

Construction Legislative & Legal Update

HRCC – September 14, 2022

Mark Stublely (Greenville)

864.240.8318

Mark.Stublely@ogletree.com



Ogletree
Deakins

A View From the Hill



Infrastructure Investment & Jobs Act

- President Biden signed into law November 15, 2021;
- \$1.2 trillion bill;
- \$550 billion in new federal spending;
- Invests in roads, bridges, railways, ports, waterways, public transit, airports, broadband internet, and more.



Infrastructure Act Requirement of Project Labor Agreements (PLA)s

- February 4, 2022 Biden Executive Order;
- All federal projects of **\$35 million or more** must be constructed using project labor agreements;
- Cited reasons – quality, on-time, cost effective;
- Opposed by several construction associations and governors.

Inflation Reduction Act

- President Biden signed into law August 2022;
- Provides tax credits for clean energy projects (e.g., carbon capture, solar, biofuel, wind, etc.);
- Requires taxpayer and all contractors and subcontractors to pay **prevailing wages**;
- Requires **employment of apprentices** from certified program;
- Does not require project labor agreements.

Penalties for Unintentional Non-Compliance

- Taxpayer must make payments to any laborer or mechanic who did not receive the prevailing wage while working on a covered facility, by paying the difference between what they were paid and the prevailing rate, with interest;
- Taxpayer must pay penalty of \$5,000 multiplied by the number of laborers and mechanics who were paid below the prevailing rates for any period during such year.

**PENALTY
NOTICE**

Penalties for Intentional Non-Compliance

- Taxpayer must pay **three times** the difference in the wages paid and the prevailing rates to affected laborers and mechanics;
- Taxpayer pay penalty of \$10,000 for each laborer and mechanic who was paid below the prevailing rates for any period for such year.



IRA Apprenticeship Requirements

- The taxpayer must ensure that qualified apprentices perform not less than the applicable percentage of the total labor hours of the construction (including work performed by any contractor or subcontractor). The applicable percentage varies based on the construction start date of the qualified facility.
 - If construction begins before January 1, 2023, the requirement is **10%**;
 - If construction begins after December 31, 2022 and before January 1, 2024, the requirement is **12.5%**;
 - If construction begins after December 31, 2023, the requirement is **15%**.

IRA Apprenticeship Requirements

- The apprenticeship requirements are subject to any applicable requirements for apprentice-to-journeyman ratios of the Department of Labor or State apprenticeship agency.
 - The Act does not require use of a union or federally certified apprenticeship program.
- Each taxpayer, contractor and subcontractor who employs four or more individuals to perform construction work must employ one or more apprentices.

Exceptions to Apprenticeship Requirements

- **Option 1**: A covered taxpayer, contractor or subcontractor can pay a penalty to the Secretary of Labor of \$50, multiplied by the total labor hours for which the requirement was not satisfied.
- **Option 2**: Satisfy the “good faith effort” exception. Under this provision, a taxpayer satisfies the apprentice requirements if the taxpayer has requested qualified apprentices from a registered apprenticeship program and the request is denied or the registered apprenticeship program fails to respond to such request within five business days.

The Chips & Science Act of 2022

- Focuses on federal aid to boost the construction of micro-processor manufacturing facilities in the US;
- The law provides subsidies to manufacture semiconductors in the U.S. and to boost science and technology research;
- **Projects must pay prevailing wages;**
- No PLA requirement;
- Intel broke ground on \$20 billion plant in Ohio on September 9, 2022:
 - PLA;
 - 7,000 construction jobs.



Prevailing Wage Considerations

- Be sure to tier down to all contractors and subcontractors;
- Use correct rates or get conformance:
 - E.g., photovoltaic panel installer.
- Mark certified payrolls confidential:
 - Anticipate FOIA requests and raise objections to disclosure.



