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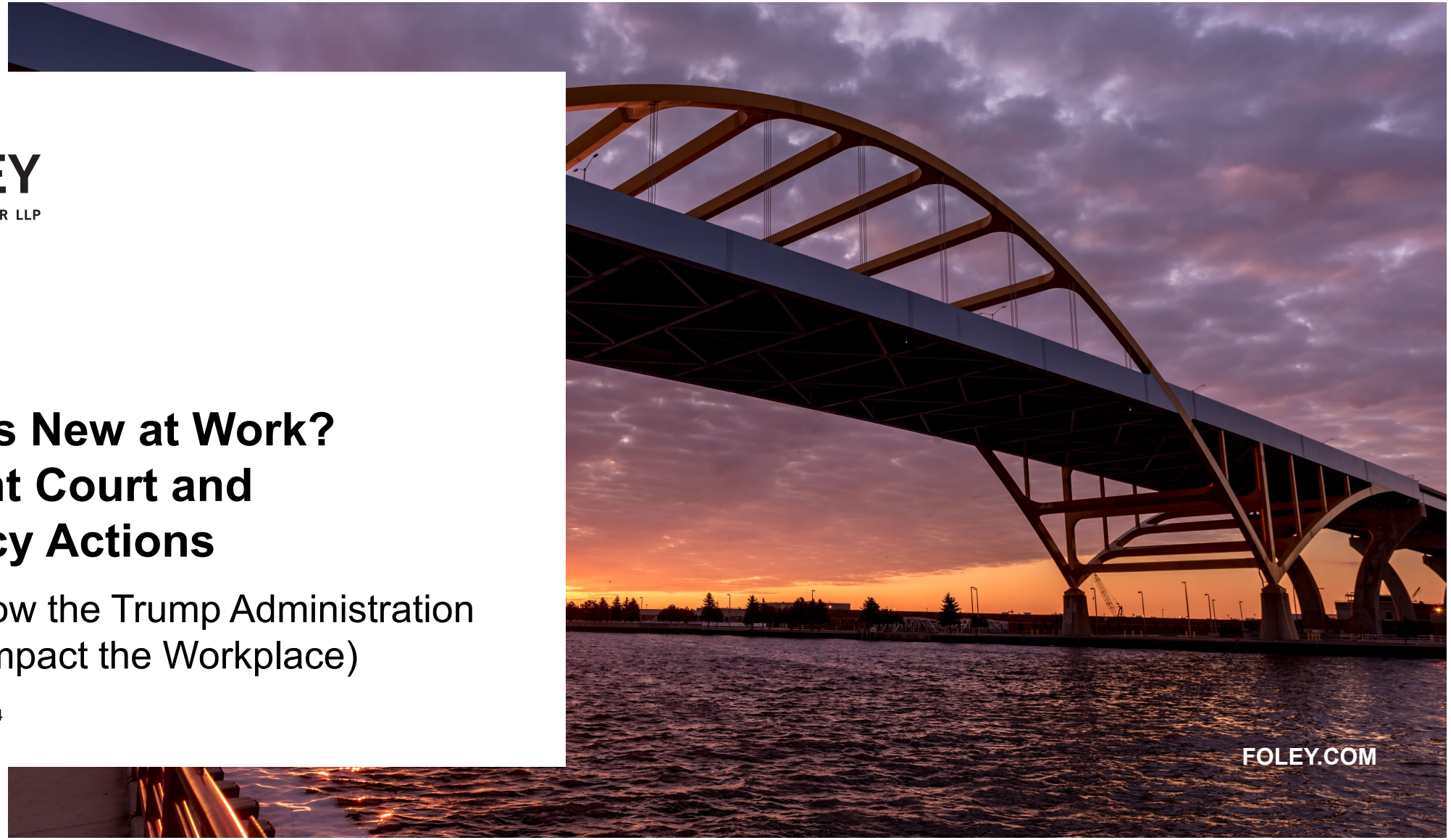
What's New at Work? Recent Court and Agency Actions

(And How the Trump Administration Might Impact the Workplace)

