STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

Employment Law

VOLUME 110

SPRING

2025

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

EDITORS

Editor in Chief
Professor Lonny Hoffman
University of Houston Law Center
lhoffman@uh.edu

Editor Emeritus
J. Patrick Hazel*
University of Texas School of Law
*Deceased

Graphic Designer
Janie Alderman
janiealderman52@gmail.com

EDITORIAL BOARD

Alvin Adjei
Burritt Adjei

Hon. Sofia Adrogué
Eleventh Business Court Division

Hon. Patricia O. Alvarez
Fourth Court of Appeals

W. Stephen Benesh
Bracewell

Bill Boyce
Alexander Dubose Jefferson

John K. Broussard, Jr.
LyondellBasell

Elizabeth Cantu
Ramon Worthington

Hon. Karin Crump
Third Court of Appeals

Professor Edward C. Dawson
University of Texas School of Law

Hon. April Farris
Fifteenth Court of Appeals

Jason P. Fulton
Buc-ee's

Erica Harris
Susman Godfrey

Claire Abernathy Henry
Ward, Smith & Hill

Allyson N. Ho
Gibson, Dunn & Crutcher

Lisa Hobbs
Kuhn Hobbs

Andy Jones
Sawicki Law

Greg Love
Love Law Firm

Hon. Jessica Mangrum
200th Civil District Court

Matthew Orwig
Dallas, TX

William R. Peterson
Morgan, Lewis & Bockius

Alex Roberts
Beck Redden

Hon. Karen Gren Scholer
United States District Court
Northern District of Texas

Ken Slavin
Kemp Smith

Hon. Lisa Soto
Eighth Court of Appeals

Michelle Stratton
Smyser Kaplan & Veselka

Kennon Wooten
Scott, Douglass & McConnico

Kristen Vander-Plas LaFreniere
Vander-Plas LaFreniere

Associate Editors, *ex officio* members of editorial board

Hon. Cory L. Carlyle
Fifth Court of Appeals

Eric Chen
Assistant US Attorney,
Northern District of Texas

Matthew Hoffman
Vinson & Elkins

Brian P. Lauten
Brian Lauten, PC

Charisma Nguepdo
Susman Godfrey

Eugene Temchenko
Kirkland & Ellis

2024-2025 LITIGATION SECTION OFFICERS

Rebecca Simmons, Chair
Rebecca Simmons

Raymond L. Thomas, Chair-Elect
Ray Thomas

Jason Paul Fulton, Vice Chair
Buc-ee's

Sofia A. Ramón, Treasurer
Edinburg, TX

Hon. Christine Lynne Stetson, Secretary
Eastern District of Texas

Geoff Gannaway,
Immediate Past Chair
Beck Redden

CHAIR EMERITUS MEMBERS

Cade W. Browning
Browning Law Firm

Hon. Xavier Rodriguez
United States District Court
Western District of Texas

J. Paul Manning
Field, Manning, Stone,
Hawthorne & Aycock

VOLUME 110
SPRING
2025

COUNCIL MEMBERS

TERMS EXPIRE IN 2025
Curt Fenley
Lufkin, TX

Hon. Chari Kelly
Austin, TX

Hon. Sue Kurita
El Paso, TX

Karen Precella
Ft. Worth, TX

Amy Prueger
Austin, TX

TERMS EXPIRE IN 2026
Raymond Baeza
El Paso, TX

Chip Brooker
Dallas, TX

Andrew L. Kerr
San Antonio, TX

Mia Lorick
Houston, TX

Jackie Robinson
Fort Worth, TX

TERMS EXPIRE IN 2027
Nadia Bettac
Austin, TX

Lara Brock
Austin, TX

Sylvia Cardona
San Antonio, TX

Robert Ford
Houston, TX

Andy Jones
Dallas, TX

LIAISONS/ADVISORS
Craig Cherry
Board Advisor
Waco, TX

Kristina N. Kastl
Alternate Board Advisor
Dallas, TX

Hon. Jeffrey S. Boyd
Supreme Court Liaison
Austin, TX

Hon. Jeff Brown
Federal Court Liaison
Galveston, TX

Laura Pratt
TYLA Liaison
Amarillo, TX

Jake Stoffle
State Bar of Texas Liaison
Austin, TX

STATE BAR LITIGATION SECTION REPORT
THE ADVOCATE

Table of Contents

SPRING VOLUME 110

Table of Contents, Continued Next Page

TABLE OF CONTENTS, CONTINUED

ADDITIONAL CONTRIBUTIONS

EDITOR'S COMMENTS

LONNY HOFFMAN

THIS ISSUE OF THE ADVOCATE BRINGS TOGETHER TIMELY and thought-provoking articles on the evolving landscape of employment law. From the potential impact of the Supreme Court's reconsideration of *Chevron* deference to the ever-relevant question of employee classification, our contributors provide critical insights into the challenges facing employers and employees, as well as for the practitioners and judges who apply the law to their disputes.

We also explore pressing contemporary issues, such as legally viable approaches to diversity in the profession initiatives, the FTC's evolving stance on noncompete agreements, and the expanding rights of pregnant workers. Other articles examine how AI is reshaping hiring, the legal implications of remote work, and even how something as seemingly routine as Sunday mail delivery can influence litigation strategy.

As employment law continues to shift in response to legislative, judicial, and technological developments, this collection of articles offers valuable guidance for those navigating the complexities of the modern workplace.

In addition to the main symposium, we also include another installment of Evidence and Procedure Update. I'd like to remind readers that Dylan Drummond has taken over responsibility for providing this regular update. Many thanks, Dylan, for your insightful summaries.

As always, I welcome your feedback. My email address is lhoffman@uh.edu.

Regards,

Lonny Hoffman
Editor in Chief

CHAIR'S REPORT

REBECCA SIMMONS

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way—in short, the period was so far like the present period that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only."

THIS QUOTE FROM DICKENS' A TALE OF TWO CITIES HAS BEEN REFERENCED frequently through the decades and seems particularly fitting for our current time. Indeed, in these challenging moments for lawyers and our clients, uncertainty seems omnipresent as we navigate a shifting legal environment presenting unique legal and business questions particularly in connection with technology, energy production and the environment, trade and national security, employment, and certain social initiatives. The regulatory landscape is changing rapidly and radically. Legal challenges over executive actions have proliferated and will continue to play out in the courts.

Yet, amidst this flux, the Constitution of the United States and the rule of law stand as unwavering pillars. The Founding Fathers carefully crafted our constitutional system with a clear vision to distribute governmental power across distinct branches, ensuring a balance preventing any single branch from overpowering the others. To protect the will of the people an independent judiciary is the final arbiter in constitutional matters.

The oath each Texas lawyer takes—"to preserve, protect, and defend the Constitution of the United States and Texas" is a fundamental promise transcending politics or personal interests. Each generation faces tests of constitutional fidelity, and ours is no exception. Regardless of political pressures or changing landscapes, the duty to preserve, protect, and defend the Constitution and rule of law is paramount. The Litigation Section's Mission Statement embodies that charge: "Empowering advocates, promoting justice, and preserving the rule of law." We will continue steadfast in our mission through our publications, educational programs, and grants.

In this edition of the Advocate, our authors provide valuable insights into some of today's most pressing legal issues in the area of employment law. The articles explore critical changes and emerging challenges related to employment law. These thoughtful articles equip us with the knowledge necessary to adapt effectively and ethically in these swiftly evolving arenas.

We also proudly celebrate outstanding achievements within our legal community. Congratulations to Judy Kostura, our esteemed recipient of the 2025 Luke Soules Award, whose career embodies excellence in advocacy and commitment to the legal profession. Two of our litigation section members, Luke Soules and Andy Kerr recently received the prestigious Texas Bar Foundation 50-year Lawyer Award. On April 2nd Kleber C. Miller, Ft. Worth attorney and centenarian, was inducted as our most recent Legal Legend. A former Chair of the State Bar of Texas, and recipient of the prestigious 50-year Lawyer award, Kleber has served the State Bar, his community and his clients with dedication and excellence.

Finally, please mark your calendars and stay connected. We will continue with our webinar series exploring hot topics over the lunch hour. Our most recent webinar on federal courts presented by Federal District Court Judge, Jeff Brown was insightful and comprehensive. We have a top-notch program ready for the Litigation Section Annual Meeting scheduled for Thursday, June 19, 2025. The annual meeting will be an excellent occasion to gather, learn, and renew our collective commitment to justice and the rule of law. For more information visit us at www.litigationsection.com.

Sincerely,

Rebecca Simmons
Chair, Litigation Section
State Bar of Texas

SUSTAINING MEMBERS OF THE LITIGATION SECTION OF THE STATE BAR OF TEXAS

(As of April 2025)

Alejandro Acosta
Tapash Agarwal
Brock Akers
Alexandra Albright
Manuel Alcozer
Steven Aldous
Joseph Alexander
Robert Ammons
Christy Amuny
John Arthur
Efosa Asemota
Anne Ashby
Jonathan Ashton
John Atkins
Ardalan Attar
Raymond Baeza
John Baldwin
Samuel Ballard
Emily Bamesberger
Marcos Baraibar
Alicia Barrs
James Baskin
Charles Beachley
Brian Beckcom
Brad Beers
Alexander Begum
W. Stephen Benesh
David Benford
Hon. Levi Benton
Mara Bindler
John Bingamon
Robert Binstock
Robert Black
Michele Boerder
Benjamin Bonner
Paul Boston
Ryan Botkin
Fred Bowers
Maria Boyce
Hon. William Boyce
Greta Braker
Elizabeth Brandon
Scott Brann
D. Clinton Brasher
Lacey Breeden
Russell Briggs
Burton Brillhart
Lori Brissette
Chip Brooker
John Brookman
Lori Brown
Hon. Jeffrey Brown
Michael Browning
Cade Browning
Robert Brunkenhoefer
Robert Burford
John Byrd
Craig Caesar
William Camp
Dwain Capodice
Carlos Cardenas
Thomas Carney
Montre Carodine
J. Scott Carothers
Ricardo Cedillo
Lena Chaisson-Munoz
Jeffrey Chandler
Sheryl Chandler
Mitchell Chaney
Kenneth Chapman
Fan Chen
Craig Cherry
Aaron Chibli
James Christian
John Clark
William Collins
Wayne Collins
Charles Conrad
Tracey Conwell
Conrad Coutinho
Scott Cowan
John Cox
Cormac Creaven
Tyler Crews
Hon. Kelly Cross
Melanie Cruthirds
Brian Cweren
Rola Daaboul
Junie Dalice
Bill & Vara Daniel
Hon. Robin Darr
Daniel David
Justin Davis
Luis Diaz Rivera
Frederick Dietrich
Errol Dietze
Jennifer Anne Doan
Spencer Dobbs
Michael Donald
Alicia Dowdy
James Doyle
Patricia Dube
Laura Dumas
Pamela Dunlop
Timothy Durst
Phillip Dye
Paul Dyson
Rex Easley
Kenneth East
James Edwards
Slater Elza
Laurie Elza
Hon. Craig Enoch
Jon Enochs
Matthew Esch
Charles Eskridge
Curtis Fenley
Julian Fertitta
Robin Fields
Harrison Fisher
Richard Fletcher
Concepcion Flores
Morton Fogelman
Zandra Foley
Byron Forrest
Danielle Fox
John Franz
Steven Freeman
Walker Friedman
Charles Frigerio
Claudia Frost
L. Hayes Fuller
Jason Fulton
Cristobal Galindo
Joseph Gallagher
Geoffrey Gannaway
Joyce-Marie Garay
Evan Garcia
Roberto Garcia
Ricardo Garcia
Tanya Garrison
Oscar Garza
Dax Garza
Nicole Garza
Viola Garza
Jason Gibson
George Gibson
Jessica Glitz
Kaleb Godwin
Paul Gold
Larry Goldman
Bernardo Gonzalez
Kassandra Gonzalez
Kenneth Goolsby
Reid Gordon
Danielle Goren
Gregory Gowan
Claude Graham
Marc Gravely
Matthew Greenberg
Andrew Greenwell
Myrna Gregory
Billy Griffin
Richard Grigg
Mark Grotefeld
Israel Guardiola
Jesus Guerra
Manuel Guerra
Michael Guerra
Thomas Hall
Marcela Halmagean
Milton Hammond
Russell Hardin
George Harris
John Hart
David Hart
Kelly Harvey
Jay Harvey
Shawn Hashemi
Christopher Hawa
Hon. Kristen Hawkins
Mary Henderson
Jaime Hernandez
Maria T Hexsel
Hon. Federico Hinojosa
Lonny Hoffman
Kirby Hopkins
Daniel Hossley
Samuel Houston
Michael Howell
John Howell
Eric Hudson
Sadik Huseny
Onyinyechi Ibe
John Jansonius
James Jennings
Gary Jewell
Anne Johnson
F. Johnstone
Andrew Jones

SUSTAINING MEMBERS OF THE LITIGATION SECTION OF THE STATE BAR OF TEXAS CONTINUED

Jason Joy
Kristina Kastl
Jeffrey Kehl
Hon. Chari Kelly
David Keltner
Jeffrey G. Kemp
Andrew Kerr
David Khirallah
Robert Killeen
Katie Klein
Cathren Koehlert
Robert Kruckemeyer
William Krueger
Hon. Sue Kurita
Lindsey Laielli
Shane Langston
James Lassiter
Thomas Laucius
Brian Lauten
Larry Layfield
Hon. Michael Lee
Carlos Leon
Gregory Lindley
Hon. Scott Link
August Linnartz
Warren Lipschitz
David Littman
Jason Llorente
Hon. Russell Lloyd
Victor Longo
Roderick Lopez
Jose Lopez
Ramiro Lopez
Amy Marie Lorenz
Mary Lovett
Michael Lowenberg
John Loyd
Sergio Lozano
Joe Luce
Vira Lukyanova
Elizabeth Mack
Luke Madole
George Mallers
Tim Maloney
Jan Mangum-Merendino
Robert Manley
J. Paul Manning
D. Nevill Manning
Gary Manuele
Trevor Martin
Dwaine Massey
Abigail Mathews
Austin Mathis
Mitzi Mayfield
McKenzi McAdams
Stephen McConnico
Linda McDonald
Charles McFarland
Kristina McGuire
James McNeel
Ian McNeill
Nicholas Milazzo
Donald Miller
Beau Miller
Hon. Kenneth Molberg
Elizabeth Molina
Jacqueline Ellise Montejano
Gregory Moore
Paul Morin
George Morrill
Robert Morris
James Morris
Christopher Morrow
Daniel Morton
Marion Moss
J. Stephen Muncey
George Murphy
Robert Myers
Michael Nava
Susan Nelson
Chad Neuens
Alfonso Nevarez
Casidy Newcomer
Nicole Newman
Joe Newsom
Nhan Nguyen
Doanh Nguyen
Thomas O'Donnell
Rene Ordonez
James Ormiston
Candace Ourso
Daniel Packard
Andrew Payne
Joseph Pellis
Rory Pendergast
Annabell Perez
Michael Perrin
Skye Perryman
Doran Peters
Douglas Peterson
Nicholas Petree
Kip Petroff
Martin Phipps
Karen Precella
John Proctor
Karen Prodromo
Ruggero Provenghi
Amy Prueger
Holli Pryor-Baze
William Puls
Percy Rainey
Sofia Ramon
Rodrigo Ramos
Megan Rapp
Nooshin Razmdideh
Thomas Reddin
Nicholas Reed
James Reed
Steven Reilley
James Renard
Hon. Rose Reyna
Brett Reynolds
R. W. (Ricky) Richards
Gillian Richards
Wayne Rife
Jana Rine
James Ringel
Randell Roberts
Reymundo Rodriguez
Joel Rodriguez
Sonia Rodriguez
Hon. Xavier Rodriguez
Mario Rodriguez
Eduardo Rodriguez
Gene Rosas
Ryan Runkle
Andrew Ryan
Alan San Miguel
Michael Sanders
Gregory Sapire
Mazin Sbaiti
Dean Schaner
Steven Schulwolf
Richard Scroggins
David Sergi
Wade Shelton
Brett Sheneman
Avery Sheppard
George Shipley
Hon. Rebecca Simmons
Dwayne Simpson
Clarissa Skinner
Robert Slovak
Michael Smith
Michele Smith
Luther Soules
Frank Southers
Brandon Starling
K. Scott Statham
Kerwin Stephens
Christine Stetson
Leslie Stewart
James Stouffer
Timothy Strickland
Caleb Stuart
William Sutton
Brian Sutton
Michael Sydow
James Tanner
Jonathan Tate
Jarom Tefteller
Jack George Ternan
Raymond Thomas
Hon. Linda Thomas
Andy Tindel
Cindy Tisdale
Jennifer Tomsen
Enrique Torres
James Tracy
Dale Trimble
Joseph Trombley
Lisa Vance
Hon. Phil Vanderpool
Santos Vargas
Lauren Varnado
Gabe Vick
Kevin Vincent
Peter Vogel
Vuk Vujasinovic
Mark Walker
Daniel Walter
Roger Walton
Wesley Ward
Leslie Warren
Corey Wehmeyer
Casie Wenmohs
James Wetwiska
Robert White
Scott Wiehle
Angelina Wike
Walter Williams
Wade Williams
Jett Williams
Chad Wilson
Wendy Wilson
Frank Winston
Roland Witherspoon
Carol Wood
William Worthington
Randel Young
George Young
Francisco Zabarte
Zeb Zbranek
Ryan Zehl
Richard Zembek
Lewis Zirogiannis

Employment Law

HOW WILL THE END OF *CHEVRON* DEFERENCE IMPACT LABOR AND EMPLOYMENT LAW?

BY AMANDA E. BROWN & CHRISTOPHER J. McKINNEY

FOR FORTY YEARS, COURTS HAVE APPLIED *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) and deferred to an administrative agency's reasonable interpretation of ambiguous regulatory provisions. On June 28, 2024, in *Loper Bright v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overruled *Chevron*, holding that courts should not defer to an agency's interpretation of a statute solely because the statute is ambiguous. Rather, courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id*. at 2273. Below, we apply both an employee and employer lens to analyze the impact of *Loper Bright* on the regulatory agendas of the administrative agencies responsible for enacting federal labor and employment laws – the Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board. We also discuss the impact of *Loper Bright* on the Federal Trade Commission's recent efforts to restrict non-compete agreements. Finally, we analyze what strategies administrative agencies may use in response to *Loper Bright*.

Courts now have greater latitude to independently interpret the FLSA, leading to potential inconsistencies and heightened uncertainty for businesses and workers relying on contractor arrangements.

The Department of Labor
Overtime Rules

The elimination of *Chevron* deference fundamentally alters the Department of Labor's ("DOL") ability to enforce overtime regulations under the Fair Labor Standards Act ("FLSA"). *Loper Bright* signals a major shift, and litigants and lower courts – particularly in Texas – have taken note. That said, the DOL's ability to enforce overtime regulations has been under attack, with success, even before *Loper Bright*.

In 2016, the U.S. District Court for the Eastern District of Texas blocked the DOL's overtime rule, which sought to raise the salary threshold for exempt employees in *Nevada v. U.S. Dep't of Labor,* 275 F. Supp. 3d 795 (E.D. Tex. 2017). In 2017, under the Trump administration, the DOL rescinded the contested overtime rule and replaced it with a revised rule setting a lower salary threshold for exempt employees.

Then, in 2024, the Biden administration's DOL issued a new overtime rule that again sought to significantly raise the salary threshold for exempt employees. The State of Texas challenged the rule and argued the DOL had exceeded its statutory authority to raise the salary threshold. The court agreed, again, and noted that *Loper Bright* reasoned that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Texas v. United States Department of Labor et al.,* No. 4:2024-cv-00499, (E.D. Tex. Nov. 15, 2024) (ECF No. 76). The district court vacated the DOL's 2024 rule nationwide, reinstating the lower 2019 salary thresholds. Now, we will have to wait and see what the new administration decides to do with this issue. It is clear, however, that the DOL will face greater scrutiny.

Independent Contractors

The classification of independent contractors is another area under scrutiny. The DOL's guidance aimed at distinguishing contractors from employees – a significant issue in the gig economy – has also been undermined by the end of *Chevron* deference. Courts now have greater latitude to independently interpret the FLSA, leading to potential inconsistencies and heightened uncertainty for businesses and workers relying on contractor arrangements. Companies operating across state lines may encounter varied judicial rulings on contractor status, increasing compliance complexity and the potential for litigation.

Tip Credit

The FLSA's tip credit provisions, which allow employers to pay tipped workers below minimum wage provided tips make up the difference, face similar challenges. Previously, DOL guidance on tip pooling and related issues enjoyed

judicial deference. Without *Chevron*, courts will reassess these interpretations, potentially reshaping compensation structures for tipped employees. This could lead to varying standards for tip pooling practices, with some jurisdictions potentially imposing stricter compliance requirements, while others may relax existing rules.

