In Case You Missed It *or* In Case You're Sweating It

MAYNARDNEXSEN

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Agenda

1. Supreme Court overturns "*Chevron* deference"
2. OSHA's proposed heat standard
3. Navigating political speech in the workplace and other election year considerations
4. EEOC trends in litigation and other lesser-known claims being asserted by employees
5. *Muldrow* Standard's impact on workplace discrimination

1. Supreme Court overturns "*Chevron* deference"

Supreme Court overturns "*Chevron* deference"

- *Loper Bright Enterprises v. Raimondo*
  - June 28, 2024
  - Overturned *Chevron U.S.A. v. Natural Resources Defense Council* (1984)

- *Chevron*: Courts should **defer** to federal administrative agencies' reasonable interpretations of the laws they enforce
  - So, for example, courts have deferred to DOL's interpretation of FLSA as set out in its regulations

- *Loper Bright*: Courts, not agencies, are best suited to interpret ambiguous statutory provisions, even in areas of agency expertise
  - Is expected to make it harder for agencies to change policy through rulemaking

Supreme Court overturns "*Chevron* deference"

- *Loper Bright* is likely to have big impact on employment law
  - And it wasn't even about employment!
- Commercial herring fishing businesses claimed NOAA exceeded its authority by promulgating rule based on fishing conservation law
- Lower courts upheld NOAA's rule based on *Chevron*
- Fishing businesses asked SCOTUS to overrule or limit *Chevron*
- Court overruled it
  - SCOTUS: courts "must exercise their independent judgment when deciding whether an agency has acted within its statutory authority"

Supreme Court overturns "*Chevron* deference"

- *Loper Bright* and DOL's new overtime rule
  - Increased minimum annual salary for EAP exemption on July 1, 2024 and again on January 1, 2025
  - And every three years after that to keep up with inflation
- *State of Texas v. U.S. DOL* (E.D. Tex.)
  - On June 28, 2024, blocked rule for employees of State of Texas
  - Waiting for further rulings that may apply to more workers
- **Court cited *Loper Bright* and did not defer to DOL**
  - Because makes EAP exemption dependent on salary and not job duties
  - "There is no mention in the [FLSA] of any minimum salary for this exemption or, for that matter, of any compensation level associated with the" exemption
  - … "Therefore, these changes to the minimum salary level are likely 'in excess of statutory jurisdiction.'"

Supreme Court overturns "*Chevron* deference"

- *Loper Bright* and FTC's non-compete rule
  - Banned almost all non-competes and "functional non-competes" between employees and workers as of September 4, 2024
- *Ryan, LLC v. FTC* (N.D. Tex.)
  - On August 20, 2024, court ruled ban is unlawful and cannot be enforced against any employer nationwide
  - FTC may appeal
- **Court cited *Loper Bright* and did not defer to FTC**
  - FTC lacks legal authority to make rules on competition policy
    - Involved analysis of FTC's authority as set out in FTC Act
  - The rule is arbitrary and capricious because FTC lacked sufficient evidentiary basis to support such a broad rule

Supreme Court overturns "*Chevron* deference"

- Non-competes after *Ryan*
  - Even without rulemaking authority, FTC can continue to challenge non-competes on case-by-case basis using its law enforcement mandate
  - In May 2023 NLRB's GC issued memo asserting non-competes violate NLRA
    - NLRB has filed complaints against employers based on their non-competes
  - 4 states have banned nearly all non-competes
    - 11 more states have thresholds protecting low to middle income or hourly workers
    - More states are considering restricting non-competes

Supreme Court overturns "*Chevron* deference"

- *Loper Bright* and OSHA's proposed heat standard
  - Issued July 2, 2024
  - Likely to be challenged after published in final form
  - Possible impact of *Loper Bright*

2. OSHA'S Proposed Heat Rule

Secretary of Labor v. A.H. Sturgill Roofing, Inc. (2019)

- Temporary worker at roofing contractor died from heat stroke on first day with employer
- 60-year-old man with multiple preexisting medical conditions
- **But employer didn't know about them**
- Work consisted of removing existing roof
- **Heat index was 85°F**

Secretary of Labor v. A.H. Sturgill Roofing, Inc. (2019)