December 10, 2024



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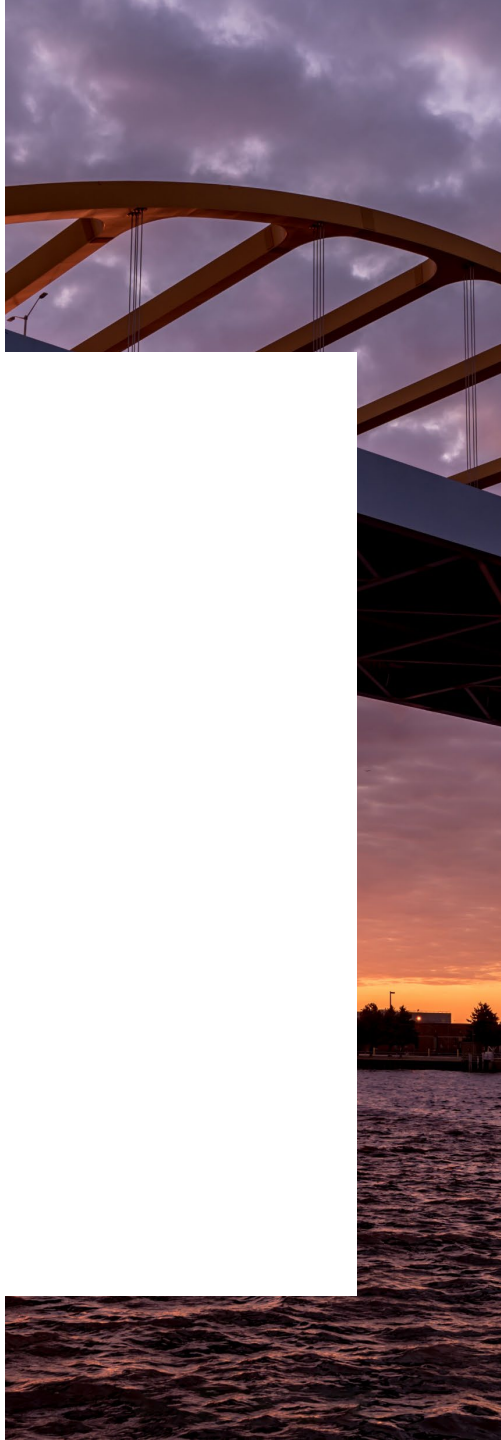
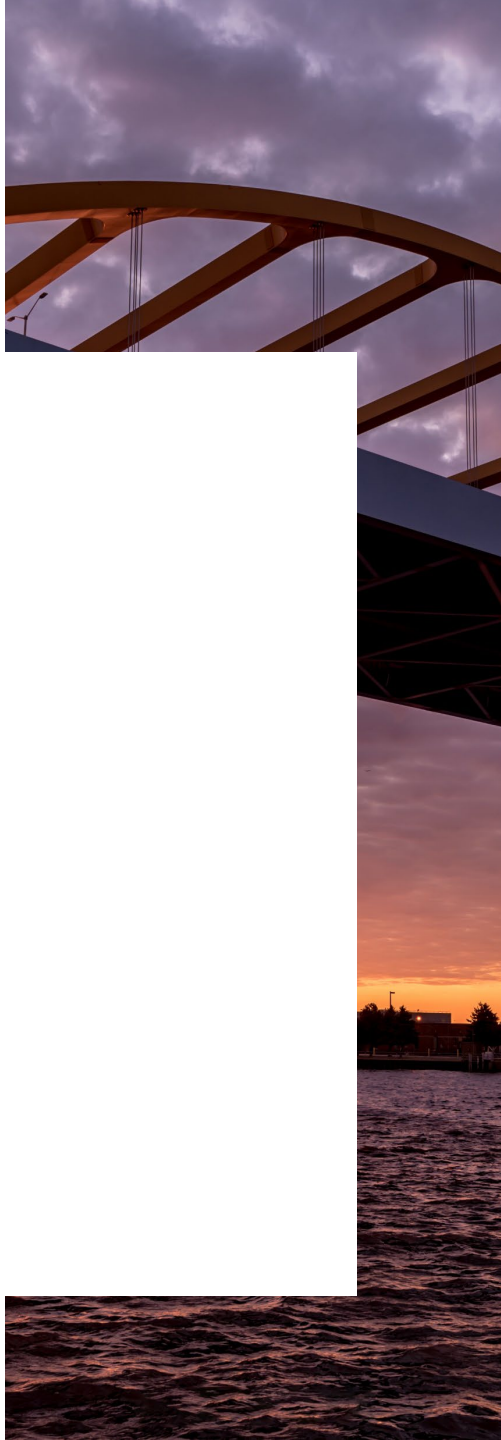
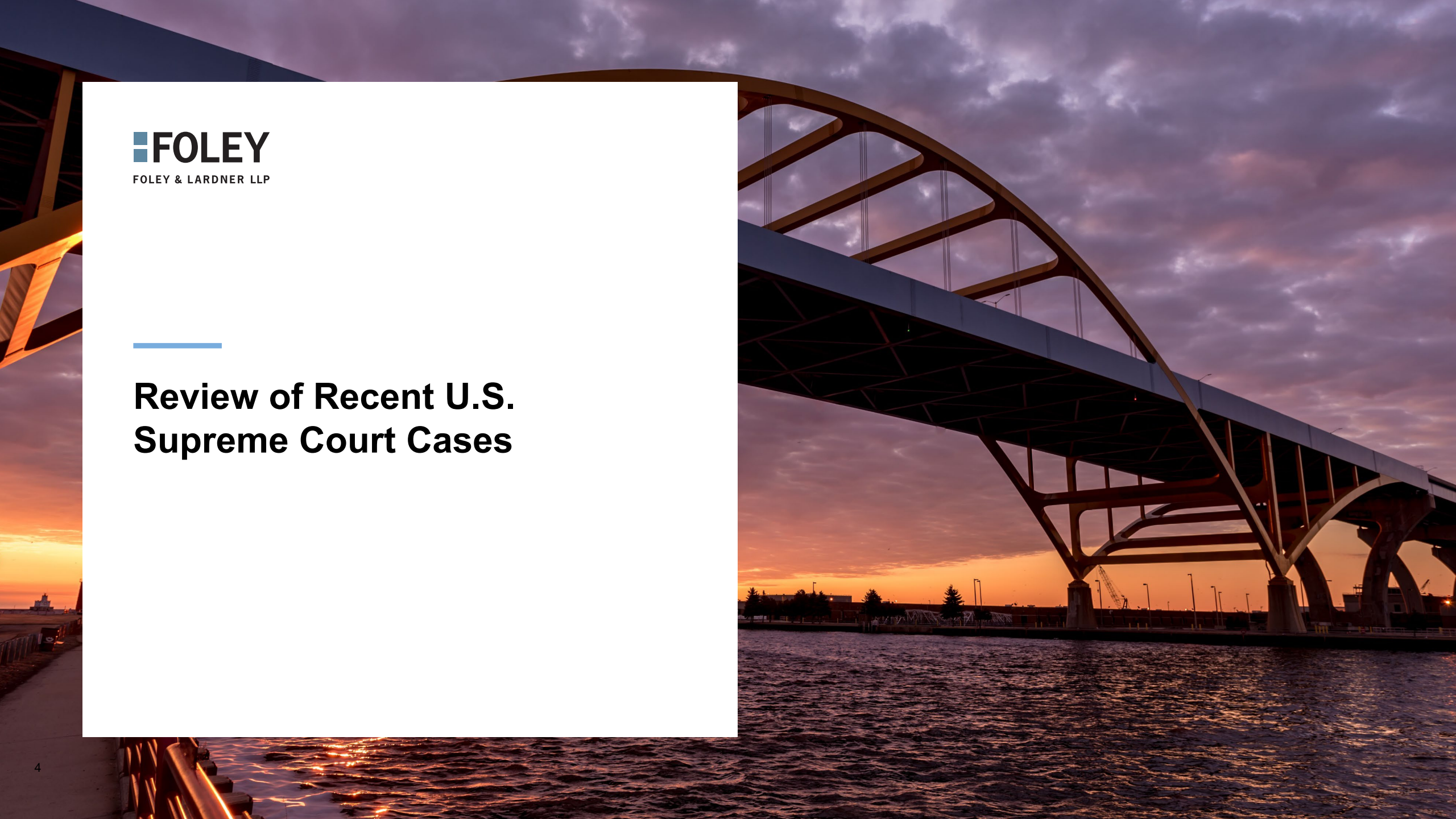


Agenda





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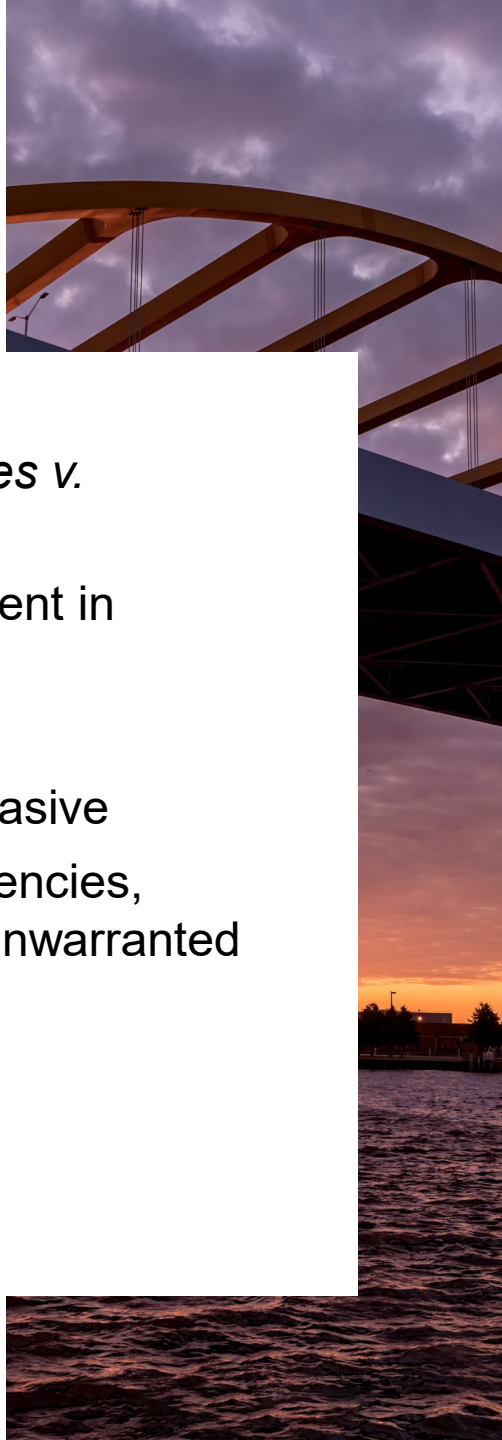
Review of Recent U.S. Supreme Court Cases

