

# Employment Law: Looking Ahead in 2024

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# About Me

- Management-side employment attorney & HR consultant
- Human Resources Officer for the U.S. Department of State in Jerusalem & Zambia
- Hostile Work Environment Podcast
- Investigations
- Policies
- Trainings



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# What We'll Cover

- Discrimination laws
- Privacy
- LGBTQ+ issues
- Overtime
- Leave
- Labor law
- Pay equity
- Weed



# Federal Government

- Split Congress
  - Republican-controlled House of Representatives
  - Democrat-controlled Senate
- Biden Administration
  - Equal Employment Opportunity Commission
  - National Labor Relations Board
  - Department of Labor





# Existential Crisis

- Starbucks, Amazon, SpaceX & Trader Joes arguing the NLRB is unconstitutional
- This is a real argument based upon conservative initiatives involving the Consumer Fraud Protection Bureau case



# *Chevron Deference*

- Possible end of Chevron deference
- Doctrine that gives agencies expert status & deference to their interpretation of laws
- Department of Labor (including FMLA, minimum wage, overtime, OSHA, etc.)
- NLRB, EEOC, FTC, *every agency*

# Discrimination

- Increased evidence of discrimination & harassment are everywhere
- Tolerance of hate & hate speech is a significant risk for employers, especially when the hate-filled employee is in management
- *303 Creative* could signal the use of religion to discriminate
- Expect laws to work around the edges of this



# Affirmative Action?

- College admission case spreading over to employment
- Some delay, but it is coming
- Has affected DEIB efforts across the country with employers reporting less funding & support







# Scenario: Becky

Becky has been with the team for some time. She was really upset that the company celebrated Indigenous People's Day & not Columbus Day. A newer employee just brought you Becky's Facebook profile. In her intro, she calls herself a "homophobe & antisemite."

# The CROWN Act

- 19 states & 44 jurisdictions have passed the CROWN Act
- Prohibition on discrimination based upon natural & protective hairstyles
- Added definition to “race” in the laws
- No changes needed to policy



# End(ish) of COVID

- Should be coming out of religious accommodation cases
- Disability & leave related issues
  - EEOC considers COVID a disabling condition
  - DOL considers COVID a condition that could be a serious medical condition under the FMLA





# Scenario: Maria

XYZ company requested everyone come into work two days a week for collaboration & team building. This seems to be working so far.

Maria is recovering from a serious bout of COVID. She tells you her doctor has diagnosed her with Long COVID. She requests to continue to work from home.

# Remote Work

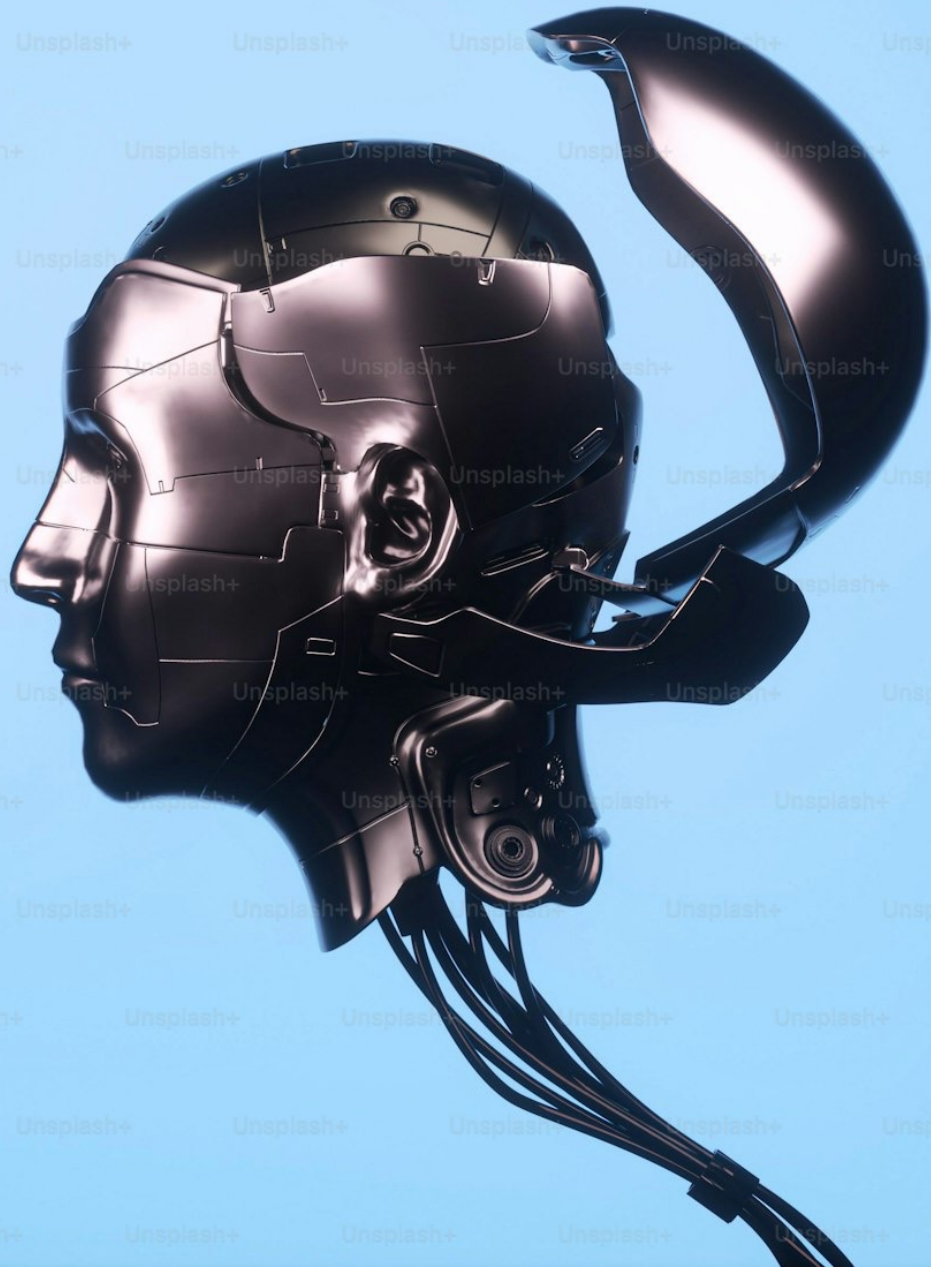
- Pandemic taught how to work from home
- Remote work was NOT a guaranteed reasonable accommodation before
- Is it now?



