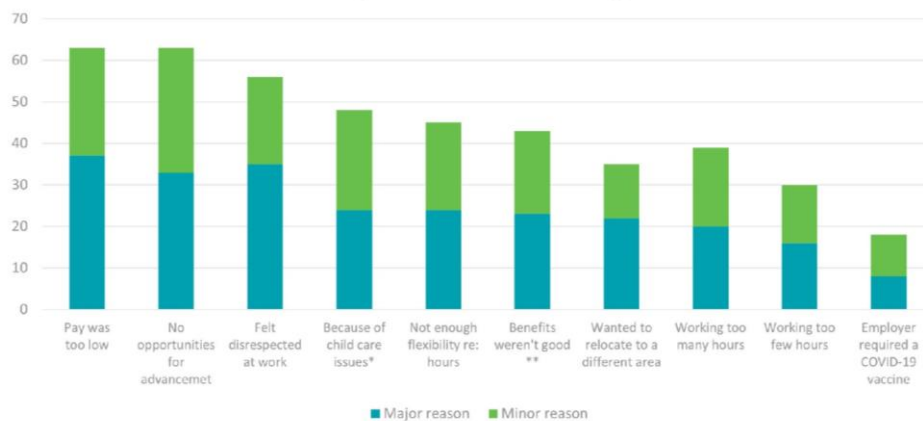
Source: U.S. Bureau of Labor Statistics

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## Top Reasons for Quitting



\*Among those with children younger than 18 living in the household

\*\*Question provided health insurance and paid time off as examples

Source: Survey of U.S. adults conducted Feb. 7-13, 2022, Pew Research Center

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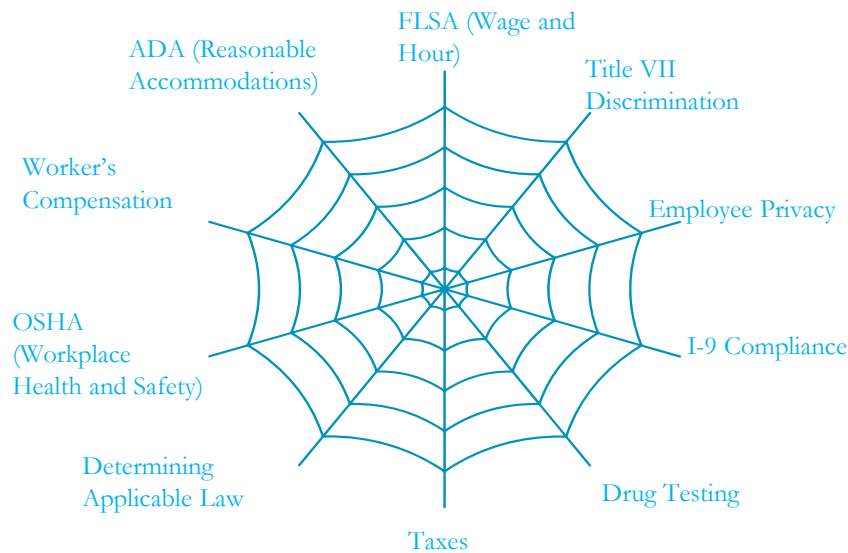
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## Remote Work in a Post-Pandemic World

- The opportunity to remote work was cited as one of the top 5 benefits that would most influence a worker to consider accepting a job. (Harris Poll)
- Harris Poll also showed that the younger the worker the more interest in a remote work
- Reasons include less of a commute, increased productivity, fear of COVID, ability to live in desired geographic location, and lack of caregivers for children
- In a recent survey of employers, 47% responded they are considering some form of permanent remote work option for employees in certain positions

## Remote Work in a Post-Pandemic World



## Best Practices for Remote Work Policies

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- Have a written policy – signed by the employee, with right to end remote work if employee does not meet expectations
- Wage and Hour
  - All work must be done while clocked in and full attention and time committed to work
- Safety
  - Remote work dedicated to one place in employee's home, safe
  - Disclaimer for others coming into space who may be injured
- Privacy
  - Requirement to keep work information safe and secure

## Best Practices for Remote Work Policies

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- Applicable Law / Taxes
  - Agree the employee must perform work at designated area (City/State) and obtain advance approval for other work to be performed in different location
- Policies & Training
  - Train supervisors
  - Update job duties/descriptions
  - Update other policies (e.g., anti-harassment, wage/hour, IT policies, injury reporting)

