ACC Association of Corporate Counsel
SOUTHERN CALIFORNIA

ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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sponsored by:

JacksonLewis

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Agenda

- Diversity, Equity & Inclusion
- Non-Compete Agreements
- EEOC & Discrimination Litigation
- Employees & Cannabis
- Political Speech in the Workplace
- Pay Transparency Laws
- Private Attorneys General Act
- AI & Employment
- DOL Issues White Collar Exemption Proposed Rule

Diversity, Equity, and Inclusion

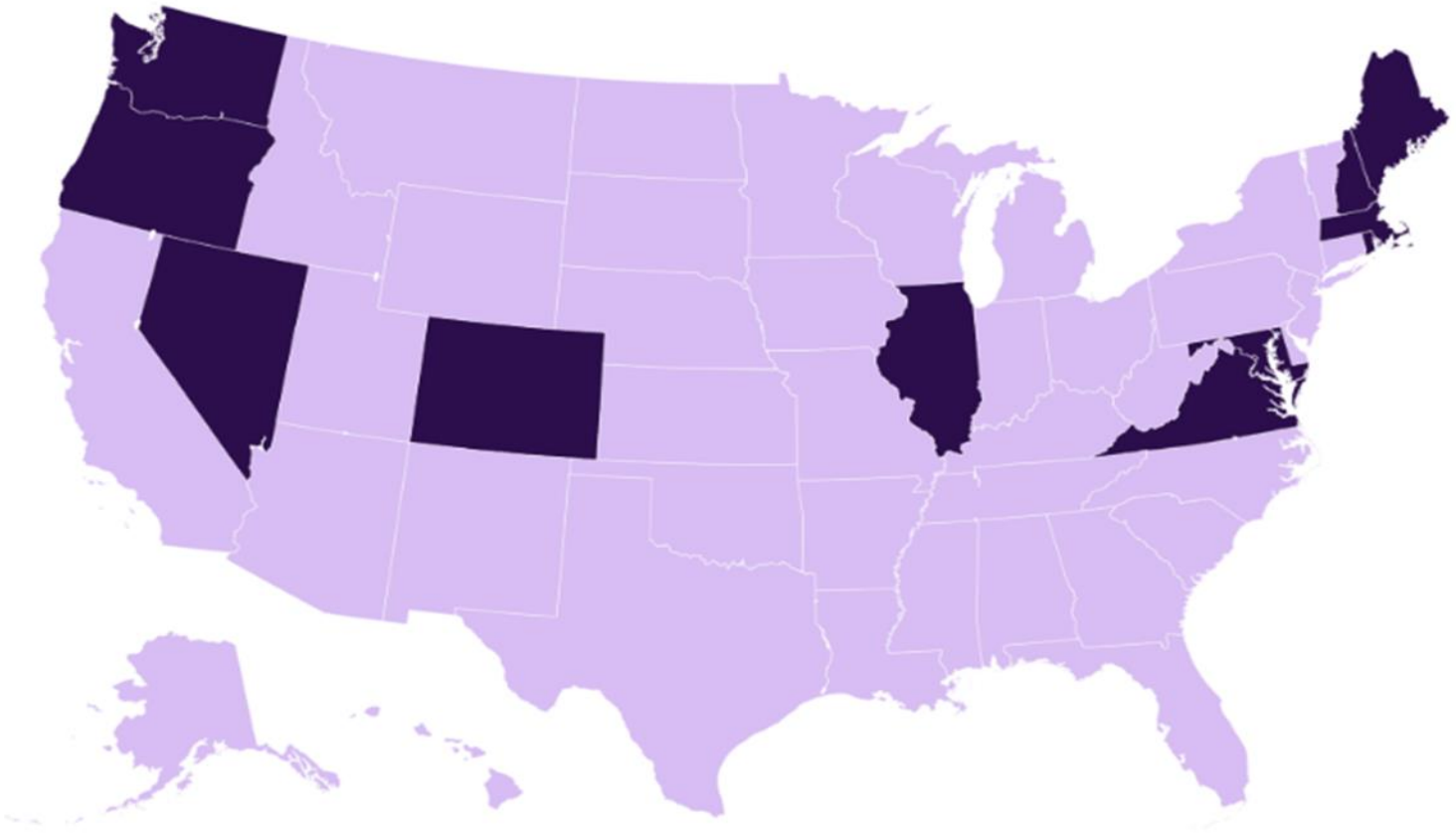
- **2023:**
  - **Supreme Court's decision in *Students for Fair Admission v. Harvard* triggered a wave of legal challenges to DEI initiatives from legal advocacy groups**
  - **Different groups share a common strategy**
    - Identify defendants and recruit plaintiffs, selecting for targets most likely to generate media attention
    - File a lawsuit seeking injunctive relief or send an open letter threatening litigation
    - Publicize the efforts
    - Coordinate with other groups for greater public attention
  - **Litigation outcomes to date lack a clear pattern**
  - **DEI continues to garner support despite these organizations**

