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## LEGISLATIVE AND ADMINISTRATIVE ACTIONS

**OSHA Issues Rule on PPE Proper Fit for Construction Industry.** The Occupational Safety and Health Administration (OSHA) has issued its Final Rule requiring proper fitting of Personal Protective Equipment (PPE) in construction jobs. PPE can include a wide variety of gear depending on the type of work. 2023 had the highest number of workplace fatalities in over a decade, and a significant number were due to improperly fitting protection gear supplied by the employer. Problems can include PPE that does not properly cover, is loose and catches or entangles, or restricts proper movement. Right-size garb has historically been unavailable for some workers, particularly women or people with a disability on many worksites. This rule seeks to help change that. (The failure to provide or make properly fitting PPE available has also been the subject of a number of sex discrimination and ADA cases.)

**Ramped Up Immigration Inspections and Fines.** Employers should prepare for increased I-9 audits and workplace raids by immigration control agents. Fines for technical violations of record-keeping requirements can be $2,789, and for knowingly hiring illegal workers can be $27,894.

- **Targeted Industries.** Agents will target industries that have historically depended on immigrant workers, such as construction, restaurants/bars, hotels, landscaping, food processing, and agriculture. Also, the administration is threatening in the future to void the work status of people who are currently legally authorized to work under a variety of now legal authorization categories, making it illegal to continue their employment. Expect more restrictions on obtaining or renewing status under legal immigration programs. (H-1B, EAD, E-3, TN, etc.)

**President Revokes OFCCP Affirmative Action Requirements Regarding Sex, Race, Religion, and National Origin**. President Trump has revoked Executive Order 11246's requirements for Affirmative Action to assure Equal Opportunity for sex, race, religion, sexual orientation-identity, and National origin for government contractors. Contractors will no longer have record-keeping or reporting obligations for these categories. The Affirmative Action requirements regarding Veterans and people with disabilities remain in effect. Contractors will also have to certify they do not operate any DEI programs that violate any Federal anti-discrimination laws. Many states and municipalities have their own Affirmative Action requirements. These will remain in effect. (There have recently been numerous legal challenges to DEI programs in courts across the U.S. In those cases, none of the programs were found to have been discriminatory or violated any anti-discrimination laws.) All of the Federal non-discrimination laws also remain in effect, since the Affirmative Action order has no connection to those laws.

## LITIGATION

### *U.S. Supreme Court — Fair Labor Standards Act*

**Supreme Court Sets Preponderance of The Evidence Standard in FLSA Misclassification Cases.** The Fair Labor Standards Act case of *EMD Sales v. Carrera* (U.S., 2025) involved Outside Salespeople who claimed they were misclassified, did not fit that "Outside" exemption category, and were due overtime pay. The trial court ruled in favor of the employees, holding that the employer had not met its burden of "clear and convincing evidence" to show the salespeople met the "Outside Sales" criteria. Thus, a great deal of "back overtime pay was owed." The company appealed, claiming the court used the wrong standard, and should have instead required only the lesser "preponderance of the evidence" burden of proof. The Supreme Court ruled that in overtime exempt status cases the FLSA does not specify a specific standard of proof. In the absence of such a specification, the general civil case preponderance of the evidence standard of proof should apply. The case was sent back to the lower court to rejudge the evidence based on the appropriate standard. This does not mean EMD won its FLSA case; it will now have a better chance using the lesser burden of proof that the Outside Sales exemption should apply. However, preponderance of the evidence still requires a good deal of tangible and solid evidence. Though less, the burden still remains for the **employer** to prove the exemption.

## *Theme of the Month — Recruiting*

Two cases this month illustrate the results of wrongful recruiting practices. The *first* shows how trying to please the discriminatory wishes of one's clients can backfire on both the recruiting/staffing agency and those clients themselves. The *second* case shows the danger of inflated job advertising and overstating wages or opportunities to attract applicants. Though both cases involve staffing agencies, similar incidents occur within organizations when recruiters go outside the boundaries or are pressured to please the hiring preferences of managers or to fill positions quickly by overstating the actual conditions, pay, and opportunities.

**Recruiter Gets $300,000 For Refusing to Exclude Women, Black and Older Applicants from Construction Jobs**. A construction industry temporary and temp-to-hire staffing company instructed a new recruiter it did not hire/refer women, Black, and older applicants. She checked with the company CEO who confirmed that its clients did not want women or older workers in construction jobs and did not want Black workers in certain areas and it needed to meet its customer preferences. The recruiter objected to no avail. She then resigned rather than have to engage in violating the federal and state discrimination laws. She filed a constructive discharge case with the EEOC. The EEOC filed suit, and the company has agreed to settle the case by payment of back wages, training of all recruiters and managers in proper hiring practices, EEOC monitoring *and* reporting to the EEOC any clients who make or have made discriminatory placement requests. *EEOC v. TKO Construction Services* (D. MN, 2025) The settlement requirement means that the other client construction companies may soon be the subject of EEOC charges since it includes providing the identity of those who made past discriminatory staffing requests, and the staffing agency may already be providing names. So, this settlement may have a domino effect.

