

# Managing Overtime and Employees in the Public Sector

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# **Pay Compliance Under Federal and State Laws**

# FAIR LABOR STANDARDS ACT (FLSA)

- Overview
  - Federal law enacted in 1938
  - Federal Minimum Wage
  - Overtime pay
- Huge area of legal risk!

# FLSA

- *Su v. East Penn Manufacturing Co., Inc.*
  - Allegations: the time employees spent changing into and out of protective gear and showering was working time, resulting in employees working more than 40 hours per week.
    - Because of the risk of exposure to hazardous chemicals, the employer required most employees to wear certain uniforms and safety gear.
    - Employees also showered after each shift to avoid dangers of lead exposure.
  - Court: activities that are “integral and indispensable part of principal activities” are compensable under the FLSA.
    - Previous courts had held changing clothes and showering are integral to the principal activity of workers in a battery plant who regularly handled hazardous materials.
  - Verdict: \$22.25 million dollars

# FLSA – Which Employers Are Covered?

- Employer
  - “any person acting directly or indirectly in the interest of an employer in relation to an employee ***and includes a public agency***, but does not include labor organizations (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.”
- Public Agency
  - Government of the United States;
  - the government of a State or ***political subdivision thereof***,
  - any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, ***or a political subdivision thereof***, or
  - Any interstate governmental agency.

# FLSA – WHICH EMPLOYEES ARE COVERED?

- Minimum wage

- “Every **employer** shall pay [the minimum wage] to each of his employees who in any **workweek** is engaged in commerce or in the production of goods for commerce, or is employed in an **enterprise engaged in commerce or in the production of goods for commerce. . . .**”

- Overtime

- “No **employer** shall employ any of his employees who . . . is employed in **an enterprise engaged in commerce or in the production of goods for commerce**, for a **workweek** longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.”

- Exemptions?

# FLSA – WHICH EMPLOYEES ARE COVERED?

- “Enterprise engaged in commerce or in the production of goods for commerce”
    - (1) (A) has employees engaged in commerce or in the production of goods for commerce, and (B) whose annual gross volume of sales made or business done is at least \$500,000
    - (2) is engaged in the operation of a hospital, a residential institution caring for the sick, aged, or mentally ill, or a school for mentally or physically disabled persons,
- OR
- (3) *is an activity of a public agency*

# FLSA – WHICH EMPLOYEES ARE COVERED?

- Classification of employees
  - Exempt Employees – FLSA overtime and/or minimum wage requirements do not apply
  - Non-exempt Employees – FLSA overtime and minimum wage requirements do apply



# WORKWEEK

- Workweek = “a fixed and regular recurring period of 168 hours – seven consecutive 24-hour periods.”
  - Plain English: A workweek is an established seven-day period.
- Employer gets to establish the workweek.
  - Sunday through Saturday
  - Monday through Sunday
  - Etc.
- Employer can establish different workweeks for different facilities or groups of employees.

# MINIMUM WAGE

- Employers must pay non-exempt employees at least the minimum wage for all hours worked in a workweek.
- Current Minimum Wage
  - Federal minimum wage = \$7.25/hour
  - Oklahoma minimum wage = \$7.25/hour
- Many states have laws setting a higher minimum wage.
  - Washington D.C. = \$17.00/hour
  - Washington (state) = \$15.74/hour

# OVERTIME

- Overtime pay = one and one-half times the employee's *regular rate of pay*.
  - Regular Rate of Pay = Total compensation paid to the employee in a workweek divided by the total hours worked in the workweek.
    - Example:
      - Jake is paid \$1,000 for a workweek in which he worked 40 hours.
      - $\$1,000/40 = \$25/\text{hour}$
- Salaried employees
  - Myth: all salaried employees are exempt from the FLSA
    - WRONG!!