# Employee Privacy

- Employees have a privacy interest in work away from the office
- Increased surveillance
- Privacy laws
- National Labor Relations Board General Counsel
  - Capture concerted protected activity
  - Violation of the NLRA regardless of unionized workforce





# AI

- Possible action on artificial intelligence
- Focused on privacy & potential bias
- Prohibitions on how data is used
- Focusing on the final decision maker



# LGBTQ+ Issues

- Equality Act codifies protections for the LGBTQ+ community – more than the *Bostock* decision
- EEOC has tried to issue guidance on LGBTQ+ issues, but the guidance has been struck down
- Expect no action from Congress on this





# Scenario – Maxine

- Maxine transitioned & most things have gone well
- Carolanne refuses to call Maxine by her name & has complained that Maxine uses the women's bathroom
- Considerations:
  - Payroll
  - Email
  - Bathroom

# Mental Health

- Mental health care will continue to be a focus
- DOL issued a new fact sheet on mental health care under the FMLA
- Expect more action from the EEOC as well





# Fair Labor Standards Act

- No changes to federal minimum wage
- Expect new overtime in April 2024
- No change to duties tests
- Supreme Court & the \$200K/year oil rig worker

# Paid Leave

- Paid family & medical leave may be coming, but not likely from Congress
- 13 states have paid leave that has either started or will start shortly, including Minnesota
- Often operate like unemployment with payroll taxes that can be split with employees





# Sick & Safe Time

- 14 states already have requirements for sick & safe time with more to come
- Minneapolis, St. Paul, Bloomington & Duluth already
- How it often works
  - 1 hour earned for every 30 hours worked
  - 48 hours per year with a cap of 80 hours
  - No use in the first 90 days
  - Most PTO already compliant with some minor tweaks

# Labor Laws

- Unions have had a bang-up year
- NLRB expected to make union campaigns easier
- Labor laws apply to employers regardless of whether the workforce is unionized
  - Surveillance
  - Employee speech
  - Joint employer
  - Severance agreements





# Severance Agreements

- *McLaren Macomb* decision on 2/21
- Offering a nondisparagement & confidentiality provision to nonsupervisory employees violates the National Labor Relations Act
- Questions whether this will be upheld by courts
- Fundamental changes to how we let folks go

# Pay Equity & Transparency

- Continuing concern as the pandemic only added to wage disparities
- Salary history bans
- Salary ranges listed in job announcements
- Possible federal contractor changes, but little other action on the federal level





# Scenario – Steve

- Steve is a hiring manager
- His Engineer II role is going to be posted
- You've explained that adding the salary range could help with recruitment
- He does not want to include it
- An applicant from Colorado applies



# Noncompetes

- FTC, NLRB announced rule prohibiting noncompetes
- California, North Dakota, Oklahoma, Minnesota & DC prohibit
- 5 other states have strict limitations for workers earning <\$100,000



# Weed

- State law changes, including your neighbor
- Changes to schedule for THC
- Will likely affect federally regulated testing
- Protections for lawful use
- How you treat marijuana will affect your ability to recruit & retain talent



# Scenario – Joey

- Joey is a forklift operator
- Uses THC for his PTSD stemming from his military service
- Tests positive for THC in preemployment testing
- Can you hire him?
- If you do, what should you do?





# Takeaways

- Employment laws are rapidly changing, like always
- Pay attention to state & local law changes specifically in 2023
- Consult with your friendly neighborhood employment attorney with questions



# Questions?

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