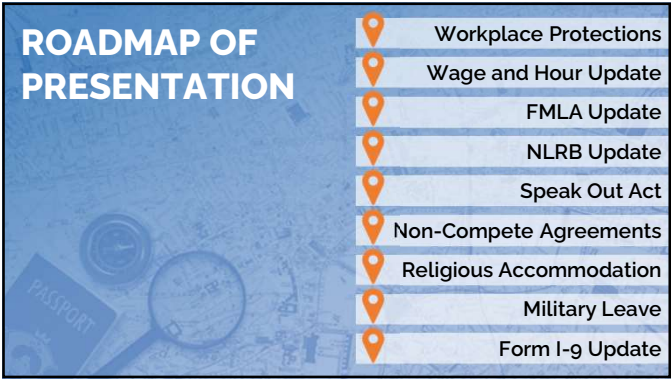





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Effective
June 27, 2023



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



5

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*

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



10





Effective
Dec. 29, 2022

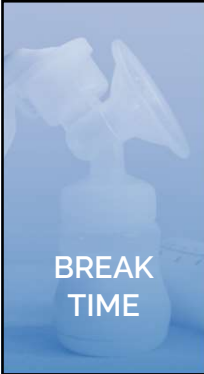


PROVIDING URGENT MATERNAL PROTECTIONS (PUMP) ACT

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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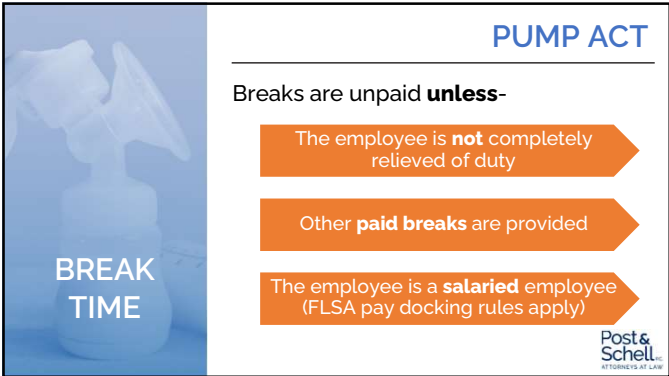
BREAK TIME

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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BREAK TIME

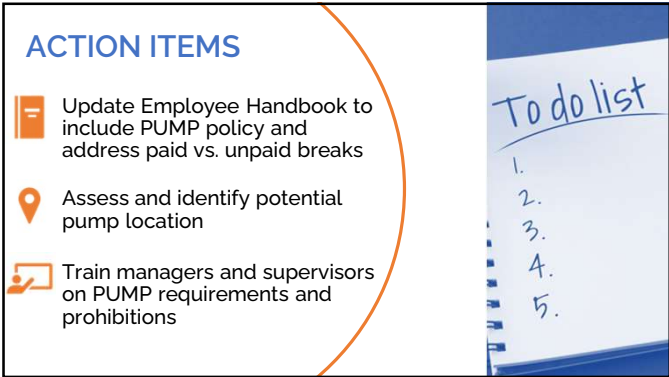
PUMP ACT

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

To do list

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


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WAGE & HOUR UPDATE

15

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

\$55,068 + Duties Test


Highly Compensated Employees: \$107,432

\$143,988



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FLSA




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

White Collar Salary Basis

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


Highly Compensated Employees


Annualized weekly earnings of the 85th 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

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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

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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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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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FINAL ELECTION RULE

RETURN OF "AMBUSH" ELECTIONS

Effective Dec. 26, 2023

NOTE:

☒ YES

☐ NO

2019 Rule	2023 Rule
Pre-election hearings scheduled 14 business days from service of Notice of Hearing	Pre-election hearings scheduled 8 calendar days from service of Notice of Hearing
Pre-election hearings can be postponed for unlimited time upon showing of good cause	Pre-election hearings can be postponed for up to 2 business days for special circumstances; longer upon showing of extraordinary circumstances
Respondent's Position Statement due 8 business days after service of Notice of Hearing	Respondent's Position Statement due 7 calendar days after service of Notice of Hearing
Due date for Position Statement can be postponed for unlimited time upon showing of good cause	Due date for Position Statement can be postponed for up to 2 business days for special circumstances; longer upon showing of extraordinary circumstances
Petitioner's Position Statement due 3 business days prior to pre-election hearing	Petitioner must respond orally at the start of the pre-election hearing

