

An American flag and a Texas state flag are flying on a tall, silver flagpole against a clear blue sky. The American flag is positioned higher on the pole than the Texas flag.

# Legislative Update

Presented by:  
Bettye Lynn  
22700 South FM 219  
Dublin, Texas 76446  
[lynn@lynntx.law](mailto:lynn@lynntx.law)

# Who Legislates?

---

## United States

---

- Congress
- Administrative Agencies
  - DOL
  - EEOC
  - CDC
- President
  - Executive Orders
- Courts

---

## Texas

---

- Legislature
- Courts

A photograph of two flags flying on a tall, silver flagpole against a clear blue sky. The top flag is the United States flag, and the bottom flag is the Texas state flag. The flagpole has a gold-colored finial at the top.

# United States

---

## Congress

# New Protections for Working Mothers – PUMP

---

- In 2022, Congress enacted Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP)
- Expands PWFA lactation protections for nursing mothers
- Requires employers to provide nursing mothers with:
  - Reasonable amount of break time to express breast milk for up to one year following birth of child
  - Space to express breast milk shielded from view and free from intrusion from coworkers and public and is not bathroom

(cont.)



# New Protections for Working Mothers – PUMP (cont.)

---

- Employer not required to pay employees for lactation breaks so long as employee is completely relieved of duties during entire break
- Exempt employees must be paid their full weekly salary
- PUMP Act creates private right of action for employees to sue

# New Protections for Pregnant Workers – PWFA

---

- In 2022, Congress enacted Pregnant Workers Fairness Act (PWFA)
- Requires employers to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions of qualified employee if not an “undue hardship”
- Takes effect on June 27, 2023

(cont.)

# New Protections for Pregnant Workers – PWFA (cont.)

---

- Extends right to request reasonable accommodations to pregnant workers under same framework as ADA
- No longer necessary to evaluate whether employee “disabled” as with ADA
- Pregnant employee has right by pregnancy alone to request reasonable accommodations
- Employee provides medical documentation and makes an affirmative request for accommodation

(cont.)



# New Protections for Pregnant Workers – PWFA (cont.)

---

- Accommodation cannot be arbitrarily denied
- “Interactive process” to determine appropriate accommodation
- Leave of absence may be reasonable accommodation after FMLA or sick leave exhausted, if not imposing “undue hardship”
- Parental leave must be provided to similarly situated men and women on same terms

(cont.)



# New Protections for Pregnant Workers – PWFA (cont.)

---

- Cities should
  - Review existing handbooks and personnel policies to alert employees of rights
  - Establish how requests will be processed/considered/approved
- Pregnancies and requests for accommodation may not be basis for harassment or retaliation regarding hiring, promotion, or other employment decisions

# Federal Legislation Proposed for Pay Transparency

---

- Proposal HR 1599 (Salary Transparency Act) requires all employers to
  - Include wage range in job postings
  - Provide wage range to applicant prior to discussing compensation
  - Provide wage range to existing employees for their positions at any time upon request
- Applies to both **public** and private employers and for internal and external job postings
- Prohibits retaliation against individual for requesting wage range

# Federal Legislation Proposed for Pay Equity

---

- Proposal HR 1600 (Pay Equity for All Act of 2023) prohibits prospective employers from
  - Inquiring about candidates' prior salaries and benefit history
  - Relying on history in considering employment or determining wages
- Lawsuit against employer in federal or state court permitted





# United States

---

## Administrative Agencies



United States

---

Department of Labor

# DOL Says Employees May Use FMLA to Shorten Workweek Indefinitely

---

- Employees may take FMLA leave to reduce work schedule or take time off because of serious health condition if unable to perform functions of their positions
- “Serious health condition” defined as an illness, injury, or physical or mental condition that involves inpatient care or continuing treatment from a health care provider
- FMLA time cannot exceed 12 weeks in 12-month period
- Employees working more than 40 scheduled hours get more FMLA time – ex. 50 hours/workweek = 600 hours FMLA leave



# DOL Distinguishes Between FMLA and ADA Rights Regarding Required Overtime

---

- FMLA employees may use FMLA leave to limit work schedules indefinitely for chronic serious health conditions
- Employees can take intermittent FMLA leave in separate blocks
- “Serious health condition” under FMLA and “disability” under ADA are different concepts and must be analyzed separately

(cont.)