## If Employees are Working in a Different City or State:

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- Register as an employer (in state and especially with Unemployment Compensation Dept.)
- Confirm any state laws related to paid sick time, leave, overtime
  - Example: Employee who was working in Ohio moves unknowingly to California
- Confirm employees may need to be present in person for certain meetings and appointments and who will pay for such travel expenses

## Remote Work and Rise in Lawsuits

- There have been a number of lawsuits filed on behalf of workers claiming they were not properly reimbursed for expenses related to working from home during the pandemic and after
  - California lawsuits claim workers were not reimbursed for costs of internet, using personal laptops for work, heat and even the cost of home offices
  - Many have settled and others are still moving forward

Key take away- don't forget to account for this issue in a Remote Work Agreement!!

## Let's Talk About Vaccines/Tests for a Minute

- Vaccines
  - Can require that employees be vaccinated
  - Exception: For employees who may require reasonable accommodations based on a disability or sincerely held religious belief
  - ADA requires employers to maintain confidentiality of vaccination status, but the EEOC has clarified that vaccination status may be shared with employees who need it perform their job duties (e.g., employee in charge of tax recordkeeping)
  
- Testing –
  - Employer must show that COVID-19 testing is job-related and consistent with business necessity

## ADA: Reasonable Accommodations

- COVID has resulted in an increase in requests for reasonable accommodations
  - Long COVID: cardiac/respiratory disease, brain fog, fatigue, cognitive effects
  - Mental health effects of pandemic
  - Vaccines
    - Also increase in religious accommodation requests
  - Impact of remote work



## ADA: Reasonable Accommodations

- Reasonable accommodations could include (depending upon the facts):
  - Making existing facilities used by employees readily accessible and usable by individuals with disabilities
  - Job restructuring
  - Part-time or modified work schedules
  - Reassignment to vacate position
  - Acquisition or modification of equipment
  - Leave of absence
  - Modification of supervisory methods
  - Remote work

## ADA: Reasonable Accommodations

- Best Practices
  - Engage in interactive process
  - Consider:
    - Job's essential functions
    - Effective accommodations
    - What have you allowed employees in the same or similar positions to do in the past?
    - What have you allowed the employee who is requesting accommodation to do in the past?
    - State laws that may have broader protections than the ADA
  - Consult employment lawyer
  - Remember – no reasonable accommodation/undue hardship analysis under FMLA

# COVID-19 Litigation

## Ongoing cases involving failure to accommodate

- Not permitting employee with disability to continue to work remotely part-time
- Employee not permitted to wear a mask at work
- Employees harassed for wearing mask
- Employees with disabilities not permitted to return to work despite being willing to do so

## Charges filed relating to sincerely held religious objections to vaccines, testing, and masking

## Remote work as an accommodation

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## Nurse Fired During COVID-19 Quarantine Can Proceed with Disability Lawsuit

- CNA tested positive for COVID-19 on July 1, 2020. She began 14-day quarantine per Company policy.
- On 3 occasions during the quarantine, her supervisor instructed her to return to work. Each time, she declined because she was still symptomatic.
- Company terminated her employment on July 13, 2020.
- Company moved to dismiss the lawsuit on the basis she did not have a “disability” under the ADA.



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## COVID-19 Just an Excuse to Hide Discrimination

- SoulCycle terminated employment of former executive 32 days into her maternity leave citing COVID-19 was the reason for her termination.
- She brought a lawsuit under FMLA, Title VII, PDA, and NYC Human Rights Law
- SoulCycle gave her shifting reasons for her termination of employment.
- Ultimately, SoulCycle settled



## COVID “Regarded As” Disability

- Employee claimed her employment was terminated the same day she disclosed her COVID-19 diagnosis to her supervisor.
- The employer terminated her employment because she was “not a good fit.”
- She brought a disability discrimination lawsuit, claiming she was “regarded as” disabled.



## EEOC Files Lawsuit Over Denied WFH Request



- The Company permitted all employees to work from home four days a week in March, April, and May of 2020. In June 2020, it required all staff to return to work in-person 5 days a week.
- Employee requested to work from home two days per week as an accommodation for her chronic obstructive lung disease and hypertension and provided documentation of her increased risk of heart conditions if exposed to COVID-19. Her position required her to be in close contact with employees.
- In August 2020, her supervisor recommended her employment be terminated for performance.



