

# ***Employment Law Challenges and Solutions for Construction Contractors***

**Presenter**

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# Employee Attitudes – Not So Positive

- **Gallup Global Workplace 2023 Report (US and Canada)**

– Employee engagement	31%	(-2%)
▪ Thriving at work (engaged)	31%	(-2%)
– Gender		
• Female	33%	
• Male	29%	
– Age		
• Under 40	30%	
• Over 40	31%	
▪ Quiet quitting (not engaged)	52%	(+1%)
▪ Loud quitting (actively disengaged)	17%	(+2%)

# Employee Attitudes – Not So Positive

## – Gallup Global Workplace 2023 Report (US and Canada)

- Daily emotions
  - Daily stress 52% (up 2%)
    - Gender
      - Female 57%
      - Male 48%
    - Age
      - Under 40 59%
      - Over 40 46%
  - Daily anger 18% (unchanged)
- Good time to find a job 71% (unchanged)
- Intent to leave new job) 47% (actively seeking)
  - Under 40 56% (40% over 40)

# Recent Developments

- **POTUS Issues Executive Order on AI Framework.**
- On October 30, 2023, President Biden issued the “[Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#)” (EO). According to its terms, the executive order sets forth “a coordinated, Federal Government-wide approach” to the responsible development and implementation of artificial intelligence (AI) technology.
- While the U.S. Congress has had [hearings](#) and [discussions](#) about [various aspects of AI](#), and agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC), have issued some [guidance on the subject](#), this EO sets the first real actionable road map for the federal government’s approach to AI.
- The EO instructs federal agencies to take steps to ensure that AI experts travel to and work in the United States, and it requires the U.S. Department of Labor (DOL) to publish best practices for employers on how to “mitigate AI’s potential harms to employees’ well-being,” as well as guidance on the interplay of AI and the Fair Labor Standards Act.
- The EO also instructs the DOL to publish “guidance for Federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems.”

# Recent Developments

- **EEOC Deadlines.** Employers may want to be aware of two significant EEOC-related dates announced this week.
- *EEO-1 filing.* Last week, the EEOC announced the opening of its EEO-1 Component 1 data collection. Covered employers' EEO-1 data is due to the Commission by **December 5, 2023**. The EEOC has published an [updated instruction booklet](#) for filers.
- *Harassment guidance one step closer.* **November 1, 2023**, was the deadline for stakeholders to submit comments in response to the EEOC's proposed "[Enforcement Guidance on Harassment in the Workplace](#)." The proposed guidance addresses recent changes in federal antidiscrimination law and policy, including the EEOC's "position on important legal issues," such as harassment based on pregnancy or childbirth, harassment based on sexual orientation and gender identity, "virtual" harassment (e.g., via video conferences), and when social media posts can contribute to a hostile work environment.

# Recent Developments

- **Child Labor Update.** Policymakers in Washington, D.C., continue to explore ways to address unlawful child labor.
- DOL Wage and Hour Division Administrator Jessica Looman recently reported that, in the past year, the division concluded 955 investigations that found child labor violations, holding more employers accountable for such violations than in any year in the last 15 years.
- [The division] also found almost 5,800 kids employed in violation of the law, an 88% increase in the number of children employed in violation since 2019.
- [The division] assessed more than \$8 million in penalties for child labor violations, an 83% increase compared to last year.

# Recent Developments

- **NLRB and OSHA Partner in MOU.** On **October 31, 2023**, the National Labor Relations Board (NLRB) and the Occupational Safety and Health Administration (OSHA) announced that the two agencies had entered into a [memorandum of understanding](#) to establish “a process for information sharing and referrals, training, and outreach between the agencies.” The memorandum generally focuses on referrals between the agencies.
- For example, a Board official investigating an unfair labor practice is instructed to share information with and refer employees to OSHA, if the Board investigator is made aware of potential workplace safety violations. Further, the memo states, “In appropriate cases and to the extent allowable under law, the agencies will determine whether to conduct coordinated investigations and inspections.”
- The Board has also entered into similar agreements to conduct coordinated investigations and inspections. In 2022, the Board entered into agreements with the [Federal Trade Commission](#) (FTC) and the [U.S. Department of Justice](#) (DOJ).



