Recent Developments in Public Sector Labor & Employment Law

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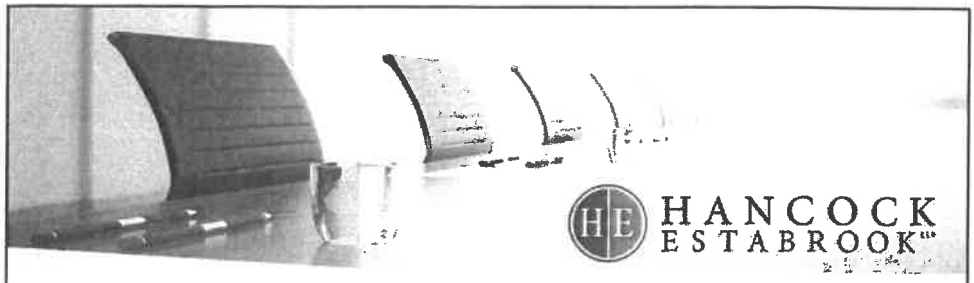

HANCOCK ESTABROOK

Recent Developments in Public Sector Labor & Employment Law

The Otesaga, Cooperstown, New York
CAASNY Annual Meeting
May 20, 2024

Presented by:
Tish E. Lynn, Esq.
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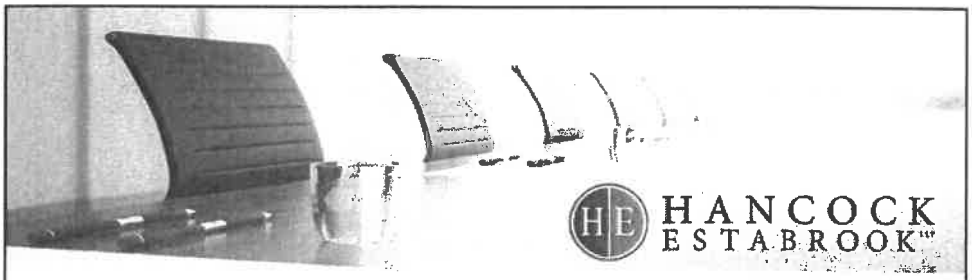

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CSL 63: Provisional Appointments

- Civil Service Law Section 63 concerning provisional appointments was amended effective September 7, 2023.
- Provisional service immediately preceding permanent appointment counts toward an employee's probationary period.
- Who does this affect?
  - NYS Dept. of Civil Service opinion: impacts permanent appointments on/after September 7, 2023.

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Employee Personal Social Media Accounts

- Creates new Labor Law Section 201-i.
- Unlawful for any employer to request, require or coerce any employee or applicant for employment to: (1) disclose any username and password, password or other information for accessing a personal account; (2) access the employee's or applicant's personal account in the presence of the employer; or (3) reproduce in any manner photographs, video or other information contained within a personal account obtained by the means which are now prohibited.

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Employee Personal Social Media Accounts

- Exceptions: Law enforcement agencies, fire departments or correctional institutions.
- An employer can require an employee to disclose any username, password, etc. for accessing non-personal accounts related to the employer's internal computer or information systems.
- Effective: March 12, 2024.

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Captive Audience Meeting Law

- Amends Section 201-d of the Labor Law regarding discrimination against the engagement in certain activities.
- Unlawful to discriminate in any aspect of employment regarding an individual's refusal to attend an employer sponsored meeting if the meeting's purpose is to communicate the employer's opinion regarding:
  - Religious matters, or
  - Political matters, including the decision to join or support a labor organization.

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Captive Audience Meeting Law

- Employers must post a notice in every workplace regarding employee rights under this Section.
- Effective: September 6, 2023.

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Unemployment Eligibility Notice

- Notice of eligibility for unemployment (S4878)
  - Amendment to the Labor Law which requires an employer to provide written notice to every employee upon termination, interruption or reduction of employment of their right to file for unemployment benefits.
  - NYS DOL form for notice. (See supplemental materials.)

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Pregnant Workers Fairness Act

- Pregnant Workers Fairness Act ("PWFA") took effect on June 27, 2023.
- Applicable, as relevant here, to public sector employers with at least 15 employees.
- Requires covered employers to provide reasonable accommodations to employee's limitations due to pregnancy, childbirth or a related medical condition, unless the accommodation poses an undue hardship.
- Undue hardship is generally defined as an accommodation which poses either a significant difficulty or expense for the employer.
- Remember, the process of exploring accommodations is known as the "interactive process" which is certainly contemplated under the PWFA.
- If employee requests accommodation, do not delay!

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Pregnant Workers Fairness Act

- Examples of reasonable accommodations contemplated by the PWFA:
  - Temporarily suspending requirement of job function;
  - The ability to sit or drink water;
  - Flexible hours;
  - Modifying work environment or making existing facilities accessible;
  - Light duty;
  - Closer parking;
  - More appropriately sized uniforms and/or safety apparel;
  - Additional break time to use the bathroom, eat and rest;
  - Job restructuring;
  - Leave or time off to recover from childbirth; and
  - Being excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

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Pregnant Workers Fairness Act

- Prohibitions of the PWFA:
  - "Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
  - Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
  - Require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working;
  - Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
  - Interfere with any individual's rights under the PWFA."

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Pregnant Workers Fairness Act

- EEOC will eventually implement final regulations implementing the PWFA.
  - The Notice of Proposed Rulemaking issued in early August and comment period closed October 10, 2023.
  - Interim Final Rule comment period closed on April 14, 2024.
- Same remedies available under the PWFA as with Title VII.
- Do not overlook obligations under the Americans with Disabilities Act, Title VII, the federal Family and Medical Leave Act ("FMLA") or New York State law.

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PUMP Act

- The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP" Act), amendment to the Fair Labor Standards Act ("FLSA").
- Applicable to public sector employers.
- Took effect on April 28, 2023.
- Requires employers to provide reasonable break time and a private place, other than a bathroom, for an employee to pump breast milk for their nursing child for up to one year after the child's birth each time such employee must pump at work.
- Narrow exceptions for small employers and certain transportation employees.
- We will compare the PUMP Act with New York State Labor Law Section 206-c.

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PUMP Act

- The frequency of breaks needed to pump at work, as well as the length of each break, will probably vary based upon each employee's needs.
- The nursing employee must be completely relieved from work or the time spent pumping must be counted as hours worked for the purposes of pay and overtime requirements.
- BUT, if the employer has a paid break time policy and if an employee chooses to use that time to pump, they must be paid in the same way that other employees are paid for break time.
- PUMP Act also contains requirements for space for an employee to nurse, but employers must be mindful of New York State requirements under Labor Law Section 206-c, which are more detailed.

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PUMP Act

- Anti-retaliation protections.
- It is unlawful under the FLSA for an employer to discharge or otherwise discriminate against an employee because, for instance, they exercised their right to pump at work or filed a complaint with regards to an alleged violation of the PUMP Act.
- Remedies for violations of the PUMP Act include legal and equitable remedies.
- Examples: Reinstatement, promotion and the payment of lost wages and an equal amount as liquidated damages, compensatory damages, damages for economic losses and also punitive damages.

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Differences between New York State Versus Federal Requirements

- PUMP Act provides employees the right to reasonable break time to pump for one year after the child's birth, but New York State Labor Law Section 206-c provides that employees may take break time to pump breast milk at work for three years following the birth of a child.
- Room requirements:
  - PUMP Act: "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
  - Labor Law Section 206-c:
    - In close proximity to work area, well lit, shielded from view and free from intrusion by other persons.
    - Location must also include: A chair, a small table, nearby access to running water and an electrical outlet, if the workplace is supplied with electricity.

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Religious Accommodation

- In the 2023 *Groff v. DeJoy* decision, the US Supreme Court changed an employer's obligation to accommodate an employee's sincere religious observances/practices.
- Previously, did not have to accommodate if more than a *de minimis* cost.
- Now, must accommodate unless the burden of accommodation is substantial.

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Nondisclosure Agreements

- Settlement agreements & liquidated damages
  - General Obligations Law 5-336 has been amended to expand the prohibition of non-disclosure clauses in discrimination cases to harassment and retaliation claims.
  - Exception: If preference of complainant.
  - Also expands prohibition to agreements with independent contractors.

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Nondisclosure Agreements

- Further prohibits liquidated damages or forfeiture of consideration for violation of non-disclosure or non-disparagement clauses.
- Also prohibits any affirmative statements that complainant was not subjected to unlawful discrimination, harassment or retaliation.
- Amendments became effective 11/17/2023.

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Expanded Statute of Limitations

- Previously only cases of sexual harassment were subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- Now all cases of discrimination, harassment and/or retaliation are subject to three-year statute of limitations to be filed with the New York State Division of Human Rights.
- No retroactive effect.
- Effective February 14, 2024.

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Change on the Horizon?

- United States exempt salary threshold increase
  - Rule pending to increase the exempt salary threshold requirements:
    - From $684/week ($35,568) to $1,059/week ($55,068);
    - Highly compensated individuals from $107,432 to $143,988 per year.
  - If the rule becomes final, these thresholds will automatically increase every 3 years.

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Change on the Horizon?

- Proposal in Governor Hochul's 2025 Executive Budget which would impact NYS Paid Family Leave ("PFL") if enacted.
- Although not applicable to public sector employers, unless the public sector employer voluntarily elected coverage, important to know for potential bargaining impacts and also to correct misperceptions . . .
- Proposal would amend PFL to provide up to 40 hours of paid leave per calendar year for pregnant employees to attend prenatal appointments.
  - Benefit would be available in hourly increments.
  - Benefit is in addition to current PFL leave entitlements and short-term disability benefits.
- Employees would have 30 days following leave to submit written proof of need for time off.

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Change on the Horizon?

- Another proposal in Governor Hochul's 2025 Executive Budget would end the requirement to provide NYS COVID sick leave effective July 31, 2023.
- CDC Guidance now removes requirement to isolate for five days following COVID-19 test (outside healthcare settings).
  - Requires individuals with symptoms of respiratory illness to stay home and not return until symptoms subside for 24 hours (such as no fever for 24 hours) versus a specific isolation period.
- Unclear if NYS will interpret the above 24 hour period above as isolation period.
- Most conservative course of action: Continue to provide NYS COVID-19 sick leave subject to NYS Health Department guidelines.

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Change on the Horizon?

- Automated Monitoring and Employment decision tools (S7623/A9315)
  - Prohibits the use of electronic monitoring of employees unless specific requirements are met. The requirements and limitations are extensive.
  - Prohibits automated employment decision tools unless:
    - The tool has been bias audited within the last year;
    - The results of the audit have been made public;
    - Notice has been given to employment candidates about the use of such tools.
  - Provides for remedial actions for violations as well as civil penalties. Includes private right of action.
  - The AG has enforcement authority.

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EEOC Artificial Intelligence Guidance

- The Equal Employment Opportunity Commission ("EEOC") issued guidance in May 2023 concerning Title VII and artificial intelligence ("AI") tools in the context of an employer's selection procedures.
- Focus of guidance is whether the use of a particular employment practice has a disparate impact on the basis of race, color, national origin, religion or sex.
- EEOC confirms that an AI tool can be a selection procedure, which is defined as any "measure, combination of measures, or procedure if it is used as a basis for an employment decision."

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EEOC Artificial Intelligence Guidance

- Examples in EEOC guidance of AI selection procedures that employers should ensure are compliant with Title VII:
  - Resume scanners that prioritize applications based upon certain keywords.
  - Employee monitoring software which rates employee performance based upon keystrokes or other factors.
  - Virtual assistants or "chatbots" which ask candidates about their qualifications and reject candidates who do not meet certain criteria.
  - Video interviewing software that evaluates applicants based upon facial expressions and/or speech patterns.
  - Testing software that provides a "job fit score" for an applicant or employee based upon cognitive skill, aptitude, personalities or "cultural fit."

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EEOC Artificial Intelligence Guidance

- If an AI tool has an adverse impact on individuals of a particular race, color, national origin, religion or sex, that will cause liability under Title VII unless it is "job related and consistent with business necessity."
- If an employer discovers an AI tool has an adverse impact, it should take steps to reduce impact or select a different tool to avoid liability under Title VII.

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EEOC Artificial Intelligence Guidance

- EEOC advises in guidance that employers use a "four-fifths rule" as a general guide to determine whether AI tool as a disparate impact
  - Rule for determining whether a selection rate for one group is substantially different than the selection rate for another group.
- EEOC states "[t]he selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group."
- This is <u>not</u> by itself determinative according to EEOC. If selection rate passes the four-fifths rule, that does not definitively prove that the AI selection procedure complies with Title VII.
  - In other words, employers should not rely solely on this rule.

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EEOC Artificial Intelligence Guidance

- Example from guidance:
  - "80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%) and the selection rate for Blacks is 12/40 (equivalent to 30%)."
  - "[T]he selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants."

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EEOC Artificial Intelligence Guidance

- In guidance, the EEOC encourages employers to conduct self-audits of their AI tools.
  - Conduct self-audits "on an ongoing basis to determine whether" the AI tool has a disproportionate impact on a basis which is unlawful under Title VII.
- An employer is responsible under Title VII for ensuring an AI tool, even if it is designed or administered by another business or entity, does not have a disparate impact.
  - Be proactive with AI vendors! Ask vendors what the vendor has done to ensure that AI does not have disparate impact.
  - If vendor is incorrect in its analysis, the employer can still be held liable under Title VII!

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EEOC Artificial Intelligence Guidance

- EEOC entered into settlement in August 2023 in lawsuit related to alleged bias in AI technology used by employers in hiring.
- In the Complaint, the EEOC alleged that the three companies, which offer tutoring services, used AI software which rejected older job applicants between March 2020 through April 2020.
  - Applicant alleged that first application she submitted was automatically rejected, but submitted new application with identical information, aside from a more recent birth date and was offered an interview.
  - EEOC alleged over 200 applicants were automatically excluded.
- Parties settled the lawsuit for $365,000.
  - Companies must adopt anti-discrimination policies and conduct anti-discrimination trainings.
  - Must reinvite all applicants that were rejected due to age for certain time frame to reapply.

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Other Updates

- New I-9 form:
  - Effective 11/1/2023.
  - List of acceptable documents has changed.
  - Accommodates remote document verification.
- New EEO category for Middle Eastern or North African individuals ("MENA"):
  - Affects EEO-4 reporting for public employers with 100 or more employees.

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Thank You! Questions?

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This presentation is for informational purposes and is not intended as legal advice.

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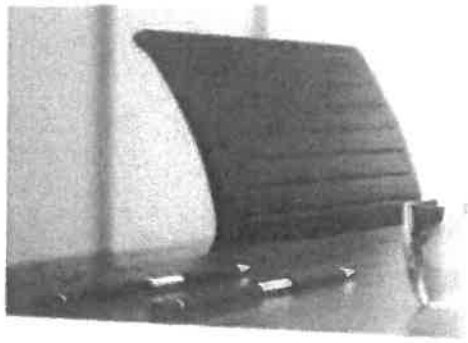

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SUPPLEMENTAL MATERIALS

1. NYS Senate Bill S5494: Civil Service Law Section 63 Amendment – Provisional Service & Probation

   NYS DCS Policy Advisory Report-13-23

2. NYS Assembly Bill 2023-A836: Employee Personal Social Media Accounts

3. NYS Assembly Bill 2023-A6604: Captive Audience Meeting Law

4. NYS Senate Bill 2023-S4878A: Unemployment Notice of Eligibility

   NYSDOL Form: Record of Employment

5. 42 USC Ch. 21G: Pregnant Worker Fairness Act

6. US DOL FLSA Protections for Employees to Pump Breast Milk at Work

   Labor Law Ch. 31 § 206-c. Right of nursing employees to express breast milk

7. Religious Accommodation Standard *(Groff v. DeJoy)*

8. General Obligations Law § 5-336. Nondisclosure Agreements (11/17/2023)

9. NYS Senate Bill 3255: Extending the DHR Statute of Limitations

10. NYS Senate Bill 2023-S7623A: AI Hiring Tools (Pending legislation)

11. EEOC Technical Guidance: Artificial Intelligence (AI) in Hiring

12. Instructions for Form I-9

    US DHS Form 1-9 – Employment Eligibility Verification

1

STATE OF NEW YORK

5494

2023-2024 Regular Sessions

IN SENATE

March 6, 2023

Introduced by Sen. JACKSON -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to crediting of probationary service

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 63 of the civil service law, as amended by chapter 175 of the laws of 1989, is amended to read as follows:

1. Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term; provided, however, that upon interdepartmental promotion the appointing officer may waive the requirement of satisfactory completion of the probationary term. The state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes.

When probationary service is required upon promotion, the position formerly held by the person promoted shall be held open [~~for him~~] and shall not be filled, except on a temporary basis, pending completion of his probationary term.

Notwithstanding the foregoing or any other law or rule to the contrary, when a permanent appointment or promotion to a position in the competitive class is conditioned upon the completion of a term of training service or of a period of service in a designated trainee title, such service and the probationary term for such competitive position shall run concurrently.

Notwithstanding the foregoing or any law or rule to the contrary, any person appointed provisionally in accordance with section sixty-five of

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07676-01-3

this title who receives a permanent appointment to the same title shall have all time spent as a provisional appointment credited to any probationary term that is required upon permanent appointment to a position.

§ 2. This act shall take effect immediately.

NEW YORK STATE OF OPPORTUNITY | Department of Civil Service

KATHY HOCHUL
Governor

TIMOTHY R. HOGUES
Commissioner

PAR-13-23

POLICY ADVISORY REPORT

TO: **All Municipal Civil Service Agencies & DCAS**

FROM: **Municipal Services Division**

SUBJECT: **Amendment to Section 63 of the Civil Service Law - Provisional Service & Probation**

DATE: **October 13, 2023**

The purpose of this policy advisory report is to notify all local civil service agencies of an amendment to section 63 of the Civil Service Law which became effective on September 7, 2023, as Chapter 356 of the Laws of 2023.

The intent of this statute is to streamline the appointment process by requiring any time spent as a provisional employee to be counted towards an employee's probationary term upon receiving a permanent appointment to the same title. Through no fault of their own, provisional appointees serve without the benefits of permanent competitive class status. According to the sponsors of the legislation, individuals serving provisionally for long periods of time before becoming permanent employees became subject to "two probationary periods" during which they could be terminated: the first as "at-will" provisional employees; the second following permanent appointment during probation.

To address this issue, section 63(1) of the Civil Service Law has been amended to include the following language:

> "Notwithstanding the foregoing or any law or rule to the contrary, any person appointed provisionally in accordance with section sixty-five of this title who receives a permanent appointment to the same title shall have all time spent as a provisional appointment credited to any probationary term that is required upon permanent appointment to a position."

