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OAB Annual Update on Employment Law Issues – October 2023

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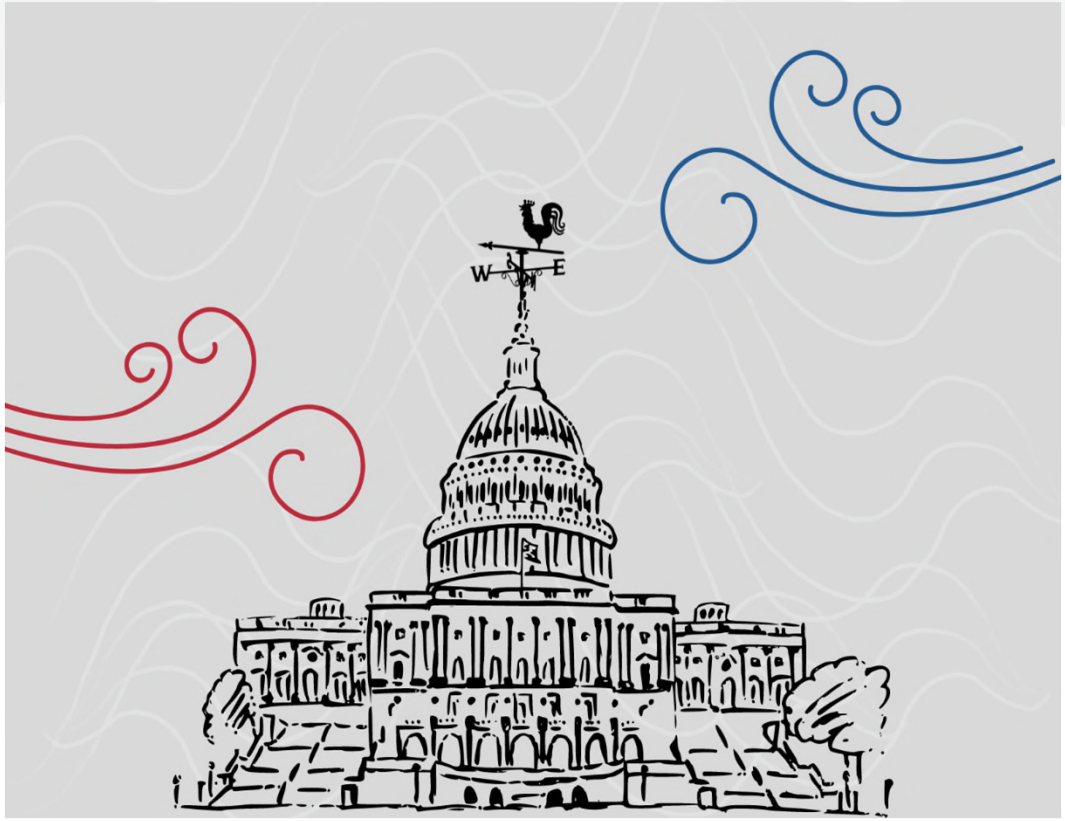
Topics for Today

- **Key handbook provisions to revisit in 2023 – and the impact of a recent NLRB decision**
- **Affirmative Action – do the university admissions cases matter for employers?**
- **Accommodations – updated requirements for accommodating disability, pregnancy, and nursing mothers**

New NLRB Standard for Workplace Rules

- *Stericycle, Inc.*, 372 NLRB, No. 113 (Aug. 2, 2023)



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Handbooks, the NLRA & NLRB – Background

- Section 7 of the National Labor Relations Act (NLRA): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…."
- These rights apply to union *and* non-union employees.

Stericycle Decision – Background

- National Labor Relations Act (NLRA), enforced by National Labor Relations Board (NLRB)
- Section 7 of NLRA protects employees' right to participate in "protected concerted activity" about "terms and conditions of their employment"
- Applies to employees who are, or legally could become, union members
- What does this have to do with handbooks???