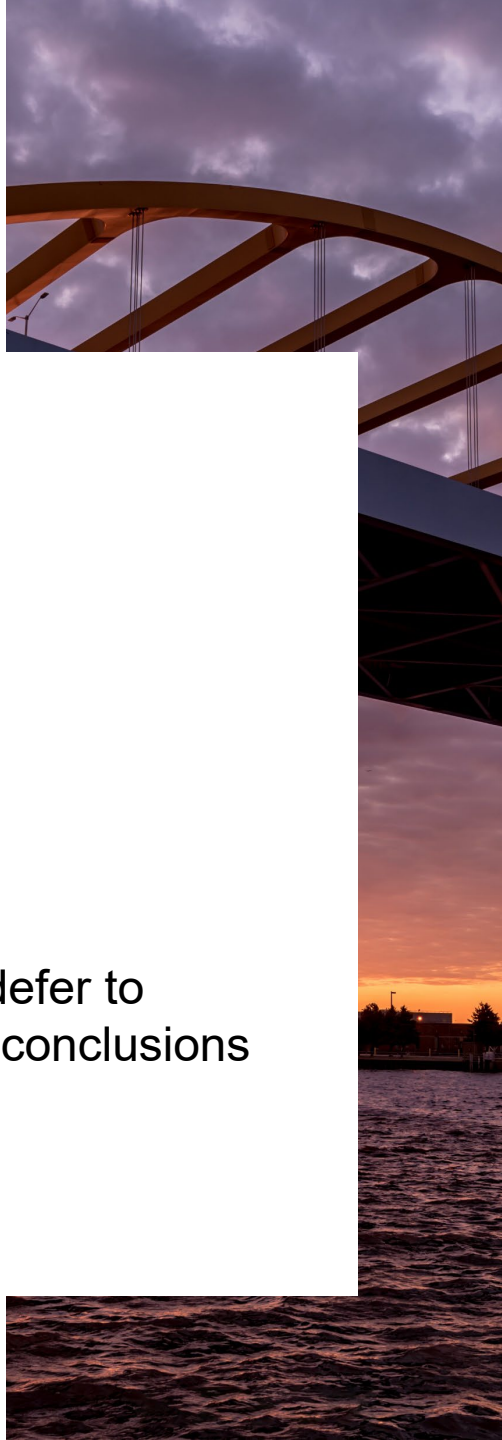
Loper Bright Overrules *Chevron*



- On June 28, 2024, the U.S. Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo,* No. 22-241
  - Held that Administrative Procedure Act requires courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority
  - Courts cannot defer to an agency interpretation just because a statute is ambiguous
  - Agency "expertise" remains "one of the factors" that may make its interpretation persuasive
- Petitioners had argued that *Chevron* deference led to excessive deference to federal agencies, resulting in overregulation, abdication of judicial responsibility to interpret statutes, and unwarranted imposition of regulatory enforcement costs

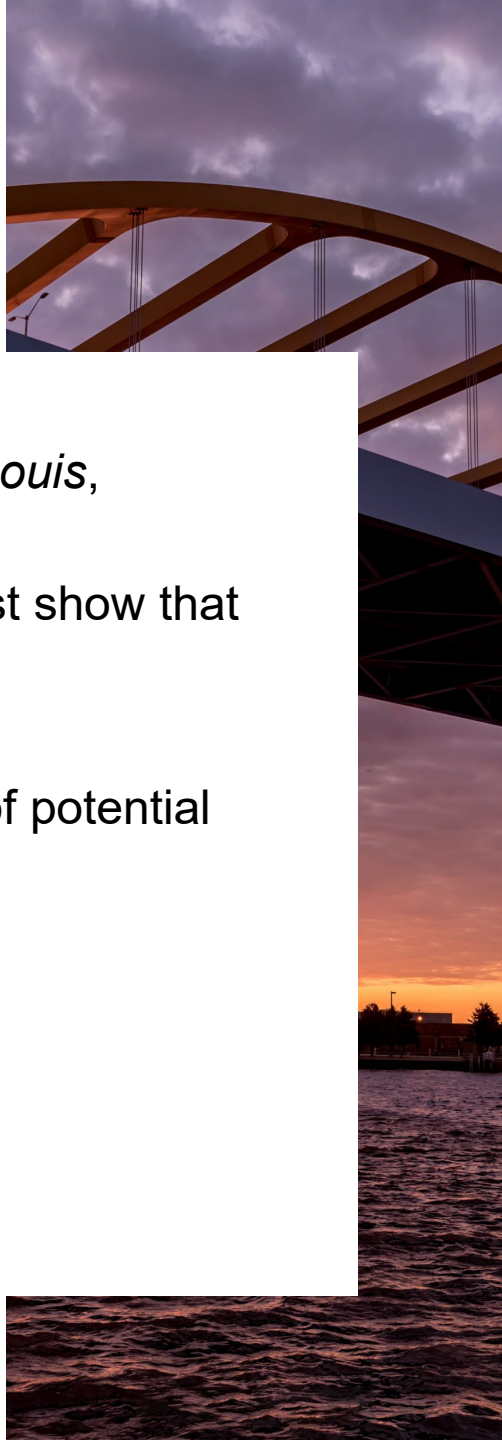
Loper Bright Overrules *Chevron*

- Implications of *Loper Bright*
  - More legal challenges
    - Many agency interpretations of congressional statutes are vulnerable
    - Prior decisions not affected, but no “thumb on the scale” going forward
  - Agency restraint?
    - Considering strength of interpretation, more cautious rule-making
  - Inconsistent decisions across courts
    - Because *Loper Bright* directs courts to exercise independent judgment rather than defer to agency’s interpretations, courts in different areas of the country may reach differing conclusions regarding agency regulations