Based on the above, any provisional employee that receives a permanent appointment to the same title that they were serving in provisionally on or after September 7, 2023, shall have all the time in provisional status counted towards completing the required probationary period provided in your agency's civil service rules. This change

does not impact individuals who served provisionally and were permanently appointed prior to September 7, 2023.

This statute applies only to provisional employees appointed in accordance with section 65 of the Civil Service Law (CSL) and does not apply to employees appointed on a temporary basis in accordance with section 64 of CSL.

For the provisional service to count towards completion of probation, the permanent appointment must be immediately following the provisional service in the same title, in the same agency. For this reason, it is recommended that the work performance of provisional employees be reviewed in the same manner as performance is reviewed during the probationary period.

We have reviewed the Model Rules to assess the impact of this change. Model civil service rule XIV (4) provides for the extension of a probationary period, due to absences more than ten days. If your agency uses the model probationary term rule or a similar one, the same would apply for provisional service that will be considered successful probationary service. If an individual serving provisionally missed more than 10 days of work, those absences could be added to the time that needs to be served to count towards the completion of the probationary term.

Model civil service rule XIV (7) provides that temporary, provisional, or contingent permanent service in a higher-level title may be treated as successful probationary service in the lower-level position. The change to section 63 has no impact on this rule.

Attached, please find a chart that summarizes landmark provisional court cases. This chart was previously distributed as MSD-CL-17-00 but has now been updated to include the impact of section 63 for each scenario. We recommend that you consult with your legal counsel regarding the application of case law to appointments under your agency's jurisdiction.

Also attached is a list of frequently asked questions about this change.

If you have any additional questions or concerns regarding this Policy Advisory Report, please email us at assistance.request@cs.ny.gov.

PROVISIONAL APPOINTMENTS

DATE OF PROVISIONAL APPOINTMENT	TYPE OF ELIGIBLE LIST	PROVISIONAL STATUS ON THE ELIGIBLE LIST	APPROPRIATE ACTION	SECTION 63 IMPACT (9/7/23)
Prior to establishment of eligible list	**Mandatory** eligible list	**Not among** the top three candidates	Must **remove provisional within two months** of establishment of eligible list, appointing authority may either make a permanent appointment from eligible list orleave position vacant	None
Prior to establishment of eligible list [1] [2]	**Mandatory** eligible list	**Reachable** - one of the top three on list willing to acceptpermanent appointment	Must **appoint or remove provisional within two months** of establishment of eligible list. If provisional is removed, the appointing authority may either make a permanent appointment of another eligibleon the list or leave position vacant	If provisional is appointed, the provisional service counts toward the completion of probation
Prior to establishment of eligible list	**Non-mandatory** eligible list	**Fails** exam, is not on eligible list	Candidate may be eligible for a second provisional appointment **depending uponyour local civil service rule.**	Employee's provisional service in successive provisional appointments to the same position will count toward completion of probation if provisional employee is permanently appointed following provisional service.
Prior to establishment of eligible list, served **less than nine months** as a provisional in that title [3]	**Non-mandatory** eligible list	**Passes** exam, is on eligible list	Provisional is considered **permanently appointed** if retained **more than two months** after date of establishment of eligible list	Provisional service counts toward the completion of the probationary term
Prior to establishment of eligible list served **atleast nine months** as a provisional in that title [4]	**Non-mandatory** eligible list	**Passes** exam, is on eligible list	Provisional is considered **permanently appointed** and begins probationary period **on the date eligible list is established.**	Provisional service counts towards the completion of the probationary term and therefore provisional employee may immediately have completed their probationary term upon receiving a permanent appointment

[1] **Haynes vs. Chautauqua County,** 80 Ad 2d 726, *affirmed* 55 NY 2d 814 (1981)
[2] **Matter of Becker vs. New York State Civil Service Commission,** 61 NY 2d 252, 473 NYS 2d 374 (1984)
[3] **Roulett vs. Town of Hempstead,** 40 AD 2d 611 (2d Dept 1972)
[4] **Matter of Lasota vs. Green,** 53 NY 2d 630 (1981)

Attachment to PAR-12-23 – Provisional Service and Probation
Frequently Asked Questions
Issued 10/11/23

1. **When does the change take effect?**

   This legislation took effect on September 7, 2023. The change impacts all permanent appointments occurring on or after that date, which were immediately preceded by provisional service in the same position.

2. **Does permanent status begin at time of permanent appointment or the date of the provisional appointment that is credited toward the completion of probation?**

   An employee gains permanent status once two conditions are met. The first condition is permanent appointment, from the eligible list for competitive appointments, or the date the transaction is approved by the civil service agency for transfers, reinstatements, non-competitive class appointments, and the second condition is the completion of the probationary term. The earliest date that those two conditions are satisfied is the date that permanent status begins. In some cases, the appointment date and the date probation are completed may be the same date.

3. **Does this change to section 63 of the Civil Service Law affect employees serving provisionally but who were permanently appointed prior to 9/7/23?**

   No, this law does not impact individuals who served provisionally and were permanently appointed before September 7, 2023.

4. **Does this change have any effect on temporary appointments?**

   No, this statute applies only to provisional employees appointed in accordance with section sixty-five of the Civil Service Law (CSL) and does not apply to employees appointed on a temporary basis in accordance with section sixty-four of CSL.

5. **Does this change apply to provisional promotions?**

   Yes, it applies to positions that would be filled through open-competitive and promotion examinations.

6. **If there is a break in service between the provisional appointment and the permanent appointment, does the provisional service count toward the probationary term?**

   No. For the provisional service to count towards completion of probation, the permanent appointment must be immediately following the provisional service.

7. **Does an appointing authority have to credit provisional service from another department or jurisdiction? For example, if an employee served as a provisional Psychiatric Social Worker in the Department of Social Services for a year and is subsequently permanently appointed to a position with the same title in the Department of Community Mental Health, does the Department of Community Mental Health miss out on the ability to assess the employee's work during a probationary period?**

   No. The intent of this legislation is to avoid having one employee serve "two probationary periods" in the same position. If the provisional is appointed on a permanent basis in a different department or agency than where they served provisionally, their provisional service does not count towards the completion of probation.

8. **If an employee is appointed provisionally to Child Support Investigator (Spanish Speaking) and then without a break in service is immediately appointed to Child Support Investigator, does the provisional time count toward the completion of the probationary term?**

   No. The statute provides that the provisional service is counted toward the completion of probation in the same title. However, the Model Rules provide, and your agency's rules may provide the appointing authority with the discretion to waive a portion of the probationary period in scenarios such as this one.

9. **Does provisional service count toward the probationary term if the provisional fails their exam and as a result is removed from the position?**

   No. A candidate serving provisionally who fails the civil service examination does not have their provisional time counted towards probation since they are not eligible for permanent appointment to the position immediately following provisional service. However, if the eligible list is non-mandatory and the provisional employee is reappointed to a successive provisional appointment in the same title, service may count if the employee is subsequently permanently appointed. Please refer to the chart attached to PAR-12-23.

10. **There is case law relating to provisional appointments. How does the change to section 63 of the Civil Service Law affect the application of those court decisions?**

    A provisional court cases reference chart has been provided for your use. We recommend any questions about the application of case law to an appointment under your agency's jurisdiction be discussed with your agency's legal counsel.

11. Section 65 provides that provisional appointments are not to last more than nine months, but exam administrations are not always completed within nine months, does this have an impact on this change?

Section 65 of the Civil Service Law requires municipal civil service agencies to request an examination within 30 days of provisional appointment. For positions filled using decentralized examinations, this provision requires a municipal civil service agency to hold the decentralized examination within 30 days of provisional appointment. For these reasons, decentralized examinations should be held on a continuous recruitment basis wherever possible and the need for centralized examinations should be anticipated prior to a vacancy needing to trigger the examination process. Please review – How to Use the Master Exam Schedule on MSD Online.

12. Can provisional time in one title be added to provisional time in a different title to count toward the completion of a probationary term?

No. See question 8.

Pursuant to model civil service rule XIV, Probationary Term, subsection 7, provisional service in a higher-level position may be counted as successful completion of the probationary term in the lower-level position. The change to section 63 has no impact on this benefit.

13. How is the retention date calculated for an employee whose provisional service was attributed to the completion of the probationary term?

There should be no change in how retention dates are calculated. The provisional service does not affect the date of permanent appointment, only the time remaining for the probationary term.

Retention dates are to be calculated when the layoff is occurring. Calculating retention dates ahead of time is not recommended as there can be changes in the employment history that will change the retention date. Please review pages 17-19 in the Layoff Procedures Manual for guidance on how to calculate retention dates.

14. We have many provisional employees that have served in their positions for more than one year due to the frequency at which exams are held. Are these employees automatically permanent when they become reachable on the list?

A provisional court cases reference chart has been provided for your use. We recommend any questions about the application of case law to an appointment under your agency's jurisdiction be discussed with your agency's legal counsel.

15. In a situation where an employee's provisional service satisfies the entire probationary period; how do we interpret the minimum probationary period in our rules?

It would be understood that an amount of time spent serving provisionally equal to the minimum probationary term would satisfy the minimum period.

16. What if there is a training requirement that must be completed during a probationary term that is shortened by provisional service?

These issues are position specific. Please contact the Municipal Services Division for guidance.

17. What happens to an employee serving provisionally followed by a permanent appointment to a position in the non-competitive class due to section 55a of Civil Service Law or the HELP program?

Section 63 is silent on the jurisdictional classification of the permanent position, consequently employees whose provisional service is immediately followed by permanent appointment to a position in the non-competitive class are also covered by this change.

18. If terminating a provisional employee, must appointing authorities comply with the due process requirements of the probationary term rule?

No. A provisional employee is still considered an "at-will" employee.

19. Should I advise appointing authorities to conduct performance reviews for provisional employees?

It is strongly recommended that appointing authorities evaluate and document the performance of provisional employees. Performance issues should be addressed in a timely manner and corrective action taken as necessary. While not technically serving probation while in provisional status, agencies should evaluate provisional employee performance in the same manner and with the same standards that would be used to evaluate the performance of a probationer.

20. Should we be tracking absences of provisional appointees for the purpose of extending the probationary term in accordance with our probationary term rule?

Yes. Absences beyond the excused limits defined in your probationary term rule should be tracked so that the probationary term may be extended if necessary.

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STATE OF NEW YORK

836

2023-2024 Regular Sessions

IN ASSEMBLY

January 11, 2023

Introduced by M. of A. DINOWITZ, L. ROSENTHAL, FAHY, COLTON, WEPRIN, REYES, CRUZ, LUNSFORD, DICKENS, JACOBSON -- Multi-Sponsored by -- M. of A. COOK, HYNDMAN -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to prohibiting an employer from requesting or requiring that an employee or applicant disclose any user name, password, or other means for accessing a personal account through specified electronic communications devices

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 201-i to read as follows:

§ 201-i. Request for access to personal accounts prohibited. 1. For purposes of this section, the following words shall have the following meanings:

(a) "Applicant" means an applicant for employment.

(b) "Electronic communications device" means any device that uses electronic signals to create, transmit, and receive information, including, but not limited to computers, telephones, personal digital assistants and other similar devices.

(c) "Employer" means (i) a person or entity engaged in a business, industry, profession, trade or other enterprise in the state; (ii) the state of New York; (iii) a county, city, town, village or any other political subdivision or civil division of the state; (iv) a school district or any government entity operating a public school, college, or university; (v) a public improvement or special district; (vi) a public authority, commission or public benefit corporation; or (vii) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state; and (viii) shall include an agent, representative or designee of the employer.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00726-01-3

(d) "Personal account" means an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or an applicant exclusively for personal purposes.

2. (a) Except as provided in paragraph (b) of this subdivision, it shall be unlawful for any employer to request, require or coerce any employee or applicant for employment to:

(i) disclose any user name and password, password, or other authentication information for accessing a personal account through an electronic communications device;

(ii) access the employee's or applicant's personal account in the presence of the employer; or

(iii) reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited in this paragraph.

(b) An employer may require an employee to disclose any user name, password or other means for accessing nonpersonal accounts that provide access to the employer's internal computer or information systems.

(c) For the purposes of this section, "access" shall not include an employee or applicant voluntarily adding an employer, agent of the employer, or employment agency to their list of contacts associated with a personal internet account.

3. An employer may not:

(a) Discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize an employee for an employee's refusal to disclose any information specified in paragraph (a) of subdivision two of this section; or

(b) Fail or refuse to hire any applicant as a result of the applicant's refusal to disclose any information specified in paragraph (a) of subdivision two of this section.

4. It shall be an affirmative defense to an action under this section that the employer acted to comply with requirements of a federal, state or local law.

5. (a) Nothing in this section shall prohibit an employer from:

(i) requesting or requiring an employee to disclose access information to an account provided by the employer where such account is used for business purposes and the employee was provided prior notice of the employer's right to request or require such access information;

(ii) requesting or requiring an employee to disclose access information to an account known to an employer to be used for business purposes;

(iii) accessing an electronic communications device paid for in whole or in part by the employer where the provision of or payment for such electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of and explicitly agreed to such conditions. However, nothing in this subparagraph shall permit an employer to access any personal accounts on such device;

(iv) complying with a court order in obtaining or providing information from, or access to, an employee's accounts as such court order may require;

(v) restricting or prohibiting an employee's access to certain websites while using an employer's network or while using an electronic communications device paid for in whole or part by the employer where

the provision of or payment for such electronic communications device was conditioned on the employer's right to restrict such access and the employee was provided prior notice of and explicitly agreed to such conditions.

(b) This section does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC §78c(a)(26).

(c) This section does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information, that is available in the public domain, or for the purposes of obtaining reports of misconduct or investigating misconduct, photographs, video, messages, or other information that is voluntarily shared by an employee, client, or other third party that the employee subject to such report or investigation has voluntarily given access to contained within such employee's personal account.

6. The provisions of this section shall not apply to any law enforcement agency, a fire department or a department of corrections and community supervision.

§ 2. This act shall take effect on the one hundred eightieth day after it shall have become a law.

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STATE OF NEW YORK

6604

2023-2024 Regular Sessions

IN ASSEMBLY

April 24, 2023

Introduced by M. of A. REYES, DINOWITZ, RAMOS, L. ROSENTHAL, JOYNER, JEAN-PIERRE, SIMON, AUBRY, STIRPE, WEPRIN, WILLIAMS, TAYLOR, SANTABARBARA, STECK, PAULIN, GLICK, CRUZ, LAVINE, STERN, SEAWRIGHT, RIVERA, JACOBSON, DeSTEFANO, DICKENS, EPSTEIN, McMAHON, BURGOS, CARROLL, FORREST -- Multi-Sponsored by -- M. of A. THIELE -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to protecting employee freedom of speech and conscience

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph c of subdivision 1 of section 201-d of the labor law, as added by chapter 776 of the laws of 1992, is amended and two new paragraphs d and e are added to read as follows:

c. "Work hours" shall mean, for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work. This definition shall not be referred to in determining hours worked for which an employee is entitled to compensation under any law including article nineteen of this chapter[.]*;*

d. "Political matters" shall mean matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization;

e. "Religious matters" shall mean matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.

§ 2. Paragraphs c and d of subdivision 2 of section 201-d of the labor law, paragraph c as amended by chapter 92 of the laws of 2021 and paragraph d as added by chapter 776 of the laws of 1992, are amended to read as follows:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD05636-01-3

c. an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property; [~~or~~]

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law; or

e. an individual's refusal to: (i) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or (ii) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

§ 3. Section 201-d of the labor law is amended by adding three new subdivisions 8, 9 and 10 to read as follows:

8. Nothing in this section shall prohibit: (i) an employer or its agent, representative or designee from communicating to its employees any information that the employer is required by law to communicate, but only to the extent of such legal requirement; (ii) an employer or its agent, representative or designee from communicating to its employees any information that is necessary for such employees to perform their job duties; (iii) an institution of higher education, or any agent, representative or designee of such institution, from meeting with or participating in any communications with its employees that are part of coursework, any symposia or an academic program at such institution; (iv) casual conversations between employees or between an employee and an agent, representative or designee of an employer, provided participation in such conversations is not required; or (v) a requirement limited to the employer's managerial and supervisory employees.

9. The provisions of this section shall not apply to a religious corporation, entity, association, educational institution or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964 pursuant to 42 USC 2000e-1(a) with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious corporation, entity, association, educational institution or society.

10. Every employer shall post a sign in every workplace at the location or locations where notices to employees are normally posted, to inform employees of their rights pursuant to this section.

§ 4. This act shall take effect immediately.

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STATE OF NEW YORK

4878--A

Cal. No. 419

2023-2024 Regular Sessions

IN SENATE

February 16, 2023

Introduced by Sen. MAYER -- read twice and ordered printed, and when printed to be committed to the Committee on Labor -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, passed by Senate and delivered to the Assembly, recalled, vote reconsidered, restored to third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the labor law, in relation to notice of eligibility for unemployment benefits

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 590 of the labor law is amended by adding a new subdivision 2 to read as follows:

2. Notice of eligibility upon separation from employment. Every employer liable under this article for contributions shall inform each employee of their right to file an application for unemployment benefits with the department. Such information shall be given at the time of each permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment that results in total or partial unemployment. Such notice shall be given in writing on a form furnished or approved by the department and shall include:

(a) the employer's name and registration number;

(b) the address of the employer to which a request for remuneration and employment information with respect to such employee must be directed; and

(c) such other information as is required by the commissioner.

§ 2. This act shall take effect on the sixtieth day after it shall have become a law.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01131-03-3

WE ARE YOUR DOL

NEW YORK STATE | Department of Labor

Unemployment Insurance Division

Record of Employment

(For Unemployment Insurance purposes only.)

Employer: Complete and give this form to each worker who is permanently, indefinitely, or temporarily laid off; discharged; quits; or has their hours reduced to 30 or less each week.

Date given to employee:
☐☐/☐☐/☐☐☐☐

NYS Employer Registration No.:
☐☐-☐☐☐☐

Federal Employer Identification No.:
☐☐-☐☐☐☐☐☐

Employer Name: _____

Payroll Records are kept at: _____

Street: _____

Street: _____

City: _____ State: _____ Zip: _____

Optional if needed by employer to locate employee record:

Payroll or Clock No.: _____ Location of employment or code: _____

Employee: Keep this certificate. Have it with you if you apply for Unemployment Insurance (UI) benefits. This certificate shows that your job was insured. It does not necessarily mean you qualify for benefits. The UI Claims Center will make that determination if you apply. Please complete the following:

Your Name: _____ Social Security No.: ☐☐☐-☐☐-☐☐☐☐

This may not be used as an identification card.