NLRB decision in *Stericycle* case

- National Labor Relations Board (NLRB) announced new legal standard to determine whether a company policy or workplace rule – in a handbook or elsewhere - is facially unlawful under National Labor Relations Act (NLRA)
- Nutshell: If a company policy has a "reasonable tendency to interfere with, restrain, or coerce" employees who contemplate engaging in protected activity, the policy is illegal on its face

New NLRB Standard for Workplace Rules

- Return to case-by-case review of rules.
- Heightened scrutiny:
  1) A rule is presumptively unlawful it "could" be interpreted to limit employee Section 7 rights (even if there are alternative interpretations).
  2) Based on the perspective of someone "*economically dependent*" on the employer (v. a reasonable employee).

New NLRB Standard for Workplace Rules (cont'd)

An employer can overcome the presumption of unlawfulness if it can prove that a rule both advances:

- A legitimate and substantial business interest; and
- The employer is unable to achieve that interest with any narrower rule.

New NLRB Standard for Workplace Rules (cont'd)

Take-Aways:

✓Conduct a general handbook overview with this new standard in mind.

✓ Tailor policies with their foreseeable effects on employees in mind.

✓ Establish a routine of regular, periodic review (keeping an eye on new decisions).

Handbook Polices: Contact with the Media (Reminder)

- NLRB decision in *DirecTV*, 359 NLRB No. 54 (2013):
  - Policy: "Do not contact the media."
  - Policy: "Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations."
  - NLRB found these provisions violated Section 7 of the NLRA because they could be interpreted by employees to mean that they were prevented from expressing to the media any disagreement with DirecTV concerning their own wages, hours, or terms and conditions of employment.

Contact with the Media Policies What is Lawful?

- "Employees should not speak to the media *on [Employer's] behalf* without contacting the Corporate Affairs Department. All media inquiries concerning the company should be directed to them."

Confidentiality Policies

- Direct TV policy: “Never discuss details about your job, company business, or work projects with anyone outside the company” and “never give out information about … DirecTV employees.” (2013)
- NLRB: Employees *could* believe they are not allowed to discuss their wages, hours, or terms and conditions of their employment with fellow employees or third parties, such as union representatives or governmental agencies concerned with workplace matters.
- Result: Policy illegal on its face.

Confidentiality Policies – What is Lawful??

- "Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications."

At-Will Disclaimer Policy

- Reduces potential for finding any type of “contract” between employer and employees
- Key provisions:
  - Employer follows the principle of at-will employment;
  - Both the employer and the employee may terminate the employment relationship at any time, for any reason, or no reason, with or without notice; and
  - Neither the handbook nor any other written or verbal communication is intended to create a contract of employment.

At-Will and Handbook Acknowledgment

- Acknowledgement signed by employee and dated.
  - Signature: acknowledges that handbook was received and that employee understands obligation to read and comply with everything in handbook.
- Acknowledgement should also:
  - Reemphasize employment at-will;
  - Indicate that the handbook is not a binding contract;
  - Indicate that employer can change or terminate any handbook provision without providing the employee with notice; and
  - Indicate that all prior handbooks and policies are superseded.

Anti-Harassment Policy

- Effective harassment policy should:
  - Prohibit harassment based on *all* protected categories, not just sex – so should apply to sexual harassment, racial harassment, etc.
  - Provide examples of what kinds of behavior or language might constitute "harassment" under the policy.
  - Encourage all employees to report any concerns, and require supervisors to report incidents of known or suspected harassment.
  - Have complaint procedure that includes at least two separate ways to report.