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FINAL ELECTION RULE

RETURN OF "AMBUSH" ELECTIONS

Effective Dec. 26, 2023

NOTE:

☒ YES

☐ NO

2019 Rule	2023 Rule
Employer has 5 business days after service of Notice of Hearing to post and distribute Notice of Petition for Election	Employer has 2 business days after service of Notice of Hearing to post and distribute Notice of Petition for Election
Individual eligibility and inclusion issues are litigated at pre-election hearing and resolved prior to election (this provision never took effect)	Individual eligibility and inclusion issues do not need to be litigated or resolved prior to election
Parties have 5 business days to file post-hearing briefs, and to business days upon showing of good cause	Parties can only file post-hearing briefs with special permission within time specified
Regional Directors may specify election type (in person vs. mail), dates, times, and locations in the Decision and Direction of Election	Regional Directors will ordinarily specify election type (in person vs. mail), dates, times, and locations in the Decision and Direction of Election
Mandatory waiting period of 20 business days following Decision and Direction of Election	No mandatory waiting period; 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	Cost of retrofitting a discriminatee's car
Reimbursing late fees for credit card payments	Healthcare expenses incurred due to unlawful termination of insurance
Payment of monthly interest on a loan taken out for living expenses	Compensation for loss of a home or car as a result of unlawful discharge
Cost of baby formula due to loss of lactation area	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: (i) categorically unlawful, or (ii) 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

- 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
- 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

To do list

1.

2.

3.

4.

5.

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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



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NON-COMPETE AGREEMENTS

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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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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?

Non-compete clause includes:

▪ Term that **prevents** worker from:

1. Seeking or accepting employment, or

2. 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:

1. Right to concertedly **threaten to quit** to demand better working conditions

2. Right to **actually concertedly quit** to obtain better working conditions

3. Right to **concertedly seek or accept employment with a local competitor** to obtain better working conditions

4. Right to **solicit co-workers to go work for a local competitor** as part of a broader course of protected concerted activity

5. 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

STATUTORY LIMITATIONS ON NON-COMPETES

California

Arkansas

Indiana

Maryland

Rhode Island

Minnesota

Colorado

Iowa

Nevada

Virginia

North Dakota

District of Columbia

Louisiana

New Hampshire

Washington

Oklahoma

Illinois

Maine


Oregon


Wisconsin


New York?

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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.

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4.

5.

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RELIGIOUS ACCOMMODATION

45


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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MILITARY LEAVE

47




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

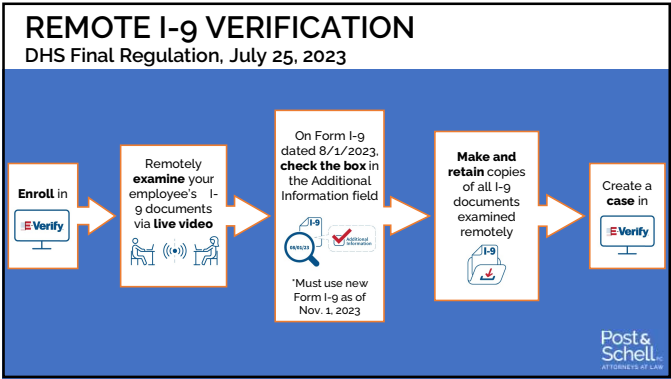
ELEVENTH CIRCUIT | *Myrick v. City of Hoover (2023)*
City provided paid administrative leave for jury duty, voting, inclement weather, promotional exams, court hearings, city hearings, other "appropriate reasons" and while an employee was on leave pending investigation
Military leave comparable to City's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

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