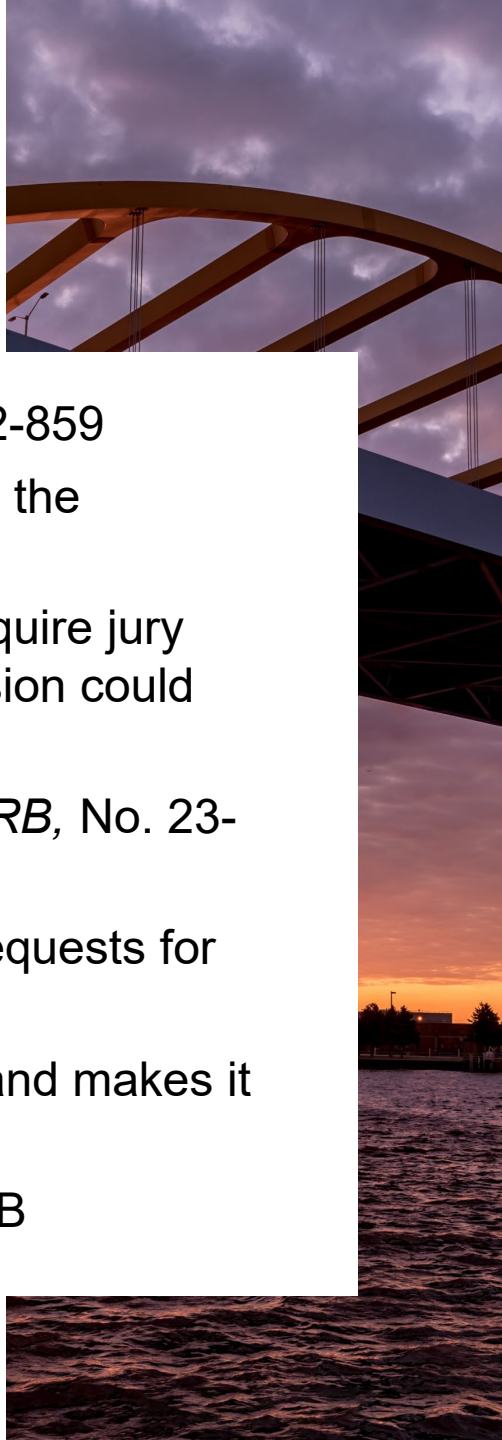
Muldrow and "Adverse" Actions

- On April 17, 2024, the U.S. Supreme Court issued its decision in *Muldrow v. City of St. Louis*, *Missouri*, *et al.*, No. 22-193
- *Muldrow* held that the plaintiff-employee challenging a job transfer as discriminatory must show that it caused **some** harm with respect to an identifiable term or condition of employment
  - Not material harm, not a significant harm — but *some* harm
- Effectively lowers the standard to show adversity, thus potentially increasing the scope of potential discrimination claims

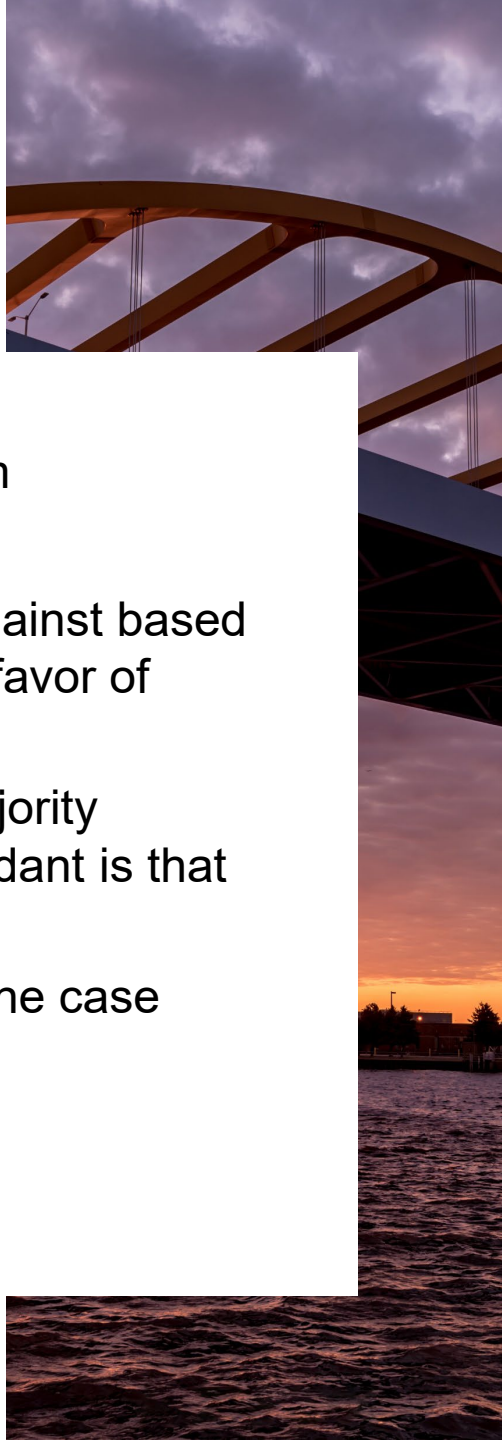


Jarkesy & Starbucks

- On June 27, 2024, the U.S. Supreme Court issued its decision in *SEC v. Jarkesy,* No. 22-859
  - Held that, when the SEC seeks civil penalties against a defendant for securities fraud, the Seventh Amendment entitles the defendant to a jury trial
  - Court distinguished precedent in which adjudication of OSHA civil penalties did not require jury trial under "public rights exception," but the majority criticized prior holdings, and decision could have implications for federal employment agencies
- On June 13, 2024, the U.S. Supreme Court issued its decision in *Starbucks Corp. v. NLRB,* No. 23-367
  - Held that courts must apply traditional four-factor test when considering the NLRB's requests for preliminary injunctions of alleged unfair labor practices
    - Four-factor test includes showing that the NLRB is likely to succeed on the merits, and makes it more difficult to obtain injunctive relief
  - Court rejected test adopted by many lower courts that was more favorable to the NLRB



More Title VII News Ahead from SCOTUS



- Supreme Court recently agreed to hear so-called “reverse discrimination” case next term
  - *Ames v. Ohio Department of Youth Services*
  - Sixth Circuit rejected a straight woman’s Title VII claims that she was discriminated against based on her sexual orientation after she was allegedly denied a promotion and demoted in favor of LGBTQ+ candidates
  - Sixth Circuit applied the so-called “background circumstances” rule: Plaintiffs from majority groups must show background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority
- There is circuit split on application of this rule — likely one reason Supreme Court took the case
- Argument is scheduled for February 2025

