



**PLUNKETT COONEY**  
ATTORNEYS & COUNSELORS AT LAW

## Digging Out...

From Under Michigan's Employment Law Avalanche!

Presented by  
**Laura M. Dinon**  
**Rhonda R. Stowers**

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### Today's Presenters



**Laura M. Dinon**  
(231) 348-6417  
ldinon@plunkettcooney.com



**Rhonda R. Stowers**  
(810) 342-7003  
rstowers@plunkettcooney.com

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2

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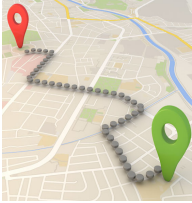
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### Outline of Discussion

- Supreme Court decisions
- Federal court decisions
- Michigan decisions
- Legislative and regulatory update
- What to watch for re: employment law trends
- Questions



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3

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## U.S. Supreme Court

- Supreme Court continues to consider critical questions that implicate labor and employment law.
- Off to a slow start
- Important issues in 2022-2023 term...



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## Supreme Court 2022-2023 Term

- Affirmative action in college admissions
- State legislatures control over elections
- Intersection of free speech and anti-discrimination laws
- Businesses:
  - Where they can be sued
  - What they can be held liable for
  - How they communicate with their attorneys

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## Supreme Court 2022-2023 Term

- Title 42 immigration policy
- Student debt relief
- Voting rights
- LGBTQ rights



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**Sixth Circuit Updates**

- Continues to trend *pro-employee* with a few notable exceptions

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***Haley Hrdlicka v General Motors***  
(Feb. 7, 2023)

- Sixth Circuit affirmed dismissal of plaintiff's claims.
- Hrdlicka was a 30-year employee who was terminated for poor attendance after she was transferred to a department she did not like.
- Post termination she was diagnosed with a brain tumor and Persistent Depressive Disorder, which she then attributed her attendance issues to.

*Continued*

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8

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***Haley Hrdlicka v General Motors***  
(Feb. 7, 2023)

- Key inquiry is whether employer made a reasonably informed and considered decision before taking an adverse employment action.
- It is clear that the decision here was in accordance with employer's established policies.

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### **Render v FCA US LLC**

- Sixth Circuit Court of Appeals recently held employee with depression did not have to give any formal notice when he called in to use intermittent leave after initial certification.
- Employee had provided initial FMLA certification.
- Doctor stated that he suffered from depression, and he would not be able to work when it flared up.
- Employee would call in and say sick or flare up which court ruled was sufficient.



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### **Bennett v Hurley Med Ctr**

(Feb. 24, 2023) (E.D. Mich)

- Plaintiff, a nursing student intern at Hurley, requested ADA accommodation that would allow her to bring her service dog on her nursing rotations.
- Hospital initially granted her accommodation request.
- After dog caused severed dog-allergy reactions for a patient and a staff member, hospital withdrew accommodation.

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### **Bennett v Hurley Med Ctr**

(Feb. 24, 2023) (E.D. Mich)

- Plaintiff sued under ADA and PWDORA.
- Hospital asserted accommodation caused a direct threat to health and safety of staff and patients.
- Court granted summary disposition for the hospital.
- Hospital did go through interactive process and reasonably concluded dog was a direct threat.



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12

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**Head v Detroit Stoker Co**

(March 27, 2023) (E.D. Mich)

- Plaintiff sued under FMLA and WDCA, claiming retaliatory termination due to her use of medical leave while sick with COVID and complications.
- Company had finalized a company-wide reduction in force just before COVID hit so they didn't implement it for a year and a half, while plaintiff happened to be on leave for COVID.
- Court granted summary disposition for employer.
- Company gave non-discriminatory reason, showing evidence of economic based, company-wide reduction in force.



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13

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**Levine v DeJoy**

(April 10, 2023) (W.D. Mich)

- Plaintiff alleged United States Postal Service discriminated against her by failing to promote her on basis of race.
- Plaintiff had significantly stronger qualifications in most categories considered.
- White hiring supervisor hired a white candidate based on her interview answers rather than considering job performances.
- After supervisor selected the white candidate, she asked the unsuccessful black candidate to train the person hired for the job.