# REGULAR RATE OF PAY

- Salaried employees

- Weekly salary

- Regular rate = weekly salary divided by number of hours which the salary is intended to compensate.
    - Ex.
      - Jake is hired at a salary of \$350/week.
      - It is understood that Jake's regular workweek is 35 hours.
      - Jake's regular rate of pay is  $\$350/35 = \$10.00/\text{hour}$
      - If Jake works 45 hours in one workweek, then he is entitled to \$10.00/hour for the first 40 hours, and overtime pay at one-and-a-half times his regular rate (\$15.00/hour) for the last 5 hours.

# REGULAR RATE OF PAY

- Salaried employees

- Monthly salary

- Must reduce it to its weekly equivalent
    - Formula: monthly salary multiplied by 12 (number of months in a year), and divide the answer by 52 (weeks in a year), then divide that answer by the number of hours per week the salary is intended to cover.
    - Ex. Jake is paid a monthly salary of \$1,560, and expected to regularly work a 40 hour workweek.
      - $\$1,560 \times 12 \text{ months} = \$18,720$
      - $\$18,720 / 52 \text{ weeks} = \$360$
      - $\$360 / 40 = \$9.00/\text{hour}$

# REGULAR RATE OF PAY

- Salaried employees
  - Semimonthly salary (i.e., paid twice per month)
    - Regular rate = semimonthly salary multiplied by 24 (payments per year), then divided that answer by 52 (weeks per year), then divided that answer by number of hours per week the salary is intended to cover.
    - Ex. Jake is paid a semimonthly salary of \$1,000, and expected to regularly work a 40 hour workweek.
      - $\$1,248 \times 24 \text{ months} = \$29,952$
      - $\$29,952 / 52 \text{ weeks} = \$576$
      - $\$576 / 40 = \$14.40/\text{hour}$

# REGULAR RATE OF PAY

- Supplemental payments – must be included in regular rate
  - Value of awards and prizes won for quality, quantity, or efficiency of work performed;
  - Bonus and incentive payments based on quality, quantity, or efficiency of work performed;
  - Attendance bonuses;
  - Safety bonuses;
  - Commission payments;
  - Payments for meals, lodging, and facilities; and
  - Tip credits taken by employer to fulfill minimum wage requirements.

# REGULAR RATE OF PAY

## ■ Exclusions

- Sums paid as gifts (Christmas gift, etc.) as long as the amounts are not measured by or dependent on hours worked, production, or efficiency.
- Vacation, holiday, and sick pay.
- Travel expenses reimbursed by the employer.
- Sums paid in recognition of a period of service (10 years of service, 25 years of service, etc.) if either of the following is true:
  - Both the fact that payment is to be made and the amount of payment is at the sole discretion of the employer at or near the end of the period; or
  - Payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan.
- Employer payments to retirement or health insurance plan.
- Certain “premium rates” that are extra compensation for certain hours worked.



# MOST COMMON MISTAKES

- Refusing to pay for “unauthorized” overtime.
  - If an employer knows or has reason to believe an employee is working, it is working time and the employee must be paid for it.
  - It is the duty of management to exercise control to ensure employees are not working at times they shouldn't be working
  - What to do?
    - Implement a written rule stating non-exempt employees are prohibited from working overtime unless expressly authorized to do so by management.
    - ENFORCE THE RULE!

# MOST COMMON MISTAKES

- Allowing “off-the-clock” work.
  - If an employee is working, it is not “off-the-clock.”
    - Even if working from home.
    - Even if it is “voluntary.”
  - Example
    - Jake is a non-exempt employee, who worked 40 hours in the current workweek (9:00am to 5:00pm, Monday through Friday)
    - Jake has a smartphone to which he receives work emails.
    - Jake’s supervisor, Charlie, sends Jake an email on Saturday asking about the status of a project.
    - Jake spends 30 minutes writing a response email.
    - Result: Jake has worked 30 minutes of overtime and must be paid time-and-a-half for those 30 minutes.