Looking Ahead to 2024

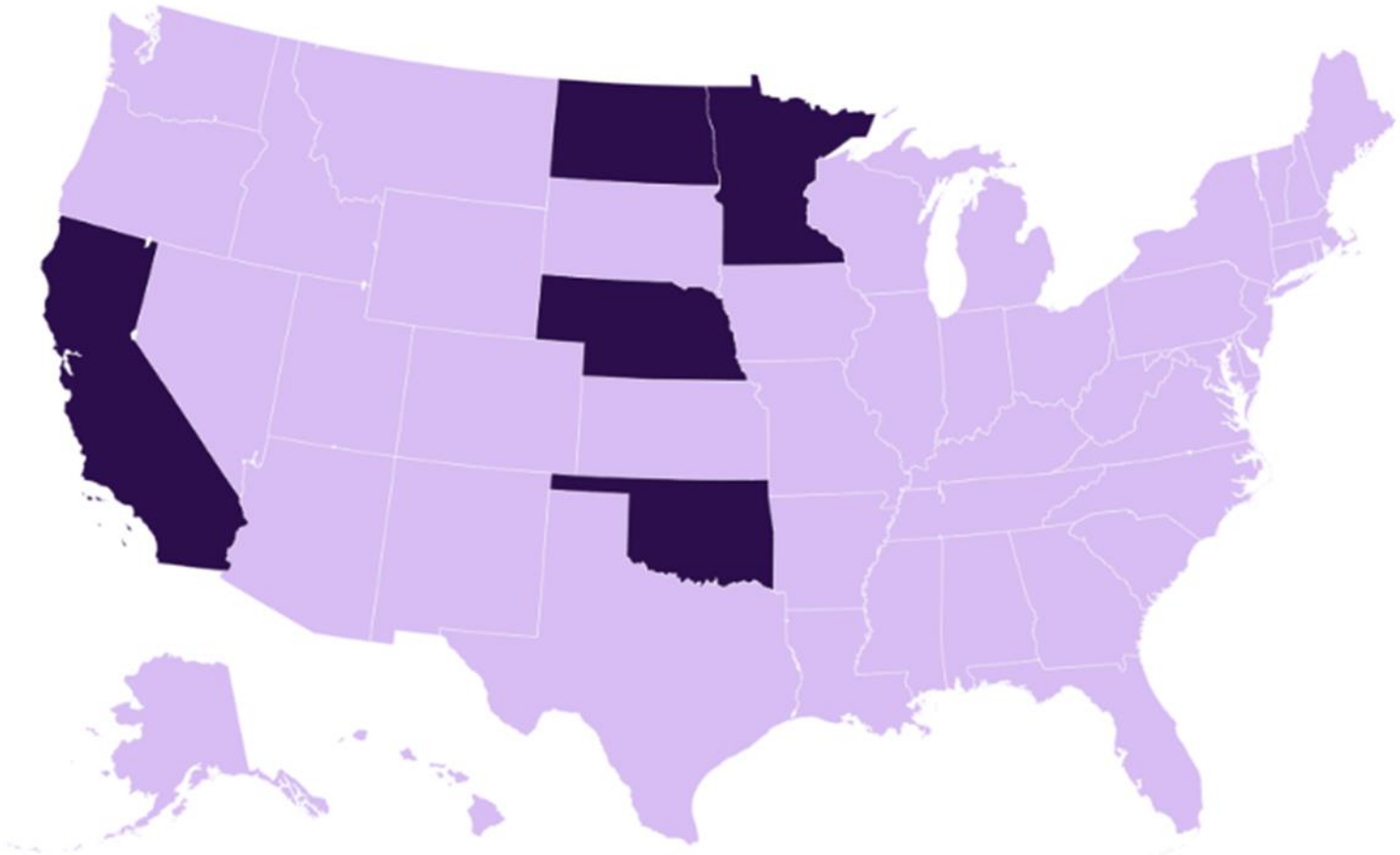
- **A more comprehensive and nuanced approach to DEI**
  - Moving beyond just race and gender only to a more holistic, intersectional approach
  - Need for data-driven insights supporting tailored solutions and interventions
  - Focus on well-being for all employees
- **DEI integration and alignment with business strategy**
  - DEI principles embedded in employer's core processes
- **Transparency and accountability**
  - Disclosure of DEI goals, progress and challenges to stakeholders and regulators
  - Measuring the impact of existing initiatives
- **Continued challenges**
  - Shareholder pressure both for and against DEI
  - Balancing the interests and expectations of stakeholders
  - DEI practices are a high priority for the EEOC