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14

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**Levine v DeJoy**

(April 10, 2023) (W.D. Mich)

- District Court granted summary disposition for the USPS, on basis that plaintiff failed to demonstrate USPS's proffered justification for its hiring decision was pretext for racial discrimination.
- Sixth Circuit reversed, holding plaintiff offered evidence sufficient for a reasonable juror to conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job.
- Sixth Circuit also discussed subjective nature of interviews and how they can provide ready mechanisms for discrimination.



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15

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### Michigan Legal Developments

- Flurry of recent activity:
  - ELCRA prohibits gender identity discrimination.
  - PMLA / minimum wage / tip credit could *dramatically* change.
- Legislation/new laws:
  - Right to work
  - Consumer protections for online purchases
  - Protections for persons training service animals



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16

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### Miller v Mich Dept Corrections

(Mich. S. Ct. Jan. 25, 2023)

- Granted leave to appeal in case that will decide whether friends and co-workers of someone fired for reporting racial harassment have right to claim retaliation damages themselves.
- Whether ELCRA establishes a right to recover for third-party retaliation claims



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17

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### McMillon v City of Kalamazoo

(Jan. 11, 2023)

- Plaintiff filled out job application with shortened statute of limitations language on it but person wasn't hired.
- Subsequently, plaintiff was hired for another position and did not fill out a second job application.
- Court held there is a genuine issue as to material fact regarding whether parties reached a mutuality of agreement regarding shortened limitations period.



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18

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**French v Mid-Michigan Med Center**  
 (Mich. App. March 23, 2023)

- Plaintiff filled out job application for a position as an RN with a subsidiary of defendant, and on application she agreed to a 180-day statute of limitations.
- Two years later, she transferred to a position at defendant hospital, by completing an MMH Transfer Request Form, on which she affirmed she was a current employee of MMH.
- She was terminated a few years later and sued 20 months after her termination.

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19

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**French v Mid-Michigan Med Center**  
 (Mich. App. March 23, 2023)

- Plaintiff argued that when she transferred to defendant's hospital, a new contractual agreement was entered into by the parties.
- Trial court granted summary disposition to defendant.
- Michigan Court of Appeals affirmed, stating she did not provide any authority for proposition that when she transferred to defendant's hospital, a new contractual agreement was created.

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**French v Mid-Michigan Med Center**  
 (Mich. App. March 23, 2023)

- Appellate court distinguished this case from *McMillon*, because plaintiff was hired by MMH and subsequently transferred within MMH'S network without ever leaving her employment and, therefore, was always bound by initial terms she agreed to.
- Court also refused to conclude that a limitations provision in an employment contract that shortens time to file a claim under ELCRA violates public policy.

21

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### ***Doe v Alpena Public Schools***

(Mich. App. Dec. 22, 2022)

- Student filed suit alleging defendants created sexually hostile educational environment in violation of Elliot Larsen Civil Rights Act (ELCRA) by not responding to student-on-student sexual harassment at an elementary school.
- Issue of first impression: whether schools may be vicariously liable for students conduct
- Court held: Schools do exercise a measure of control over students such that they may be vicariously liable for hostile educational environment discrimination arising from student-on-student harassment.



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22

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### ***S. P. v Lakelands Golf & CC***

(Mich. App. Jan. 12, 2023)

- Employee sued Club and member alleging violations of ELCRA for constructive discharge alleging sexual assault led to constructive discharge.
- Club sought enforcement of Arbitration Agreement.
- Hostile work environment sexual harassment claim requires an employment relationship; therefore, these claims were subject to Arbitration Agreement.