PLA Considerations

- Assess risk of exposing non-union crafts and projects:
 - Unions are legal representatives of employees on the project;
 - Unions have right to access project;
 - Unions have right to craft employee information for those they represent.
- Review jurisdictional and temporal scope of agreement;
- Try to avoid signing area agreements:
 - Increases exposure;
 - Would prevent company from performing non-union work in same area;
 - Withdrawal liability (under multi-employer pension funds) may be a concern.
- Evaluate risk of converting from a 8(f) to a 9(a) relationship under the NLRA.

L&E Legislation, 117th Congress

- *Securing a Strong Retirement Act of 2022*
 - Amended Act from 2021; Passed House March 29, 2022, 414-5 Vote.
- *Creating a Respectful and Open World for Natural Hair (CROWN) Act*
 - Passed House March 18, 2022, 235 – 189 Vote; Companion Bill in Senate.
- *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*
 - Signed into law March 3, 2022.
- *Protecting Older Job Applicant (POJA) Act*
 - Passed House November 2021, 224 – 220 Vote.

L&E Legislation, Cont.

- *PUMP for Nursing Mothers Act*
 - Passed House October 2021, 276 – 149 Vote; Read 2x in Senate October 2021.
- *Protecting Older Workers Against Discrimination Act*
 - Passed House June 2021, 247 – 178 Vote; Received in Senate.
- *Pregnant Workers Fairness Act*
 - Passed House May 2021; Senate HELP Committee Approved Aug. 2021.
- *Protecting the Right to Organize (PRO) Act*
 - Passed House March 2021; Expected to be reintroduced this session
- *Paycheck Fairness Act*
 - Passed House April 2021, 217 – 210 Vote.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Pre-dispute arbitration agreements or joint-action waivers **unenforceable** “with respect to a case which is filed” that “relates to” a sexual assault or sexual harassment dispute, “at the election of the person alleging” the misconduct.
- Immediate and retroactive effect

State of the Federal Government

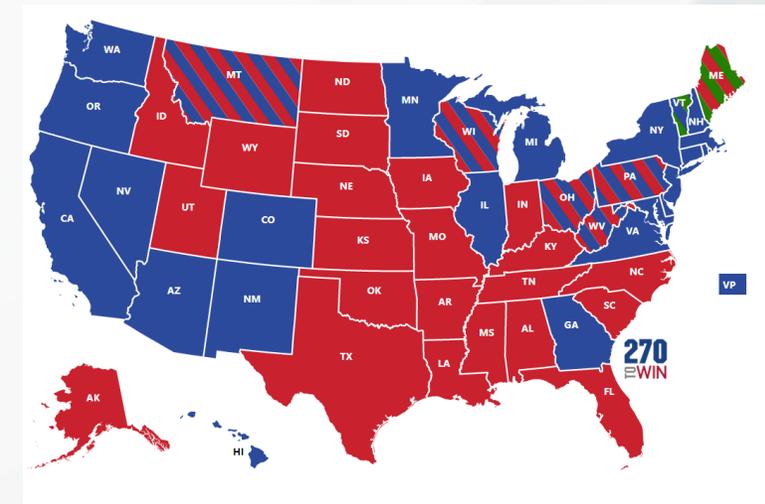
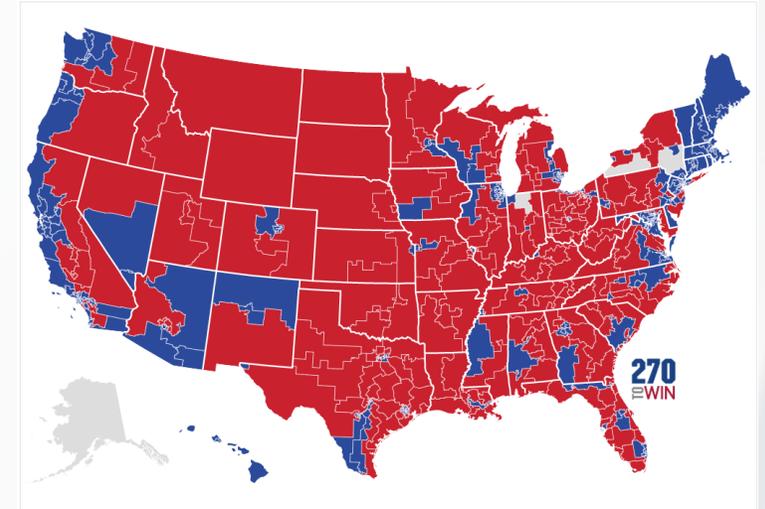
- **House of Representatives**

