

CURRENT ISSUES IN EMPLOYMENT LAW: THE MODERN WORKPLACE

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for good reason, bad reason, or no reason at all.



IS THE EMPLOYMENT AT WILL DOCTRINE A MYTH?

Law	Brief Description	Employer
Title VII of the Civil Rights Act of 1964	Prohibits discrimination in the hiring process (race, color, religion, sex, national origin)	15 or more employees
Americans with Disabilities Act (ADA)	Prohibits discrimination against a person with a qualified disability	15 or more employees
Age Discrimination in Employment Act (ADEA)	Prohibits discrimination against workers aged 40 or older	20 or more employees
Fair Labor Standards Act (FLSA)	Governs the following: duration of work hours, breaks, minimum salary, and overtime	Employer with \$500,000 or more in gross annual sales or individual employee engaged in commerce
Family and Medical Leave Act (FMLA)	Employers must allow employees (who have worked there more than 12 months) up to 12 weeks off for certain medical conditions	50 or more employees within a 75 mile radius

**SOME
EXCEPTIONS**



“There are more ideas on earth than intellectuals imagine. And these ideas are more active, stronger, more resistant, more passionate than ‘politicians’ think. We have to be there at the birth of ideas, the bursting outward of their force: not in books expressing them, but in events manifesting this force, in struggles carried on around ideas, for or against them. Ideas do not rule the world. But it is because the world has ideas... that it is not passively ruled by those who are its leaders or those who would like to teach it, once and for all, what it must think.”

Michel Foucault

TITLE VII

- ▶ Title VII of the Civil Rights Act of 1964 (Title VII) as amended in 1991 (makes it illegal to discriminate against someone on the basis of sex, race, religion)

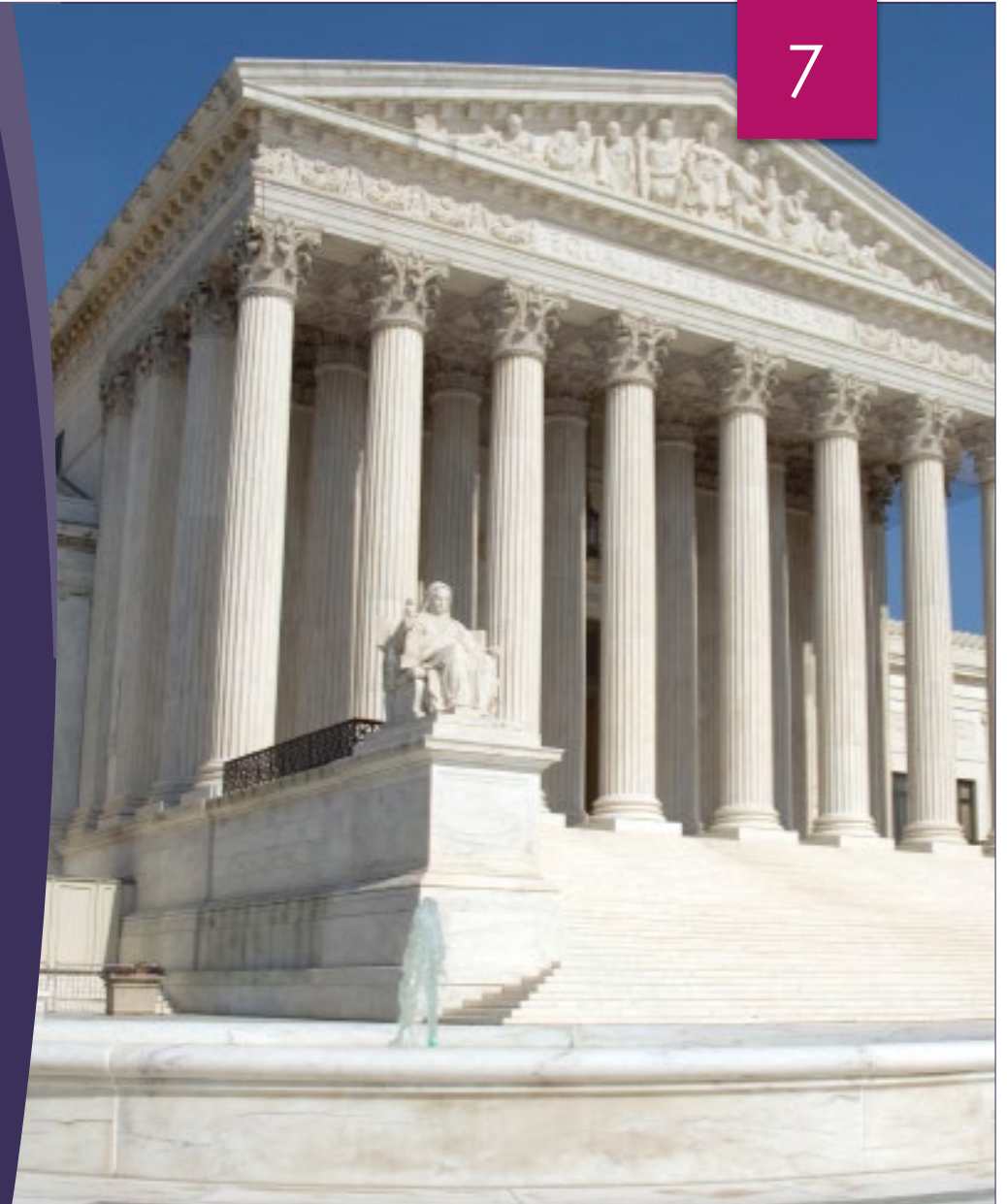


A large rainbow flag is shown waving in the wind against a bright blue sky with scattered white clouds. The flag's colors are vibrant and the folds are clearly visible.

THE MODERN WORKPLACE – GENERATIONAL CHANGE – EXPANSION OF THE TERM “SEX”

UNITED STATES SUPREME COURT

- ▶ On June 15, 2020, in *Bostock v. Clayton County Board of Commissioners*, the United States Supreme Court ruled in a 6-3 decision that Title VII's prohibition of workplace "sex" discrimination clearly encompasses discrimination based on one's sexual orientation or transgender status because "homosexuality and transgender status are inextricably bound up with sex."
- ▶ This long-awaited decision was an unexpected victory for the LGBTQi community, of course, but also for the sanctity of Title VII.



We the People of the
insure domestic Tranquillity, provide for the common defence, and our Posterity, do ordain and establish this Constitution for
Article I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative, and until such Enumeration shall be made, the State of New Hampshire shall be entitled to three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York seven, New Jersey four, Pennsylvania six, Delaware one, Maryland one, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers, and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years, and each Senator shall have one Vote. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Term of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

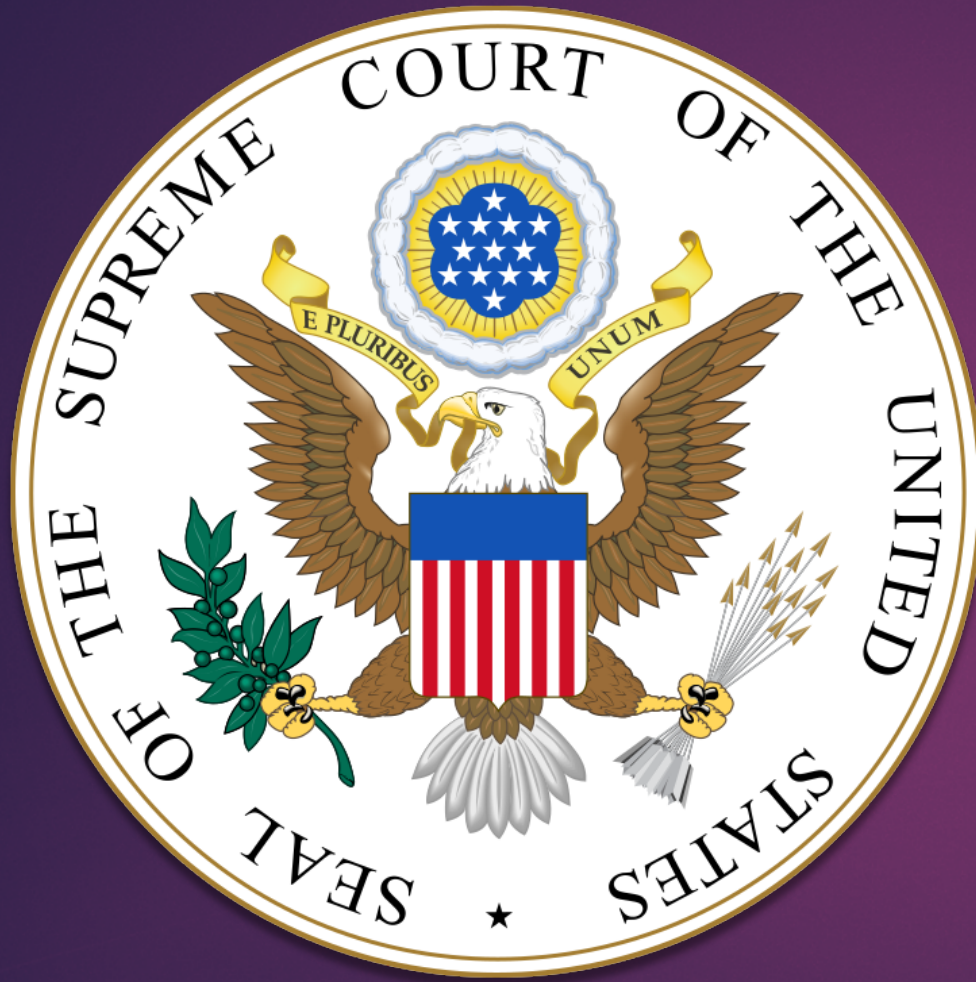
The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of