# MOST COMMON MISTAKES

- Holding paychecks for disciplinary purposes.
  - Oklahoma law:
    - Non-exempt employees must be paid semimonthly on regular paydays designated in advance by the employer;
      - Exception: state, county, and municipal employees must be paid a minimum of once each calendar month;
    - Exempt employees must be paid a minimum of once each calendar month.
- Uncompensated travel time

# FLSA White Collar Exemptions

# White Collar Exemptions

- FLSA has over 30 enumerated exemptions from FLSA overtime rules.
- Most common: white collar exemptions
  - Executive, Administrative, and Professional
- There are some that apply specifically to public employees

# White Collar Exemptions: The Basics



# Salary Basis

- An employee is paid on a salary basis if they:
  - Regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.
    - Cannot be reduced based on quantity or quality of work.
    - Must receive full weekly salary for any workweek in which the employee performs any work.
      - Some exceptions
- Salary must be at least \$684 per week (\$35,568/year)
  - Attempts by the Department of Labor to increase the minimum salary have dominated the last three presidential administrations

# Salary Basis

- Proper deductions from pay for salaried employees
  - If an employee is absent for a full day, or full days, for personal reasons other than sickness or disability;
  - If an employee is absent for a full day, or full days, due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary lost due to illness;
  - Offset amounts received as a jury or witness fee, or for military pay;
  - Penalties imposed in good faith for infractions of safety rules of major significance; or
  - Unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.



# New salary threshold proposal

- Increase announced August 30, 2023
- Standard salary level for white collar exempt workers would increase from \$684 per week to \$1,059 per week (\$55,068 per year)
- DOL estimates that there are approximately 3.4 million employees that would be newly eligible for overtime if the new rule goes into effect

# New salary threshold proposal *(cont'd)*

- Importantly, the proposed rule also automatically updates the earnings thresholds every three years so that the earnings threshold keep pace with changes in worker salaries.
- This means that employers would need to monitor changes in salary threshold requirements and regularly review whether employees are properly classified as exempt.

# New salary threshold proposal *(cont'd)*

- Additionally, the total annual compensation requirement for highly compensated employees would increase from \$107,432 per year to \$143,988 per year.
- Highly compensated employee exemption provides that an employee is exempt from the FLSA's overtime requirements if they are paid the requisite salary threshold, perform non-manual labor, and perform at least one of the job duties required to meet a white collar exemption.

# Increasing FLSA salary basis requirements?

- Proposed salary threshold increases:

Effective Date	New Salary Threshold
Date the Rule takes effect	\$45,000 per year
January 1, 2024	\$55,000 per year
January 1, 2025	\$65,000 per year
January 1, 2026	\$75,000 per year
January 1, 2027	“an annualized amount that is equal to the rate of the 55 <sup>th</sup> percentile of weekly earnings of full-time salaried workers nationally”

# New salary threshold proposal *(cont'd)*

- There is some belief that a final rule will come into effect around July 2024. It is also likely that any final rule will be challenged in the courts, similar to what happened after the Obama administration's introduction of similar rules in 2016. Even without litigation, the DOL made clear that the salary threshold laid out in the NPRM, which is based on 2022 data, is likely to be as high as \$60,000 by the time a final rule is issued.

# New salary threshold proposal *(cont'd)*

- Employers wishing to proactively prepare for the potential implementation of the proposed rule may want to start strategizing on how they will treat their exempt employees who currently earn an annual salary between \$35,568 and approximately \$60,000.
- Options include converting those employees to hourly, raising salaries, and paying overtime compensation above a fixed salary. Employers may also want to consider conducting a review of employee job duties to make sure employees are properly classified as exempt and prepare to account for automatic increases to the salary threshold.

# Duties Tests – Executive Exemption

- Must be compensated on a salary basis of at least \$684/week;
- Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- Must have the authority to hire or fire other employees, or their suggestions and recommendations must be given particular weight.

# Duties Tests – Executive Exemption

- Management includes activities such as:
  - Interviewing, selecting, and training employees;
  - Setting rates of pay or hours of work;
  - Directing the work of employees;
  - Appraising employee's productivity and efficiency for the purpose of recommending promotions or other changes in status;
  - Planning the work;
  - Determining techniques to be used, types of materials, etc.



