

2023-2024

EMPLOYMENT LAW UPDATE

10<sup>th</sup> Annual FSA Compliance and Risk Management Conference | October 3, 2023

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ROADMAP OF PRESENTATION

Workplace Protections

Wage and Hour Update

FMLA Update

NLRB Update

Speak Out Act

Non-Compete Agreements

Religious Accommodation


Military Leave


Form I-9 Update

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Effective  
June 27, 2023



**PREGNANT WORKERS FAIRNESS ACT (PWFA)**

Employers with **15** or more employees must provide reasonable accommodations for employees with **known limitations** related to pregnancy, childbirth or related medical condition

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## PWFA

### What's Changed For Employers?

#### ADA

Employers must provide reasonable accommodations when pregnancy, childbirth or related medical condition resulted in a **disability**

Gestational Diabetes

Carpal Tunnel Syndrome

Preeclampsia

Depression

#### PWFA

Employers must provide reasonable accommodations for pregnancy, childbirth or related medical condition even if the employee **is not "disabled"** under the ADA

Morning Sickness

Increased Urination

Inability to Stand All Day

Exposure to Chemicals

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## PWFA

### What's Changed For Employers?

#### ADA

Employers must accommodate qualified employees – employees who, with or without reasonable accommodation, **can perform** the **essential functions** of the position

#### PWFA

Employees are qualified even if they **cannot perform** one or more **essential functions** of the position, if:

1

The inability to perform an essential function is **temporary**

2

The essential function could be performed **in the near future**  
(EEOC Proposed Regs: Generally 40 weeks)

3


The inability to perform the essential function can be **reasonably accommodated**

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## PWFA


### Examples of Reasonable Accommodations




Being able to sit or drink water




Working remotely




Receiving closer parking



Receiving additional restroom breaks




Schedule changes, flexible work hours



Leave or time off to recover from childbirth



Appropriately sized uniforms




Temporarily suspending one or more essential functions

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## PWFA/ADA


### Interactive Process




Employee requests an accommodation




Document the request and make follow-up inquiries<sup>\*</sup>



Evaluate the request and supporting documentation



Respond to the employee and document the response



Periodically check in with the employee

#### Proposed Regs

Employer may only request supporting documentation if it is **reasonable** - must describe or confirm:

1. The physical or mental condition;
2. The condition is related to, affected by, or arises out of pregnancy, childbirth or related medical conditions; and
3. A change or adjustment at work is needed for that reason


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## PWFA


### Prohibitions (EEOC Proposed Regulations)




Denying an accommodation, absent undue hardship




Requiring leave if another effective accommodation exists




Failure to engage in the interactive process



Taking adverse employment action based on a request for, or use of, an accommodation




Denying employment opportunities based on the need for an accommodation




Retaliation, coercion, intimidation, threats, or interference with PWFA rights

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## ACTION ITEMS




Submit comments to EEOC by Oct. 10: <https://www.regulations.gov/>




Update Accommodation Policy to include PWFA requirements



Implement or modify interactive process documents



Train managers and supervisors on PWFA requirements and prohibitions, and their role in interactive process



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Effective  
Dec. 29, 2022




### PROVIDING URGENT MATERNAL PROTECTIONS (PUMP) ACT

FLSA-covered employers\* must provide reasonable **break time** and a **private place** (other than a bathroom) for employees to express milk for **one year** after a child's birth




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BREAK  
TIME


### PUMP ACT




Frequency and duration depends on the nursing employee and child




Includes time to get to location of space, set up pump, and clean parts




Employer cannot mandate any kind of schedule



Remote workers are also entitled to break times



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## PUMP ACT




Breaks are unpaid **unless**-


- The employee is **not** completely relieved of duty
- Other **paid breaks** are provided
- The employee is a **salaried** employee (FLSA pay docking rules apply)

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## ACTION ITEMS

-  Update Employee Handbook to include PUMP policy and address paid vs. unpaid breaks
-  Assess and identify potential pump location
-  Train managers and supervisors on PUMP requirements and prohibitions



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FLSA

### PROPOSED INCREASE IN SALARY BASIS


August 30: DOL issued Notice of Proposed Rulemaking to increase Salary Basis threshold for exempt employees

White Collar Exemptions: \$35,568 + Duties Test	<b>\$55,068</b> + Duties Test
Highly Compensated Employees: \$107,432	<b>\$143,988</b>

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FLSA



### AUTOMATIC UPDATES

DOL proposing automatic update to salary basis every **3 years**

White Collar Salary Basis

35<sup>th</sup> percentile of weekly earnings of full-time non-hourly workers in the lowest-wage Census Region


Highly Compensated Employees

Annualized weekly earnings of the 85<sup>th</sup> percentile of full-time non-hourly workers nationally


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### ACTION ITEMS




Submit comments to DOL by Nov. 7: <https://www.regulations.gov/>




Review job descriptions/duties for exempt employees



Track hours worked by exempt employees below \$55,068



Assess cost of pay increase vs. payment of overtime



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FMLA

FMLA 2023-1-A  
DOL Opinion Letter

A hand placing a block on top of others, forming the words "Family Medical Leave Act".