Outside of Statutory Rights

EVEN FURTHER EXPANSION OF RIGHTS OUTSIDE OF STATUTORY RIGHTS

- ▶ ***Obergefell v. Hodges*, 576 U.S. 644 (2015)** the United States Supreme Court ruled that the fundamental right to marry is guaranteed to same sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The 5–4 ruling requires all 50 states, DC and the Insular Areas to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with equal rights and responsibilities.
- ▶ Prior to *Obergefell*, same-sex marriage had already been established by statute, court ruling, or voter initiative in 36 states, DC and Guam.



**BUT: Elections
Have
Consequences:
THE UNITED STATE
SUPREME COURT
AND
APPOINTMENTS
MATTER**

PRECEDENTS CAN BE OVERTURNED:

- ▶ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), United States Supreme Court overturned *Roe v. Wade* and held that the United States Constitution does not confer a right to abortion.
- ▶ Justice Thomas: In future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because if any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents.
- ▶ What does this mean? Here are a few due process decisions:
- ▶ *Griswold v. Connecticut*, 381 U.S. 479 (1965), is a United States Supreme Court decision that the United States Constitution protects the liberty of married couples to use contraceptives without government restriction.
- ▶ *Lawrence v. Texas*, 539 U.S. 558 (2003), is a United States Supreme Court decision that U.S. state laws criminalizing sodomy between consenting adults are unconstitutional. The Court based its ruling on the "right to privacy" and the notions of personal autonomy to define one's own relationships and of American traditions of non-interference with any or all forms of private sexual activities between consenting adults.
- ▶ *Obergefell* (see above) the fundamental right to marry is guaranteed to same sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution
- ▶ ALL ARE AT RISK

LET'S GO BACK TO STATUTORY LAW



**FOR STATUTORY CLAIMS
LEGAL LIABILITY IS
DEPENDENT UPON
EMPLOYER/EMPLOYEE
RELATIONSHIP**

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REMEMBER MUST BE AN EMPLOYEE AND EMPLOYER MUST BE HAVE THRESHOLD NUMBER OF EMPLOYEES

FIFTH CIRCUIT CASE

- ▶ *Parrish v. Premier Directional Drilling, L.P.*, No. 17-51089, 917 F.3d 369 (5th Cir. 2019)



***Parrish v. Premier Directional Drilling, L.P.*, No. 17-51089, 917 F.3d 369, 2019 U.S. App. LEXIS 6115, 2019 WL 973091**

- ▶ In cases involving claims of contractor/employee misclassification, the dispute between the parties focuses on the existence of the employer-employee relationship.
- ▶ The Fifth Circuit left undisturbed the five factor economic realities test to determine whether individuals are employees. The non-exhaustive factors are:
 - ▶ (1) the degree of control exercised by the alleged employer;
 - ▶ (2) the extent of the relative investments of the worker and the alleged employer;
 - ▶ (3) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer;
 - ▶ (4) the skill and initiative required in performing the job; and
 - ▶ (5) the permanency of the relationship." See, e.g., *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008).

HOW TO PROVE DISCRIMINATION FOR AN EMPLOYEE UNDER TITLE VII

MCDONNELL DOUGLAS CORP. V. GREEN, 411 U.S. 792 (1973)



ENTER TEXTUALISM

THE GROWING RELIANCE ON TEXTUALISM

- ▶ Textualism is being used to purge judicially created tests in the body of law for employment discrimination.
- ▶ See for example, *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024)
- ▶ United States Supreme Court employed a textualism approach to reject the heightened standards applied by various circuits for actionable adverse employment actions under Title VII (no more "ultimate employment action")
- ▶ The rejection of this judicially created rule helps employees survive summary judgment.

SUMMARY JUDGMENTS –AAJ'S VIEWS

- ▶ With the judicially created test of the *McDonnell Douglas* case, summary judgment has sadly become so routinely granted in federal courts that some defendants believe they need only invoke the phrase “plaintiff cannot prove her case” to trigger near-automatic dismissal.
- ▶ This mechanical approach has produced a pattern of barebones motions, thin on facts, heavy on conclusions, designed not to meet the moving party’s burden, but to shift it prematurely onto the plaintiff.
- ▶ The result is a distortion of Rule 56: defendants rely on the Court to comb through the plaintiff’s case and make evidentiary judgments before the movant has even met the threshold established in *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*).
- ▶ The burden should remain squarely with the moving party to affirmatively demonstrate, with competent evidence, that there are no genuine disputes of material facts. Only, then, should Plaintiff need to marshal evidence.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

- ▶ The *McDonnell Douglas* case established that, in an employment discrimination case:
- ▶ The plaintiff (employee) must first establish a prima facie case of discrimination.
- ▶ The defendant (employer) must produce evidence of a legitimate non-discriminatory reason for its actions. If this occurs, then the presumption of discrimination dissipates.
- ▶ The plaintiff must then be afforded a fair opportunity to present facts to show an inference of discrimination. The plaintiff may do so either by showing that the defendant's explanation is insufficient and only a pretext for discrimination or by otherwise proving that the defendant's actions used one of the listed unlawful discriminatory parameters.
- ▶ In practice, the third step is the most difficult step for plaintiffs to achieve successfully.
- ▶ Plaintiffs bear the ultimate burden of persuasion at all times.

AMES V. OHIO DEPT. OF YOUTH SERVICES

FACTS:

- **2004:** Ames (heterosexual woman) hired as executive secretary, later promoted to program administrator
- **2019:** Applies for new management role; agency hired lesbian woman instead
- Ames was demoted to secretary with significant pay cut; her former role filled by a gay man
- **Claim:** Filed Title VII claim alleging discrimination based on sexual orientation
- District Court granted summary judgement for agency, citing lack of “background circumstances.” Sixth Circuit affirmed.



