

# EMPLOYMENT LAW 2025...AND BEYOND

WHAT HAPPENED, WHAT'S NEXT,  
AND WHAT TO DO ABOUT IT

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HR & EMPLOYMENT LAW CONFERENCE - MAY 15, 2025

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Better outcomes.

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**I HAVE NO IDEA WHAT'S HAPPENED**

**I HAVE NO IDEA WHAT'S NEXT**

**I HAVE NO IDEA WHAT TO DO  
ABOUT IT ... BUT**



**NEITHER DOES ANYONE ELSE**

# THE UNCERTAINTY OF GOVERNMENT BY EXECUTIVE ORDER

- Presidents have attempted to expand authority through Executive Orders -- but the scope of current effort is well beyond prior efforts
- Which Executive Orders are unconstitutional?
- When will we find out?
- What happens in the meantime?

# THE UNCERTAINTY OF GOVERNMENT BY SELECTIVE ENFORCEMENT

- Can the President/Cabinet Member/Agency Head refuse to enforce laws passed by Congress?
- Can the President strip an agency of the resources needed to enforce the law?
- When will we find out?
- What happens in meantime?

# THE UNCERTAINTY OF TRUMP ATTEMPT TO CONTROL GOVERNMENT AGENCIES

- **Despite 90-year precedent** Trump fired D **NLRB** member rather than awaiting expiration of term
  - ▣ No quorum
  - ▣ March 6: federal judge rules **illegal** ... on appeal.
- Trump fired two D members of the **EEOC** rather than awaiting expiration of terms as required by law.
  - ▣ No quorum
  - ▣ Court challenge planned

# WILL TRUMP BE PERMITTED TO CONTROL EMPLOYMENT LAW?

- ❑ EO: **“Ensuring Accountability for All Agencies”**
- ❑ Independent agencies, such as the NLRB and EEOC, must submit to oversight from the president
- ❑ Effect: **President – more than EEOC, NLRB, DOL -- will control employment policy and enforcement activities**
- ❑ Will the courts allow it?

# THE FOCUS FROM HERE ON: THE COURTS

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**200+ COURT CHALLENGES**

**60+ REVERSALS**

**WE'VE ONLY JUST BEGUN**



**“WE ARE A GOVERNMENT OF LAWS  
AND NOT MEN”**

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Will lower courts draw a line?

Will the Supreme Court draw a line?

**“THE SUPREME COURT HAS NO ARMY”**



**WHERE WE ARE NOW IS NOT  
WHERE WE WILL END UP**

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**PROBLEM: HOW DO YOU COMPLY  
WITH THE LAW IF THERE IS NO WAY  
TO KNOW WHAT THE LAW IS?**



# NO QUORUM: EEOC WILL USE CLAIMS AS A WAY TO MAKE POLICY

- Lucas outlined EEOC **priorities**:
  - ▣ Rooting out unlawful **DEI-motivated** race and sex discrimination;
  - ▣ Protecting American workers from **anti-American national origin discrimination**;
  - ▣ Defending the **biological and binary reality of sex** and related rights, single-sex spaces at work
- **Employees are taking the hint**

# NO QUORUM: EEOC WILL USE CLAIM DENIALS AS A WAY TO MAKE POLICY

- **Lucas press release (after EO):** “Acting Chair Lucas also issued a statement describing her opposition to certain parts of the Commission’s Final Rule implementing the Pregnant Workers Fairness Act (PWFA). **The acting chair does not agree with the Commission’s interpretation of the phrase “pregnancy, childbirth, or related medical conditions”** and the contrivances the Commission used to arrive at its construction of the statute.”

# NO QUORUM: EEOC WILL USE CLAIM DENIALS AS A WAY TO MAKE POLICY

- **Lucas press release (after EO):** “Biological sex is real, and it matters. Sex is binary (male and female) and immutable ... The EEOC will “protect men and women as biologically distinct sexes... It is neither harassment nor discrimination for a business to draw distinctions between the sexes in providing single-sex bathrooms or other similar facilities ... The Commission’s harassment guidance was fundamentally flawed...”

