FEDERAL LEGAL UPDATES

NOTABLE CASES & REGULATIONS

U.S. SUPREME COURT CASES

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***Loper Bright Enterprises v. Raimondo*, No. 22-451, 144 S. Ct. 2244 (2024)**

In *Loper Bright*, the U.S. Supreme Court fundamentally shifted the legal landscape regarding judicial deference to federal agencies. The Court overruled longstanding precedent under a previous U.S. Supreme Court case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984), which required courts to defer substantially to federal agency interpretations of federal statutes.

CASE BACKGROUND

This case examined a rule by the National Marine Fisheries Service (NMFS), a federal agency overseeing fisheries management, which mandated that Atlantic herring fishermen bear the cost of hiring government-certified observers to collect regulatory data when federal funding was unavailable. With these observer fees reaching up to $710 daily, the rule presented significant economic implications for the industry.

Previously, under the *Chevron* framework, courts followed a two-step process when reviewing agency interpretations of federal statutes. First, courts would ask whether Congress had directly addressed the precise issue in question. If Congress's intent was clear, that would conclude the inquiry. If not, the second step required courts to defer to the agency's interpretation so long as it was based on a "permissible" reading of the statute.

The *Loper Bright* ruling abandons this approach, as the Supreme Court found that judicial deference to agencies conflicted with the Administrative Procedure Act's directive for courts to apply independent judgment in determining whether a statute authorizes a particular regulation. Moving forward, courts must now determine whether an agency's interpretation of a statute is the "correct" interpretation rather than merely a permissible one.

KEY TAKEAWAYS

With *Loper Bright* overturning *Chevron*, employers should be aware that federal rules and agency guidance—particularly those from the Department of Labor (DOL), Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), and even the Federal Trade Commission (FTC)—are more vulnerable

to legal challenges. Employers should carefully monitor any developments, especially in cases where courts issue nationwide or region-specific injunctions. Legal and regulatory teams should be prepared to evaluate and respond to any potential policy changes resulting from such challenges.

The impact of *Loper Bright* may vary if Congress passes new laws that reaffirm agency authority on certain issues. This adds an additional layer of potential change in compliance requirements that employers must watch closely.

While *Loper Bright* may impact many federal regulations, it is important for employers to remember *Loper Bright* has no impact on state regulations. Many states may have rules similar to those of the federal agency that employers will still be required to abide by even if *Loper Bright* results in federal regulations being overturned.

***Muldrow v. City of St. Louis*, Missouri, 601 U.S. 346, 144 S. Ct. 967 (2024)**

In *Muldrow v. City of St. Louis, Missouri*, the U.S. Supreme Court broadened the scope of "adverse employment action" under Title VII, ruling that even minor but disadvantageous changes in job conditions—without substantial harm to pay or rank—may now qualify as actionable discrimination, so long as they result in a tangible disadvantage to the affected employee.

CASE BACKGROUND

Sgt. Muldrow, a police sergeant with the St. Louis Police Department, alleged gender-based discrimination after being transferred against her will to a new role. Although her rank and pay remained unchanged, her responsibilities, access to certain perks, and work schedule shifted. A male officer replaced her in her former role, and her transfer resulted in the loss of specific privileges, such as a take-home vehicle and a more flexible schedule.

Previously, lower courts required that an employment action bring "significant harm" to identifiable terms or conditions of employment for an adverse action claim to succeed. In a unanimous 9-0 decision, the Supreme Court clarified that while some disadvantage must exist, it does not need to be "significant" to meet the threshold for a legally valid claim. The Court ruled that under Title VII, discrimination entails any treatment that results in a "disadvantageous change" to an "economic or tangible" term or condition of employment. By easing this standard, the Court underscored that requiring "significant" harm imposed an unnecessary burden that was not supported by Title VII's text.

KEY TAKEAWAYS

Employers should exercise caution when considering job transfers that employees do not request, especially where changes impact tangible job conditions such as duties, schedules, or perks. A transfer need not involve a demotion, pay cut, or substantial change to meet the legal standard for adverse action under *Muldrow*.