**$3 Million in Recruiting Misrepresentation Case.** Have you seen TV commercials in which the promotors claim that you can make huge amounts of money by signing up with them to do seemingly routine work – even in your spare time? Too good to be true? That is what the Federal Fair Trade Commission and the New York Attorney General alleged in an FTC Act and New York deceptive business practices law case, *Federal Trade Commission and People of New York v. Handy Technologies, Inc*. (S.D. NY, 2025). Handy placed widespread advertisements claiming it could place people into highly paid gig work. However, this turned out to be highly inflated and did not reveal other

charges, fees, and penalties charged by the company. For instance, it advertised "up to $62" an hour for lawn care work, when the reality was $20; or "up to $45" an hour for handyman or assembly, when the actual average pay was again $20/hour. Then the company charged fees and fined workers for cancellation, and work errors, and failed to pay promptly. If you wanted pay in a reasonable time, you had to pay Handy an additional processing fee. In a pending settlement, Handy will pay approximately $3 million in refunds of fees and penalties to affected workers who were misled, will clearly disclose all fees and costs, obtain written consent before meeting any deductions, and will be required to specifically back up any claims on how much the work will actually pay, subject to federal and state monitoring.

## *Discrimination*

### Standards of Proof

Yet a third hiring case this month covers two issues regarding the standards by which courts judge discrimination cases. This case covers both the tangible evidence that a plaintiff must produce *and* the employer's need to show that there is some actual foundation underlying seemingly subjective hiring criteria.

**Heartfelt Belief About Discrimination Is Not Enough**. A mid-level Benefits Supervisor applied but was not promoted to a higher position. She alleged sex discrimination because a male applicant received the promotion. The reason given was her "strategic vision" and "leadership" skills; both of which are very subjective. Subjective criteria have often been used as a pretext for discriminatory selection. The plaintiff had a strong "*heartfelt belief*" that the subjective criteria were used to favor the male candidate, however, she presented no tangible evidence. It helped the employer's case that it had included "leadership and strategic vision" as two of the selection criteria before the process, had designed interview questions for the criteria, and was able to describe how each applicant's answers matched these criteria. So, there was more substance to the terms than just a loose generality. The court recognized that subjective criteria have often been used in a biased manner as a pretext for discrimination and that the plaintiff had a sincere belief that this occurred. However, some tangible evidence beyond conjecture and belief is necessary to refute the employer's stated reasons. In the absence of such evidence, the court affirmed the dismissal of the case. *Cunningham v. Austin* (7th Cir., 2025). **Be aware** that subjective criteria are suspect and have often led to decisions against employers. (See *Peralto v. Town of East Haven* case in the January 2025

Update.) However, in this case, the employer was able to show it gave thought to why the leadership and strategic criteria were important and was able to provide more tangible evidence to show how it evaluated the criteria, thus making it very difficult for the plaintiff to meet her burden. **Also, be aware** that though the plaintiff lost this case, she is still protected from future retaliation. One does not have to be correct to be protected from retaliation. A "*heartfelt belief*" or sincere belief provides the basis for the protected activity of raising concerns or complaints of discrimination – right or wrong. There may be a no-cause finding in the initial case, but people often win retaliation cases based on employers' treatment or decisions that occur afterward.

## *Strangest Case of the Month*

**Attorney Loses License Due to Fabricated Harassment Complaint About Co-worker.** A female Deputy District Attorney (DDA) accused a co-worker, a male Criminal Investigator in the DA's office, of unwelcome, inappropriate sexual comments to her. He denied this and the investigation could not conclude that he had done so. Several months later the DDA claimed the investigator had sent her improper sexual text messages. She showed a phone record and screenshot of the texts from him. The investigator again claimed he was innocent. He produced his own phone records showing NO texts or calls to the DDA's number. Then the DDA was asked to produce her phone and laptop as part of the investigation of the complaint. At this point "a cycle of improbable accidents" occurred. The DDA claimed she dropped her phone in her filled bathtub, and it would not work. Then she went to make a video call on her laptop and "Oops!" spilled a bottle of water, which soaked the computer and ruined it. So, she could not provide the devices. Becoming suspicious, the DA's office obtained records from the phone provider. These revealed that the DDA had texted the messages to herself and that she had altered her phone to make it appear the messages came from the other person's phone. It was also found she had downloaded and altered a spreadsheet containing Verizon message lists before providing it as part of the investigation. The DDA was discharged for dishonesty. The Colorado Supreme Court's disciplinary office then pursued charges against her for falsification and issued an order disbarring her from the practice of law. The Order opined that "fabrication of false messages reflects adversely on, and undermines the pursuit of truth; the very foundation of which our system of justice rests" and "deception within the ranks of prosecutors, in whatever form, poses an even greater danger of eroding public confidence in

our legal system…" In *Re Choi* (CO Sup. Ct. Office of Presiding Disciplinary Judges (2025)).

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