# Recent Developments

- DOL issues new rule for determining prevailing wages under **Davis Bacon Act** (812 page rule) August 2023)
  - Based on 30% in geographic area if majority don't share same wages
  - Prime contractor responsible for DBA compliance of subcontractors regardless of intent (back wages)
  - Record retention of employee data (phone numbers and email addresses) for at least three years after work is completed on a contract



# Federal Legislation



# Federal Laws Boosting Construction Activity

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- Infrastructure Investment and Jobs Act of 2021
- CHIPS and Science Act of 2022
- Inflation Reduction Act of 2022

# 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.

# 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.

# 2023 Omnibus Bill: Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

- Effective April 28, 2023;
- Extends workplace protections for nursing mothers previously adopted in the 2010 Affordable Care Act (provided non-exempt employees an entitlement to unpaid breaks to express milk);
  - Expands break time to exempt employees;
  - If employee is still on clock or not completely relieved from duties, this time is “hours worked” and compensable.
- Does not apply to small employers (fewer than 50 employees) if undue hardship, involving significant difficulty or expense.
- Violations of the PUMP Act fall under the FLSA, and penalties can include unpaid wages, reinstatement, liquidated damages, and attorney’s fees.

# Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023:
- Extends similar protections available under ADA to pregnant workers seeking workplace accommodations;
- Unlawful employment practice for employer with 15+ employees:
  - Not to make reasonable accommodations unless entity can demonstrate that the accommodation would impose an undue hardship;
  - To fail to utilize an interactive process with an employee to determine reasonable accommodation;
  - To require an employee take leave—whether paid or unpaid—if another reasonable accommodation can be provided.
- Retaliation claims:
  - Alleged violations handled as those under Title VII;
  - EEOC has two years to implement regulations and begin enforcement.

# Restrictive Covenants

- Workforce Mobility Act
  - Introduced in the Senate in February
  - Bans non-competes except in limited circumstances (sale of business)
  - Currently in committee
- Freedom to Compete Act
  - Introduced in the Senate in February, amends FLSA
  - Prohibits enforcing, or threatening to enforce, entering or extending a non-compete with a non-exempt employee