- OSHA cited contractor under GDC for exposing employees to excessive heat
  - GDC=Section 5(a)(1) of OSH Act
  - Requires employers to provide workplace "free from recognized hazards … likely to cause death or serious harm to employees"

- ALJ affirmed citation

- OSH Review Commission reversed 2-1

- **Commission criticized OSHA's use of GDC to cite for heat hazards instead of developing heat exposure standard**

- **In 2021 OSHA formally began rulemaking process to develop heat standard**

OSHA's National Emphasis Program on heat hazards (2022)

- Issued April 8, 2022
- Runs until 2025
- Targets for inspection workplaces where heat-related injuries and illnesses are common during high heat conditions, including:
  - Construction
  - Agriculture
  - Landscaping and roofing
  - Ship and boat building
  - Warehousing and storage
  - Waste collection
  - Foundries and bakeries
- 5,000 federal inspections under this NEP so far
- Uses GDC for enforcement

OSHA's Proposed Standard on heat hazards (2024)

- Issued July 2, 2024
- Expected to be published in Federal Register by August 31, 2024
- After that public will have 120 days to submit comments
- OSHA will consider comments, hold hearings, and publish in final form
- Then could face court challenge because it imposes inflexible compliance obligations that may not be workable for some employers
- **Even if successfully challenged, should be considered as menu of options to protect employees from heat**

OSHA's Proposed Standard on heat hazards (2024)

- If employees may be exposed to heat index of at least 80°F for 15 minutes or more during 60-minute period, then must:
  - Develop Heat Injury and Illness Prevention Plan (HIIPP)
  - In writing if10 employees or more
  - In language each employee understands
  - Designate one or more heat safety coordinators
  - Include all policies and procedures needed to comply with standard
  - Explain how will respond to employee showing signs of heat illness
  - List emergency phone numbers and describe how employees can contact supervisor and EMS

OSHA's Proposed Standard on heat hazards (2024)

- "Initial heat trigger"—if heat index of 80°F is reached, provide:
  - Cool drinking water in quantities of one quart per employee per hour
  - Break areas with shade for outdoor work sites
  - Break areas with fans or air conditioning for inside work sites
  - Paid rest breaks if needed

- "High heat trigger—if heat index of 90°F is reached, provide in addition:
  - Hazard alerts pre-shift or upon determining trigger has been met covering:
    - Importance of drinking water
    - Right to take breaks
    - How to seek help for emergency
    - Location of break areas and drinking water
  - Minimum of 15-minute paid rest breaks at least every two hours in break areas with cooling measures
  - Observation of employees for signs of heat illness

OSHA's Proposed Standard on heat hazards (2024)

- Training requirement
  - Train all employees expected to perform work when heat index is above 80°F
  - Give them refresher training annually
  - Also train supervisors and heat safety coordinators

- Plan review requirement
  - Review HIIPP at least annually
  - Also whenever significant heat-related illness or injury occurs

- Employee input
  - Seek input and involvement of non-managerial employees when developing the plan

Polling Question #1

- Does your Company have a heat illness prevention plan?