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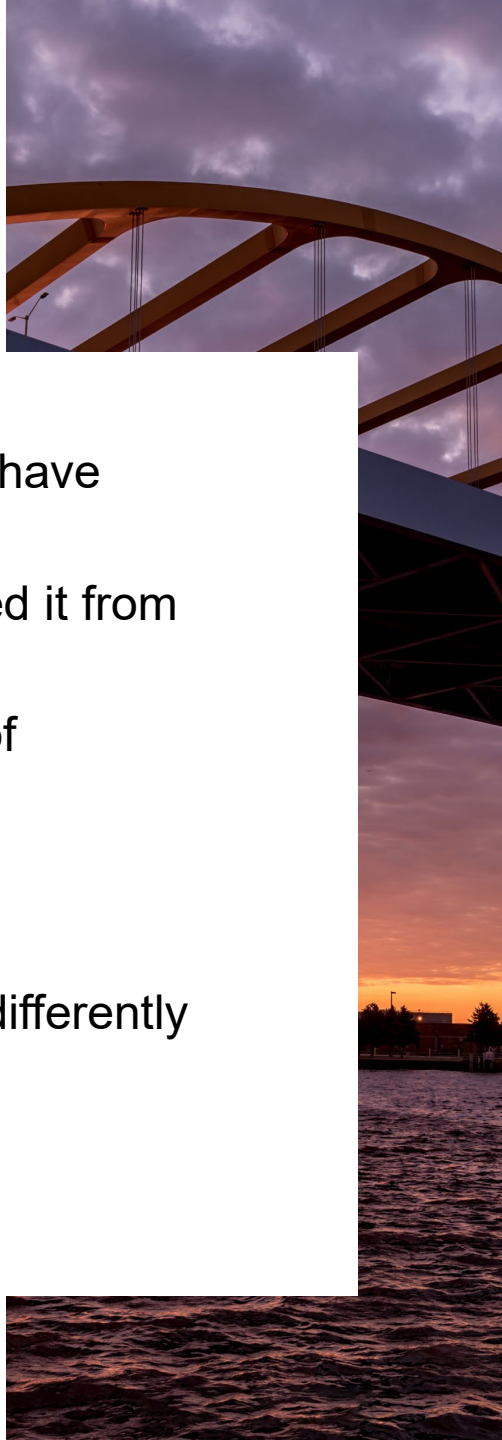
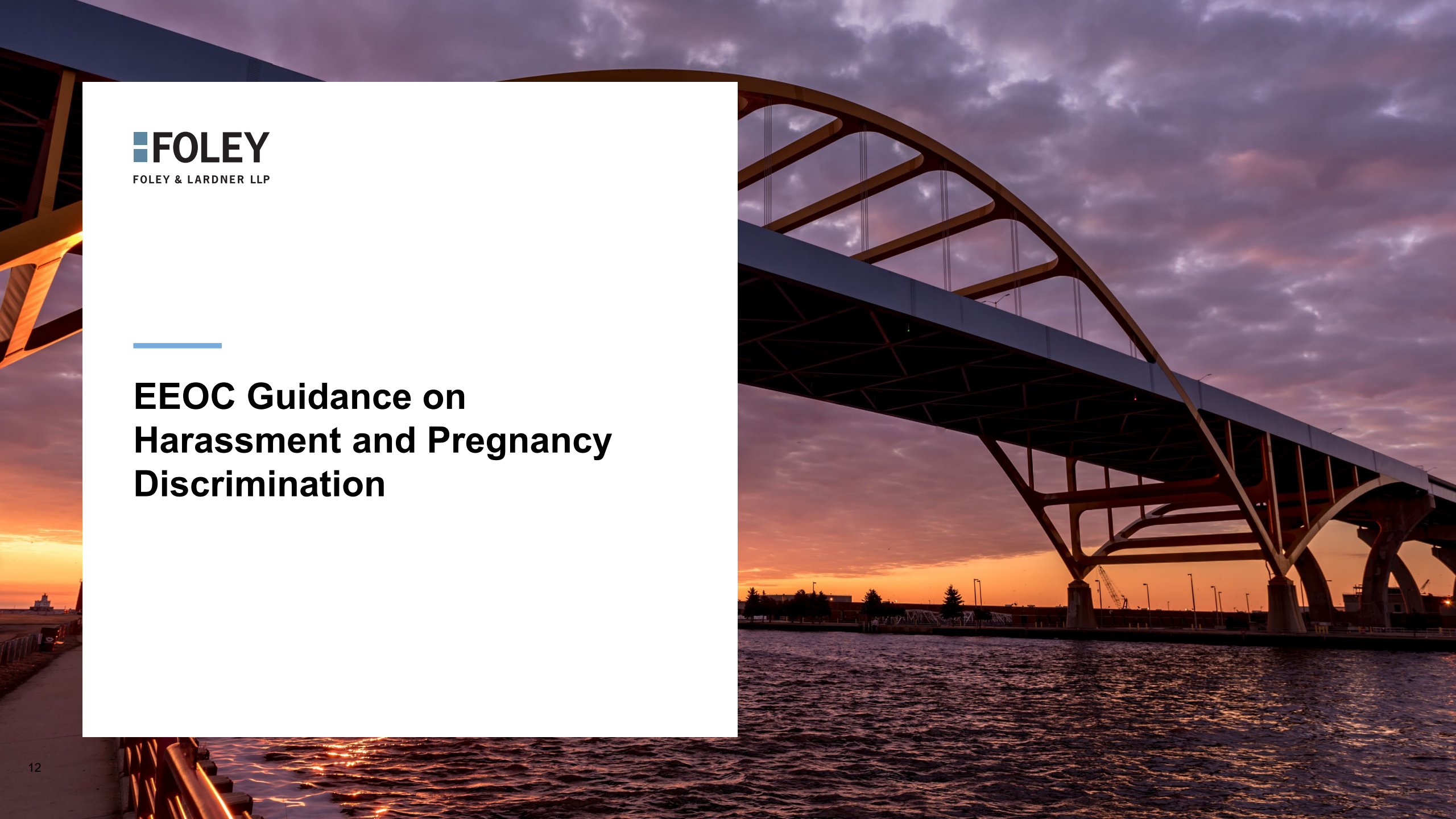
FTC’s Failed Attempt to Ban Most Noncompetes

FTC (Tried to) Ban Most Noncompetes

- The Federal Trade Commission (FTC) issued a Final Rule on April 23, 2024, that would have banned almost all noncompetes effective September 4, 2024
- On August 20, 2024, N.D. Texas federal court held the Final Rule was invalid and blocked it from taking nation-wide effect, finding:
  - The FTC did not have authority to create *substantive* rules regarding unfair methods of competition
  - The Rule was arbitrary and capricious
- Where does that leave us?
  - FTC appealed October 18, 2024 — but the Trump administration might see the case differently
  - Statewide trends continue
  - Opportunity to recalibrate if needed