# DOL Distinguishes Between FMLA and ADA Rights Regarding Required Overtime (cont.)

---

- Requirements of FMLA and ADA must be applied for an employee who qualifies under both that assures the most beneficial rights and protection of employee
- Employee who exhausts FMLA leave may still have rights under ADA

# Handling Wage-Hour Issues with Remote Workers

---

- FLSA does not require breaks, but most employers provide them, some paid (if no work interruptions or PUMP) and some unpaid (if no work interruptions)
- Essential to count accurately all hours worked
- Employers encouraged to adopt very precise timekeeping system for remote workers

(cont.)



# Handling Wage-Hour Issues with Remote Workers (cont.)

---

- Be sure supervisors and managers are aware of any overtime policy and comply with it
- When remote workers report time, consider policies around PWFA and PUMP and around intermittent FMLA leave (unpaid)



United States

---

Equal Employment Opportunity Commission

# EEOC Announces Enforcement Priorities for 2023-2027

---

- Draft Strategic Enforcement Plan (SEP) subject matter priorities:
  1. Eliminating barriers in recruitment and hiring
  2. Protecting vulnerable workers and persons from underserved communities from employment discrimination
  3. Addressing emerging and developing issues
  4. Enforcing equal pay laws
  5. Preserving access to legal system
  6. Preventing harassment through systematic enforcement and targeted outreach



# Where Have All the Charges Gone?

---

- Five years after #MeToo movement took shape, trend in EEOC charges of discrimination is *down* significantly
- 30,000 fewer charges in FY 2021 than in FY 2019
- Notable uptick in retaliation charges (56% of charges in FY 2021 up from 48% in FY 2016)
- Sex discrimination charges dropped from 26,934 in FY 2016 to 18,762 in FY 2021

(cont.)

# Where Have All the Charges Gone? (cont.)

---

- Many more internal complaints of sexual harassment
- Positive development – employers have implemented effective policies
- Increased focus on preventative training
- Remind managers of duty to report complaints to HR for prompt action

# Lessons for Employers Revealed in EEOC Public Sector Harassment Guidance

---

- EEOC issued, “Promising Practices for Preventing Harassment ...” providing practical tips for preventing and addressing workplace harassment
- Provides important perspective on how EEOC enforcement efforts works
- Establish and maintain anti-harassment program with neutral staff-members
- Thoroughly, and impartially investigate allegations and take immediate and appropriate corrective action
- Liability can hinge on promptness of investigation and remedial actions

(cont.)



# Lessons for Employers Revealed in EEOC Public Sector Harassment Guidance (cont.)

---

- Establish and maintain comprehensive anti-harassment policy that is regularly disseminated to all employees
- Important element of effective harassment prevention strategy and helps limit liability
- Provide multiple avenues for employees to report harassment, including outside employee's reporting chain of command
- Include assurances that identities of all involved will be kept confidential

(cont.)

# Lessons for Employers Revealed in EEOC Public Sector Harassment Guidance (cont.)

---

- Management must be aware of what conduct is prohibited and how to prevent and correct it
- Training recommended to be specific to workplace and regularly updated to ensure compliance with what EEOC considers adequate
- Policy should take into account relevant Texas laws

# EEOC Issues New Guidance on Auditory Disabilities

---

- Hearing impairment moved up on EEOC's priority list
- ADA protects individuals with varying degrees of hearing impairments, determined without considering positive effects of mitigating measures
- EEOC directs employers on what to do when applicant has or is suspected to have hearing impairment
- Before making job offer
  - Do not ask applicants about possible hearing impairment
  - May ask whether applicant needs accommodation

(cont.)