REDUCED WORK SHIFTS


- Employees may use intermittent FMLA leave to work reduced shifts until FMLA is exhausted
- Example: An employee that is scheduled to work four 10-hour shifts may use 2 hours of FMLA per day to achieve 8-hour shift
- Reminder: Employees who are regularly scheduled to work more than 40 hours are entitled to more than 480 hours of FMLA


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FMLA

FMLA 2023-2-A  
DOL Opinion Letter



 HOLIDAYS

- When a holiday falls during a week that an employee takes a full workweek of FMLA, the entire week is counted as FMLA leave
- When an employee takes less than full week of FMLA, a holiday only counts as FMLA leave if employee was scheduled and expected to work on the holiday and used FMLA leave on that day

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NLRB  
UPDATE

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April 26, 2021  
Executive Order  
Worker Organizing  
and Empowerment

Created Task Force to identify Executive Branch policies, practices and programs that could be used to support worker organizing and collective bargaining

Sept. 1, 2023  
White House  
Press Release

"Ahead of Labor Day, the Biden-Harris Administration announces new actions to empower workers – building on the President's historic support for workers and unions"

## PRESIDENTIAL SUPPORT FOR UNIONS

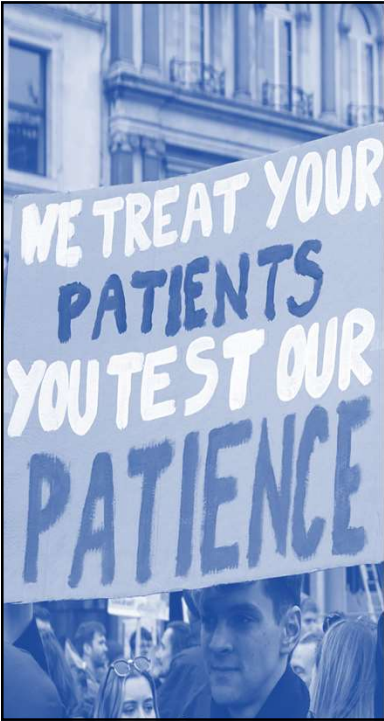
**Relaunch** of Worker Organizing Resource and Knowledge (WORK) Center

**Disclosure** of union avoidance advisors by federal contractors

**Report** by Treasury Dept. on union impact on U.S. economy

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## RECENT UNION ACTIVITY

### FY 2021

Union Election Petitions: 1,638

Unfair Labor Practice Charges: 15,082

### FY 2022

Union Election Petitions: 2,510

Unfair Labor Practice Charges: 17,988

### FY 2023 (6-month data)

Union Election Petitions: 1,200 (1,174 in 2021)

Unfair Labor Practice Charges: 9,529 (8,275 in 2021)

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# DEMAND FOR RECOGNITION

*Cemex Construction Materials Pacific, 372 NLRB No. 130 (Aug. 25, 2023)*

## DEMAND FOR RECOGNITION

Unions may **demand recognition** based on majority support


## EMPLOYER RESPONSE

1. Voluntarily **recognize** union without NLRB election; **or**
2. File **Petition for Election** within 2 weeks of demand


## UNFAIR LABOR PRACTICES

NLRB will issue **mandatory bargaining order** without election if:

- Employer fails to recognize union or file Petition for Election
- Employer engages in unfair labor practice during period between filing of petition and election




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		2019 Rule	2023 Rule
<div><div>FINAL ELECTION RULE</div><div>RETURN OF "AMBUSH" ELECTIONS</div><div>Effective Dec. 26, 2023</div></div> 		Pre-election hearings scheduled <b>14 business days</b> from service of Notice of Hearing	Pre-election hearings scheduled <b>8 calendar days</b> from service of Notice of Hearing
		Pre-election hearings can be postponed for <b>unlimited time</b> upon showing of good cause	Pre-election hearings can be postponed for up to <b>2 business days</b> for special circumstances; longer upon showing of extraordinary circumstances
		Respondent's Position Statement due <b>8 business days</b> after service of Notice of Hearing	Respondent's Position Statement due <b>7 calendar days</b> after service of Notice of Hearing
		Due date for Position Statement can be postponed for <b>unlimited time</b> upon showing of good cause	Due date for Position Statement can be postponed for up to <b>2 business days</b> for special circumstances; longer upon showing of extraordinary circumstances
		Petitioner's Position Statement due <b>3 business days</b> prior to pre-election hearing	Petitioner must respond orally at the <b>start of the pre-election hearing</b>