For any job transfers, particularly those involving members of protected classes, employers should document the economic and business rationale behind the decision.

Documentation should clearly outline objective reasons for the transfer and include an analysis showing that the action is not influenced by any protected characteristic.

This ruling may lead to increased claims where employees perceive a disadvantage from a change in job assignment. Employers may consider implementing review procedures to ensure transfers are non-discriminatory and handled transparently, minimizing the risk of adverse claims and ensuring alignment with business goals.

NINTH CIRCUIT CASES

***Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024)**

In *Okonowsky v. Garland*, the Ninth Circuit reinforced that online behavior, even outside work hours, can contribute to a Title VII hostile work environment claim if it affects the workplace atmosphere.

CASE BACKGROUND

Lindsay Okonowsky, a psychologist at the federal prison complex in Lompoc, California, alleged that a fellow employee, Steven Hellman, created an anonymous Instagram page filled with offensive and discriminatory content targeting Bureau of Prison employees and inmates, including hundreds of posts that the Court described as "overtly sexist, racist, anti-Semitic, homophobic memes." More than 100 Lompoc employees, including senior personnel, followed and interacted with the page's posts, and Okonowsky soon discovered that she herself was implicitly targeted in some posts.

Despite her complaints to supervisors, the Bureau's response was slow, and the harassment continued, exacerbating Okonowsky's fears about her safety and colleagues' loyalty. Although Hellman was eventually reassigned, the posts continued until a threat assessment team intervened.

Okonowsky complained about Hellman's Instagram page, forwarding content to her supervisor and Lompoc's safety manager. Her complaints were not well met, and her persistence was rebuffed. Hellman's posts only escalated after her complaints. Once she determined Hellman was the page's author, Okonowsky continued to share her concerns with her supervisor as her worry for her personal safety grew. In short, she feared that the very employees who were hired to assist her in an emergency in the prison would not because she was a "female joke." Eventually, the warden assigned Hellman to another facility at Lompoc, but the posts continued. Finally, a new warden convened a Threat Assessment Team which concluded the conduct harassing and ordered Hellman to cease posting. Notwithstanding the request, the posts continued, as did Okonowsky's complaints. Without explanation, the posts finally stopped.

The slow and tepid response of the Bureau to Okonowsky's complaints weighed significantly in the Ninth Circuit's findings. The Court emphasized that workplace hostility must be assessed in the context of the total environment, including outside-of-work conduct that impacts the workplace. Social media posts, even if made offsite, were ruled as contributing to a hostile work environment if they affect an employee's working conditions.

KEY TAKEAWAYS

Online conduct occurring outside of work and outside of work hours may still impact the workplace if it fosters an intimidating or offensive atmosphere. Employers should recognize that the boundaries of "workplace" behavior can extend into social media if interactions between employees create a hostile work climate.

While employers aren't obligated to monitor employees' social media, they should take reports of concerning behavior seriously and investigate as needed. If reported content breaches company policy or affects workplace morale, employers should respond quickly, documenting actions taken to protect employee welfare.

***Cadena v. Customer Connexx LLC*, 107 F.4th 902 (9th Cir. 2024)**

In *Cadena v. Customer Connexx LLC*, the Ninth Circuit clarified that the "de minimis doctrine" still applies in overtime wage claims, allowing small amounts of uncompensated time to be considered non-compensable under certain circumstances.

CASE BACKGROUND

Customer Connexx, a Las Vegas call center, required customer service representatives to use an online system to clock in. Employees had to turn on/awaken the computer, log in, and then open the timekeeping software to clock in, with total startup times ranging from 1 to 20 minutes, with an average of 6-12 minutes. Employees testified some computers were "old and slow" and that sometimes they had to try several workstations before they found a working computer.

This startup time was uncompensated. Under Connexx's policies, employees had to be clocked in and ready to accept calls before their shift started, so employees had to arrive and login before their shift began. Connexx policy prohibited employees from clocking in seven or more minutes before their shift began.