# BUT WHAT ABOUT THE LAW?

- ❑ January 20 Executive Order: Federal agencies are directed to only recognize two sexes
- ❑ EEOC: eliminate non-binary option on EEO-1 forms?
- ❑ EEOC: backing off of transgender discrimination cases
- ❑ **BUT:** According to the Supreme Court, gender identity and sexual orientation protected under Title VII
- ❑ Can the EEOC ignore that? Will Courts get involved?
- ❑ Still have right to bring lawsuits.

# THE FTC AND NONCOMPETES

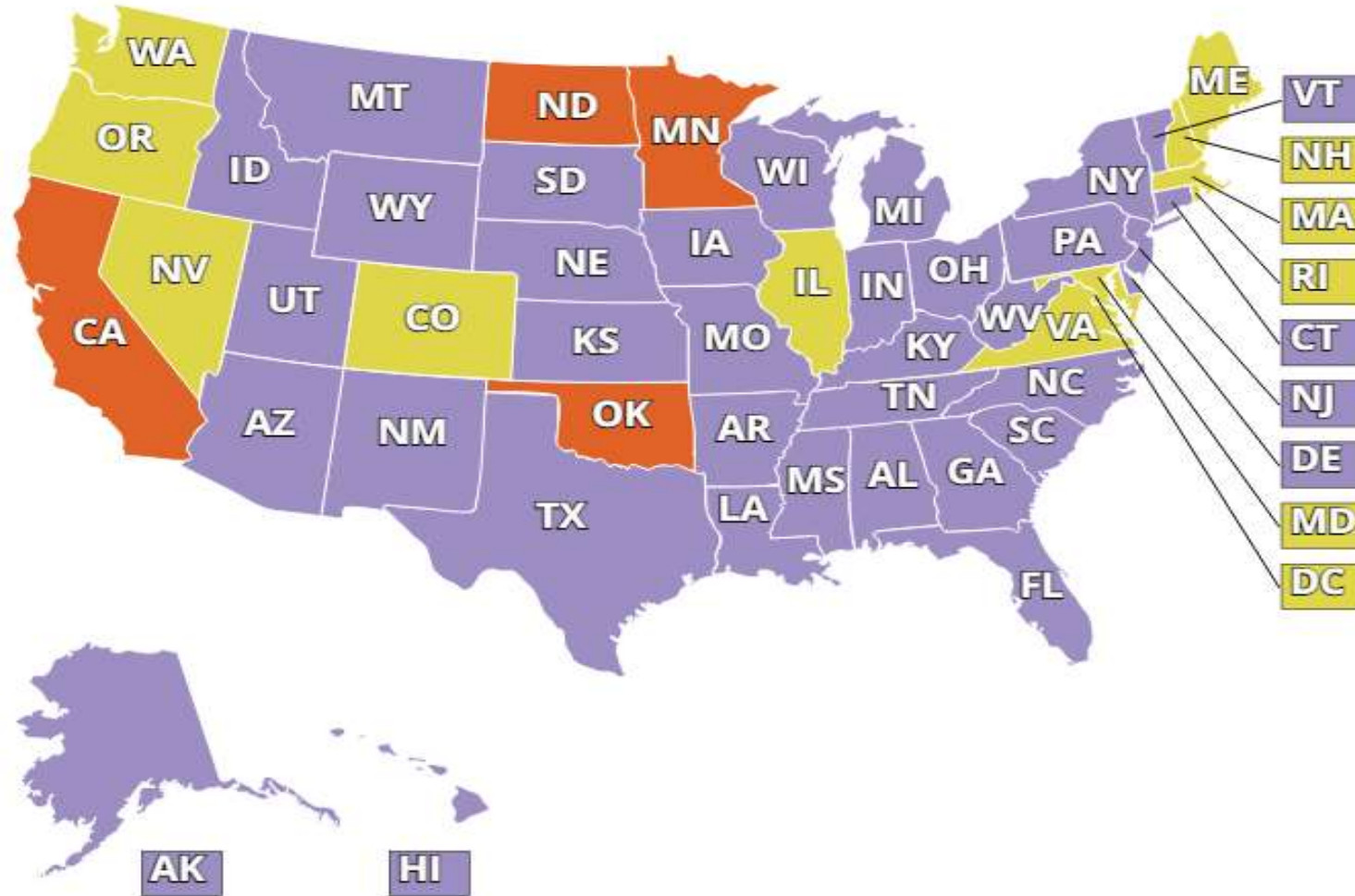
- Proposed FTC Rule: Non-competes are “unfair methods of competition” – banned
- Texas judge: FTC lacked authority, “unreasonably overbroad without a reasonable explanation.”
- FTC will not pursue appeal under Trump admin
- FTC before: FTC will address noncompetes through enforcement actions.
- FTC now: Minimal FTC risk



# STATES *WILL* RESTRICT NONCOMPETES

- ❑ Major increase in key employee poaching
- ❑ Non-competes are enforceable in PA, NJ, DE if done correctly
- ❑ Legitimate business interest; reasonable limits in area and duration
- ❑ Many states have limited non-competes
- ❑ Valuable recruits more unwilling to sign.