# Duties Tests – Executive Exemption

- Department or Subdivision
  - Fairly broad
  - A unit or collection of employees with permanent status and function
    - As opposed to a collection of employees assigned from time to time to a specific job or series of jobs

# Duties Tests – Administrative Exemption

- Must be compensated on a salary basis of at least \$684/week;
- Primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Primary duty includes exercise of discretion and independent judgment with respect to matters of significance.

# Duties Tests – Administrative Exemption

- Directly related to management or general business operations:
  - Assisting with the running or servicing of the business;
    - More than working on a production line or selling products in a retail establishment;
  - Includes work in functional areas such as:
    - Tax
    - Finance
    - Accounting
    - Budgeting
    - Auditing
    - Insurance
    - QC
    - HR
    - Procurement

# Duties Tests – Professional Exemption

- Must be compensated on a salary basis of at least \$684/week;
- Primary duty must be the performance of work requiring advanced knowledge;
  - Predominantly intellectual in character;
  - Requires the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# **PUBLIC SECTOR EXCEPTIONS/EXEMPTIONS**

# OVERTIME ON A “WORK PERIOD” BASIS

- This applies to public sector law enforcement and fire protection personnel.
- Fire Protection Employees
  - Firefighters, paramedics, EMTs, rescue workers, ambulance personnel, or hazardous materials workers who:
    - Are trained in fire suppression;
    - Have the legal authority and responsibility to engage in fire suppression;
    - Are employed by a fire department of a municipality, county, fire district, or state; and
    - Are engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

# OVERTIME ON A “WORK PERIOD” BASIS

## ■ Law Enforcement

### – Employees who

- Are empowered by state or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes;
- Have the power to arrest; and
- Have undergone, will undergo, or is currently undergoing training in law enforcement.

- An employee who spends more than 20 percent of their time on work that is not performed in conjunction with law enforcement activities is not “engaged in law enforcement activities.”

# OVERTIME ON A “WORK PERIOD” BASIS

- Overtime on a “Work Period” Basis
  - Public employer may adopt a “work period” between 7 and 28 days.
  - FLSA Regulations identify how many hours an employee may work in the work period before the employer has to start paying overtime.
  - The number of hours depends on the length of the chosen work period.



<b>MAXIMUM HOURS WORKED (ROUNDED) BEFORE OVERTIME</b>		
<b>CONSECUTIVE DAYS WORK PERIOD</b>	<b>HOURS OF FIRE PROTECTION</b>	<b>HOURS OF LAW ENFORCEMENT</b>
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

# OVERTIME ON A “WORK PERIOD” BASIS

## ■ Example

- Jake is a fire protection employee, and he works a 28 day work period.
  - Week 1 (Days 1-7) – Jake works 80 hours
  - Week 2 (Days 8-14) – Jake works 80 hours
  - Week 3 (Days 15-21) – Jake works 52 hours
  - Week 4 (Days 22-28) – Jake works 0 hours
  - Total = 212 hours
- Under normal OT rules, Jake would be entitled to 92 hours of overtime pay.
  - (40 hours for Week 1 + 40 hours for Week 2 + 12 hours for Week 3).
- Under the “work period” basis rules, Jake is entitled to no overtime pay.

## COMPENSATORY TIME OFF

- Public employers may “pay” employees “compensatory time” off in lieu of overtime pay.
- Must provide compensatory time off at the rate of at least 1.5 hours for every hour of overtime worked by the employee.
- Ex. Jake’s regular rate of pay is \$14.00/hour, and he works 10 hours of overtime in one workweek.
  - Normal OT Requirements:  $\$21.00$  (time and a half)  $\times 10 = \$210$
  - Compensatory Time Off: 1.5 hours of PTO  $\times 10 = 15$  PTO hours

# COMPENSATORY TIME OFF

## ■ Requirements

- Must be an agreement or understanding between employer and employee reached *before the work is performed*, OR
- An agreement between employer and representatives of employees (i.e., the union).