Pictured above: Marlean Ames

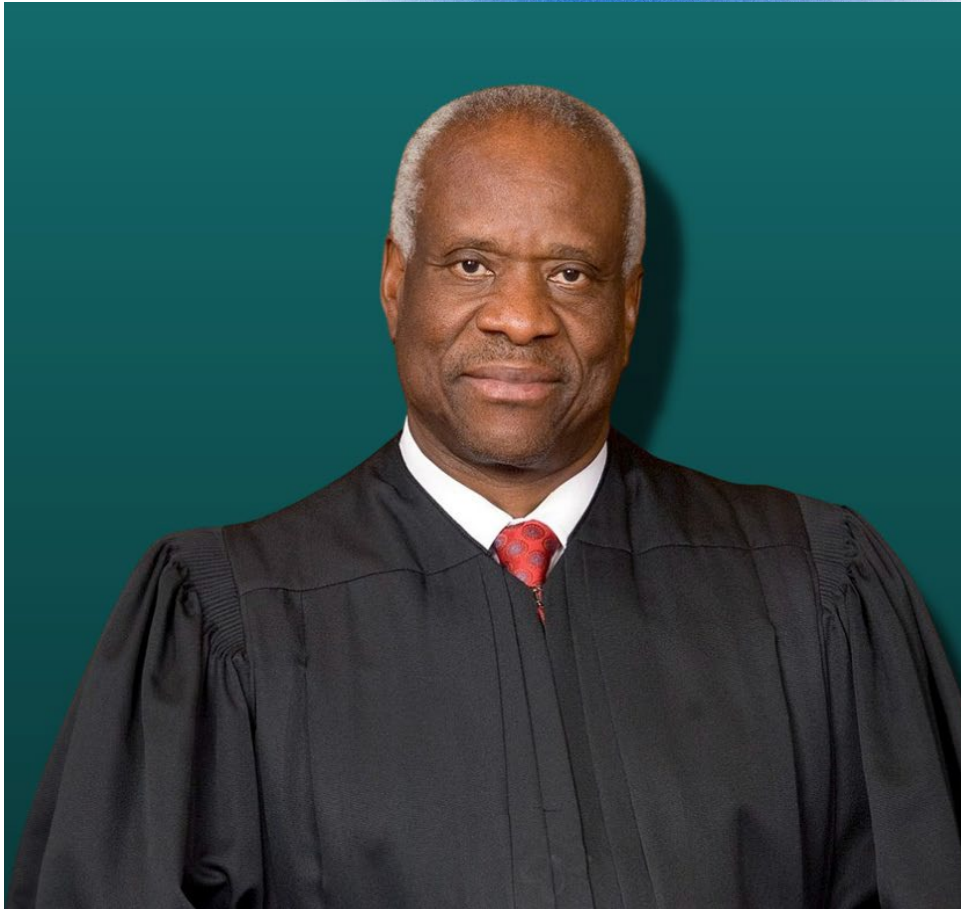
AMES V. OHIO DEPT. OF YOUTH SERVICES

ISSUE PRESENTED:

- **Question:** Must a plaintiff who is a member of a majority group (ex. white, heterosexual) also show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority” to establish a prima facie case of discrimination under Title VII?

AMES V. OHIO DEPT. OF YOUTH SERVS.

JUSTICE THOMAS CONCURRENCE:



- **Judge-Made Doctrines:**
 - tendency to distort underlying statutes, lack textual basis, impose unnecessary burdens on litigants, and create undue judicial confusion
- **Background Circumstances Rule:**
 - Imposes unnecessarily stricter burden on majority-group plaintiffs,
 - Contradicts Title VII's protection of "any individual"
 - Risks unconstitutional race-based preference
 - Difficult to apply
- **McDonnell-Douglas Test:**
 - Incompatible with summary judgment standards
 - Excludes valid ways to prove a claim
 - Maintains an artificial distinction between direct and circumstantial evidence
 - Confuses courts
- **Justice Thomas's Perspective:**
 - Supports eliminating the Background Circumstances rule
 - Advocates for abandoning the McDonnell-Douglas test

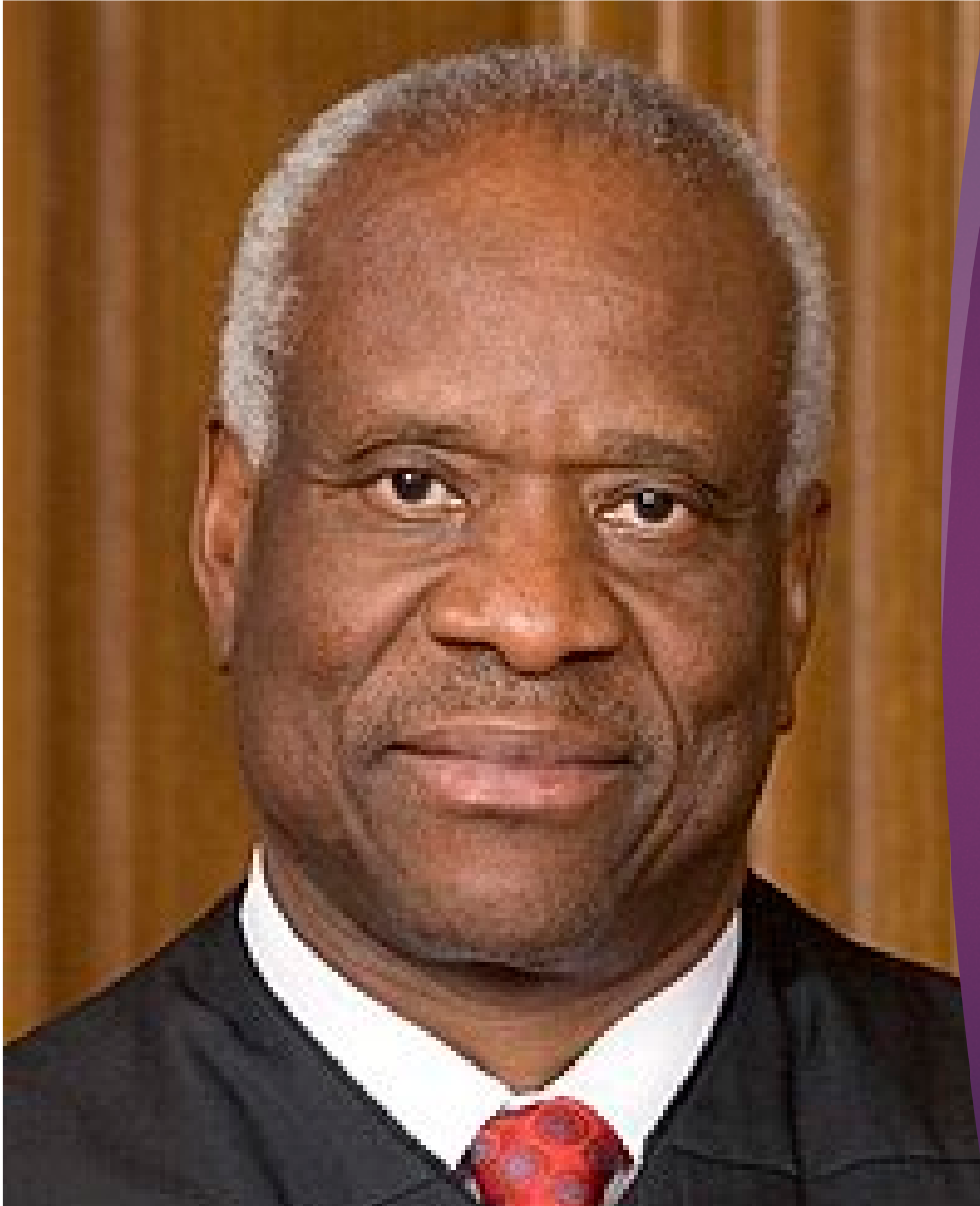
IS THE MCDONNELL-DOUGLAS TEST STILL ALIVE?

- Answer: Yes.
 - Despite Justice Thomas's urging to abandon the *McDonnell-Douglas* test, it remains in use.
 - However, courts are not and have never been obligated to use the *McDonnell-Douglas* standard.
 - In March 2025, the Supreme Court even declined to hear a case challenging the McDonnell-Douglas test, with Thomas and Gorsuch dissenting. These dissents, however, signal that a well-founded challenge to the test is more likely to end up being heard before the Supreme Court than thought.



WHAT COULD REPLACE THE MCDONNELL-DOUGLAS TEST?

- The *McDonnell Douglas* framework in employment discrimination cases could be replaced by a more flexible and holistic "convincing mosaic" standard.
- This new approach allows plaintiffs to present a comprehensive narrative of workplace bias, considering patterns of conduct and broader organizational dynamics.
- For the defense, it necessitates enhanced documentation and internal consistency to counter the full spectrum of alleged discrimination.
- Judicially, it requires a shift from procedural gatekeeping to a detailed, context-rich analysis that aligns with the summary judgment standard.
- This shift allows cases with genuine disputes of material fact to proceed to trial.



WHO WOULD
HAVE “THUNK IT”
– ALLISON
AGREES WITH
JUSTICE THOMAS

For More Discussion

- ▶ William R. Corbett, *Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law*, 79 U. Miami L. Rev. 174-175 (2024)
- ▶ Michael Travis, *the Supreme Court Case That Will Fuel the Corporate DEI Debate in 2025*, Forbes, (December 22, 2024)

WHERE TO PROVE DISCRIMINATION



30

COURTS VS. ARBITRATION?