IA 12.3 (11/23)

How to Apply For New York State Unemployment Insurance

Unemployment Insurance is temporary income for eligible workers who are out of work through no fault of their own. It provides them a weekly benefit while they look for work. If you become unemployed and want to apply for Unemployment Insurance benefits, apply online at www.labor.ny.gov for a quick and convenient way to file your claim or call the Telephone Claim Center toll free at (888) 209-8124.

Have the following information available when you apply:

1. Your Social Security number.
2. A valid New York State driver's license or Non-Driver Photo Identification Card number (if you have either one).
3. Your complete mailing address and ZIP code.
4. A telephone number, including area code, where we can contact you Monday through Friday between 8:00 am and 5:00 pm Eastern Time.
5. Your Alien Registration Number (A#) or USCIS Number, if you are not a United States citizen.
6. Details about your employment for the last 18 months:
   - Employer names, addresses, and phone numbers (including out-of-state employers)
   - NYS Employer Registration Number or Federal Employer Identification Number (FEIN) for each employer. The FEIN can be located on your W-2 form(s).
   - Your total gross earnings (before any deductions) for each employer. You may be asked for pay stubs, W-2 forms, or other payment records.
7. A copy of your Notice to Federal Employee about Unemployment Insurance, Form SF8, if you have employment with the federal government.
8. Form DD-214, member copy 4, if you have military employment. (If member copy 4 is not available, you may use copy 2-3, or 5-8, or DD-215. You can request a DD-214 through the U.S. National Archives and Records Administration website at: http://www.archives.gov/st-louis/military-personnel/standard-form-180.html.
9. A blank personal check so you may enter your bank routing and checking account numbers, if you want direct deposit of your weekly benefits. **The fastest way to receive your benefits is through direct deposit.**

You can file a claim without all of these documents. However, missing information could delay your first payment.

5

42 USC Ch. 21G: PREGNANT WORKER FAIRNESS

From Title 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 21G—PREGNANT WORKER FAIRNESS

§2000gg. Definitions

As used in this chapter—

(1) the term "Commission" means the Equal Employment Opportunity Commission;

(2) the term "covered entity"—

(A) has the meaning given the term "respondent" in section 2000e(n) of this title; and

(B) includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 2000e(b) of this title;

(ii) an employing office, as defined in section 1301 of title 2 and section 411(c) of title 3;

(iii) an entity employing a State employee described in section 2000e–16c(a) of this title; and

(iv) an entity to which section 2000e–16(a) of this title applies;

(3) the term "employee" means—

(A) an employee (including an applicant), as defined in section 2000e(f) of this title;

(B) a covered employee (including an applicant), as defined in section 1301 of title 2, and an individual described in section 1311(d) of title 2;

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3;

(D) a State employee (including an applicant) described in section 2000e–16c(a) of this title; or

(E) an employee (including an applicant) to which section 2000e–16(a) of this title applies;

(4) the term "known limitation" means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

(5) the term "person" has the meaning given such term in section 2000e(a) of this title;

(6) the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated; and

(7) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act [42 U.S.C. 12101 et seq.] and as set forth in the regulations required by this chapter, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

(Pub. L. 117–328, div. II, §102, Dec. 29, 2022, 136 Stat. 6084.)

Editorial Notes

References in Text

Such Act, referred to in par. (7), means the Americans with Disabilities Act of 1990, Pub. L. 101–336, July 26, 1990, 104 Stat. 327, which is classified principally to chapter 126 (§12101 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 12101 of this title and Tables.

Statutory Notes and Related Subsidiaries

Effective Date

Pub. L. 117–328, div. II, §109, Dec. 29, 2022, 136 Stat. 6089, provided that: "This division [enacting this chapter and provisions set out as a note under this section] shall take effect on the date that is 180 days after the date of enactment of this Act [Dec. 29, 2022]."

Short Title

Pub. L. 117–328, div. II, §101, Dec. 29, 2022, 136 Stat. 6084, provided that: "This division [enacting this chapter and provisions set out as a note under this section] may be cited as the 'Pregnant Workers Fairness Act'."

§2000gg–1. Nondiscrimination with regard to reasonable accommodations related to pregnancy

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 2000gg(7) of this title;

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

(Pub. L. 117–328, div. II, §103, Dec. 29, 2022, 136 Stat. 6085.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–2. Remedies and enforcement

(a) Employees covered by title VII of the Civil Rights Act of 1964

(1) In general

The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) [42 U.S.C. 2000e–4, 2000e–5, 2000e–6, 2000e–8, 2000e–9, and 2000e–10] to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(A) of this title except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(b) Employees covered by Congressional Accountability Act of 1995

(1) In general

The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) for the purposes of addressing allegations of violations of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this chapter provides to address an allegation of an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(B) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title for the purposes of addressing allegations of such a violation shall be the powers, remedies, and procedures this chapter provides to address allegations of such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, for purposes of addressing allegations of such a violation, shall be the powers, remedies, and procedures this chapter provides to address any allegation of such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(c) Employees covered by chapter 5 of title 3

(1) In general

The powers, remedies, and procedures provided in chapter 5 of title 3 to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(C) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the President, the Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(d) Employees covered by Government Employee Rights Act of 1991

(1) In general

The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this chapter provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(D) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(e) Employees covered by section 717 of the Civil Rights Act of 1964

(1) In general

The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(E) of this title, except as provided in paragraphs (2) and (3) of this subsection.

(2) Costs and fees

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) Damages

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

(f) Prohibition against retaliation

(1) In general

No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this chapter or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(2) Prohibition against coercion

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(3) Remedy

The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) Limitation

Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this chapter or regulations implementing this chapter, damages may not be awarded under section 1981a of this title if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

(Pub. L. 117–328, div. II, §104, Dec. 29, 2022, 136 Stat. 6085.)

Editorial Notes

References in Text

The Civil Rights Act of 1964, referred to in subsec. (a), is Pub. L. 88–352, July 2, 1964, 78 Stat. 241. Title VII of the Act is classified generally to subchapter VI (§2000e et seq.) of chapter 21 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

The Congressional Accountability Act of 1995, referred to in subsec. (b), is Pub. L. 104–1, Jan. 23, 1995, 109 Stat. 3, which is classified principally to chapter 24 (§1301 et seq.) of Title 2, The Congress. For complete classification of this Act to the Code, see Short Title note under section 1301 of Title 2 and Tables.

The Government Employee Rights Act of 1991, referred to in subsec. (d), is title III of Pub. L. 102–166, Nov. 21, 1991, 105 Stat. 1088, which is classified generally to sections 2000e–16a to 2000e–16c of this title. For complete classification of this Act to the Code, see section 2000e–16a(a) of this title and Tables.

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–3. Rulemaking

(a) EEOC rulemaking

Not later than 1 year after December 29, 2022, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5 to carry out this chapter. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

(b) OCWR rulemaking

(1) In general

Not later than 6 months after the Commission issues regulations under subsection (a), the Board (as defined in section 1301 of title 2) shall (in accordance with section 1384 of title 2), issue regulations to implement the provisions of this chapter made applicable to employees described in section 2000gg(3)(B) of this title, under section 2000gg–2(b) of this title.

(2) Parallel with agency regulations

The regulations issued under paragraph (1) shall be the same as substantive regulations issued by the Commission under subsection (a) except to the extent that the Board may determine, for good cause shown and stated together with the regulations issued under paragraph (1) that a modification of such substantive regulations would be more effective for the implementation of the rights and protection under this chapter.

(Pub. L. 117–328, div. II, §105, Dec. 29, 2022, 136 Stat. 6088.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–4. Waiver of State immunity

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(Pub. L. 117–328, div. II, §106, Dec. 29, 2022, 136 Stat. 6089.)

STATUTORY NOTES AND RELATED SUBSIDIARIES

EFFECTIVE DATE

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–5. Relationship to other laws

(a) In general

Nothing in this chapter shall be construed—

(1) to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions; or

(2) by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b) Rule of construction

This chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title.

(Pub. L. 117–328, div. II, §107, Dec. 29, 2022, 136 Stat. 6089.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

§2000gg–6. Severability

If any provision of this chapter or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this chapter and the application of that provision to other persons or circumstances shall not be affected.

(Pub. L. 117–328, div. II, §108, Dec. 29, 2022, 136 Stat. 6089.)

Statutory Notes and Related Subsidiaries

Effective Date

Section effective 180 days after Dec. 29, 2022, see section 109 of div. II of Pub. L. 117–328, set out as a note under section 2000gg of this title.

6

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work

Revised January 2023

Under the Fair Labor Standards Act (FLSA), most nursing employees have the right to reasonable break time and a place, other than a bathroom, that is shielded from view to express breast milk while at work. This right is available for up to one year after the child's birth.

This fact sheet provides general information on the FLSA's protections for nursing employees, as extended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which was signed into law on December 29, 2022 (P.L. 117-328).

ABOUT THE FLSA

The FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time employees in the private sector and in Federal, State, and local governments. The FLSA also protects the rights of employees to pump breast milk at work.

Workers may have greater protections under State or local worker protection laws. The FLSA does not preempt State or local laws that provide greater protections to employees.

For more information about the FLSA, visit www.dol.gov/agencies/whd/flsa.

Break Time to Pump Breast Milk

Most employees have the right to take reasonable break time to express breast milk for their nursing child. For **one year after the child's birth**, covered employees may take reasonable break time "**each time such employee has need to express the milk.**" An employer may not deny a covered employee a needed break to pump.

The frequency and duration of breaks needed to express milk will likely vary depending on factors related to the nursing employe and the child.

Factors such as the location of the space and the steps reasonably necessary to express breast milk, such as pump setup, can also affect the duration of time an employee will need to express milk.

Employees who telework are eligible to take pump breaks under the FLSA on the same basis as other employees.

Private Space to Pump Breast Milk

Covered employees must be provided with "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." Under the FLSA, a bathroom, even if private, **is not a permissible location** for the employer to provide for pumping breast milk.

The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing employee's use, it must be available when needed by the employee in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing breast milk or made available when needed by the nursing employee is sufficient

provided that the space is shielded from view and free from any intrusion from co-workers and the public.

Workers who telework must also be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.

Covered Employees

As of December 29, 2022, nearly all FLSA-covered employees have the right to take needed time and to access an appropriate space to express breast milk for a nursing child for up to one year after the child's birth. For more information about FLSA coverage, see Fact Sheet #14.

Certain employees of airlines, railroads, and motorcoach carriers are exempt from nursing employee protections under the FLSA. Employees who are exempted may be entitled to break and/or space protections under State or local laws.

Employers with fewer than 50 employees are not subject to the FLSA break time and space requirements if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Examples

- Julia cleans guest rooms at hotels on weekends. Julia is entitled to break time and space under the FLSA for one year after the birth of a child.
- Sam is a registered nurse who is exempt from receiving overtime pay under the FLSA. Beginning on December 29, 2022, Sam is entitled to break time and space for one year after the birth of a child.
- Irina is the shift manager at a fast-food restaurant with several locations and meets all requirements to be exempt from overtime pay requirements under the FLSA. When Irina returns to work after the birth of her child in March of 2023, in order to comply with the law, her employer provides an office to take four breaks a day of 25 minutes each to pump breast milk for the nursing child.

Compensation for Break Time to Pump Breast Milk

Under the FLSA, when an employee is using break time at work to express breast milk they either:

- Must be completely relieved from duty; or
- Must be paid for the break time.

Further, when employers provide paid breaks, an employee who uses such break time to pump breast milk must be compensated in the same way that other employees are compensated for break time.

For more information about time that must be compensated, see Fact Sheet #22.

Examples

- Madison works on a farm. Madison's employer provides all employees with two paid 15-minute rest breaks each day. Madison chooses to use both of the paid 15-minute breaks to pump breast milk for her 6-month-old infant. If Madison needs additional breaks to pump, the additional break time does not have to be compensated as long as Madison does not perform any work during the breaks.
- Peyton is a third-grade teacher. Under the FLSA, Peyton is entitled to time to pump breast milk in a private space. Peyton chooses to grade papers and complete student records while pumping breast milk. Peyton must be compensated for the time spent pumping and doing this work at the same time.
- Lauren's employer requires all employees to attend a team-building meeting at 3pm on Thursdays. Lauren requests break time to pump during the Thursday meeting. Lauren's employer denies her request in violation of the FLSA. Lauren must be paid for the time attending the meeting and must be permitted time and space to pump.

FLSA Prohibitions on Retaliation

It is a violation of the FLSA for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the Wage and Hour Division are protected, and most courts have ruled that internal complaints to an employer are also protected.

Example

- Leslie is a delivery truck driver for a department store and takes breaks to pump breast milk a couple of times each day. The supervisor complains that the breaks are interfering with the delivery schedule and moves Leslie to a lower-paying job as a result.

In this example, Leslie has experienced unlawful retaliation under the FLSA.

Remedies for Violations

Beginning April 28, 2023, an employer who violates an employee's right to reasonable break time and space to pump breast milk will be liable for appropriate legal or equitable remedies under the FLSA. Remedies may include employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate. These remedies are available regardless of whether the employee has also experienced retaliation.*

An employee may file a complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies. Special procedures may apply to filing a private action where an employer has failed to provide an employee with an appropriate space to pump. Special procedures **do not apply** before an employee or other party can file a complaint with the Wage and Hour Division or when an employee brings a private suit to enforce the reasonable break time requirement.

*Please Note: Before April 28, 2023, remedies for violations of the reasonable break time and space requirements of the FLSA are limited to unpaid minimum or overtime wages. An employee who experienced retaliation may also seek additional remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.dol.gov/agencies/whd and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 7. General Provisions

McKinney's Labor Law § 206-c

§ 206-c. Right of nursing employees to express breast milk

Effective: June 7, 2023
Currentness

1. An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time to allow an employee to express breast milk for her nursing child each time such employee has reasonable need to express breast milk for up to three years following child birth. No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.

2. (a) Upon request of an employee who chooses to express breast milk in the workplace, an employer shall designate a room or other location which shall be made available for use by such employee to express breast milk. Such room or other location shall be a place that is: (i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; and (iv) free from intrusion from other persons in the workplace or the public. Such room or other location shall provide, at minimum, a chair, a working surface, nearby access to clean running water and, if the workplace is supplied with electricity, an electrical outlet. The room or location provided by the employer for this purpose shall not be a restroom or toilet stall.

(b) If the sole purpose or function of such room or other location is not dedicated for use by employees to express breast milk, such room or other location shall be made available to such an employee when needed and shall not be used for any other purpose or function while in use by such employee. Employers shall provide notice to all employees as soon as practicable when such room or other location has been designated for use by employees to express breast milk.

(c) Where compliance with the requirements of paragraphs (a) or (b) of this subdivision is impracticable because it would impose an undue hardship on the employer by causing significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business, such employer shall make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breast milk in privacy. Provided, however, nothing in this subdivision shall otherwise exempt an employer from the requirements of subdivision one of this section.

(d) If the workplace has access to refrigeration, the employer shall extend such access to refrigeration for the purposes of storing the expressed milk.

3. The commissioner shall develop and implement a written policy regarding the rights of nursing employees to express breast milk in the workplace pursuant to the provisions of this section. Employers shall provide such written policy to each employee upon hire and annually thereafter, and to employees upon returning to work following the birth of a child. Such policy shall:

(a) Inform employees of their rights pursuant to this section;

(b) Specify the means by which a request may be submitted to the employer for a room or other location for use by employees to express breast milk; and

(c) Require the employer to respond to such request within a reasonable timeframe, but not to exceed five business days.

4. No employer or their agent, or the officer or agent of any corporation, partnership, or limited liability company, or any other person, shall discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because such employee has exercised their rights afforded under this section.

Credits
(Added L.2007, c. 574, § 1, eff. Aug. 15, 2007. Amended L.2022, c. 672, § 1, eff. June 7, 2023.)

McKinney's Labor Law § 206-c, NY LABOR § 206-c
Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

7

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GROFF *v.* DEJOY, POSTMASTER GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 22–174. Argued April 18, 2023—Decided June 29, 2023

Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned.

Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the *de minimis* cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

Held: Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would re-

Syllabus

sult in substantial increased costs in relation to the conduct of its particular business. Pp. 4–21.

(a) This case presents the Court's first opportunity in nearly 50 years to explain the contours of *Hardison*. The background of that decision helps to explain the Court's disposition of this case. Pp. 4–15.

(1) Title VII of the Civil Rights Act of 1964 made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." §2000e–2(a)(1). As originally enacted, Title VII did not spell out what it meant by discrimination "because of . . . religion." Subsequent regulations issued by the EEOC obligated employers "to make reasonable accommodations to the religious needs of employees" whenever doing so would not create "undue hardship on the conduct of the employer's business." 29 CFR §1605.1 (1968). In 1970, however, the Sixth Circuit held that Title VII did not require an employer "to accede to or accommodate" a Sabbath religious practice because to do so "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334. This Court affirmed *Dewey* by an evenly divided vote. See 402 U. S. 689. Congress responded by amending Title VII in 1972 to track the EEOC's regulatory language and to clarify that employers must "reasonably accommodate. . . an employee's or prospective employee's religious observance or practice" unless the employer is "unable" to do so "without undue hardship on the conduct of the employer's business." §2000e(j). Pp. 4–6.

(2) *Hardison* concerned an employment dispute that arose prior to the 1972 amendments to Title VII. In 1967, Trans World Airlines hired Larry Hardison to work in a department that operated "24 hours per day, 365 days per year" and played an "essential role" for TWA by providing parts needed to repair and maintain aircraft. *Hardison*, 432 U. S., at 66. Hardison later underwent a religious conversion and began missing work to observe the Sabbath. Initial conflicts with Hardison's work schedule were resolved, but conflicts resurfaced when he transferred to another position in which he lacked the seniority to avoid work during his Sabbath. Attempts at accommodation failed, and TWA discharged Hardison for insubordination.

Hardison sued TWA and his union, and the Eighth Circuit sided with Hardison. The Eighth Circuit found that reasonable accommodations were available to TWA, and rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33, 42–44. This Court granted certiorari. TWA's petition for certiorari asked this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied by the Eighth

Circuit, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement. At the time, some thought that the Court's now-abrogated decision in *Lemon* v. *Kurtzman*, 403 U. S. 602—which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional, *id.*, at 612–613—posed a serious problem for the 1972 amendment of Title VII. Ultimately, however, constitutional concerns played no on-stage role in the Court's decision in *Hardison*. Instead, the Court's opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Hardison*, 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Id.*, at 83, and n. 14. This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81. Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath.