Non-Compete Agreements

States That Impose Income or Other Compensation- Based Thresholds



States That Ban Non-Compete Agreements Entirely



Navigating the Non-Compete Minefield in 2024

- Employers need to comply with California's notice provision by February 14, 2024
- FTC's proposed rule would ban most non-compete agreements
- Delaware Chancery Court is no longer a safe space
- States and the FTC are poised to zealously enforce bans
- Pending legislation to restrict or prohibit non-competes
  - Workforce Mobility Act of 2023
  - Connecticut
  - New Jersey

EEOC and Discrimination Litigation Trends

EEOC Enforcement Trends

- For FY 2022, EEOC reported 73,485 total charges, a 4-year high following 6 years of declining charges.
- The EEOC report notes FY2022 saw a significant increase in vaccine-related charges of religious discrimination being a possible source of data variation from prior years.
- The percentage of total claims related to religious discrimination was 18.8%, up from 3.4% of total claims in FY2021.
  - Religious discrimination claims increased from 2,111 in FY2021 to 13,814 in FY2022.
  - This was the only category of claims to increase in any significant way.
  - The percentage of religious discrimination claims had been relatively flat going back to FY2010.
- Disability claims increased slightly from 22,842 to 25,004, however the percentage of disability claims to total claims decreased (37.2% to 34.0%)

The EEOC Strategic Enforcement Plan for Fiscal Years 2024-2028

- Expands the categories of workers considered to be vulnerable and underserved.
- Recognizes employers' increasing use of technology (including AI) in job advertisements, recruiting and hiring and other employment decisions.
- Updates emerging and developing issues priority to include protecting workers affected by:
  - Pregnancy, childbirth, and related medical conditions;
  - Employment discrimination associated with the long-term effects of COVID-19;
  - Technology-related employment discrimination.
- Focuses on potential impediments to access to the legal system from overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements.

Muldrow v. City of St. Louis, Mo. and its Potential Impact on Title VII Claims

- On December 6, 2023, SCOTUS heard oral arguments in Muldrow v. City of St. Louis, Mo., a case involving the question of whether a job transfer without a "significant disadvantage" to the employee is actionable under Title VII.
  - The Justices' questioning suggested a decision finding a job transfer based on a protected characteristic, in and of itself, is sufficient to give rise to a Title VII claim.
  - The Court expressed some concern about an increase in Title VII claims, but seemed to concur that claims without damages were not likely to make their way to court.
  - Some Justices questioned whether finding a Title VII violation without a separate disadvantage to the employee would impact companies' diversity initiatives.
- While the Court seemed to acknowledge the way the issue before it had been framed limited the scope of any potential decision, they also seemed to be thinking ahead to the impact their decision might have beyond transfers.
  - Contrary to the Justices' reasoning, a decision that a job transfer without a "significant disadvantage" to an employee likely will result in litigation with a claim the plaintiff is entitled to some compensation for the discrimination
  - The Justices seemed open to expanding the reasoning of such a decision to go after DEI initiatives and affirmative action.

Groff v. DeJoy

- In Groff, a unanimous Supreme Court "clarified" (changed) the undue burden test.
- According to the Court, it now "understands Hardison to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."
- According to the Court, "Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."
- The Court declined to incorporate the undue hardship test under the Americans With Disabilities Act which requires "significant difficulty and expense."
- But the Court did opine: "A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision."
- The Court declined to determine what facts would meet this new test and remanded the case back to the lower court to decide.
- What's next? Years of legal battles with courts attempting to apply this new standard.