- 219 Democrats
- 211 Republicans
- Vacancies (3 GOP Seats; 2 Democrat Seats)

- **Senate**

- 48 Democrats
- 2 Independent (both caucus with Democrats)
- 50 Republicans
- VP Harris – Tie Breaking Vote

- **Midterm Elections – Nov. 8, 2022**



Nationwide Right to Unionize Act

- September 8, 2022 - Reintroduced by Sen. Warren;
- “To repeal the authority under the National Labor Relations Act for States to enact laws prohibiting agreements requiring membership in a labor organization as a condition of employment, and for other purposes.”
- The bill would ban state “right-to-work” laws nationwide by repealing Section 14(b) of the NLRA;
- Union Support: USW, IAM, TWU, SEIU, CWA, AFGE.

State of the Agencies



U.S. Wage and Hour Division



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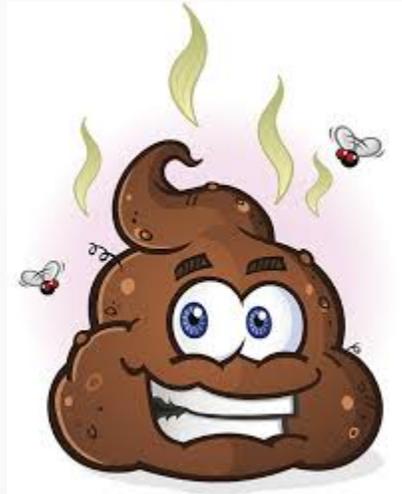


Wage & Hour

- **January 2022:** U.S. Department of Labor's Wage and Hour Division and the NLRB announced a memorandum of understanding between the agencies to share information, collaborate, and coordinate on investigations of potential violations of federal labor and employment laws.
 - The MOU emphasized worker misclassification (both independent contractor and joint-employment relationships) and retaliation and represents the latest in the Biden administration's efforts to ramp up enforcement in these areas.
- **March 2022:** DOL announced proposal to change its regulations implementing the **Davis-Bacon Act**.
- **October 2022:** the WHD is slated to issue a proposal amending the regulations "which implement the exemption of bona fide executive, administrative, and professional employees from the Fair Labor Standards Act's [FLSA] minimum wage and overtime requirements."

Wage & Hour

- August 11, 2022 – U.S. District Court for District of Nevada held that DOL did not violate the Davis-Bacon Act or regulations when it set prevailing wage rates based partly on wages from outside the relevant geographic area.



OSHIA[®]

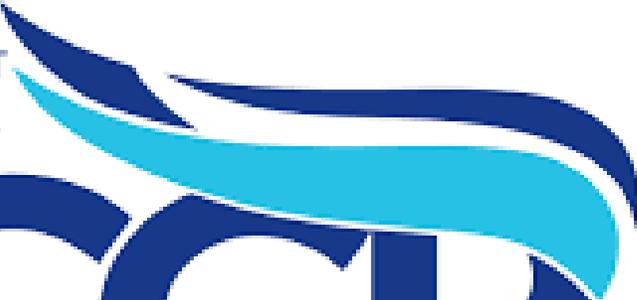
OSHA

- **April 2022:** OSHA publishes a notice of proposed rulemaking to change injury and illness recordkeeping requirements that would “require establishments with 100 or more employees in certain designated industries [including construction] to electronically submit information from their OSHA Forms 300, 301, and 300A to OSHA once a year.”
- **April 2022:** OSHA issued a new National Emphasis Program (NEP) on indoor and outdoor heat-related hazards that expands on the agency’s ongoing heat-related illness prevention campaign. The NEP took effect immediately and will remain in effect for three years unless canceled or superseded by another directive.