The parties had not focused on determining when increased costs amount to "undue hardship" under Title VII separately from the seniority issue. But the Court's opinion in *Hardison* contained this oft-quoted sentence: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Although many lower courts later viewed this line as the authoritative interpretation of the statutory term "undue hardship," the context renders that reading doubtful. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14. Pp. 6–12.

(3) Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard. To be sure, many courts have understood that the protection for religious adherents is greater than "more than . . . *de minimis*" might suggest when read in isolation. But diverse religious groups tell the Court that the "*de minimis*" standard has been used to deny even minor accommodations. The EEOC has also accepted *Hardison* as prescribing a "more than a *de minimis* cost" test, 29 CFR §1605.2(e)(1), though it has tried

to soften its impact, cautioning against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§1605.2(e)(1), (2). Yet some courts have rejected even the EEOC's gloss on "*de minimis*," rejecting accommodations the EEOC's guidelines consider to be ordinarily required. The Court agrees with the Solicitor General that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. Tr. of Oral Arg. 107. Pp. 12–15.

(b) The Court holds that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. The Court understands *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech. Pp. 15–21.

(1) To determine what an employer must prove to defend a denial of a religious accommodation under Title VII, the Court begins with Title VII's text. The statutory term, "hardship," refers to, at a minimum, "something hard to bear" and suggests something more severe than a mere burden. If Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Adding the modifier "undue" means that the requisite burden or adversity must rise to an "excessive" or "unjustifiable" level. Understood in this way, "undue hardship" means something very different from a burden that is merely more than *de minimis*, *i.e.*, "very small or trifling." The ordinary meaning of "undue hardship" thus points toward a standard closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14. Further, the Court's reading of the statutory term comports with pre-1972 EEOC decisions, so nothing in that history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ___, ___. And no support exists in other factors discussed by the parties for reducing *Hardison* to its "more than a *de minimis* cost" line. Pp. 16–18.

(2) The parties agree that the "*de minimis*" test is not right, but they differ in the alternative language they propose. The Court thinks

it is enough to say that what an employer must show is that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S. at 83, n. 14. Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. Pp. 18.

(3) The Court declines to adopt the elaborations of the applicable standard that the parties suggest, either to incorporate Americans with Disabilities Act case law or opine that the EEOC's construction of *Hardison* has been basically correct. A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision. But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification the Court adopts today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test. Pp. 18–19.

(4) The Court also clarifies several recurring issues. First, as the parties agree, Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." §2000e(j). Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business. A court must analyze whether that further logical step is shown. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue." Bias or hostility to a religious practice or accommodation cannot supply a defense.

Second, Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. Faced with an accommodation request like Groff's, an employer must do more that conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options would also be necessary. Pp. 19–20.

(c) Having clarified the Title VII undue-hardship standard, the Court leaves the context-specific application of that clarified standard in this case to the lower courts in the first instance. Pp. 21.

35 F. 4th 162, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which JACKSON, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 22–174

GERALD E. GROFF, PETITIONER *v.*
LOUIS DEJOY, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 2023]

JUSTICE ALITO delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business." 78 Stat. 253, as amended, 42 U. S. C. §2000e(j). Based on a line in this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 84 (1977), many lower courts, including the Third Circuit below, have interpreted "undue hardship" to mean any effort or cost that is "more than . . . *de minimis*." In this case, however, both parties—the plaintiff-petitioner, Gerald Groff, and the defendant-respondent, the Postmaster General, represented by the Solicitor General—agree that the *de minimis* reading of *Hardison* is a mistake. With the benefit of thorough briefing and oral argument, we today clarify what Title VII requires.

I

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the "transport[ation]" of

worldly "goods." App. 294. In 2012, Groff began his employment with the United States Postal Service (USPS), which has more than 600,000 employees. He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled. During a 2-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including Rural Carrier Associates like Groff) working from a "regional hub." For Quarryville, Pennsylvania, where Groff was originally stationed, the regional hub was the Lancaster Annex.

The memorandum specifies the order in which USPS employees are to be called on for Sunday work outside the peak season. First in line are each hub's "Assistant Rural Carriers"—part-time employees who are assigned to the hub and cover only Sundays and holidays. Second are any volunteers from the geographic area, who are assigned on a rotating basis. And third are all other carriers, who are compelled to do the work on a rotating basis. Groff fell into this third category, and after the memorandum of understanding was adopted, he was told that he would be required to work on Sunday. He then sought and received a transfer to Holtwood, a small rural USPS station that had only seven employees and that, at the time, did not make Sunday deliveries. But in March 2017, Amazon deliveries began there as well.

With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff

were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff's Sunday assignments were redistributed to other carriers assigned to the regional hub.[1] Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. 35 F. 4th 162, 166 (CA3 2022). Finally, in January 2019, he resigned.[2]

A few months later, Groff sued under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS, 2021 WL 1264030 (ED Pa., Apr. 6, 2021), and the Third Circuit affirmed. The panel majority felt that it was "bound by [the] ruling" in *Hardison*, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th, at 174, n. 18 (quoting 432 U. S., at 84). Under Circuit precedent, the panel observed, this was "not a difficult threshold to pass," 35 F. 4th, at 174 (internal quotation marks omitted), and it held that this low standard was met in this case. Exempting Groff from Sunday work, the panel found, had "imposed on his coworkers, disrupted

[1] Other employees complained about the consequences of Groff's absences. While the parties dispute some of the details, it appears uncontested that at least one employee filed a grievance asserting a conflict with his contractual rights. After disputing any conflict with contract rights, USPS eventually settled that claim, with the settlement reaffirming USPS's commitment to the Memorandum of Understanding. App. 118, 125–126.

[2] Groff represents that his resignation was in light of expected termination, and the District Court found "a genuine issue of material fact" foreclosed summary judgment as to whether Groff suffered an adverse employment action. 2021 WL 1264030,*8 (ED Pa., Apr. 6, 2021). The Government does not dispute the point in this Court.

the workplace and workflow, and diminished employee morale." *Id.*, at 175. Judge Hardiman dissented, concluding that adverse "effects on USPS employees in Lancaster or Holtwood" did not alone suffice to show the needed hardship "on the employer's *business*." *Id.*, at 177 (emphasis in original).

We granted Groff's ensuing petition for a writ of certiorari. 598 U. S. ___ (2023).

II

Because this case presents our first opportunity in nearly 50 years to explain the contours of *Hardison*, we begin by recounting the legal backdrop to that case, including the development of the Title VII provision barring religious discrimination and the Equal Employment Opportunity Commission's (EEOC's) regulations and guidance regarding that prohibition. We then summarize how the *Hardison* case progressed to final decision, and finally, we discuss how courts and the EEOC have understood its significance. This background helps to explain the clarifications we offer today.

A

Since its passage, Title VII of the Civil Rights Act of 1964 has made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's . . . religion." 42 U. S. C. §2000e–2(a)(1) (1964 ed.). As originally enacted, Title VII did not spell out what it meant by discrimination "because of . . . religion," but shortly after the statute's passage, the EEOC interpreted that provision to mean that employers were sometimes required to "accommodate" the "reasonable religious needs of employees." 29 CFR § 1605.1(a)(2) (1967). After some tinkering, the EEOC settled on a formulation

that obligated employers "to make reasonable accommodations to the religious needs of employees" whenever that would not work an "undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968).

Between 1968 and 1972, the EEOC elaborated on its understanding of "undue hardship" in a "long line of decisions" addressing a variety of policies. *Hardison*, 432 U. S., at 85 (Marshall, J., dissenting); see Brief for General Conference of Seventh-day Adventists as *Amicus Curiae* 10–22 (collecting decisions). Those decisions addressed many accommodation issues that still arise frequently today, including the wearing of religious garb[3] and time off from work to attend to religious obligations.[4]

EEOC decisions did not settle the question of undue hardship. In 1970, the Sixth Circuit held (in a Sabbath case) that Title VII as then written did not require an employer

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[3] See, *e.g.*, EEOC Dec. No. 71–779, 1970 WL 3550, *2 (Dec. 21, 1970) (no undue hardship in permitting nurse to wear religious headscarf).

[4] See EEOC Dec. No. 71–463, 1970 WL 3544, *1–*2 (Nov. 13, 1970) (no "undue hardship" or "unreasonable burde[n]" for employer to train coworker to cover two-week religious absence); EEOC Dec. No. 70–580, 1970 WL 3513, *1–*2 (Mar. 2, 1970) (manufacturing employer asked to accommodate sundown-to-sundown Sabbath observance did not carry "burden . . . to demonstrate undue hardship" where it did not address "whether another employee could be trained to substitute for the Charging Party during Sabbath days, or whether already qualified personnel ha[d] been invited to work a double shift"); EEOC Dec. No. 70–670, 1970 WL 3518, *2 (Mar. 30, 1970) (no "undue 'hardship'" in having other employees take on a few more on-call Saturdays per year); see also EEOC Dec. No. 70–110, 1969 WL 2908, *1–*2 (Aug. 27, 1969) (employer could not deny employee all Sunday "overtime opportunities" on basis of employee's religious inability to work Saturday, where others not working the full weekend had been accommodated, notwithstanding employer's claim of "considerable expense"); EEOC Dec. No. 70–99, 1969 WL 2905, *1 (Aug. 27, 1969) (no obligation to accommodate seasonal employee unavailable for Saturday work, where employer showed both "no available pool of qualified employees" to substitute and a "practical impossibility of obtaining and training an employee" to cover one day a week for six weeks).

"to accede to or accommodate" religious practice because that "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334. This Court granted certiorari, 400 U. S. 1008, but then affirmed by an evenly divided vote, 402 U. S. 689 (1971).

Responding to *Dewey* and another decision rejecting any duty to accommodate an employee's observance of the Sabbath, Congress amended Title VII in 1972. *Hardison*, 432 U. S., at 73–74; *id.*, at 88–89 (Marshall, J., dissenting). Tracking the EEOC's regulatory language, Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. §2000e(j) (1970 ed., Supp. II).

B

The *Hardison* case concerned a dispute that arose during the interval between the issuance of the EEOC's "undue hardship" regulation and the 1972 amendment to Title VII. In 1967, Larry Hardison was hired as a clerk at the Stores Department in the Kansas City base of Trans World Airlines (TWA). The Stores Department was responsible for providing parts needed to repair and maintain aircraft. *Hardison* v. *Trans World Airlines*, 375 F. Supp. 877, 889 (WD Mo. 1974). It played an "essential role" and operated "24 hours per day, 365 days per year." *Hardison*, 432 U. S., at 66. After taking this job, Hardison underwent a religious conversion. He began to observe the Sabbath by absenting himself from work from sunset on Friday to sunset on Saturday, and this conflicted with his work schedule. The problem was solved for a time when Hardison, who worked in Building 1, switched to the night shift, but it resurfaced when he sought and obtained a transfer to the day shift in

Building 2 so that he could spend evenings with his wife. 375 F. Supp., at 889. In that new building, he did not have enough seniority to avoid work during his Sabbath. Attempts at accommodation failed, and he was eventually "discharged on grounds of insubordination." 432 U. S., at 69.

Hardison sued TWA and his union, the International Association of Machinists and Aerospace Workers (IAM).[5] The Eighth Circuit found that reasonable accommodations were available, and it rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33, 42–44 (1975).

Both TWA and IAM then filed petitions for certiorari, with TWA's lead petition asking this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied in the decision below, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement.[6] The Court granted both petitions. 429 U. S. 958 (1976).

When the Court took that action, all counsel had good reason to expect that the Establishment Clause would figure prominently in the Court's analysis. As noted above, in June 1971, the Court, by an equally divided vote, had affirmed the Sixth Circuit's decision in *Dewey*, which had heavily relied on Establishment Clause avoidance to reject the interpretation of Title VII set out in the EEOC's reasonable-accommodation guidelines. Just over three weeks later, the Court had handed down its (now abrogated)[7] decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) which

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[5] "Labor organization[s]" themselves were and are bound by Title VII's nondiscrimination rules. 42 U. S. C. §2000e–2(c) (1964 ed.).

[6] See Pet. for Cert. in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1975, No. 75–1126, pp. 2–3, 17–22.

[7] See *Kennedy* v. *Bremerton School Dist.*, 597 U. S. ___, ___ (2022) (slip op., at 22).

adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional. *Id.*, at 612–613. Because it could be argued that granting a special accommodation to a religious practice had just such a purpose and effect, some thought that *Lemon* posed a serious problem for the 1972 amendment of Title VII. And shortly before review was granted in *Hardison*, the Court had announced that the Justices were evenly divided in a case that challenged the 1972 amendment as a violation of the Establishment Clause. *Parker Seal Co.* v. *Cummins*, 429 U. S. 65 (1976) (*per curiam*).

Against this backdrop, both TWA and IAM challenged the constitutionality of requiring any accommodation for religious practice. The Summary of Argument in TWA's brief began with this categorical assertion: "The religious accommodation requirement of Title VII violates the Establishment Clause of the First Amendment." Brief for Petitioner TWA in O. T. 1976, No. 75–1126, p. 19. Applying the three-part *Lemon* test, TWA argued that any such accommodation has the primary purpose and effect of advancing religion and entails "pervasive" government "entanglement . . . in religious issues." Brief for Petitioner TWA in No. 75–1126, at 20. The union's brief made a similar argument, Brief for Petitioner IAM, O. T. 1976, No. 75–1126, pp. 21–24, 50–72, but stressed the special status of seniority rights under Title VII, *id.*, at 24–36.

Despite the prominence of the Establishment Clause in the briefs submitted by the parties and their *amici*,[8] constitutional concerns played no on-stage role in the Court's opinion, which focused instead on seniority rights.[9] The

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[8] See, *e.g.*, Brief for Chrysler Corporation as *Amicus Curiae* 6–20 (arguing an Establishment Clause violation), and Brief for State of Michigan as *Amicus Curiae* 20–25 (arguing no conflict with the Establishment Clause), in *Trans World Airlines, Inc.* v. *Hardison*, O. T. 1976, No. 75–1126 etc.

[9] The background summarized above and the patent clash between the

opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Ibid.* This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81. It noted that Title VII expressly provides special protection for "'bona fide seniority . . . system[s],'" *id.*, at 81–82 (quoting 42 U. S. C. §2000e–2(h)), and it cited precedent reading the statute "'to make clear that

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ordinary meaning of "undue hardship" and "more than . . . de minimis" led some to interpret the decision to rest on Establishment Clause concerns. Justice Marshall observed in his *Hardison* dissent that the majority opinion "ha[d] the singular advantage of making consideration of petitioners' constitutional challenge unnecessary." 432 U. S., at 89. A few courts assumed that *Hardison* actually was an Establishment Clause decision. See, *e.g.*, *Gibson* v. *Missouri Pacific R. Co.*, 620 F. Supp. 85, 88–89 (ED Ark. 1985) (concluding that requiring an employer to "incur greater than de minimis costs" related to accommodating a Sabbath "would therefore violate the establishment clause"); see also *Massachusetts Bay Transp. Auth.* v. *Massachusetts Comm'n Against Discrimination*, 450 Mass. 327, 340–341, and n. 15, 879 N. E. 2d 36, 46–48, and n.15 (2008) (construing state law narrowly on premise that *Hardison* might state outer constitutional bounds). Some constitutional scholars also suggested that *Hardison* must have been based on constitutional avoidance. See, *e.g.*, P. Karlan & G. Rutherglen, Disabilities, Discrimination, and Reasonable Accommodation, 46 Duke L. J. 1, 6–7 (1996); M. McConnell, Accommodation of Religion: An Update and a Response to the Critics, 60 Geo. Wash. L. Rev. 685, 704 (1992); cf. *Small* v. *Memphis Light, Gas & Water*, 952 F. 3d 821, 829 (CA6 2020) (Thapar, J., concurring). In doing so, some have pointed to *Hardison*'s passing reference to a need to avoid "unequal treatment of employees on the basis of their religion." 432 U. S., at 84. But the Court later clarified that "Title VII does not demand mere neutrality with regard to religious practices" but instead "gives them favored treatment" in order to ensure religious persons' full participation in the workforce. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U. S. 768, 775 (2015).

the routine application of a bona fide seniority system [is] not . . . unlawful under Title VII.'" 432 U. S., at 82 (quoting *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977)). Invoking these authorities, the Court found that the statute did not require an accommodation that involuntarily deprived employees of seniority rights. 432 U. S., at 80.[10]

Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath. The Court found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its "essential" mission. *Id.*, at 68, 80.

The Court also rejected two other options offered in Justice Marshall's dissent: (1) paying other workers overtime wages to induce them to work on Saturdays and making up for that increased cost by requiring Hardison to work overtime for regular wages at other times and (2) forcing TWA to pay overtime for Saturday work for three months, after which, the dissent thought, Hardison could transfer back to the night shift in Building 1. The Court dismissed both of these options as not "feasible," *id.*, at 83, n. 14, but it provided no explanation for its evaluation of the first. In dissent, Justice Marshall suggested one possible reason: that the collective bargaining agreement might have disallowed Hardison's working overtime for regular wages. *Id.*, at 95 (dissenting opinion). But the majority did not embrace that explanation.

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[10] We do not understand Groff to challenge the continued vitality of *Hardison*'s core holding on its "principal issue" (bracketing his disputes that the memorandum of understanding set forth a seniority system). 432 U. S., at 83, and n. 14.

As for the second, the Court disputed the dissent's conclusion that Hardison, if he moved back to Building 1, would have had enough seniority to choose to work the night shift. *Id.*, at 83, n. 14. That latter disagreement was key. The dissent thought that Hardison could have resumed the night shift in Building 1 after just three months, and it therefore calculated what it would have cost TWA to pay other workers' overtime wages on Saturdays for that finite period of time. According to that calculation, TWA's added expense for three months would have been $150 (about $1,250 in 2022 dollars).[11] *Id.*, at 92, n. 6. But the Court doubted that Hardison could have regained the seniority rights he had enjoyed in Building 1 prior to his transfer, and if that were true, TWA would have been required to pay other workers overtime for Saturday work indefinitely. Even under Justice Marshall's math, that would have worked out to $600 per year at the time, or roughly $5,000 per year today.

In the briefs and at argument, little space was devoted to the question of determining when increased costs amount to an "undue hardship" under the statute, but a single, but oft-quoted, sentence in the opinion of the Court, if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure. The line read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*, at 84.

Although this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term "undue hardship," it is doubtful that it was meant to take on that large role. In responding to Justice Marshall's dissent, the Court described the governing standard quite

[11] The dissent appears to have drawn its estimate from Hardison's daily rate at the time of termination ($3.37/hour) and deposition testimony on typical overtime rates and shift lengths. See App. in No. 75–1126 etc., at pp. 40, 126.

differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id.*, at 83, n. 14. This formulation suggests that an employer may be required to bear costs and make expenditures that are not "substantial." Of course, there is a big difference between costs and expenditures that are not "substantial" and those that are "de minimis," which is to say, so "very small or trifling" that that they are not even worth noticing. Black's Law Dictionary 388 (5th ed. 1979).