## ■ Limitations

- Police and fire protection employees may accrue up to 480 hours of compensatory time
  - Same for employees performing “seasonal” activities.
- All others may accrue up to 240 hours of compensatory time

# COMPENSATORY TIME OFF

## ■ PTO requests

- If an employee requests to use compensatory time, employer must permit the use within a “reasonable period” after the request is made, unless it would “unduly disrupt” the operations of the agency.
- “reasonable period”
  - Based on the customary work practices within the specific agency.
    - Normal schedule of work,
    - Anticipated peak workloads based on past experience,
    - Emergency requirements for staff and services, and
    - Availability of qualified substitute staff
  - Case by case basis.

# COMPENSATORY TIME OFF

- PTO requests

- “unduly disrupt”

- Reasonable good faith belief that it would impose an unreasonable burden on the agency’s ability to provide services of acceptable quality and quantity for the public.
    - Mere inconvenience is not enough to justify a denial of a request to take compensatory time off.

# COMPENSATORY TIME OFF

- Payments for unused compensatory time
  - Employer may choose to pay for unused compensatory time at any time.
    - Paid at the employee's regular rate of pay.
  - If employee is terminated, employer *must* be paid for unused compensatory time.
    - Rate must be the HIGHER of the following:
      - The average regular rate received by the employee during the last 3 years of employment, or
      - The employee's rate of pay at the time of termination.

# COMPENSATORY TIME OFF

- *Christensen v. Harris County*, 529 U.S. 576 (2000)
  - U.S. Supreme Court
  - Issue: whether a public employer could require employees to schedule compensatory time off
  - Facts: Harris County, fearing the fiscal consequences of having to pay for accrued compensatory time, required employees to schedule time off to use compensatory time once they accrued a certain amount.
  - Court:
    - FLSA regulations restrict employers from prohibiting the use of compensatory time when employees request to do so.
    - BUT, the regulations do not contain any restriction prohibiting an employer from requiring employees to use compensatory time.
    - Thus, Harris County did not violate the FLSA regulations.



# Pregnant Workers Fairness Act

# Background

- In 1978, Title VII of the Civil Rights Act of 1964 was amended by the Pregnancy Discrimination Act to prohibit discrimination on the basis of pregnancy, childbirth and related medical conditions
- However, the law did not address a pregnant or postpartum employee's need for special accommodations while working on the job

# Pregnant Workers Fairness Act

- Took effect on June 27, 2023
- Expands employment protections to pregnant and postpartum workers by requiring employers to make reasonable accommodations to “known limitations” related to pregnancy, unless the employer can demonstrate an undue hardship
- Employers must engage in the interactive process regarding an accommodation

# “Known limitation”

- “Known limitation” defined as any physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer, “whether or not such condition meets the definition of disability” under the Americans with Disabilities Act

# Additional protection

- PWFA's pregnancy accommodation protection is in addition to the protections of Title VII, which already prohibits pregnancy discrimination and requires employers to treat a worker affected by pregnancy in the same way as other workers with light duty restrictions

# Implementation rules

- EEOC's proposed regulations for implementing the PWFA were published on August 11, 2023
- Public comment period ended October 10, 2023
- Final rules are expected by the end of 2023

# Notable guidance

- Notable guidance from the EEOC's proposed rules include the following:
  - PWFA covers medical conditions related to childbirth and pregnancy that are modest, minor, and/or episodic in nature, and further includes those conditions that are exacerbated by pregnancy or childbirth, such as high blood pressure, anxiety, or carpal tunnel syndrome
  - Condition does **not** have to be severe or rise to the level of a disability to qualify for accommodation under the PWFA

# Accommodation examples

- Accommodations may include:
  - job restructuring;
  - part-time or modified work schedules; more frequent breaks;
  - acquisition or modification of equipment, uniforms, or devices;
  - allowing seating for jobs that require standing or standing in jobs that require sitting;
  - appropriate adjustment or modification of examinations or policies;