# EEOC

# EEOC Roundup Report

Ogletree  
Deakins

By State

State Detail

By Claim Type

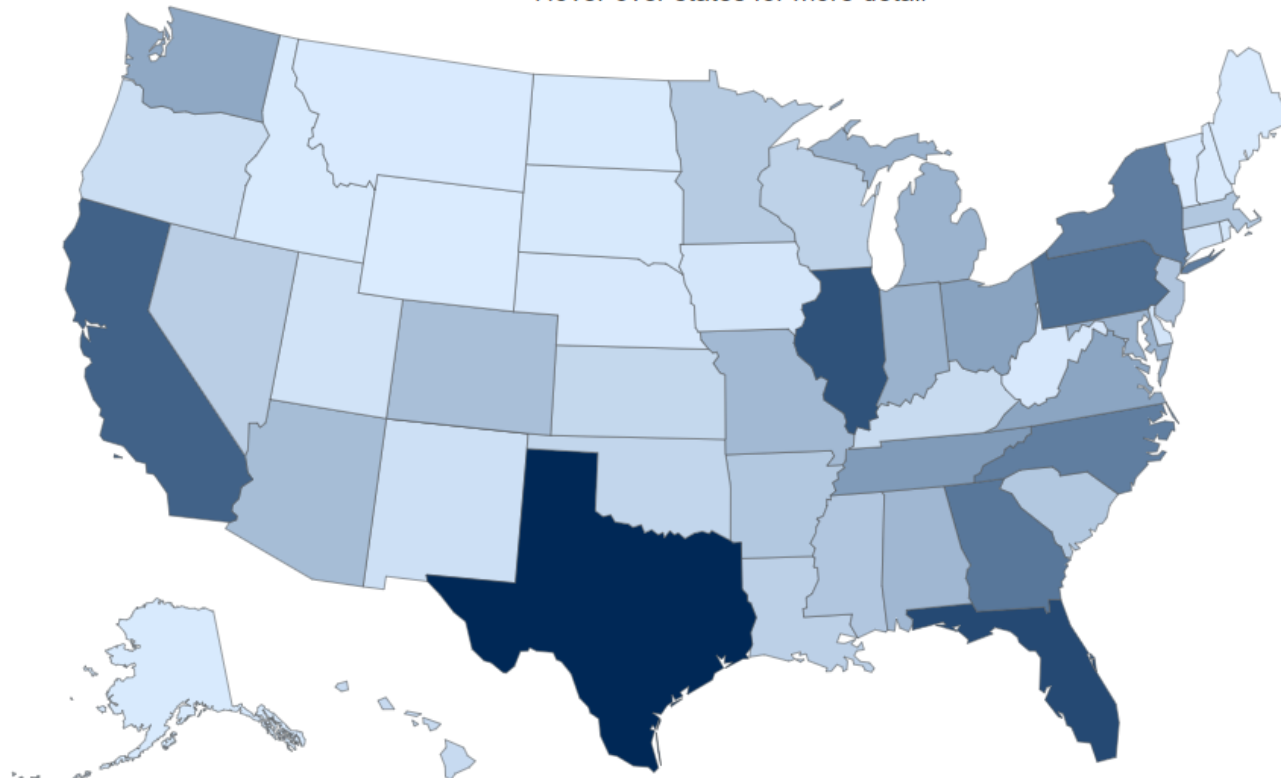
Claim Type Detail

Fiscal Year

- ☐ 2017
- ☐ 2018
- ☐ 2019
- ☐ 2020
- ☐ 2021
- ☒ 2022

## 2022 EEOC Charge Filings by State

Hover over states for more detail



Top 3 States by  
Charge Filings in  
2022

**Texas**

6,990  
Charge Filings

**Florida**

5,192  
Charge Filings

**Illinois**

4,909  
Charge Filings

Ogletree  