The Court's response to Justice Marshall's estimate of the extra costs that TWA would have been required to foot is also telling. The majority did not argue that Justice Marshall's math produced considerably "more than a *de minimis* cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees." 432 U. S., at 83, n. 14; see Brief for United States 29, n. 4 (noting that *Hardison* "specifically rejected" the dissent's calculations and that it is "wrong to assert" that *Hardison* held that a $150 cost was an undue hardship).

Ultimately, then, it is not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights. The *Hardison* Court was very clear that those rights were off-limits. Its guidance on "undue hardship" in situations not involving seniority rights is much less clear.

C

Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard.

To be sure, as the Solicitor General notes, some lower

courts have understood that the protection for religious adherents is greater than "more than . . . *de minimis*" might suggest when read in isolation. But a bevy of diverse religious organizations has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market. See, *e.g.*, Brief for The Sikh Coalition et al. as *Amici Curiae* 15, 19–20 ("the de minimis standard eliminates any meaningful mandate to accommodate Sikh practices in the workplace" and "emboldens employers to deny reasonable accommodation requests"); Brief for Council on American-Islamic Relations as *Amicus Curiae* 3 (Muslim women wearing religiously mandated attire "have lost employment opportunities" and have been excluded from "critical public institutions like public schools, law enforcement agencies, and youth rehabilitation centers"); Brief for Union of Orthodox Jewish Congregations of America as *Amicus Curiae* 14–15 (because the "*de minimis* cost" test "can be satisfied in nearly any circumstance," "Orthodox Jews once again [are] left at the mercy of their employers' good graces"); Brief for Seventh-day Adventist Church in Canada et al. as *Amici Curiae* 8 (joint brief of Sabbatarian faiths arguing that Sabbath accommodation under the *de minimis* standard is left to "their employers' and coworkers' goodwill").

The EEOC has also accepted *Hardison* as prescribing a "'more than a *de minimis* cost'" test, 29 CFR §1605.2(e)(1) (2022), but has tried in some ways to soften its impact. It has specifically cautioned (as has the Solicitor General in this case) against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§1605.2(e)(1), (2).

Nevertheless, some courts have rejected even the EEOC's

gloss on "*de minimis*."[12] And in other cases, courts have rejected accommodations that the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences.[13]

Members of this Court have warned that, if the *de minimis* rule represents the holding of *Hardison*, the decision might have to be reconsidered. *Small* v. *Memphis Light, Gas & Water*, 593 U. S. ___ (2021) (GORSUCH, J., dissenting from denial of certiorari); *Patterson* v. *Walgreen Co.*, 589 U. S. ___ (2020) (ALITO, J., concurring in denial of certiorari). Four years ago, the Solicitor General—joined on its brief by the EEOC—likewise took that view. Brief for United States as *Amicus Curiae* in *Patterson* v. *Walgreen Co.*, O. T. 2019, No. 18–349, p. 20 ("Contrary to *Hardison*, therefore, an 'undue hardship' is not best interpreted to mean 'more than a *de minimis* cost'").

Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the

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[12] For example, two years ago, the Seventh Circuit told the EEOC that it would be an undue hardship on Wal-Mart (the Nation's largest private employer, with annual profits of over $11 billion) to be required to facilitate voluntary shift-trading to accommodate a prospective assistant manager's observance of the Sabbath. *EEOC* v. *Walmart Stores East, L. P.*, 992 F. 3d 656, 659–660 (2021). See Walmart Inc., Wall Street Journal Markets (June 4, 2023).

[13] See, *e.g.*, *Wagner* v. *Saint Joseph's/Candler Health System, Inc.*, 2022 WL 905551, *4–*5 (SD Ga., Mar. 28, 2022) (Orthodox Jew fired for taking off for High Holy Days); *Camara* v. *Epps Air Serv., Inc.*, 292 F. Supp. 3d 1314, 1322, 1331–1332 (ND Ga., 2017) (Muslim woman who wore a hijab fired because the sight of her might harm the business in light of "negative stereotypes and perceptions about Muslims"); *El-Amin* v. *First Transit, Inc.*, 2005 WL 1118175, *7–*8 (SD Ohio, May 11, 2005) (Muslim employee terminated where religious services conflicted with "two hours" of training a week during a month of daily training); *EEOC* v. *Sambo's of Ga., Inc.*, 530 F. Supp. 86, 91 (ND Ga., 1981) (hiring a Sikh man as a restaurant manager would be an undue hardship because his beard would have conflicted with "customer preference").

"more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost.[14] Tr. of Oral Arg. 107. With the benefit of comprehensive briefing and oral argument, we agree.[15]

III

We hold that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context

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[14] At the certiorari stage, the Government argued against review by noting that Government employees receive "at least as much protection for religious-accommodation claims [under the Religious Freedom Restoration Act (RFRA)] as [under] any interpretation of Title VII." Brief in Opposition 9. Courts have not always agreed on how RFRA's cause of action—which does not rely on employment status—interacts with Title VII's cause of action, and the Third Circuit has treated Title VII as exclusively governing at least some employment-related claims brought by Government employees. Compare *Francis* v. *Mineta*, 505 F. 3d 266, 271 (CA3 2007), with *Tagore* v. *United States*, 735 F. 3d 324, 330–331 (CA5 2013) (federal employee's RFRA claim could proceed even though *de minimis* standard foreclosed Title VII claim). Because Groff did not bring a RFRA claim, we need not resolve today whether the Government is correct that RFRA claims arising out of federal employment are not displaced by Title VII.

[15] In addition to suggesting that *Hardison* be revisited, some Justices have questioned whether *Hardison* (which addresses the pre-1972 EEOC Guidelines) binds courts interpreting the current version of Title VII. See *Abercrombie*, 575 U. S., at 787, n. (THOMAS, J., concurring in part and dissenting in part). As explained below, because we—like the Solicitor General—construe *Hardison* as consistent with the ordinary meaning of "undue hardship," we need not reconcile any divergence between *Hardison* and the statutory text.

of an employer's business. See Tr. of Oral Arg. 61–62 (argument of Solicitor General). This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.

A

As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text. After all, as we have stressed over and over again in recent years, statutory interpretation must "begi[n] with," and ultimately heed, what a statute actually says. *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. 109, ___ (2018) (slip op., at 15) (internal quotation marks omitted); see *Bartenwerfer* v. *Buckley*, 598 U. S. 69, 74 (2023); *Intel Corp. Investment Policy Comm.* v. *Sulyma*, 589 U. S. ___, ___–___, ___ (2020) (slip op., at 5–6, 9). Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.*, Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.*, Webster's Third

2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive"). The Government agrees, noting that "'undue hardship means something greater than hardship.'" Brief for United States 30; see *id.*, at 39 (arguing that "accommodations should be assessed while 'keep[ing] in mind both words in the key phrase of the actual statutory text: "undue" and "hardship"'" (quoting *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F. 3d 444, 456 (CA7 2013)).

When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis*, *i.e.*, something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14.

Similarly, while we do not rely on the pre-1972 EEOC decisions described above to define the term, we do observe that these decisions often found that accommodations that entailed substantial costs were required. See *supra*, at 5, nn. 3–4. Nothing in this history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. Cf. *George* v. *McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (a "robust regulatory backdrop" can "fil[l] in the details" of a statutory scheme's use of a specific term).

In short, no factor discussed by the parties—the ordinary meaning of "undue hardship," the EEOC guidelines that *Hardison* concluded that the 1972 amendment "'ratified,'" 432 U. S., at 76, n. 11 (internal quotation marks omitted), the use of that term by the EEOC prior to those amendments, and the common use of that term in other statutes—supports reducing *Hardison* to its "more than a *de minimis* cost" line. See Brief for United States 39 (arguing that "the Court could emphasize that *Hardison*'s language does not

displace the statutory standard").

B

In this case, both parties agree that the "*de minimis*" test is not right, but they differ slightly in the alternative language they prefer. Groff likes the phrase "significant difficulty or expense." Brief for Petitioner 15; Reply Brief 2. The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to "substantial expenditures" or "substantial additional costs." Brief for United States 28–29 (citing 432 U. S., at 83–84, and n. 14); see Brief for United States 39. We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S., at 83, n. 14.

What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40 (internal quotation marks omitted).

C

The main difference between the parties lies in the further steps they would ask us to take in elaborating upon their standards. Groff would not simply borrow the phrase "significant difficulty or expense" from the Americans with Disabilities Act (ADA) but would have us instruct lower courts to "draw upon decades of ADA caselaw." Reply Brief 13. The Government, on the other hand, requests that we opine that the EEOC's construction of *Hardison* has been basically correct. Brief for United States 39.

Both of these suggestions go too far. We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee rights, much of the EEOC's guidance has focused on what should be accommodated. Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 CFR §1605.2(d). But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification we adopt today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test.

D

The erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues. Since we are now brushing away that mistaken view of *Hardison*'s holding, clarification of some of those issues—in line with the parties' agreement in this case—is in order.

First, on the second question presented, both parties agree that the language of Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." 42 U. S. C. §2000e(j); see 35 F. 4th, at 177–178 (Hardiman, J., dissenting). As the Solicitor General put it, not all "impacts on coworkers . . . are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." Tr. of Oral Arg. 102–104. So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court

cannot stop its analysis without examining whether that further logical step is shown in a particular case.

On this point, the Solicitor General took pains to clarify that some evidence that occasionally is used to show "impacts" on coworkers is "off the table" for consideration. *Id.*, at 102. Specifically, a coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry." *Id.*, at 89–90. To the extent that this was not previously clear, we agree. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself. See *id.*, at 89 (argument of Solicitor General) (such an approach would be "giving effect to religious hostility"); contra, *EEOC* v. *Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 89 (ND Ga. 1981) (considering as hardship "[a]dverse customer reaction" from "a simple aversion to, or discomfort in dealing with, bearded people").

Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. See *Adeyeye*, 721 F. 3d, at 455; see also Brief for United States 30, 33, 39. This distinction matters. Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

IV

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

* * *

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 22–174

GERALD E. GROFF, PETITIONER *v.*
LOUIS DEJOY, POSTMASTER GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, concurring.

As both parties here agree, the phrase "more than a *de minimis* cost" from *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 84 (1977), was loose language. An employer violates Title VII if it fails "to reasonably accommodate" an employee's religious observance or practice, unless the employer demonstrates that accommodation would result in "undue hardship on the conduct of the employer's business." 42 U. S. C. §2000e(j). The statutory standard is "undue hardship," not trivial cost.

Hardison, however, cannot be reduced to its "*de minimis*" language. Instead, that case must be understood in light of its facts and the Court's reasoning. The *Hardison* Court concluded that the plaintiff's proposed accommodation would have imposed an undue hardship on the conduct of the employer's business because the accommodation would have required the employer either to deprive other employees of their seniority rights under a collective-bargaining agreement, or to incur substantial additional costs in the form of lost efficiency or higher wages. 432 U. S., at 79–81, 83–84, and n. 14. The Equal Employment Opportunity Commission has interpreted Title VII's undue-hardship standard in this way for seven consecutive Presidential administrations, from President Reagan to President Biden.

See 29 CFR §1605.2(e) (2022) (citing *Hardison*, 432 U. S., at 80, 84).

Petitioner Gerald Groff asks this Court to overrule *Hardison* and to replace it with a "significant difficulty or expense" standard. Brief for Petitioner 17–38. The Court does not do so. That is a wise choice because *stare decisis* has "enhanced force" in statutory cases. *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. 446, 456 (2015). Congress is free to revise this Court's statutory interpretations. The Court's respect for Congress's decision not to intervene promotes the separation of powers by requiring interested parties to resort to the legislative rather than the judicial process to achieve their policy goals. This justification for statutory *stare decisis* is especially strong here because "Congress has spurned multiple opportunities to reverse [*Hardison*]—openings as frequent and clear as this Court ever sees." *Id.*, at 456–457.[1] Moreover, in the decades since *Hardison* was decided, Congress has revised Title VII multiple times in response to other decisions of this Court,[2] yet never in response to *Hardison*. See *Kimble*, 576 U. S., at 457.

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[1] See, *e.g.*, H. R. 1440, 117th Cong., 1st Sess., §4(a)(4) (2021); H. R. 5331, 116th Cong., 1st Sess., §4(a)(4) (2019); S. 3686, 112th Cong., 2d Sess., §4(a)(3) (2012); S. 4046, 111th Cong., 2d Sess., §4(a)(3) (2010); S. 3628, 110th Cong., 2d Sess., §2(a)(1)(B) (2008); H. R. 1431, 110th Cong., 1st Sess., §2(a)(4) (2007); H. R. 1445, 109th Cong., 1st Sess., §2(a)(4) (2005); S. 677, 109th Cong., 1st Sess., §2(a)(4) (2005); S. 893, 108th Cong., 1st Sess., §2(a)(4) (2003); S. 2572, 107th Cong., 2d Sess., §2(a)(4) (2002); H. R. 4237, 106th Cong., 2d Sess., §2(a)(4) (2000); S. 1668, 106th Cong., 1st Sess., §2(a)(4) (1999); H. R. 2948, 105th Cong., 1st Sess., §2(a)(4) (1997); S. 1124, 105th Cong., 1st Sess., §2(a)(4) (1997); S. 92, 105th Cong., 1st Sess., §2(a)(3) (1997); H. R. 4117, 104th Cong., 2d Sess., §2(a)(3) (1996).

[2] See Civil Rights Act of 1991, 105 Stat. 1071 (overruling *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989)); Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5 (overruling *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007)).

Groff also asks the Court to decide that Title VII requires the United States Postal Service to show "undue hardship to [its] *business*," not to Groff's co-workers. Brief for Petitioner 42 (emphasis added); see 35 F. 4th 162, 176 (CA3 2022) (Hardiman, J., dissenting). The Court, however, recognizes that Title VII requires "undue hardship on the *conduct* of the employer's business." 42 U. S. C. §2000e(j) (emphasis added). Because the "conduct of [a] business" plainly includes the management and performance of the business's employees, undue hardship on the conduct of a business may include undue hardship on the business's employees. See, *e.g.*, *Hardison*, 432 U. S., at 79–81 (deprivation of employees' bargained-for seniority rights constitutes undue hardship). There is no basis in the text of the statute, let alone in economics or common sense, to conclude otherwise. Indeed, for many businesses, labor is more important to the conduct of the business than any other factor.

To be sure, some effects on co-workers will not constitute "undue hardship" under Title VII. For example, animus toward a protected group is not a cognizable "hardship" under any antidiscrimination statute. Cf. *ante*, at 20. In addition, some hardships, such as the labor costs of coordinating voluntary shift swaps, are not "undue" because they are too insubstantial. See 29 CFR §§1605.2(d)(1)(i), (e)(1). Nevertheless, if there is an undue hardship on "the conduct of the employer's business," 42 U. S. C. §2000e(j), then such hardship is sufficient, even if it consists of hardship on employees. With these observations, I join the opinion of the Court.

8

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
General Obligations Law (Refs & Annos)
Chapter 24-a. Of the Consolidated Laws (Refs & Annos)
Article 5. Creation, Definition and Enforcement of Contractual Obligations
Title 3. Certain Prohibited Contracts and Provisions of Contracts (Refs & Annos)

McKinney's General Obligations Law § 5-336

§ 5-336. Nondisclosure agreements

Effective: November 17, 2023
Currentness

1. (a) Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, harassment, or retaliation, in violation of laws prohibiting discrimination, including discriminatory harassment or retaliation, including but not limited to, article fifteen of the executive law, any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.

(b) Any such term or condition must be provided in writing to all parties in plain English, and, if applicable, the primary language of the complainant, and the complainant shall have up to twenty-one days to consider such term or condition. If confidentiality is the complainant's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the complainant may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

(c) Any such term or condition shall be void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency; or (ii) filing or disclosing any facts necessary to receive unemployment insurance, Medicaid, or other public benefits to which the complainant is entitled.

2. Notwithstanding any provision of law to the contrary, any provision in a contract or other agreement between an employer or an agent of an employer and any employee, potential employee, or independent contractor of that employer entered into on or after January first, two thousand twenty, that prevents the disclosure of factual information related to any future claim of discrimination is void and unenforceable unless such provision notifies the employee, potential employee, or independent contractor that it does not prohibit the complainant from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, the attorney general, a local commission on human rights, or an attorney retained by the employee or potential employee.

3. Notwithstanding any other law to the contrary, no release of any claim, the factual foundation for which involves unlawful discrimination, including discriminatory harassment, or retaliation, shall be enforceable, if as part of the agreement resolving such claim:

(a) the complainant is required to pay liquidated damages for violation of a nondisclosure clause or nondisparagement clause;

(b) the complainant is required to forfeit all or part of the consideration for the agreement, for violation of a nondisclosure clause or nondisparagement clause; or

(c) it contains or requires any affirmative statement, assertion, or disclaimer by the complainant that the complainant was not in fact subject to unlawful discrimination, including discriminatory harassment, or retaliation.

Credits

(Added L.2018, c. 57, pt. KK, subpt. D, § 1, eff. July 11, 2018. Amended L.2019, c. 160, § 7, eff. Oct. 11, 2019; L.2023, c. 658, § 1, eff. Nov. 17, 2023.)

McKinney's General Obligations Law § 5-336, NY GEN OBLIG § 5-336

Current through L.2024, chapters 1 to 49, 52, 61 to 112. Some statute sections may be more current, see credits for details.