# Accommodation examples *(cont'd)*

- permitting the use of paid or unpaid leave (whether accrued, short-term disability, or another type of employer benefit);
- assignment to light duty;
- telework;
- accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future

# **I-9 Compliance and Document Confirmation**

# DHS and ICE end temporary flexibilities

- Temporary flexibilities permitting remote inspections ended on July 31, 2023
  - For more than three years ICE permitted employers of workplaces that were operating remotely to delay the mandatory in-person inspection requirements for I-9s and authorized employers to remotely inspect their employees' identity and work authorization documents.
- Employers had until August 30, 2023 to conduct the in-person physical inspections and properly annotate the affected Form I-9s for its employees hired on or after March 20, 2020, but remotely inspected.

# Alternative verification procedure

- In late July, ICE announced an alternative procedure for verification of I-9 data for members in good standing of the E-Verify program
- Requires the retention of identification documentation copies

# Management and Leadership Training

# Employment litigation trend

- Post-COVID, employment litigation was down for the first time in 20 years
- Immediate post-COVID era saw employers focused on hiring and rebuilding their businesses; however, employers are no longer in mass-hiring mode, and economic trends are leading to more separations
- With employees not as able to readily replace jobs, litigation has made a comeback

# Why focus on training?

- Coupled with the downward trend in litigation, employers have lost focus on training management and leadership on core principles: compliance, complaint response, investigation and documentation
- Training accomplishes two important goals:
  1. Prevention of lawsuits
  2. Establishment of important legal defenses

# Management and leadership training

- It's time to reexamine the state of your training to respond to the recent uptick in charges and litigation
- Failures by management to properly recognize and respond to complaints are the number one cause of preventable and expensive litigation
- Where possible, focus on in-person, live training with small groups. Otherwise, use technology to your advantage
- Refocusing on training is critical at this point in time



# Potential impact of SCOTUS ruling on affirmative action in education

- SCOTUS prohibits affirmative action in education...
  - *Students for Fair Admissions Inc. v. President & Fellows of Harvard College, Students for Fair Admissions, Inc. v. Univ. of North Carolina* (2023)
- Executive Order 11246
  - Gender and historical race classifications – these groups have been subjected to a history of discrimination such that remedial action is necessary
  - EO 11246 AA Programs justifiable, pass scrutiny

# Potential impact of SCOTUS ruling on affirmative action in education *(cont'd)*

- Voluntary gender or race-based AA Program
  - May justify based on EO 11246 findings
  - Particularly upon a finding that females and minorities have been subjected to historical discrimination such that remedial action is necessary

# Potential impact of SCOTUS ruling on affirmative action in education *(cont'd)*

- Broader AA Program – i.e., diversity and inclusion efforts
  - Likely exceeds the scope EO 11246 findings
  - Employers may need to generate their own findings prior to implementation:
    - Identify remedial and/or business purpose
    - Identify and articulate operational needs that justify D&I efforts
    - Undertake a needs assessment to determine the extent to which “diversity” is currently (under)represented

# EEOC PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE

- On September 29, 2023, the Equal Employment Opportunity Commission (EEOC) released its revised ***Proposed Enforcement Guidance on Harassment in the Workplace***. If issued in final form, the guidance will be the EEOC's first update on harassment in the workplace since 1999.
- While this guidance is not considered to be "law," it's intended as a resource for EEOC staff investigating, adjudicating, or litigating harassment claims, and provides some guidance to employers as they navigate potential harassment issues in the workplace.

- The EEOC first released its proposed guidance on workplace harassment for public comment in 2017, however it was not considered 'finalized'. This most recent updated proposed guidance reflects notable changes in the law, including discrimination based on gender orientation and sexual identity and recent social justice developments such as the #MeToo movement.