- ❑ Yes
- ❑ No
- ❑ I don't know

3. Election Year Considerations in the Workplace

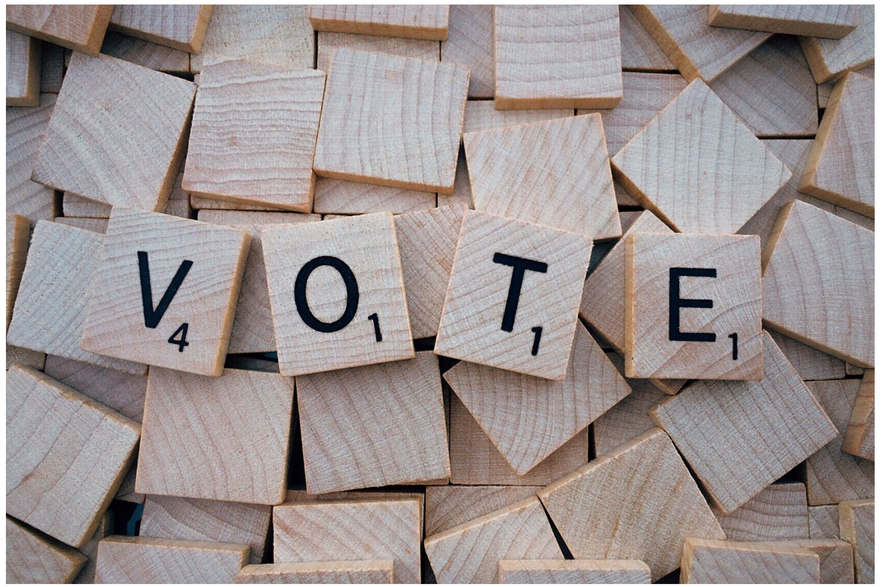
Polling Question #2

- Does your Company have a voting leave policy?

- ❑ Yes
- ❑ No
- ❑ I don't know

Voting Leave: Checklist for Compliance

- Identify your state's specific requirements
- Determine if your state mandates paid leave
- Review your company's voting leave policy
- Clearly outline procedures for requesting leave
- Educate management about voting leave policies



Political Speech in the Workplace: Corporate Speech

- Employers generally have the right to engage in political activity in the workplace (e.g., communicating with employees about support for or opposition to legislation or regulations)
- Federal and state laws prohibit employers from coercing employees to vote in a certain way or to interfere with an employee's ability to vote for certain candidates.
- Private companies are permitted to contribute money to a particular campaign or cause.

Political Speech in the Workplace: Employee Speech

- Federal laws to consider:
  - National Labor Relations Act
  - Various EEO laws
- NLRB's "Captive Audience" Memorandum
- Be aware of state and local laws applicable to employees' political speech in the workplace.
- Considerations regarding employees' use of social media

- Recommendations:
  - Be prepared.
  - Review your internal policies for compliance with applicable laws.
  - Ensure consistent application of policies.
  - Train leaders, management, and HR staff about applicable policies.
  - When in doubt, consult outside counsel!

4. EEOC Trends and Workplace Litigation Claims

EEOC Suits Filed in 2023

Of the lawsuits filed:

92 contained claims under Title VII (64.3%)
49 contained claims under the ADA (34.3%)
12 contained claims under the ADEA (8.4%)
3 contained claims under the EPA (2.1%)
1 contained claims under GINA (0.7%)
57 sought relief for multiple individuals (39.9%)

sex (50), disability(49), race (24), age (12), religion (10), national origin (8), color (3)

Most common claim made in all suits: retaliation

EEOC Suits Filed in 2023

One of the Biggest Bugaboos: failure to deal with internal complaints

EEOC v. The Whiting-Turner Contracting Company, No. 3:21-cv-00753 (M.D. Tenn. May 3, 2023)

- Black employees at a construction site were subjected to racial harassment and retaliated against. In response to multiple complaints employer did not investigate; instead, a White assistant superintendent told one of the Black employees to "let it go" and that the crew leader was "old-fashioned."

EEOC v. AMTCR, Inc., AMTCR Nevada, Inc., AMTCR California, LLC, No. 2:21-cv-01808 (D. Nev. Jan 5,2023)

- Affiliated entities that own and operate 21 McDonald's franchises subjected male and female employees to sexual harassment, resulting in the constructive discharge of some employees. In response to a complaint made to management, no corrective action was taken; instead, a manager said the charging party should take the conduct as a compliment.

Emerging Claims

Diversity, Equity, and Inclusion Programs (Reverse Race)

De Piero v. Pa. State Univ., Civil Action 23-2281 (E.D. Pa. Jan 11, 2024) – Court Denied Motion to Dismiss

Facts:

- Employee - white male writing instructor
- Resigned from his position after a series of events including, being "instructed" to include race in his grading rubrics, participating in an employee-led breathing exercise where non-Black individuals were told to hold their breath longer to feel more pain, and reading an email from the Director of Diversity, Equity, and Inclusion that "'call[ed] on white people' to 'feel terrible.'"
- Employee filed multiple reports alleging racial harassment, which were all denied and forced him to continue attending the workshops.