A particularly contentious aspect of tip credit regulations is the "80/20 rule," which dates to 1988 and limits employers from applying the tip credit if employees spent more than 20% of their workweek on non-tip-producing tasks. In 2021, the DOL expanded this framework with the "80/20/30 rule," adding a provision that employers could not claim the tip credit if tipped employees performed non-tip-producing tasks for more than 30 continuous minutes. In August 2024, the Fifth Circuit refused to give the DOL discretion as to its interpretation and vacated the 80/20 rule in its entirety, finding it conflicted with the FLSA's clear statutory text. *Rest. Law Ctr. v. U.S. Dep't of Labor*, 120 F.4th 163 (5th Cir. 2024). The Fifth Circuit's ruling conflicts with a December 2024 district court decision holding that the 80/20 rule survives scrutiny even without heightened *Chevron* deference. *See Green v. Perry's Rests. Ltd*, Civil Action 21-cv-0023-WJM-NRN, 2024 WL 4993356 (D. Colo. Dec. 5, 2024), This leaves employers and employees with a fragmented regulatory landscape, with the applicability of the 80/20 rule varying depending on the jurisdiction.

ESG Investing

DOL regulations permitting the consideration of Environmental, Social, and Governance ("ESG") factors in retirement plan investments are also at risk. Courts may now question whether the DOL has the statutory authority to allow such considerations, potentially invalidating rules that have sparked contentious debate. This shift could also lead to uneven judicial rulings and prolonged litigation. Additionally, plan fiduciaries may face heightened uncertainty regarding their ability to incorporate ESG factors, potentially affecting investment strategies and participant outcomes.

The Equal Employment Opportunity Commission

The impact of the end of *Chevron* deference on the Equal Employment Opportunity Commission ("EEOC") is multi-faceted. With respect to the EEOC's guidance documents, employers have long argued that such guidance is non-binding and should be granted limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) – a lower level of deference by which courts defer to an agency's interpretation to the extent it is persuasive. Because this argument is not tied to *Chevron*, the ability to raise it is not impacted by *Loper Bright*. Therefore, employers will likely continue to challenge the EEOC's guidance as creating employer obligations that are not part of the federal employment statute at issue. For example, the EEOC's 2024 Enforcement Guidance on Harassment in the Workplace, which addresses harassment based on sexual orientation and gender identity, has been challenged by employers as an improper expansion of the scope of Title VII of the Civil Rights Act of 1964, and as an attempt to create new rules without going through the notice and comment process.

With respect to the EEOC's rulemaking, the EEOC typically engages in less rulemaking than the DOL and therefore the impact of the demise of *Chevron* on the EEOC is likely not as great. In addition, several of the federal employment statutes enforced by the EEOC expressly grant the EEOC rulemaking authority. These statutes include the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act. As a result, courts will likely continue to give the EEOC deference when it issues rulemaking with respect to those statutes. Employers may, however, still challenge the EEOC's rulemaking with respect to those statutes as going beyond the scope of the rulemaking granted to the EEOC by Congress. Employers have already raised such arguments with respect to the recent PWFA rule, arguing the rule is inconsistent with the wording of the PWFA. Given the increased scrutiny that courts are now applying to agency rulemaking, employers may have a more receptive audience when asserting these types of *ultra vires* arguments.

Employers will have the greatest likelihood of success challenging the EEOC's rulemaking when it is asserted with respect to a statute where no rulemaking authority has been delegated to the EEOC. For example, the Biden administration expressed its intent to issue a pay data collection rule in early 2025 via the EEOC's enforcement of Title VII. Such a rule, which would increase the information collected as part of employers' annual EEO-1 report, will likely be challenged by employers who argue it is improper rulemaking post-*Chevron*. However, given the change in administration, it is unclear whether the rule will ever be proposed.

The National Labor Relations Board

The National Labor Relations Board ("NLRB") has certainly been subject to numerous challenges by employers lately. The majority of the challenges, however, have focused on whether the NLRB's structure is constitutional following the Supreme Court's ruling in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), not whether its rulemaking is proper post-*Chevron*.

Employers may be relying on *Jarkesy*, not *Chevron*, to challenge the NLRB because the NLRB's rulemaking does not derive from *Chevron*. Rather, the NLRB's rulemaking originated in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), where the Supreme Court deferred to the NLRB's interpretation of the National Labor Relations Act's definition of "employee" because the factual record supported the interpretation and it had a reasonable basis in law. Following *Hearst*, the Supreme Court reasoned in *NLRB v. Iron Workers Local 103*, 434 U.S. 335, 350 (1978), and *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979), that the NLRB should receive "considerable deference" because Congress gave the NLRB primary responsibility for interpreting the National Labor Relations Act and effectuating national labor policy.

Despite the NLRB's rulemaking deriving from *Hearst*, not *Chevron*, employers may still use *Loper Bright* to challenge the NLRB's rulemaking. In *Loper Bright*, the Court reasoned that an agency's rulemaking should receive greater deference when it is issued close in time to the enactment of the statute being interpreted and is consistent over time. *Loper Bright*, 144 S. Ct. at 2263. Employers can cite such reasoning when challenging the NLRB's recent rulemaking that departs from prior practice. Employers may use this ability to challenge the NLRB's recent joint employer rule, "quickie" election rule, and more.

The Occupational Safety and Health Administration
Heat Stress Rule
The Occupational Safety and Health Administration's ("OSHA") forthcoming heat stress rule, designed to protect workers from heat-related illnesses, exemplifies the challenges agencies face post-*Loper Bright*. Scheduled for release in mid-2025, this rule will likely undergo intense judicial scrutiny, with courts evaluating OSHA's statutory authority and the rule's compliance with legislative mandates. Such challenges could delay implementation and weaken worker protections. The rule is particularly critical for industries like construction and agriculture, where workers face elevated risks of heat-related illnesses. Conversely, employers will be relieved from complying with an expensive and, arguably, ambiguous rule.

Worker Walk Around Rule
OSHA's Worker Walk Around Rule, which permits third parties to accompany inspectors during workplace evaluations, is currently facing similar legal challenges. In April 2024, several business associations filed a lawsuit arguing that the rule exceeds OSHA's statutory authority and violates employers' property rights. *See Chamber of Com. v. Occupational Safety & Health Admin..*, No. 6:2024-cv-00271 (W.D. Tex. May 21, 2024). The plaintiffs claim that the rule constitutes an overreach of OSHA's power. Employers have also been concerned that the presence of third parties could increase union organizing by allowing union representatives to participate in inspections. The outcome of this case and others that will likely be filed around the country will significantly impact OSHA's enforcement capabilities.

The Federal Trade Commission
Non-Compete Rule
The Federal Trade Commission's ("FTC") non-compete rule, proposed in January 2023, aims to prohibit employers from entering into non-compete agreements with workers, with limited exceptions, to enhance labor mobility and promote fair competition. This rule would apply broadly to nearly all workers, including independent contractors and interns and would represent a major sea change in U.S. labor relations. The rule was initially scheduled to go into effect in 2024, however, in August of 2024, the U.S. District Court for the Northern District of Texas ruled that the FTC lacked authority to enforce its rule, prompting the agency to appeal to the Fifth Circuit. *See Ryan LLC v. Fed. Trade Comm'n*, Civil Action 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024). While on appeal, the rule remains unenforceable. As a result, employers continue to be able to restrict employees' post-termination conduct, in accordance with state law.

Broader Impact of *Loper Bright*
The Supreme Court's decision to end *Chevron* deference signifies a profound transformation in labor and employment law. By shifting interpretive authority from federal agencies to the judiciary, the ruling exposes key regulations to heightened scrutiny and legal challenges. Agencies like the DOL, EEOC, FTC, NLRB, and OSHA must now navigate a landscape where their regulatory actions are subject to rigorous judicial review. Employers, meanwhile, gain new avenues to contest agency rules, potentially disrupting long-standing regulatory frameworks.

With administrative agencies' rulemaking set to receive less deference from the courts, agencies may shift to establishing their positions through litigation. A greater focus on administrative litigation could lead to greater circuit splits on employment statutes. As a result, employers may be safer now from regulatory overreach and instead face increased uncertainty in areas such as wage protections, workplace safety, and equitable employment practices.

Agencies may also elect to focus more on non-binding guidance in lieu of rulemaking. Such an approach would still

allow agencies to present their interpretation of employment statutes and allow litigators to cite the guidance in support of arguments but would be less likely to receive deference from the courts and provide less certainty for employers.

In sum, while the future of the agencies is unclear, it is clear that in the absence of statutory clarity, employers and employees will need to adapt to a more fragmented and litigious environment.

Amanda E. Brown, a partner with Fisher & Phillips, LLP, represents employers nationwide in disputes involving federal and state employment laws, including claims of discrimination, retaliation, wrongful discharge, violations of leave and wage and hour laws, whistleblower allegations, and restrictive covenants.

Christopher J. McKinney, an attorney with the McKinney Law Firm in San Antonio, has represented individuals throughout the State of Texas in employment rights cases for more than 25 years. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. He currently serves as a member of the Board of Directors for the Texas Employment Lawyers Association. ★

EMPLOYEE OR INDEPENDENT CONTRACTOR? NAVIGATING THE DEPARTMENT OF LABOR'S STANDARD

BY EVA W. TURNER & STEPHEN KENNEY

THE ANSWER TO THE QUESTION OF WHETHER A WORKER is an employee or independent contractor can be deceptively complicated. While many businesses and freelance workers may desire to classify workers as independent contractors to maintain flexibility over the relationship, that desire is not enough to ensure compliance with the law.

One of the complicating factors in determining worker classification is that each distinct government agency has its own approach to worker classification. For instance, Texas employers could be subject to a worker classification review from the Texas Workforce Commission under the Texas Unemployment Compensation Act ("TUCA"), the U.S. Department of Labor ("DOL") under the Fair Labor Standards Act ("FLSA"), and the Internal Revenue Service under the Internal Revenue Code ("IRC"). Each respective government agency has its own administrative review process developed through its respective agents' experience and administrative decisions. This article will focus on the DOL's worker classification analysis under the FLSA because this review standard has most recently changed.

One of the complicating factors in determining worker classification is that each distinct government agency has its own approach to worker classification.

The FLSA establishes minimum wage, overtime pay, and recordkeeping requirements for covered, non-exempt employees. Employers are required to correctly classify their workers as employees or independent contractors because this classification determines whether the FLSA's requirements apply. For example, if a worker is found to be incorrectly classified as an independent contractor under the FLSA, then the worker's newly determined employer may be held liable for paying any unpaid wages, such as wages for overtime, to the newly determined employee under the FLSA.

Under the FLSA, a worker is determined to be an employee based upon the economic reality of the working relationship. A worker is considered an employee when the worker is economically dependent upon the employer for work. The DOL's economic reality test is currently under the spotlight because its interpretation has recently changed from a 2021 rule that was considered to be more contractor determinative to a 2024 rule that is considered to result in more employment determinations.

On October 11, 2022, the DOL unveiled a new proposed rule to replace and rescind the prior worker classification rule published in January 2021. The DOL issued the new final rule on January 9, 2024, and it went into effect on March 11, 2024. The January 2021 rule created a more streamlined FLSA worker classification analysis based upon the economic reality test. The 2024 rule that went into effect on March 11, 2024, put in place a more complex "totality of the circumstances" standard for the economic reality test. Both the 2021 and 2024 worker classification rules relied upon an established set of factors for the DOL to consider when determining whether a worker is an independent contractor or employee.

The streamlined approach of the 2021 rule elevated two core factors in the worker classification analysis – (1) the nature and degree of control over the relevant work and (2) an individual's opportunity for profit or loss. Additionally, the 2021 rule sought to minimize the three remaining factors – (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship; and (3) whether the work is part of an integrated unit or production. The 2021 rule was generally considered to be more contractor determinative.

The DOL later found this streamlined approach to be in tension with case law and the DOL's prior guidance, so it proposed the 2024 rule. Specifically, the DOL took issue with the 2021 rule because:

- The 2021 rule's designation of two "core factors"—control and opportunity for profit or loss—as having

a greater predetermined weight in the analysis.
- The 2021 rule's consideration of a worker's investments and initiative only as part of the opportunity for the profit or loss factor instead of a more comprehensive review under this factor.
- The 2021 rule's prohibition against considering whether a worker's duties performed were central or important to the potential employer's business.

Under the 2024 rule, the DOL returned to a six-factor totality of the circumstances test: with no single factor taking preeminence over the others during the analysis. The six factors under the current rule are:

- **Opportunity for profit or loss by the worker.** This factor examines whether the worker has the potential to earn more or less than the agreed-upon compensation based on their performance. The DOL considers the following when determining if the opportunity for profit or loss exists: whether the worker determines or can meaningfully negotiate compensation; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.
- **Worker's investment in equipment or facilities.** This factor assesses whether the worker has made significant investments in tools, equipment, or facilities that are necessary to perform their work. A worker's investments that are more entrepreneurial in nature indicate that the worker is an independent contractor. Capital investments that help improve the worker's ability to perform services for other clients are also indicative of an independent contractor relationship.
- **Permanence of the work relationship.** This factor considers the duration and stability of the worker's relationship with the employer. A permanent relationship indicates that the worker is an employee. An independent contractor agreement may indicate that the contractor relationship is not permanent, but the agreement does not control the permanence factor's outcome. For example, the agreement may state that the contract only lasts for one year, but if the contract is continually renewed each year, then it is likely that the work relationship is permanent.
- **Degree of control by the employer over the worker.** This factor examines the extent to which the employer controls the worker's work hours, work location, and methods of work. The more independence granted to the worker to set his or her own schedule, perform services for other businesses, and operate without oversight indicate that there is less control exercised over the worker and the worker is thus more likely to be considered an independent contractor. "Control" does not need to be exercised to indicate an employment relationship. A worker may be deemed an employee if the business has the right to exercise control over the employee, even if it chooses to reserve its control instead of exercising it.
- **Whether the work is integral to the employer's business.** This factor considers whether the worker's tasks are essential to the employer's operations or if they could be outsourced without significantly affecting the business. This factor is not based on the individual services of any one worker, but instead is focused on the services themselves without regard to the worker. If those services are considered integral to the business, then the worker performing those services is more likely to be found to be an employee.
- **Worker's skill and initiative.** This factor examines whether the worker possesses specialized skills or knowledge that are essential to his or her work, and whether he or she can exercise independent judgment in performing tasks. This factor does not hinge solely upon whether a worker has a specialized skill because both employees and contractors can be highly skilled specialized professionals. Instead, this factor is determined by how a specialized skill is utilized. A specialized skill that is used by a worker in his or her own volition is more indicative of an independent contractor arrangement.

No one single factor of the six factors is determinative, but instead each factor is given equal weight which makes the analysis complex because it is multi-faceted, and the factors must be balanced out to make a worker classification determination. The analysis is also individualized since it is based upon a worker's specific facts and circumstances. The 2024 rule also allows the DOL to bring in other additional factors that are relevant to its worker classification determination. These "additional factors" may be any factors that may help determine whether the worker has its own independent business or if the worker is economically dependent upon the business.

The final rule has been challenged in multiple federal courts. The general arguments are two part. The first part is procedural. The procedural argument is that the final rule violates the Administrative Procedure Act because the DOL exceeded its rulemaking authority. The second part is based upon the interpretation of the FLSA. The FLSA argument relies upon previous judicial interpretations of the FLSA to say that the final rule is contrary to the established judicial precedent. The outcome of these cases is uncertain, and one has been dismissed due a lack of standing.

The future of the rule itself is also uncertain at this point. The 2021 rule was put in place by the DOL while it was under the executive leadership of President Trump. The 2024 rule was put in place by the DOL while it was under the executive leadership of President Biden. It is conceivable that the DOL will propose a new worker classification rule that reverts to a variation of the 2021 rule under the second iteration of the President Trump administration.

Given the degree of uncertainty surrounding the DOL's worker classification rule, what should businesses that engage contractors do?

- First, they should not presume that the rule will automatically revert to the 2021 version. The 2024 rule has been finalized and it may be relied upon by the DOL to assess FLSA worker classification violations.
- Second, businesses may want to evaluate their existing and future worker relationships and independent contractor agreements and make necessary changes as needed to be in compliance with the 2024 rule. The 2024 rule is considered to be more employment relationship determinative so if a business's current contractor relationships are in good standing under the 2024 rule, then they will likely remain so if a new rule is finalized that reverts to the 2021 standard. Businesses should also remember that there are multiple exceptions to the FLSA that exempt certain types of workers from the FLSA so even if a worker may be considered an employee under the economic reality test, the employer's liability may be limited by an FLSA exception.
- Third, while the DOL's worker classification analysis is separate and distinct from other government agencies' analysis, the analyses of the other agencies may be considered to rhyme with the DOL's analysis. Thus, it is advisable to consider the worker classification standards and tests under other relevant employment and tax law while reviewing contractor agreements from the FLSA perspective.
- Lastly, businesses will have to monitor notices from the DOL closely to ensure that they are up to date with the current worker classification review standard under the new presidential administration.

In the end, it is important for businesses and their advisors to remember that worker classification crosses a gamut of employment and tax laws. The DOL's rule focuses only on the FLSA. The DOL's rule is also an interpretive rule meaning that it is the DOL's interpretation of worker classification under the FLSA. Courts can, but are not required to, grant deference to the DOL's interpretation. Existing case law continues to control regardless of the DOL's current or future interpretation because it is courts – and not regulatory agencies – that create binding legal precedent.

Eva W. Turner, a shareholder at Ogletree Deakins, is Board Certified in Labor and Employment Law through the Texas Board of Legal Specialization.

Stephen Kenney, an Associate at Ogletree Deakins, specializes in counseling clients on employment-related tax issues.★

DON'T SKIP A BEAT: HOW TO KEEP DIVERSITY IN THE PROFESSION AND COMPLY WITH THE LAW[1]

BY KATIE ANDERSON

SO AS NOT TO BURY THE LEDE, I WILL CUT TO THE CHORUS. Recent statutory enactments and case law challenge DEI programs by expressly prohibiting the consideration of race, sex, and/or other protected characteristics as factors in decision-making (despite the fact that those metrics were historically used for centuries to benefit the majority). However, neutral factors that reveal the benefit and value of diverse voices can and should be used instead to meet the lawful and necessary goal of attracting and retaining a diverse workforce. Note, this means that instead of giving weight to an applicant being a woman, programs should instead go deeper and evaluate why the applicant's lived experience qualifies her to be selected (for college admission, scholarships, employment, and more). The focus is then appropriately on the applicant's qualifications, rather than simply checking a box.

Why Diversity in the Profession Matters to Litigators

If you hire a diverse array of lawyers, you are potentially more likely to be able to connect with a diverse array of jurors. Study after study shows the value in creating and maintaining diverse talent, including attorneys from a variety of races, religious traditions, cultures, geographies, political backgrounds, countries of origin, gender identities, ages, and more. Indeed, litigators now have to relate to jurors spanning four or more generations. While what unites us is arguably stronger than what divides us, successful lawyers understand their audiences and their differing viewpoints, and the smartest way to do that is to curate a team with many voices and with members able to understand different points of view. To persuade a finder of fact that the facts your side presents are thorough, accurate, and believable, your witnesses and exhibits need credibility. That credibility can be built in a number of ways, but good rapport is non-negotiable and often based on relatability. Two obvious ways to be relatable are to share a significant commonality or to do your homework to comprehend how another person might be thinking so you tell your client's story in a way that will be heard.

Instead of giving weight to an applicant being a woman, programs should go deeper and evaluate why the applicant's lived experience qualifies her to be selected (for college admission, scholarships, employment, and more). The focus is then appropriately on the applicant's qualifications, rather than simply checking a box.

Why the Discord?

The reasons that DEI initiatives are under legal attack, as evidenced through lawsuits challenging them and statutes precluding them, are as varied as the different programs themselves. Misunderstanding what it means to seek diverse talent, address inequities, and proactively include individuals from underrepresented groups may motivate some of these challenges. However, one reason that strikes a chord with many is the overly broad (and at times offensive) use of racial or ethnic groups that presumes their members are all socially or economically disadvantaged individuals. To be clear, providing opportunities for those with social, economic, or other hurdles is lawful (moral, ethical, and commendable), but the method to do this is not by assumption but by obtaining meaningful information from candidates, participants, and employees.

What's the New Cadence?

When SCOTUS ruled in 2023 that use of race by public institutions or those receiving public funds as a part of a holistic process for college admissions violated the Equal Protection Clause,[2] the tempo of change accelerated. Litigants filed a great crescendo of cases across the country, resulting in a growing ensemble of rulings that expressly disallow the use of racial preferences in primary and secondary schools,[3] minority- and women-owned business programs,[4] internships,[5] business grants,[6] scholarship programs to address teacher shortages,[7] federal government programs,[8] corporate governance and board composition,[9] and more. The repertoire will likely grow as cases make their way through state and

federal courts across the country.

However, since 1964 when Title VII was enacted, it has been the law in hiring that race, sex, etc., cannot be the basis of a job decision (e.g., hiring, firing, promoting), and the EEOC has long told us that race is NEVER a bona fide occupational qualification.[10] Presumptively, then, not all that much has changed in the employment realm, where employers often find success seeking scores of diverse talent. For those private employers who were giving preference based on characteristics, many have been targeted by legal nonprofits who have filed civil rights complaints with the EEOC (for hiring practices) for promoting DEI in hiring, citing *Muldrow v. City of St. Louis*, which held that employers violate Title VII when they change the terms or conditions of employment because of race, sex, religion, or national origin.[11] Not only has using those characteristics been unlawful for many years, but companies that do so are now being held accountable and need to update their approach.

Why Employers Shouldn't Scale Back Too Much Yet

Proactively seeking a diverse array of candidates has been and still is allowed to create a harmonized workplace that empowers those from underrepresented groups to make their debut and perhaps even steal the show. While Executive Order 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 29, 2025) and Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 31, 2025) seem to create some dissonance, employers can remain upbeat knowing these directives to executive branch agencies only seek to curtail *illegal* discrimination and are currently enjoined pending litigation.[12] Even assuming those orders become effective, this article offers currently *legal* ways that employers can continue to compose their arrangement of employees to prevent discrimination and create a polyphonic composition.