Deakins

# EEOC Roundup Report

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By State

State Detail

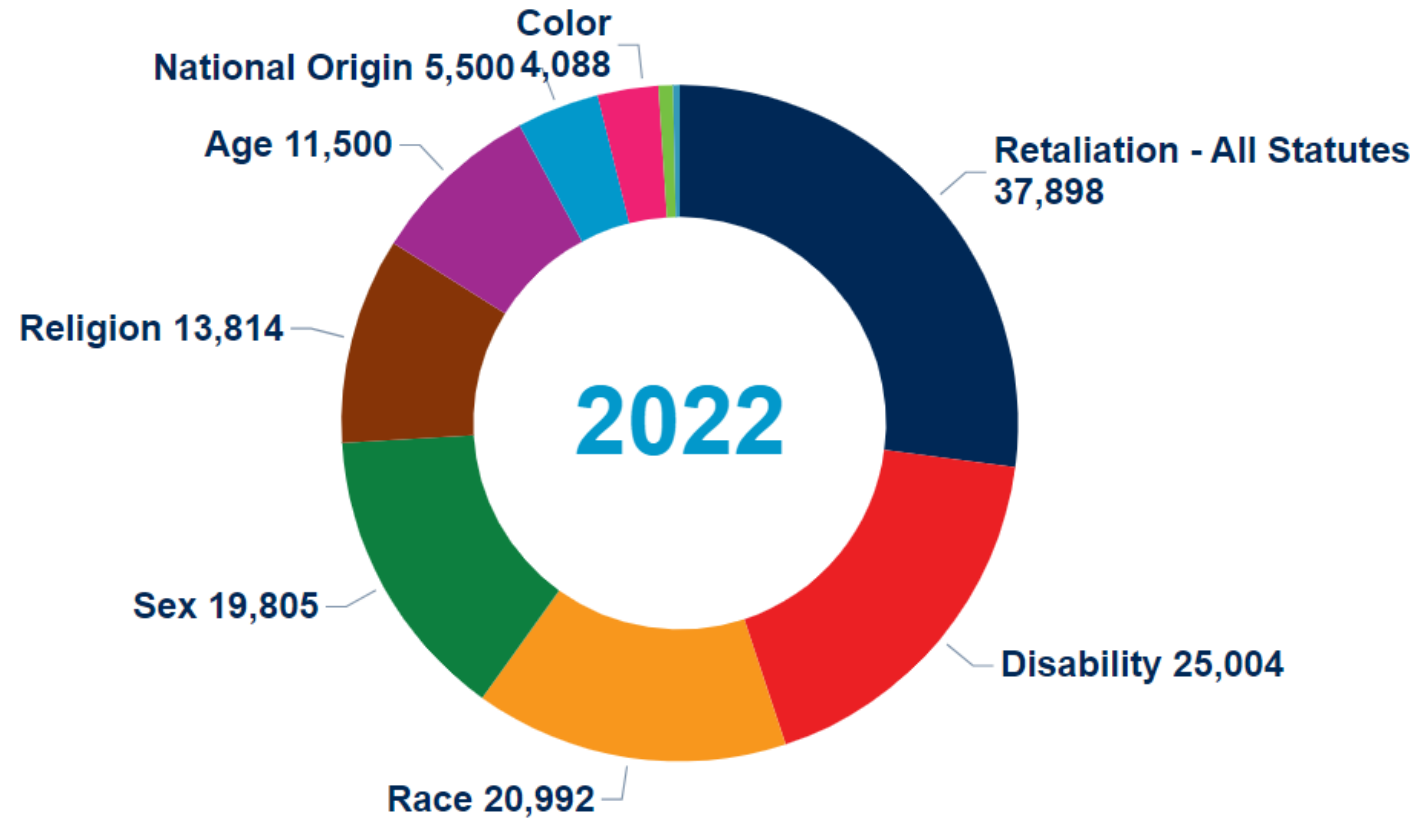
By Claim Type

Claim Type Detail

Fiscal Year

- ☐ 2017
- ☐ 2018
- ☐ 2019
- ☐ 2020
- ☐ 2021
- ☒ 2022

## EEOC Charges by Claim Type



\* In FY 2022, there was a significant increase in vaccine-related charges filed on the basis of religion. As a result, FY 2022 data may vary compared to previous years.