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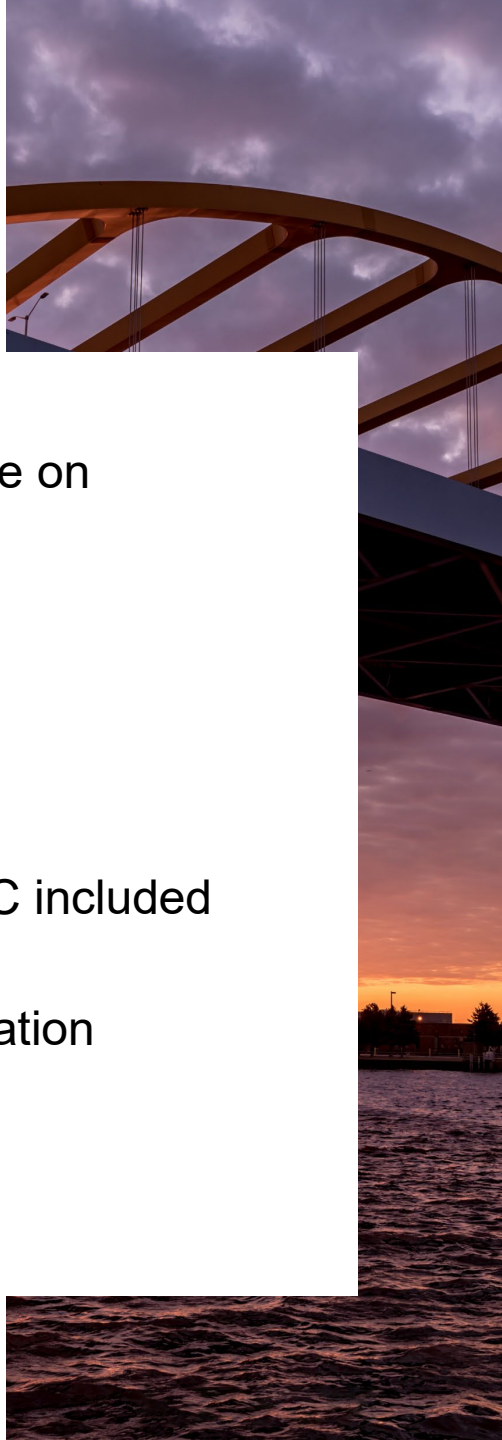
EEOC Guidance on Harassment and Pregnancy Discrimination

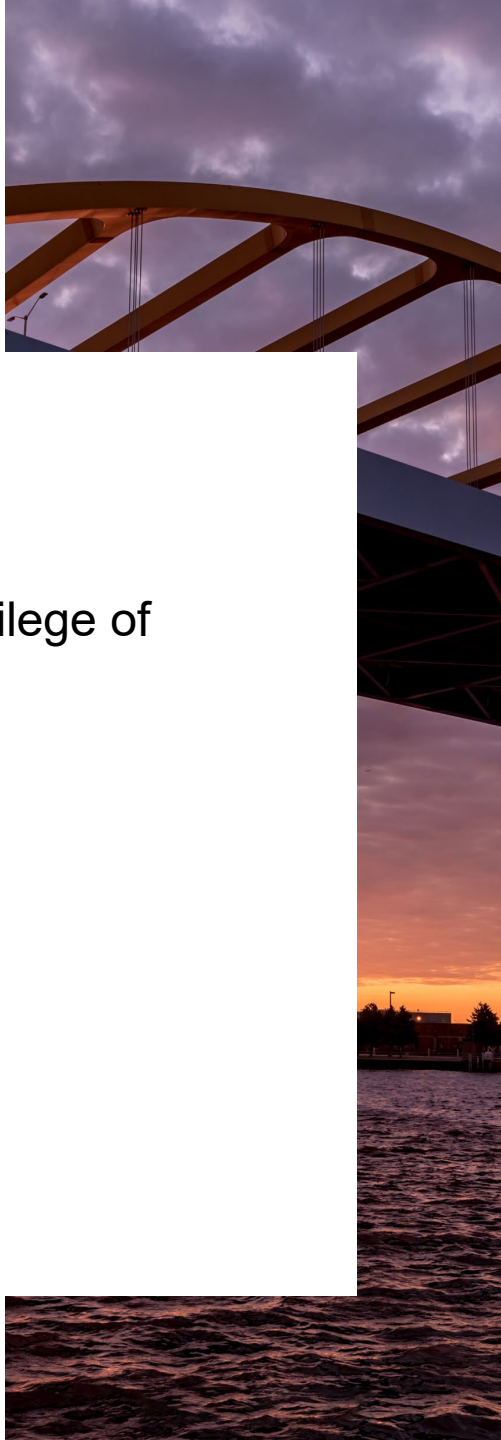
EEOC – Harassment Guidance

- The Equal Employment Opportunity Commission (EEOC) issued “Enforcement Guidance on Harassment in the Workplace” on April 29, 2024
  - Supersedes prior guidance documents, issued between 1987-1999
  - Was immediately legally challenged by many state AGs
  - Includes 77 scenarios to exemplify what might (or might not) be a Title VII violation
- EEOC noted statistics in updating guidance:
  - Between FY 2016-2023, more than 1/3 of all discrimination charges received by EEOC included harassment allegation
  - 35% of 143 merits lawsuits that the EEOC filed in FY 2023 included harassment allegation