PROS V. CONS

- ▶ **PROS:** Arbitration is an appropriate way to resolve disputes when it is knowingly and voluntarily agreed to by the parties after a dispute arises
 - ▶ Can be a faster process
 - ▶ No jury risk
 - ▶ Usually more defense/business oriented
 - ▶ Blocks appeal rights
- ▶ **CONS:** Forced arbitration of workplace claims is anathema to our public justice system because it occurs in secret, private tribunals in the absence of accompanying legal safeguards, such as a written record of the arbitration proceedings, the right to appeal the arbitrator's decision if the law is not applied correctly, or other guarantees that ensure a fair process that exist in a court of law. The practice is widespread, affecting every segment of the workforce from minimum wage workers to our nation's servicemembers to highly compensated professionals who are compelled to give up their right to go to court when they believe they have been illegally treated in the workplace to get or keep a job.
 - ▶ Can be very expensive
 - ▶ No jury potential

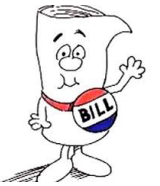
Supreme Court Sides with Employers in Class Action Arbitration Cases

Epic Systems Corp. v. Lewis, No. 16–285. Argued October 2, 2017—Decided May 21, 2018



Ending Forced Arbitration of Sexual Harassment Act

Forced Arbitration Injustice Repeal Act, or FAIR Act 2021



- ▶ The bill was reintroduced in the House by Rep. Henry C. Johnson, D-Ga., who also chaired the subcommittee hearing. Two previous attempts to pass the legislation never won Senate approval.
- ▶ “In forced arbitration, the deck is stacked against the little guy and most often the corporations come out on top,” Johnson said.
- ▶ He added that only about 3% of employees win their cases in arbitration, partly because the arbitrators are commonly hired by the corporate employers. At the same time, about 60% of the American workforce is bound by arbitration agreements because they have no other options for obtaining employment
- ▶ Republicans on the subcommittee said eliminating arbitration requirements would create worse alternatives for employees and their employers. They could be forced into lawsuits that would be more expensive and take much longer.
- ▶ Rep. Mike Johnson, R-La., said the speed and lower costs of arbitration meant, “It’s advantageous to litigants on all sides.” The statistics do not bear this out.
- ▶ The bill has never passed the Senate and has died in committee since 2023.

GOOGLE --- THE POWER OF THE EMPLOYEE

- ▶ One of the best-known disputes over arbitration clauses was the November 2018 walkout by more than 20,000 employees of technology giant Google.
- ▶ They were protesting what they described as Google's policies on "equity and transparency in the workplace," which included disagreement over its forced arbitration clause in employee contracts.
- ▶ In February 2019, Google announced it was ending forced arbitration for full-time employees.

Other Areas of The Law That Are Experiencing Expansion of Ideas in the Modern Workplace

- ▶ The American With Disabilities Act of 1990, as amended in 2008
- ▶ The Family Medical Leave Act
- ▶ They often intersect



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ADAA and FMLA

HAPPENINGS: AMERICANS WITH DISABILITIES ACT

AREAS OF EXPANDED COVERAGE

HISTORY OF THE ADAAA

- ▶ The ADA prohibits employers from discriminating in all aspects of employment against qualified individuals based on a disability and requires employers to reasonably accommodate disabilities if they can do so without an undue hardship.
- ▶ Around 2008, Congress noted that “the Supreme Court and EEOC had interpreted the ‘substantially limits’ standard to be a more demanding one than Congress had intended.” 42 U.S.C. §12101 note (ADA Amendments Act of 2008) (expressly disapproving of prior Supreme Court decisions and EEOC interpretations of the “substantially limits” standard); see *Neely v. PSEG Tex., Ltd. P’ship*, 735 F.3d 242, 245 (5th Cir. 2013) (stating that the ADAAA was passed in part to correct the perceived misconception that the “substantially limits” standard is a demanding inquiry).
- ▶ To correct this, Congress enacted the ADA Amendments Act of 2008 (“ADAAA”) which broadened the definition of disability under the ADA. *McNeal v. Louisiana Department of Public Safety and Corrections*, Civ. Action No. 20-312, 2021 WL 359737, at *13 (M.D. La. Feb. 2, 2021)(citing *Neely*, 735 F.3d at 245–46).

NOW THE DEFINITION OF DISABILITY IS BROADLY CONSTRUED

- ▶ Under the ADA, "disability" means "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A)



THE DEFINITION OF “DISABILITY” IS BROAD!

- ▶ The ADA prohibits employers from discriminating in all aspects of employment against qualified individuals based on a disability and requires employers to reasonably accommodate disabilities if they can do so without an undue hardship.
- ▶ Under the ADA, a disability can be defined in one of three ways:
 - ▶ A physical or mental impairment that substantially limits one or more major life activities.
 - ▶ A record or past history of impairment.
 - ▶ Being regarded as having an impairment.

NINE RULES OF CONSTRUCTION AS TO WHETHER AN IMPAIRMENT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY

- ▶ Construe the term “substantially limits” broadly. Do not interpret it as a demanding standard. (See *Parada v. Banco Indus. De Venezuela, C.A.*, 753 F.3d 62 (2d Cir. 2014).)
- ▶ Judge the ability of an individual to perform a major life activity as compared to most people in the general population. To be substantially limiting, an impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity.
- ▶ Focus on the employer’s ADA obligations (to accommodate and to not discriminate), and do not extensively analyze the “substantially limits” test.
- ▶ Make assessments of impairment on an individual basis. Interpret and apply “substantially limits” to require a lower degree of functional limitation than before the ADAAA.
- ▶ Comparing an individual's performance of a major life activity to others usually should not require scientific, medical, or statistical analysis (although this type of analysis is not prohibited).
- ▶ Do not consider mitigating measures (like hearing aids or medication), with the exception of ordinary eyeglasses or contact lenses.
- ▶ An impairment that is in remission or reoccurs sporadically is a substantial limitation if it would substantially limit a major life activity when active.
- ▶ An impairment that limits one major life activity is sufficient; it does not need to limit more than one major life activity.
- ▶ Even if an impairment lasts six months or less, it can still substantially limit a major life activity.
- ▶ 29 C.F.R. §1630.2(j)(1)(i)-(ix).

Transient/Temporary Disabling Condition

- ▶ *Summers v. Altarum Inst., Corp*, 740 F.3d 325 (4th Cir. 2014).
- ▶ *Mancini v. City of Providence by and through Lombardi*, 909 F.3d 325, n.1, 333 (4th Cir. 2014)
- ▶ *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013)
- ▶ *Mullinex v. Eastman Chem. Co.*, 237 F. Supp.3d 695, 705 (E.D. Tenn. 2017)
- ▶ *Taylor v. FedEx Ground Package Sys., Inc.*, No. 3:16-CV-402, 2018 WL 1363063(JCH) (D. Conn. Feb. 26, 2018).
- ▶ *Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc.*, CV-15-00665-PHX-DLR, 2017 WL 1326130 (D. Ariz. Apr. 11, 2017).

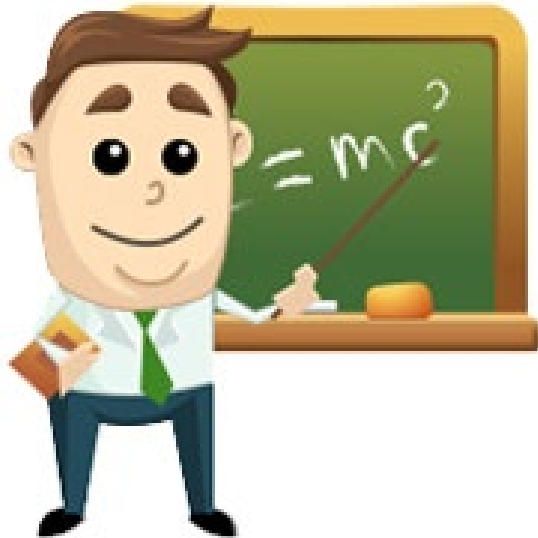
EPIODIC IMPAIRMENTS

- ▶ IMPAIRMENT THAT IS EPISODIC OR IN REMISSION IS A DISABILITY IF IT WOULD SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY WHEN ACTIVE.
- ▶ *Hostettler v. Coll of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018)
- ▶ *Cf. Trautman v. Time Warner Cable Texas, LLC*, 2017 WL 5985573 (W.D. Tex. Dec. 1, 2017)

Relational or Associational Discrimination Under the ADA

- ▶ (1) the plaintiff was “qualified” for the job at the time of the adverse employment action;
- ▶ (2) the plaintiff was subjected to adverse employment action;
- ▶ (3) the plaintiff was known by his employer at the time to have a relative or associate with a disability;
- ▶ (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.
- ▶ *Hartman v. Lafourche Parish Hosp.*, 262 F. Supp. 3d 391, 398 (E.D. La. 2017).