1. Build a Pipeline of Talent

As an initial step, expand your applicant pool to consider new recruiting targets, such as historically Black colleges and universities (HBCU), minority industry groups, and training programs focused on creating opportunities for veterans or qualified individuals with a disability. Recruiters can build partnerships with organizations that focus on providing access to talent from underrepresented groups. Employers can and should aim to reach and even target those who have not been included in the past, especially using bases that are unrelated to protected classes (such as zip code, first generation status, untapped geographic location from another part of state or another country, etc.).

2. Explore Mansfield or Other Certifications

Interview a wide array of candidates - including women and minorities - before hiring leaders, and then hire the most qualified, which will likely include individuals from groups previously underrepresented. Then, do it over and over. One official program is Mansfield Certification,[13] which can be a powerful tool if used thoughtfully. A caveat is that organizations must resist checking off "hiring diverse candidates" from the "to do" list, which is never a one-and-done exercise but an ongoing commitment. Additionally, your organization should evaluate any program or certification process to ensure it meets your needs.

3. Ask Better Questions

Rather than using race or sex as a lazy shortcut by asking questions implicating those characteristics as a proxy, instead ask an individual about their experiences that make them gritty and resilient and thus great candidates. For example, inquire along these lines: "Can you tell me about a challenging situation you faced at work or in your personal life, how you approached it, and what the outcome was?" This question allows the candidate to demonstrate their problem-solving abilities, persistence, and how they handle adversity, providing insight into their capacity to work through challenges.

4. Explore Resources that Ignite Creative Ideas

At the risk of revealing my own bias, I believe the Dallas Bar Association Equality Committee's *Toolkit to Promote and Enhance Diversity, Equity, Inclusion, and Belonging (DEIB) of Lawyers in Dallas, Texas* may be something to consider for review to see which ideas and resources can help move the needle for organizations seeking to lawfully attract and retain diverse talent. The Toolkit has sections that may or may not fit your organization's goals, and leaders should take what they like and leave the rest.

5. Will DEI Training Get You in Trouble?

There is no doubt that all training needs to be thoughtfully synchronized to meet an organization's needs while not alienating a portion of its workforce or running afoul of the law. The Tenth Circuit rejected a Title VII challenge to the Colorado Department of Correction's mandatory DEI training for prison staff because there was no evidence of a hostile work environment that was severe and pervasive.[14] Note, however, that the court did not reach the equal protection

argument because the plaintiff lost standing after he was no longer employed. Implicit or unconscious bias training that does not focus on one group or intend to shame a class of people should withstand legal challenge, and race- and sex-neutral policies and training are the best bet to focus on dignity and respect for all in the workplace. It is equally offensive to say stereotypical things about men compared to women, for instance.

6. Review Policies and Procedures to Be Anti-Discriminatory

Chances are that most companies and law firms have strong anti-discrimination language in their policies and procedures, but it never hurts to review with a fresh set of eyes in these changing times. Bylaws, too, can use a review and may have gendered terms that can be eliminated, for example.

7. Insure Against Risks Where You Can

Employment practices liability insurance (EPLI) can protect against some employment-related claims such as wrongful termination, discrimination, and harassment. So, it may be time to review your policies internally or with your broker or agent.

The Grand Finale

The truth is that nothing about this work or the law surrounding it will stagnate (or allow a long fermata). Employers will need creative inspiration to lawfully and cleverly craft programs to attract and retain diverse employees. The trick is to avoid the "same song, second verse" patterns to break cycles of thought and try new initiatives.

When we understand, acknowledge, and embrace that which makes us different, the voices on our teams can create harmony, even when we have to pause for a solo of those who march to the beat of a different drum. Stay courageous and keep working lawfully to ensure your employees have the tools and resources to succeed on a level playing field and perhaps even perform to a standing ovation.

Katie Anderson, a partner at Carrington Coleman, represents schools, housing authorities, cities, and youth organizations on employment issues, particularly the lawful use of DEI, investigations, and policies and procedures. She is the former co-chair of the Dallas Bar Association Allied Bars Equality Committee and gives a special thanks to her brilliant firm colleague and treasured friend Andrea Reed for assisting with the research contained in this article.★

---

[1] As drum major of her high school marching band and a proud former member of the University of Texas Longhorn Band (the Showband of the Southwest), Katie believes music is the most powerful tool any of us have for expression. As such, all references to musical terms are intentional and intended to elicit feeling. Afterall, "Music is the shorthand of emotion." — Leo Tolstoy.

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

[3] *See, e.g.*, *Chinese Am. Citizens All. of Greater New York v. Adams*, 116 F.4th 161 (2d Cir. 2024) (finding the New York City Department of Education's admission policy for its specialized high schools discriminated against Asian Americans); *but see Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 883 (4th Cir. 2023) (rejecting challenge to admissions policy of Fairfax County, Maryland's science and technology magnet school, finding no express racial preference used).

[4] *See Mid-Am. Milling Co., LLC v. United States Dep't of Transp.*, No. 3:23-CV-00072-GFVT, 2024 WL 4267183, at *1 (E.D. Ky. Sept. 23, 2024) (granting preliminary injunction against the Department of Transportation's Disadvantaged Business Enterprise program due to its use of racial and gender classifications to award federal funds for transit projects); *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-CV-00278-P, 2024 WL 965299 (N.D. Tex. Mar. 5, 2024) (finding federal Minority Business Development Agency program violates the Equal Protection Clause by providing services to specific historically disadvantaged racial and ethnic groups).

[5] *See Am. Alliance for Equal Rights v. Zamanillo*, No. 1:24-CV-00509 (D.D.C. dismissed Mar. 26, 2024) (challenging the constitutionality of an internship program with the National Museum of the American Latino that sought to increase the number of people of Hispanic heritage working in museums).

[6] *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024) (explaining how the Fearless Fund, a venture capital fund owned by women of color, violated Section 1981 by offering grants—"contracts"—only to other businesses owned by women of color).

[7] *Am. Alliance for Equal Rights v. Pritzker*, No. 3:24-CV-03299 (C.D. Ill. filed Oct. 22, 2024) (challenging Illinois's Minority Teachers of Illinois Scholarship Program, which awards scholarships only to non-white students seeking to become K–12 teachers).

[8] *See Strickland v. U.S. Dep't of Agric.*, No. 2:24-CV-60-Z, 2024 WL 2886574 (N.D. Tex. June 7, 2024) (granting preliminary injunction against the USDA's Emergency Relief Program 2022 because it targeted federal disaster relief funds to "socially disadvantaged famers"); *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023) (finding unconstitutional the USDA and the Small Business Administration's preferential contracting with minority-owned business).

[9] *See Alliance for Fair Bd. Recruitment v. Weber*, No. 2:21-CV-01951-JAM-AC, 2023 WL 3481146, at *2 (E.D. Cal. May 15, 2023) (striking down California state law that required diversity on corporate boards of companies headquartered in the state, finding express use of racial and gender quotas was facially unconstitutional); *but see Alliance for Fair Bd. Recruitment v. SEC*, 125 F.4th 159 (5th Cir.

2024) (en banc) (reversing panel decision that upheld a NASDAQ rule requiring board-level diversity reporting, finding there was no state action as required to show an Equal Protection Clause violation).

[10] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1982-2, CM-625 BONA FIDE OCCUPATIONAL QUALIFICATIONS (1982), available at: https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications.

[11] *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024).

[12] See Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, No. 1:25-CV-00333-ABA, 2025 WL 573764 (D. Md. Feb. 21, 2025), opinion clarified sub nom. Nat'l Ass'n of Diversity Officers in Higher Educ., et al., Plaintiffs, v. Donald J. Trump, et al., No. 25-CV-0333-ABA, 2025 WL 750690 (D. Md. Mar. 10, 2025) (enjoining both Executive Orders in large part) and Nat'l Urb. League, et al. v. Trump, et al., No. 1:25-cv-00471, (D.D.C. filed Feb. 19, 2025) (preliminary injunction hearing currently scheduled for March 19, 2025).

[13] Diversity Lab, *Mansfield Certification – What We Do*, https://www.diversitylab.com/what-we-do/mansfield-certification/ (last visited Feb. 3, 2025).

[14] *Young v. Colorado Dep't of Corr.*, 94 F.4th 1242 (10th Cir. 2024).

DESPITE THE FTC'S EFFORTS, NONCOMPETE AGREEMENTS ARE STILL MOSTLY STILL ENFORCEABLE

BY CLARA (C.B.) BURNS

THE YEAR 2024 COULD HAVE PRESENTED A SEA CHANGE in the law regarding employment noncompete agreements. Traditionally a matter of state law, noncompete agreement enforcement can vary widely depending on applicable state law. In April 2024, however, the Federal Trade Commission ("FTC") issued a rule federalizing the law on employment noncompete agreements and, most significantly, banning their use in most cases on a nationwide basis. This rule followed a 2021 Biden Administration Executive Order on Promoting Competition in the American Economy in which President Biden encouraged the FTC to exercise its rulemaking authority to diminish the use of noncompete clauses perceived to limit worker mobility. The resulting FTC rule broadly prohibited the use of noncompete agreements for the vast majority of American workers. Exceptions included existing noncompete agreements for senior executives and also for noncompete agreements entered into in connection with the bona fide sale of a business.

In April 2024, the Federal Trade Commission issued a rule federalizing the law on employment noncompete agreements and, most significantly, banning their use in most cases on a nationwide basis.

The rule proved to be short-lived – at least for now. On August 20, 2024, on the eve of the rule's effective date of September 4, 2024, the United States District Court for the Northern District of Texas ruled that the FTC cannot enforce it rule, concluding that the FTC exceeded its statutory authority in implementing the rule and that the rule is arbitrary and capricious. The ruling enjoined the enforcement of the rule on a nationwide basis. The FTC is appealing the decision to the Fifth Circuit Court of Appeals.

So for now, the law regarding noncompete agreements is what it has been – a hodge podge of state laws that range from banning them in broad fashion similar to the FTC rule, to more liberal enforcement of noncompete agreements provided they contain reasonable limitations as to the time, geographic territory, and scope of activity in which competition can be limited.

While not a survey of all noncompete laws, this article discusses state laws in a broader fashion, focusing specifically on Texas law on employment noncompete agreements, as well as the FTC rule, the Northern District's injunction of that rule, and what the future may hold.

A. State Law

A noncompete agreement is, at its core, a contract. And as a contract (not considering the FTC rule), a noncompete agreement is subject to state contract law, as well as any specifically applicable state statutes. Fundamentally as a contract, a noncompete agreement must meet the requirements of a valid, enforceable contract -- there must be an offer to do or not do something, acceptance of that offer, and consideration. In most states, noncompete agreements, however, are also viewed as restraints on trade and as a result, most states have enacted specific statutory requirements regarding the terms and limits of these agreements that otherwise preempt normal contract law.

1. Texas Law

Passed in 1989 and amended in 1993, the Texas Covenant Not to Compete Act ("Act") establishes the criteria for the enforceability of all non-compete agreements in Texas. Tex. Bus. & Com. Code §15.50-.52. Its passage, according to the Texas Supreme Court, was intended to make enforcement of reasonable noncompete agreements more likely, reversing the trend prior to enactment of courts refusing to enforce such agreements. *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 654 (Tex. 2006).

Under the Act, a noncompete agreement is enforceable if "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint that is necessary to protect the goodwill or

other business interest of the promise." Tex. Bus. & Com. Code § 15.50 (a). The Act carves out physician noncompetes from the general rule. Physician noncompete agreements are allowed only if they contain a reasonable buyout and do not deny the physician access to patients that they have seen within the last year. *Id*. 15.50 (b).

Enforceability of agreements under the Act have primarily focused on two areas: whether the agreement is "ancillary" to an otherwise enforceable agreement, and whether the limitations as to time, geographical area and scope of activity are reasonable. As interpretation of the Act has evolved over the years, a covenant is "ancillary to or part of" an enforceable agreement if (1) the consideration given by the employer in the otherwise enforceable agreement gives rise to the employer's interest in restraining the employee from competing; and (2) the covenant is designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement. *Sheshunoff,* 209 S.W.3d at 649-50. An example of an enforceable agreement under current law would be where the employer gives or promises to give an employee confidential information, such as trade secrets or customer lists, and the employee, in return, promises not to compete with the employer for a two-year period within a specific radius of the employee's employment. The otherwise enforceable agreement is the employer's agreement to provide confidential information to the employee. In turn, a reasonable restriction on the employee's ability to compete against the employer will be considered valid because the restrictions are necessary to protect the consideration – the confidential information – that the employer provided. Stated differently, as long as the consideration provided by the employer is reasonably related to an interest worthy of protection, a noncompete will be valid. *Marsh USA, Inc. v. Cook,* 354 S.W.3d 764, 775 (Tex. 2011). Other types of consideration beyond confidential information that courts have found legitimate include (1) specialized training, *Sheshunoff*, 209 S.W.3d at 649; (2) stock options that are exercised, *Marsh*, 354 S.W.3d at 775; and (3) access to business goodwill, *Republic Servs., Inc. v. Rodriguez*, No. 14-12-01054-CV, 2014 WL 2936172 at *6 (Tex. App. June 26, 2014).

A reasonable restriction on the employee's ability to compete against the employer will be considered valid because the restrictions are necessary to protect the consideration – the confidential information – that the employer provided.

Analysis of the reasonableness requirements of noncompete agreements typically results in a fact-specific inquiry that focuses on factors such as the nature of industry or business of the employer and the specific position held by the restricted employee. There is no uniform geographical requirement, for example, although a reasonable area will generally be considered the territory in which the restricted employee worked for the employer. *Curtis v. Ziff Energy Grp., Ltd.*, 12 S.W.3d 114, 119 (Tex. App. – Houston [14th Dist.] 1999, no pet). Broad geographic restrictions have been upheld, therefore, when the area is the employee's actual work territory, or the employee is a high-level manager or executive with the employer. *Daily Instruments Corp., v. Heidt*, 998 F. Supp. 2d 553, 567 (S.D. Tex. 2014).

There also is no specific duration that always will or will not be considered reasonable, but Texas courts have held that durations up to five years can be reasonable. *Stone v. Griffin Comm. & Security Sys., Inc.*, 53 S.W. 3d 687, 696 (Tex. App.—Tyler 2001, no pet.).

Finally, regarding the scope of activity to be restrained, courts frown upon industry-wide restrictions but are willing to find reasonableness if the scope is limited to the type of work performed by the restricted employee at his prior employer. *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 794 (S.D. Tex. 2010).

2. Other States

Even before the FTC rule, a handful of states already banned the use of noncompete agreements. California, for example, has long refused to enforce noncompete agreements. Cal. Business & Professions Code §§ 16600-16602.5. More recently, California has expanded its law from that of simply not enforcing such agreements to making them illegal (AB 1076) and allowing employees to sue if an employer attempts to have employees sign a noncompete agreement (SB 699). Oklahoma (2023 Oklahoma Statutes, §15-219A), North Dakota (North Dakota Century Code §9-09-06), and Minnesota (2024 Minnesota Statutes §181.988) also fully ban employment noncompete agreements.

A trend in many states is the use of income thresholds – that is allowing enforceability of noncompete agreements only for who earn at higher compensation levels. Oregon law allows noncompete agreements only for employees whose annual gross compensation (for 2024) is $113,241 and terms are limited to one year. Oregon Rev. Stat. §653,295. Virginia limits use to employees earning $73,320 annually. Code of

Va. §40.1-28.7:8. Maine ties usage of agreements to federal poverty levels; employers may not enter into noncompete agreements with employees earning at or below 400 percent of the federal poverty level. 26 Maine Rev. Stat. §599-A.

Some states have some rather unique limitations. Arizona, while otherwise honoring reasonable noncompete agreements, bars broadcast employers from requiring their employees to sign noncompete agreements. Arizona Statutes §23-494. In Louisiana, a noncompete must list the particular parish in which it will apply and the term is limited to two years. La. R.S. § 23:921.

Many states take approaches similar to that of Texas regarding enforceability of noncompete agreements, with more stringent limitations on use in the healthcare industry, but otherwise enforceable when an employer has a protectable business interest and the terms of the covenant are limited in time and scope no greater than necessary to defend that protectable interest. See generally www.eig.org/state-noncompete-map/.

B. The FTC Rule

With the hodge podge of state laws and their different requirements and limitations, one could argue that uniformity provided by a single rule would be welcome to those who practice in the noncompete space. The FTC rule certainly brought uniformity by declaring that noncompete agreements, except in very specific and limited situations, would no longer be enforceable regardless of employee or industry.

The FTC rule is premised on the notion that noncompete agreements are unfair restraints on competition because they reduce wages, stifle innovation and decrease labor conditions. *See* 89 FR 38342, 38381-82. The FTC posits that the objectives traditionally served by noncompete agreements – protection of trade secrets and confidential information – are better protected through other means, such as non-disclosure agreements and even litigation. *Id*. at 38,424.

The FTC rule, if effective, would prohibit employers from entering into, and rendering unenforceable terms or conditions that limit a worker's ability to seek or accept employment or to operate a business after the end of the worker's current employment. "Workers" as the FTC rule provides is a broad category that includes employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors. 16 C.F.R. §910.2(a). In plainer words, businesses cannot prevent anyone who works for them from competing after the work relationship ends.

Existing noncompete agreements with "senior executives" – those who earn over $151,164 annual compensation and hold a policy-making position within the business – can be maintained, but the FTC rule would prohibit any new agreements with senior executives after the effective date of the rule. *Id*. §910.2(a)(2). The rule also would not apply to noncompete agreements pursuant to a bona fide sale of a business. *Id*.§ 910.3(a).

Finally, the FTC rule also would require an employer to provide notice to workers subject to a prohibited noncompete agreement, in an individualized communication, that the workers' noncompete clause will not and cannot be legally enforced. *Id*. § 910.2(b)(1). The FTC rule was intended to supersede all state laws to the extent that a state's law permits or authorizes conduct contrary to what the FTC rule prohibits. *Id*. § 910.4.

The FTC rule, once issued, was met with immediate challenge on multiple fronts. The challenge that stuck was a lawsuit filed in the Northern District of Texas, *Ryan LLC v. Federal Trade Commission*, No. 3:24-CV-00986-E, challenging the FTC rule as beyond the regulatory power of the FTC and that the rule was an arbitrary and capricious exercise of the FTC's rule-making authority. On July 3, 2024, the district court granted a preliminary injunction and stayed the effective date of the rule as to the parties before it, pending a final decision on the merits. The final decision on the merits came on August 20, 2024, shortly before the rule's effective date of September 4, 2024.

In the final decision, U.S. District Judge Ada Brown found that the FTC exceeded its statutory authority, specifically finding that Congress had not given the FTC authority to create substantive rules regarding unfair methods of competition and that by issuing the noncompete rule, it exceeded its authority. The Court also found that the rule was "arbitrary and capricious" because it was "unreasonably overbroad without a reasonable explanation," "imposing a one-size-fits-all approach" and was based on "inconsistent and flawed empirical evidence." Judge Brown thus invalidated the rule and expanded the preliminary injunction to a nationwide basis – meaning that the FTC rule could not be enforced in the United States.

The FTC has filed an appeal to the Fifth Circuit Court of Appeals.

C. Going Forward

Since the FTC rule has been enjoined, noncompete law

remains up to each state. For Texas, that means continued enforcement when there is a protectable interest, such as confidential information or trade secrets, and there are reasonable time, geographic and scope of activity limitations no greater than necessary to protect that interest. The trend, however, as seen in other states, is for greater restrictions on the use of noncompete agreements, whether through full bans or through income and position thresholds. And while the conventional wisdom is that the Fifth Circuit will not reverse the outcome of the *Ryan* decision, practitioners need to continue to monitor the FTC's appeal of that case and any further activity by the FTC in this space.

Clara (C.B.) Burns is Chair of Kemp Smith Law's Labor and Employment Department and board certified in Labor and Employment Law by the Texas Board of Legal Specialization.★

PREGNANT WORKERS' RIGHTS ON THE RISE

BY JENNIFER M. TRULOCK & CORTLIN BOND

FOR OVER 40 YEARS, EMPLOYERS HAVE BEEN PROHIBITED from taking adverse employment actions because of an employee's or applicant's pregnancy, due to the Pregnancy Discrimination Act (PDA), enacted in 1978. This means employers cannot demote, punish, or terminate an employee or applicant because of pregnancy, childbirth, or a related medical condition. However, the PDA does not require employers to provide reasonable accommodations that would allow these employees to assist them in performing their jobs.

In contrast, the Americans with Disabilities Act (ADA) provides broader protections for individuals with disabilities, and not only prohibits employers from discriminating against employees with disabilities but also requires employers to provide qualified employees who have a disability with reasonable accommodations to assist them in performing the essential functions of their job. The ADA does not extend to pregnant employees automatically because pregnancy by itself is not considered a disability. Under the ADA, unless an employee is experiencing unusual circumstances or significant complications, pregnancy does not meet the threshold level of severity that the statute's definition of disability requires. Thus, until recently employers have been able to refuse a pregnant employee's request for an accommodation and escape any legal consequences for doing so.