9

STATE OF NEW YORK

3255

2023-2024 Regular Sessions

IN SENATE

January 30, 2023

Introduced by Sens. HOYLMAN-SIGAL, BROUK, JACKSON, KRUEGER -- read twice and ordered printed, and when printed to be committed to the Committee on Investigations and Government Operations

AN ACT to amend the executive law, in relation to extending the statute of limitations for claims resulting from unlawful discriminatory practices to three years

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 5 of section 297 of the executive law, as amended by chapter 160 of the laws of 2019, is amended to read as follows:

5. Any complaint filed pursuant to this section must be so filed within [~~one year~~] three years after the alleged unlawful discriminatory practice. [~~In cases of sexual harassment in employment, any complaint filed pursuant to this section must be so filed within three years after the alleged unlawful discriminatory practices.~~]

§ 2. This act shall take effect on the ninetieth day after it shall have become a law and shall apply to all unlawful discriminatory practice claims arising on or after such effective date.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD02756-01-3

10

STATE OF NEW YORK

7623--A

2023-2024 Regular Sessions

IN SENATE

August 4, 2023

Introduced by Sen. HOYLMAN-SIGAL -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the labor law, in relation to restricting the use of electronic monitoring and automated employment decision tools; and to amend the civil rights law, in relation to making a conforming change

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 203-g to read as follows:

§ 203-g. Electronic monitoring and automated employment decision tools. 1. For the purposes of this section, the following terms have the following meanings:

(a) "Automated employment decision tool" means any computational process, automated system, or algorithm utilizing machine learning, statistical modeling, data analytics, artificial intelligence, or similar methods that issues a simplified output, including a score, classification, ranking, or recommendation, that is used to assist or replace decision making for employment decisions that impact natural persons. "Automated employment decision tool" does not include a tool that does not assist or replace employment decision processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

(b) "Bias audit" means an impartial evaluation by an independent auditor, which shall include, at a minimum, the testing of an automated employment decision tool to assess the tool's disparate impact on employees because of their age, race, creed, color, ethnicity, national origin, disability, citizenship or immigration status, marital or familial status, military status, religion, or sex, including sexual orien-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD11940-03-3

tation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare choices.

(c) "Candidate" means any natural person or their authorized representative seeking employment through an application, or who is screened or evaluated for recruitment, for a position of employment by a business operating in the state.

(d) "Electronic monitoring tool" means any system that facilitates the collection of data concerning worker activities or communications by any means other than direct observation by a natural person, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photoelectronic, or photo-optical system.

(e) "Employer" means any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, benefits, other compensation, hours, working conditions, access to work or job opportunities, or other terms or conditions of employment, of any worker. "Employer" includes any of the employer's labor contractors.

(f) "Employee" means any natural person or their authorized representative acting for, employed by, or an independent contractor providing service to, or through, a business operating in the state.

(g) "Employee data" means any information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular employee, regardless of how the information is collected, inferred, or obtained. Data includes, but is not limited to, the following:

(i) personal identity information, including the individual's name, contact information, government-issued identification number, financial information, criminal background, or employment history;

(ii) biometric information, including the individual's physiological, biological, or behavioral characteristics, including the individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with other data, to establish individual identity;

(iii) health, medical, lifestyle, and wellness information, including the individual's medical history, physical or mental condition, diet or physical activity patterns, heart rate, medical treatment or diagnosis by a health care professional, health insurance policy number, subscriber identification number, or other unique identifier used to identify the individual; and

(iv) any data related to workplace activities, including the following:

(A) human resources information, including the contents of an individual's personnel file or performance evaluations;

(B) work process information, such as productivity and efficiency data;

(C) data that captures workplace communications and interactions, including emails, texts, internal message boards, and customer interaction and ratings;

(D) device usage and data, including calls placed or geolocation information;

(E) audio-video data and other information collected from sensors, including movement tracking, thermal sensors, voiceprints, or facial recognition, emotion, and gait recognition;

(F) inputs to or outputs generated by an automated employment decision tool that are linked to the individual; and

(G) data that is collected or generated on workers to mitigate the spread of infectious diseases, including COVID-19, or to comply with public health measures.

(h) "Employment decision" means any decision made by the employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, selecting for recruitment, discipline, promotion, termination, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety, and other terms or conditions of employment. For independent contractors or candidates for employment, this means the equivalent of these decisions based on their contract with or relationship to the employer.

(i) "Vendor" means any person who sells, distributes, or develops for sale an automated employment decision tool to be used in an employment decision made by an employer in the state.

2. (a) It shall be unlawful for an employer to use an electronic monitoring tool to collect employee data unless:

(i) the electronic monitoring tool is primarily intended to accomplish any of the following purposes:

(A) allowing a worker to accomplish an essential job function;

(B) ensuring the quality of goods and services;

(C) periodic assessment of worker performance;

(D) ensuring compliance with employment, labor, or other relevant laws;

(E) protecting the health, safety, or security of workers, or the security of the employer's facilities or computer networks;

(F) administering wages and benefits; or

(G) additional purposes to enable business operations as determined by the department;

(ii) the specific type of electronic monitoring tool is strictly necessary to accomplish the purpose, exclusively used to accomplish the purpose, and is the least invasive means to the employee that could reasonably be used to accomplish the purpose; and

(iii) the specific form of electronic monitoring is limited to the smallest number of workers and collects the least amount of data necessary to accomplish the purpose.

(b) Any employer that uses an electronic monitoring tool shall give prior written notice to all employees who may be subject to electronic monitoring and post said notice in a conspicuous place which is readily available for viewing by employees, pursuant to subdivision two of section fifty-two-e of the civil rights law. Such notice shall include, at a minimum, the following:

(i) a description of the purpose for which the electronic monitoring tool will be used, as specified in subparagraph (i) of paragraph (a) of this subdivision;

(ii) a description of the specific employee data to be collected, and the activities, locations, communications, and job roles that will be electronically monitored by the tool;

(iii) a description of the dates, times, and frequency that electronic monitoring will occur;

(iv) whether and how any employee data collected by the electronic monitoring tool will be used as an input in an automated employment decision tool;

(v) whether and how any employee data collected by the electronic monitoring tool will alone or in conjunction with an automated employment decision tool be used to make an employment decision by the employer or employment agency;

(vi) whether any employee data collected by the electronic monitoring tool will be used to assess employees' productivity performance or to set productivity standards, and if so, how;

(vii) a description of where any employee data collected by the electronic monitoring tool will be stored and the length of time it will be retained; and

(viii) an explanation for how the specific electronic monitoring practice is the least invasive means available to accomplish the monitoring purpose.

(c) An employer shall destroy any employee data collected via an electronic monitoring tool when the initial purpose for collecting the data has been satisfied or at the end of the employee's relationship with the employer, unless the employee has provided written and informed consent to the retention of their data by the employer.

(d) Notice of the specific form of electronic monitoring shall be clear and conspicuous and provide the worker with actual notice of electronic monitoring activities. A notice that states electronic monitoring "may" take place or that the employer "reserves the right" to monitor shall not be considered clear and conspicuous.

(e) (i) An employer who engages in random or periodic electronic monitoring of employees shall inform the affected employees of the specific events which are being monitored at the time the monitoring takes place. Notice shall be clear and conspicuous.

(ii) Notice of random or periodic electronic monitoring may be given after electronic monitoring has occurred only if necessary to preserve the integrity of an investigation of illegal activity or protect the immediate safety of employees, customers, or the public.

3. (a) Notwithstanding the allowable purposes for electronic monitoring described in paragraph (a) of subdivision two of this section, an employer shall not:

(i) use an electronic monitoring tool in such a manner that results in a violation of labor or employment law;

(ii) use an electronic monitoring tool in such a manner as to threaten the health, welfare, safety, or legal rights of employees;

(iii) use an electronic monitoring tool to monitor employees who are off-duty and not performing work-related tasks;

(iv) use an electronic monitoring tool in order to obtain information about an employee's religious beliefs, health or disability status, or immigration status;

(v) use an electronic monitoring tool in order to identify, punish, or obtain information about employees engaging in activity protected under labor and employment law;

(vi) use an electronic monitoring tool in order to or with the effect of informing a dynamic wage-setting system;

(vii) conduct audio-visual monitoring of bathrooms or other similarly private areas, including locker rooms, changing areas, breakrooms, smoking areas, employee cafeterias, lounges, areas designated to express breast milk, or areas designated for prayer or other religious activity, including data collection on the frequency of use of those private areas;

(viii) conduct audio-visual monitoring of a workplace in an employee's residence, an employee's personal vehicle, or property owned or leased by an employee, unless that audio-visual monitoring is strictly necessary to ensure employee health and safety, to verify the security of company or client data, or to accomplish other similarly compelling purposes;

(ix) use an electronic monitoring tool that incorporates facial recognition, gait, or emotion recognition technology;

(x) discipline or terminate the employment of an employee solely on the basis of their opposition of or refusal to submit to a practice that the employee believes in good faith that violate this section; or

(xi) where employees have union representation, refuse to bargain over the use of electronic monitoring tools.

(b) An employer shall not use employee data collected via an electronic monitoring tool for purposes other than those specified in the notice provided pursuant to paragraph (b) of subdivision two of this section.

(c) An employer shall not sell, transfer, or disclose employee data collected via an electronic monitoring tool to any other entity unless it is required to do so under state or federal law, or necessary to do so to comply with a bias audit of an automated employment decision tool pursuant to subdivision four of this section.

(d) An employer shall not require employees to either install applications on personal devices that collect or transmit employee data or to wear, embed, or physically implant those devices, including those that are installed subcutaneously or incorporated into items of clothing or personal accessories, unless the electronic monitoring is strictly necessary to accomplish essential job functions and is narrowly limited to only the activities and times necessary to accomplish essential job functions. Location tracking applications and devices shall be disabled outside the activities and times necessary to accomplish essential job functions.

(e) An employer shall not rely solely on employee data collected through electronic monitoring when making hiring, promotion, termination, disciplinary, or compensation decisions.

(f) The information and judgments involved in an employer's use of electronic monitoring data shall be documented and communicated to affected employees prior to the hiring, promotion, termination, or disciplinary decision going into effect.

(g) Data that provides evidence of criminal activity, when independently corroborated by the employer, or captured through the use of reasonable security measures that comply with paragraph (a) of subdivision two of this section, is exempt from this subdivision.

4. (a) It shall be unlawful for an employer to use an automated employment decision tool for an employment decision unless such tool has been the subject of a bias audit. Bias audits for automated employment decision tools must:

(i) be conducted no more than one year prior to the use of such tool, or where the tool was in use by the employer before this act became a law, within six months of this act becoming a law; and

(ii) be conducted by an independent and impartial party with no financial or legal conflicts of interest;

(iii) identify and describe the attributes and modeling techniques that the tool uses to produce outputs;

(iv) evaluate whether those attributes and techniques are a scientifically valid means of evaluating an employee or candidate's performance or ability to perform the essential functions of a role, and whether those attributes may function as a proxy for belonging to a protected class;

(v) consider, identify, and describe any disparities in the data used to train or develop the tool and describe how those disparities may result in a disparate impact on persons belonging to a protected class,

and what actions may be taken by the employer or vendor of the tool to reduce or remedy any disparate impact;

(vi) consider, identify, and describe any disparities in the outputs produced by the tool that may result in a disparate impact on persons belonging to a protected class, and what actions may be taken by the employer or vendor of the tool to reduce or remedy that disparate impact;

(vii) evaluate whether the use of the tool may limit accessibility for persons with disabilities, or for persons with any specific disability, and what actions may be taken by the employer or vendor of the tool to reduce or remedy the concern;

(viii) identify and describe any other assessment of risks of discrimination or a disparate impact of the tool on members of a protected class that arise over the course of the bias audit, and what actions may be taken to reduce or remedy that risk;

(ix) for any finding of a disparate impact or limit on accessibility, evaluate whether the data set, attribute, or feature of the tool at issue is the least discriminatory method of assessing a candidate's performance or ability to perform job functions; and

(x) be submitted in its entirety or an accessible summary form to the department for inclusion in a public registry of such audits within sixty days of completion and distributed to employees who may be subject to the tool.

(b) An employer shall conduct or commission subsequent audits each year that the tool is in use to assist or replace employment decisions. Subsequent audits shall comply with the requirements of paragraph (a) of this subdivision, and shall assess and describe any change in the validity or disparate impact of the tool.

(c) An employer or vendor shall retain all documentation pertaining to the design, development, use, and data of an automated employment decision tool that may be necessary to conduct a bias audit. This includes but is not limited to the source of the data used to develop the tool, the technical specifications of the tool, individuals involved in the development of the tool, and historical use data for the tool. Such documentation must include a historical record of versions of the tool, such that an employer shall be able to attest in the event of litigation disputing an employment decision, the nature and specifications of the tool as it was used at the time of that employment decision. Such documentation shall be stored in such a manner as to be legible and accessible to the party conducting a bias audit.

(d) If an initial or subsequent bias audit requires the collection of sensitive employee data to assess a tool's disparate impact on employees, such data shall be collected, processed, stored, and retained in such a manner as to protect the privacy of employees. Employee data provided to auditors for the purpose of a bias audit shall not be shared with the employer, nor shall it be shared with any person, business entity, or other organization unless strictly necessary for the completion of the bias audit.

(e) If an initial or subsequent bias audit concludes that a data set, feature, or application of the automated employment decision tool results in a disparate impact on persons belonging to a protected class, or unlawfully limit accessibility for persons with disabilities, an employer shall:

(i) take reasonable and appropriate steps to reduce or remedy that disparate impact or limit on accessibility and describe in writing to employees, the auditor, and the department what steps were taken; and

(ii) if the employer believes the audit finding of a disparate impact or limit on accessibility is erroneous, or that the steps taken in accordance with subparagraph (i) of this paragraph sufficiently address those findings such that the tool may be lawfully used in accordance with this section, describe in writing to employees, the auditor, and the department how the data set, feature, or application of the tool is the least discriminatory method of assessing an employee's performance or ability to complete essential functions of a position; or

(iii) if the employer believes the audit finding of a disparate impact or limit on accessibility is part of a lawful affirmative action plan or other lawful effort to reduce or eliminate bias in employment decisions, describe such plan or effort in writing to employees, the auditor, and the department.

(f) It shall be unlawful for an independent auditor, vendor, or employer to manipulate, conceal, or misrepresent the results of a bias audit.

5. Any employer that uses an automated employment decision tool shall notify employees and candidates subject to the tool no less than ten business days before such use:

(a) that an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate;

(b) the job qualifications and characteristics that such automated employment decision tool will assess, what employee or candidate data or attributes the tool will use to conduct that assessment, and what kind of outputs the tool will produce as an evaluation of such employee or candidate;

(c) what employee or candidate data is collected for the automated employment decision tool, the source of such data and the employer's data retention policy. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation;

(d) the results of the most recent bias audit of the automated employment decision tool, including any findings of a disparate impact and associated response from the employer, or information about how to access that information if publicly available;

(e) information about how an employee or candidate may request an alternative selection process or accommodation that does not involve the use of an automated employment decision tool; and

(f) information about how the employee or candidate may (i) request internal review of the employment decision made by the automated employment decision tool in accordance with subdivision seven of this section and (ii) notification of the employee or candidate's right to file a complaint in a civil court in accordance with subdivision eight of this section.

6. (a) Notwithstanding the provisions of subdivision four of this section, an employer shall not, alone or in conjunction with an electronic monitoring tool, use an automated employment decision tool:

(i) in such a manner that results in a violation of labor or employment law;

(ii) in such a manner as to unduly intensify the conditions of work or to harm the health and safety of employees, including by setting unreasonable productivity quotas;

(iii) to make predictions about an employee or candidate for employment's behavior, beliefs, intentions, personality, emotional state, or other characteristic or behavior;

(iv) to predict, interfere with, restrain, or coerce employees engaging in activity protected under labor and employment law;

(v) to implement a dynamic wage-setting system that pays employees different wages for the same work;

(vi) to subtract from an employee's wages time spent exercising their legal rights; or

(vii) that involves facial recognition, gait, or emotion recognition technologies.

(b) An employer shall not rely solely on output from an automated employment decision tool when making hiring, promotion, termination, disciplinary, or compensation decisions.

(i) An employer shall establish meaningful human oversight of hiring, promotion, termination, disciplinary or compensation decisions assisted or replaced by automated employment decision tools. Meaningful human oversight requires:

(A) the designation of an internal reviewer with sufficient expertise in the operation of automated employment decision tools, sufficient familiarity with the results of the most recent bias audit of the employer's tool, and sufficient understanding of the outputs of the employer's tool to identify potential errors, discrepancies, or inaccuracies produced by the tool;

(B) that sufficient authority and discretion be granted to the designated internal reviewer to dispute, rerun, or recommend the rejection of an output suspected to be invalid, inaccurate, or discriminatory; and

(C) that the designated internal reviewer has the time and resources available to review and evaluate the tool output in accordance with clause (B) of this subparagraph.

(ii) An employer shall consider information other than automated employment decision tool outputs when making hiring, promotion, termination, disciplinary, or compensation decisions, such as supervisory or managerial evaluations, personnel files, employee work products, or peer reviews.

(c) An employer may not, where employees have union representation, refuse to bargain over the use of automated employment decision tools.

(d) An employer shall not require employees or candidates that apply for a position of employment to consent to the use of an automated employment decision tool in an employment decision in order to be considered for an employment decision, nor shall an employer discipline or disadvantage an employee or candidate for employment solely as a result of their request for accommodation.

7. (a) An employer shall offer employees and candidates a meaningful opportunity to request a reevaluation of the results of an employment decision made or assisted by an automated employment decision tool, if an employee or candidate believes or suspects that the decision resulted from inaccuracy, error, or bias in the tool, that the tool was used as the sole basis for the decision, or that the employer's use of the tool in some other way violates the provisions of this section, and the employee or candidate was meaningfully harmed by the outcome of the employment decision. An employee or candidate shall within thirty days of being notified of the employment decision provide the employer with a written request for reevaluation. Such written request shall include:

(i) the person's name, the employment decision at issue, and how the person was harmed by the outcome of the employment decision;

(ii) why the person believes or suspects the employment decision was informed by an inaccurate, erroneous, or biased output, was the result

of an unlawful sole reliance on an automated employment decision tool, or otherwise violated the provisions of this section;

(iii) any evidence that may support the person's belief or suspicion; and

(iv) what reasonable remedial action the person would like the employer to take to investigate or remedy the believed or suspected harm, which may include providing the employee or candidate with outputs or documentation associated with the employment decision, providing the employee or candidate with documentation about the tool's most recent bias audit, or reprocessing the employee or candidate's data through the tool.

(b) An employer shall respond in writing to an employee or candidate's written request for reevaluation within sixty days of receipt of such request. Such written response shall include:

(i) any employment decision tool outputs regarding the person purporting to be harmed by the employment decision that were used in the making of the employment decision;

(ii) a description of the information other than the automated employment decision tool output that contributed to the employment decision;

(iii) whether the employer agrees with the employee or candidate's belief or suspicion that the decision was informed by an inaccurate, erroneous, or biased tool or output, that the tool was the unlawful sole basis for the decision, or that the employer otherwise violated the provisions of this section in its use of the tool, and why or why not;

(iv) if the employer disagrees with the employee or candidate's belief or suspicion, any evidence supporting the tool or output's accuracy and validity, the existence of meaningful human oversight, or the use of bases other than the tool in the making of the decision;

(v) if the employee or candidate requested the reprocessing of their data through the tool, the results or outputs of that reprocessing, and whether the results of the reprocessing have changed the employer's employment decision, and why or why not; and

(vi) if the employer refuses to take any reasonable remedial action requested by the employee or candidate, why they refuse to do so.