# EEOC Issues New Guidance on Auditory Disabilities (cont.)

---

- After making job offer
  - May ask about applicant's health (including hearing impairment)
  - Must ask ALL applicants for that position same question
- During employment, employer may ask about impairment when employer
  - Has observed symptoms
  - Receives reliable information of impairment that may cause performance or safety concerns

# Are Your EEOC Posters Up-to-date?

---

- October 2022, EEOC released updated “Know Your Rights” poster
- Describes different forms of prohibited workplace discrimination
- New poster includes several significant updates:
  - Harassment is prohibited form of discrimination
  - “Sex” discrimination includes pregnancy, sexual orientation, and gender identity
  - QR code for employees to scan to direct link to instructions for filing charge of workplace discrimination (cont.)

# Are Your EEOC Posters Up-to-date? (cont.)

---

- Display “within reasonable amount of time” in “conspicuous location...where notices to applicants and employees are customarily posted”
- Failure to display poster may result in noncompliance penalties





United States

---

Centers for Disease Control

# New Guidance Regarding End of COVID-19 Emergencies

---

- March 29, 2023, Senate passed H.J. Resolution 7, which terminates “National Emergencies Act” declaration concerning COVID-19 and ended Public Health Emergency effective May 11, 2023
- After May 11, emergency health plans will no longer provide free COVID-19 diagnostic testing but encouraged to do so
- State and grandfathered plans must continue to provide COVID-19 vaccines, boosters, and other preventative services without cost

The background of the slide features a tall flagpole with a gold finial. Two flags are flying from the pole: the United States flag at the top and the Texas state flag below it. The scene is set against a clear, light blue sky. A thin black horizontal line is positioned across the middle of the slide, just below the top of the flags.

United States

President





United States

---

Executive Orders

A photograph of two flags flying on a tall, silver flagpole against a clear blue sky. The top flag is the United States flag, and the bottom flag is the Texas state flag. The flagpole has a gold-colored finial at the top.

# United States

---

## Courts

# Supreme Court to Rule on Proposed New Standard for Religious Accommodation of Employees

---

- Cities may be significantly impacted by case recently argued in U.S. Supreme Court: religious accommodation for employees who request not to work on Sundays due to attending religious services
- Postal employee disciplined and resigned because Post Office required him to work Sundays
- Employee refused to work 24 Sundays in 14-month period due to his religious beliefs

(cont.)



# Supreme Court to Rule on Proposed New Standard for Religious Accommodation of Employees (cont.)

---

- Post Office attempted accommodation, but no other employees wanted to work Sundays
- Employee resigned when it became clear he could be fired by USPS
- District Court rejected employee's claims he was treated differently than other employees based on religion

(cont.)

# Supreme Court to Rule on Proposed New Standard for Religious Accommodation of Employees (cont.)

---

- Court agreed with Postal Service that accommodating employee would cause undue hardship
- Court of Appeals affirmed lower court only on its conclusion that Post Office had demonstrated undue burden to make accommodation
- Supreme Court heard oral arguments mid-April
- Employee asked Court to establish new standard: “substantial difficulty or expense”

(cont.)

# Supreme Court to Rule on Proposed New Standard for Religious Accommodation of Employees (cont.)

---

- Oral arguments reveal likelihood of modifying “de minimis” standard for higher standard of “substantial difficulty or expense” – this is used in ADA
- If Court revises standard, will require more cases to determine meaning of “significant cost” and what factors are to be applied to standard
- Possible impact on cities

*Groff v. DeJoy*



# Fifth Circuit Re-examines Gender-Specific Scheduling Decision

---

- Employer, a jail, instituted a policy allowing employees two days off each week, but only male employees could schedule both weekend days for safety reasons
- Female officers claimed discrimination, and Fifth Circuit affirmed trial court's dismissal of claim because scheduling is not "ultimate employment decision"
- Only ultimate employment decisions could be adverse employment actions

*Hamilton v. Dallas County*

(cont.)