Plaintiffs filed a collective action complaint, seeking unpaid overtime under the Fair Labor Standards Act (FLSA) for the time they spent booting up and down their computers before and after clocking into the timekeeping software each shift. The trial court granted summary judgment to Connexx, concluding that this time was de minimis. Plaintiffs appealed.

The Ninth Circuit remanded the case, instructing the District Court to determine if the startup time met the criteria for de minimis time. While there is no "bright line rule," to determine whether such time is de minimis, the Ninth Circuit identified several factors to consider:

1. the regularity of the additional work;
2. the aggregate amount of compensable time; and
3. the practical administrative difficulty of recording the additional time.

KEY TAKEAWAYS

The Court's decision emphasizes the burden on employers to prove the work time really is de minimis and should not be compensated. The Court's decision further highlights that regular uncompensated time, even in small or varying amounts, could aggregate to significant amounts that warrant compensation and are not de minimis.

When employers are aware employees are engaging in pre-/post-shift work activities that are not being compensated, they should take appropriate action to make sure there is compliance with the FLSA. This includes evaluating whether such time is regular and if there are feasible alternative methods to capture and compensate employees for this time, such as having employees swipe in/out from their worksite or non-computer-based timekeeping systems such as punch clocks or mobile apps.

***Mattioda v. Nelson*, 98 F.4th 1164 (9th Cir. 2024)**

In a case of first impression, the Ninth Circuit confirmed that disability-based harassment claims are permissible under both the Americans with Disabilities Act (ADA) and the Rehabilitation Act, aligning with prior rulings from other federal circuit courts.

CASE BACKGROUND

Dr. Andrew Mattioda, a NASA scientist with hip and spine disabilities, alleged he faced a hostile work environment after requesting premium-class tickets as a reasonable accommodation for work travel. Dr. Mattioda formally notified his supervisors at NASA about these disabilities and explained that these accommodations were necessary to alleviate pain and avoid further harm to his physical condition. Following this request, he alleged that he experienced a hostile work environment characterized by dismissive and derogatory responses from his supervisors.

According to Dr. Mattioda, his supervisors not only resisted his accommodation request but also subjected him to disparaging comments, treating his request as an undue burden on the department. These comments included questioning the legitimacy of his disabilities and insinuations that his request for premium seating was excessive. Beyond verbal hostility, Dr. Mattioda claimed his supervisors began to limit his professional opportunities, precluding him from key assignments and projects that were previously available to him. This exclusion, he alleged, created significant professional setbacks and worsened the hostile environment.

In addition to these restrictions, Dr. Mattioda reported that he received negative performance reviews without justification, which he believed were retaliatory responses to his accommodation request and his status as a person with disabilities. The alleged unfavorable evaluations impacted his reputation within the organization and his potential for advancement. Dr. Mattioda also claimed that despite his qualifications and contributions, he was passed over for a promotion that went to a less qualified candidate—a decision he attributed to discrimination based on his disability.

The Ninth Circuit considered these allegations and referenced decisions from other federal circuits affirming the right to bring hostile work environment claims under the ADA and Rehabilitation Act. The court found persuasive the reasoning from the Seventh and

Fifth Circuits, which have held that the language of the ADA, similar to Title VII, supports a claim for hostile work environment. Thus, the Ninth Circuit ultimately held that hostile work environment claims based on disability are viable under the Rehabilitation Act, marking a significant expansion of protections for employees with disabilities.

KEY TAKEAWAYS

With the Ninth Circuit's decision, employers should recognize that employees may bring hostile work environment claims under both the ADA and Rehabilitation Act. Employers need to understand that harassment or repeated negative interactions tied to an employee's disability may be sufficient to establish such a claim. This aligns disability-based harassment protections with the same standards afforded to claims based on race, gender, and other protected characteristics under Title VII.

This case also underscores the importance of handling accommodation requests with care, respect, and responsiveness. Dismissing or questioning the legitimacy of disability accommodations, especially in a manner perceived as derogatory or resistant, can lead to a hostile work environment claim. Employers should provide comprehensive training to supervisors and managers on handling accommodation requests, ensuring they treat each request with empathy and adherence to legal guidelines.