8. (a) If an employer fails to respond to an employee or candidate's request for reevaluation, or if the employee or candidate continues to have reason to believe they were harmed by the unlawful use of an inaccurate or biased automated employment decision tool or other violation of this section, the employee or candidate may initiate an action in a court of competent jurisdiction to enforce the provisions of this section. An employer that violates this section shall be liable for actual damages to any employee or candidate that has suffered damages due to such violation, reasonable attorneys' fees and costs, and, unless the employer proves a good faith basis to believe that its actions were in compliance with the law, one hundred percent of the total amount of actual damages, except such liquidated damages may be up to three hundred percent if found that the actions were willful.

(b) In any civil action claiming that an employer has violated this section in its use of electronic monitoring or automated employment decision tools, any person, employer, vendor, or other business entity that used, sold, distributed, or developed the tool shall be jointly and severally liable to a prevailing plaintiff for all damages awarded to that prevailing plaintiff, except that where a person, employer, vendor, or other business entity knowingly sells, provides, or distributes a tool to an employer with fewer than fifty employees, the vendor, not the small employer, shall be liable for any unlawful acts.

9. (a) Any person who violates any provision of this section or any rule promulgated pursuant to this section is liable for a civil penalty of not more than five hundred dollars for a first violation and each additional violation occurring on the same day as the first violation, and not less than five hundred dollars nor more than fifteen hundred dollars for each subsequent violation.

(b) Each day on which an electronic monitoring tool or automated employment decision tool is used in violation of this section shall give rise to a separate violation of this section.

(c) Failure to provide any notice to a candidate or an employee in violation of subdivision two or five of this section shall constitute a separate violation.

(d) A proceeding to recover any civil penalty authorized by this section is returnable to any tribunal established within any agency designated to conduct such proceedings, or, in a city of over one million in population, such hearing may be held by a hearing officer employed within the office of administrative trials and hearings.

10. The attorney general may initiate in a court of competent jurisdiction action that may be appropriate or necessary for correction of any violation of this section, including mandating compliance with the provisions of this section or such other relief as may be appropriate.

11. The provisions of this section shall not be construed as to limit the authority of the division of human rights to enforce the provisions of article fifteen of the executive law.

§ 2. (a) The department of labor shall promulgate any rules and regulations necessary to implement the provisions of this section.

(b) The department of labor shall within one hundred eighty days of this act becoming a law have established a means of collecting, storing, and making publicly available any bias audits or summaries of bias audits submitted by employers or vendors in the state. Such department shall promulgate rules and regulations by which employers, vendors, or employees may request the redaction of certain information from said bias audits or summaries thereof, if that information is proprietary, sensitive, or poses a threat to the privacy of employees or candidates.

§ 3. Section 52-c of the civil rights law, as added by chapter 583 of the laws of 2021, is renumbered section 52-e and is amended to read as follows:

§ 52-e. Employers engaged in electronic monitoring; prior notice required. 1. For purposes of this section, employer means any individual, corporation, partnership, firm, or association with a place of business in the state. It shall not include the state or any political subdivision of the state.

2. (a) Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems, shall give prior written notice upon hiring to all employees who are subject to electronic monitoring. The notice required by this subdivision shall be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically. Each employer shall also post the notice of electronic monitoring in a conspicuous place which is readily available for viewing by its employees who are subject to electronic monitoring. Such written notice shall comply with the requirements of subdivision two of section two hundred three-g of the labor law.

(b) For purposes of written notice required by paragraph (a) of this subdivision, an employee shall be advised that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.

3. The attorney general may enforce the provisions of this section. Any employer found to be in violation of this section shall be subject to a maximum civil penalty of five hundred dollars for the first offense, one thousand dollars for the second offense and three thousand dollars for the third and each subsequent offense.

4. The provisions of this section shall not apply to processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, that are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, and that are performed solely for the purpose of computer system maintenance and/or protection.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law.

11

U.S. Equal Employment Opportunity Commission

Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:	EEOC-NVTA-2023-2
Concise Display Name:	Title VII and AI: Assessing Adverse Impact
Issue Date:	05-18-2023
General Topics:	Title VII, Adverse Impact, Employment Selection Procedures, Technology
Summary:	This technical assistance document discusses how existing Title VII requirements may apply to assessment of

	adverse impact in employment selection tools that use artificial intelligence (AI).
Citation:	Title VII, 29 CFR Part 1607
Document Applicant:	Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff
Previous Revision:	No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of algorithmic decision-making tools available to assist them in making employment decisions, including recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, dismissal, and referral. Employers increasingly utilize these tools in an attempt to save time and effort, increase objectivity, optimize employee performance, or decrease bias.

Many employers routinely monitor their more traditional decision-making procedures to determine whether these procedures cause disproportionately large negative effects on the basis of race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964 ("Title VII").[1] Employers may have questions about whether and how to monitor the newer algorithmic decision-making tools. The Questions and Answers in this document address this and several closely related issues.

Title VII applies to all employment practices of covered employers, including recruitment, monitoring, transfer, and evaluation of employees, among others. However, the scope of this document is limited to the assessment of whether an employer's "selection procedures"—the procedures it uses to make employment decisions such as hiring, promotion, and firing—have a disproportionately large negative effect on a basis that is prohibited by Title VII. As discussed below, this is often referred to as "disparate impact" or "adverse impact" under Title VII. This document does not address other stages of the Title VII disparate impact analysis, such as whether a tool is a valid measure of important job-related traits or

characteristics. The document also does not address Title VII's prohibitions against intentional discrimination (called "disparate treatment") or the protections against discrimination afforded by other federal employment discrimination statutes.

The Equal Employment Opportunity Commission ("EEOC" or "Commission") enforces and provides leadership and guidance on the federal equal employment opportunity ("EEO") laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (40 or older) and genetic information. This publication is part of the EEOC's ongoing effort to help ensure that the use of new technologies complies with federal EEO law by educating employers, employees, and other stakeholders about the application of these laws to the use of software and automated systems in employment decisions.[2] For related content regarding the Americans with Disabilities Act, see **The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees. (https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence)**

Background

As a starting point, this section explains the meaning of central terms used in this document—"software," "algorithm," and "artificial intelligence" ("AI")—and how, when used in a workplace, they relate to each other and to basic Title VII principles.

Central Terms Regarding Automated Systems and AI

- Software: Broadly, "**software (https://www.access-board.gov/ict/#E103-definitions)**" refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function. "Application software" (also known as an "application" or "app") is a type of software designed to perform or to help the user perform a specific task or tasks. The United States Access Board is the source of these definitions.

  Many different types of software and applications are used in employment, including automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.

- Algorithm: Generally, an "algorithm" is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools are used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

- Artificial Intelligence ("AI"): Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. While the public usage of this term is evolving, Congress defined "AI" to mean a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." **National Artificial Intelligence Initiative Act of 2020 at section 5002(3) (https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210)**. In the employment context, using AI has typically meant that the developer relies partly on the computer's own analysis of data to determine which criteria to use when making decisions. AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, _____ _____ **(https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf)**.

Employers sometimes rely on different types of software that incorporate algorithmic decision-making at a number of stages of the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test. Each of these types of software might include AI. In the

remainder of this document, we use the term "algorithmic decision-making tool" broadly to refer to all these kinds of systems.

Title VII

Title VII generally prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), or national origin.

- Title VII generally prohibits intentional discrimination, or "disparate treatment" in employment, including employment tests that are "designed, intended or used to discriminate because of race, color, religion, sex or national origin."[3] Disparate treatment is not the focus of this technical assistance.
- Title VII also generally prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not "job related for the position in question and consistent with business necessity."[4] This is called **"disparate impact"** or **"adverse impact"** discrimination. Disparate impact cases typically involve the following questions:[5]
    - Does the employer use a particular employment practice that has a disparate impact on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? **This issue is the focus of this technical assistance.**
    - If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection procedure is job-related and consistent with business necessity? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The selection procedure should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the selection procedure must evaluate an individual's skills as related to the particular job in question.
    - If the employer shows that the selection procedure is job-related and consistent with business necessity, is there a less discriminatory

alternative available? For example, is another test available that would be comparably as effective in predicting job performance but would not disproportionately exclude people on the basis of their race, color, religion, sex, or national origin?

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures ("*Guidelines*") under Title VII.[6] These *Guidelines* provide guidance from the EEOC for employers about how to determine if their tests and selection procedures are lawful for purposes of Title VII disparate impact analysis.[7]

Questions and Answers

1. Could an employer's use of an algorithmic decision-making tool be a "selection procedure"?

Under the *Guidelines*, a "selection procedure" is any "measure, combination of measures, or procedure" if it is used as a basis for an employment decision.[8] As a result, the *Guidelines* would apply to algorithmic decision-making tools when they are used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees.

2. Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?

As the *Guidelines* explain, employers can assess whether a selection procedure has an adverse impact on a particular protected group by checking whether use of the procedure causes a selection rate for individuals in the group that is "substantially" less than the selection rate for individuals in another group.[9]

If use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics (e.g., a combination of race and sex, such as for applicants who are Asian women), then use of the tool will violate Title VII unless the employer can show that such use is "job related and consistent with business necessity" pursuant to Title VII.[10]

3. Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a selection procedure, it may be responsible under Title VII if the procedure discriminates on a basis prohibited by Title VII, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.[11] This may include situations where an employer relies on the results of a selection procedure that an agent administers on its behalf.

Therefore, employers that are deciding whether to rely on a software vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor, at a minimum, whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII. If the vendor states that the tool should be expected to result in a substantially lower selection rate for individuals of a particular race, color, religion, sex, or national origin, then the employer should consider whether use of the tool is job related and consistent with business necessity and whether there are alternatives that may meet the employer's needs and have less of a disparate impact. (See Question 7 for more information.) Further, if the vendor is incorrect about its own assessment and the tool does result in either disparate impact discrimination or disparate treatment discrimination, the employer could still be liable.

4. What is a "selection rate"?

"Selection rate" refers to the proportion of applicants or candidates who are hired, promoted, or otherwise selected.[12] The selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group.[13] For example, suppose that 80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application, and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%), and the selection rate for Blacks is 12/40 (equivalent to 30%).

5. What is the "four-fifths rule"?

The four-fifths rule, referenced in the *Guidelines*, is a general rule of thumb for determining whether the selection rate for one group is "substantially" different than the selection rate of another group. The rule states that one rate is substantially different than another if their ratio is less than four-fifths (or 80%).[14]

In the example above involving a personality test scored by an algorithm, the selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants.

6. Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?

The four-fifths rule is merely a rule of thumb.[15] As noted in the *Guidelines* themselves, the four-fifths rule may be inappropriate under certain circumstances. For example, smaller differences in selection rates may indicate adverse impact where a procedure is used to make a large number of selections,[16] or where an employer's actions have discouraged individuals from applying disproportionately on grounds of a Title VII-protected characteristic.[17] The four-fifths rule is a "practical and easy-to-administer" test that may be used to draw an initial inference that the selection rates for two groups may be substantially different, and to prompt employers to acquire additional information about the procedure in question.[18]

Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance.[19] As a result, the EEOC might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination.[20] (A "charge of discrimination" is a signed statement asserting that an employer, union, or labor organization is engaged in employment discrimination. It requests EEOC to take remedial action. For more information about filing charges of discrimination with

the EEOC, visit the EEOC's website (**https://www.eeoc.gov/ (https://www.eeoc.gov/)**.)

For these reasons, employers that are deciding whether to rely on a vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor specifically whether it relied on the four-fifths rule of thumb when determining whether use of the tool might have an adverse impact on the basis of a characteristic protected by Title VII, or whether it relied on a standard such as statistical significance that is often used by courts.

7. If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that impact?

Generally, if an employer is in the process of developing a selection tool and discovers that use of the tool would have an adverse impact on individuals of a particular sex, race, or other group protected by Title VII, it can take steps to reduce the impact or select a different tool in order to avoid engaging in a practice that violates Title VII. One advantage of algorithmic decision-making tools is that the process of developing the tool may itself produce a variety of comparably effective alternative algorithms. Failure to adopt a less discriminatory algorithm that was considered during the development process therefore may give rise to liability.[21]

The EEOC encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently. Generally, employers can proactively change the practice going forward.[22]

Individuals who believe that they have been discriminated against at work because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information may file a **Charge of Discrimination (https://www.eeoc.gov/filing-charge-discrimination)** with the EEOC.

There are strict time limits for filing a charge; to learn more about those see: **Time Limits For Filing A Charge (https://www.eeoc.gov/time-limits-filing-charge)**.

Charges may be filed through EEOC's Online Public Portal at **https://publicportal.eeoc.gov (https://publicportal.eeoc.gov)**. For additional information on charge filing, visit the EEOC's website (**https://www.eeoc.gov (https://www.eeoc.gov)**) or a local EEOC office (see **https://www.eeoc.gov/field-office (https://www.eeoc.gov/field-office)** for contact information), or contact the EEOC by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

The information in this document is not new policy; rather, this document applies principles already established in the Title VII statutory provisions as well as previously issued guidance. **The contents of this publication do not have the force and effect of law and are not meant to bind the public in any way. This publication is intended only to provide clarity to the public regarding existing requirements under the law.** As with any charge of discrimination filed with the EEOC, the Commission will evaluate alleged Title VII violations involving the use of software, algorithms, artificial intelligence, and algorithmic decision-making tools based on all of the facts and circumstances of the particular matter and applicable legal principles.

[1] 42 U.S.C. § 2000e-2(k)(1)(A)(1). Title VII is found at §§ 2000e–2000e-17.

[2] The EEOC website provides additional resources and information on this subject. *See generally Artificial Intelligence and Algorithmic Fairness Initiative*, Equal Emp't Opportunity Comm'n, **https://www.eeoc.gov/ai (https://www.eeoc.gov/ai)** (last visited April 13, 2023); *see also Meeting of January 31, 2023—Navigating Employment Discrimination In AI and Automated Systems: A New Civil Rights Frontier*, Equal Emp't Opportunity Comm'n, **https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new (https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new)** (last visited April 13, 2023). The Commission invited written comments from the public for 15 days after the meeting. The comments were made available to members of the Commission and to Commission staff working on the matters discussed at the meeting, including comments from industry groups, vendors, and civil rights groups, among others.

[3] 42 U.S.C. § 2000e-2(h) (discussing professionally developed tests); *see also* §2000e-2(a) (generally prohibiting discrimination on the basis of race, color, national origin, sex or religion by covered employers), (c) (same, with respect to labor organizations), (d) (same, with respect to training programs).

[4] *Id.* at § 2000e-2(a)(2), (k).

[5] *See* 42 U.S.C. § 2000e-2(k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[6] *See* 29 C.F.R. part 1607. The Guidelines were adopted simultaneously by other federal agencies under their authorities. *See* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290 (Aug. 25, 1978) (adopted by the Office of Federal Contract Compliance Programs at 41 C.F.R. part 60-3, by the Civil Service Commission at 5 C.F.R. § 300.103(c), and by the Department of Justice at 28 C.F.R. § 50.14).

[7] The *Guidelines* use the term "adverse impact"; other sources use "disparate impact." This document uses the terms "adverse impact" and "disparate impact" interchangeably.

[8] *See* 29 C.F.R. § 1607.16(Q).

[9] 29 C.F.R. § 1607.16(B).

[10] 42 U.S.C. § 2000e-2(k)(1); 29 C.F.R. § 1607.3(A).

[11] EEOC, Compliance Manual Section 2 Threshold Issues § 2-III.B.2 (May 12, 2000), **https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2 (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)**.

[12] 29 C.F.R. § 1607.16(R).

[13] *See* EEOC, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, Q&A 12 (Mar. 1, 1979) [hereinafter Questions and Answers], **https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines (https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines)**.

[14] 29 C.F.R. §§ 1607.4(D), 1607.16(B).

[15] *See* 29 C.F.R. § 1607.4(D); *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,291 (Aug. 25, 1978) (referring to the four-fifths rule as a "rule of thumb"); *id.* at 38,291 (explaining why the four-fifths rule was adopted as a "rule of thumb"); Questions and Answers, *supra* note 13, at Q&A 20 (answering the question of why the four-fifths rule is called a "rule of thumb").

[16] Questions and Answers, *supra* note 13, at Q&A 22; *see also* 29 C.F.R. § 1607.4(D).

[17] 29 C.F.R. § 1607.4(D); *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 ("[A]n employer's reputation may have discouraged or 'chilled' applicants of particular groups from applying because they believed application would be futile. The application of the '4/5ths' rule in that situation would allow an employer to evade scrutiny because of its own discrimination.")

[18] Questions and Answers, *supra* note 13, at Q&A 19, 24; *see also* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 ("[The four-fifths rule] is not a legal definition of discrimination.").

[19] *See, e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 412 (6th Cir. 2005) (rejecting the argument that "a test's compliance with the four fifths rule definitively establishes the absence of adverse impact."); *Jones v. City of Boston*, 752 F.3d 38, 46–54 (1st Cir. 2014) (rejecting the use of the four-fifths rule to evaluate a test with a large sample size); *Howe v. City of Akron*, 801 F.3d 718, 743 (6th Cir. 2015) ("[The Sixth Circuit] ha[s] used the four-fifths rule as the starting point to determine whether plaintiffs alleging disparate impact have met their prima facie burden, although we have used other statistical tests as well."); Questions and Answers, *supra* note 13, at Q&A 20, 22.

[20] Although the *Guidelines* state that federal agencies will consider whether a selection procedure meets the four-fifths rule when determining whether to take an "enforcement action," the *Guidelines* specifically exempt findings of reasonable cause, conciliation processes, and the issuance of right to sue letters from the definition of "enforcement action," where such findings, conciliation processes, and issuances are based on individual charges of discrimination filed under Title VII. 29 C.F.R. § 1607.16(I). The *Guidelines* thus do not require the Commission to base a determination of discrimination on the four-fifths rule when resolving a charge.

[21] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[22] *See* EEOC, Employment Tests and Selection Procedures (Dec. 1, 2007), **https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures (https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures)**; EEOC, Compliance Manual Section 15 Race and Color Discrimination § IX (Apr. 19, 2006), **https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination (https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination)**. Employers should also be aware of how the disparate impact and disparate treatment portions of Title VII may interact. *See Ricci v. DeStefano*, 557 U.S. 577 (2009).