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		2019 Rule	2023 Rule
<div>FINAL ELECTION RULE</div> <div>RETURN OF "AMBUSH" ELECTIONS</div> <div>Effective Dec. 26, 2023</div>		Employer has <b>5 business days</b> after service of Notice of Hearing to post and distribute Notice of Petition for Election	Employer has <b>2 business days</b> after service of Notice of Hearing to post and distribute Notice of Petition for Election
		Individual eligibility and inclusion issues <b>are litigated at pre-election hearing and resolved prior to election</b> (this provision never took effect)	Individual eligibility and inclusion issues <b>do not need to be litigated or resolved prior to election</b>
		Parties have <b>5 business days</b> to file post-hearing briefs, and 10 business days upon showing of good cause	Parties can only file post-hearing briefs <b>with special permission within time specified</b>
		Regional Directors <b>may</b> specify election type (in person vs. mail), dates, times, and locations in the Decision and Direction of Election	Regional Directors <b>will ordinarily</b> specify election type (in person vs. mail), dates, times, and locations in the Decision and Direction of Election
		Mandatory waiting period of <b>20 business days</b> following Decision and Direction of Election	<b>No mandatory waiting period;</b> elections to be scheduled at earliest possible date


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ACTION ITEMS

 Assess wages, benefits, and employee feedback

 Review/update policies (non-solicitation, open door, grievance)

 Prepare preliminary response plan in event of organizing campaign

 Train managers to recognize signs of union campaign and prohibited (TIPS) and permitted (FOE) conduct



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## ULP MAKE WHOLE REMEDIES

*Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022)



Reimbursing late fees for car loan payments or rent



Reimbursing late fees for credit card payments



Payment of monthly interest on a loan taken out for living expenses



Cost of baby formula due to loss of lactation area



Cost of retrofitting a discriminatee's car



Healthcare expenses incurred due to unlawful termination of insurance



Compensation for loss of a home or car as a result of unlawful discharge



Increased transportation or child care costs

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## WORKPLACE RULES

*Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023)

2004

*Lutheran Heritage*

Workplace rules are subject to case-by-case review and are unlawful if they "would reasonably be interpreted" by employees as limited protected activities

2017

*The Boeing Co.*

Workplace rules are either: (1) categorically unlawful; or (2) subject to a balance test that weighed their tendency to restrict employee rights against business needs

2023

*Stericycle, Inc.*

Return to case-by-case review of workplace rules

### TWO STEP ANALYSIS

1. NLRB determines whether work rule **could** reasonably be interpreted as having a coercive meaning (chill exercise of Section 7 rights)

- NLRB evaluates rule from the perspective of an employee who is subject to the rule and economically dependent on the employer
- If NLRB determines rule could be coercive, rule is presumptively unlawful

2. Employer may rebut presumption that a work rule is unlawful by proving:

- The rule advances a **legitimate and substantial business interest**, and
- The employer is **unable** to advance that interest with a **more narrowly tailored rule**

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## ACTION ITEMS



Review, assess and update work rules, policies and handbooks

- Employee civility, honesty, respect, behavioral norms
- Social media
- Contact with the media
- Non-disparagement
- Prohibition on cameras/recording
- Insubordination



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## SEVERANCE AGREEMENTS


*McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)*

### BOARD DECISION

A severance agreement is **unlawful** if its terms have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of Section 7 rights, including the right to:

- Make negative or critical public statements about the employer
- Discuss wages, terms and conditions of employment
- Raise workplace complaints or assist coworkers with complaints
- Communicate with coworkers, former coworkers, unions, the NLRB, other government agencies, the media, and other third parties concerning workplace issues, complaints and labor disputes
- Cooperate in NLRB investigations and litigation

Employers violate the NLRA when they **offer** employees severance agreements that contain unlawful terms



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# SEVERANCE AGREEMENTS

McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)