In 2022, Congress passed the Pregnant Workers Fairness Act (PWFA), which requires employers to provide reasonable accommodations to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition. Shortly after the PWFA became effective in June 2023, the U.S. Equal Employment Opportunity Commission (EEOC) began accepting charges of discrimination from employees and applicants who alleged their employer or potential employer failed to accommodate their limitations related to pregnancy, childbirth, or a related medical condition. Over the next year, the EEOC developed and published more than 400 pages of regulations and guidance, and eventually published its final rule interpreting the PWFA and providing hypothetical situations to assist employers in evaluating accommodation requests (the "Final Rule"). The Final Rule is not law but includes regulations enacted by the EEOC and used by the EEOC in interpreting the PWFA. The Final Rule took effect in June 2024.

Now, more than eleven months post-publication, and despite the numerous examples and summaries provided by the EEOC, there is still confusion as to how employers practically abide by and comply with the PWFA. Even so, the EEOC is taking enforcement seriously. As of November 15, 2024, the EEOC reported that it "received thousands of charges of discrimination that included claims under the PWFA" and filed five PWFA lawsuits.[1] The EEOC will release more detailed statistics in 2025 in its Annual Performance Report.

The Text and Application

The PWFA applies to private employers covered by Title VII, which are employers with 15 or more employees. The PWFA also covers Congress, Federal agencies, and state and local employers covered by Title VII, with one caveat: the State of Texas, its divisions, and agents are not covered.

The State of Texas initiated a lawsuit, *Texas v. Garland*, to enjoin the PWFA in its entirety against it as an employer. The basis for the challenge was that the voting process that led to the PWFA enactment was improper, enforcement would cause Texas irreparable harm, and the PWFA usurped Texas of its sovereign immunity. On February 27, 2024, Judge James Hendrix of the Northern District of Texas, Lubbock Division, held that the process for passing the PWFA was improper and enjoined all agencies from enforcing the PWFA against the State of Texas and its divisions and agencies.[2] Importantly, the injunction does not apply to all states or even to all employers in Texas. It simply applies to state actors in Texas and prohibits the EEOC and other federal agencies from accepting, investigating, and issuing a notice of right to sue regarding a charge against the State of Texas and its divisions and agencies.

Other states also sought judicial relief from enforcing the PWFA. Louisiana and Mississippi, along with four entities affiliated with the Roman Catholic church, filed a lawsuit,

Louisiana v. E.E.O.C., requesting the Western District of Louisiana to postpone the effective date of "the portion of the Final Rule mandating that covered employers provide workplace accommodation for purely elective abortions." The States and church entities argued, and the court agreed, that the EEOC exceeded its statutory authority to implement the PWFA and "unlawfully expropriated the authority of Congress and encroached upon the sovereignty of the *States* Plaintiffs." The district court enjoined enforcement of a portion of the Final Rule as to Louisiana and Mississippi employers and the four entity-plaintiffs. Specifically, the order prohibits enforcement of requiring the covered employers in Louisiana and Mississippi (including the four church entities) from providing accommodations for employees for elective abortions.[3]

Like the ADA, the PWFA defines "qualified" as employees or applicants who, with or without reasonable accommodation, can perform the essential functions of the employment position.

Outside of these exceptions, the PWFA prohibits covered employers from denying reasonable accommodations to employees with known limitations related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition, unless the accommodation would impose an undue hardship. It also prohibits employers from denying employment opportunities to qualified applicants under the PWFA, if the denial is due to the need for a reasonable accommodation for pregnancy, childbirth, or other related medical condition, and prohibits adverse employment actions against a qualified employee due to the employee's request or use of a reasonable accommodation under the PWFA.

Limitation or Condition

Unlike the ADA, there is no level of severity required for the condition the employee is experiencing. Rather, the regulations are clear that physical or mental conditions that are modest, minor, episodic, relate to the employee's health or health of the pregnancy, or involve the employee seeking health care related to pregnancy, childbirth, or a related medical condition are limitations under the PWFA. However, the PWFA does not cover conditions the child is experiencing or any other family member and, therefore, does not cover bonding with the child or provide protection for an employee who is not experiencing the limitations.

While pregnancy and childbirth need little explanation, "related medical conditions" may. The Final Rule explains that "related medical conditions" cover a multitude of conditions, including but not limited to termination of pregnancy (including miscarriage, stillbirth, and abortion); infertility and fertility treatment; pelvic prolapse, nerve injuries, nausea or vomiting; endometriosis; changes in hormone levels; and post-partum anxiety or depression.

Another complication regarding "related medical conditions" is that some of the conditions that arise during pregnancy or after childbirth, such as anxiety or depression, may also occur separately from pregnancy or childbirth. While the PWFA requires that such conditions relate to pregnancy or childbirth to qualify for an accommodation, per the Final Rule, pregnancy, childbirth, or a related medical condition do not have to be the sole, the original, or even a substantial cause of the condition. While the "related medical conditions" are sometimes less than clear, the EEOC's regulations and guidance to date make clear that it is interpreting the PWFA broadly.

Qualified Employee

Like the ADA, the PWFA defines "qualified" as employees or applicants who, with or without reasonable accommodation, can perform the essential functions of the employment position. Essential functions are the fundamental job duties of the position. However, unlike the ADA, the PWFA provides a second definition of "qualified," which allows an employee or applicant to be qualified even if they cannot perform one or more essential functions of the job, if the inability to perform the essential function(s) is temporary and can be reasonably accommodated. Temporary is not defined in the statute. The Final Rule defines it as lasting for a limited time that may extend beyond the "near future," and further suggests that there is an automatic assumption that a pregnant employee would be able to perform the essential function in the "near future" because pregnancy is generally 40 weeks. For non-pregnant employees, the timing is on a case-by-case basis but will likely be interpreted by the EEOC to be more than 40 weeks given the language.

The Process

Employees generally must initiate the process to obtain an accommodation. The PWFA requires that a limitation must be known to the employer. Thus, the employee or a representative must communicate the limitation to the employer to begin the interactive process.

When employers are notified of a limitation, employers

should engage in conversations with the employee regarding potential reasonable accommodations to assist the employee. Employers should avoid automatically asking employees to complete accommodation request forms used for the ADA process. Instead, employers should start with a conversation with the employee experiencing the limitation, and ask questions tailored to determining the employee's needs and what reasonable accommodations may meet those needs. Potential questions are:

- Based on the limitations you are experiencing what accommodation do you think would help you perform your position?
- How will that accommodation help you?
- How long do you think you will need it?
- Are there any alternative accommodations that would assist?

If the request is obviously tied to the employee's pregnancy, childbirth, or related medical condition (including lactation), the employer may not need to ask the above questions and should instead move forward with any reasonable accommodation requested or agreed upon. For instance, if an employee is pregnant and requests extra sitting breaks, the employer should provide the requested accommodation quickly, without opposition. The Final Rule makes clear that if a request is related to pregnancy and is easy to provide, it should be granted immediately, and employees may file a charge with the EEOC based on an employer's undue delay.

If the request is not obviously tied to the employee's pregnancy, childbirth, or a related medical condition and the accommodation is not easy and reasonable to implement, the employer should continue to engage in conversation with the employee about potential accommodations.

As for paperwork related to the condition, only when the condition is not clearly related to pregnancy, childbirth, or a related medical condition, should the employer seek additional documentation from a medical provider. This is different from the traditional approach under the ADA. For a disability, employers automatically request medical information to assist in determining what the disability is and what accommodation is necessary to assist the employee with performing the essential functions of the job. With the PWFA, the Final Rule provides that employers usually will not need medical documentation.

Reasonable Accommodations

Like the ADA analysis, employers do not necessarily have to provide the employee with the requested accommodation but must provide a reasonable accommodation absent undue hardship. By engaging in the interactive process and having a dialogue with the employee, employers can identify alternative accommodations that will meet the employee's needs and work better for the employer. This collaboration is the interactive process that employers are required to engage in with employees.

While the definition of "reasonable" is evaluated on a case-by-case basis, examples that most likely qualify are additional breaks to sit/stand, drink water, or use the restroom, schedule changes, parking accommodations, job restructuring, and modifying equipment, uniforms, or devices. Telework may also be a reasonable accommodation depending on the employer's business. Employers should think creatively to work with employees in identifying accommodations and keep in mind that the accommodations are temporary and may be revisited periodically. Ongoing conversations between employer and employee will help address the employee's limitations and review whether the accommodation remains reasonable for the employer.

Finally, employers should provide leave only as a last resort. The EEOC, in multiple publications, has made clear that leave should not be the first thought in employers' minds. Rather, if any other reasonable accommodation could be provided that allows the worker to continue working, the employer should work with the employee to implement that accommodation instead of leave. In *EEOC v. Urologic Specialists of Oklahoma, Inc.*, filed in the Northern District of Oklahoma, the EEOC sued a specialty medical practice for not permitting a medical assistant to sit, take breaks, or work part-time during her third trimester.[4] Instead, the employer required that she take unpaid leave. This suit was filed in September 2024, and should give employers a sense that the EEOC is serious about not simply placing employees on leave.

Undue Hardship

Employers may only refuse to provide a reasonable accommodation when there is an undue hardship. Here, like the ADA, the bar is high for proving an undue hardship. And, while the EEOC's guidance and other materials state the analysis is the same, because the accommodations under the PWFA are usually temporary, the bar may turn out to be higher.

EEOC Enforcement

Like Title VII and the ADA, the PWFA requires employees to first file a charge with the EEOC and exhaust their

administrative remedies before filing a lawsuit. Given this administrative prerequisite, there is a dearth of case law to provide insight as to judicial interpretation of the PWFA. While ADA cases will be useful, for the reasons discussed above, they are limited as to applicability for the PWFA. Therefore, employers will have to wait for the courts to weigh in on temporal limitations, related medical condition scope, and examples of circumstances that are unreasonable.

In the meantime, the EEOC has filed at least three cases against employers under the PWFA in Oklahoma, Alabama, and Maryland,[5] and has issued press releases of settlements or conciliation agreements with a number of employers recently. The EEOC is actively enforcing the PWFA, and its guidance suggests that it is on alert for the following fact patterns:

- Employer fails to make a reasonable accommodation or delays in providing an accommodation
- Employer requires an employee to accept an accommodation without going through the interactive process
- Employer denies an employment opportunity to a qualified employee or applicant because of a requested accommodation
- Employer retaliates against an employee or applicant for requesting or using an accommodation under the PWFA
- Employer retaliates against an employee who reports or opposes unlawful discrimination under the PWFA or participates in a PWFA proceeding or investigation
- Employer coerces an employee who is exercising or helping others to exercise their rights under the PWFA

To avoid liability, employers should train supervisors about these issues. Further, employers must respond quickly when an employee reports a limitation or need for an accommodation related to pregnancy, childbirth, or a related medical condition, no matter how minor the limitation is.

Jennifer M. Trulock is a Partner and Cortlin Bond is an Associate in the Labor & Employment practice group at Bradley Arant Boult Cummings LLP. ★

[1] *November 15, 2024 EEOC Press Release, https://www.eeoc.gov/newsroom/eeoc-issues-agency-financial-report-fiscal-year-2024.*

[2] *Texas v. Garland*, 719 F. Supp. 3d 521 (N.D. Tex. 2024).

[3] *Louisiana v. Equal Employment Opportunity Comm'n*, 705 F. Supp. 3d 643 (W.D. La. 2024).

[4] *Urologic Specialists of Okla., Inc.*, Case No. 4:24-cv-0452-JFJ (N.D. Okla. filed Sept. 25, 2024)

[5] *Id.*; *EEOC v. Polaris Indus. Inc.*, Case No. 5:24-cv-01305 (N.D. Ala. filed Sept. 25, 2024); *EEOC v. Kurt Bluemel, Inc.*, Case No. 1:24-cv-02816 (D. Md. filed September 30, 2024).

A BRAVE NEW WORLD AFTER *HAMILTON V. DALLAS COUNTY*

BY DYLAN A. FARMER & LAURA C. EMADI

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 makes it illegal "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). For nearly 30 years, the Fifth Circuit repeatedly—and emphatically—held that this prohibition applied only to "ultimate employment decisions" like "hiring, granting leave, discharging, promoting, or compensating." *See, e.g.*, *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818 (5th Cir. 2019); *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004) ("[A]n employment action that 'does not affect job duties, compensation, or benefits' is not an adverse employment action."). In 2023, the Fifth Circuit abruptly—but equally emphatically—jettisoned this jurisprudence, holding in *Hamilton v. Dallas County* that the tangibility, finality, or economic significance of an adverse employment action is at least facially irrelevant to the analysis of Title VII anti-discrimination claims.

At issue in *Hamilton* was the Dallas County Sheriff's Department's blatant sex-based scheduling policy, which required female officers to work either Saturday or Sunday but allowed male officers to have whole weekends off.

A. Hamilton abrogates the Fifth Circuit's "ultimate employment decision" precedent.

At issue in *Hamilton* was the Dallas County Sheriff's Department's blatant sex-based scheduling policy, which required female officers to work either Saturday or Sunday but allowed male officers to have whole weekends off. *Hamilton*, 79 F.4th 494, 497 (5th Cir. 2023). Dallas County did not deny that the policy was discriminatory; instead, it accurately argued that the prevailing Fifth Circuit standard precluded Title VII discrimination claims for mere scheduling issues. *See id.* at 498-99, 504. The district court agreed and granted the County's motion to dismiss.

At the invitation of the appellate panel, which reluctantly affirmed the district court's dismissal, the *en banc* Fifth Circuit enthusiastically skewered its "ultimate employment decision" precedent. That prior standard was wrong, the court said, because it was based only on dubious readings of out-of-circuit opinions. *See id.* at 500 (citing *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) and *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)). It was also wrong because it led to clearly absurd results, like the dismissal of a claim that black employees were forced to work outside without water while white employees worked indoors with air conditioning. *Id.* (citing *Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 373 (5th Cir. 2019)). But, most simply, it was wrong because it dishonored Title VII's plain text, which is not limited to "ultimate" employment actions but reaches the entire spectrum of "terms, conditions, or privileges of employment." *See id.* (citing 42 U.S.C. § 2000e-2(a)(1)). That spectrum, the court emphasized, "is broad," encompasses far more than the "economic" or "tangible" aspects of employment, and does not require any injury to be "objectively" adverse. *Id.* at 503 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998)).

Put simply, discrimination that adversely impacts any term, condition, or privilege of employment, "ultimate" or not, is actionable under Title VII. *See id.* at 503-04. As alleged by the plaintiffs, Dallas County's scheduling policy easily cleared this hurdle; thus, the court reversed the district court's Rule 12 dismissal. *See id.*

B. The Fifth Circuit answers Hamilton's unanswered question.

While the *Hamilton* court found Dallas County's scheduling policy clearly adverse and actionable within its new framework, it confirmed there is some floor beneath which Title VII does not reach. *See id.* at 505 n.64 ("[A]ll circuits agree that, at the very least, Title VII does not permit liability for petty trivialities or insubstantial annoyances."). The court did not decide exactly where that floor lies because, "whatever

standard we might apply, it is eminently clear that the [plaintiffs'] allegations would satisfy it at the pleading stage." *Id.* at 505. Thus, the court expressly left for future cases the task of triangulating the injury threshold—specifically, whether the statute requires a "material" degree of harm some level above *de minimis* or "whether 'material' and 'more than de minimis' are simply two sides of the same coin." *Id.*

A panel of the Fifth Circuit answered this question only a month later in *Harrison v. Brookhaven School District*, in which the black female plaintiff alleged that her district refused to pay for her to attend an administrative leadership academy despite paying for white males to attend. *Harrison*, 82 F.4th 427, 428 (5th Cir. 2023). The panel first applied *Hamilton* to conclude that the plaintiff plausibly alleged discrimination affecting a "privilege" or "benefit" of employment: having her leadership academy fees paid for by the district. *See id.* at 431 (referring to this part of the analysis as the "adversity" component). The panel then turned to the undecided "materiality" component and held, after a lengthy exploration of the "most persuasive" out-of-circuit case, that Title VII provides a remedy for any injury that is "more than a *de minimis* harm." *See id.* at 431 (citing *Threat v. City of Cleveland*, 6 F.4th 672, 678-80 (6th Cir. 2021)). Whatever other harms the plaintiff suffered, she incurred, at the very least, a "personal expenditure of approximately $2,000." *Id.* at 432. Because "this injury clear[ed] the *de minimis* threshold," her claims survived. *Id.*

C. The Supreme Court also weighs in with Muldrow v. City of St. Louis, Missouri.

Another roundabout answer to *Hamilton*'s questions came from the United States Supreme Court, which held earlier this year that Title VII afforded relief to a female police officer who was involuntarily transferred to a different position. *See generally Muldrow v. City of St. Louis, Missouri*, 601 U.S. 346 (2024). Like the Fifth Circuit in *Hamilton* and *Harrison*, the Supreme Court confirmed that the plaintiff had to show only that the transfer caused her "some harm" in "an identifiable term or condition of employment"; she did *not* have to show that any harm was "significant . . . or serious or substantial or any similar adjective suggesting that the disadvantage . . . must exceed a heightened bar." *Id.* at 354-55. In the plaintiff's case:

> She was moved from a plainclothes job in a prestigious specialized division giving her substantial responsibility over priority investigations and frequent opportunity to work with police commanders. She was moved to a uniformed job supervising one district's patrol officers, in which she was less involved in high-visibility matters and primarily performed administrative work. Her schedule became less regular, often requiring her to work weekends; and she lost her take-home car. If those allegations are proved, she was left worse off several times over. *It does not matter, as the courts below thought . . . , that her rank and pay remained the same, or that she still could advance to other jobs.* Title VII prohibits making a transfer, based on sex, with the consequences Muldrow described.

Id. at 359 (emphasis added).

The Court's detailed factual application of the new standard is welcome because, frankly, the "some harm" language is vague and not intuitive to apply. Perhaps recognizing this, the Court identified several fact patterns that did not survive under the "significance" test but would have survived under the "some harm" test, giving practitioners at least some practical ammunition:

- An engineering technician is assigned to work at a new job site—specifically, a 14-by-22-foot wind tunnel. *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).
- A shipping worker is required to take a position involving only nighttime work. *Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 635 (10th Cir. 2012).
- A school principal is forced into a non-school-based administrative role supervising fewer employees. *Cole v. Wake Cty. Bd. of Educ.*, 834 F. Appx. 820, 821 (4th Cir. 2021) (per curiam).

To be fair, some of these cases (specifically *Cole*), seem wrongly decided even under a "significance" standard. Regardless, *Muldrow*'s point is the same as the Fifth Circuit's: the time has come to free Title VII from its unwarranted shackles.

D. Texas's federal courts navigate the post-Hamilton waters.

In the wake of *Hamilton*, *Harrison*, and *Muldrow*, Texas's federal district courts have tested the limits of the new Title VII jurisprudence. There is no question that those cases are having their intended effect, as a number of courts have allowed Title VII claims to proceed on alleged actions that would never have made it past the courthouse door under the old standard:

- *Smith v. McDonough*, No. SA-22-CV-01383-JKP, 2023 WL 5918322 at *5 (W.D. Tex. Sept. 8, 2023) (finding that plaintiff "sufficiently pled he suffered adverse

employment action based on unfair scrutiny of his work and having his telecommuting agreement revoked");

- *McClendon-Lemman v. Tarrant Cty. Coll.*, No. 4:21-CV-1338-P, 2023 WL 8007122, at *4 n.8 (N.D. Tex. Nov. 2, 2023) ("Because of [*Hamilton*], the Court presumes that Plaintiff's claim that she was discriminated against by being issued a letter of reprimand on May 5, 2020 and receiving a reduction in hours would constitute an adverse employment action.");
- *Johnson-Lee v. Tex. A&M Univ. - Corpus Christi*, No. 2:23-CV-00229, 2024 WL 3196764, at *4 (S.D. Tex. Apr. 11, 2024) (finding "undesirable work assignments that are outside an employee's job duties" sufficient to state a claim);
- *McWilson v. Bell Textron Inc.*, No. 4:23-CV-01104-P, 2024 WL 3585615, at *4 (N.D. Tex. July 30, 2024) (finding a cognizable claim from the plaintiff's allegations that unaddressed harassment "forced [him] to alter his route to work, change his parking routine, and avoid [his harasser] altogether");
- *Malia Livolsi v. University of Texas at Austin*, No. 1:24-CV-127-RP, 2024 WL 4849060, at *5 (W.D. Tex. Nov. 15, 2024) (denying a motion to dismiss where the plaintiff alleged that her supervisor "assigned her the additional workload of another employee . . . and sent her an extraordinarily long list of additional tasks to perform.").

Still, some courts have dismissed claims for lack of cognizable adverse action:

- *Sambrano v. United Airlines, Inc.*, 707 F. Supp. 3d 652, 663 (N.D. Tex. 2023) (characterizing as *de minimis* allegations that the plaintiffs were required to provide "regular COVID-19 test results," were "needlessly banished to eat outdoors" and "were required to wear an N-95 respirator as opposed to a KN-95 or cloth mask");
- *Dixon v. Garland*, No. 4:23-CV-00019-P, 2024 WL 150509, at *6 (N.D. Tex. Jan. 12, 2024) (characterizing as *de minimis* the plaintiff's complaints that (1) her boss "played favorites," (2) she received "excellent" rather than "outstanding" performance reviews, (3) her boss caused a "minimal delay" of her licensure application, and (4) she was "ostracized in the workplace").