Americans with Disabilities Act ("ADA") Policy

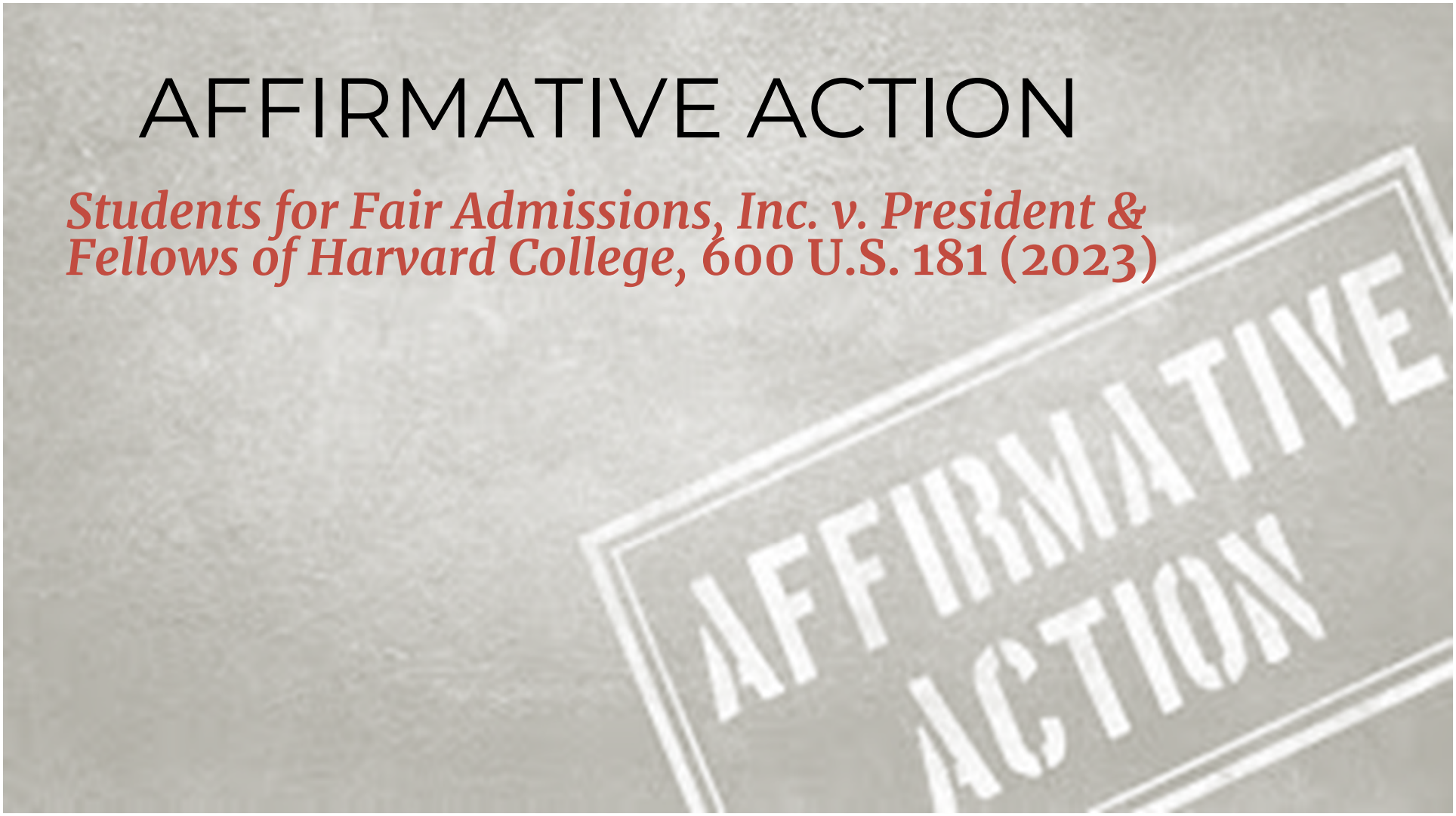
- Need a separate ADA policy.
  - This policy is in addition to the general anti-discrimination policy.
  - ADA imposes additional requirement on employer to provide reasonable accommodations.