OSHA

- **May 2022:** U.S. House Committee on Education and Labor’s Workforce Protections Subcommittee heard testimony from Asst. Secretary of Labor for Occupational Safety and Health Doug Parker on the workplace safety agency’s policies and fiscal year 2023 budget request.
 - “In light of increased infrastructure activity and investment spurred by passage of the Bipartisan Infrastructure Law, OSHA is continuing to focus on construction sites.
 - Since the beginning of the Biden Administration, OSHA has conducted approximately **17,000 construction inspections and issued approximately \$138 million in penalties.**”

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS



OFCCP

U.S. DEPARTMENT OF LABOR

OFCCP

- Week of August 26, 2022: OFCCP opened Construction Contract Notification Portal, an online platform intended to “make it easier for contracting officers and contractors to submit information about construction contract awards, which will provide more timely and complete information on federal contracts.”
- Current law requires contractors (as well as contracting officers and applicants) to notify OFCCP “within 10 working days of an award of a federal or federally assisted construction contract or subcontract in excess of \$10,000.”

OFCCP

- August 19, 2022: OFCCP offered federal contractors 30 days (**deadline September 19, 2022**) to file written objections to the OFCCP's anticipated disclosure of the 2016-2020 EEO-1, Type 2 Consolidated reports.
- If disclosed, federal contractors can expect wave of pay discrimination claims based on reports.



Current National Labor Relations Board Members

- The Board currently consists of three Democrats and two Republicans.
- First time since 2016 that Democrats hold majority Board seats



Lauren M. McFerran (D)
December 2024



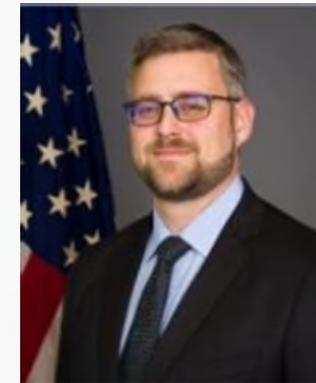
David M. Prouty (D)
August 2026



Gwynne A. Wilcox (D)
August 2023



John F. Ring (R)
December 2022



Marvin E. Kaplan (R)
August 2025

NLRB GC - Jennifer Abruzzo



- Confirmed July 2021

Notable Developments

- **GC 22-03 (Feb. 10, 2022): Inter-Agency Coordination**
 - Effort to increase coordination with EEOC, DOL, OSHA, OLMS, OFCCP, and MSHA
 - Expect inter-agency investigations, referrals and sharing of data
- **September 7, 2022: Issues notice of proposed rulemaking for new joint employer standard**
 - Extreme standard – owner’s or contractor’s reservation of right to control any term or condition of employment of a subcontractor’s employees may be sufficient to be deemed a joint employer
 - Expect other agencies may follow NLRB’s lead



EEOC – Artificial Intelligence Guidance

- On May 12, 2022, the EEOC and DOJ each issued guidance documents addressing potential disability discrimination that might result from employers' use of artificial intelligence (AI) tools or other computer software when making employment decisions.
- The EEOC's guidance focuses on three primary concerns regarding AI tools and the potential applicability of the ADA:
 - Employers using AI to assess job applicants and/or employees may be required to provide **reasonable accommodations**. According to the guidance, examples of reasonable accommodations include extended time to perform a task or an alternative test.
 - AI tools that may **unlawfully “screen out” individuals** from job opportunities.
 - AI assessment tools might **violate the ADA's restrictions on disability-related inquiries and medical examinations**.