At the moment, it is difficult to say whether applying the new "more than *de minimis*" standard is more difficult than applying the "economic," "tangible," and "objective" harm framework. In theory, by removing touchstones like monetary harm, the new standard lacks the easily applicable, abstractable rules developed under the prior standard—albeit at the expense of textual fidelity. *Cf. Hamilton*, 79 F.4th at 510 (Jones, J. dissenting) ("The question left hanging by the majority is what kind of 'term or condition' of employment creates an actionable Title VII discrimination claim."). However, many of the post-*Hamilton* cases decided to date seem to be following an even easier rule: if the plaintiff articulates any kind of employment-related harm, the claim survives. It remains to be seen whether the Fifth Circuit will set the *de minimis* bar any higher than its current level, but the relative sea change from the pre-*Hamilton* climate is clearly permanent.

E. Hamilton's impact on claims under Chapter 21 of the Texas Labor Code is uncertain.

As with Title VII, an employer violates Chapter 21 of the Texas Labor Code if, on the basis of a protected characteristic, it "fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment." TEX. LAB. CODE § 21.051(1). Indeed, one of Chapter 21's express purposes is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Id.* § 21.001(1).

Given the statutes' virtually identical language, Texas courts have long turned to federal Title VII precedent to construe and apply Chapter 21. *See, e.g.*, *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 781 (Tex. 2018) ("In discrimination and retaliation cases under the TCHRA, Texas jurisprudence parallels federal cases construing and applying equivalent federal statutes, like Title VII."); *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) ("One of the primary goals of the statute is to coordinate state law with federal law in the area of employment discrimination. . . . Thus, analogous federal statutes and the cases interpreting them guide our reading of the TCHRA." (cleaned up)).

Given this backdrop, it is unsurprising that Texas state courts have long held that Chapter 21 only concerns "ultimate employment decisions," as well. *See, e.g.*, *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 575 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citations omitted) ("Title VII and Chapter 21 address ultimate employment decisions; they do not address every decision made by employers that arguably might have some tangential effect upon employment decisions."). It is an open question, then: will Texas courts revise their understanding of Chapter 21's reach in light of *Hamilton*? So far, the answer has been . . . not yet.

City of Pasadena v. Poulos, the first Texas case to cite *Hamilton*, recognized the possibility that *Hamilton* might upend the previous interpretation of Chapter 21, but ultimately declined to apply it. *See Poulos*, No. 01-22-00676-CV, 2023 WL 7134974, at *10 n.1 (Tex. App.—Houston [1st Dist.] Oct. 31, 2023, no pet.). Instead, the First Court of Appeals explained, "[i]n the absence of contrary authority from the Texas Supreme Court or this Court sitting *en banc*, we continue to be bound by our prior precedent holding that the TCHRA's anti-discrimination provision only applies to 'ultimate employment decisions.'" *Id.* Thus, the court dismissed as insufficient the plaintiff's claim that her supervisors "scrutinized her more closely than her white coworkers," "required her to obtain permission before using the restroom," and once denied a request for leave despite granting one for a white colleague. *See id.* at 11.

The First Court of Appeals reiterated its position in a second case, *Harris Center for Mental Health v. McLeod*, earlier this year. *McLeod*, No. 01-22-00947-CV, 2024 WL 1383271, at *9 (Tex. App.—Houston [1st Dist.] Apr. 2, 2024, pet. filed) (noting again that the Texas Supreme Court has yet to adopt *Hamilton*'s reasoning for Chapter 21 claims). Accordingly, it dismissed the plaintiff's Chapter 21 discrimination claim based on allegations that her supervisor "spoke to [her] in an impatient, derogatory, and disrespectful manner; was rude and hostile to her; issued her written reprimands; and gave her unachievable work tasks intended to result in the termination of her employment." *Id.*, at *10.

The only other Texas court to have addressed *Hamilton* in a written opinion is the Fourteenth Court of Appeals, which took a different approach than its sister court. *See generally City of Houston v. Willis*, No. 14-23-00178-CV, 2024 WL 3342439. (Tex. App.—Houston [14th Dist.] July 9, 2024, no pet.). In *Willis*, the plaintiff complained of gender discrimination after she was involuntarily transferred from the mounted patrol police unit to a regular patrol unit—a position she characterized as "objectively worse" even though she suffered no loss of rank or pay. *Id.* at *1-2. Unlike the First Court of Appeals, the Fourteenth Court of Appeals embraced *Hamilton* as authoritative precedent for Chapter 21 claims, but still found that the plaintiff failed to identify an adverse employment action because she "offered no evidence that being transferred to the downtown patrol was generally considered to be a demotion or a form of punishment," did not "complain about any change in her shift hours," and did not allege "that she received a reduction in pay or benefits." *Id.* at 6. Absent any "objective" evidence that the new position was worse than the old, all she had was her subjective belief, which was insufficient to sustain her claim. *See id.*

Most curious was the Fourteenth Court's explicit reliance on pre-*Hamilton* Fifth Circuit precedent, particularly on cases holding that a transfer to a "less prestigious" position is not actionable without a reduction in pay, benefits, chance at future promotion, or some other "serious, objective, and tangible harm." *Serna v. City of San Antonio*, 244 F.3d 479, 483 (5th Cir. 2001). As *Hamilton* emphatically repudiated these types of cases, it is difficult to square *Willis*'s reasoning with its enthusiastic recognition of *Hamilton*'s applicability. In any event, it seems likely that the Fifth Circuit—and probably even the United States Supreme Court after *Muldrow*—would have reached a different conclusion.

For now, these are the only three written opinions from Texas appellate courts concerning *Hamilton*'s applicability. No doubt others will follow.

Dylan A. Farmer (Partner) practices labor and employment and construction law at the San Antonio-based Schmoyer Reinhard LLP.

Laura C. Emadi (Counsel) practices labor and employment law at Schmoyer Reinhard LLP. ★

FAITHFUL DELIVERY: HOW SUNDAY MAIL DELIVERY CHANGED YOUR LITIGATION PRACTICE

BY HIRAM SASSER & TABITHA M. HARRINGTON

FOR OVER A CENTURY, THE UNITED STATES Postal Service (USPS) did not deliver mail on Sundays. No letters, no packages, not even a postcard. Congress banned such practice in 1912.[1] But that all changed on November 11, 2013 with the announcement that USPS would deliver Amazon packages on Sundays.[2] This development set the stage for a showdown between religious liberty and USPS as some postal workers had chosen to work for USPS precisely because such a job naturally accommodated those who may seek Sundays off for religious reasons. One such conflict created an unexpected opportunity for the United States Supreme Court to address the reach of religious liberty in the workplace by clarifying the meaning of "undue burden" in Title VII of the Civil Rights Act of 1964. The Supreme Court accepted that opportunity, delivering a landmark decision in *Groff v. DeJoy*, 600 U.S. 447, 454 (2023) that clarified the phrase "undue hardship" in Title VII. In the wake of the decision, attorneys and their corporate clients should work to deliver workplace policies that reflect and value America's religiously diverse workforce.

USPS's 2013 decision to deliver Amazon packages on Sundays set the stage for a showdown between religious liberty and USPS as some postal workers had chosen to work for USPS precisely because such a job naturally accommodated those who may seek Sundays off for religious reasons.

The Route: Title VII of the Civil Rights Act of 1964

Under Title VII, it is unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1) (1964). The Equal Employment Opportunity Commission, for its part, settled on an interpretation that the employer did not have to grant a religious accommodation if doing so would cause an "undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968). Subsequently, Congress amended Title VII to read: "'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) (1972).

The Mailman: Gerald Groff

Gerald Groff did not set out to be a litigant when he became a part-time (substitute) mail carrier at USPS in 2012. However, the ability to observe Sunday Sabbath in accordance with his Protestant Christian faith was a deciding factor when he accepted employment. Gerald excelled at his job and pursued becoming a full-time carrier with a willingness to work any route, any shift, including many Saturdays and non-Sunday holidays. But all of that changed when USPS executed a contract with Amazon to deliver packages on Sunday. Sunday delivery became an unavoidable job duty of all employees, with absolutely no exception. To keep his job without violating his conscience, Gerald took on extra duties and routes so that his co-workers could have easier Saturdays and non-Sunday holidays off. When this became unacceptable to his superiors, Gerald sacrificed his seniority to transfer to a different post office where Sunday delivery did not occur. But this sacrifice was in vain: eventually his new post office began requiring Sunday deliveries as well. Additionally, throughout this time, Gerald was treated with contempt, disdain, and hostility by superiors and peers and faced numerous adverse actions, affecting his income and well-being. (Ironically, before the transfer, Gerald was very close to achieving status as a full-time carrier, which would have exempted him from Sunday deliveries.) Gerald remained steadfast and did not violate his conscience, but the work environment became untenable; he left USPS in January 2019.

Wrong Address: *Hardison* and the Legal Background of *Groff*

Gerald recognized the alarming infringement on his religious

rights. He decided to push back on the discrimination and wrongful treatment he experienced in the courtroom, filing a lawsuit under Title VII against the Postmaster General. Title VII does not define "undue hardship." In 1977, a definition, of sorts, of "undue hardship" emerged from a snippet of dicta in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The actual holding of *Hardison* was that "TWA made reasonable efforts to accommodate" Hardison and that "TWA was not required by Title VII to carve out a special exception to its seniority system in order to help Hardison to meet his religious obligations." *Id.*, at 77 & 83. But the *Hardison* court went on the say "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*, at 84. Employers and lower courts clung to this language and quickly lost sight of the actual *Hardison* holding. The fallout of the dicta definition was catastrophic for employees who need a religious accomodation.

The *de minimis* standard was a low, easily met bar. For decades after *Hardison*, employers defeated claims of religious accommodation merely by showing that the burden was more than *de minimis* in sometimes quite trivial ways. This creative interpretation of the meaning and intention of Title VII deepened when courts applied the unfortunate *Hardison* dicta. "Under the ADA [Americans with Disabilities Act], an employer may be required to alter the snack break schedule for a diabetic employee because doing so would not pose an undue hardship. Yet, thanks to *Hardison*, at least one court has held that it would be an undue hardship to require an employer to shift a meal break for Muslim employees during Ramadan." *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227,1229 (2021) (Gorsuch, J., dissenting) (citations omitted) (criticizing denial of certiorari). When the *Groff* matter came before them, the Supreme Court seized the opportunity to correct this decades-long error.

Delivering Victory: *Groff*'s Holding

Justice Samuel Alito delivered the opinion for a unanimous Court. He began by identifying the most relevant statutory language:

> Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, **unless an employer demonstrates that he is unable to reasonably accommodate** to an employee's or prospective employee's religious observance or practice without **undue hardship on the conduct of the employer's business**."

Groff v. DeJoy, 600 U.S. 447, 458 (2023) (citing 42 U.S.C. § 2000e(j) (1970 ed., Supp. II)) (emphasis added).

He then thoroughly explained why and how the *de minimis* standard is an "erroneous . . . interpretation" of the holding of *Hardison*. *Groff*, 600 U.S. at 471 (2023). The correct standard for reasonable accommodations is "undue hardship" which is reached when a "burden is substantial." *Id.*, at 468. The opinion emphasized that hardship must be something that impacts the conduct of the employer's business, minor impacts on coworkers are not relevant. Finally, Justice Alito warned that merely assessing the reasonableness of a particular employee-proposed accommodation is not sufficient. Because Title VII requires employers to accommodate (if possible), employer-devised alternatives must be proposed and considered, if the employee-proposed accommodation is unacceptable. By the end of the opinion, Justice Alito had effectively shifted the burden of proof from the employee to employer.

One can distill the holding of *Groff* into three principles:

1. The onus is on the employer to identify and offer reasonable accommodations.
2. Burden on the employer is tolerable, unless it rises to the level of "undue hardship."
3. Only burdens on the conduct of the business are relevant to the analysis of undue hardship.

Groff reminds us that protecting religious freedom is usually worth the potential burden or inconvenience. Before thinking through how these principles should affect the practice of law, it is important to think through why the law, from the U.S. Constitution through statutes like Title VII, is so protective of religious liberty.

What's in the Package? The Value of Religious Liberty

Why does our law put such a high value on religious liberty? Because the Founders did. John Adams once said "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[3] In law, "religion" can best be understood as a system of faith that usually drives a moral or ethical code.[4] Religious belief is also often connected with another key word: "conscience," which refers to a person's consciousness of "right and wrong."[5] To the Founders, a religious person is someone whose conscience was bound, not by personal predilection, but by God. Such a person would be particularly prepared for a political system of self-governance. Alexis de Tocqueville devoted much his famous book *Democracy in America* to analyzing the highly

religious nature of American society. He found religiosity to be both foundational and integral to the continued success of the American experiment.

But politics is not the only aspect of American life that benefits from religiosity and conscientiousness. Take, for example, the West Point Cadet prayer written by Colonel Clayton E. Wheat sometime between 1918 and 1926. Those who recite this prayer ask God to "[s]trengthen and increase our admiration for honest dealing and clean thinking." More recently, Joshua Haberman, a Jewish Rabbi who fled the Nazi invasion of Austria in the 1930s and settled in Alabama, marveled at the general trustworthiness of Americans in the "Bible belt," declaring it "America's safety belt."[6] This mindset would be highly beneficial not only when executing military operations and in civil society, but in civilian workplaces, too.

Fundamentally, a sincerely held religious belief is a bind on a person's conscience because of their system of faith. It is a moral position. And such moral scruples make great colleagues and employees. We should all want colleagues who do the right thing—even when no one is watching. Would you rather work with someone who ignores their conscience and deliberately acts immorally? Does your client want to hire and retain someone who easily flouts their conscience? More likely that the opposite is true. In the age of managerial challenges like quiet quitting, a religious person who is so serious about their faith and obeying their conscience that they seek an accommodation is a high-value employee. Employers will not be better off forcing their employees to engage in hypocrisy. And retaining that employee is likely worth the effort and potential small inconvenience their conscientiousness may create. Religious devotion makes important contributions to our society and granting religious accommodation is in keeping with "the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

A New Route Map: Bringing *Groff* Home to Texas

The *Groff* decision is an invigorating legal development because, in the age of appreciation for workplace diversity, it provides a constitutionally approved blueprint for how to achieve and maintain a religiously diverse workplace. Texas courts have already been providing guidance on how *Groff* should shape employers' approach to requests for reasonable accommodation of religious beliefs and practices. *Groff* has already been cited by eleven Texas district court cases and four Fifth Circuit cases, all four of which originated in Texas district courts. Almost all of these cases were decisions regarding Title VII religious accommodation. Three of these matters are particularly illustrative of the current understanding of Title VII after *Groff*.

> In September 2023, just a few months after *Groff* was decided, the Fifth Circuit declined to grant the defendant's motion for summary judgment in *Hebrew v. Texas Dep't of Crim. Just.*, 80 F.4th 717 (5th Cir. 2023) in part because the defendant had merely argued that the burden the requested accommodation would cause was more than *de minimis*.
>
> In *Troutman v. Teva Pharms. USA, Inc.*, No. 6:22-cv-395-JDK, 2024 WL 3635303, (E.D. Tex. June 25, 2024), the Eastern District of Texas found the employer, Teva Pharmaceuticals, did not engage in the sort of fact-specific inquiry *Groff* requires to establish undue hardship. In 2021, Teva mandated that employees like Senior Regional Sales Manager Derek Troutman receive the COVID-19 vaccine immediately or be fired. The court found that Teva did not establish that visiting clients in person was in fact an essential function, nor did Teva establish that there were no clients that Troutman could have visited in person unvaccinated or remotely. Teva did not consider Troutman's proposed accommodations, nor did it attempt to devise and propose any accommodations on its own. Instead, Teva deployed a take-it-or-leave-it approach to vaccination, violating Title VII.
>
> In the Southern District of Texas, the court found that the fact-specific nature of the undue hardship standard as clarified in *Groff* precluded summary judgment. *Bellard v. Univ. of Texas MD Anderson Cancer Ctr.*, 716 F. Supp. 3d 503 (S.D. Tex. 2024). A core issue in *Bellard* was at what point does the volume of persons seeking the same accommodation tip the scales, warranting a finding of undue burden. The *Bellard* court found this question presented a genuine issue of a material fact.

In other words, Texas courts have received the message from the Supreme Court that Title VII requires employers to intentionally and thoughtfully engage with their religious employees and have wasted no time spreading it.

Unboxing the *Groff* Decision: Knowing and Applying the Law

The *Groff* decision should be seen as an opportunity for lawyers and employers. Many workplaces are struggling with an epidemic of employee disengagement practices like quiet quitting. In vindicating employees' rights to freedom of religion, the Supreme Court also made clear that it is discriminatory to not try to accommodate religious diversity in

the workplace. This effectively greenlights a sea change in the way religious employees and religious accommodations should be conceptualized. Put simply, the best way for lawyers and employers to move forward in the wake of *Groff*, is to absorb and operate according to two main principles: (1) know the law; and (2) accommodate religious employees.

(1) Everyone should know the law

Counsel should be especially eager to incorporate *Groff*'s directives into legal advice and policies for clients. *Groff* provides an opening to encourage employer clients to be proactive and innovative. Counsel should advise clients to take care that policies, schedules, and workplaces are tailored to the needs of the business and do not unnecessarily tread on employee's religious rights. A common mistake is simply labeling something an essential function and refusing make any accommodations. In 2021, retail pharmacy giant CVS attempted to make the prescription of birth control a no-exceptions "essential function" and, consequently, faced multiple lawsuits. One of the matters, *Kristofersdottir v. CVS Health Corp.*, No. 9:24-cv-80057-RLR (S.D. Fla.), recently settled.[7]

The clarity of *Groff* puts employers back on the right path, so that situations like *Groff* and *Kristofersdottir* do not arise. Business leaders should educate their employees on all levels on the founding American principle of encouraging conscientiousness. Managers and supervisors should know how to properly respond to requests for religious accommodations. Employers should educate subordinate employees about their rights, so that, in the face of improper denials, they can escalate the issue with more senior corporate representatives. This will help employers remedy such mistakes before they get hit with post-employment lawsuits.

(2) Employees' religious beliefs and practices should be accommodated

How should an employer respond to a communication from his employee that a workplace condition burdens their conscience? The first step should be to have a decision maker talk to that individual employee. Do not hide behind a one-size-fits-all approach. Engage with the person that you chose to hire and try to retain them. It is highly unlikely that your employee's religious belief has rendered them unable to provide enough work to justify their employment. When conversing with the religious employee, the decision maker should seek to understand the exact nature of the problem. Is it a scheduling issue? A matter of speech? A dress code? Is the employee seeking non-participation or exemption or time and space to engage in a religious practice?

Once it is clear what belief or practice needs to be accommodated, the employer should do all they can to accommodate the employee. Direct supervisors and middle managers, listen to your instincts, if you can make an accommodation work, advocate for your subordinate. Be a part of the solution. The general workplace culture should be one that fosters inclusivity by coming up with creative solutions to the hiccups that workplace diversity can trigger.

Employers have a plethora of resources to help them do this. Most organizations underutilize the software and technology that they license, lease, and purchase. Common challenges presented by requests for accommodation include scheduling around the accommodation and tracking the number of employees with accommodations and the nature of the accommodation. Companies should not only avail themselves of the resources that they already pay for, but also seek any additional support needed to accommodate religiously diverse employees. The rapid development of Artificial Intelligence should be seen as a development that will make retaining and managing a diverse, and therefore complex, workforce even more practicable. It is always a good idea for companies to stay abreast of developing technologies that would improve workplace efficiency and productivity. Technologies that facilitate religious accommodation likely have other benefits. For example, software that tracks productivity, can help an employer not only determine if an employee with a religious accommodation is sufficiently productive, but track the productivity of the entire workforce.

Proof of Delivery: Appreciating *Groff* in the Workplace

A religious belief or practice should not end an effective and productive working relationship between an employer and employee. In June 2023, the Supreme Court handed down a unanimous decision regarding the degree of effort employers must exert to hire and retain employees with religious beliefs that complicate the employee's ability to follow workplace standard practice and procedures. Specifically, the Supreme Court found that USPS could not simply disregard the religious beliefs of their carrier Gerald Groff because of potential *de minimus* burdens on the workplace. Rather, USPS had to work to accommodate Gerald, unless the only workable accommodation would place undue burden on the conduct of the business. Under the previous understanding of Title VII, when an employee brought a conflict between a work condition or responsibility and a religious belief to the attention of the employer, the employer could discharge their legal obligation to not discriminate against that employee far too easily. More fundamentally, what the Supreme Court did in *Groff* is refocus us on one of the motivating principles

of Title VII: protecting religious liberty. Fortunately, the Supreme Court also delivered a clear path forward for how to resolve potential conflicts between employees' religious beliefs and workplace conditions. To put things very bluntly: try to your darnedest to accommodate the employee's belief. Hopefully, receipt of this message becomes quickly evident in workplaces across America.

Hiram Sasser, Executive General Counsel of First Liberty Institute, is an Adjunct Professor of Law at both The University of Texas at Austin School of Law (Religious Liberty) and Oklahoma City University School of Law (Civil Rights Procedure).

Tabitha M. Harrington was Counsel with First Liberty Institute and is now focused full time on her family at home.★

---

1 *See* Act of August 24, 1912, ch. 389, 37 Stat. 539.

2 Ron Nixon, *Postal Service to Make Sunday Deliveries for Amazon*, N.Y. TIMES (Nov. 11, 2013), https://www.nytimes.com/2013/11/11/business/postal-service-and-amazon-strike-deal.html.