Undue Hardship Post *Groff*

Courts have found undue hardship in these situations:

- Allowing remote work where “fundamental aspect of the job was to be physically present” was an undue hardship.
- Hiring an extra employee for an indefinite period was an undue hardship.
- Vaccine exemption that posed a risk to the health and safety of other co-workers and would impact operations should the employer have to find substitutes for co-workers who fell ill was enough to establish undue hardship.
- Requiring employer to violate a state law is both "excessive" and "unjustifiable”.
- Inability to wear SCBA due to facial hair posed an undue hardship at fire department.

No Undue Hardship Post *Groff*

Courts have declined to find undue hardship in these situations:

- 1.5 days of leave was not an undue hardship.
- "A hypothetical policy reevaluation if *everyone* received an accommodation" did not show an undue hardship if the employer just grants one accommodation.
- Permitting a beard that might inhibit a correctional officer's gas mask from sealing tightly was not an undue hardship.

Employer Takeaways

1. Consider facts surrounding an employee's request for a religious accommodation when deciding whether the accommodation would impose an "undue hardship."
2. Consider unique facts related to the business, including the size of the business.
3. Assess the actual expense and hardship of implementing the request.
4. Consider reasonable alternatives beyond what is requested, and the impact.
5. Keep in mind, the requirement that employee must have a sincerely held religious belief remains unchanged.

California Leave Updates for 2024

- **Senate Bill 616: Additional Paid Sick Leave**
  - Under the SB 616 employers must increase the amount of sick leave provided to California employees from 3 days/24 hours to 5 days/40 hours.
  - Employer must increase accrual and carryover caps to 10 days/80 hours.
  - For employers not using the standard accrual of 1 hour for every 30 hours worked, employers must ensure that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period, and no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period.
  - These requirements take effect **January 1, 2024**.

California Leave Updates for 2024

Senate Bill 848: Reproductive Loss Leave

- SB 848 requires employers with 5 or more employees to provide employees who have worked for at least 30 days with up to five days of reproductive loss leave.
- In the event an employee suffers more than one reproductive loss within a 12-month period, his/her employer is not obligated to grant a total amount of leave in excess of 20 days within 12 months.
- Effective **January 1, 2024**.

Pregnant Workers Fairness Act

- Effective **June 27, 2023.**
- EEOC published proposed regulations on August 11.
- Public comment period closed on October 10.
- PWFA directs the EEOC to issue final regulations by December 29.

** EEOC is accepting charges and enforcing the PWFA NOW.

5 Key Rules. Employers Cannot:

1. Fail to "make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."
2. Require an employee to accept accommodations without engaging in the interactive process.
3. Discriminate against employees based on their need for reasonable accommodations.
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided.
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation.

** Employers with at least **15 employees**.

***Remember some state laws may provide more protection than the PWFA and/or have affirmative policy and/or notice obligations.

Employees Who Cannot Perform Essential Functions May Be Entitled to Accommodation

- **ADA-Like Employees**
  - These employees can perform the essential functions of their job with or without a reasonable accommodation.
  - The law does not require this ADA-Like employee to have a temporary limitation.
  - If an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA).
  - Employers must reasonably accommodate the ADA-Like employee subject only to the undue hardship defense.
- **ADA-Plus Employees**
  - These employees cannot perform the essential functions of their position even with an accommodation.

ADA-Plus Employees

- The Act says:
  - These employees are qualified if (1) the inability to perform the essential job function is temporary, (2) the essential job function can be performed in the near future and (3) inability to perform the essential job function can be reasonably accommodated.
- The EEOC says:
  - **T**emporary = lasting for limited time, not permanent, may extend beyond “in the near future”
  - In the near future = ability to perform essential function will “generally resume within 40 weeks.”
  - Reasonable accommodation may be accomplished by temporarily suspending the essential job function(s) and performing the remaining functions, transfer, light duty, or other arrangements.

* Removing an essential function is not required if there is an undue hardship. However, the employer must consider other alternative accommodations that do not create an undue hardship.