ONCE A DISABILITY IS ESTABLISHED – MUST ESTABLISH THAT EMPLOYEE IS “QUALIFIED”



- ▶ To be qualified under the ADA, an individual must be able to perform the essential functions of the job with or without a reasonable accommodation. 42 U.S.C. §12111(8); 29 C.F.R. §1630.2(m).
- ▶ Essential functions of a position are the “fundamental job duties” and do not include “marginal functions of the position.” 29 C.F.R. §1630.2(m), (n)(1).
- ▶ Identifying essential functions depends on the desired results of the job, not only the means of attaining those results. A job function may be considered essential for various reasons, including:
 - ▶ The reason the position exists is to perform that function.
 - ▶ A limited number of employees are available to perform that job function.
 - ▶ The function is highly specialized so that the employee in the position is hired for a particular expertise or ability.
- ▶ 29 C.F.R. § 1630.2(n)(2).

*Stanley v. City of Stanford,
Florida*, 606 U.S. ---, 145
S.Ct. 2058 (2025)

Stanley v. City of Stanford, Florida, 606 U.S. ---, 145 S.Ct. 2058 (2025)



- ▶ The ADA defines a “qualified individual” as someone “who, with or without reasonable accommodation, can perform the essential functions of the employment position that [she] holds or desires.” §12111(8).
- ▶ The *Stanley* Court, in finding that the ADA did not apply to retirees, reasoned that:
 - ▶ “Congress’s use of present-tense verbs (‘holds,’ ‘desires,’ ‘can perform’) signals that §12112(a) protects individuals able to do the job they hold or seek at the time they suffer discrimination, not retirees who neither hold nor desire a job.”
 - ▶ The ADA’s definition of “reasonable accommodation” - “‘job restructuring,’ modifying ‘existing facilities used by employees,’ and altering ‘training materials or policies,’ §12111(9) - makes sense for current employees or applicants but not for retirees. Section 12112(b)’s examples of discrimination, such as ‘qualification standards’ and ‘employment tests,’ similarly aim to protect job holders and seekers, not retirees.”

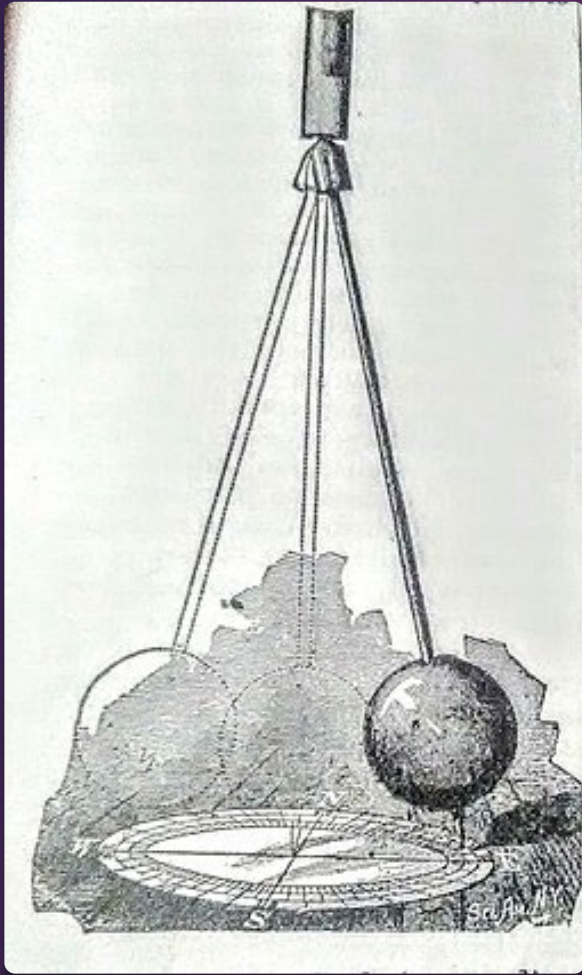
ADA REQUIREMENTS

ADA requires an employer to reasonably accommodate a disabled individual's needs, but it "does not require an employer to relieve an employee of any essential function of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so." *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 698 (5th Cir. 2014).

Excusing an employee from performing his or her essential functions, and leaving performance of those functions to other employees, is "an undue hardship in and of itself." See *Pegues v. Mississippi State Veterans Home*, 736 F.App'x. 473, 477 (5th Cir. 2018).

Accommodations: New Millennial Work Force With Generation Z Entering





REMOTE WORK:
THE PENDULUM
HAS SWUNG

Accommodations: New Millennial Work Force With Generation Z Coming Soon

- ▶ *Credeur v. Louisiana, through Office of Attorney General*, 860 F.3d 785 (5th Cir. 2017).
- ▶ Telecommuting for unlimited period of time is not reasonable accommodation when employer defines regular office attendance as an essential function of the job. Regulation lists 7 considerations in determining essential functions, and greatest weight is accorded to employer's judgment.
- ▶ Plaintiff's claim failed because she could not establish that she was a "qualified individual with a disability."
- ▶ ATTENDANCE WAS AN ESSENTIAL FUNCTION OF THE JOB

The Seven Considerations

- ▶ The employer's judgment;
 - ▶ Written job descriptions prepared before advertising or interviewing applicants for the job;
 - ▶ The amount of time spent performing the function;
 - ▶ The consequences of not requiring the employee to perform the function;
 - ▶ The terms of a collective bargaining agreement;
 - ▶ The work experience of past employees; and
 - ▶ The current work experience of employees in similar jobs.
- ▶ 29 C.F.R. §1630.2(n)(3); see *Montague v. U.S. Postal Service*, No. 22-20113, 2023 WL 4235552, *2 (5th Cir. Jun. 28, 2023).

MY HOW TIMES HAVE CHANGED!!!!

- ▶ Historically, courts have recognized that regular attendance is an essential function of most jobs but during the COVID-19 pandemic, many employers found ways for their employees to accomplish the essential functions of hundreds of jobs without physical presence at the workplace.
- ▶ Even pre-pandemic, technological advances made working from home more possible.
- ▶ Employers can no longer rely on an automatic presumption that working from home is always unreasonable. See *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635, 644-645 (7th Cir. 2023) (listing cases spanning from 1995 through 2019 holding that, as a general matter, working from home is not a reasonable accommodation and explaining shift to more case-specific analysis with advanced technologies and post-COVID-19 pandemic).

Ray v. Columbia Brazoria Indep. Sch. Dist., 2025 WL 1219191, *3 (5th Cir. 2025),

- ▶ There is still a reluctance to accept remote work though.
- ▶ “there is a general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs,” especially when “the position is interactive.”) – summary judgment in favor of employer affirmed.
- ▶ On appeal, Ray alleged that the district court’s reliance on *Credeur* was improper because it was decided pre-COVID but failed to cite any post-pandemic caselaw indicating that in-person attendance is not an essential part of being a teacher and district court cases cited number of cases to the contrary. *Ray, supra*.
- ▶ Ray also alleged that in-person attendance was not essential because her employer allowed teachers to work remotely at the start of the pandemic. The Fifth Circuit condoned the district court’s dismissal of this argument as well in quoting EEOC guidance on the issue:
 - ▶ The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job’s essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.

EEOC GUIDANCE



- ▶ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, U.S. EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#> (last updated May 15, 2023).*

CASES FINDING ATTENDANCE AS ESSENTIAL FUNCTION

- ▶ Physical presence was required for a science teacher during the established times of the school day and the requested accommodation of arriving at school up two hours late every day was not a reasonable accommodation. *Smithson v. Austin*, 86 F.4th 815, 820-22 (7th Cir. 2023).
- ▶ Physical presence was required for a director of imaging services at a hospital to oversee proper functioning of sophisticated medical imaging equipment, supervise and evaluate staff, and serve as a liaison between radiologists and other staff. *Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635, 646 (7th Cir. 2023).
- ▶ Attendance was an essential function of a railroad employee's job as a locomotive engineer and the requested accommodation of not accepting, or "laying off" work shifts as necessary and receiving 24 hours of rest between shifts was unreasonable. *Higgins v. Union Pac. R.R. Co.*, 931 F.3d 664 (8th Cir. 2019).