FEDERAL REGULATIONS

U.S. Federal Trade Commission

Noncompete Clause, Final Rule, 89 Fed. Reg. 38342, 16 C.F.R. 910, May 7, 2024

On May 7, 2024, the FTC published a much-anticipated new rule that would have prohibited all new noncompetes with employees nationwide, and enforcement of almost all existing noncompetes beginning September 4, 2024. However, a federal district court in Texas held that the FTC lacked the authority to issue the rule and issued a nationwide injunction that now prevents the rule from going into effect.

RULE DETAILS

Under the FTC rule, noncompetes are broadly defined to include any contractual commitments (often called "restrictive covenants") that "prohibit a worker from, penalizes a worker for, or functions to prevent a worker from" either seeking or accepting work from a competitor after leaving employment or operating a competing business after leaving employment. The rule also mandates that notification be given to employees and former employees with an existing noncompete that is now unenforceable.

The FTC rule includes only a very limited exception for certain "senior executives" with a noncompete executed before the rule becomes effective, but only if (1) they were paid a minimum of $151,164 in total annual compensation, subject to future increases for inflation, and (2) they were in a policy-making position for the business.

The FTC rule specifically carves out noncompetes entered into in conjunction with the bona fide sale of a business or ownership interest in a business. It also does not address, prohibit, or affect the enforceability of nondisclosure agreements, nonsolicitation

agreements, or similar covenants with an employee, provided that the terms of those limitations are not written so broadly as to effectively "function" as a noncompete.

In addition to effectively voiding most existing noncompetes, the FTC rule would have required that employers with any existing noncompetes provide the affected worker (that is, any current employees subject to a noncompete or any previous employees with a noncompete that is still otherwise in effect) with "clear and conspicuous notice to the worker" that it is not enforceable. A model notice was also published and can be found online here (https://img.federalregister.gov/ER07MY24.000/ER07MY24.000_original_size.png).

KEY TAKEAWAYS

On October 18, 2024, the FTC filed an appeal to the Fifth Circuit Court of Appeals seeking to overturn the district court's injunction. The Supreme Court's recent *Loper Bright* decision is expected to make the FTC's appeal and ultimate success on the merits more challenging.

For now, at least, employers are under no obligation to send any notices to affected employees/former employees with a current noncompete. Those that have done so already may want to consult counsel about their options. Likewise, given that the rule has been struck down, employers are not prevented from pursuing enforcement of any current noncompetes, if needed, provided the terms are otherwise enforceable within their jurisdiction.

Employers should also consider using other types of agreements to protect their legitimate interests. Noncompetes are just one type of restrictive covenant that may be entered into with employees. Other types of agreements may offer some (or all) of the protections that an employer sought by using a noncompete, provided it is structured correctly. For example, nonsolicitation clauses can prevent departing employees from taking customers and other employees with them. Nondisclosure agreements can prevent employees from using or disclosing their employer's trade secrets or other confidential information to, or on behalf of, third parties, including customer and contact information. Invention assignment agreements can ensure that employers own the rights to intellectual property the employees create and keep it away from competitors. These alternative agreements, or clauses, remain a viable option for most companies, if done correctly. Remember though, that any of these restrictions must also comply with applicable state law.

Employers may also want to adopt, review, and/or update their policies to protect their proprietary information and address confidentiality expectations, and train employees consistently—and often. Comprehensive workplace policies are effective ways to buttress or even supplant post-employment contractual restrictions. In fact, most employers likely already have codes of conduct and confidentiality policies addressing how employees are to handle sensitive and proprietary information. Consider revisiting and updating those now to be sure they are as robust as needed for your particular business interests. And be sure to train all employees on the applicable policies, especially front-line managers who are likely to be the people enforcing these policies.

U.S. Department of Labor

New Minimum Salary Requirements for Overtime Exemptions, Final Rule, 89 Fed. Reg. 32842, 29 C.F.R. 541, Apr. 26, 2024

The DOL issued new administrative rules increasing the minimum salary requirements for executive, administrative, and professional employees to be exempt from mandatory overtime payment. The new regulations, which took effect July 1, 2024, increased the minimum salary requirements to $844 per week, or $43,888 annually for the remainder of 2024. Beginning January 1, 2025, the minimum salary requirements will increase to $1,128 per week or $58,656 annually. Starting July 1, 2027, the minimum salary requirements for the executive, administrative, and professional employees' exemptions will be adjusted every three years based on a wage data formula.