## Hybrid Work Updates

# Recruiting Legal Risks

- I-9 Compliance
- Interviewing
- Drug Testing
- Location Matters
  - What tax jurisdiction?
  - State workers' compensation implications?
  - Choice of law provisions in employment agreements



## Practical Challenges of a Hybrid Workplace

- Building rapport and trust with employees
- Tracking employee productivity
- Network and security concerns
- Generational differences
- Overall workforce morale

# Legal Risks

## Disparate Impact & Disparate Treatment Claims

- Consistent and equal treatment is more of a challenge in a hybrid environment

## Wage and Hour Concerns

- Auditing employee equipment
- Tracking log-in/log-out procedures
- Expense reimbursement
- Travel time
- Meal and rest breaks
- Policies for technical problems at home

## Privacy Concerns

- What is your property?
- What is the employees?
- How far can the employer encroach in a hybrid environment?

# Legal Risks

## Workers' Compensation

- More difficult to investigate and defend

## Labor Law Issues

- Mail-in Ballots
- "Collective Action" at Home

## Location Matters

- Tax Consequences

## Reasonable Accommodations

# Some Things Never Change

Employees still need to be paid properly

Employers still need to make accommodations for employees with disabilities and for religious reasons

Employers cannot discriminate against employees on the basis of a protected characteristic

Employers need to provide a safe working environment free from unlawful harassment



## EEOC/OCRC Update

# EEOC FY 2021 Report

## Charges Filed by Category

Charges	2020		2021		Change in Percent of Total	
	Number of Charges Filed	Percent of Total	Number of Charges Filed	Percent of Total		
Retaliation and Disability Charges Top the Chart	Color	3562	5.3%	3516	5.7%	7.5%
	National Origin	6377	9.5%	6213	10.1%	6.3%
	Race	22064	32.7%	20908	34.1%	4.3%
	Disability	24324	36.1%	22843	37.2%	3.0%
	Age	14183	21.0%	12965	21.1%	0.5%
	Retaliation - All Statutes	37632	55.8%	34332	56.0%	0.4%
COVID-19 related discrimination accounts for 5.9% of the total charges	Retaliation - Title VII only	27997	41.5%	25121	41.0%	-1.2%
	Sex	21398	31.7%	18762	30.6%	-3.5%
	Religion	2404	3.6%	2111	3.4%	-5.6%
	Equal Pay Act	980	1.5%	885	1.4%	-6.7%
	GINA	440	0.7%	242	0.4%	-42.9%

## EEOC Priorities

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Hiring Initiative to Reimagine Equity (HIRE)

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Racial Justice and Systemic Discrimination

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Pay Equity

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AI in Employment Decision-Making

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LGBTQ Issues and Gender Identity

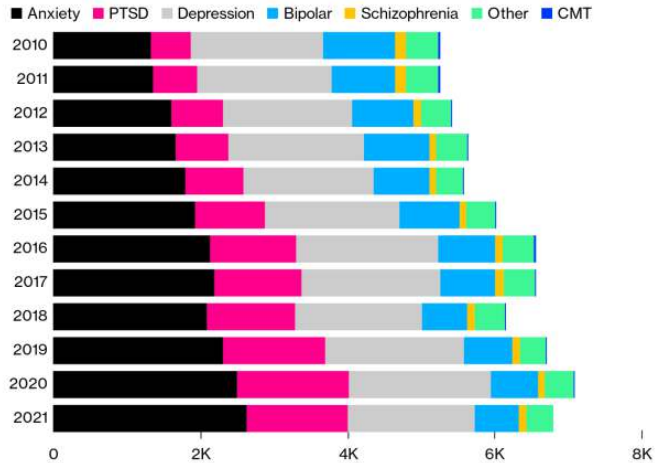
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Anti-Retaliation



### Mental Health Discrimination Charges

EEOC charges alleging bias against workers with anxiety, PTSD on the rise



Source: U.S. Equal Employment Opportunity Commission

Bloomberg Law

## Mental Health

- According to the National Institute of Health, approximately 20% (52.9 million in 2020) of employees reportedly suffer from mental illnesses - but only ½ of them seek treatment
  - Why? Shame, social stigma, lack of available services, lack of financial resources
  - Workplace results? Poor performance, burnout, behavior issues
  - Can trigger other physical disorders: heart disease, diabetes, and respiratory issues
- Nearly 33% of Americans reported increased alcohol consumption and drug use since the COVID pandemic started
- 25% reported their drug and alcohol use made it difficult to complete their job duties
- Nearly 20% missed work at least once per week due to substance abuse