3 John Adams, *Letter from John Adams to Massachusetts Militia*, JOHN ADAMS ACADEMY (Oct. 11, 1798), https://www.johnadamsacademy.org/apps/pages/index.jsp?uREC_ID=2003858&type=d&pREC_ID=2094472.

4 Religion, Black's Law Dictionary (12th ed. 2024).

5 Conscience, Black's Law Dictionary, *supra*.

6 Joshua O. Haberman, T*he Bible Belt Is America's Safety Belt: Why the Holocaust Couldn't Happen Here*, POLICY REVIEW 40 (Fall 1987).

7 Plaintiff Gudrun Kristofersdottir is represented by the authors' employer, First Liberty Institute.

ARTIFICIAL INTELLIGENCE AND HIRING: THE RELEVANCE OF AI THROUGHOUT THE HIRING PROCESS

BY HENSON ADAMS, ADAM SENCENBAUGH & DAN LAMMIE

Introduction

Since artificial intelligence ("AI") went mainstream with the launch of ChatGPT, interest in AI has exploded in the workplace and across society. Federal law defines AI as a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." 15 U.S.C. § 9401(3). Employers are eager to introduce AI tools throughout the hiring process to aid in: generating job descriptions; screening and interviewing candidates; and making ultimate hiring decisions.

AI promises to make hiring more efficient and offer an objective, unbiased analysis of candidates. But employers should be mindful of its accompanying legal considerations. To this end, this article walks through stages of the candidate selection and hiring process to address those considerations for employers and follows with a discussion of the importance of vendor selection and the AI legal landscape moving forward.

Recruiting

At the recruiting stage, employers can use AI to generate job descriptions for postings and target candidates on social networking platforms, such as LinkedIn.

AI offers real advantages in generating job descriptions that sound professional and attractive to potential candidates, created in a fraction of the time that it might take a human.

However, employers should be wary of taking an AI-generated job description to press without careful review. For example, an employer may want to tailor that job description depending on whether the employer plans on classifying the employee as exempt or nonexempt from the minimum wage and overtime provisions under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., as that job description may become important in later litigation or an agency investigation. *See, e.g.*, *Hebert v. Technipfmc USA, Inc.*, No. 4:20-cv-2059, 2021 WL 1137256, at *4 (S.D. Tex. Feb. 5, 2021). Further, AI-generated job descriptions may omit required notices, such as an EEO tagline, that employers may need to include to comply with federal and state laws. Finally, AI generated job descriptions may mimic language that perpetuate gender stereotypes for the position.

Second, employers may use AI to target specific candidates on LinkedIn. But AI does not guarantee the elimination of bias in recruiting. The AI algorithm is only as good as its training data; imperfect, biased, or insufficient training data can encode those same flaws into the AI model. This may cause the AI to inexplicably give preference to insignificant factors, such as zip code, when targeting candidates. These seemingly benign factors could unintentionally serve as proxies for protected characteristics, such as race, color, religion, sex, national origin, age, disability or genetic information. While this is a practical problem for employers hoping to target the best candidates, this bias could also lead to legal exposure under federal laws such as Title VII. *See United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973) (holding that discriminatory recruiting practices violate Title VII); *United States v. Brennan*, 650 F.3d 65, 126 (2d Cir. 2011) (same).

Screening

After applications come in, employers need an efficient way to screen applicants to narrow the candidate pool. AI promises employers a quick and objective method to process applications infinitely faster than human screeners, focusing only on the most "promising" candidates. The scale at which AI can screen applicants opens the door to identifying candidates that might otherwise go unnoticed, ultimately generating a deeper and more diverse pool of interviews.

But biased training data underlying the AI can introduce that same bias into the screening process, leading to possible discrimination based on protected characteristics such as race, gender, disability, or religion. For example, an AI may have been expressly taught, or inadvertently learned based on training data, to screen out candidates with large gaps in employment history. While seemingly inconspicuous, screening out candidates on this basis may disproportionately

screen out candidates who have taken time off for protected parental leave or family care responsibilities. Alternatively, if a candidate's disability caused this gap in employment history, the AI in effect screened out that candidate because of the candidate's disability.

Indeed, some have noted that the use of AI increases the likelihood that employers will make employment decisions "because of" protected characteristics, opening the door to credible allegations of discrimination. Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1, 23 (2022). Importantly, such discrimination does not have to be purposeful to be actionable based on allegations of disparate impact discrimination.

An employer's use of AI at the screening stage can make class-wide disparate impact discrimination claims more viable. That is, potential claimants can more easily show that a common hiring practice affected an entire class if the same AI tool used at the screening stage was used to assess an entire pool of candidates, allowing them to more easily show a common question of law or fact necessary to certify the class under Federal Rule of Civil Procedure 23. *Id.* at 24.

Indeed, some have noted that the use of AI increases the likelihood that employers will make employment decisions "because of" protected characteristics, opening the door to credible allegations of discrimination.

In these situations, both vendors and employers can be on the hook for discrimination. Plaintiffs can properly file suit against vendors who develop AI-hiring tools and run the first round of screening for employers. For example, the Northern District of California in *Mobley v. Workday, Inc.*, No. 3:23-cv-770, 2024 WL 3409146 (N.D. Cal. July 12, 2024), recently allowed disparate impact discrimination claims against Workday, Inc. ("Workday") to survive a motion to dismiss, where the plaintiff alleged that Workday's AI screening and hiring tools improperly screened out his applications for over 100 separate positions on the basis of his race, age, and/or disability.

Second, employers are also generally responsible for any discrimination by an AI-hiring tool under both the ADA and Title VII. U.S. Equal Emp. Comm'n, EEOC-NVTA-2023-2, Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 (2023); U.S. Equal Emp. Comm'n, EEOC-NVTA-2022-2, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (2022). This is true even where an independent vendor developed and administered the AI. And while employers may want to seek indemnification or contribution for any resulting liability, there remains an open question regarding the extent employers can turn to indemnification or contribution in these circumstances. *Compare Maness v. Vill. of Pinehurst, N. Carolina*, 522 F. Supp. 3d 166, 172 (M.D.N.C. 2021) *with Bowman v. Shadowbriar Apartments, LLC*, No. 4:22-cv-2106, 2023 WL 6798119, at *3 (S.D. Tex. Oct. 13, 2023).

Interviewing

Once the candidate pool is narrowed, employers will often interview the short-list to make a selection. Employers are increasingly turning to AI to conduct candidate interviews without human assistance. The AI asks candidates questions and analyzes the candidate's verbal and nonverbal responses, listening and watching for the right answers and assessing a candidate's word choice and cadence.

But there are practical concerns over the impersonal nature of AI interviews and the ability of AI to accurately identify top candidates. For example, some candidates have described AI-interview tools as rude and impersonal, with some programs cutting off interviewees mid-response and providing a cold, inhuman environment that alienates interviewees.

The same discrimination concerns underlying the use of AI at the screening stage persist at the interview stage. And, under the ADA, employers must provide reasonable accommodations for those candidates whose disability would make it hard for the AI-interview tool to evaluate them. U.S. Equal Em. Comm'n, EEOC-NVTA-2003-4, Job Applicants and the ADA (2003). Ideally, any tool should be able to recognize the need for, and provide, a reasonable accommodation. If it does not, then the AI tool may improperly reject a candidate based on a protected trait or disability.

On the flip side, job seekers themselves are increasingly turning to AI to assist with their interviews. In fact, CNBC recently noted that at least one-fifth of candidates are relying on AI in the hiring process. Some use AI to generate resumes and cover letters, while others use AI to help prepare for interviews, including generating responses to interview questions in real time during remote interviews. One tech

company is even developing an "AI clone" that would perform AI interviews on the candidate's behalf.

To ensure that employers are vetting an actual candidate, employers can and should consider policies on the use of AI by candidates. Additionally, employers may decide to conduct final in-person interviews to head off the possibility of hiring an "AI clone." But draconian restrictions on AI use may exclude promising, resourceful candidates—particularly as proficiency with AI becomes a more desirable skillset. And employers should narrowly craft restrictions so that they comply with federal laws such as the ADA.

Decision

Once the short list of candidates is interviewed, it is time for the employer to make the hiring decision. According to Indeed, it costs between one-half and twice an employee's annual salary to replace the employee. An employer may feed candidates' data into the AI for "objective" assistance in choosing between candidates. Employers could ask for a simple pros-cons list on different candidates or go as far as to ask that the AI recommend the best candidate.

But employers should be aware that using AI in such a manner may put the employer in a tough position down the road. For example, where the AI recommends hiring a diverse candidate but the employer instead elects to go with a non-diverse candidate, later justifications for such a decision may appear pretextual to any potential finder of fact. To this effect, employers should strive for consistency and implement clear policies for AI's use in the final hiring decision.

Choosing an AI-Hiring Tool & Software Vendor

Given the various practical and legal considerations that employers must juggle in using AI-hiring tools, an employer's choice of vendor and AI is paramount. To help employers make this choice, the Department of Labor ("DOL") has put together a helpful AI and Inclusive Hiring Framework. According to the DOL, it developed this framework "to help organizations advance their inclusive hiring policies and programs, specifically for people with disabilities, while managing the risks associated with deploying AI hiring technology." It recommends ten focus areas for employers to consider in adopting AI-hiring tools; among these focus areas, the DOL recommends that employers work with responsible AI vendors and ensure effective human oversight.

To this end, though vendors can present their AI-hiring tools as top shelf products free from bias, it is ultimately on employers to minimize their own legal exposure. Frustratingly, the opacity of AI can make it hard for employers to detect issues as there can be little insight into the black box of AI's methodology. For this reason, employers looking to incorporate AI-hiring tools should work with vendors willing to (1) offer insight into the AI's methodology and (2) collaborate with employers to identify and minimize bias. For example, before using an AI tool on real candidates, employers may consider testing the vendor's AI tool with sample datasets beforehand to identify potential biases.

Another important aspect of vendor selection is determining the extent to which the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681b et seq., applies to a given vendor's AI-hiring tool. Specifically, according to a circular published by the Consumer Financial Protection Bureau ("CFPB") in October 2024, a "consumer reporting agency" under the FCRA means a third party—such as a vendor— who "collects consumer data in order to train an algorithm that produces scores or other assessments about workers for employers." U.S. Consumer Fin. Prot. Bureau, Circular 2024-06, Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions (2024). In that circular, the CFPB went on to state that, although a report "containing information solely as to transactions or experiences between the consumer and the person making the report" does not fall within the FCRA's scope, this exception "does not apply to a report containing information not about transactions or experiences between the report-maker and the consumer, such as when the report includes algorithmic scores[.]" *Id.* Thus, it appears that, in the CFPB's eyes, the FCRA applies to AI-hiring tools that have been trained using consumer data to score candidates. Accordingly, prior to selecting a vendor and an AI-hiring tool, employers should determine the applicability of the FCRA to that vendor's AI-hiring tool.

Moving Forward

As AI becomes increasingly pervasive, the legal landscape surrounding the technology is certain to shift quickly at both the federal level and state level.

At the federal level, employers should keep an eye out for new EEOC, DOL, CFPB, and other guidance on the intersection of AI and hiring processes, particularly as the incoming Trump administration enters the White House. Though impossible to predict the new administration's exact policies, the previous Trump administration held a more relaxed attitude toward AI regulation. And on the campaign trail, Trump indicated that he would take a "light touch" approach to AI.

Similarly, employers should monitor developments at the state

level. For example, in *Baker v. CVS Health Corp.*, 717 F. Supp. 3d 188 (D. Mass. 2024), a district court denied a motion to dismiss a plaintiff's complaint alleging that CVS's employment screening process violated the Massachusetts Lie Detector Law (Mass. Gen. Laws ch. 149, § 19B). While no suit to this effect has yet to make its way through Texas courts, *Baker* is an important reminder for employers to stay abreast of both federal and state laws in developing their approach to AI. In fact, in 2025, Texas Legislator, Rep. Giovanni Capriglione, plans to introduce legislation regarding the use of "high-risk" AI systems, requiring that developers and deployers of "high-risk" AI systems take "reasonable care" to ensure such systems do not discriminate. Under this legislation, a "high-risk" AI system would be one used in making a "consequential decision" such as an employment decision. If the developer or deployer fails to exercise reasonable care, that developer or deployer could be subject to an injunction, and in the event the violation is not timely cured, the developer or deployer could be fined up to $100,000.

The power of AI can be both exciting and terrifying for employers. Businesses that want to remain competitive in the marketplace will invariably have to face to decision on if, and to what extent, to incorporate AI into the hiring process. But in doing so, employers need to have clear eyes to the risks and pitfalls of AI in order to effectively navigate and mitigate legal risk—such legal risk evolving by the day along with AI ubiquity.

Adam Sencenbaugh is the Managing Partner of the Austin office of Haynes Boone.

Henson Adams is a partner and Dan Lammie is an associate with Haynes Boone in San Antonio. ★

THE FUTURE OF REMOTE WORK

BY CHRISTINE E. REINHARD & LAUREN CHLOUBER HOWELL

I. Introduction: The Evolution of Remote Work in Texas and Legal Considerations

"Is work a real place? Is it just an activity?" These questions are more than just a play on Freddie Mercury's iconic lyrics. They have gained new meaning as the ability to telecommute has blurred the lines between home and office. Fueled by necessity during the COVID-19 pandemic, the remote work model has since become a permanent and essential component of some businesses' operational structures. Other businesses, however, have reverted back to an in-person structure or are still contemplating their next move, including how to bring workers back into the traditional workplace be it full or part-time.

Remote work has advantages and disadvantages for all involved. It simultaneously liberates employees from the constraints of traditional office environments, offering flexibility and at times increasing productivity, while in-person collaboration may be lost or drastically reduced, leading to a lower energy and less sustaining workforce. Although anyone is available at the "ping" of a Teams, Slack, or other electronic chat or message, coworkers may be less likely to reach out to each other due to both real and perceived distance. *See* Natalia Emanuel, Emma Harrington, and Amanda Pallais, *The Power of Proximity to Coworkers: Training for Tomorrow or Productivity Today?*, HARV. UNIV. (Nov. 10, 2023), https://scholar.harvard.edu/sites/scholar.harvard.edu/files/pallais/files/power_of_proximity_nov2023.pdf. The reality of remote work has thus introduced distinct challenges for employers, such as how to effectively train remote staff, foster a sense of workplace community that sustains team cohesion, and ensure consistent performance and productivity. At the same time, remote work also presents opportunities for significant cost savings, as employers may be able to reduce expenses related to office space and utilities, while employees can save money on the gas once required to drive into the office.

Although anyone is available at the "ping" of a Teams, Slack, or other electronic chat or message, coworkers may be less likely to reach out to each other due to both real and perceived distance.

Remote work also brings unique legal complexities, including navigating compliance with employment and labor laws, managing tax obligations across jurisdictions, addressing workplace accommodation obligations, determining responsibilities related to work-from-home supplies, and handling workplace safety issues that can arise from a non-employer-controlled work location. Labor and employment issues around remote work have only just begun to emerge, and the implications for wage and hour compliance, discrimination, and security concerns demand careful analysis and thought.

From a management perspective, navigating these complexities is key to attracting employees and harnessing the benefits of remote work without sacrificing compliance. From the applicability of the Americans with Disabilities Act of 1990, as amended in 2008 (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Texas Commission on Human Rights Act (TCHRA), to safety concerns raised under the Texas Workers' Compensation Act (TWCA) and the Occupational Safety and Health Act (OSHA) and related regulations, to wage and hour issues under the Fair Labor Standards Act (FLSA), Texas-based employers must carefully navigate these legal requirements to avoid potential lawsuits, penalties, and noncompliance. This article thus examines the evolving legal landscape of remote work, with a particular focus on Texas employers and employees.

II. Definitions and Legal Framework Surrounding Remote Work

Although the terms used to reference remote work are often varied and conflated, the distinctions and nuances amongst some of those terms may be important when implementing and enforcing related policies. According to the federal Office of Personnel Management, "[r]emote work is defined as a flexible work arrangement in which an employee, under a written remote work agreement, is scheduled to perform work

at an alternative worksite and is not expected to perform work at an agency worksite on a regular and recurring basis. A remote worker's official worksite may be within or outside the local commuting area of an agency worksite." *What Is the Definition of Remote Work?*, OPM, https://www.opm.gov/frequently-asked-questions/telework-faq/remote-work/what-is-the-definition-of-remote-work/#:~:text=Remote%20work%20is%20defined%20as,a%20regular%20and%20recurring%20basis. However referenced, remote work envisions more of a permanent arrangement wherein the employee is not working at the employer's designated worksite. That can be at the employee's home, and it can include employees who work regularly while "on the move" or who work virtually or digitally, regardless of location, on a continuous, ongoing basis.

Remote work is often also called telework or telecommuting. The Telework Enhancement Act of 2010 defines telework as "a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work." Telework Enhancement Act of 2010, Pub. L. No. 111-292 (2010), https://www.govinfo.gov/app/details/PLAW-111publ292. The federal Office of Personnel Management, on the other hand, defines telework as an arrangement wherein an employee is expected to report to work both at the employer's worksite and alternative worksite on a regular and recurring basis each pay period. *Is There a Difference Between Remote Work and Telework?,* OPM, https://www.opm.gov/frequently-asked-questions/future-of-work-faq/general/is-there-a-difference-between-remote-work-and-telework/. This latter definition aligns more closely with the popular term, hybrid or flex work, which is understood to involve splitting time between remote and in-office environments. Many employers today in fact delineate which days hybrid employees may work from home or elsewhere, and other employers remain more flexible with in their in-office requirements.

Although many companies have already implemented remote or hybrid work policies in response to the pandemic or shifting workforce demands, it is important to judiciously review and revise these policies periodically. The various available models—and variability with which they are defined—require employers to use careful and intentional language to manage expectations and compliance risks with regard to both fully remote and hybrid employees.

III. Discrimination Concerns Surrounding Remote Work

A. Is There a Right to Remote Work?

The COVID-19 pandemic reshaped the way work was structured in many significant ways and has led to the question of whether employees have a "right" to remote work. Generally, the answer is no. Federal and Texas law does not provide employees with an automatic right to work remotely. On the whole, employers retain the authority to determine workplace policies, including whether remote work is even available. *See* Rachel Arnow-Richman, *Is There a Right to Remote Work?*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v35/number-1/is-there-right-to-remote-work.pdf, at 2 ("Most employees are at will: they have no contractual rights to continued employment, let alone to particular working conditions. If an employer does not accept a remote arrangement, the employee's resource is to quit.").

However, certain conditions, such as medical disabilities, pregnancy, or even religious beliefs, may necessitate remote work as a reasonable accommodation. As one ABA commentator stated, "[a]n employee seeking remote work is effectively requesting an accommodation, . . . and ADA-qualifying [or other qualifying] employees are not entitled to their preferred accommodation"—only to a *reasonable* accommodation that enables them to perform the essential functions of their job." *Id.* at 3. If a legal accommodation request is at issue, then employers are obligated to engage in an interactive process to identify and implement a suitable accommodation, which may or may not be remote work, particularly if alternative accommodations are effective and less disruptive to the employer's operations. *Id.* ("A court could find that an employer's implementation of a lesser adjustment—such as providing a private office or reassigning the worker to a less contact-intensive shift—is a reasonable, and consequently sufficient, accommodation for the employee's disability."). In other words, employees may be entitled to accommodations under certain laws, as is further explored below, but this does not inherently grant them a right to work from home.

The decision of the employer to allow remote work as an accommodation depends on the nature of the job, the specific limitations of the employee, and whether remote work would adequately address those limitations without disrupting essential job and business functions. Employers should evaluate each request individually and on case-by-case basis, engage in a good faith discussion with the employee during the interactive process, and carefully document their reasoning to avoid legal challenges. Employers must also

consider the specific dynamics of remote work, including how it impacts protected classes and accommodation requests, when creating workplace policies.

B. Accommodation Concerns

1. Remote Work as a Reasonable Accommodation

The "ADA does not require an employer to offer a telework program to all employees. However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program." *Work at Home/Telework as a Reasonable Accommodation*, U.S. EEOC, https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation. Under the ADA and its analog provisions under the TCHRA, remote work can be considered a reasonable accommodation for employees with disabilities, as long as employees can still perform the essential duties of their job position. *Id.* This is particularly relevant for employees with physical or mental disabilities that make commuting to a workplace or performing certain tasks in an office environment difficult or impossible.

Whether remote work is a reasonable accommodation depends on various factors, including the essential functions of the job, the nature of the disability, and the employer's ability to make the accommodation without undue hardship. *Id.* Employers must discuss the request with the employee so as to understand the necessity of remote work, and, along the way, they might discover "other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability." *Id.* Within the Fifth Circuit and Texas, case law regarding remote work is still developing, with varied outcomes. Although some courts have upheld remote work as a reasonable accommodation, others have ruled that an employee's role, particularly one that requires in-person interaction or physical presence, does not lend itself to remote work..