# Anti-Harassment Policies and Procedures

- The proposed guidance outlines ways that employers can develop anti-harassment policies, processes, and training as well as implementation. There are additional examples of an employer's actions that can weigh both for and against a finding of an effective anti-harassment program.

# Conducting Internal Investigations

- The proposed guidance reinforces previous EEOC guidance regarding an employer's duty to investigate harassment claims internally. However, it additionally notes that an investigation will be considered adequate if it "arrives at a reasonably fair estimate of truth" and is completed by an impartial party free from influence by the alleged harasser. The EEOC will assess the employer's investigation and subsequent corrective actions based on how the employer utilized the "arsenal of incentives and sanctions" available to it to address the complained of harassment.

# Systemic Harassment in the Workplace

- The proposed guidance recommends that employers retain records of all harassment complaints and investigations in order to best identify patterns of harassment. According to the EEOC, retention of these records can help employers to further improve their harassment prevention measures and training to the extent that employers recognize patterns of practice.
- It should be noted that the proposed guidance emphasizes employers' requirement to adopt remedies to address the pattern and practice of harassment rather than just individual complaints.



# Watch for More Nuanced Legal Theories

- There are a number of instances which suggest the EEOC will pursue more nuanced legal theories.
  - For example, the guidance addresses “associational discrimination,” which has not previously garnered much attention.

# Watch for More Nuanced Legal Theories

- According to the EEOC, an individual can be harassed because the employee associates with someone in a different protected class or harassed because the complainant associates with someone in the same protected class.
- Such association may include, but is not limited to, close familial relationships, such as marriage, or close friendship with another individual belonging to a protected group.

# Watch for More Nuanced Legal Theories

- As another example, the EEOC indicates an individual may be able to establish a hostile work environment in situations where the employee's job was merely "more difficult" because of the offending conduct. Examples like this suggest there will be an on-going push to expand legal theories and related remedies.

# Key Takeaways

# Focus on Sexual Harassment

- The proposed guidance reflected on updated statistics which place renewed focus on sexual harassment at work. Specifically, the guidance cites a 2021 Associated Press poll which reflected that, while only 35% say sexual misconduct is a very serious problem in the workplace (down from 56% in 2017), 54% say the recent attention to the issue has made them more likely to speak out if they were a victim of sexual misconduct, as well as 58% saying they are more willing to speak out if they were to witness it happening.

# Focus on Sexual Harassment

- The guidance also refers to a June 2016 report from the Commission's Select Task Force on the Study of Harassment in the Workplace, which acknowledged that the severity of harassment may be enhanced if a complainant has reason to believe that the harasser is insulated from corrective action – i.e., where the alleged harasser was a highly valued employee, or the employer has previously failed to take appropriate corrective action in similar circumstances.

# Emerging Issues Regarding Online Harassment

- While the proposed guidance primarily addresses work-related incidents, the EEOC also discussed emerging issues outside of the office such as virtual or online harassment.
- Given the abundance of digital technology and the advent of social media (and its role in the workplace), the proposed guidance sheds light on the increased likelihood that electronic communications can contribute to a hostile work environment.

# Updates on Protected Characteristic Standard

- Utilizing recent EEO cases, the proposed guidance provides over a dozen detailed examples which address specific factors used to assess workplace harassment.



# Clarifications on the Severe-or-Pervasive Standard

- The proposed guidance purports to clarify that the “severe-or-pervasive” standard takes a “middle path” that requires the conduct to be more than merely offensive but does not require that the conduct caused psychological harm.

# Single Incidents and Hostile Work Environments

- While the proposed guidance provides a number of examples that relate to systemic or repeated incidents of harassment, it also provides examples of conduct that courts have recently found sufficiently severe to establish a hostile work environment based on a single incident.

# Bottom Line

- Although the EEOC's guidance does not have the force of the law, and therefore may be rejected by the court system, employers should nevertheless be aware of how the EEOC may evaluate and apply the law to various fact patterns. In that regard, this new guidance is useful in anticipating issues and the EEOC's likely approach.

**QUESTIONS ?**