## Mental Health

- In fiscal year (“FY”) 2021, allegations of mental health discrimination accounted for approximately 30% of ADA-related charges – that represents a 10% increase from FY 2010
- Anxiety and PTSD account for nearly 60% of all mental health charges (35% in FY 2010) and approximately 18% of all ADA charges (7.4% in FY 2010) in 2021
- In FY 2021, depression and bipolar disorder charges were 7.5% and 2.7% of all ADA charges

# THE ADA - RECAP

# ADA - DEFINITION OF DISABILITY

Can meet definition of “disability” in one of three ways:

- physical or mental impairment that substantially limits one or more major life activities or major bodily functions

record of such an impairment (history of cancer)

regarded as having such an impairment (wrongfully assume Jack had cancer)

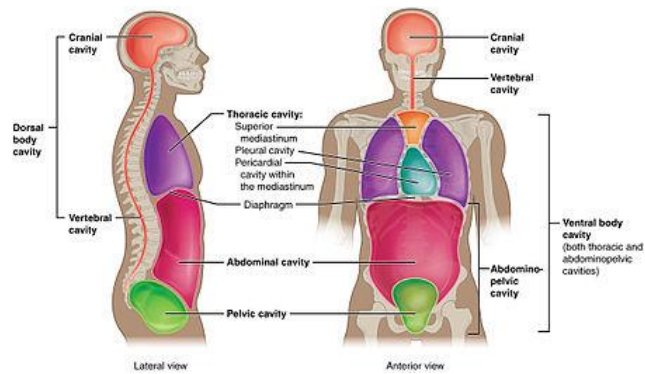
## ADA - MAJOR LIFE ACTIVITIES

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- bending
- working

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## ADA - MAJOR BODILY FUNCTIONS

- the immune system
- normal cell growth
- digestive bowel
- bladder
- neurological
- brain
- respiratory
- circulatory
- endocrine
- reproductive



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## ADA

- The applicant or employee must be qualified for the job sought
  - meet job-related requirements (education, training, skills)
  - must be able to perform the job's essential functions with or without a reasonable accommodation

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## But – How do you know if an employee is disabled?

- It's obvious
- You've already been told
- You ask



# THE FMLA - RECAP

## Job Protected Leave for Eligible Employees

- 12 workweeks of unpaid leave during a 12-month period for most leaves
- 26 workweeks of leave in a single 12-month period to care for a covered family member who sustained injury/illness during active military duty

## Is the Employee Eligible?

- Works for a covered employer
- Employed for at least 12 months over a 7-year period
- Worked 1250 hours (as defined by the Fair Labor Standards Act) in the 12 months preceding the leave
- Employed at site where at least 50 employees work within 75 surface miles

## Is the Absence Subject to FMLA Protection?

- Employee's Own Serious Health Condition
- Employee's Expanding Family
- Employee's Family's Serious Health Condition
- Employee's Family's Military Obligations



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## Serious Health Conditions

- Inpatient care; or
- Continuing treatment by healthcare provider (HCP), defined as:
  - Incapacity plus treatment
  - Chronic conditions
  - Permanent or long-term conditions
  - Conditions requiring multiple treatments
  - Incapacity from pregnancy/prenatal care



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# FMLA

- On May 25, 2022, the DOL's Wage and Hour Division published new FMLA guidance focused on mental health conditions.
- **Fact Sheet #280** explains when eligible employees may take FMLA leave (for themselves or family members) to address mental health issues.
- **Frequently Asked Questions** address specific examples involving FMLA leave in mental health situations.

# Examples

- Karen is occasionally unable to work due to severe anxiety. She sees a doctor monthly to manage her symptoms. Karen uses FMLA leave to take time off when she is unable to work unexpectedly due to her condition and when she has a regularly scheduled appointment to see her doctor during her work shift.
- Wyatt uses one day of FMLA leave to travel to an inpatient facility and attend an after-care meeting for his fifteen-year-old son who has completed a 60-day inpatient drug rehabilitation treatment program.
- Anastasia uses FMLA leave to care for her daughter, Alex. Alex is 24 years old and was recently released from several days of inpatient treatment for a mental health condition. She is unable to work or go to school and needs help with cooking, cleaning, shopping, and other daily activities as a result of the condition.