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23

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### ***Stegall v Resource Tech. Corp., et al.***

(Mich.App. Feb. 2, 2023)

- Plaintiff appealed to Supreme Court the appellate court's holding that public policy claim fails because exception does not extend to discharges in retaliation for *internal reporting* of alleged violations of law.
- Plaintiff's public policy claim was premised on two well-recognized exceptions:
  - exercising right conferred by well-recognized legislative enactment
  - failure or refusal to violate law

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24

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### ***Stegall v Resource Tech., et al.***

- Supreme Court recognized appellate court has previously held that plaintiff could support a public-policy claim on basis of internal reporting.
- Supreme Court noted: "We see no reason why limiting public-policy claims to external reports would serve the welfare of the people of Michigan, especially where the WPA might otherwise preempt claims that involve reports to public bodies."
- In *Stegall*, plaintiff had good-faith belief of asbestos regulations violations at his workplace and followed proper internal reporting procedures.

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25

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### ***Stegall v Resource Tech., et al.***

- Internal report was sufficient to state a public-policy claim.
- Supreme Court remanded (even though issue was not preserved for appeal) for further consideration of whether plaintiff was discharged in violation of public policy.
- Whether public policy claim is nonetheless preempted by state or federal law
- Appellate Court on remand held public policy claims preempted by OSHA and/or MIOSHA since both prohibit retaliatory discharge.



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26

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### ***Rouch World LLC et al v MDCR et al*** (Mich. Jul. 28, 2022)

- Supreme Court affirmed that ELCRA prohibits discrimination because of an individual's sexual orientation.
- Sexual orientation is "inextricably bound up with sex," because a person's sexual orientation is generally determined by reference to their own sex.
- Also held transgender status protected under ELCRA.



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27

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***Mothers Justice, et al v Dana Nessel & State of Michigan*** (Mich. App. Jan. 27, 2023)

- Court of Appeals overturned Court of Claims, upholding legislative changes to ballot initiatives.
- On appeal to Supreme Court with oral arguments held in February. If overturned, decision will upend Michigan's Paid Medical Leave Act and wage and hour laws regarding minimum wages and tipped wages.
- Case filed to challenge method used by Legislature to enact 2018 PA 368 and 2018 PA 369 as unconstitutional.

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28

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
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***Mothers Justice, et al v Dana Nessel*** (Mich. App. Jan. 27, 2023)

- Began as voter-initiated laws heading for a vote on ballot; before they hit the ballot, Legislature legally enacted and then amended during lame duck sessions (adopt and amend).
- **Affect of ruling status quo until Supreme Court decision**

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29

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
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**Restoring Workers' Rights' Bills**

- Restored prevailing wage on all state projects.

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30

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**Repeal of Right to Work Law**

- Effective March 30, 2024
  - Allows Collective Bargaining Agreements (CBA) to require all employees covered by CBA to pay dues

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31

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**Package of 16 Bills in Committee on April 13, 2023**

- Could have dramatic impact on businesses and workers across the state.
- Other pending bills include:
  - Employee Fair Scheduling Act – “chain businesses” (two or more locations) would have to compensate employees for altering work schedules

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32

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**HB 4390 –Limits Use of Independent Contractors**

- To be an independent contractor, worker would have to meet all three criteria:
  - Individual is free from control and direction of hiring entity in connection with performance of the work
  - Performs work that is outside usual course of hiring entities business
  - Individual is customarily engaged in an independently established trade, occupation

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33

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**HB 4406 - Mandatory Wage Transparency**

- Employees could request wage information for similarly situated employees covering a period of not more than three years.
  - Sex and seniority of employees
  - Salary
  - Hours wage
  - Bonus pay
  - Overtime

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34

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**HB 4401 - Mandatory Wage Transparency Penalties**

- Companion bill would make violation of HB 4406 (wage transparency) a felony punishable by:
  - 2 years imprisonment
  - Fine up to \$10,000 or both
  - For each violation

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35

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**HB 4399 – Restrictions on Use of Non-Compete Agreements**

- Would restrict all businesses from obtaining non-competes unless it:
  - Provided the applicant written notice of the requirement
  - Disclosed to the employee or applicant in writing the terms of the non-compete agreement
  - Displayed a poster of the bill's requirements at the worksite.

