




# Before and After Fixer-Upper Reveals: 2020 Federal Employment Law Update


**2020 Employment Law Seminar**  
Day 2: 2020 Federal & State Law Update





## Speaker Introductions



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## Federal Case Update: Supreme Court



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## Modernizing Title VII

### THE BEFORE:

- Before *Bostock*, sex-based discrimination meant on the basis of being female or male
- The “definition” of sex under Title VII did not include homosexuals or transgender persons



*Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 218 (2020)

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## “Sex” Discrimination Redefined

### AFTER:

- The Court modernized the definition of “sex” under Title VII
- Now, sex includes:
  - Homosexuals
  - Transgender persons



*Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 218 (2020)

## Limited Employment Protections for Religious Leaders

### THE BEFORE

- The Constitution’s religious protections bars certain employment discrimination claims against religious organizations
- Under the “ministerial exception,” leaders of religious organizations have fewer employment protections because the organization requires independence of its faith and doctrines



*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 150 S. Ct. 2049, 207 L. Ed. 2d 870 (2020), consolidated with *St. James Sch. v. Biel*, 140 S. Ct. 680, 205 L. Ed. 2d 448 (2019)

## Ministerial Exception Expanded Further

### AFTER

- Even employment discrimination lawsuits by non-leadership employees are barred by Religious Clauses of Constitution



*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 150 S. Ct. 2049, 207 L. Ed. 2d 870 (2020), consolidated with *St. James Sch. v. Biel*, 140 S. Ct. 680, 205 L. Ed. 2d 448 (2019)

## Religious Exemption from Affordable Care Act Requirement

### BEFORE

- The ACA requires that employers provide health care plans to employees that cover contraceptives, but there are certain exceptions for religious employers



*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020) consolidated with *Trump v. Pennsylvania*, 140 S. Ct. 918, 205 L. Ed. 2d 519 (2020)

## New Exemptions: Religious and Moral Objections to Contraceptives

### AFTER

- Employers with “sincerely held” religious or moral objections exempt from ACA’s contraceptive mandate



*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 207 L. Ed. 2d 819 (2020) consolidated with *Trump v. Pennsylvania*, 140 S. Ct. 918, 205 L. Ed. 2d 519 (2020)

## Federal Case Update: Ninth Circuit



## Equal Pay Act, Revisited

### BEFORE

- Equal Pay for Equal Work
- Different pay can be justified when it is based on certain affirmative defenses, or “any other factor other than sex”



*Rizo v. Yovino*, 950 F.3d 1217 (9th Cir 2020)

## “Salary History” Does Not Justify Unequal Pay

### AFTER

- Salary history is not a justification for different pay. Only “job-related factors” may serve as affirmative defenses to EPA claims.



*Rizo v. Yovino*, 950 F.3d 1217 (9th Cir 2020)

## Wage and Hour Law: What is “Willful?”

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### BEFORE

- If an employer knows or reasonably should know its conduct violates the Fair Labor Standards Act, it may mean higher damages



*Scalia v. Employer Solutions Staffing Group, LLC, 951 F.3d 1097 (9th Cir 2020)*

## Ignoring Warnings from Payroll Company is “Willful”

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### AFTER

- Even a low-level employee’s awareness of a problem could be considered “willful”



*Scalia v. Employer Solutions Staffing Group, LLC, 951 F.3d 1097 (9th Cir 2020)*

## “After-Acquired” Evidence: ADA Claim Defense

### BEFORE

- Employee sued for disability discrimination under the ADA
- To establish ADA claim, employee must be a “qualified” individual with disability
- Before, evidence acquired after litigation began could not be used to show employee was not qualified for their job



*Anthony v. TRAX International*, 955 F.3d 1123 (9th Cir. 2020)

## “After-Acquired” Evidence: ADA Claim Defense

### AFTER

- Evidence that employee had not earned bachelor’s degree required for job was admissible to show the employee was not a qualified individual with a disability, even though evidence was only acquired after litigation began



*Anthony v. TRAX International*, 955 F.3d 1123 (9th Cir. 2020)



## Department of Labor Updates

The Department of Labor has made several new rules intended to address current workplace practices that prior rules may not have addressed including:

- Updated salary levels
- Clarifying “regular rate of pay” inclusions
- A new Joint Employer test
- Tracking time for teleworkers

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## Minimum Salary Level Changes

### BEFORE

- Old minimum salary:
  - \$455 per week
  - \$23,660 annually
- Highly Compensated Employee minimum: \$100,000 annually

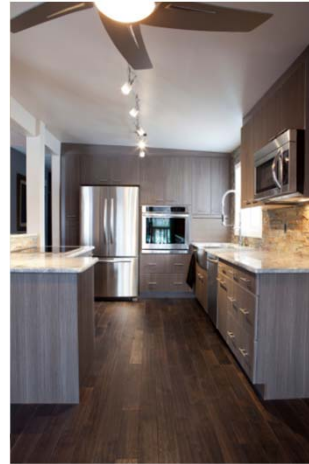


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## New Minimum Salary Level

### AFTER

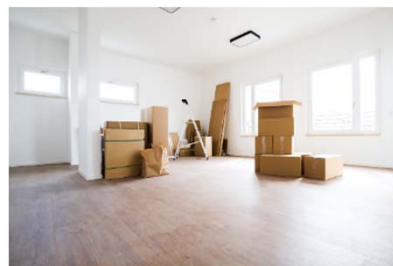
- New minimum salary:
  - \$684 per week
  - \$35,568 annually
- 10% of that amount can be nondiscretionary bonuses or incentive pay
- Abbreviated exemption test minimum salary increase: \$107,432



## Changes to “Regular Rate of Pay”

### BEFORE

- Regular rate **includes**:
  - Bonuses
  - Shift differentials
  - On-call pay
  - Commissions
- And **excludes**:
  - Health insurance
  - Paid leave
  - Holiday and other discretionary bonuses
  - Certain gifts
- **Unclear**:
  - Everything else!