The DOL also increased the minimum salary requirements for the "highly compensated employees" exemption. On July 1, 2024, the minimum salary requirement was increased to $132,964. Beginning January 1, 2025, the minimum salary requirement is increased to $151,164. Starting July 1, 2027, the minimum salary requirement for the highly compensated employees' exemption will be adjusted every three years based on a wage data formula.

KEY TAKEAWAYS

Employers should review and be sure all currently exempt workers based on the executive, administrative, and professional exemptions are still exempt under this new minimum salary requirement and based on applicable state or local law. This is also a good time to ensure that the position still satisfies one or more of the available duties tests, an additional requirement for exemption.

Classification of "Independent Contractor" under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 29 C.F.R. 780, Jan. 10, 2024

The DOL sought to draft a rule intended to address misclassification of employees as independent contractors, which the DOL called a "serious problem that impacts workers' rights to minimum wage and overtime pay, [and] facilitates wage theft."

The new rule, which took effect March 11, 2024, reverts back to a previously used multifactor "economic reality" analysis. The new rule considers six factors for determining the "economic reality" of whether a worker is an employee or independent contractor. No one factor is determinative. The six factors are:

1. Opportunity for profit or loss depending on the worker's managerial skill, such as through negotiating the worker's price/fee, the worker's ability to accept or decline jobs from the potential employer, the worker's engaging in marketing and advertising efforts for the worker, and whether the worker can hire others or lease/purchase office space and equipment;
2. Investments by the worker and the potential employer, such as the worker making investments to grow the worker's own business or skillset;

3. Degree of permanence of the work relationship, including whether the relationship is continuous, the duration is indefinite, or the relationship is exclusive for the potential employer;
4. Nature and degree of control [of the worker's work] such as work scheduling, supervision rights or reservation of such rights (excluding mandatory compliance with applicable federal, state, tribal, and local laws), mandatory trainings beyond those required for relevant licensing, price-setting, and ability to work for others;
5. Extent to which the work performed is an integral part of the potential employer's business; and
6. Worker's use of the worker's own specialized skill combined with business-like initiative of the worker.

KEY TAKEAWAYS

Employers should review all existing independent contractor arrangements and agreements to ensure that workers are properly categorized as independent contractors under this rule. Employers that mis-categorize workers as independent contractors face potential government agency actions or individual employee or class action lawsuits for mis-categorization.

Employers should be aware that workers are not permitted to declare themselves to be independent contractors. Workers often make such requests to avoid paying payroll taxes. Thus, even if a worker requests to be treated as an independent contractor, the U.S. DOL and state agencies may nevertheless consider the worker to be an employee for FLSA and other purposes.

U.S. Equal Employment Opportunity Commission

Enforcement Guidance on Harassment in the Workplace, EEOC-CVG-2024-1, Apr. 29, 2024

The EEOC clarified that sex discrimination can include intentional misgendering (using a name or pronoun not consistent with a worker's gender identity) and can also include denying access to bathrooms consistent with a worker's gender identity. The guidance states that the EEOC continues to recognize the current legal standard that, for harassment to be legally actionable, it must involve a change to the complainant's employment such as termination or promotion denial or transfer or change in hours, or else must involve a "hostile work environment." The EEOC guidance states that the employee does not need to prove the behavior was severe and pervasive, and just one instance of severe misconduct can be sufficient to prove the existence of a hostile work environment.

The instances of harassment can also occur in a work meeting, online chat, or any other work-related communication system, such as instant messaging. The guidance also confirms that a "hostile work environment" can be caused by any person, including not only supervisors and coworkers, but also customers, clients, vendors, and third parties. It also confirms that "intersectional harassment" is actionable on multiple grounds, such

as a Black woman being harassed based on race and gender, and that harassment can occur between members of the same protected class, known as "interclass harassment." Similarly, the EEOC clarifies that sex-based harassment does not need to be sexualized to be actionable, such as stating that a man does not belong in a certain profession or job can still constitute sex-based harassment.