CASES FINDING ATTENDANCE AS ESSENTIAL FUNCTION

- ▶ Physical presence at an airline's headquarters was an essential function of all jobs within the flight service department after an airline merger restructured all jobs within the department from independent activities the employee could do remotely to team-centered crisis management activities requiring frequent face-to-face meetings with team members on short notice, and the employee, who could not relocate to the airline's headquarters because of a disability, was no longer qualified for the job. *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565 (7th Cir. 2019).
- ▶ Regular and reliable attendance was an essential function of an employee's job on the production line of a meat packing facility and the requested accommodation of additional unscheduled absences after 194 days of unplanned absences was not reasonable. *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 546 (8th Cir. 2018).
- ▶ Regular attendance in the office was an essential function of a medical malpractice litigation attorney's job because of the interactive nature of the position and the need for day-to-day coordination with supervisors and staff. *Credeur v. State of Louisiana*, 860 F.3d 785, 793-95 (5th Cir. 2017).

CASES FINDING ATTENDANCE AS ESSENTIAL FUNCTION

- ▶ Attendance was an essential function of an automotive resale buyer's job and a request to telecommute up to four days per week was not a reasonable accommodation. *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).
- ▶ Because attendance is an essential function of the job of a neo-natal nurse, a hospital employer was not required to offer a waiver of the cap on five unplanned absences as an accommodation. *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1241 (9th Cir. 2012).
- ▶ Employers are not required to authorize unlimited absenteeism. *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008), *cert. denied*, 555 U.S. 1072 (2008).

CASES FINDING ATTENDANCE AS ESSENTIAL FUNCTION

- ▶ The ability to work overtime was an essential function of manufacturing job, and an inability to work overtime meant the employee was not qualified. *Tjernagel v. Gates Corp.*, 533 F.3d 666, 673 (8th Cir. 2008).
- ▶ Regular attendance is an essential function of the job. *Willi v. Am. Airlines, Inc.*, 288 Fed. Appx. 126, 127 (5th Cir. 2008).
- ▶ Regular attendance is an essential function of the job of Patient Access Representative whose duties included welcoming patients and providing patients “easy access to the facility,” giving patients documents that needed to be taken to other departments, and collecting payments on accounts, among other tasks, all functions “predicated upon the physical presence of hospital patients.” *Jackson v. CHRISTUS Health Northern Louisiana*, Civ. Action No. 20-1459, 2022 WL 2911684, *3 (W.D.La. Jul. 22, 2022, Hicks, J.)

CASES FINDING ATTENDANCE WAS NOT AN ESSENTIAL FUNCTION

- ▶ A jury reasonably concluded that in-person attendance was not an essential function of an in-house attorney's job for the 10-week period in which the employee requested to telework because the attorney had not tried cases in court or taken depositions during the eight years the attorney had been employed, and all the other essential functions of the job could be performed remotely. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 603-05 (6th Cir. 2018).
- ▶ The employer had informally accommodated a paraplegic employee's tardiness for 17 years, and when the employer began prohibiting tardiness and terminated the employee under the policy, the court determined that a fact issue existed regarding whether timely arrival was an essential function of the job. *Holly v. Clairson Industries, L.L.C.*, 492 F.3d 1247, 1260-61.

CASES FINDING ATTENDANCE WAS NOT AN ESSENTIAL FUNCTION

- ▶ A data entry employee whose work was time-sensitive only in that it must be completed before the employer's laboratory opened the next day and the employer allowed flexible schedules suggested that a regular and predictable schedule was not an essential function of the employee's position. Therefore, the employee's disability could reasonably be accommodated with an open schedule, if the employee worked the requisite seven and a half hours per day. *Ward v. Mass. Health Rsh. Instit.*, 209 F.3d 29, 35 (1st Cir. 2000).

SHIFTING TIDES IN RETURN TO WORK POLICIES

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- ▶ **Microsoft** will require employees to be onsite three days a week, beginning late February 2026, rolling out in phases. Exceptions are possible for commuting hardships or remote role necessities. Tom Warren, *Microsoft Will Require Workers in the Office Three Days a Week Starting in 2026*, **The Verge** (Sept. 5, 2025), <https://www.theverge.com/report/774414/microsoft-return-to-office-policy-announcement>
- ▶ **Paramount Skydance** (Los Angeles and New York offices) will mandate five days a week in-office starting January 5, 2026. A voluntary severance or buyout option is offered for those unwilling to comply. Dawn Chmielewski, *Paramount to Mandate Five-Day Return to Office Starting January, Memo Says*, **Reuters** (Sept. 4, 2025), <https://www.reuters.com/business/world-at-work/paramount-mandate-five-day-return-office-starting-january-memo-says-2025-09-04/>

SHIFTING TIDES IN RETURN TO WORK POLICIES

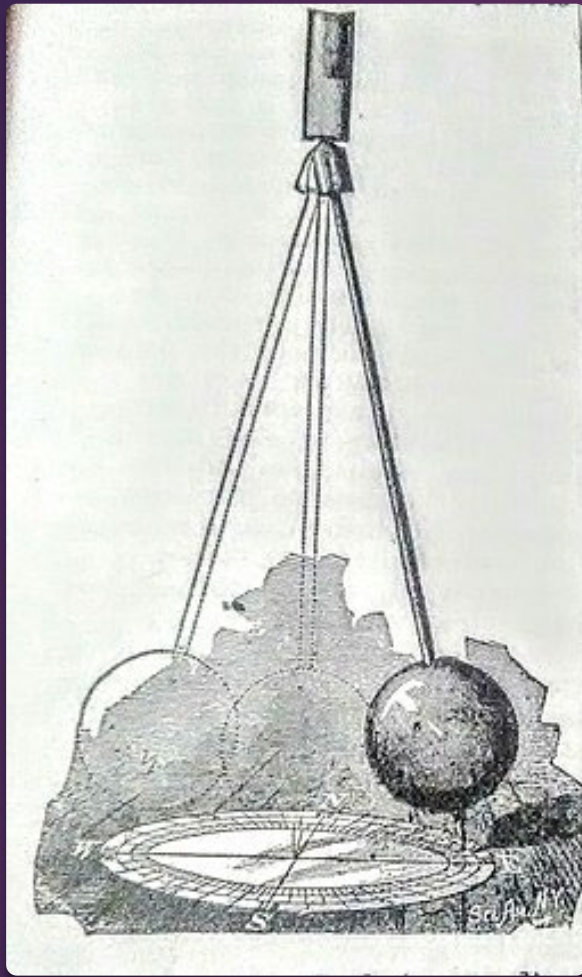
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- ▶ Dell ended hybrid and remote work this past March, requiring employees to attend the office five days a week starting March 3, 2025. Tom Warren, *Dell Ends Hybrid Work, Orders Employees Back to the Office Five Days a Week*, The Verge (Jan. 23, 2025), <https://www.theverge.com/news/603963/dell-return-to-office-stellantis-jpmorgan>
- ▶ JPMorgan Chase mandated that hybrid workers return to a full-time, five-days-per-week in-office schedule starting this past March. Lauren Aratani, *JPMorgan Chase Orders Workers Back to Office Five Days a Week*, The Guardian (Jan. 10, 2025), <https://www.theguardian.com/business/2025/jan/10/jp-morgan-chase-return-to-office>
- ▶ Starbucks will require corporate employees to be in the office four days a week beginning early October. Corporate “people leaders” must also relocate to headquarters, with a voluntary exit payout offered to those who decline. Dee-Ann Durbin, *Starbucks Takes Aim at Remote Work, Says Some Employees May Need to Relocate to Headquarters*, Associated Press (Sept. 3, 2025), <https://apnews.com/article/134eb6122e1dffc5f319fbca083f5b3>

SHIFTING TIDES IN RETURN TO WORK POLICIES

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- ▶ Many employers are continuing to offer remote options while moving toward more structured hybrid schedules. Common models include fixed patterns like “3 days remote / 2 days in-office,” or allowing employees to choose their remote days within guidelines. This adjustment reflects an effort to balance operational needs, team cohesion, and employee flexibility. OpsMatters, *Remote Work 2025: Data-Backed Trends Shaping the Future of Work* (2025), <https://opsmatters.com/posts/remote-work-2025-data-backed-trends-shaping-future-work>



WILL THE
PENDULUM
SWING
AGAIN?