# Fifth Circuit Re-examines Gender-Specific Scheduling Decision (cont.)

---

- Fifth Circuit granted rehearing *en banc* to re-examine ultimate employment decision requirement and reconsider court's precedent
  - Full Fifth Circuit Court heard case on January 23, 2023
  - Dallas County argued ultimate employment decision appropriate standard
  - Female employees asserted Court should adopt less stringent standard used by other circuit courts
  - No decision yet
- (cont.)

# Inadequate Training May Be Adverse Employment Action

---

- Adverse employment action is ultimate employment decision that affects job duties, compensation, or benefits
- Fifth Circuit identifies “inadequate training” as another adverse action in discrimination claim
- Two employees (one white; one black) vying for same job where black employee failed testing even after being given more time for study; white employee passed
- Black employee terminated and sued claiming racial discrimination and inadequate training

(cont.)



# Inadequate Training May Be Adverse Employment Action (cont.)

---

- Appeals court reasoned if failure to train tied to termination, there is an adverse action
- Court found training opportunities available to both employees, and not discriminatory
- Educate all employees of access to training and remind them of all training opportunities

*Rahman v. Exxon Mobil Corporation*

# Failing to Report is Not Protected Activity Under Title VII

---

- Manager chose to conduct investigation into harassment complaint, rather than follow employer's reporting protocol
- Harasser terminated; manager demoted for failure to report
- Manager sued alleging retaliation
- Claim of retaliation under Title VII, must show
  - Protected conduct
  - Suffered an adverse employment activity
  - A causal connection

(cont.)

# Failing to Report is Not a Protected Activity Under Title VII (cont.)

---

- Seventh Circuit found manager “...failed to report harassment” –inaction not protected activity
- Cities should implement clear reporting procedures and train managers on procedures

*Alley v. Penguin Random House*



# Rumor Based Beliefs are Defense to Discrimination Claims

---

- Employee sought schedule change (day shifts only) due to medical condition
- Change to day shifts granted on trial basis
- Suggestion that change may violate CBA and burden others having to take night shifts
- Employee then moved to day shift administrative job, and applied for two open positions

(cont.)

# Rumor Based Beliefs are Defense to Discrimination Claims (cont.)

---

- Employee scored highest for training position, but rumor surfaced that if faced with active shooter, he would flee
- Based on rumor, Chief re-interviewed candidates and requested references for each candidate
- Employee scored lower than other candidate and did not get promotion
- Sued under the ADA's Rehabilitation Act for failure to accommodate his disability and discriminatory refusal to promote

(cont.)

# Rumor Based Beliefs are Defense to Discrimination Claims (cont.)

---

- Claimed “unusual” interview process and scant investigation of rumor
- Court ruled “unusual” interview process not sufficient to prove pretext and “...shortcomings in investigation do not support an inference of discrimination...”

*Leblanc v. McDonough*



# Failure to Follow Employer's FMLA Protocols

---

- FMLA provides “employer may require employee to comply with usual and customary notice for requesting leave
- Employee’s failure to respond to reasonable employer inquiries for leave may result in denial of FMLA protection
- Employee had medical issue and sent doctor’s notes for time off but no other information
- Employee did not contact HR as he was directed to do

(cont.)

# Failure to Follow Employer's FMLA Protocols (cont.)

---

- Employee terminated for failure to follow protocols, then sued
- By failing to follow protocol and respond to requests for information, he lost right to FMLA protections
- Cities should establish leave protocols that are clear and consistent – and enforce them

*Munger v. Cascade Steel Rolling Mills, Inc.*

# Only One Notice Required for Intermittent FMLA Leave

---

- FMLA intermittent leave can vary in time from an hour to blocks lasting several weeks
- Employee granted FMLA intermittent leave, he called in to miss work but did not mention FMLA leave
- Terminated due to absences; sued and lost; appealed
- Court ruled only one FMLA-qualified notice for intermittent leave required (up to 12 weeks)

(cont.)