For instance, in *Texas Workforce Commission v. Seymore*, the Fort Worth court of appeals examined whether the plaintiff's employer, the Texas Workforce Commission (TWC), violated either ADA or TCHRA in handling Seymore's accommodation request, wherein she sought to transition from a hybrid work arrangement to working remotely full-time due to allergies. No. 02-23-00036-CV, 2024 WL 283688, at *1 (Tex. App.—Fort Worth Jan. 25, 2024, no pet.). The plaintiff, however, did not provide specific information about her sensitivity to the allergens in her Fort Worth workplace, despite multiple requests from her employer. *Id.* at *2–3. Her employer, on the other hand, explained why full-time remote work was incompatible with the plaintiff's job duties, outlined the impact on her coworkers, and offered other alternative accommodations, including a transfer to nearby offices. The plaintiff disputed her employer's position that her job duties required in-person work, but she resigned before the seven-month long interactive accommodation process concluded. *Id.* at *2.

Ultimately, the appellate court relied on established precedent holding that an employer is not liable under the ADA or TCHRA for a breakdown in the interactive process if the responsibility for the breakdown lies with the employee. *Id.* at *5. In this case, the employer had actively engaged in the interactive process for seven months, and it was the plaintiff's failure to provide requested medical documentation and voluntarily resign that shifted the responsibility for the breakdown to her. In finding no violation, the court reiterated that employers are not obligated to consider all possible accommodations, guarantee the employee's preferred option, or offer equivalent compensation in alternative positions. *Id.* at *6. The court also noted that offering a lower-paying position does not necessarily indicate bad faith, stating that "[a] disabled employee has no right to a promotion, to choose what job to which [s]he will be assigned, or to receive the same compensation as he received previously." *Id.* at *7 (quoting *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011)).

Recent cases emerging from the COVID-19 pandemic have explored the role of remote work as a reasonable accommodation even further, highlighting the unique challenges posed by a public health crisis. Courts have emphasized that the unprecedented circumstances of the pandemic created novel considerations for evaluating workplace accommodations. For example, in *Milteer v. Navarro County*, the Northern District of Texas considered whether remote work was a reasonable accommodation for an employee with diabetes and hypertension. 652 F. Supp. 3d 754 (N.D. Tex. 2023). The court acknowledged that these conditions, in the "unusual and narrow context" of the COVID-19 pandemic, substantially limited the employee's ability to work in environments where COVID-19 exposure was possible. *Id.* at 763. The court then found that, under those unique circumstances, remote work was potentially reasonable because it directly addressed the employee's health-related vulnerabilities.

As noted previously, a medical condition is not the only type of circumstance that may give rise to a remote work accommodation request. In *Troutman v. Teva Pharmaceutical*

USA, Inc. et al., the Eastern District of Texas addressed a situation where an employee requested alternatives to a mandatory COVID-19 vaccination policy, including allowing him to work remotely, wear a mask, social distance, and participate in periodic testing, after his employer had returned to in-person work. No. 6:22-CV-395-JDK, 2024 WL 3635303, at *8 (E.D. Tex. June 25, 2024). The plaintiff sought in particular a religious accommodation, and his employer denied the plaintiff's request on the basis that allowing customer-facing employees to remain unvaccinated imposed an undue burden on its business. Although the plaintiff even went so far as to confirm his specific assigned clients were not requiring the vaccine or mandating masks, the employer still ended his employment for refusing to comply with its mandatory policy. The Eastern District of Texas, in denying the employer summary judgment on the plaintiff's religious accommodation claim, criticized the employer's outright refusal to discuss or consider any of plaintiff's alternative accommodations, characterizing it as exactly "the kind of take-it-or-leave-it approach that Title VII is meant to prohibit." *Id.* at *8.

One issue employers have struggled with is whether they can withdraw remote work as an accommodation once granted.

With remote work more and more normalized, courts are likely to continue grappling with its viability as a reasonable accommodation under various scenarios, including future public health emergencies and the "new normal." To show their good faith efforts in the interactive process, employers should remain flexible, explore and offer alternative solutions, and carefully document their decision-making processes to avoid legal pitfalls.

2. Withdrawing a Remote Work Accommodation

One issue employers have struggled with is whether they can withdraw remote work as an accommodation once granted. According to Judge James C. Ho on the Fifth Circuit, "[w]hen employees [have been] able to successfully perform the essential functions of their jobs remotely at some point, this may be relevant to the interactive process and to assessing whether an employee's remote-work request is reasonable." *Montague v. United States Postal Serv.*, No. 22-20113, 2023 WL 4235552, at *3 (5th Cir. June 28, 2023) (comparing the remote performance of similarly situated employees). As a result, if the accommodation has been granted to some and denied to others, or when remote work is withdrawn from an employee who has already shown the ability to telecommute, a legal concern may arise. After all, as Judge Ho summarized when reversing a grant of summary judgment to the employer, "It's often said that 90% of life is showing up. But the right number no doubt varies from job to job. It may be reasonable to work part of the day at home for some jobs-but not others. The correct answer turns on the nature of the job and the facts of the case." *Id.* at *1.

Relatedly, for decades, the Fifth Circuit limited actionable adverse employment actions to "ultimate employment decisions," such as hiring, firing, or promotions. *Dollis v. Rubin*, 77 F.3d 777, 781–82 (5th Cir. 1995) (per curiam). However, in *Hamilton v. Dallas County*, the Fifth Circuit overturned this precedent, holding that "a plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the 'terms, conditions, or privileges of employment . . . .'" 79 F.4th 494, 506 (5th Cir. 2023). In doing so, the Fifth Circuit allowed a broader interpretation of what may qualify as adverse and be actionable, a shift allowing plaintiffs to challenge employment actions that, while not "ultimate," could impact their terms and conditions of employment.

One result of *Hamilton* in the remote work context is seen in *Smith v. McDonough* out of the Western District of Texas. In relevant part, Smith alleged Title VII race, color, and national origin discrimination, ADEA age discrimination, and ADA disability discrimination, all based on the revocation of his telecommuting agreement. The district court ultimately allowed Smith's claim to proceed tot rial given that revocation of his telecommuting agreement "could potentially support a finding that he was denied the terms, conditions, and privileges of employment." In doing so, the court noted that the Fifth Circuit "ha[d] yet to conclude definitively whether revocation of telecommuting privileges constitutes an adverse employment action." *Smith v. McDonough*, No. SA-22-CV-01383-JKP, 2023 WL 5918322, at *5 (W.D. Tex. Sept. 8, 2023) (quoting *Price v. Wheeler*, 834 F. App'x 849, 856 (5th Cir. 2020)).

These developments underscore the legal scrutiny around workplace flexibility and accommodations, particularly as remote work has become integral to modern employment practices. Employers thus must approach the withdrawal of remote work arrangements with careful consideration, ensuring decisions are justified by legitimate business needs and supported by thorough documentation. Engaging in a clear and meaningful dialogue with affected employees,

especially those who rely on remote work as a reasonable accommodation, is likewise critical. Failing to take these actions otherwise may expose employers to viable legal claims, especially as courts continue to adapt to the evolving realities of remote work.

C. FMLA Eligibility for Remote Workers

The rise of remote work raises critical questions about employee eligibility under the FMLA. The FMLA excludes employees from coverage if their worksite employs fewer than 50 employees within a 75-mile radius. 29 U.S.C. § 2611(2)(B)(ii) (1999). For traditional office roles, this definition is straightforward, but for remote workers, determining the "worksite" is more complex.

For employees without a fixed physical worksite, the FMLA defines the worksite as the location considered the employee's home base, the site from which work is assigned, or the location to which they report. *Landgrave v. ForTec Med., Inc.*, 581 F. Supp. 3d 804, 812–13 (W.D. Tex. 2022) (quoting 29 U.S.C. § 2611(2)(B)(ii) (1999)). A remote employee's "home base" must be a location they physically visit during regular business activities. *Id.* The focus is not on the employer's operations but on the physical location integral to the employee's duties. *Id.* Similarly, the "assigning site" is the source of the employee's day-to-day instructions, while the "reporting site" is tied to the personnel responsible for monitoring performance, reviewing reports, and providing feedback. *Id.* Crucially, an employee's residence does not qualify as a worksite, which further signifies the intent an effort to anchor the worksite concept in employer operations, not personal living arrangements. *Id.*

In *Landgrave*, a remote employee, who was terminated after taking unapproved leave, alleged that her former employer violated the FMLA by failing to grant her protected leave. *Id.* at 810. The issue facing the district court was whether the plaintiff, an otherwise eligible employee under the FMLA, was ineligible due to the FMLA's numerosity provision. *Id.* at 812–13. As the opinion reiterates, the plaintiff's hiring took place in ForTec's Hudson, Ohio corporate headquarters, where more than 50 employees work, but she never personally visited that site. She instead worked in Texas, where ForTec only employed twenty people at the time. However, she received regular updates and confirmations from employees located at the Hudson office, sent case details and reports to the Hudson office, and reported to one indirect supervisor who worked in the Hudson office. *Id.* at 809. The court quickly determined that the Hudson location was not the "home base." However, the identity of the assigning site and reporting site required further examination. Ultimately, the court found "Hudson was involved, at least to some degree, in Landgrave's 'actual work' assignments," which raised a genuine issue of material fact preventing summary judgment. *Id.* at 814 (citing *Bader v. N. Line Layers, Inc.*, 503 F.3d 813, 821 (9th Cir. 2007)).

As remote work continues to expand, questions about eligibility under laws like the FMLA are likely to become more frequent. Employers must carefully document remote workers' operational hubs and reporting structures to ensure compliance and defend against legal claims. Future legislative or regulatory updates likewise may be necessary to address the nuances of a workforce that increasingly defies traditional geographic boundaries.

IV. Injuries When Work is at Home: OSHA and Worker's Compensation Concerns

As remote work becomes increasingly common, employers and employees alike face novel questions about workplace injuries occurring in home settings. Determining liability and compensability under OSHA guidelines and workers' compensation laws, respectively, often require a nuanced analysis of the work environment, the nature of the activity, and the employee's connection to their job duties.

A. Defining Work-Related Injuries at Home

OSHA itself has clarified its limited jurisdiction over home offices. The agency simply does not regulate telework environments, conduct home office inspections, or hold employers liable for home office safety. *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S. DOL WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/flsa/pandemic#15. If an employee files a complaint about home office conditions, OSHA may informally notify the employer but will not pursue further action, unless an employer fails in its responsibility to maintain records of work-related injuries, even in remote settings. As OSHA has explained, injuries or illnesses sustained at home are "considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting." 29 C.F.R. 1904.5(b)(7). For example, if an employee drops a box of work documents at home and injures their foot, that would be considered work-related. However, injuries such as tripping "on the family dog while rushing to answer a work phone call" or being "electrocuted because of faulty home wiring" are not deemed work-related. *Id.*

B. Workers' Compensation Coverage

Like other workplace arenas, workers' compensation insurance has had adapt to the realities of remote work. The National Council on Compensation Insurance (NCCI) has identified specific vulnerabilities tied to telecommuting, including ergonomic hazards that may have been addressed by an employer in an in-person desk setup leading to an increased risk of repetitive stress injuries. Furthermore, the definition of work-related activity can be narrower in the workers' compensation context than even under OSHA. In *Batey v. Beacon Hill Staffing Group*, a remote worker fell down the stairs while hurrying back to a meeting after a restroom break. Jon Campisi, *Comp Court Approves Benefits for Employee with Remote Work Injury*, BUS. INS., https://www.businessinsurance.com/comp-court-approves-benefits-for-employee-with-remote-work-injury/. Although the employee's compensation claim was denied as not compensable, the reviewing workers' compensation court disagreed and awarded the remote employee workers' compensation benefits. *Id.* The court determined that her injury occurred within the scope of employment because she was actively engaged in work duties. *Id.*

Although there is no definitive case law on this particular issue in Texas at this time, employers should be aware of the potential for similar workers' compensation claims. To manage the risks associated with remote work, employers should consider:

- Providing ergonomic guidance and tools to remote employees.
- Establishing clear policies delineating work duties and hours.
- Educating employees on identifying and reporting early signs of repetitive strain injuries.
- Ensuring workers' compensation coverage explicitly includes telecommuting scenarios.

Carolyn Wise, *Telecommuting and Workers Compensation: What We Know*, NAT'L COUNCIL ON COMP. INS. (Jan. 25, 2021), https://www.ncci.com/Articles/Pages/Insights-Telecommuting-WorkersComp.aspx. After all, a proactive approach to defining and managing workplace risks in remote environments will be essential to fostering a sustainable and compliant workforce.

V. Employee Privacy and Security Concerns

Remote work creates new privacy concerns for employees and employers alike. As employees work from home, their personal space becomes intertwined with their professional responsibilities, potentially violating privacy rights or leading to concerns about workplace surveillance.

A. Workplace Surveillance and Employee Privacy Rights

Employers have a legitimate interest in monitoring their remote employees to ensure productivity and prevent misuse of company time and resources. However, the methods used to monitor remote workers must comply with privacy laws and respect employees' reasonable expectations of privacy, where applicable. Employers must strike a balance between monitoring employees and respecting their privacy rights. Invasive practices that could create an issue, even in Texas, include "keyloggers, wiretapping, GPS monitoring, internet traffic interception, message interception, and video recording from device cameras." Nick Butkovskiy, *Employee Monitoring in the State of Texas, USA*, Worktime (June 6, 2023), https://www.worktime.com/employee-monitoring-in-the-state-of-texas-usa#A10.

B. Data Security and Protection

Remote work has significantly increased the risk of data breaches. Perhaps unsurprisingly, since the start of the COVID-19 pandemic, "[e]mployees are an alarming 85% more likely to leak or lose files," and "the number of data breaches [has] skyrocket[ed] by as much as 300%." *Is Your Data Security Keeping Pace With an Increasingly Remote Workforce?*, HBR (Apr. 22, 2021), https://hbr.org/sponsored/2021/04/is-your-data-security-keeping-pace-with-an-increasingly-remote-workforce; James Harrison, *Your Remote Workers: A Target for Cybercrime*, ASS'N OF LEGAL ADMIN., https://www.alanet.org/legal-management/2020/october/columns/your-remote-workers-a-target-for-cyber-crime.

When employees access company data from home, they may be using unsecured networks or personal devices, creating vulnerabilities for any organization. Employers have a responsibility to protect company and client data and ensure that remote workers follow appropriate cybersecurity protocols. Although crucial in many areas, this is particularly important in sectors that handle customer data, intellectual property, or proprietary business information. Therefore, in an abundance of caution, employers should implement the following best practices:

- Virtual Private Network (VPN);
- Two- or multi-factor authentication to protect employee data;
- Institute an enterprise-wide mobile device management policy; and
- Emphasize secure password protection and management, such as what makes a good

password and encourage the use of secure enterprise password management tools.

Sabin J., *The Future of Security in a Remote-Work Environment*, NAT'L LIBR. OF MED. (Oct. 28, 2021), https://pmc.ncbi.nlm.nih.gov/articles/PMC9759928/. Employers should also regularly review their procedures, particularly as technology evolves, and consider other updates that may be necessary to ensure their date is secure and protected.

VI. Exempt Status and Financial Implications

A. FLSA Exempt vs. Non-Exempt Status

The distinction between exempt and non-exempt employees under the Fair Labor Standards Act (FLSA) presents unique challenges in remote work settings. Employers must carefully navigate these challenges to maintain compliance and ensure fair treatment of all employees. Key issues include monitoring work hours, determining availability, managing overtime, and leveraging technology for oversight. *See* Kerry Brian Melear, Ph.D., Russell H. Willis, J.D., *Working Remotely at Colleges and Universities: Federal and State Employment Law and the Pandemic*, 408 ED. LAW REP. 20, 22 (2023).

Employers, for instance, must be vigilant in tracking the hours worked by remote employees, particularly non-exempt employees entitled to overtime compensation. *Id.*; Field Assistance Bulletin No. 2023-1: "Telework Under the Fair Labor Standards Act and Family and Medical Leave Act," Jessica Looman, U.S. Department of Labor, Wage and Hour Division, Feb. 9, 2023, https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-1.pdf (citing 29 C.F.R. § 785.11–.12). The challenge lies in ensuring accurate timekeeping when employees are not working in a centralized office environment. Under the FLSA, employers are obligated to compensate non-exempt employees for all hours worked, including overtime, which can be difficult to monitor when employees work from home or irregular hours. Field Assistance Bulletin No. 2020-5: "Employers' Obligation to Exercise Reasonable Diligence in Tracking Teleworking Employees' Hours of Work," Cheryl M. Stranton, U.S. Department of Labor, Wage and Hour Division, Aug. 24, 2020, https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf (quoting 29 C.F.R. § 785.11–12) ("[I]t may not always be clear when an employer 'has reason to believe that work is being performed,' particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor.").

In addition, employers must make reasonable efforts to track the time worked by remote employees, maintaining accurate records and ensuring employees are paid for overtime hours. Employers that fail to track remote workers' hours effectively may face FLSA violations, leading to potential class action lawsuits and significant penalties. *See generally* *Harrington v. Sw. Bell Tel. L.P.*, No. SA-20-CV-00770-JKP, 2021 WL 4441979 (W.D. Tex. Sept. 28, 2021) (finding class-action Plaintiffs' overtime usage were generally known by leadership, and could be "precisely recorded for payroll purposes" and was not de minimis, and denying summary judgment and allowing the case to proceed); *Sams v. Sw. Bell Tel. L.P.*, No. SA-20-CV-00684-JKP, 2022 WL 545069, at *8 (W.D. Tex. Feb. 22, 2022) (same); *Kirby v. Sw. Bell Tel., L.P.*, No. SA-20-CV-00683-JKP, 2022 WL 545068, at *8 (W.D. Tex. Feb. 22, 2022) (same).

As a result, employers must set clear policies for remote workers that ensure they understand the limits of their work hours, and the employees either need to document time worked or the employer must do it themselves when able to do so and not de minimis. *See id.* If employers fail to do so, they may be held responsible for unpaid overtime wages, including liquidated damages and attorney's fees.

B. Employer Responsibilities for Expenses

Under the Fair Labor Standards Act (FLSA), employers cannot require non-exempt employees to bear business expenses if doing so would reduce their earnings below the federal minimum wage or overtime compensation requirements. This includes expenses for tools essential to remote work, such as computers, internet access, or additional phone lines. For example, if an employer provides a laptop or reimburses a remote employee for purchasing one, the employer cannot deduct that cost from the employee's pay if it compromises the employee's legal wage entitlements. Employers therefore are advised to carefully document and communicate policies regarding the allocation of remote work expenses and consider offering stipends or reimbursement plans for home office supplies to mitigate disputes and promote compliance.

C. Tax Considerations in a Multistate Workforce

Remote work's expansion has also complicated tax obligations for both employers and employees. Key factors influencing tax compliance include:

- **Employee Location:** The physical location of remote employees determines state income tax withholding and reporting requirements. Some states require withholding for any employee working within their borders, while others base obligations on the employer's business presence.
- **Residency Issues:** Employees who live and work in

different states from their employer may encounter double taxation or differing state tax credits.
- **Nexus Considerations:** Employers must monitor whether having remote employees in certain states establishes a "nexus" that subjects the business to additional state taxes or regulatory requirements.

State and Local Tax Considerations of Remote Work Arrangements, NAT'L CONF. OF STATE LEGS., passim (updated July 31, 2023), https://documents.ncsl.org/wwwncsl/State-Federal/NCSL-SALT-Remote-Work-Considerations-White-Paper-2023.pdf. Employers can address these challenges by conducting regular audits of employee locations and reviewing relevant state tax laws, partnering with tax professionals to ensure compliance with multistate regulations, and clearly communicating with employees about their tax responsibilities, especially for those living in states with complex tax laws or reciprocal agreements.

As remote work continues to evolve, legislative and regulatory updates may further address issues related to expenses and taxation. Employers and employees alike must remain vigilant and adaptable to ensure that financial and legal responsibilities are met while sustaining the benefits of a flexible work environment.

VII. Additional Considerations and Potential Next Steps

A. The Democratizing Effect of Remote Work

Despite there not being an all-encompassing legal "right" to remote work, its expansion has had a democratizing effect, helping level the playing field in some ways by offering more flexibility and removing geographical barriers. As a result, many businesses are choosing to allow a continued hybrid or remote presence, even if to expand the diversity of their workforce and business overall. Businesses that plan a return to in-person work, however, must consider the potential negative consequences of reversing these trends, particularly concerning workers who may disproportionately benefit from remote work—such as parents, which still has a particularly high impact on women, and people of color. Although a return to work policy itself would be neutral, legal claims can still arise under Title VII's and the TCHRA's disparate impact provisions.

Another related concern with remote work is the potential for disparate access to opportunities and resources for those employees working from home because, "[i]n a virtual setting, discriminatory practices can become less overt and harder to detect." Barrett & Farahany, *The Impact of Remote Work on Employment Law*, JUSTICE AT WORK (Nov. 20, 2024), https://www.justiceatwork.com/the-impact-of-remote-work-on-employment-law/. Remote workers also can face several challenges that may limit their access to positive aspects of the workplace, particularly in terms of decision-making, career advancement, and professional development. For example, they may be excluded from important in-person meetings, which can hinder their ability to contribute to key projects and decisions. *Id.* Remote workers may also have disadvantaged access to technology, company-sponsored resources such as training, or even informal mentorship opportunities that often arise in office settings. *Id.* These gaps can lead to disparities in professional growth, which could affect an employee's ability to secure promotions or move up within the organization. In addition, there may be unequal access to networking opportunities or key conversations that often occur spontaneously in the office environment, further isolating remote workers from critical workplace dynamics. *Id.* Depending on how the demographic impact, these negative consequences could lead to disparate treatment or disparate impact claims.