ADA Compliance – Leave and Attendance Policies

- Make sure your attendance and leave policies are ADA-compliant.
- Attendance policy should specify that no points/unexcused absences are assigned for legally-protected absences, such as FMLA, jury duty, and military leave.

AFFIRMATIVE ACTION

***Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023)**



Supreme Court on Affirmative Action

- SCOTUS said in H*arvard* case that affirmative action admission plans:
  - Must have legitimate end goals;
  - May no longer use race as a "plus factor" for admission; and
  - No longer use "standardless" goals (e.g. "training future leaders, acquiring new knowledge based on diverse outlooks,") or based on "stereotypical" assumption that diverse individuals have diverse viewpoints.

Why Should Private Employers Care about Rules for Affirmative Action in Education?

- Case shows SCOTUS is willing to overturn existing precedent on this subject.
- Title VI (education) and VII (employment) of Civil Rights Act are practically cousins / next door neighbors.
- Diversity alone may no longer be a "compelling interest" sufficient to support any type of affirmative action plan.
- Open-ended AA plans and DEI initiatives may be at risk.

SCOTUS + Affirmative Action + Private Employers =?

- Republican Attorneys General in 5 states (MT, KY, IA, AK, KS) sent letters to Fortune 100 companies & top law firms claiming that programs under label of "diversity, equity & inclusion" are illegal based on SCOTUS *Harvard* ruling.
  - Demands immediate termination of "unlawful race-based quotas or preferences."
  - "If you choose not to do so, know that you will be held accountable – sooner rather than later."
  - Pursuit of Mansfield Rule certification (awarded to law firms that maintain at least 30% diversity in leadership roles) violates federal law.

SCOTUS + Affirmative Action (cont'd)

Potential pitfalls to consider:

- Avoiding quotas or preferences based on race
- Protected class status should not be a factor in hiring—no "tie breaking"
- DEI programs/efforts should involve legal compliance, and HR review
- "Reverse" discrimination claims may be the next chapter in diversity-related litigation

Employee Accommodation:

New / updated rules for religious accommodation; and accommodation for disabled, pregnant, and nursing employees

Religious Accommodation – A History Lesson

- **Title VII: 1964**
  - Employers cannot discriminate on the basis of religion.
- **Title VII Amendment, 1972**
  - "Religion" in Title VII includes all aspects of belief, observance, and practice;
  - An employer must "reasonably accommodate" such observances and practices *if* it can do so "without undue hardship on the conduct of its business."
- ***Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)**
  - "De minimis" *undue hardship standard* – If the requested religious accommodation requires more than a minimal cost to the employer, employer is not required to grant the requested accommodation.
  - Employer not required to excuse employee from working on the Sabbath because "[t]o require [the employer] to bear more than a de minimis cost in order to give [the employee] Saturdays off is an undue hardship."

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New Standard, 2023: *Groff v. DeJoy*

- "De Minimis" test replaced by "**substantial increased costs in relation to the conduct of the particular business**"
  - "Substantial"
  - "Costs"
  - "Particular business"
  - Case sent back to lower court to apply this standard
  - USPS: We will prevail on this test on remand

Groff v DeJoy (cont'd)

- Groff was a rural mail carrier
- Evangelical Christian
- Requested Sundays off to observe Sabbath
- Attempts to recruit volunteers to cover his shifts were unsuccessful
- Collective bargaining agreement prohibited forcing someone else to switch shifts with him
- Progressive discipline for failing to work Sunday shifts
- Groff resigns
- Lower courts granted USPS motion to dismiss, using longstanding "de minimis" standard

New Meaning of "Undue Hardship"

- Not "undue hardship"
  - Temporary costs
  - Voluntary shift swapping
  - Administrative costs
  - bias or hostility from customers or other employees
- Yes "undue hardship"
  - Paying OT to one employee so that another could be off for weekly religious observance

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EEOC Guidance on Religious Accommodation – Supreme Court Seems to Endorse

- The following things are NOT Undue hardships
  - Temporary costs
  - voluntary shift swapping
  - occasional shift swapping
  - administrative costs

Practical Consequences of *Groft v. DeJoy*

- Uptick in requests for religious accommodations?
- Belief by employees that they are entitled to accommodations if the request is tied in any way to their claimed religion or belief?
- More requests for shift changes?
- Excuse from Saturday or Sunday work?
- How to decide among competing requests?