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36

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### HB 4399 – Restrictions on Use of Non-Compete Agreements

- Would prohibit businesses from obtaining non-competes from low wage employees.
- Violations would be civil infractions subject to fine of \$5,000 for each violation.
- Burden of proof on employer



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37

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### HB 4398 – False Claims Act

- Would authorize private plaintiffs to sue on behalf of state and collect a bounty if there is recovery.



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38

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### HB 4393 – Enforcement

- Provides \$5 million to Attorney General for hiring 25 full-time employees for independent contractor and payroll fraud enforcement
- **HB 4394** – allows anonymous complaints regarding wage, benefit and record keeping requirements
- **HB 4395** – allows individuals to anonymously complain about violations of minimum wage law
- **HB 4396** – expands WPA to independent contractors and prospective employees and protects them from adverse actions



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39

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### HB 4402 – Enforcement

- Creates a felony schedule for mis-payment of wage, fringe benefits and recordkeeping requirements.
- **HB 4403** – creates misdemeanor and felony provisions for mis-payment of wage, fringe benefits and recordkeeping requirements with intent to defraud.
- **HB 4404** – changes penalties from 10% per year to 100% per year for violations of wage, fringe benefits and recordkeeping requirements. Increases civil fines from \$1,000 to \$10,000.
- **HB 4405** – changes garnishment notice requirements



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40

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### PA 339 of 2020 – Reminder

- Outlines COVID-19 **isolation/quarantine** periods
  - Incorporates changing federal, state and local health guidelines
    - Typically requires review of county health department requirements / CDC guidance
- Prohibits employers from taking certain actions against employees who do not report to work during those periods, as well as those who oppose violations of Act or report health violations related to COVID-19.



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41

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### Legislative & Regulatory Actions

- **PUMP Act**
- Signed by President Biden Dec. 29, 2022
  - Expanded rights for nursing mothers - almost all covered, including exempt employees
  - If work while expressing milk, must be paid.
  - Increases penalties and damages for violations

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42

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**Pregnant Workers Fairness Act**

- Signed by President Biden Dec. 29, 2022
  - Employers must provide accommodations for pregnant workers.
  - Similar to ADA but accommodations are intended to be temporary.
  - Employee must request – employer may not offer

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43

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**Pregnant Workers Fairness Act**

- Reasonable accommodations may include:
  - Light duty/help with lifting
  - Temporary transfer to safer position
  - Additional, longer or more flexible breaks to drink water, eat, rest or use the bathroom

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**Pregnant Workers Fairness Act**

- Reasonable accommodations may include:
  - Changing food or drink policies to allow water bottles or food
  - Changing equipment, devices, workstations such as provide a stool
  - Changing uniform or dress code, like allowing wearing maternity pants

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**Pregnant Workers Fairness Act**

- Changing a work schedule, shorter hours or later start time
- Breaks, private space for lactation needs
- Flexible scheduling for doctor appointments
- Time off for bedrest, recovery from childbirth
- Requires employers to engage in the interactive process
- Prohibits discrimination and retaliation

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**Legislative & Regulatory Actions**

- Federal SECURE 2.0 – Signed Dec. 29, 2022
  - Wide sweeping retirement plan legislation, various effective dates, some mandatory requirements, many discretionary requirements
  - Phased in from 2023 through 2025

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**Legislative & Regulatory Actions**

- **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**, enacted March 2022
  - Prohibits enforcement of pre-dispute agreements requiring employees to arbitrate sexual assault or harassment claims
- Does not:
  - Prohibit non-disclosure or non-disparagement clauses
  - No effect on settlement agreements
  - Not retroactive

48

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## Federal Speak Out Act

- Signed Dec. 7, 2022
  - Prohibits enforcement of **pre-dispute** non-disclosure and non-disparagement clauses in disputes relating to claims of sexual assault or sexual harassment
  - Does not apply to settlement or severance agreements



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49

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## Legislative & Regulatory Actions

- DOL proposed rule to update **test for** determining whether worker is an employee or **independent contractor**.
  - Final rule expected May 2023



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## Legislative & Regulatory Actions

- FTC Proposed Noncompete Rule – Jan. 5, 2023
  - Comment period extended to April 19, 2023.
  - If rule passes, it takes effect 180 days after final publication, so fall at the earliest.