EEOC – Updated COVID-19 Guidance

- On July 12, 2022, the EEOC updated its COVID-19 guidance as it relates to the testing of employees in the workplace.
- Since the start of the pandemic, the EEOC has advised that COVID-19 viral testing was generally permissible under the Americans with Disabilities Act.
- Following the EEOC’s update, employers must now be able to demonstrate that mandatory testing is **job-related and consistent with business necessity**.
- **Individualized assessment** - This standard will require employers to “assess whether current pandemic circumstances and individual workplace circumstances justify viral testing of employees to prevent workplace transmission of COVID-19.”

EEOC – EEO1-Form Report

- On July 28, 2022, the EEOC released a report by the National Academies of Sciences, Engineering, and Medicine titled “***Evaluation of Compensation Data Collected Through the EEO-1 Form.***”
- The report analyzed the quality of the EEO-1 Component 2 “wage and hours worked” data collected from 2017 – 2018.
- According to **EEOC Chair Charlotte Burrows**, the report “confirms that federal pay data collection could be a unique and critically important resource for helping the Commission better identify and combat pay discrimination.”
- Yet the report confirms many of the flaws that the employer community warned about in 2016.

EEOC – EEO-1 Form Report

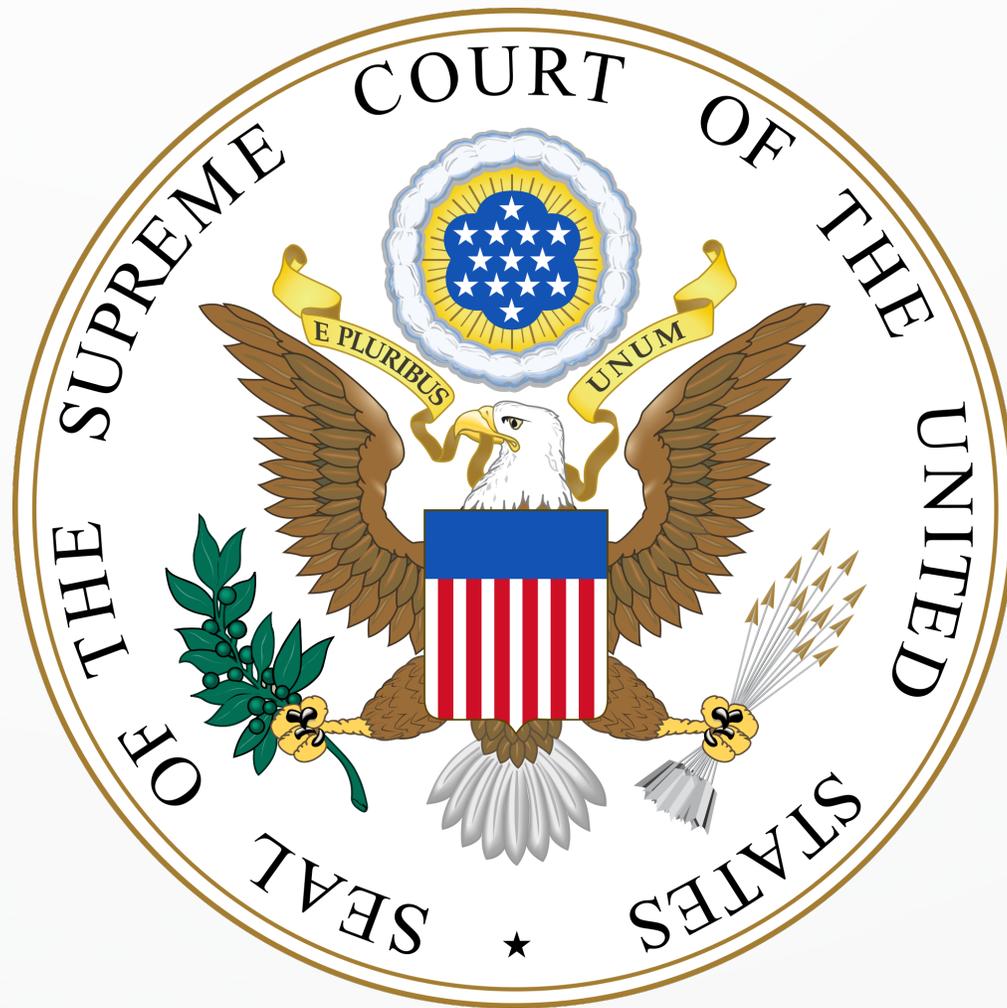
- The report recommends that the EEOC “conduct a field test to investigate issues of burden, data availability, and questionnaire design,” should the agency embark on a wage-reporting scheme in the future.
- The current EEO-1 form, which does not contain Component 2 reporting requirements, is set to expire on **June 30, 2023**.