# Only One Notice Required for Intermittent FMLA Leave (cont.)

---

- Court of Appeals found intermittent leave, thus qualifying reason was known in advance
- Employee did notify employer of need and was granted FMLA intermittent leave
- Employee did not have to give FMLA “notice” every time he called in to miss work

*Render v. FCA US, LLC*

# Expanded Retaliation Protections for Employees Potentially Entitled to Leave Under FMLA

---

- During COVID, attorney requested to work from home to care for her son; she was denied and offered to take unpaid leave, but did not specifically request FMLA leave
- HR offered work from home for few days; she didn't return to office when expected
- Terminated and sued alleging FMLA retaliation

(cont.)

# Expanded Retaliation Protections for Employees Potentially Entitled to Leave Under FMLA (cont.)

---

- District Court dismissed the case – attorney required to show “she was entitled to FMLA leave” to sustain FMLA retaliation claim
- Attorney had not established she would be caring for someone with “serious medical condition”
- Ruling reversed on appeal – holding employee has only to make leave request raising question of possible entitlement to FMLA leave

*Polina Milman V. Fieger & Fieger P.C. et al.*



# Takeaways

---

- Employer has obligation to work with requesting employee to determine whether requested leave qualifies under FMLA
- Firm recognized attorney's need for accommodation but failed to determine if entitled to leave under FMLA
- Cities should determine if employee qualifies for FMLA leave before taking action, especially if adverse action contemplated

# Mandatory Job Reassignment Not Reasonable Accommodation Under “Most Qualified Applicant” Policy

---

- Reassigning disabled employee to vacant position may qualify as reasonable accommodation under ADA
- Fifth Circuit held disabled employee not entitled to job reassignment as reasonable accommodation because employee was not “most qualified applicant”
- Employee failed to respond to offer by employer to extend employee’s leave period for additional six months as “breakdown in interactive process”

(cont.)

# Mandatory Job Reassignment Not Reasonable Accommodation Under “Most Qualified Applicant” Policy (cont.)

---

- Fifth Circuit applied two-step test:
  - Employee must show requested accommodation is reasonable “on its face”
  - Employer must “show special circumstances demonstrating undue hardship
- Court concluded request was not reasonable on its face

*EEOC v. Methodist Hospitals of Dallas*



# Multiple-Choice Promotional Exam Discriminates Against Minority Police Officers

---

- Multiple-choice tests for promotion were biased against minority officers
- Relied on abstract knowledge and rote memorization on written test, not on situational judgement
- Racial disparity existed based on test-taking ability, not job qualification
- Cities knew of adverse impact but failed to adopt alternatives such as performance-based assessment techniques

(cont.)

# Multiple-Choice Promotional Exam Discriminates Against Minority Police Officers (cont.)

---

- Minorities promoted at drastically lower rate than non-minority officers
- Cities must understand how testing systems may adversely impact certain classes of individuals
- Ensure neutral policies and practices do not adversely impact groups of individuals

*Tatum et al. v. Commonwealth of Massachusetts, et al.*

# Employer Did Not Violate Title VII in Prohibiting Black Lives Matter Attire

---

- Employees alleged employer violated Title VII by:
  - Discriminating against Black employees and advocates in selectively enforcing its dress policy to target and suppress BLM messaging, and
  - Retaliating against employees for continuing to wear BLM apparel and protesting employer's dress policy
- Court found employees failed to allege race was reason for disparate treatment since policy applied regardless of race

(cont.)



# Employer Did Not Violate Title VII in Prohibiting Black Lives Matter Attire (cont.)

---

- Appellate Court affirmed district court decision because employees did not allege employer
  - Applied policy selectively nor
  - Disciplined only for wearing BLM attire and not other violations
- Takeaway: apply workplace policies consistently and uniformly

*Frith, et al. v. Whole Foods Market, Inc.*

# Third Circuit Rules that PTO Not part of FLSA Salary

---

- Exempt employees are paid on “salary basis” – guaranteed base salary and paid at predetermined amount each pay period regardless of the number of days or hours worked
- Deductions from FLSA-exempt employee’s accumulated PTO not improper deduction from salary

(cont.)