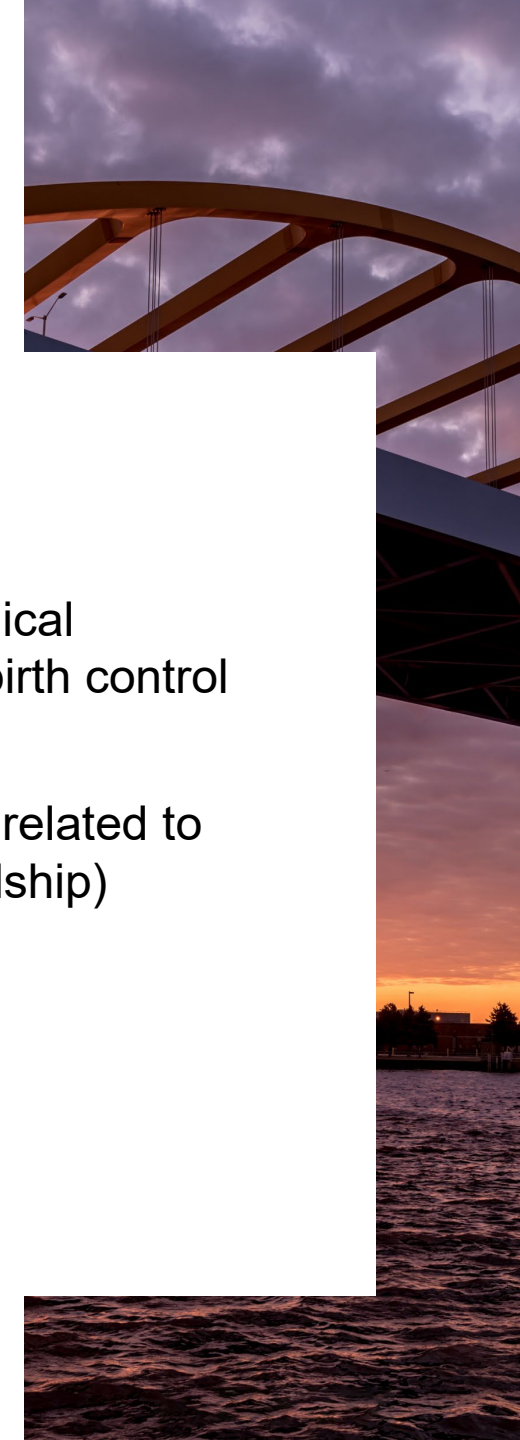
EEOC – Harassment Guidance

- Maintains focus on three components of harassment claims:
  - Conduct based on protected trait (e.g., age, race, sex, etc.)
  - Nature of the harassment resulting in discrimination affecting a term, condition, or privilege of employment
  - Basis for holding the employer liable for the conduct
- Addresses emerging workplace issues like:
  - Online, virtual harassment
  - Harassment based on sexual orientation and gender identity
  - Religious expression that could create a hostile work environment
- Opportunity to review and update policies as needed



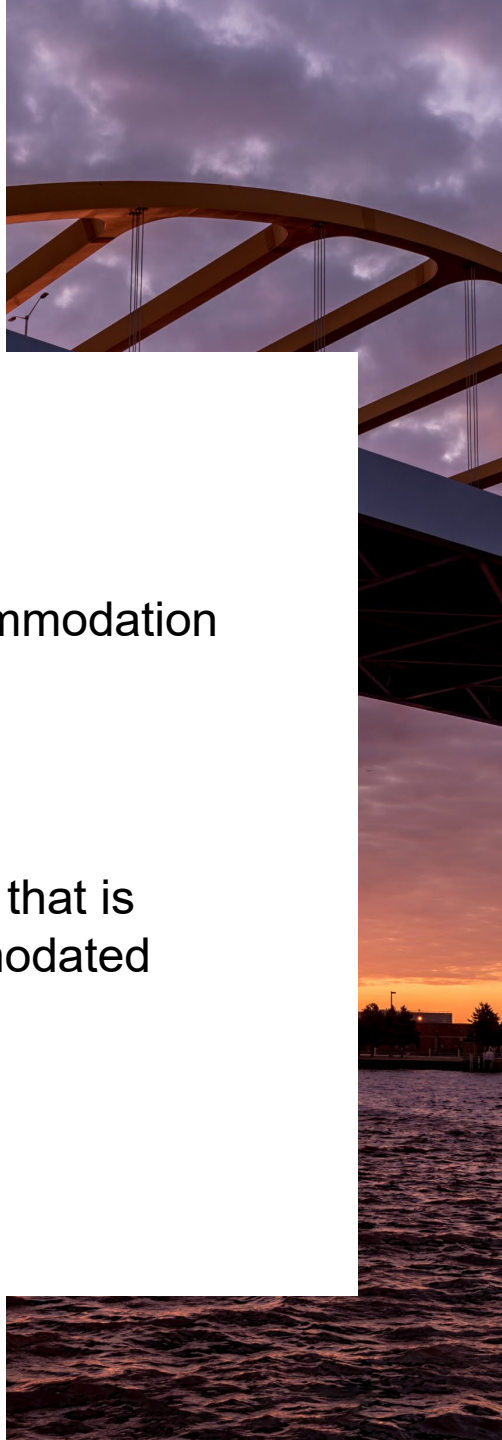
EEOC – Pregnancy Discrimination

- Pregnancy discrimination is a priority for the EEOC
- Title VII (as amended by the Pregnancy Discrimination Act)
  - Prohibits discrimination based on “pregnancy” — current, past, potential; related medical condition (incl. breastfeeding/lactation); having or choosing not to have an abortion; birth control
- Pregnant Workers Fairness Act (PWFA)
  - Requires employers to provide a reasonable accommodation to a known limitation related to pregnancy, childbirth, or related medical condition (unless would cause undue hardship)
- Americans with Disabilities Act (ADA)
  - Prohibits discrimination based on a disability
  - While pregnancy is not a disability, related conditions may be (e.g., diabetes)



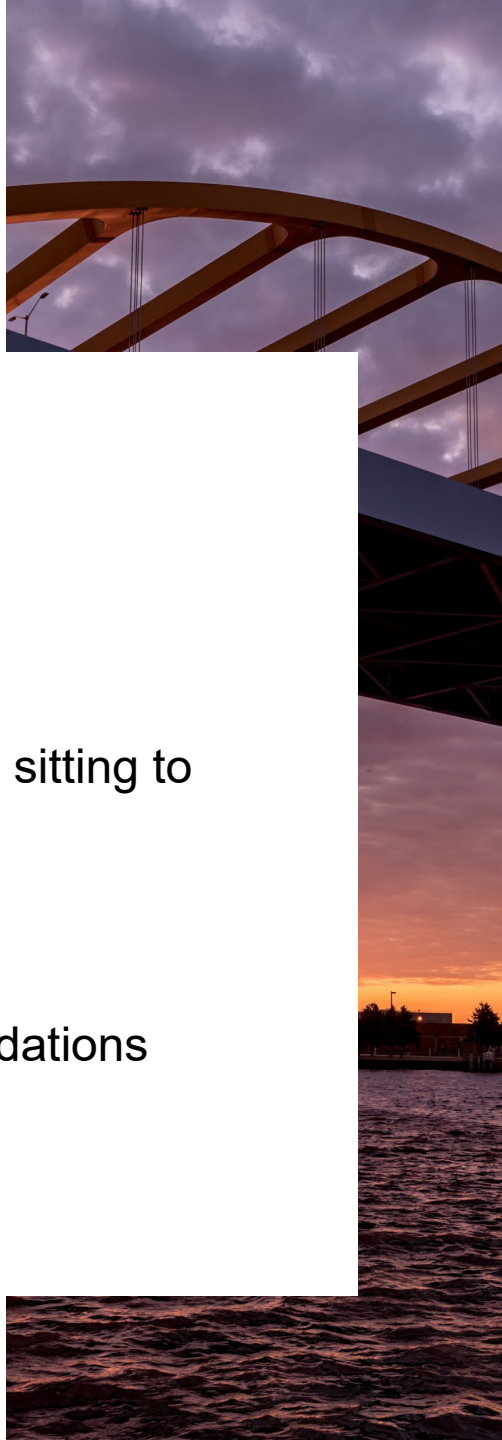
EEOC – Pregnancy Discrimination

- PWFA
  - Prohibits employers from forcing employees to take an accommodation
  - Prohibits employers from requiring that employees take leave if there is another accommodation that will allow them to continue working (and does not cause undue hardship)
  - Similar in some ways but farther reaching than the ADA
    - Pregnancy-related condition need not rise to level of disability
    - Employees may be “qualified” even if they can’t perform one+ essential functions, if that is temporary, they can perform in near future, and inability can be reasonably accommodated
    - Accommodation/undue hardship analysis requires interactive process like ADA
    - Employers only permitted to seek documentation when it is reasonable under the circumstances, and only permitted to seek “reasonable documentation”