## CONFIDENTIALITY/NON-DISCLOSURE

- Section 7 protects the right of employees to engage in “concerted activity” – includes the right to **discuss wages, terms and conditions** of employment
- Confidentiality and non-disclosure provisions which restrict employees from disclosing the existence or terms of a severance agreement **violate** Section 7
- Employers **may prohibit** disclosure of proprietary and trade secret information
- Employers **can include** these terms in severance agreements for management employees

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# SEVERANCE AGREEMENTS

McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)


## NON-DISPARAGEMENT

- Section 7 protects the right of employees to engage in “concerted activity” – includes the right to **make and support complaints, critique employer policy, publicize labor disputes and make negative public statements about employers**
- Non-disparagement provisions which restrict employees from making public statements about employers **violate** Section 7
- Employers **may prohibit** defamatory (maliciously untrue) statements
- Employers **can include** these terms in severance agreements for management employees

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## ACTION ITEMS



Review and update template severance agreements

- Confidentiality
- Non-disclosure
- Non-disparagement
- Savings clauses
- Severability
- Release of NLRA claims



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# SPEAK OUT ACT

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SPEAK OUT ACT



ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT (March 2022)

Prohibits employers from requiring employees to arbitrate disputes related to sexual assault or sexual harassment

SPEAK OUT ACT (December 2022)


Prohibits enforcement of pre-dispute non-disclosure and non-disparagement terms in cases involving sexual assault or sexual harassment

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ACTION ITEMS



Review and update-

■ Employment agreements

■ Confidentiality/Non-Disclosure agreements

■ Severance agreements

To do list

1.

2.

3.

4.

5.

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## FTC PROPOSED RULE

July 9, 2021

Executive Order encouraging FTC to curtail the use of non-compete clauses

January 5, 2023

FTC issues Notice of Proposed Rulemaking to prohibit use of non-competes

March 6, 2023

FTC extends comment period from March 20 to April 19, 2023 – approx. 27,000 comments received

April 2024?

Final regulation?

Proposed rule makes it unlawful for employers to:

- 1. Enter into or attempt** to enter into a non-compete agreement with a worker
- 2. Maintain** non-compete agreements with workers
- 3. Represent** to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause

Employers required to **rescind** prior non-competes and **provide notice** to workers

Limited exception for sale of business or ownership interest by 25% owner

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# FTC PROPOSED RULE

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April 2024?

Final regulation?


Non-compete clause includes:

- Term that **prevents** worker from:
  - Seeking or accepting employment, or
  - Operating a business
- Overbroad **non-disclosure** agreement that effectively **precludes** the worker from working in the same field
- Term that requires worker to **pay for training costs** if employment terminates within a specified time period, where the payment is **not reasonably related** to the costs incurred for the training

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May 30, 2023

Non-Compete Agreements that Violate the NLRA

# GENERAL COUNSEL MEMO

Position of NLRB General Counsel that non-compete agreements violate the following Section 7 rights:

- Right to concertedly **threaten to quit** to demand better working conditions
- Right to **actually concertedly quit** to obtain better working conditions
- Right to **concertedly seek or accept employment with a local competitor** to obtain better working conditions
- Right to **solicit co-workers to go work for a local competitor** as part of a broader course of protected concerted activity
- Right to seek employment at least, in part, **to engage in protected activity** with other workers at an employer's workplace (union organizing efforts)

Memo is **not** NLRB precedent or binding law

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# STATE PROHIBITIONS

## NON-COMPETES PROHIBITED

California

Minnesota

North Dakota

Oklahoma

New York?

## STATUTORY LIMITATIONS ON NON-COMPETES

Arkansas

Colorado

District of Columbia

Illinois

Indiana

Iowa

Louisiana

Maine

Maryland

Nevada

New Hampshire

Oregon

Rhode Island


Virginia


Washington


Wisconsin


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# ACTION ITEMS

 Confirm non-compete limitations in your state

 Review existing non-compete agreements

 Evaluate business justification for non-compete agreements



To do list

- 1.
- 2.
- 3.
- 4.
- 5.