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Instructions for Form I-9, Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 07/31/2026

Anti-Discrimination Notice: Employers must allow all employees to choose which acceptable documentation to present for Form I-9. Employers cannot ask employees for documentation to verify information entered in **Section 1**, or specify which acceptable documentation employees must present for **Section 2** or **Supplement B, Reverification and Rehire**. Employees do NOT need to prove their citizenship, immigration status, or national origin when establishing their employment authorization for Form I-9 or E-Verify. Requesting such proof or any specific document from employees based on their citizenship, immigration status, or national origin, may be illegal. Similarly, discriminating against employees in hiring, firing, recruitment, or referral for a fee, based on citizenship, immigration status, or national origin may be illegal. Employers should not reject acceptable documentation due to a future expiration date. For more information on how to avoid discrimination or how to report it, contact the Immigrant and Employee Rights Section in the Department of Justice's Civil Rights Division at **www.justice.gov/ier**.

Purpose of Form I-9

Employers and employees must complete their respective sections of Form I-9. The form is used to document verification of the identity and employment authorization of each new employee (both U.S. citizen and noncitizen) hired after November 6, 1986, to work in the United States. In the Commonwealth of the Northern Mariana Islands (CNMI), employers must complete Form I-9 to document the verification of the identity and employment authorization of each new employee (both U.S. citizen and noncitizen) hired after November 27, 2011.

Definitions

Employee: A person who performs labor or services in the United States for an employer in return for wages or other remuneration. The term "employee" does not include individuals who do not receive any form of remuneration (e.g., volunteers), independent contractors, or those engaged in certain casual domestic employment.

Employer: A person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. This includes recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors.

Authorized Representative: Any person an employer designates to complete and sign Form I-9 on the employer's behalf. Employers are liable for any statutory and regulatory violations made in connection with the form or the verification process, including any violations committed by any individual designated to act on the employer's behalf.

Preparer and/or Translator: Any individual who helps the employee complete or translates **Section 1** for the employee.

General Instructions

Form I-9 consists of:

- **Section 1**: Employee Information and Attestation
- **Section 2**: Employer Review and Verification
- Lists of Acceptable Documents
- Supplement A, Preparer and/or Translator Certification for Section 1
- Supplement B, Reverification and Rehire (formerly Section 3)

EMPLOYEES

Employees must complete and sign **Section 1** of Form I-9 no later than the first day of employment (i.e., the date the employee begins performing labor or services in the United States in return for wages or other remuneration). Employees may complete **Section 1** before the first day of employment, but cannot complete the form before acceptance of an offer of employment.

EMPLOYERS

Employers in the United States, except Puerto Rico, must complete the English-language version of Form I-9. Only employers located in Puerto Rico may complete the Spanish-language version of Form I-9 instead of the English-language version. Any employer may use the Spanish-language form and instructions as a translation tool.

All employers must:

- Make the instructions for Form I-9 and Lists of Acceptable Documents available to the employee when completing the Form I-9 and when requesting that the employee present documentation to complete Supplement B, Reverification and Rehire. See page 5 for more information.
- Ensure that the employee completes **Section 1**.
- Complete **Section 2** within three business days after the employee's first day of employment. If you hire an individual for less than three business days, complete **Section 2** no later than the first day of employment.
- Complete Supplement B, Reverification and Rehire when applicable.
- Leave a field blank if it does not apply and allow employees to leave fields blank in **Section 1**, where appropriate.
- Retain completed forms. You are not required to retain or store the page(s) containing the Lists of Acceptable Documents or the instructions for Form I-9. Do not mail completed forms to U.S. Citizenship and Immigration Services (USCIS) or Immigration and Customs Enforcement (ICE).

Additional guidance about how to complete Form I-9 may be found in the **Handbook for Employers: Guidance for Completing Form I-9 (M-274) and on I-9 Central.**

Section 1: Employee Information and Attestation

Step 1: Employee completes Section 1 no later than the first day of employment.

- All employees must provide their current legal name, complete address, and date of birth. If other fields do not apply, leave them blank.
- When completing the name fields, enter your current legal name and any last names you previously used, including any hyphens or punctuation. If you only have one name, enter it in the Last Name field and then enter "Unknown" in the First Name field.
- Providing your 9-digit Social Security number in the Social Security number field is voluntary, unless your employer participates in E-Verify. See page 5 for instructions related to E-Verify. Do not enter an Individual Taxpayer Identification Number (ITIN) as your Social Security number.

Step 2: Attest to your citizenship or immigration status.

You must select one box to attest to your citizenship or immigration status.

1. **A citizen of the United States.**
2. **A noncitizen national of the United States:** An individual born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.
3. **A lawful permanent resident:** An individual who is not a U.S. citizen and who resides in the United States under legally recognized and lawfully recorded permanent residence as an immigrant.

   Conditional residents should select this status. Asylees and refugees should NOT select this status; they should instead select "A noncitizen authorized to work." If you select "lawful permanent resident," enter your 7- to 9-digit USCIS Number (A-Number) in the space provided.

4. **A noncitizen (other than Item Numbers 2. and 3. above) authorized to work:** An individual who has authorization to work but is not a U.S. citizen, noncitizen national, or lawful permanent resident.

   If you select this box, enter the date that your employment authorization expires, if any, in the space provided. In most cases, your employment authorization expiration date is found on the documentation evidencing your employment authorization. If your employment authorization documentation has been automatically extended by the issuing authority, enter the expiration date of the automatic extension in this space.

   - Refugees, asylees, and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau, and other noncitizens authorized to work whose employment authorization does not have an expiration date, should enter N/A in the Expiration Date field.

   Employees who select "a noncitizen authorized to work" must enter **one** of the following to complete **Section 1**:

   (1) USCIS Number/A-Number (7 to 9 digits);

   (2) Form I-94 Admission Number (11 digits); or

   (3) Foreign Passport Number and the Country of Issuance

   Your employer may not ask for documentation to verify the information you entered in **Section 1**.

Step 3: Sign and enter the date you signed Section 1. Do NOT back-date this field.

Step 4: Preparer and/or translator completes a Preparer and/or Translator Certification, if applicable.

If a preparer and/or translator assists an employee in completing Section 1, that person must complete a Certification area on Supplement A, Preparer and/or Translator Certification for Section 1, located on Page 3 of Form I-9. There is no limit to the number of preparers and/or translators an employee may use. Each preparer and/or translator must complete and sign a separate Certification area. Employers must ensure that they retain any additional pages with the employee's completed Form I-9. If the employee does not use a preparer or translator, employers are not required to provide or retain Supplement A.

Step 5: Present Form I-9 Documentation

Within three business days after your first day of employment, you, the employee, must present to your employer original, acceptable, and unexpired documentation that establishes your identity and employment authorization. For example, if you begin employment on Monday, you must present documentation on or before the Thursday of that week. However, if you were hired to work for less than three business days, you must present documentation no later than the first day of employment.

Choose which documentation to present to your employer from the Lists of Acceptable Documents. An employer cannot specify which documentation you may present from the Lists of Acceptable Documents. You may present either: 1.) one selection from List A or 2.) a combination of one selection from List B and one selection from List C. In certain cases, you may also present an acceptable receipt for List A, B, or C documents. For more information on receipts, refer to the M-274.

- List A documentations show both identity and employment authorization. Some documentation must be presented together to be considered acceptable List A documentation. If you present acceptable List A documentation, you should not be asked to present List B and List C documentation.

- List B documentation shows identity only and List C documentation shows employment authorization only. If you present acceptable List B and List C documentation, you should not be asked to present List A documentation. Guidance is available in the M-274 if you are under the age of 18 or have a disability (special placement) and cannot provide List B documentation.

Your employer must physically examine the documentation you present to complete Form I-9, or examine them consistent with an alternative procedure authorized by the Secretary of DHS. If your documentation reasonably appears to be genuine and to relate to you, your employer must accept the documentation. If your documentation does not reasonably appear to be genuine or to relate to you, your employer must reject it and provide you with an opportunity to present other documentation. Your employer may choose to make copies of your documentation, but must return the original(s) to you. Your employer may not ask for documentation to verify the information you entered in **Section 1**.

Section 2: Employer Review and Verification

Before completing **Section 2**, you, the employer, should review **Section 1**. If you find any errors or missing information in **Section 1.**, the employee must correct the error, and then initial and date the correction.

You may designate an authorized representative to act on your behalf to complete **Section 2**.

You or your authorized representative must complete **Section 2** by physically examining evidence of the employee's identity and employment authorization within three business days after the employee's first day of employment. For example, if an employee begins employment on Monday, you must review the employee's documentation and complete **Section 2** on or before the Thursday of that week. However, if the individual will work for less than three business days, **Section 2** must be completed no later than the first day of employment.

Step 1: Enter information from the documentation the employee presents.

You, the employer or authorized representative, must either physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, the original, acceptable, and unexpired documentation the employee presents from the Lists of Acceptable Documents to complete the applicable document fields in **Section 2**. You cannot specify which documentation an employee may present from these Lists of Acceptable Documents. A document is acceptable if it reasonably appears to be genuine and to relate to the person presenting it. Photocopies, except for certified copies of birth certificates, are not acceptable for Form I-9. Employees must present one selection from List A or a combination of one selection from List B and one selection from List C.

You may use common abbreviations for states, document titles, or issuing authorities, such as: "DL" for driver's license, and "SSA" for Social Security Administration. Refer to the M-274 for abbreviation suggestions.

List A documentation shows both identity and employment authorization.

- Enter the required information from the List A documentation in the first set of document entry fields in the List A column. Some List A documentation consists of a combination of documents that must be presented together to be considered acceptable List A documentation. If the employee presents a combination of documents for List A, use the second and third sets of document entry fields in the List A column. Use the Additional Information space, as necessary, for additional documents. When entering document information in this space, ensure you record all available document information, such as the document title, issuing authority, document number and expiration date.
- If an employee presents acceptable List A documentation, do not ask the employee to present List B and List C documentation.

List B documentation shows identity only, and List C documentation shows employment authorization only.

- If an employee presents acceptable List B and List C documentation, enter the required information from the documentation under each corresponding column and do not ask the employee to present List A documentation.
- If an employee under the age of 18 or with disabilities (special placement) cannot provide List B documentation, see the M-274 for guidance.

In certain cases, the employee may present an acceptable receipt for List A, B, or C documentation. For more information on receipts, refer to the Lists of Acceptable Documents and the M-274.

Photocopies

- You may make photocopies of the documentation examined but must return the original documentation to the employee.
- You must retain any photocopies you make with Form I-9 in case of an inspection by DHS, the Department of Labor, or the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

Step 2: Enter additional information, if necessary.

Use the Additional Information field to record any additional information required to complete **Section 2**, or any updates that are necessary once **Section 2** is complete. Initial and date each additional notation. See the M-274 for more information. Such notations include, but are not limited to:

- Those required by DHS, such as extensions of employment authorization or a document's expiration date.
- Replacement document information if a receipt was previously presented.
- Additional documentation that may be presented by certain nonimmigrant employees.

You may also enter optional information, such as termination dates, form retention dates, and E-Verify case numbers, if applicable.

Step 3: Select the box in the Additional Information area if you used an alternate procedure for document examination authorized by the Secretary of DHS.

You must select this box if you used an alternative procedure authorized by DHS to examine the documents. You may refer to the M-274 for guidance on implementing alternative procedures for document examination approved by the Secretary of DHS.

Step 4: Complete the employer certification.

Employers or their authorized representatives, if applicable, must complete all applicable fields in this area, and sign and date where indicated.

Reverification and Rehire

To reverify an employee's work authorization or document an employee's rehire, use Supplement B, Reverification and Rehire (formerly Section 3). Employers need only complete and retain the supplement page when employment authorization reverification is required. Employers may choose to document a rehire on the supplement as well. Enter the employee's name at the top of each supplement page you use. In the New Name field, record any change the employee reports at the time of reverification or rehire. Use a new section of the supplement for each instance of a reverification or rehire, sign and date that section when completed, and attach it to the employee's completed Form I-9. Use additional supplement pages as necessary. Use the Additional Information fields if the employee's documentation presented for reverification requires future updates.

Reverifications

When reverification is required, you must reverify the employee by the earlier of the employment authorization expiration date stated in Section 1 (if any), or the expiration date of the List A or List C employment authorization documentation recorded in Section 2. Employers should complete any subsequent reverifications, if required, by the expiration date of the List A or List C documentation entered during the employee's most recent reverification.

For reverification, employees must present acceptable documentation from either List A or List C showing their continuing authorization to work in the United States. You must allow employees to choose which acceptable documentation to present for reverification. Employees are not required to show the same type of document they presented previously. Enter the documentation information in the appropriate fields provided.

You should not reverify the employment authorization of U.S. citizens and noncitizen nationals, or lawful permanent residents (including conditional residents) who presented a Permanent Resident Card (Form I-551) or other employment authorization documentation that is not subject to reverification (such as an unrestricted Social Security card). Reverification does not apply to List B documentation. Reverification may not apply to certain noncitizens. See the M-274 for more information about when reverification may not be required.

Rehires

If you rehire an employee within three years from the date the employee's Form I-9 was first completed, you may complete the supplement and attach it to the employee's previously completed Form I-9. If the employee remains employment-authorized, as indicated on the previously completed Form I-9, record the date of rehire and any name changes. If the employee's employment authorization or List A or C documents have expired, you must reverify the employee as described above.

Alternatively, you may complete a new Form I-9 for rehired employees. You must complete a new Form I-9 for any employee you rehired more than three years after you originally completed a Form I-9 for that employee.

Employee and Employer Instructions Related E-Verify

E-Verify uses Form I-9 information to confirm employees' employment eligibility. For more information, go to **www.e-verify.gov** or contact us at **www.e-verify.gov/contact-us**.

For employees of employers who participate in E-Verify:

- You must provide your Social Security number in the Social Security number field in **Section 1**.
  - If you have applied for, but have not yet received, your Social Security number, you should leave the field blank until you receive the number. Update this field once you receive it, and initial and date the notation.
  - If you can present acceptable identity and employment authorization documentation to complete Form I-9, you may begin working while waiting to receive your Social Security number.
- Providing your email address and telephone number in **Section 1** will allow you to receive notifications associated with your E-Verify case.
- If you present a List B document to your employer, it must contain a photograph.

For E-Verify employers:

- Ensure employees enter their Social Security number in **Section 1**.
- You must only accept List B documentation that contains a photograph. This applies to individuals under the age of 18 and individuals with disabilities.
- You must retain photocopies of certain documentation.

What is the Filing Fee?

There is no fee for completing Form I-9. This form is not filed with USCIS or any other government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the "**DHS Privacy Notice**" below.

USCIS Forms and Information

Employers may photocopy or print blank Forms I-9. To ensure you are using the latest version of this form and corresponding instructions, visit the USCIS website at **www.uscis.gov/i-9**. You may order paper forms at **www.uscis.gov/forms/forms-by-mail** or by contacting the USCIS Contact Center at **1-800-375-5283** or **1-800-767-1833** (TTY).

For additional guidance about Form I-9, employers and employees should refer to the **Handbook for Employers: Guidance for Completing Form I-9 (M-274)** or USCIS' Form I-9 website at **www.uscis.gov/i-9-central**.

You can obtain information about Form I-9 by e-mailing USCIS at **I-9Central@uscis.dhs.gov**. Employers may call **1-888-464-4218** or **1-877-875-6028** (TTY). Employees may call the USCIS employee hotline at **1-888-897-7781** or **1-877-875-6028** (TTY).

Retaining Completed Forms I-9

An employer must retain Form I-9, including any supplement pages, on which the employee and employer (or authorized representative) entered data, as well as any photocopies made of the documentation the employee presented, for as long as the employee works for the employer. When employment ends, the employer must retain the individual's Form I-9 and all attachments for one year from the date employment ends, or three years after the first day of employment, whichever is later. In the case of recruiters or referrers for a fee (only applicable to those that are agricultural associations, agricultural employers, or farm labor contractors), the retention period is three years after the first day of employment.

Completed Forms I-9 and all accompanying documents should be stored in a safe and secure location. Employers should ensure that the information employees provide on Form I-9 is used only as stated in the DHS Privacy Notice below.

Form I-9 may be generated, signed, and retained electronically, in compliance with Department of Homeland Security regulations at 8 CFR section 274a.2. Employers creating, modifying, or storing Form I-9 electronically are encouraged to review these and any other relevant standards for electronic signature, and the indexing, security, and documentation of electronic Form I-9 data.

Penalties

Employers may be subject to penalties if Form I-9 is not properly completed or for employment discrimination occurring during the employment eligibility verification process. See 8 U.S.C. section 1324a and section 1324b, 8 CFR section 274a.10 and 28 CFR Part 44. Individuals may also be prosecuted for knowingly and willfully entering false information, or for presenting fraudulent documentation, to complete Form I-9.

Employees: By signing **Section 1** of this form, employees attest under penalty of perjury (28 U.S.C. section 1746) that the information they provided, along with the citizenship or immigration status they select, and all information and documentation they provide to their employer, is true and correct, and they are aware that they may face penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or using false documentation when completing this form. Further, falsely attesting to U.S. citizenship may subject employees to penalties or removal proceedings, and may adversely affect an employee's ability to seek future immigration benefits.

Employers: By signing **Sections 2** and **3**, as applicable, employers attest under penalty of perjury (28 U.S.C. section 1746) that they have physically examined the documentation presented by the employee, that the documentation reasonably appears to be genuine and to relate to the employee named, that to the best of their knowledge the employee is authorized to work in the United States, that the information they enter in **Section 2** is complete, true, and correct to the best of their knowledge, and that they are aware that they may face civil or criminal penalties provided by law and may be subject to criminal prosecution for knowingly and willfully making false statements or knowingly accepting false documentation when completing Form I-9.

DHS Privacy Notice

AUTHORITIES: The information requested on this form, and the associated documents, are collected under the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 U.S.C. 1324a).

PURPOSE: The primary purpose for providing the requested information on this form is for employers to verify the identity and employment authorization of their employees. Consistent with the requirements of the Immigration Reform and Control Act of 1986, employers use the Form I-9 to document the verification of the identity and employment authorization for new employees to prevent the unlawful hiring, or recruiting or referring for a fee, of individuals who are not authorized to work in the United States. This form is completed by both the employer and the employee and is ultimately retained by the employer.

DISCLOSURE: The information employees provide is voluntary. However, failure to provide the requested information, and acceptable documentation evidencing identity and authorization to work in the United States, may result in termination of employment. Failure of the employer to ensure proper completion of this form may result in the imposition of civil or criminal penalties against the employer. In addition, knowingly employing individuals who are not authorized to work in the United States may subject the employer to civil and/or criminal penalties.

ROUTINE USES: This information will be used by employers as a record of their basis for determining eligibility of an individual to work in the United States. The employer must retain this completed form and make it available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section. DHS may also share this information, as appropriate, for law enforcement purposes or in the interest of national security.