Other Highlights from the EEOC's Proposed Regulations

- "Related medical conditions" is not defined in the Act and EEOC's interpretation is extremely broad.
- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified.
- Employers must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies. How much leave must be provided? *Up to the point of undue hardship.*
- There are 4 accommodations that are almost always reasonable:
    1. Allowing an employee to carry water and drink, as needed;
    2. Allowing an employee additional restroom breaks;
    3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and
    4. Allowing an employee breaks, as needed, to eat and drink.
- Asking for medical documentation is not appropriate for the 4 "almost" always reasonable accommodations and accommodations for lactation.
- Lactation is covered as a related medical condition and must be accommodated subject to undue hardship. Accommodation obligation for lactation is broader than under the PUMP Act.

Looking Ahead to 2024

- Ensure policies are updated to include updates to state and federal law.
- Ensure HR and Managers are educated on leave and accommodation requirements

Employees & Cannabis

- **Prior to 2024 in California**
  - Adult Use of Marijuana Act
  - California's constitutional right to privacy
  - Limitations on drug testing

Senate Bill 700: Inquires About Applicant Cannabis Use

- Makes it unlawful under the Fair Employment and Housing Act (FEHA) for an employer to discriminate against a job applicant based on information regarding prior use of cannabis that is learned from a criminal history.
- Does not preempt state or federal laws requiring an applicant to be tested for controlled substances, nor is an employer prohibited from asking about an applicant's criminal history as long as in compliance with state law requirements.
- **Effective January 1, 2024.**

Assembly Bill 2188: Cannabis Use Discrimination

- Signed in 2022
- makes it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment based upon:
  - a person's use of cannabis off the job and away from the workplace, or,
  - an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.
- Effective January 1, 2024.

Looking Ahead to 2024

- Potential claims pertaining to discrimination for cannabis use.
- Businesses should review policies for drug testing.
- Businesses should review policies for background check procedures to ensure cannabis use convictions are not used as reason for declining to hire.

Political Speech in the Workplace

Divisive Political Climate

+

Presidential Election

=

Potential for disagreements & more in the workplace.

Why is it important to consider?

- Preserving harmony, inclusiveness, and efficiency in the workplace.
- Potential harassment/discrimination issues.
- Free speech issues under federal and/or state constitutions or statutes.
- Applicability of other statutes that may concern certain topics employees may address during an election season.

Political Speech Protections

- **Actions employers can take depend on:**
  - Whether you are a public or private employer
  - Where the employee works
  - Whether the workplace is union or nonunion

- **Other considerations:**
  - Company policies and practices
  - National Labor Relations Act (NLRA)
  - Title VII and Related State Laws

Looking Ahead to 2024

- Establish and communicate clear expectations as to your company's policy on political expression, and the sound reasons for it.
- Train supervisors and managers on the company's policy, which may include:
  - Steps to take if they observe inappropriate conduct
  - Avoiding engaging in inappropriate conduct themselves (e.g., favoritism toward certain employees based on political affiliation or views)
- Restrict access to bulletin boards or e-mail systems for political purposes.
- Do not allow third party political activity on the premises.
- Don't overreact to short discussions among employees. However, do not permit significant distractions during working time. Use progressive steps – beginning with a simple reminder or coaching – to enforce company policy.
- Enforce dress code and attendance policies, consistent with past practice.
- Promptly and appropriately investigate any employee complaints of harassment, similar to other investigations of reported misconduct.

Pay Transparency Laws

- An ever-evolving patchwork of state laws
  - Some require disclosure of benefits in addition to salary.
  - Some require salary info in job postings. Some merely require disclosure upon request by employee/applicant.
  - Some require disclosure for internal job movements as well as external postings.
  - Some require annual pay data reporting to state agency.
- Most problematic: Washington Equal Pay and Opportunity Act
  - Private right of action
  - The result: 50 class action suits actions and counting…
- Other laws requiring pay disclosure in job ads: California, Colorado, New York
- Passed: Hawaii (eff. Jan.1, 2024); Illinois (eff. Jan. 1, 2025)
- Pending: numerous states
- Federal legislation: Introduced in Congress: Salary Transparency Act (with private right of action)

California Pay Transparency

- **Pay Transparency**
  - **Effective January 1, 2023**
  - **Employers with 15 or more employees: include pay scale in posting for any job position.**
  - **All employers: Provide current employees with pay scale for current position upon request.**
  - **Recordkeeping requirements: maintain records of a job title and wage rate history for each employee throughout employment + 3 years after employment ends.**