## Mental Health and the ADA and FMLA


- Mental health conditions can be disabilities **and** serious health conditions
- Alcoholism can be a disability **and** a serious health condition
- Current legal drug use is not protected under the ADA - recovering addicts, however, are protected under the ADA – if they “are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully...”
- Addiction **can** be a serious health condition

### Signs

- Increased use of alcohol or illegal drugs
- Unexplained absenteeism
- Depression/withdrawal
- Resistance and overreaction to changes in policy and procedures
- Mood swings
- Unstable responses
- Explosive outbursts
- Ominous, specific threats
- Increased personal conflicts




## Signs

- Disruptive, aggressive, and hostile
  - Prolonged anger
  - Holding grudges
  - Hypersensitive to criticism
  - Blaming Others
  - Preoccupied with violence
  - Change in personality
  - Recent acquisition/fascination with weapons
  - Disastrous home life
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## Signs

- Significant loss, discipline, financial trouble, termination
  - Extreme disorganization/loss of organization or cleanliness
  - Homicidal or suicidal comments or threats
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## Signs of Burnout

- Lack of interest/apathy
- Sleep issues
- Frequent illness
- Depression
- Irritability with co-workers and friends
- Working hard and feeling drained with no signs of higher production
- Forgetfulness
- Anxiety
- Loss of appetite



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# FITNESS FOR DUTY

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## FMLA

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- An employer can ask for a fitness for duty certification (i.e. release to work) (“FDC”) before an employee returns to work following consecutive leave for their own serious health condition.
- An employer is not entitled to a FDC for each absence taken on an intermittent or reduced leave schedule. But, an employer is entitled to a FDC once every 30 days (or a different set time period) if reasonable safety concerns exist regarding the employee’s ability to perform his or her duties, based on the serious health condition *Reasonable safety concerns* means a reasonable belief of significant risk of harm to the employee or others.
- If the employer is going to require a FDC for an employee when they return or every 30 days, the employee must be told in the Designation Notice.
- A FDC under the FMLA is different than a fitness for duty exam.
- Under the FMLA, employers are entitled only to notice from the employee’s physician that the employee can perform the job/return to work. Under the FMLA, employers are not specifically entitled to send employees for a medical examination.

## Fitness for Duty Under the ADA

- What if you’re worried the employee can’t return to work or can’t perform the job or is dangerous?
  - The ADA strictly prohibits an employer from seeking medical information unless the request is “job-related and consistent with business necessity”:
    - (1) When the employer has a reasonable belief based on objective evidence that an employee’s ability to perform:
      - is impaired by a medical condition (performance issues)

OR

      - the employee poses a direct threat to himself or others due to a medical condition (safety issues); or
    - (2) After an employee has requested a reasonable accommodation



# Religious Accommodations

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## Title VII

Employers have to make reasonable accommodations for an employee's sincerely held religious belief

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Sincerely  
Held  
Religious  
Belief

The individual's  
belief

Not church doctrine

Expansive view of  
religion

## Sincerely Held Belief



EEOC – AN EMPLOYER SHOULD ORDINARILY ACCEPT AN EMPLOYEE'S STATEMENT OF SINCERELY HELD BELIEF UNLESS THE EMPLOYER HAS AN OBJECTIVE BASIS TO DENY THE EXEMPTION



POLITICAL, SOCIETAL, CULTURAL BELIEFS ARE NOT RELIGIOUS BELIEFS

## Factors for Sincerely Held Religious Belief

Whether the employee previously acted in a manner inconsistent with the professed belief;

Whether the employee's requested accommodation or exception is likely sought for personal or non-religious reasons;

Whether the timing of the employee's request renders it suspicious or follows a previous request by the employee for the same accommodation for secular reasons; and

Whether the employer has reason to believe the accommodation is sought for non-religious reasons.

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## Weighing the Belief

- Possible questions:
  - identification of the "religion";
  - when, where, and how the employee embraced the "religious practice";
  - whether and to what extent the tenets of the employee's religion prohibit what is being asked
  - whether the employee has previously acted in conformity with the belief (or not)
  - whether a religious leader can provide a note or documentation verifying the belief

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# Undue Hardship?