Ogletree  
Deakins

# EEOC Roundup Report

By State

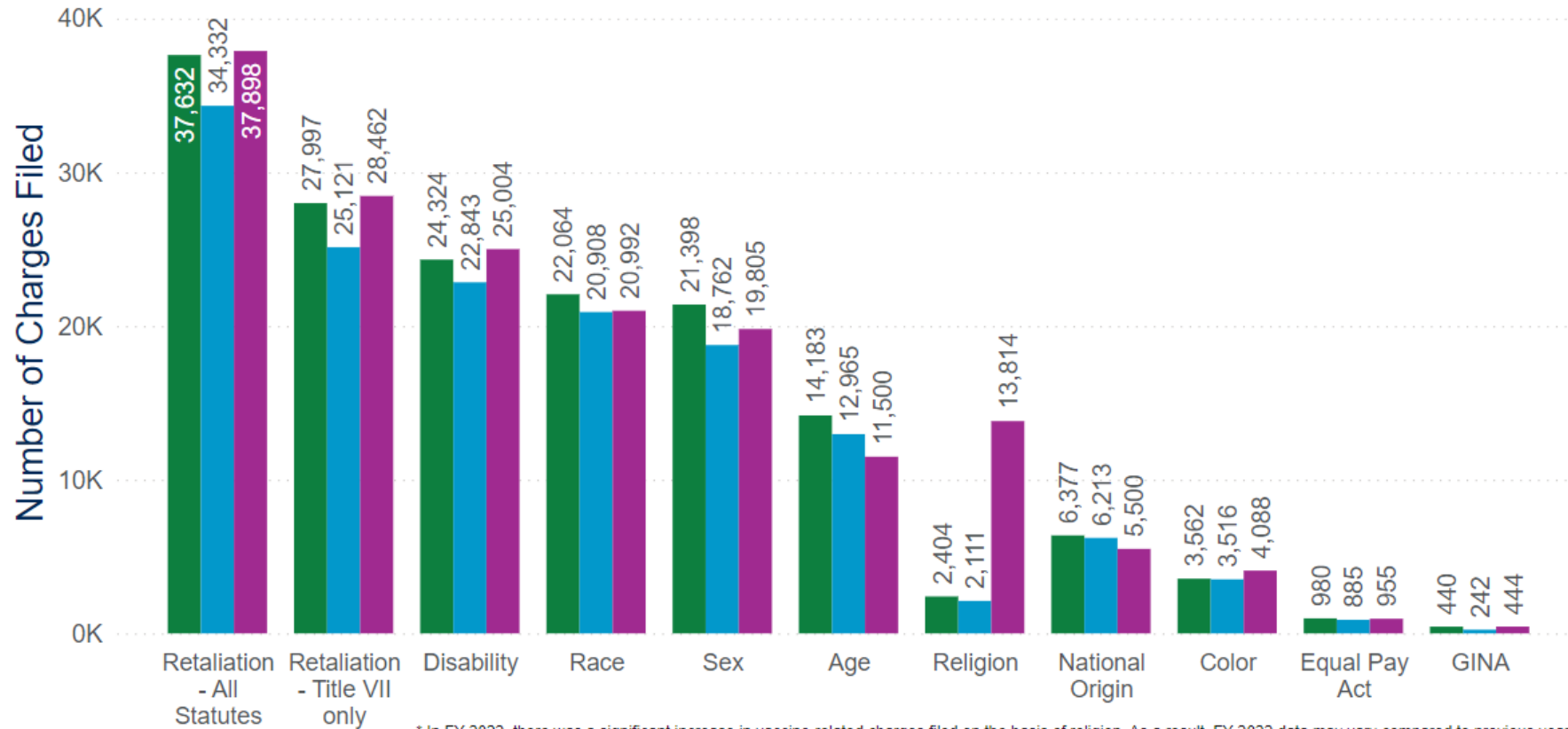
State Detail

By Claim Type

Claim Type Detail

## EEOC Charges by Claim Type 2020 - 2022

Year ● 2020 ● 2021 ● 2022



# EEOC – Year End Litigation 2023

- Total of 143 new “merits” lawsuits for FY 2023
- 70 filed in the last 4 weeks of the FY!!
- ADA lawsuits a priority
  - Hearing impairments
  - Mental health-related
- Reasons? Lessening of Pandemic, funding boost

# EEOC: Fiscal Year 2023 Priorities

- Recruitment and hiring practices and policies that result in discrimination
- Qualification standards and inflexible policies affecting disabled individuals
- Protecting individuals affected by pregnancy, childbirth, and related medical conditions
- Addressing discrimination influenced by or arising as backlash in response to local, national or global events
- Technology related employment discrimination
- Equal pay

# EEOC Guidance on Employer Use of AI

- Issued May 18, 2023
- Not binding, does not have the force of law, and does not announce new policy – just their views
- Warns that automated decision making tools (employee selection procedures) has the potential of disparate impact





# EEOC Issues New AI Guidance – Title VII

- Issue in newest is disparate/adverse impact under Title VII;
- Issue in first is disability discrimination;
- Focus is on the use of AI in employee selection (hiring, promotion), firing.
- If use of AI results in disparate impact, employer must show:
  - 1) job-related/consistent with business necessity; and
  - 2) no less discriminatory alternative available.
- Recommended: Ensure validation, if possible.



# EEOC Updated Resource: Guidance on ADA Requirements for Individuals with Hearing Disabilities in the Workplace

- Chair Burrows: “The practical questions and answers and realistic scenarios in this updated document will help educate employers on [their] responsibilities and employees about their rights.”



**EEOC  
DISABILITY  
RESOURCES**

# EEOC Guidance on Workplace Harassment

- Guidance issued on September 29, 2023
- Comment Period Ends November 1, 2023
- “Proposed Enforcement Guidance on Harassment in the Workplace”
  - advises employers on handling new workplace realities
    - LGBTQ rights
    - Online misconduct
    - Abortion
    - Other forms of Workplace Harassment

[www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace](https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace)

# EEOC Focus on Construction

- *Building For the Future: Advancing Equal Employment Opportunity in the Construction Industry (May 2023)*
  - Women and people of color are underrepresented, especially in higher-paid and higher-skilled trades
  - Discrimination based on sex, race and national origin persists and contributes to the underrepresentation
  - Harassment is pervasive on many jobsites and poses barrier to recruitment and retention
  - Racial harassment in construction often takes virulent forms and nooses appear with chilling frequency on jobsites across the country.
  - Retaliation is a serious problem in construction



# 2023 NLRB Developments

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- Joint employment rule (August 2023)
- Quickie election rules (August 2023)
- **Cemex** decision (August 2023)
- GC Memoranda
- **McLaren Macomb** decision