Private Attorneys General Act Claims (PAGA)

- **2023:**
  - **Adolph v. Uber – California Supreme Court**
    - Held that when a court compels an employee to arbitrate their "individual" Labor Code Private Attorneys General Act (PAGA) claims, the employee retains statutory standing to pursue "non-individual" PAGA claims on behalf of other allegedly aggrieved employees in court.
  - Trial courts **unpredictable** in handling of motions to compel arbitration.
  - Continued increase in PAGA filings.
- **2024: 20th anniversary of PAGA**

Estrada v. Royalty Carpet Mills

- California Supreme Court – January 18, 2024
- Holds trial courts lack inherent authority to strike PAGA claims on manageability grounds.
- Suggest trial courts have other tools to ensure the litigation of PAGA claims is manageable.

Looking Ahead to 2024

- Review arbitration agreements or determine if company should implement arbitration agreements.
- Conduct Wage and Hour Audits and related employment practices audits to avoid PAGA claims.
- Especially ensure wage statements are compliant.
- If PAGA Notice is received, contact counsel immediately as time is of the essence to potentially cure certain violations.

AI & Employment – Federal & State Developments

- **Federal Developments**
  - **May 2023:**
    - EEOC Issues Technical Assistance: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.
  - **August 2023:**
    - First EEOC Consent Decree with AI-related claims: EEOC v. iTutorGroup.
  - **October 2023:**
    - President Biden signs Executive Order on Artificial Intelligence dated October 30, 2023.

- **State Developments**
  - **January 2023:**
    - New Jersey proposes Assembly Bill 4909 requiring companies to notify candidates of the use of AI when screening applicants.
    - California proposes AB 331 and SB 721 (Becker) modifying use of AI in automated-decision systems.
    - Vermont proposes Assembly Bill 114 restricting the use of AI in employment decision making.
  - **February 2023:**
    - Massachusetts introduces House Bill 1873 restricting the use of AI when making employment-related decisions.
    - Washington, D.C. introduces “Stop Discrimination by Algorithms Act of 2023”.
  - **July 2023:**
    - New York City regulation (Local Law 144) on using AEDT in employment goes into effect.

Takeaways for Using AI in the Workplace

- Understand the risks of using AI in the workplace (e.g., recruiting, performance monitoring, performance improvement, safety and so on).
- Track emerging laws, guidance, and established frameworks surrounding the use of AI.
- Consider the risks and implement strategies to minimize.
- Possible strategies can include providing notice to candidates of the use of AI, providing candidates with informed consent, being transparency with the Company's use of AI, and performing annual audits on the technology to ensure fairness and non-discrimination.
- Incorporate "promising practices" suggested by the EEOC, such as ensuring reasonable accommodations are available.
- Review record retention obligations on federal, state, and local levels.

DOL Issues White-Collar Exemption Proposed Rule

Major Changes

- Minimum salary increases from $35,568 per year ($684 per week) to $55,068 per year ($1,059 per week)
    - 55% increase over the current salary floor
- Salary minimum may be even higher in the final rule, depending on the economic data the DOL uses to set the salary level.
    - $59,285 [2023 Q4 data]; $60,209 [2024 Q1 data]
- Highly Compensated Employee (HCE) exemption minimum increases from $107,432 to $143,988
    - 34% increase over the current salary floor
- Automatic adjustments (increases) every 3 years based on current wage data

Refresher: FLSA White-Collar Exemption Requirements

Salary basis Test

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.

Salary Level Test

The amount of salary paid must meet a minimum specified in the regulations.

Duties Test

Primary duties must involve executive, administrative, or professional duties, as defined in regulations.

What To Do Now?

1. Identify all exempt employees and current salary levels
2. Identify employees in each job title below projected salary level and potential salary level
3. Identify total cost to raise salaries to minimum level
4. Evaluate options
5. Increase salary so affected employees retain exempt status (assuming they satisfy the duties test)
6. Reclassify as non-exempt/overtime-eligible and pay overtime
7. Reclassify as non-exempt and adjust hourly pay rate to account for anticipated overtime (so overall pay is consistent and reclassification is cost-neutral).
8. Reclassify and use fluctuating workweek method of pay (where allowed by state law).
9. Reduce hours to avoid overtime, shift work to other employees

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