EEOC – Significant Recoveries/Settlements Involving Contractors

- *Plains Pipeline L.P., Plains All American GP LLC, Plains Marketing L.P., and Copperhead Pipeline and Construction Inc.* (Aug. 8, 2022)
 - **\$1.75 million** to settle harassment and retaliation lawsuit.
- *Air Control Heating & Air Conditioning Inc.* (Jun. 14, 2022)
 - **\$361,000** to resolve a sexual harassment lawsuit.
- *Giertsen Company* (construction and commercial real estate renovation company) (Jun. 2, 2022)
 - \$140,000 and furnish other relief to settle a lawsuit for racial harassment and retaliation.

EEOC - Significant Recoveries/Settlements Involving Contractors, Cont.

- *DLS Engineering Associates* (federal contractor) (Apr. 26, 2022)
 - **\$70,000** to settle a pregnancy discrimination lawsuit.
- *S&C Electric Co.* (Apr. 21, 2022)
 - **\$315,000** to settle disability discrimination claim.
- *Ranew's Management Co., Inc.* (fabrication, coating, and assembly products provider) (Feb. 14, 2022)
 - **\$250,000** to settle a disability discrimination lawsuit.



Overturning of *Roe v. Wade*

- June 24, 2022 - SCOTUS issues landmark opinion in *Dobbs v. Jackson Women's Health Organization*
- Expressly overturns *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992)
- **Justice Samuel Alito:** “We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”
- “Abortion presents a profound moral question. **The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.** *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”

Employer Responses to *Dobbs*

- Payments for out of state travel;
- Modification of health plans to cover procedures and expenses;
- Leave benefits;
- **Caution:** Be careful of state laws. State law of plan governs.
- New frontier. Could raise criminal conspiracy or accessory claims.

State Criminal Laws on Abortion

State Paid Leave Laws – A Growing Concern

Evolving Employment Issues

- ***Williams v. Kincaid* (4th Cir. 2022)**
 - Court of appeals joined growing number of district courts in ruling that “**gender dysphoria**” can be a disability under the ADA;
 - Gender dysphoria is a medical condition where an “incongruence between their gender identity and assigned sex” results in “clinically significant distress;”
 - Employers covered by this ruling may have to provide reasonable accommodations for gender dysphoria under the ADA and Rehabilitation Act.

Evolving Employment Issues

- **Monkeypox:**

- President Biden recently declared monkeypox a public health emergency.
- Currently, neither the CDC nor OSHA are recommending specific protocols.
- Research suggests it is passed through direct contact. Prevention is focused on avoiding direct contact – skin-to-skin or face-to-face contact with individuals with symptoms:
 - Rash that looks like pimples or blisters;
 - Fever, chills;
 - Muscle ache, backache;
 - Respiratory symptoms.
- CDC has a monkeypox website

Monkeypox Cases

Case Range

○ 1 to 10

● 51 to 100

● >500

● 11 to 50

● 101 to 500

Evolving Employment Issues

- Federal and state attacks on **non-compete** agreements and restrictive covenants:
 - Federal legislation proposed to ban;
 - State laws prohibiting or restricting agreements;
 - DOJ filing antitrust actions against **no-poach** agreements and other anti-competitive tactics to suppress wages and employee mobility (civil and criminal).