# Third Circuit Rules that PTO Not part of FLSA Salary (cont.)

---

- Employer uses “points” equivalent to “hours” to calculate salary basis
- Exempt employees sued claiming exempt employees treated as if non-exempt (additional compensation for more “points” and deductions from PTO for fewer “points”)
- Court found PTO is “fringe benefit” and not considered “salary” under FLSA

*Higgins v. Bayada Home Health Care Inc.*



A tall flagpole with a gold finial at the top. Two flags are flying from the pole: the United States flag on top and the Texas state flag below it. The background is a clear, light blue sky.

Texas

---

Legislature

# Calculating Back Pay

---

- Amount of wrongfully discharged employee's back pay depends on how lost pay calculated – weekly, monthly, quarterly, or annually, or others
- Recent decision addressed manner of calculating back pay under TLGC Section 143.053(f)
- Employee's total earnings since discharge exceeded what he would have earned as firefighter, but was still entitled to back pay for every separate pay period during which he earned less

*Butler v. Big Spring*

# Texas CROWN Act Legislation Passed

---

- HB 567 “Create a Respectful and Open World for Natural Hair” (CROWN) protects cultural and self-expression in hair styles, especially for African Americans
- Employers should add this to personnel policy manuals and inform supervisors



# Chapter 143

---

## Civil Service Expansion FAILS!



Texas

Courts

# Prompt Remedial Action by Employer When Discrimination Alleged

---

- Prompt action to remedy discrimination in workplace not just good management – may avert legal liability
- Plaintiff claimed racial harassment by co-worker under Title VII and Texas anti-discrimination law
- Manager alerted HR immediately
- HR investigated within 5 days sent written warnings to employees they would be fired if discrimination continued
- Court dismissed case because employer took “prompt remedial action”  
*Hudson v. Lincare, Inc.*



# Short-Term Military Leave May Have To Be Comparable to Non-Military Leave Benefits

---

- Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), employers required to provide employees who take military leave with the same non-seniority rights and benefits as colleagues who take comparable non-military leaves
- Employee alleged violation of USERRA to grant paid leave for jury duty, bereavement, and sick leave, but not for short term military leave

(cont.)

# Short-Term Military Leave May Have To Be Comparable to Non-Military Leave Benefits (cont.)

---

- District court granted summary judgement to employer.
- Ninth Circuit found district court erred by not considering short term (3.1 days) military leave.

*Clarkson v. Alaska Airlines*

# Current Bills – Texas House

BILL	BILL TOPIC	STATUS	AS OF 05.12.2023
HB471	Entitlement to and claims for benefits for certain first responders and other employees due to illness and injury	Sent to Senate Business and Commerce Committee (50% engrossed)	Passed in the House but stalled in the Senate (05/16 vote taken in committee)
HB1579	Investigation of fire fighters in certain municipalities (same as Senate bill in 2016)	Referred to Local Government Committee (05/11)	Pending in House Committee
HB1661	Age limit for a beginning position in a police department under municipal civil service (see SB2161 – companion bill)	Sent to Senate Criminal Justice Committee (03/22)	Passed in the House but stalled in the Senate
HB4842	Disclosure of information in department files of fire fighters or police officers and civilian oversight boards in certain municipalities	Pending in the House	Pending in House Committee (05/16 vote taken in committee)



# Current Bills – Texas Senate

BILL	BILL TOPIC	STATUS	AS OF 05.12.2023
SB1738	Automatic suspension and investigation of law enforcement personnel involved in a shooting a child	Sent to Senate State Affairs Committee	Pending in the Senate – sent to State Affairs Committee
SB909	Municipal civil service for fire fighters and police officers	Sent to Senate Local Government Committee	Pending in the Senate – sent to Government Committee
SB2209	Disclosure of information in department files of fire fighters or police officers and civilian oversight boards in certain municipalities	Reported as favorable vote following amendments	Bill moved to Senate House and Urban Affairs Committee (05/10)

*Thank You*

*Bettye Lynn*

*Attorney at Law*  
22700 South FM 219  
Dublin, Texas 76446  
lynn@lynntx.law  
817-988-7108



*This document is provided for general informational purposes only. It is not intended and is not to be construed to constitute legal advice. Please consult your employment attorney for specific situations.*