## On and Off Duty Conduct



# On- and Off-Duty Conduct

- Social Media Activity
- Attendance at Protests and Rallies
- Messaging on Clothing and Masks
- Workplace Civility and Safety; and
- Leaves and Time Off



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## Numerous Laws Implicated

- Labor Law
- Title VII
- ADAAA
- FMLA
- OSHA/BWC
- Laws re Political Activity and Privacy
- Free Speech Protections

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## Off-Duty Conduct

- Social Media Posts
- Taking a Knee During National Anthem
- Protests
- Complaints re Co-Workers' Off-Duty Conduct



## On-Duty Conduct

- Clothing to Express Political or Social Beliefs
- Office / Cubicle Décor
- Workplace Protests
- Social Media Posts
- Internal Message System and Chat Rooms

## Workplace Safety



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## So, What Does the Law Say?

- First Amendment
- Labor Law
- Title VII, ADAAA, ADEA, and similar federal and state laws
- State Off-Duty Conduct Laws
- State Political Activity Laws
- OSHA/BWC

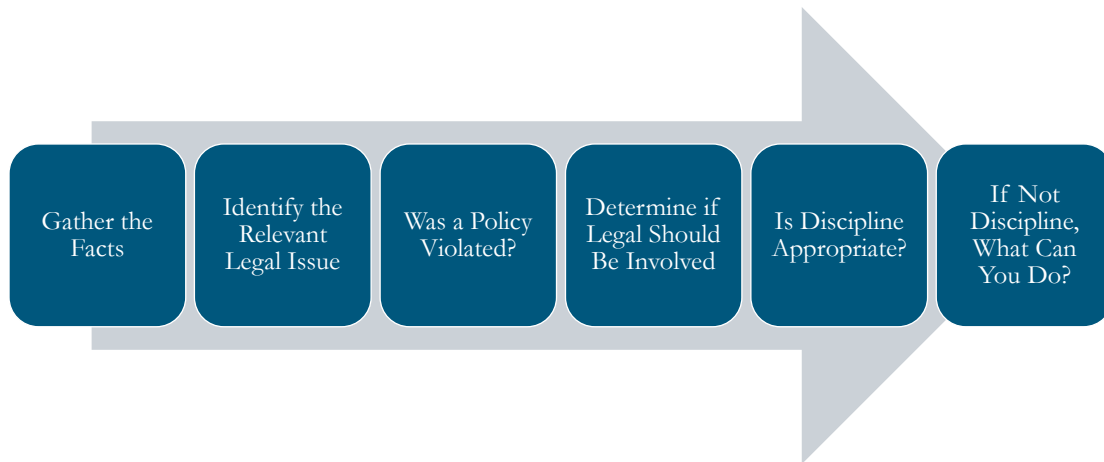


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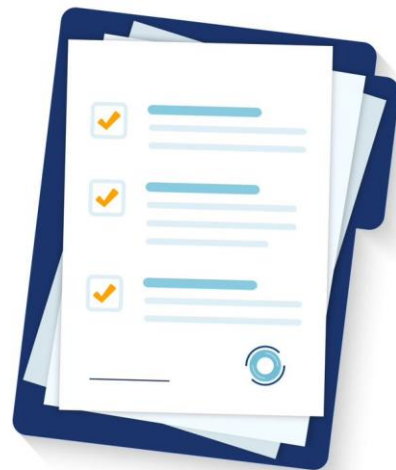
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## What is HR to Do?



## Best Practices

- Review and Revise Policies
  - Develop Neutral Policies
  - Be Consistent in Drafting and Application
  - Include Diverse Perspectives
  
- Promote Mutual Respect Among Employees



# Reviewing Policies

Codes of Conduct	
Social Media	
Off-Duty Conduct	
Electronic Use	
Solicitations	
Civility Statements	
Workplace Safety	



## Best Practices

- Training
  - Supervisor Training
  - Implicit Bias Training
  - Workplace Safety Training
  - Provide DE&I Programming
- Consider Broadening Employee Resources and Leave Availability
  - Expanded EAP
  - Consider Mental Health Impact
  - Develop Affinity Groups
- Read Your Lawyers' Client Advisories



# Wage and Hour Update

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## Ohio's Wage and Hour Laws Revised

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- Exempts from overtime pay any time outside of the normal working hours than an employee spends
  - commuting to and from the workplace;
  - engaging in activities that are preliminary to or postliminary to the principal activities of the job; and
  - doing de minimis activities that require an insubstantial or insignificant period of time beyond the employee's scheduled working hours (i.e., checking emails or listening to voicemails).
- This time is considered compensable if it's done at the specific direction of the employer or is otherwise required by an agreement between the employer and the employee.
- Converts class action claims from opt-out classes to be opt-in classes (consistent with FLSA collective actions)

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# FLSA Overtime Rule Changes Anticipated

- Anticipated review of:
  - Exemptions for bona fide executive, administrative, and professional employees
  - Minimum salary level required for exemption (Currently \$35,568/year)

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## Independent Contractors

- Department of Labor Interpretation
  - Most Independent Contractors are misclassified and are actually Employees.
    - Employment should be interpreted very broadly?
  - Is the worker economically dependent on the employer – or – really in business for him or herself?