The guidance also reflects that the EEOC's position is that an employer "knows" of harassment not only after harassment is officially reported or a complaint lodged, but also if any manager or supervisor witnesses the conduct, or if the conduct is "open and obvious" such that the owner, manager, or supervisor reasonably should have known it was happening.

Finally, the EEOC's guidance seeks to ensure all notices and information about reporting discrimination and harassment are readily comprehensible to all employees, including requiring notices and reporting processes in other languages used at the worksite, orally (if workers are illiterate or vision-impaired), in braille, and other applicable means to ensure comprehension.

KEY TAKEAWAYS

Ensure all harassment and discrimination policies are reviewed and revised, including adding provisions for reporting and addressing harassment by customers, clients, vendors, and other third parties, as well as policies addressing gender identity protections, including the use of preferred names/pronouns and use of bathrooms consistent with a worker's gender identity.

Consider conducting a revised and then annual training on workplace harassment to incorporate the new EEOC guidance.

Rule Implementing the Pregnant Workers Fairness Act, Final Rule, 89 Fed. Reg. 29096, 29 C.F.R. 1636, Apr. 19, 2024

The Pregnant Workers Fairness Act (PWFA) was enacted in 2023 to protect pregnant employees from workplace discrimination and ensure they receive reasonable accommodations in the workplace. The final rule includes an expansive interpretation of "pregnancy, childbirth, or related medical conditions" that are protected and require employers to provide reasonable accommodations.

According to the EEOC, the PWFA applies to current, past, and potential pregnancy; lactation and conditions related to lactation; postpartum depression; use of contraception; menstruation; treatments related to infertility and fertility; endometriosis; stillbirth; miscarriage; and abortion, among other medical conditions. The inclusion of abortion is currently the subject of a legal challenge, but no stay has been issued to date, and the expansive definition applies. The final rule also clarifies that the phrase "related medical conditions" in the PWFA includes preexisting conditions that are exacerbated by childbirth or pregnancy.

The final rule identifies four modifications for pregnant employees that will, "in virtually all cases," be deemed reasonable accommodations that do not impose undue hardship:

- Allowing an employee to carry or keep water near and drink, as needed;
- Allowing an employee to take additional restroom breaks, as needed;
- Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- Allowing an employee to take breaks to eat and drink, as needed.

The rule provides five instances when employers are not allowed to request medical documentation:

- When the limitation and need for a reasonable accommodation is obvious and the employee self-confirms the need for accommodation;
- When the employer already has sufficient information to determine the employee has a covered condition and requires a reasonable accommodation;
- When the requested accommodation is one of the four "predictable assessment" accommodations discussed above;
- When the reasonable accommodation is related to a time and/or place to express milk/breastfeed at work, other modifications related to milk expression at work, or a time to breastfeed during work hours; and
- When the requested accommodation is available to employees without known limitations under the PWFA pursuant to the employer's policies or practices without submitting supporting documentation.

The EEOC identifies five unlawful employment practices under the PWFA in its final rule:

- Denying equal employment opportunities;
- Failing to provide reasonable accommodations—which includes unnecessary delay in providing a reasonable accommodation;
- Requiring an applicant or employee to accept an accommodation;
- Mandating leave when other effective reasonable accommodations are available allowing the person to remain working; and
- Disciplining or taking other adverse employment action against an employee for requesting or using a reasonable accommodation.

KEY TAKEAWAYS

Employers should review and update their workplace policies, procedures, and manager training to ensure they are in compliance with the EEOC's final rule and all PWFA requirements.

Employers should consider revising their ADA accommodation request paperwork to include PWFA accommodation requests and should consider using a process similar to the ADA process for determining reasonable accommodations.

Disclaimer: This summary is not legal advice and is based upon current statutes, regulations, and related guidance that is subject to change. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps employers must take under applicable laws. For legal advice on these or related issues, please consult qualified legal counsel directly.