Potential Third Rail:
Is It Even a Sincerely Held Religious Belief ?

- Title VII protects “sincerely held religious beliefs.”
- No accommodation analysis necessary if that first element is absent.
- So don’t have to accommodate “ I want Good Friday off because I want a three day weekend” vs “I want Good Friday off because I have a sincere religious belief that I should not work on that day.”
- <u>This is a dangerous path- proceed (if at all) with caution!</u>

Next steps on Religious Accommodation

- Training managers and supervisors to not handle these issues on their own, or to assume that an accommodation is/is not going to be made
- Developing and documenting process for evaluating requests' impact on the business and any related "increased costs"
- Developing process for offering and recording potential alternative accommodations that achieve same result

PUMP Act – protections for breast pumping

The "PUMP" Act

- Effective date: December 29, 2022
- PUMP Act is an amendment to the Fair Labor Standards Act (FLSA)
- Updates 2010 Break Time for Nursing Mothers Act, mostly by expanding scope to non-exempt workers

The "PUMP" Act (cont'd)

- Requirements
  - Provide reasonable break time to express breast milk
  - Small employer (fewer than 50 employees) may be exempt if "undue hardship"
- Where?
  - A place, other than a bathroom, shielded from view and from intrusion by coworkers and the public
- How long?
  - For one year after the child's birth

"PUMP" Act Exceptions

- For non-exempt workers, break time for pumping does not need to be paid (unless other applicable law requires) – however –
- Unless completely relieved from duty, time is compensable

"PUMP" Act Penalties

- Penalties
  - Private right of action (employees can sue)
  - Employee must notify employer of failure to comply and give 10 days to allow compliance
  - Typical FLSA remedies: reinstatement, lost wages, liquidated damages, attorney's fees

Pregnant Workers Fairness Act (PWFA)

Pregnant Workers Fairness Act (PWFA)

- Effective date: June 27, 2023
- Employers with 15 or more employees
- **Requirements:**
  - Reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions
  - …to allow performance of essential functions
  - … unless the accommodation will cause an undue hardship
  - Similar to ADA analysis
- Damages: Same as Title VII violations
  - Private right of action
  - compensatory, punitive damages
  - Reinstatement, attorney's fees

PWFA – Who is Covered?

- Individual is protected if:
  1) inability to perform an essential job function is temporary; or
  2) can perform the essential functions in the near future; or
  3) can perform essential job function with reasonable accommodation.

PWFA Prohibits:

- Denying a job or other employment opportunities to a qualified applicant or employee based on their need for a reasonable accommodation;
- Requiring an employee to take leave if another reasonable accommodation can be provided that would allow the employee to continue working;
- Retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
- Interfering with any individual's rights under the PWFA.

PWFA – EEOC Statement

- EEOC guidance to be issued by June, 2024
- EEOC website suggests PWFA accommodations might include things like allowing the pregnant worker or applicant to:
  - Sit, or drink water;
  - Receive closer parking to their worksite;
  - have flexible hours;
  - receive appropriately sized uniforms and safety apparel;
  - receive additional break time to use the bathroom, eat, and/or rest;
  - take leave or time off to recover from childbirth; and
  - be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

Practical Impact of PWFA?

- May need to further analyze/ try harder before sending someone home
- Further analyze opportunities for light duty work?
- Accommodate for a few months vs. sending home on short-term disability or other leave?
- Impact on sitting, pushing, pulling, lifting requirements
- Coordinate with other options – for example, if 50+ employees, intermittent FMLA for morning sickness.

QUESTIONS?

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