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## Two Ends of the Spectrum

Roofing contractor who owns his own business and repairs a City's roof for a quoted price, then moves on to his next customer.

VS

Individual comes into employer each day to perform a production job.

## Economic Control Test

- Is the work performed an integral part of the business;
- worker's opportunity for profit or loss depending on their managerial skill;
- relative investments of the employer and the worker;
- whether the work performed requires special skills and initiative;
- the permanency of the relationship; and
- the degree of control exercised or retained by the alleged employer.



## Travel Time

- Travel from home to work typically not compensable.
- Travel once the workday has begun is typically compensable under “continuous workday rule”
- Challenge: If employee begins working, travels to site and then works again, travel time could be converted to work time.
  - *Dooley v. Liberty Mutual Ins. Co.*: Insurance appraiser who checked e-mails, responded to messages, and mapped out route for day
- What about interruptions in work to tend to personal tasks?
  - Common Challenge with Remote Work.



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## Remote Work Issues

- Non-Exempt / Hourly Challenges
  - Capture all time worked
  - Travel time
  - Meal and rest breaks
  - Expense reimbursement and minimum wage



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## Remote Work Issues

- Capturing all time worked
  - Clear clock-in / clock-out policies and communication.
  - Expressly limit overtime. Require explicit permission.
    - No emails before or after scheduled shift.
    - If supervisor sees email outside of schedule – fix and pay.
  - How to supervise enforcement?



# LBTQ+

# Definitions



## Sexual orientation

An inherent or immutable enduring emotional, romantic or sexual attraction to other people.



## Gender identity

One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.



## Gender expression

External appearance of one's gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

# Definitions Cont.

## Transgender

- An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.

## Gender transition

- The process by which some people strive to more closely align their internal knowledge of gender with its outward appearance. Might be social or physical.

## Gender dysphoria

- Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify.

# Gender vs. Sex

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## Other Terms

- **Nonbinary/Gender Fluid-used** by people who experience their gender identity and/or gender expression as falling outside the binary gender categories of man and woman or has a fluid gender identity.
- **Asexual**-An adjective used to describe a person who does not experience sexual attraction (e.g., asexual person).
- **Intersex**-An adjective used to describe a person with one or more innate sex characteristics, including genitals, internal reproductive organs, and chromosomes, that fall outside of traditional conceptions of male or female bodies.
- **Pansexual**-An adjective used to describe a person who has the capacity to form enduring physical, romantic, and/ or emotional attractions to any person, regardless of gender identity.
- **Cisgender**-A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.

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# Binary vs. Continuum



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# Define yourself...

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## Pronouns / Harassment

- Refusing to use an employee's identified pronouns has been found by courts to be harassment.
- Where an employee is transitioning, it is good to communicate with the employee about a plan.
  - Legal name changes can only be done with a legal name change
  - How / to whom to communicate the transition
  - Changes to pronouns, restroom use, outward identity



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As a  
reminder....



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## Restroom Use

- EEOC and OSHA take the position that employees should be permitted to use the restroom consistent with gender identity



## Steps to Take

- Always use the pronouns & name people want you to use. Don't ask about "real" names.
- Don't confuse gender with sexual orientation.
- Don't ask about bodies.
- Understand there is more than one way to transition.
- Don't give tips on how to be a certain gender.
- Don't ask someone to educate you – BUT, be open to a discussion





# Grab Bag Updates

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## Employee Privacy Concerns



Video and audio surveillance



Email, computer, and Internet monitoring



Social media



Location tracking



Data tracking



Biometric information



Protecting employees' confidential information

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# HR is a Target for Hackers

- **Be vigilant!**
- You hold the keys to the vault as far as hackers are concerned
- Work with IT to understand your obligations and vulnerabilities
- Request incident response training



**THANK YOU!**  
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