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**Legislative & Regulatory Actions**

- FTC Proposed Noncompete Rule – Jan. 5, 2023
  - Applies to express and de facto:
    - Noncompete clauses
    - Nondisclosure and confidentiality clauses
    - Clauses requiring employee to repay training costs, which have effect of prohibiting employment

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**Legislative & Regulatory Actions**

- FTC Proposed Noncompete Rule Jan. 5, 2023
  - Does not forbid non-solicitation clause if narrow
  - Employers will be required to rescind existing non-competes and supply individual notice to current and former employees.
  - Exception for sale of business non-competes
  - Preempt and supersedes all inconsistent state laws

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**Legislative & Regulatory Actions**

- NLRB decision in McLaren Macomb on Feb. 21, 2023
  - Employers may not offer employees severance agreements that require employees to broadly waive their rights under the NLRA.
    - Agreements at issue prohibited employees from making statements that could disparage employer and from disclosing terms of the agreement itself.

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### Legislative & Regulatory Actions

- DOL new proposed regulations on white collar exemptions expected in May 2023.
  - May increase (substantially) current salary basis of \$684/\$35,368
  - May require periodic salary increases
  - May change "duties test"
  - May increase minimum wage



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### EEOC Trends

- COVID pandemic resulted in dramatically reduced investigatory activity (starting to ramp back up).
  - Backlog of cases and new investigators
- Rumor: *more aggressive litigation tactics in future*
- What we see: disability rights/medical leave cases continue to be more closely scrutinized.
  - Especially in light of COVID-19 and upward trend in medical leave laws



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56

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### Medical Leave Issues

- COVID-19 effects are still being felt/processed, including mental health conditions and long COVID cases.
  - More "intermittent leave" issues
  - More requests for leave/accommodations
  - More demands for remote work (even for traditionally non-remote jobs)
- Require careful examination of interplay between FMLA/ADA and ensuring **interactive process** is followed and **documented**.



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57

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**EEOC Strategic Enforcement Plan**

- Expand category of vulnerable workers to include:
  - Intellectual and developmental disabilities
  - Arrest or conviction records
  - LGBTQI+ individuals
  - Temporary workers
  - Older workers
  - Low wage earners
  - Limited literacy or English proficiency

58

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**EEOC Strategic Enforcement Plan**

- Employers increasing use of AI to ensure they do not inadvertently screen for impermissible medical or disability related information from applicants.
- Discrimination associated with COVID-19 and other threats to public health as well as violations of the new Pregnant Workers Fairness Act and technology related employment discrimination.
- Overly broad nondisclosure agreements and nondisparagement agreements.

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**CROWN Act**

- Creating a Respectful and Open World for Natural Hair
- Michigan bill to amend ELCRA to prohibit discrimination based on hair texture and race-based hairstyles including:
  - Braids, dreadlocks, twists and afros

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### Biden Budget Proposals

- Paid FMLA, government funded, administered by SSA
- Allowing seven paid sick days per year
- 25% increase in NLRB budget to increase enforcement

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61

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### Closing Thoughts

- Expect to see continued expansion of workers' rights in 2023.
- Keep a close eye on PMLA and minimum wage provisions, **but don't panic yet!**
- Don't diminish illness/sickness/medical conditions as not rising to level to implicate ADA/FMLA/leave protections. Must have a well-documented and **consistent process.**
- Review your handbooks and agreements for necessary updates.
- Feel free to ask for help!

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62

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### Questions?



**Laura M. Dinon**  
(231) 348-6417  
ldinon@plunkettcooney.com



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(810) 342-7003  
rstowers@plunkettcooney.com

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63

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64

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**Continuing Education**




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65

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**ATTORNEYS**  
 Laura M. Dixon  
 Rhonda R. Stowers

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