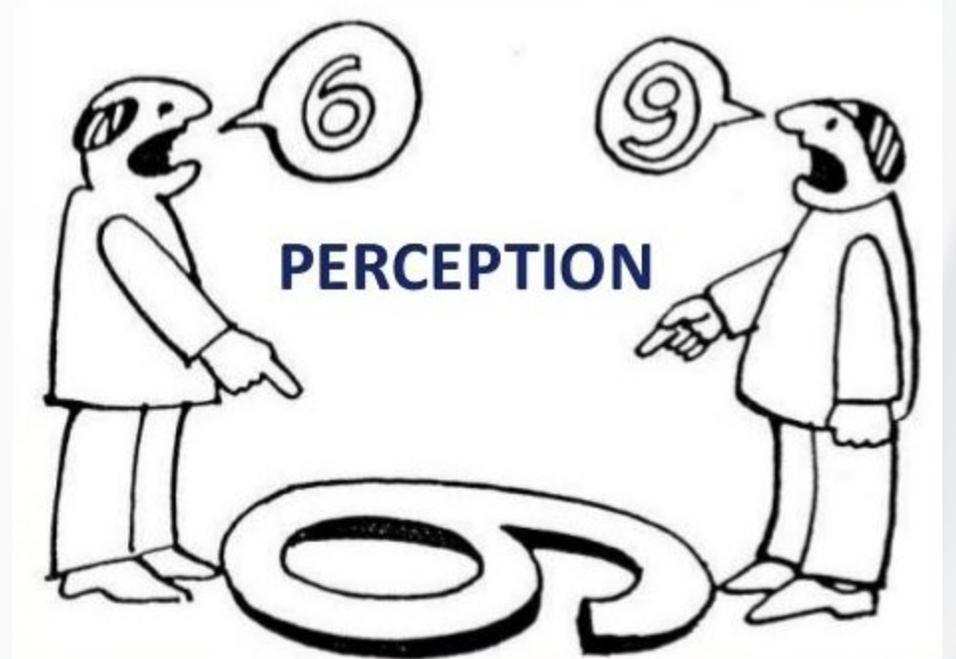
Juror Attitudes in Employment Litigation

- Juror psychology often creates substantial predisposition toward plaintiff and a transfer of the burden of proof to the employer;
- Jurors' initial inclination toward plaintiffs in employment cases is fostered by their own senses of personal vulnerability in the workplace.



Juror Perceptions

- Jurors share a widespread perception of employer misconduct;
- Jurors frequently hold employers to a higher standard of behavior than the law requires;
- Employers are often held accountable for the way in which the termination was handled despite agreeing with the business rationale.



Practical Considerations

- Public support of unions is the highest in decades
- Worker resentment of corporations is high
 - Many companies made record profits in the pandemic
 - Essential workers felt abused
 - Required to work while corporate staff worked remotely
 - Safety risk to families
 - No reward
 - Wages are not keeping up with current inflation



Take-Aways

- Advise your business partners on requirements of federal funding/tax credits for qualifying projects (e.g., owners, sales, procurement, estimating, etc.);
- Prepare for increasing enforcement efforts:
 - Policies (e.g., pay, per diem, etc.);
 - Compliance audits;
 - Auditing subcontractors.
- Train managers and supervisors (check state requirements):
 - Legal requirements;
 - Avoiding joint employment.

More Take-Aways

- Consider using arbitration agreements with waivers of class/collective actions:
 - Risk/benefit;
 - Can't cover sexual assault or sexual harassment claims.
- Review any planned company response to abortion laws;
- Check compliance with state paid leave laws.
- Continue to monitor COVID and monkeypox developments:
 - Establish a protocol for compliance (OSHA, ADA, FMLA).
- Monitor evolving legal developments;
- Remember the jury!

Questions?

Thank you!

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