# Joint Employer

- Evidence of indirect or merely potential or un-exercised control over the wages, hours, and working conditions could be sufficient to demonstrate joint employer status.
- Potentially applicable to employee leasing and temporary employee relationships
- Need to evaluate contracts and train project leadership



# Quickie Election Rules

- Effective December 25, 2023
- Elections to be scheduled “as soon as practicable”
  - No litigation of scope of unit
  - Micro units will be presumed appropriate absent “overwhelming evidence”
  - Resolution post-election

# Cemex decision

- Allows unions to gain representation without election
- If union claims majority support, employer must:
  - Voluntarily recognize (but verify showing)
  - File RM petition within two weeks
    - Bargaining order will be issued to remedy any ULP interfering with the laboratory conditions for an election
  - Refuse recognition and challenge in possible ULP proceeding

# NLRB Expanding Employee Protections

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- **GC enforcement posture**
  - One-on-one and group meetings
  - Remedies
  - Scope of PCA (harassment, threats, violation of policies, etc.)

# *McLaren Macomb* Decision

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- Outlawed overly broad confidentiality and nondisparagement provisions in severance agreements
- Issues to consider:
  - Past agreement
  - Narrowly tailored agreements
  - Settlement agreements

# FTC

# Restrictive Covenants



- FTC Proposed Rulemaking
  - Bans non-competes
  - Does not ban non-solicitation or non-disclosure restrictions, unless they act as non-competes
  - Applies to all “workers”
  - Commentary period has now closed
  - If passed, it would become illegal to enter into, attempt to enter into, maintain or seek to enforce a non-compete agreement

# OSHA

# Walk Around Rule

- Authorizes participation in the walkaround portion of an OSHA inspection by “a representative authorized by [the employer’s] employees,” without any limit on whom the employees can choose.
- August 29, 2023 – Issued clarification the representative may be a non-employee third party if the compliance officer determined the third party is “reasonably necessary” to conduct an effective and thorough inspection.
- Need to prepare plan now!



# Employment Developments to Watch

# Pay Equity and Transparency

- Six states require employers to post pay ranges on all job postings:
  - California, Colorado, Connecticut, Maryland, Nevada, Rhode Island, Washington;
  - Number seven: New York, effective September 17, 2023.
- Local requirements:
  - NYC;
  - Ithaca, NY;
  - Westchester County, NY;
  - Jersey City (if principal place of business).
- “Will or could be performed in the [jurisdiction]” standard
- Very likely more to come...
  - Wisconsin and Michigan???

# Impact of Pay Equity/Transparency Laws on Company Culture?

- Potential morale implications if range advertised in job posting is higher than what employees currently in the role are making;
- Considerations:
  - Bridging the gap;
    - Impact on willfulness when you know of disparities and fail to correct them.
  - Reevaluating the range.
- Weigh employee relations impact of avoidance and “creative” compliance strategies.



# Expansion of Paid Leave Laws

- In recent years, uptick in state legislation providing paid sick and/or medical leave to private employees;
  - New York, New Jersey, Maryland, Connecticut
- Several federal proposals circulating on The Hill;
- Provide employees with paid leave relating not only to their own health conditions, but also to care for a family member suffering from a health condition;
- Define term “family member” broadly (e.g., to include siblings, grandchildren, grandparents, and domestic partners).

# Employment Law Litigation Trends

- Supreme Court's recent decision in ***Groff v. DeJoy*** may make it easier for employees to prevail on claims alleging a failure to provide a religious accommodation.
- **New Standard:** To deny a religious accommodation as an “undue hardship” requires an employer to show that it “would result in substantial increased costs in relation to the conduct of its particular business.”
  - Departs from more lenient “de minimis” cost standard.
- New standard takes into account the impact on coworkers to the extent those impacts affect the conduct of the employer's business.
  - Example - forcing other employees to work overtime would constitute an undue hardship.
- The Supreme Court left it to the trial courts to apply the new standard on a case-by-case basis.

# Misclassification Cases

- Helix Energy Solutions
- Supreme Court ruled offshore oil rig worker classied as “bona fide executive” was entitles to overtime pay for working more than 40 hours per week
- Worker earned more than \$200,000 annually
- Employee was paid daily rate.