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## UNDUE HARDSHIP

*Groff v. DeJoy*, 600 U.S. 447 (2023)

### TITLE VII

Employer must provide religious accommodations unless doing so would constitute an **undue hardship**

**PRIOR STANDARD** | *TWA v. Hardison* (1977)  
Undue hardship: More than a **de minimis** cost

**NEW STANDARD** | *Groff v. DeJoy* (2023)  
Undue hardship: **Substantial increased cost** in relation to the conduct of the employer’s business  
Not enough for employer to conclude that forcing other employees to work overtime is an undue hardship; employer must consider other options, such as voluntary shift swapping


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USERRA

## PAID MILITARY LEAVE

**SEVENTH CIRCUIT** | *White v. United Airlines (2021)*  
Under USERRA, military leave must be treated the same as other comparable types of leave  
"Comparable" Factors: (1) duration of leave; (2) purpose of leave; and (3) ability of the employee to choose when to take leave

**THIRD CIRCUIT** | *Travers v. Federal Express (2021)*  
USERRA does not allow employers to treat service members differently by paying employees for some kinds of leave while exempting military service  
On remand, District Court found that bereavement and jury duty leave are not comparable to military leave; currently on appeal

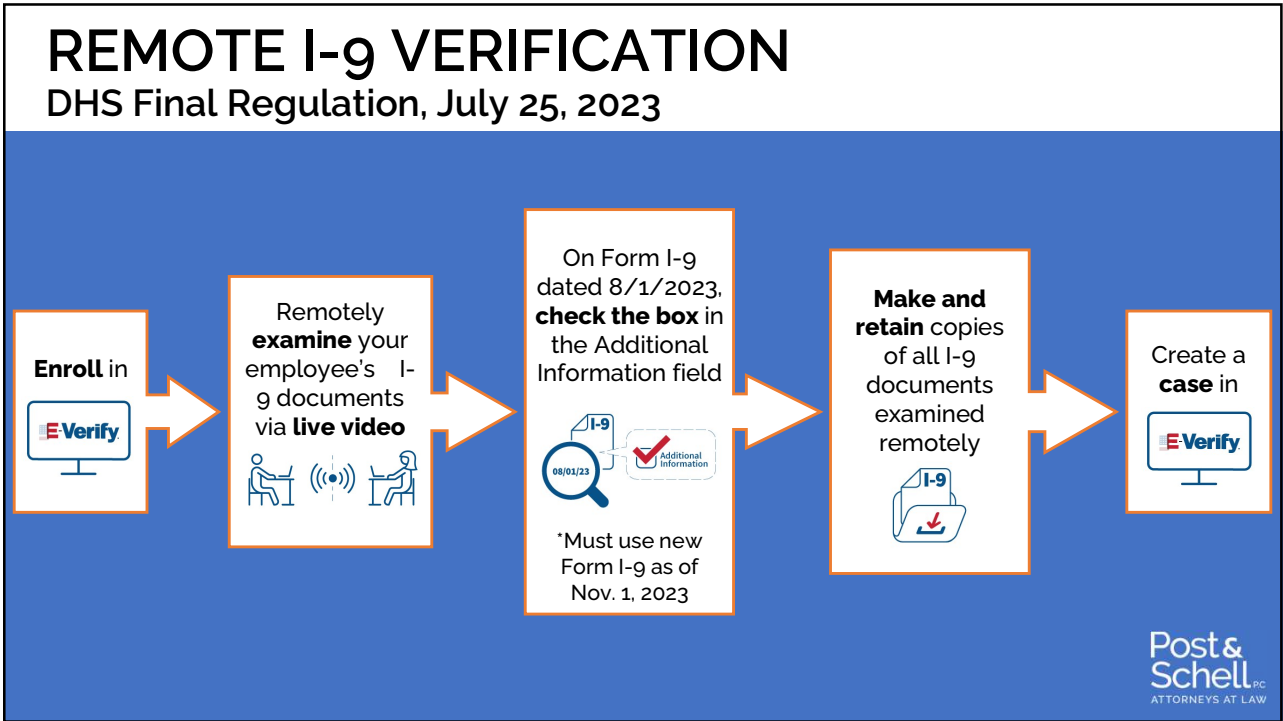
**ELEVENTH CIRCUIT** | *Myrick v. City of Hoover (2023)*  
City provided paid administrative leave for jury duty, voting, inclement weather, promotional exams, court hearings, city hearings, other "appropriate reasons" and while an employee was on leave pending investigation  
Military leave comparable to City's paid administrative leave

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**P&S Employment and Labor Services**

**EMPLOYMENT COUNSELING**

- HR audits
- Employment agreements
- Handbooks and personnel policies
- Compliance with federal, state and local employment laws
- Wage and hour compliance
- Employee misconduct, theft and discipline
- Hiring, termination, severance and work force reductions
- Union avoidance

**INVESTIGATIONS**

- Discrimination
- Compliance with corporate policies
- Workplace violence
- Employee theft

**EMPLOYMENT LITIGATION**

- Defense of harassment and discrimination
- Administrative agency investigations (EEOC, PHRC, DOL, OSHA, NLRB)
- Wage and hour defense
- Enforcement of restrictive covenants