HAVE A WRITTEN POLICY IN PLACE

There's a growing push for companies to replace informal or ambiguous guidelines with clear formal policies. These define eligibility, expectations, communication rules, cybersecurity practices, and coordination procedures—making remote work more consistent and manageable. MojoTrek, *Remote Work Trends & Best Practices* (2025), <https://mojotrek.com/blog/remote-work-trends-best-practices>

WHAT HAPPENS WHEN ADA CLASHES WITH FMLA?

HAPPENINGS: ADA and FMLA

Leave As An Accommodation

- ▶ Remember that disability is no longer difficult to prove – broadly interpreted.
- ▶ What does this have to do with employee leave? Leave may be a reasonable accommodation. Even leave in excess of what is required under the FMLA.



WHAT ABOUT A MENTAL HEALTH DAY?

- ▶ Is the employer covered by the ADA (employers with more than 15 employees on their payroll for 20 or more calendar workweeks (need not be consecutive) in the year of the request or the preceding year)?
- ▶ Is the employee protected by the ADA, *i.e.*, is the employee a qualified individual under the ADA?
- ▶ Is the employer covered by the FMLA (employers with more than 50 employees on its payroll for 20 or more calendar workweeks (need not be consecutive) in the year of the request or the preceding year)?
- ▶ Is the employee eligible for leave under the FMLA, *i.e.*, has the employee worked for the covered employer for at least 12 months (need not be consecutive) and at least 1,250 hours during the 12 months before the first day of the requested leave?

POST-2008: FMLA V. ADA



Differences Between FMLA and ADA

- ▶ **FMLA: provides NO RECOGNITION of any hardship experienced by the employer from the exercise of FMLA leave.**
- ▶ **ADA: recognizes concept of “undue hardship as defense to a claim of failure to “accommodate a qualified individual with a disability.”**
- ▶ **There is no such defense in the FMLA, and it requires employers to comply with its obligations and protections just as they must comply with minimum wage statutes.**
- ▶ **FMLA definition of “employer” (50 or more employees) differs from the definition used by the ADA (15 or more employees).**



DIFFERENCE BETWEEN FMLA AND ADAAA CONTINUED

- ▶ The ADA does not impose the same eligibility requirements
 - ▶ A qualified employee may be entitled to leave as a reasonable accommodation even if
 - ▶ The employer has less than fifty – but at least fifteen – employees
 - ▶ The employee has not worked at the company for twelve months
 - ▶ The employee has not worked at the company for the requisite 1,250 hours
 - ▶ The employee has already exhausted twelve weeks of FMLA leave



“Serious Health Condition” v. “Disability”

A “serious health condition” entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

- ▶ Inpatient care; or
- ▶ Continuing treatment by a health care provider, which requires absence for 3 full, consecutive calendar days of incapacity and a regimen of continuing treatment.

Under the ADA, the term disability” means, with respect to an individual:

- ▶ (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- ▶ (B) a record of such an impairment; or
- ▶ (C) being regarded as having such an impairment (as described in paragraph (3)).

BOTH ARE TO BE BROADLY INTERPRETED

Essential Functions of The Job

- ▶ An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's job.
- ▶ "Essential functions" in the FMLA context means the same thing as it does under the ADAAA:
 - ▶ Whether employees in the position actually are required to perform the function, and whether removing that function would fundamentally change the job.
- ▶ It does not mean total incapacitation, and an employee is considered to be unable to perform essential functions of the job when he or she is absent to receive or in preparation to receive treatment.
- ▶ The employer should include along with its request for medical certification of a serious health condition a description of the essential functions of the job and a request that the health care provider render an opinion as to whether the employee can perform them. 29 C.F.R. § 825.123.

Essential Functions of The Job

- ▶ This is one area in which the FMLA and the ADA create confusion.
- ▶ For example, an employer may seek to accommodate an employee under the ADA by relieving him of certain duties.
- ▶ However, the FMLA gives the employee the right to take leave rather than accept the accommodation.

Qualified Employees, Direct Threats, and Shifting the Burden on Burden Shifting

- ▶ “An employer is entitled to a direct threat defense if an employee poses ‘a significant risk to the health or safety of other that cannot be eliminated by reasonable accommodation.’” *Nall v. BNSF Ry. Co.*, 912 F.3d 263, 270 (5th Cir. 2018) (*withdrawn*); see also *Nall v. BNSF Ry. Co.*, 917 F.3d 335 (5th Cir. 2019).
- ▶ Who decides? “[T]he question here is whether the processes used in determining that Nall could not perform the essential duties of a trainman safely were objectively reasonable; or, applying the summary judgment standard, whether a reasonable jury could conclude that BNSF’s actions were not objectively reasonable.” *Id.*
- ▶ *But see*: “Just because an employee disagrees with an employment decision—and just because a plaintiff’s expert disagrees with the underlying medical judgment that led to that employment decision—does not make the employment decision ‘objectively unreasonable.’ . . . Under the majority’s approach, however, a plaintiff is entitled to take a case to trial so long as he can identify some procedural irregularity in the process used by him employer to determine whether or not he presents a direct threat.” *Id.* (J. Ho, *dissenting*).
- ▶ See also: “In determining whether an education institution’s eligibility requirement is essential and whether it has been met, the court must afford a measure of deference to the school’s professional judgment.” *Class v. Towson*, 806 F.3d 236, 245 (4th Cir. 2015); *Chiari v. City of League City*, 920 F.2d 311, 311 (5th Cir. 1991) (“Chiari maintains that, despite the testimony of the three physicians, a jury still could find that he is capable of performing his job without endangering others. He contends, and the City concedes, that he has never fallen on anyone or injured anyone in the past. The risk, he states, is not that he will hurt others but that he will hurt himself, and he argues that this court cannot consider the risk of personal injury to the handicapped individual as one of the factors in determining whether that individual is qualified to do a job. We disagree.”).
- ▶ Whose burden?
- ▶ “We do not reach the question of which party bears the burden of proof regarding the direct threat defense.” *Nall*, 917 F.3d at 343 n. 5.

Interaction of FMLA and ADA

- ▶ *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018).
- ▶ Whether employer violates ADA by refusing to grant long-term medical leave beyond what is required by FMLA.
- ▶ No. “The ADA is an anti-discrimination statute, not a medical leave entitlement.”



ADA: LEAVE AS AN ACCOMMODATION

The ADAAA: Leave As A Reasonable Accommodation

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- ▶ If an employee has a disability, an employer may be required to provide leave, even if the employee has exhausted FMLA leave.
- ▶ Is additional leave beyond the FMLA requirements always required by the ADA? No.
- ▶ Remember that indefinite leave is not a reasonable accommodation. The employee does not have to give a set return date, but must at least be able to give an estimate. The employee may also revise the return date. (“Reasonable accommodation does not require an employer to wait indefinitely for the employee’s medical condition to be concluded” *Rogers v. Int’l Marine Terminals, Inc.* 87 F.3d 755 (5th Cir. 1996); *Reed v. Petroleum Helicopters Inc.*, 218 F.3d 477,481 (5th Cir. 2000).



How to Determine if Leave is a Reasonable Accommodation Under the ADAAA?

- ▶ First, determine if the employee has made a request for a reasonable accommodation. Has the employee expressed a desire to return to work? Has the employee stated that additional leave will allow him/her to return?
- ▶ Second, conduct the interactive process with the employee. The ADA requires the employer to sit down with the employee and to discuss the possible accommodations that would allow the employee to perform the essential functions of his or her job. Are there any options other than leave? The employer must document this process including any accommodations proposed by the employee and the employer.

EEOC v. Chevron Phillips Chem. Co. LP 570 F.3d 621 (5th Cir. 2009) “[w]hen an employer does not engage in a good faith interactive process, the employer violates the ADA – including when the employer discharges the employee instead of considering the requested accommodations. *Picard v. Tammany Parish Hospital*, 423 Fed. Appx 467m 470 (5th Cir. 2011), failure of employer to engage in interactive process is not a per se violation if there was no reasonable accommodation available.

- ▶ Third, require the employee’s physician to provide employer with responsive and complete verification for the need for leave. Does the physician believe that leave will allow the employee to return?

How to Determine if Leave is a Reasonable Accommodation Under the ADAAA?

- ▶ Fourth, choose a reasonable accommodation and communicate it to the employee. Remember that the employee is entitled to a reasonable accommodation, not any reasonable accommodation he/she chooses. Does the employee's physician believe that employer proposed accommodation will enable the employee to perform the job? Has the employer documented why employer believes the accommodation is reasonable or why one is preferable to the other?
- ▶ Fifth, if employer is considering denying the request for an accommodation, employer must first analyze whether the accommodation would cause an undue hardship. Ask how the company will be harmed if the accommodation is not granted. What concrete costs will there be? Are the costs hypothetical and uncertain or likely? It is always advisable to discuss the decision to deny an accommodation with counsel prior to communicating it with the employee.



ARTIFICIAL INTELLIGENCE WILL CHANGE OUR WORK WORLD

- ▶ **Transportation:** Autonomous cars will one day ferry us from place to place.
- ▶ **Manufacturing:** AI powered robots work alongside humans to perform a limited range of tasks like assembly and stacking, and predictive analysis sensors keep equipment running smoothly.
- ▶ **Healthcare:** In the comparatively AI-nascent field of healthcare, diseases are more quickly and accurately diagnosed, drug discovery is sped up and streamlined, virtual nursing assistants monitor patients and big data analysis helps to create a more personalized patient experience. But, there are also downsides here regarding the use of electronic health records.
- ▶ **Education:** Textbooks are digitized with the help of AI, early-stage virtual tutors assist human instructors, and facial analysis gauges the emotions of students to help determine who is struggling or bored and better tailor the experience to their individual needs.
- ▶ **Customer Service:** Last but hardly least, Google is working on an AI assistant that can place human-like calls to make appointments at, say, your neighborhood hair salon. In addition to words, the system understands context and nuance. Imagine an AI legal assistant?

ARTIFICIAL INTELLIGENCE WILL CHANGE OUR WORK WORLD

- ▶ **Discrimination and Bias:** If AI-driven reductions in force disproportionately affect protected groups, employers may face Title VII, ADEA, ADA, or state-law claims.
- ▶ **WARN Act Compliance:** Large layoffs (triggered by automation/AI adoption) may require advance notice under the federal WARN Act or state “mini-WARN” laws (Louisiana, Texas and Arkansas have none).
- ▶ **Employment Classification & Wage Laws:** As tasks shift from humans to AI or contractors (e.g., labeling, monitoring AI outputs), employers must ensure proper Fair Labor Standards Act classification and pay compliance.
- ▶ **Privacy & Data Security:** AI tools often process sensitive employee or customer data; improper use may create liability under HIPAA or sector-specific laws.



MODERN MEDICINE AND NON-COMPETES IN THE BEGINNING.....

NON-COMPETES! DOCTORS BEWARE

- ▶ *Board of Supervisors of Louisiana State University v. Lauren McCalmont, M.D.*, 339 So.3d 1261 (La. App. 2 Cir. 05/25/2022)
- ▶ Trial court granted Dr. McCalmont's Motion for Involuntary Dismissal of the Preliminary Injunction. LSU appealed.
- ▶ Although the Second Circuit found that the non-competition agreement met the temporal (2 years) and geographic restrictions (applying only in Caddo and Bossier Parishes) of La. R.S. 23:921, it determined that "the language that limits [Dr. McCalmont's] livelihood as a physician is so overly broad as to be unenforceable."
- ▶ Provision was deemed particularly overly broad because the restriction, as written, would restrict the physician from using her medical license in any field of medicine at all in Caddo or Bossier Parishes.
- ▶ Dismissal of LSUHSC's preliminary injunction – affirmed.

Revisions to La. R.S. 23:921 for physicians:

- ▶ To any agreement or contract entered into on or after the effective date of the Act (1/1/25)
- ▶ For any agreement or contract existing as of 1/1/25, the 3- or 5-year term provided for in the Act shall commence on the effective date of the Act (1/1/25) as will the new geographic limitation provisions.

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NON-COMPETE AGREEMENT

1. Purpose

This agreement, when countersigned below, shall constitute an agreement regarding certain confidential and proprietary information and trade secrets ("Confidential Information") relating to the business of _____ hereinafter referred to as the "Company" and _____ hereinafter referred to as the "Recipient" (collectively referred to as the "Parties") of the date executed by the Company (the "Effective Date").

The Recipient shall strictly maintain the confidentiality of the Company's confidential and proprietary information may be shared by the Recipient for the purpose of estimating, and completing projects as well as for the Company's business practices for the Company and its clients.

2. Non-Compete/Disclosure

During the tenure of the Recipient with the Company, and after the termination of the Recipient's employment with the Company, the Recipient shall not:

(Check All that Apply)

☐ - **Business Practices** - Provide services, or engage in any other work of a similar nature to the business of the Company.

Revisions to La. R.S. 23:921 for physicians: (SECTION M)

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- ▶ Primary Care Physicians
- ▶ M. (1) Any provision in a contract or agreement which restrains a primary care physician from practicing medicine shall not exceed three years from the effective date of the initial contract or agreement. Any subsequent contract or agreement between the employer and primary care physician executed after the initial three-year term shall not include noncompete provisions.
- ▶ (2) If the contract or agreement provided for in Paragraph (1) of this Subsection is terminated by the primary care physician prior to the initial three-year term, the primary care physician may be prohibited from carrying on or engaging in a business similar to that of the employer in the parish in which the primary care physician's principal practice is located and no more than two contiguous parishes in which the employer carries on a like business. The parishes shall be specified in the contract or agreement. The prohibition authorized in this Paragraph shall not exceed a period of more than two years from termination of employment.
- ▶ (3) For purposes of this Subsection, "primary care physician" means a physician who predominantly practices general family medicine, general internal medicine, general pediatrics, general obstetrics, or general gynecology. For any other physician, the provisions of Subsection N of this Section shall apply.

Revisions to La. R.S. 23:921 for physicians: (SECTION N)

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- ▶ All Other Physicians
- ▶ N. (1) For any physician other than a primary care physician as defined in Subsection M of this Section, any provision in a contract or agreement which restrains the physician from practicing medicine shall not exceed five years from the effective date of the initial contract or agreement. Any subsequent contract or agreement executed between the employer and the physician after the initial five-year term shall not include noncompete provisions.
- ▶ (2) If the contract or agreement provided for in Paragraph (1) of this Subsection is terminated by the physician prior to the initial five-year term, the physician may be prohibited from carrying on or engaging in a business similar to that of the employer in the parish in which the physician's principal practice is located and no more than two contiguous parishes in which the employer carries on a like business. The parishes shall be specified in the contract or agreement. The prohibition authorized in this Paragraph shall not exceed a period of more than two years from termination of employment.

Revisions to La. R.S. 23:921 for physicians:

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- ▶ O. (1) The provisions of Subsections M and N of this Section shall not apply to the following physicians:
- ▶ (a) Any physician who is employed by or under contract with a rural hospital as provided for in the Rural Hospital Preservation Act, R.S. 40:1189.1 et seq.
- ▶ (b) Any physician who is employed by or under contract with a federally qualified healthcare center as defined in R.S. 40:1183.3 and which operates in a rural parish as designated by the federal Office of Management and Budget at the time that the physician is hired.
- ▶ (2) For any physician exempted in this Subsection, the provisions of Subsection C, J, K, or L of this Section shall apply.

QUESTIONS FOR COURTS THAT WILL LIKELY ARISE

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- ▶ What rules apply when the employer terminates the physician's agreement or contract in light of the Legislature's choice to limit application of La. R.S. 23:921(M)(2) and (N)(2) to circumstances when the agreement or contract is terminated *by the physician*?
- ▶ If a physician non-compete agreement's geographic restriction includes more than just the parish where the physician's principal practice is located and two contiguous parishes where the employer carries on a like business, will courts reform those agreements to comply?
 - ▶ How will they be reformed?
 - ▶ If more than two parishes contiguous to the principal practice parish exist, how does a court determine in which two parishes a physician is restricted?
 - ▶ Will courts find those agreements that include more than the 3 parishes allowed by 921(M)(2) and (N)(2) to be overly broad and declare them to be invalid for that reason?

TRANSITIONS

THE MODERN WORKPLACE MUST PREPARE FOR THE NEW WORLD



**QUESTIONS,
COMMENTS,
DISCUSSION...**