Emerging Claims

Diversity, Equity, and Inclusion Programs (Reverse Race)

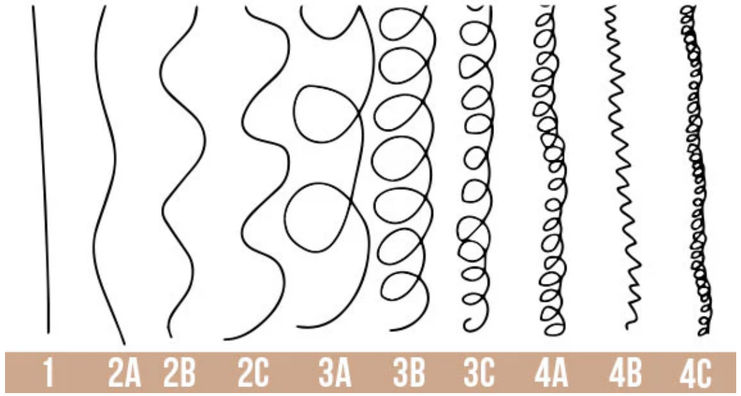
Diemert v. City of Seattle, No. 2:22-CV-1640, 2023 WL 5530009 (W.D. Wash. Aug. 28, 2023) – Court Denied Motion to Dismiss

Facts:

- Employee – white male who worked for the City of Seattle and claimed the City's Race and Social Justice Initiative ("RSJI"), which is a program that required "race-based thinking and decision-making," led him to experience severe discrimination.
- Consistently treated worse than Black, Indigenous, and People of Color ("BIPOC") employees.
- At the training, it was stated "all white people have privilege and are racist."
- Employee was told to step down because he obtained his position through "white privilege."
- Employee also had to attend workshops where he was forced to play "privilege" bingo and was told that "white people are like the devil."

Lesser Known Claims

Discrimination on the basis of an immutable characteristic associated with race, such as skin color, **hair texture**, or certain facial features violates Title VII, even though not all members of the race share the same characteristic.



April 2024: American Screening, LLC agreed to pay $50,000 to settle claims filed by the EEOC of race discrimination. Black employee interviewed and was selected for a sales position (was wearing a wig with long, straight hair).

Hired and stopped wearing the wig– wore hair in its naturally curly texture (Type 4A).

The owner instructed HR to counsel the employee about her hair and "looking more professional." The owner then directed the employee to begin wearing her wig with straight hair again. When the employee continued to wear her natural hair, the company fired her.

Lesser Known Claims

Gender discrimination against males

The Children's Home, Inc., a Tampa non-profit children's organization, refused to consider a male employee for a management position in a maternity home program.

The Company's upper management and human resources personnel discouraged the male manager from internally applying for a position in a newly created Adolescent Motherhood Program.

Management said they "weren't sure if they would accept males to work at the new motherhood program," and asked, "… can you imagine males changing pampers, working with babies and with pregnant girls?" The employer expressed concern that the ladies in the maternity home may be uncomfortable with males "due to their hormonal changes."

Polling Question #3

- Has your Company received a Charge of Discrimination within the past year?

❑ Yes
❑ No
❑ I don't know

5. *Muldrow* v. *City of St. Louis* and Workplace Discrimination

Muldrow Factual Background

Sergeant Muldrow was laterally transferred from a position in the Intelligence Division to a job in the Fifth District by a new commander (he made other personnel changes too, transferring 22 officers (17 of whom were male) into various other positions).

Muldrow asserted the transfer was discriminatory because she was moved her from a job in a prestigious, specialized division with substantial responsibility over priority investigations and frequent opportunity to work with police commanders to a uniformed position supervising one district's patrol officers primarily performing administrative work.

She lost the perks associated with her former job: the opportunity to work in plain clothes, keep a strict Monday-to-Friday schedule, and access to an unmarked FBI vehicle.

Supreme Court Sets Forth New Standard

An employee challenging a job transfer under Title VII of the Civil Rights Act must show the transfer brought about ***some* harm** with respect to an identifiable term or condition of employment, but that harm need ***not* be significant**.

SCOTUS did not say that all mandatory lateral transfers are adverse actions – instead, employees who are transferred must always show at least some harm beyond the harm of being transferred for allegedly discriminatory reasons.

SCOTUS eliminated a heightened threshold for harm under Title VII, but what showing is sufficient for Title VII purposes to prove "some harm" is still an open question.

Thank you!