# STATE LAWS – NONCOMPETES



## SUGGESTION: PICK YOUR SPOTS

- ❑ If employee works from a state that allows them ...
- ❑ Do you have a **legitimate business interest** in restricting the employee?
- ❑ Does the employee know the unique, valuable ways you do business, your “secret sauce”
- ❑ Does the employee have valuable information on customers, pricing, operations?
- ❑ Is it worth it?

# SUGGESTION: CHANGE THE USUAL NONCOMPETE BOILERPLATE

- **Alternative:** You can work for a competitor ...
- Except for [list competitors]
- So long as it does not offer/is not planning to offer [specific products/services]
- So long as it does not deal with, agrees not to deal with [list specific customers]

# SUGGESTION: STRATEGIC USE OF NON-SOLICITATION AGREEMENTS

- In addition to, or in place of a noncompete
- “You can work where you want, but...
- You cannot “solicit” our customers/prospects, or ...
- You cannot “solicit” customers/prospects you dealt with/learned of while in our employment, or ...
- You cannot “solicit” specific customers.

# WORKER MISCLASSIFICATION: INDEPENDENT CONTRACTORS

- ❑ **Major policy/politics issue:** I/Cs not protected by discrimination, harassment, ADA, FMLA, overtime, ACA, FICA ...
- ❑ Typical: IT, marketing, accounting, operations, sales, maintenance, clerical, programmers, drivers...
- ❑ **Significant consequences for misclassification**
- ❑ Prior DOL rule. Effective March 11, 2024 ...

# “ECONOMIC REALITIES TEST”

	EMPLOYEE	OR	INDEPENDENT CONTRACTOR
	Working for someone else's business		Running their own business
	Paid hourly, salary, or by piece rate		Paid upon completion of project
	Uses employer's materials, tools and equipment		Provides own materials, tools and equipment
	Typically works for one employer		Works with multiple clients
	Continuing relationship with the employer		Temporary relationship until project completed
	Employer decides when and how the work will be performed		Decides when and how they will perform the work
	Employer assigns the work to be performed		Decides what work they will do

# NEW WHD ENFORCEMENT GUIDANCE – MAY 1, 2025

- DOL WHD will no longer enforce the 2024 rule, will revert to the 2008 approach
- Not really all that different; less mechanical
- DOL head has a pro-labor history
- BUT – Employees can still file private suits and courts often trend toward the economic realities test
- **Result: uncertainty**
- Be very careful



# THE NEW ROLE OF RELIGION IN THE WORKPLACE

- For decades: businesses could deny employee religious accommodation request if it created anything more than a “de minimis” burden
- Supreme Court: Employers must accommodate employee religion unless it causes a “substantial” burden to the employer in the “overall context” of the business

# “THAT’S AGAINST MY RELIGION”

- **Major impact:** is the objection is based on a sincere religious belief, as opposed politics, personal preference?
  - ▣ How do you tell? How much risk can you take?
- **Major impact:** another “interactive dialogue” mandate
- The importance of **documentation**.

# EMERGING BATTLEGROUND

- ❑ **Religious objection to ...**
- ❑ Working with, reporting to gay, transgender, female employees
- ❑ Working with, reporting to employees of certain races, religions
- ❑ Working on certain products, projects, services
- ❑ Holidays, religious practices.

# AI AND HR

- ❑ **“Algorithmic discrimination”** -- the use of an artificial intelligence system that results in differential treatment or impact disfavoring an individual based on protected characteristics
- ❑ Many documented cases
- ❑ Do you have a policy? Do your contractors?
- ❑ State/local laws are arising – NYC
- ❑ This will be among the next waves.



# QUESTIONS?



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