To mitigate such claims, employers should take a proactive approach in fostering an equitable work environment. This involves not only providing remote workers with the same tools and technology that in-office workers use, but also ensuring that opportunities for professional development, training, and advancement are equally available to all employees. *Id.* For example, virtual collaboration tools should be used to include remote workers in meetings and decision-making processes. *Id.* Mike Tolliver and Jonathan Sass, *Hybrid Work Has Changed Meetings Forever*, HBR (June 17, 2024), https://hbr.org/2024/06/hybrid-work-has-changed-meetings-forever. In other words, by investing in inclusive practices and technology, organizations can create a more balanced and supportive work environment where all employees, regardless of their physical work location, have equal access to resources, opportunities, and the ability to contribute meaningfully to the organization., but they also can lessen the chance of other types of discrimination claims arising. Barrett & Farahany, *The Impact of Remote Work on Employment Law*, JUSTICE AT WORK (Nov. 20, 2024), https://www.justiceatwork.com/the-impact-of-remote-work-on-employment-law/.

B. Agreement and Policy Changes

As remote work becomes increasingly permanent, employers need to reconsider their employment and telecommuting agreements and policies to reflect the new reality of work-from-home arrangements. Effective telecommuting agreements should clearly define expectations for remote workers, including the scope of their work. *A Guide to*

Managing Your (Newly) Remote Workers, HBR (Mar. 18, 2020), https://hbr.org/2020/03/a-guide-to-managing-your-newly-remote-workers. This includes specifying the permanent or temporary nature of the remote work, the employees' working hours, availability, and communication protocols. *Id.* Employees must be aware of their rights and responsibilities when working remotely, as well as the potential consequences for violating company policies, such as using personal devices for work without proper security measures. *Id.* Clear definitions of telecommuting status can prevent confusion and potential legal disputes.

Employment contracts likewise should be updated to include legal language addressing remote work. This includes provisions on intellectual property, confidentiality, cybersecurity, and the ownership of equipment used by remote workers. Overlooking these clauses when drafting telecommuting agreements could put businesses at risk of intellectual property theft or data breaches. The contracts should also clarify that an employee's remote work is subject to the same policies and procedures as working in the office, including those related to disciplinary action.

As remote work becomes increasingly common, employee handbooks should also be updated to reflect new workplace realities. In adapting to a hybrid or fully remote model, it is crucial that employee handbooks clarify expectations surrounding regarding attendance, productivity, communication, and expected work hours. In particular, employers should include sections addressing:

- Remote Work, Hybrid, and Telecommuting Policy: This should outline the specific terms and conditions for remote work.
- Equipment and Technology: Employees should be informed about the company's expectations regarding the use of technology and any equipment provided for remote work.
- Performance Metrics: Employers should clearly define performance expectations, including how productivity will be measured for remote workers.
- Security and Privacy: Given the increased risk of data breaches, policies should outline security measures for remote employees, including the use of VPNs and secure passwords.

Employers may also want to outline expectations around availability, communication, and productivity in their handbooks, including, and especially, for remote employees. For example, employers should specify whether employees are expected to be available during certain hours or whether flexibility is allowed. Performance metrics should also be clearly defined, and employers must ensure they can accurately assess remote employees' work output through the use of digital communication tools. In the absence of in-person interactions, communication can be more challenging, and employers must establish protocols to ensure that remote employees remain engaged and informed.

VIII. Conclusion: A Call to Action

So "is work a real place? Is it just an activity?" It is both, and so much more. It is a place of community, collaboration, and purpose. The requirements to allow remote work and the benefits of doing so result in a call to action for businesses to confront the challenges of telecommuting, whilst ensuring efficient, secure, positive workplace environments. Remote work offers the promise of flexibility and possibility of cost savings, but it also brings the realities of compliance, workplace safety, and team cohesion into sharper focus. Navigating these and hybrid landscapes requires intentional strategies and thoughtful leadership.

Employers should proactively update their policies and training programs to ensure they align with the ever-evolving legal and compliance standards. By addressing the legal complexities of remote work, organizations can create environments that not only meet business objectives but also prioritize employee well-being and productivity. And as the courts and legislatures continue to define the legal framework for remote work, decisions made today will echo in the workplaces of tomorrow.

Christine E. Reinhard, a founding partner of Schmoyer Reinhard LLP, is Board Certified by the Texas Board of Legal Specialization in Labor and Employment Law, a member of the Texas Board of Legal Specialization Labor & Employment Law Exam Commission, and a former member of the State Bar of Texas, Labor and Employment Law Section Council

Lauren Chlouber Howell, who was a civil litigation paralegal for five years before entering the practice of law, is an associate with Schmoyer Reinhard LLP and practices in all areas of labor and employment law. ★

EVIDENCE & PROCEDURE UPDATES

UPDATES ON CASE LAW pertaining to procedure and evidence as compiled by Dylan O. Drummond of Langley & Banack, Inc.

EMPLOYMENT LAW

EVIDENCE UPDATE

BY DYLAN O. DRUMMOND

To best serve the statewide membership of the Litigation Section, this update focuses on decisions from the three courts that possess statewide civil jurisdiction in Texas: the Supreme Court, the Fifteenth Court of Appeals, and the Business Court.

EXPERT REPORTS UNDER THE TEXAS MEDICAL LIABILITY ACT

Walker v. Baptist St. Anthony's Hosp., 703 S.W.3d 339 (Tex. 2024) (per curiam). Parents sued a hospital and their physician for medical negligence arising from permanent neurological injuries their infant son sustained during delivery. The Texas Medical Liability Act ("TMLA") requires healthcare liability claimants like the parents to serve a defendant healthcare provider with a timely and adequate expert report. An expert report is adequate under the TMLA if it "represent[s] an objective good faith effort" to provide a "fair summary of the expert's opinions ... regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." Pursuant to the TMLA, the parents filed the requisite preliminary expert reports.

In response, the hospital and the physician sought to dismiss the lawsuit under Texas Civil Practices & Remedies Code section 74.351 of the TMLA on the grounds that the parents' expert reports insufficiently explained the applicable standards of care, how they were breached, and the causal link, if any, between the alleged breaches and their son's resulting injuries. The trial court overruled hospital and the physician's objections to the expert reports and denied their motion to dismiss—determining that the reports provided a fair summary of the experts' opinions regarding the standard of care, breach, and causation, as required by the TMLA.

But the Seventh Court of Appeals reversed, holding the reports contained conclusory and incomplete language that did not sufficiently explain the cause of the child's brain injury. In so doing, the court of appeals focused its analysis on the hospital and the physician's challenge that the reports do not adequately explain proximate cause.

The Supreme Court reversed, holding that the trial court did not abuse its discretion in overruling the hospital and the physician's objections and denying their motion to dismiss. The Supreme Court reiterated that, "[t]o meet the standard of good-faith effort as to causation, a report need not use magic words like 'proximately caused,' but it must 'explain, to a reasonable degree, how and why the breach caused the injury.'" To this end, a "report must 'explain, factually, how proximate cause is going to be proven,' although it 'need not prove the entire case or account for every known fact.'" Ultimately, the Supreme Court concluded that the expert reports provided a fair summary of the experts' opinions as to the causal relationship between the hospital and the physician's deviations from the standard of care and the child's resulting neurologic injury.

Dylan O. Drummond is a former clerk to retired Texas Supreme Court Chief Justice Nathan L. Hecht and wildlife biologist and who practices in San Antonio, Texas as an appellate shareholder with the law firm of Langley & Banack, Inc. He is a former chair of the State Bar of Texas Appellate Section and the Texas Bar College, as well as a former president of the Texas Supreme Court Historical Society. ★

PROCEDURE UPDATE

BY DYLAN O. DRUMMOND

To best serve the statewide membership of the Litigation Section, this update focuses on decisions from the three courts that possess statewide civil jurisdiction in Texas: the Supreme Court, the Fifteenth Court of Appeals, and the Business Court.

DISCOVERY—EFFECT ON PROPRIETY OF DEPOSITION AFTER AMENDED ANSWER

In re Off. Of Att'y Gen., 702 S.W.3d 360 (Tex. 2024) (orig. proceeding) (per curiam). Four former employees sued the Office of the Texas Attorney General ("OAG") under the Texas Whistleblower Act. Pursuant to the lawsuit, the former employees sought to depose the Attorney General and three senior OAG employees.

Before the depositions took place, the OAG amended its live answer to state that it "elects not to dispute the [former employees'] lawsuit as to any issue and consents to the entry of judgment." Specifically, while the amended answer contained numerous affirmative statements refuting the factual allegations in the former employees' live petition and insisting that their claims are "baseless and they would fail," the OAG's live answer nevertheless stated that it "consent[s] to the entry of judgment in this matter to the extent of the statutory limitations of the Texas Whistleblower Act." Upon a motion from the former employees filed after the OAG amended its live answer, the trial court set deposition dates for the Attorney General and three senior OAG employees.

The OAG sought mandamus relief from the Third Court of Appeals, which was denied.

The Supreme Court conditionally granted the mandamus relief, holding that, once the OAG narrowed the scope of the dispute by amending its answer and consenting to entry of judgment in favor of the former employees, the trial court abused its discretion by failing to "*re*-evaluate the need, likely benefit, and burden or expense of any requested discovery in light of the change in the disputes scope."

DISCOVERY—WITHDRAWN ADMISSIONS

In re Euless Pizza, LP, 702 S.W.3d 543 (Tex. 2024) (orig. proceeding) (per curiam). A pizza delivery driver was arrested and indicted for felony racing causing serious bodily injury following the collision between the vehicle he was operating and another vehicle—seriously injuring that vehicle's elderly driver and passenger. The elderly couple sued the delivery driver and three corporate defendants.

In discovery, the elderly couple asked each corporate defendant to admit that, at the time of the crash, the delivery driver was acting within the scope of his employment with certain of the corporate defendants. One of the corporate defendants initially admitted to the delivery driver's course and scope but subsequently developed discovery showing the admission was incorrect. Consequently, the corporate defendants amended their discovery response and sought leave to withdraw and amend the admission but the trial court denied the motion.

The Fifth Court of Appeals denied the corporate defendants' request for mandamus relief.

The Supreme Court conditionally granted the corporate defendants mandamus relief. Confirming that requests for admission were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense," the Supreme Court reiterated that requests for admission "should be used as 'a tool, not a trapdoor,'" While acknowledging that trial courts have "broad discretion" to permit or deny requests to change admissions, the Supreme Court cautioned that "broad is not unlimited" and a trial court's discretion is "narrowest when denying permission to make the change would 'compromise presentation of the merits.'" The Supreme Court determined that denial of the corporate defendants' motion for leave impermissibly compromised the presentation of the case's merits by eliminating the corporate defendants' scope-of-employment defense.

The Supreme Court also reiterated the established test for

withdrawing admissions—good cause and lack of undue prejudice to the opposing party. Because the corporate defendants represented that their initial admissions were based inaccurate or incomplete information that was later clarified through discovery, the Supreme Court found the corporate defendants established the requisite good cause. And the Supreme Court reasoned that the no-undue-prejudice prong was also met because granting the corporate defendants' motion would not have delayed or otherwise hampered the elderly couple's preparation for trial.

EXTENDING DEADLINE TO FILE NOTICE OF APPEAL

In re S.V., 697 S.W.3d 659 (Tex. 2024) (orig. proceeding) (per curiam). A pro se litigant missed the deadline to file a notice of appeal but timely filed an extension motion pursuant to Texas Rule of Appellate Procedure 26.3.

Rule 26.3 requires the filing of an extension motion complying with Rule 10.5(b), subparagraph (2)(A) of which requires such motions to state the "facts relied on to reasonably explain the need for an extension." A reasonable explanation includes "any plausible statement of circumstances indicating that failure to file within the sixty-day period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance." The "proper focus" under the rule "is on a lack of deliberate or intentional failure to comply." Consequently, "[a]ny conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance." The pro se litigant's explanation for his delay in filing the notice of appeal was that he mistakenly believed a notice of appeal was not required until after the trial court ruled on his postjudgment motions.

The Fifth Court of Appeals denied the Rule 26.3 motion and dismissed the appeal because it equated the pro se litigant's conscious decision to wait to file his notice of appeal with a conscious or strategic decision to let the notice-of-appeal deadline pass.

The Supreme Court disagreed and reversed, explaining the "former is not necessarily the latter." Specifically, the Supreme Court held that the pro se litigant's "mistaken understanding of the notice-of-appeal deadline was just that—a mistake." Consequently, the Supreme Court determined the pro litigant did not deliberately fail to comply with the rule of appellate procedure and, as a result, his Rule 26.3 motion should have been granted.

PLEADING SUFFICIENCY

Herrera v. Mata, 702 S.W.3d 538 (Tex. 2024) (per curiam). In 2019, a county irrigation district sought to collect charges from a group of homeowners accrued some thirty to forty years before in the 1980s and 1990s. The homeowners sued the district, claiming that the charges are taxes and that the district's refusal to remove them from the tax rolls violates the Texas Tax Code's limitations period. In the alternative, the homeowners claimed that the charges constituted assessments under the Texas Water Code that the district had no authority to levy. The district filed a plea to the jurisdiction, arguing that, because the charges were assessments that have no applicable limitations period, governmental immunity bars the homeowners from seeking to stop their collection. The trial court granted the plea.

The Thirteenth Court of appeals affirmed in part, holding that the Tax Code does not apply as a matter of law, so district officials did not act *ultra vires* by refusing to remove the charges from the tax rolls.

The Supreme Court reversed, determining that the homeowners pled sufficient facts to demonstrate the trial court's jurisdiction for their Tax Code claim by alleging that the charges are taxes assessed well after the applicable limitations periods expired. The Supreme Court also held that the homeowners' alternative pleading treating the charges as assessments did not affirmatively negate their pleadings that the charges are taxes.

PRESERVATION OF ERROR

In re Est. of Phillips, 700 S.W.3d 428 (Tex. 2024) (orig. proceeding) (per curiam). One of a decedent's heirs intervened in the probate of the decedent's estate to partition a bequeathed tract of land. The trial court granted the independent executor's special exceptions, struck the heir's partition claims, and ordered the heir to file an amended petition omitting the claims. The heir complied but her amended petition expressly reserved the right to replead the stricken claims if the trial court's order was later reversed on appeal. When the trial court signed an order authorizing the independent executor to sell the bequeathed tract, the heir appealed—challenging both the sale order and order striking the heir's partition claims.

A divided Sixth Court of Appeals affirmed, holding that the heir abandoned the partition claims by omitting them from the live amended petition.

But the Supreme Court reversed, finding that the majority improperly "overlooked" the express reservation in the heir's amended petition to reassert "causes of action that a court of appeals may determine were wrongly dismissed by the trial court." Going further, the Supreme Court identified an "even more basic reason" why the heir's appellate complaint was not waived—it was error for the majority to construe the heir's adherence to the trial court's striking order "as a manifestation of intent to abandon the stricken claims." Relying on a prior opinion, the Supreme Court observed that, "[i]f simply adhering to an adverse order while continuing to litigate waived review of that order on appeal from a final judgment, there would be few orders left to review." The Supreme Court also relied on the plain language of Texas Rule of Civil Procedure 65, which qualifies the superseding effect of amended instruments if "some error of the court in deciding upon the necessity of the amendment, or otherwise in superseding it, be complained of" as the heir did here.

REMOVABILITY TO THE TEXAS BUSINESS COURT

The Winter 2024 issue of *The Advocate* summarized three decisions from the Fourth, Eighth, and Eleventh Divisions of the Business Court, each of which confirmed that the Business Court lacks jurisdiction to hear disputes that were commenced prior to September 1, 2024. *XTO Energy, Inc. v. Hous. Pipe Line Co.*, ___ S.W.3d ___, 2024 Tex. Bus. 6 (Tex. Bus. Ct.—11th Div. 2024); *Winans v. Berry*, ___ S.W.3d ___, 2024 Tex. Bus. 5 (Tex. Bus. Ct.—4th Div. 2024), *Tema Oil & Gas Co. v. ETS Field Servs., LLC*, ___ S.W.3d ___, 2024 Tex. Bus. 3 (Tex. Bus. Ct.—8th Div. 2024).

Now, the First and Third Divisions of the Business Court have similarly rejected attempts to remove actions commenced before September 1, 2024. *Yadav v. Agrawal*, ___ S.W.3d ___, 2025 Tex. Bus. 7 (Tex. Bus. Ct.—3d Div. 2025); *Osmose Util. Servs., Inc. v. Navarro Cnty. Elec. Coop.*, ___ S.W.3d ___, 2025 Tex. Bus. 3 (Tex. Bus. Ct.—1st Div. 2025). To this end, the Eleventh Division has determined that "it is now settled that the Texas Business Court lacks subject-matter jurisdiction over actions which were commenced prior to September 1, 2024." *Cypress Towne Ctr. , Ltd. v. Kimco Realty Servs., Inc.*, ___ S.W.3d ___, 2025 Tex. Bus. 8 (Tex. Bus. Ct.—11th Div. 2025) (citing *Bestway Oilfield Inc. v. Cox*, 2025 Tex. Bus. 2 (Tex. Bus. Ct.—11th Div. 2025); *Winans*, ___ S.W.3d ___, 2024 Tex. Bus. 5; *Jorrie v. Charles*, ___ S.W.3d ___, 2024 Tex. Bus. 4, (Tex. Bus. Ct.—4th Div. 2024); *Energy Transfer LP v Culberson Midstream LLC*, 2024 Tex. Bus. 1 (Tex. Bus. Ct.—1st Div. 2024)).

And the Fifteenth Court of Appeals has separately affirmed these rulings as well:

In re ETC Field Servs., LLC, ___ S.W.3d ___, 2025 WL 582320 (Tex. App.—Austin [15th Dist.] 2025, orig. proceeding). In one of several original proceedings challenging orders by the Business Court remanding to the district court civil actions commenced before September 1, 2024, the Fifteenth Court of Appeals centered its abuse-of-discretion analysis on the use of the word, "commence," in the Business Court's organic act (the "Act").

While the effective date of the Act was September 1, *2023*, the Business Court itself was not actually created until September 1, *2024*. And the Act provides that the "changes in law made by this Act apply to civil actions *commenced* on or after September 1, 2024."

The Fifteenth Court of Appeals found the Business Court did not abuse its discretion by remanding the action back to its originating trial court because removal does not "commence" a new action in the Business Court but instead merely transfers a preexisting one. Therefore, a civil action filed before September 1, 2024 in a local trial court cannot be removed to the Business Court. *See also In re Synergy Glob. Outsourcing, LLC*, No. 15-25-00002-CV, 2025 WL 582311 (Tex. App.—Austin [15th Dist.] Feb. 21, 2025, orig. proceeding) (mem. op.); *Synergy Glob. Outsourcing, LLC v. Hinduja Global Sols., Inc.*, No. 15-24-00127-CV, 2025 WL 582314 (Tex. App.—Austin [15th Dist.] Feb. 21, 2025) (mem. op.). To hold otherwise, the appellate court reasoned, would render the Act's effective date "meaningless," making it impermissibly "apply to all cases everywhere all at once."

ETC Field Servs., LLC v. Tema Oil and Gas Co., ___ S.W.3d ___, 2025 WL 582317 (Tex. App.—Austin [15th Dist.] 2025). In one of several appeals taken from orders by the Business Court remanding civil actions back to the local trial court where they were originally commenced before September 1, 2024, the Fifteenth Court of Appeals denied this direct appeal for want of jurisdiction pursuant to Texas Rule of Appellate Procedure 42.3(a). In so doing, the appellate court focused on whether a direct appeal—either interlocutory or after final judgment—is allowed from such a remand order.

While Texas Government Code chapter 25A generally grants the court exclusive jurisdiction over appeals and original proceedings arising from a judgment, order, or action of the Business Court, the appellate court held that a remand order is not a final judgment subject to this provision. To constitute a

final judgment, an order on the merits without a conventional trial must "(1) disposes of all remaining parties and claims, or (2) contains unequivocal finality language that expressly disposes of all claims and parties." But a remand order from the Business Court "does not dispose of *any* parties, or any issues other than the [B]usiness [C]ourt's jurisdiction." Indeed, the appellate court further reasoned that a remand order from the Business Court cannot dispose of any parties or claims because the Business Court expressly lacks jurisdiction over remanded actions pursuant to Chapter 25A.

The Fifteenth Court of Appeals also concluded that "[n]o statute authorizes an interlocutory appeal of a remand order from the business court."

Notably, the appellate court left open whether a remand order could be challenged by mandamus on the basis that it was akin to the denial of a plea to the jurisdiction by a nongovernmental entity.

Dylan O. Drummond is a former clerk to retired Texas Supreme Court Chief Justice Nathan L. Hecht and wildlife biologist and who practices in San Antonio, Texas as an appellate shareholder with the law firm of Langley & Banack, Inc. He is a former chair of the State Bar of Texas Appellate Section and the Texas Bar College, as well as a former president of the Texas Supreme Court Historical Society. ★

Join the Section of Litigation and receive THE ADVOCATE regularly

Send completed form and $30.00 to:

State Bar of Texas
Litigation Section
P.O. Box 12487
Austin, TX 78711

Name

Address

City, State and Zip

(If licensed in Texas) State Bar Number

Telephone ( ) Fax ( )

Email

State Bar of Texas

P.O. Box 12487

Austin, Texas 78711-2487

Non-Profit Org.

U.S. Postage

PAID

Permit No. 1804

Austin, Texas

STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE