

A hand in a dark suit jacket is shown from the wrist up, pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent. The background is a blurred outdoor scene with trees and a bright sky.

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WORKPLACE 2024

TODAY'S AGENDA

Theresa Rusnak – (12:00PM-12:05PM)

- Introduction

Philip Zaccheo – (12:05PM-12:15PM)

- Office of Civil Rights Title VI Guidance

Thomas Bezigian – (12:15 PM-12:25PM)

- Power of Attorney Basics

Stephanie Fedorka – (12:25PM-12:35PM)

- DOL Bulletin on AI and Automated Systems in the Workplace

Theresa Rusnak – (12:35PM - 12:45PM)

- Latest Updates on Pregnant Worker Protections

Office of Civil Rights Title VI Guidance



Philip J. Zaccheo

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May 7, 2024 OCR Dear Colleague Letter

- *Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics*
 - May 25, 2023 DCL: Addressing Discrimination Against Jewish Students
 - November 7, 2023 DCL: Discrimination, including Harassment, Based on Shared Ancestry or Ethnic Characteristics
 - March 14, 2024 DCL: Addressing Discrimination Against Muslim, Arab, Sikh, South Asian, Hindu, and Palestinian Students
- OCR has opened more than 100 investigations Since October 7, 2023 into complaints alleging discrimination based on shared ancestry or ethnic characteristics, including Antisemitism

Title VI of the Civil Rights Act of 1964

- *“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”*
 - Includes:
 - Shared ancestry
 - Shared ethnic characteristics
 - Citizenship or residency in a country with a dominant religion or distinct religious identity

Different Treatment

- Different treatment based on actual or perceived race, color, or national origin.
 - Grading
 - Discipline
 - Pursuit of complaints

Hostile Environment

- Institutional liability if:
 - a hostile environment based on race, color, or national origin exists;
 - Unwelcome conduct based on race, color, or national origin that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from educational programs or activities
 - *“The offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title VI. OCR evaluates the conduct from the perspective of the student who is allegedly being harassed and from the perspective of a reasonable person in that student’s position, considering all the circumstances.”* May 7, 2024 DCL, p. 5

Hostile Environment

- Institutional liability if:
 - The institution had actual or constructive notice of the hostile environment; and
 - The institution failed to take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring

Balancing Speech Concerns

- *“Nothing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment to the U.S. Constitution. OCR enforces the laws within our jurisdiction consistent with the First Amendment.”*
- *“The fact that harassment may involve conduct that includes speech in a public setting or speech that is also motivated by political or religious beliefs, however, does not relieve a school of its obligation to respond under Title VI as described.”*

(May 7, 2024 DCL, p. 5)

Balancing Speech Concerns

- “Speech expressing views regarding a particular country’s policies or practices is protected by the First Amendment and does not necessarily implicate federal civil rights laws. However, if harassing conduct that otherwise appears to be based on views about a country’s policies or practices is targeted at or infused with discriminatory comments about persons from or associated with a particular country, then it may implicate Title VI....”
 - “OCR acknowledges that it may sometimes be difficult to distinguish between alleged conduct based on views regarding a particular country or its policies (which would not implicate Title VI) and alleged conduct based on students’ actual or perceived shared ancestry or ethnic characteristics or their citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity (which could implicate Title VI).”

(May 7, 2024 DCL, pp. 16-17)

DCL Examples of Hostile Environment

- 9 Scenarios Involving Hypothetical On-Campus Conduct
 - According to OCR, the facts provided in every one of its examples would lead to an investigation
- Common Themes:
 - Conduct beyond political speech
 - Slurs, epithets, stereotypes
 - Graffiti or other vandalism
 - Verbal threats
 - Obstruction
 - Physical aggression, intimidation or violence
 - Directed (individually or generally) based on protected characteristics

Takeaways

- Very fact-specific
- Nominally objective, practically subjective
- Considerations beyond regulatory enforcement:
 - Legal
 - Optical/Reputational
 - Political
- To learn more, see: <https://www.bsk.com/news-events-videos/navigating-compliance-with-ocr-rsquo-s-new-guidance-on-title-vi>

Power of Attorney Basics



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DOL Bulletin on AI and Automated Systems in the Workplace



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USDOL Guidance on Use of AI in Employment

- USDOL WHD – Field Assistance Bulletin No. 2024-1
 - Issued April 29, 2024
- Guidance to WHD field staff as employers increasingly use AI and other automated systems in the workplace
- Use of AI for tracking hours, measuring worker performance, setting work schedules, assigning tasks, performing complex human resources functions, etc.

Key Takeaways

- Employers are responsible for providing human oversight when using AI
 - Do not rely on AI exclusively to get it right; AI is only as good as the input and oversight
 - Do not rely on AI for matters that should not be rigidly applied
 - Human oversight for ultimate decisions on hiring, promotions, discipline, etc.
 - Do not use AI to engage in surveillance or retaliation
- Can result in undercounting, underpayment, inaccurate reporting/tracking of hours → Host of compliance issues!

FLSA

- Hours Worked
 - If employer knows or has reason to believe work is being performed, time must be counted as hours worked → Compensated (paid)
 - Employer has obligation to exercise reasonable diligence to acquire knowledge regarding hours worked by employees, whether scheduled or unscheduled by employer and to keep accurate records of hours worked
- Tracking Working Time – AI programs can analyze worker activity, send notification that employee is not working/idle
 - Reliance on monitoring systems without proper human oversight can result in failure to pay wages for all hours worked if AI program incorrectly categorizes time as non-compensable work time

FLSA

- Monitoring Break Time –
 - Breaks 20 minutes or less generally counted as hours worked (paid)
 - “Smart” entries or auto-populated time entries where employee is not actually relieved of all duties or not accurate accounting of time could result in violation
- Waiting Time - Some instances time spent waiting constitutes hours worked that must be paid
 - “Engaged to wait” – hours worked
 - “Waiting to be engaged” – not hours worked
 - AI programs that assign tasks automatically

FLSA

- Worked Performed at Multiple Locations –
 - Use of location monitoring to track employees as a basis to determine if employee is “working”; Automatic clock in and clock out process
 - If systems fail to account for work performed in different locations
 - E.g., construction worker may begin their workday before they arrive at the designated worksite if employer asks them to pick up tools at the Company headquarters or purchase supplies at store on the way to worksite
- Calculating Wages – Use of AI to calculate wage rates may not be accurate; depends on inputs
 - Regular rate

FMLA

- Processing Leave Requests – Eligibility, timekeeping, undercount time and result in denial of leave/finding of ineligibility incorrectly
- Certification to Support FMLA Leave – Automated system that has “rules” for FMLA leave certification could result in asking employee to disclose more medical information than permissible
 - Improper deadline setting/rigid treatment when there could be circumstances that permit extra time for submission of certification

FMLA

- Interference and Retaliation – AI systems may track and analyze leave use
 - Cannot be used to target FMLA leave users for retaliation or discouraging the use of leave
 - Cannot count FMLA leave as a negative factor in employment actions (promotions, disciplinary actions) or assign negative attendance points for FMLA protected absences
 - Denial of benefit to employees who use other similar types of leave

PUMP Act

- Use of AI to track and make determinations on employee work hours, work schedules, assignment of tasks, management of break time requests, and assessment of worker productivity
- AI systems that limit length, frequency, or timing of employee breaks for expression of breast milk in the workplace would violate FLSA reasonable break time requirement
 - Productivity scoring/monitoring systems that penalize worker for failing to meet productivity standards or quotas due to pumping breaks would also violate FLSA
 - Automated scheduling system that requires employee to make up time spent taking pump breaks or reduces scheduled hours in the future would be unlawful retaliation

Employee Polygraph Protection Act

- EPPA generally prohibits private employers from using lie detector tests on employees for pre-employment screening or requiring, requesting, suggesting, or causing an employee or prospective employee to take or submit to any lie detector test
- AI technologies have ability to use eye measurements, voice analysis, micro-expressions, other body movements to suggest if someone is lying

Retaliation

- Use of AI to take adverse employment action against workers for engaging in protected activities is prohibited
- Use of AI tools as “pretext” for penalizing employee for engaging in protected activity could constitute unlawful retaliation
- Use of AI for surveillance for protected activity could violate anti-retaliation protections

Latest Updates on Pregnant Worker Protections



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Pregnant Workers Fairness Act Final Rule

- Pregnant Workers Fairness Act (“PWFA”) went into effect June 27, 2023
- EEOC finally published final rule and expansive interpretive guidance regarding implementation of PWFA
- Recall, EEOC published proposed rule on August 11, 2023
 - Comment period open for 60 days (October 10, 2023)
- **Published in Federal Register:** April 19, 2024
- **Effective:** June 18, 2024

Expansive Definitions - Pregnancy and Childbirth

- **“Pregnancy”** and **“childbirth”** → Pregnancy or childbirth of the specific employee, and include but are not limited to: current pregnancy; past pregnancy; potential or intended pregnancy (including infertility, fertility treatment, and the use of contraception); labor; childbirth (vaginal and cesarean delivery)

Expansive, Non-Exhaustive Definition - Related Medical Conditions

- Termination of pregnancy (including via miscarriage, stillbirth, or abortion)
- Ectopic pregnancy
- Preterm Labor
- Pelvic Prolapse
- Nerve Injuries
- Cesarean or perineal wound infection
- Maternal Cardiometabolic Disease
- Gestational Diabetes
- Preeclampsia
- HELLP (hemolysis, elevated liver enzymes and low platelets) Syndrome
- Hyperemesis Gravidarum
- Anemia
- Endometriosis
- Sciatica
- Lumbar Lordosis
- Carpal Tunnel Syndrome
- Chronic Migraines
- Dehydration
- Hemorrhoids
- Nausea or Vomiting
- Edema of the legs, ankles, feet or fingers
- High Blood Pressure
- Infection
- Antenatal (during pregnancy) anxiety, depression, or psychosis
- Postpartum depression, anxiety, or psychosis
- Frequent urination
- Incontinence
- Loss of balance
- Vision changes
- Varicose veins
- Changes in hormone levels
- Vaginal bleeding
- Menstruation
- Lactation and conditions related to lactation (including low milk supply, engorgement, plugged ducts, mastitis, or fungal infections)

Requests for Accommodation

- Obligation to accommodate is triggered when employee or their representative has communicated with: supervisor, manager, someone who has supervisory authority for the employee or regularly directs the employee's tasks, HR personnel, or another appropriate official, or by following steps in employer's policy for requesting accommodation
 - May be made orally or in writing, or some other effective means
 - Cannot require that request be in writing, use of specific form, use of specific words, or be in a specific format
 - Employee does not have to identify medical condition or use medical terms, need only communicate an adjustment or change needed at work due to a limitation
- **Interactive Process** may be necessary to determine the appropriate accommodation

Presumptively Reasonable Accommodations

1. Allowing employee to carry or keep water near, and drink as needed
2. Allowing employee to take additional restroom breaks, as needed
3. Allowing employee whose work requires standing to sit, and whose work requires sitting to stand, as needed
4. Allowing employees to take breaks to eat and drink, as needed

*Documentation cannot be requested to support these requested accommodations!

When Documentation Cannot Be Requested

1. When limitation and adjustment/change needed due to the limitation is obvious and employee provides self-confirmation
2. When employer already has sufficient information to determine whether employee has a limitation and needs adjustment/change at work due to the limitation
3. When employee is pregnant and seeks one of the four common accommodations (listed on prior slide) and employee provides self-confirmation
4. When accommodation is related to time/place to pump breast milk at work or other modifications relating to lactation breaks and employee provides self-confirmation
5. When the requested accommodation is available to employees without known limitations pursuant to employer's practices and policies without submitting supporting documentation

Final Highlights

- Significant differences from ADA interactive process and reasonable accommodation considerations
- Employee is not required to accept an accommodation
 - But if rejection results in employee not being able to perform essential functions of their position employee may not be “qualified” under PWFA
- Remedies/Enforcement:
 - Same as Title VII; EEOC, Attorney General, private right of action
 - Costs and fees
 - Damages

Questions?



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New York Employment Law: The Essential Guide

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Thank You

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