## New Rules for “Regular Rate of Pay”

### AFTER

- Now okay to **exclude**:
  - Employee “perks” such as parking benefits, wellness programs, onsite specialist treatments, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits, and adoption assistance
  - Penalty payments under predictive scheduling laws, if applicable
  - Business expense reimbursement for items such as cellphone plans, credentialing exam fees, organization membership dues and travel expenses that don’t exceed the maximum travel reimbursements within permissible rates
  - Certain sign-on and longevity bonuses
  - Complimentary office coffee and snacks
  - Discretionary bonuses
  - Contributions to benefit plans for accidents, unemployment, legal services and other events that could cause a financial hardship or expense in the future



## Joint Employer Updates

### BEFORE

- Two (or more) entities can “employ” an employee at once if both benefit from their work and the employee acts in the entities’ interest



## New Joint Employer Rules

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### AFTER

- New four-factor test:
  1. Hires or fires
  2. Supervises and substantially controls work schedule and employment conditions
  3. Determines rate/method of payment
  4. Maintains employment records



## Field Advisory Bulletin: Time Reporting for Teleworkers

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### BEFORE

- Employers are responsible for paying employees for all time they “suffer or permit” them to work
- This includes unscheduled and even unauthorized time, such as overtime worked in violation of a policy requiring approval



# Field Advisory Bulletin: Time Reporting for Teleworkers

## AFTER

Advisory clarifies obligations to track teleworkers compensable hours. Employers are to:

1. Provide **reasonable procedure** for reporting any unscheduled work;
2. **Train employees** on procedure.

However, if an employee fails to report unscheduled hours worked through such a procedure, the employer is generally not required to investigate further to uncover unreported hours.



# USCIS Issues New I-9 Form


**Employment Eligibility Verification**  
 Department of Homeland Security  
 U.S. Citizenship and Immigration Services

I-9  
 Form I-9  
 (08/14, 01/15, 08/17)  
 Revised 10/10/2019

**START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.  
**ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented does not meet the requirements may constitute illegal discrimination.

**Section 1: Employee Information and Attestation** (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer)

Last Name (Family Name) \_\_\_\_\_ First Name (Given Name) \_\_\_\_\_ Middle Initial \_\_\_\_\_ (Other Last Names Used (if any)) \_\_\_\_\_

Address (Street Number and Name) \_\_\_\_\_ Apt. Number \_\_\_\_\_ City or Town \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

Date of Birth (mm/dd/yyyy) \_\_\_\_\_ U.S. Social Security Number \_\_\_\_\_ Employee's E-mail Address \_\_\_\_\_ Employee's Telephone Number \_\_\_\_\_

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.  
 I attest, under penalty of perjury, that I am (check one of the following boxes):

1. A citizen of the United States.

2. A non-citizen national of the United States (See instructions).

3. A lawful permanent resident (Alien Registration Number (AOE) Number) \_\_\_\_\_  
 Some aliens may work until expiration date, if applicable, mm/dd/yyyy.

4. An alien authorized to work until expiration date, if applicable, mm/dd/yyyy.  
 Aliens authorized to work must provide any one of the following document numbers to complete Form I-9:  
 An Alien Registration Number/AOE Number OR Form I-94 Admission Number OR Foreign Passport Number \_\_\_\_\_  
 OR  
 1. Alien Registration Number/AOE Number \_\_\_\_\_  
 OR  
 2. Form I-94 Admission Number \_\_\_\_\_  
 OR  
 3. Foreign Passport Number \_\_\_\_\_  
 Country of Issuance: \_\_\_\_\_

Signature of Employee \_\_\_\_\_ Today's Date (mm/dd/yyyy) \_\_\_\_\_

**Preparer and/or Translator Certification (check one):**

I did not use a preparer or translator.  A preparer(s) and/or translator(s) assisted the employee in completing Section 1.  
 (If the preparer(s) and/or translator(s) assisted the employee in completing Section 1, the preparer(s) and/or translator(s) must be identified and signed when preparing and/or translating all of the employee's responses to Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator \_\_\_\_\_ Today's Date (mm/dd/yyyy) \_\_\_\_\_

Last Name (Family Name) \_\_\_\_\_ First Name (Given Name) \_\_\_\_\_

Address (Street Number and Name) \_\_\_\_\_ City or Town \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_


 Employer Completes Next Page



Form I-9 (10/10/2019) Page 1 of 3

## Executive Order on Federal Training

- By Executive Order 13950, issued on September 22, 2020, the White House mandated that federal agencies, uniformed services, and recipients of federal funds shall not "promote race or sex stereotyping or scapegoating" or use grant funds for these purposes. It also prohibits federal contractors from "inculcat[ing] such views in their employees."
- Also requires specific language to be incorporated into federal contracts addressing these requirements.

## Executive Order on Federal Training

Examples of impermissible concepts, according to the FAQ issued by the Office of Federal Contract Compliance Program (OFCCP), include:

- That any one race or sex is inherently superior to another;
- That an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- That an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;
- That an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; or
- That any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex.

# Thank You!



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