EEOC – Pregnancy Discrimination

- EEOC's PWFA regulation became effective June 18, 2024
  - Identifies accommodations that EEOC views as reasonable in nearly all cases:
    - allowing an employee to carry or keep water near and drink, as needed
    - allowing an employee to take additional restroom breaks, as needed
    - allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed
    - allowing an employee to take breaks to eat and drink, as needed
- EEOC has brought several actions against employers to enforce PWFA
- EEOC is defending its regulation in appeals court on issue of abortion-related accommodations



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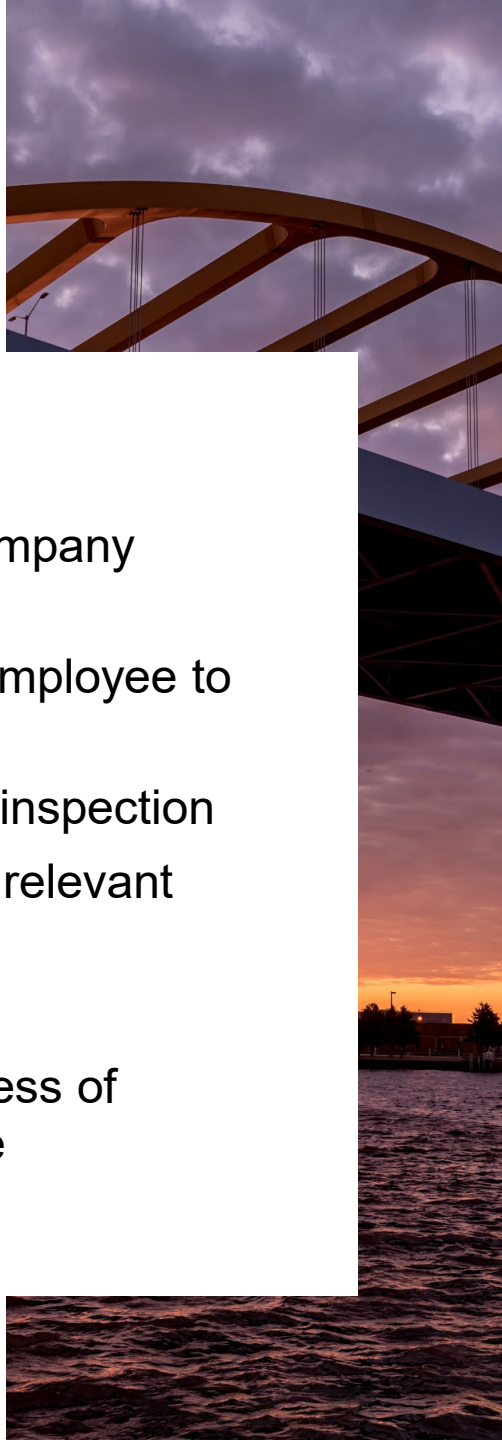
Happenings at OSHA

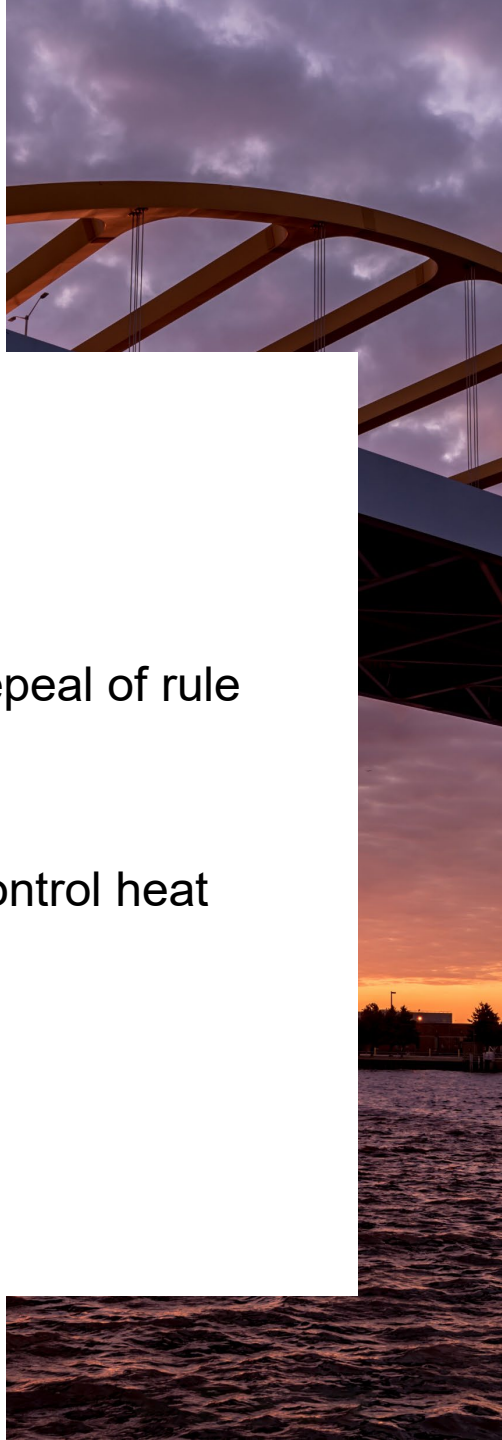
OSHA's New Walk-Around Rule



- Effective May 21, 2024
- OSH Act gives employers and employees the right to authorize a representative to accompany OSHA compliance officers during workplace inspections
- Per OSHA, the new walk-around rule "clarifies" that employees may authorize another employee to serve as their rep, or may select a non-employee
  - Non-employee reps must be reasonably necessary to conduct effective and thorough inspection
    - Based on knowledge, skills, or experience with workplace hazards or conditions, or relevant language or communication skills, among other things
  - Employers can object to third-party rep, but OSHA compliance officer decides
- New rule could allow union reps (regardless of whether they are employees and regardless of whether it is a union plant) to join OSHA compliance officers as they inspect the worksite

OSHA's New Heat Proposal

- Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings
  - Notice of Proposed Rulemaking published August 30, 2024
  - Comment period expires on Dec. 30, 2024
  - Rule expected in 2025 or 2026
- Rule may be scrapped under Trump Administration: either through executive action or repeal of rule by Congress
  - OSHA under new leadership could also issue revised rule
- Programmatic standard that would require employers to create a plan to evaluate and control heat hazards in their workplace (similar to California)
- Proposed elements of a heat standard, among others:
  - Initial heat trigger (80 degrees F) and high heat trigger (90 degrees F)
  - Prevention measures (breaks, water, two-way communication, etc.)
  - Heat illness and emergency response and planning
  - Training



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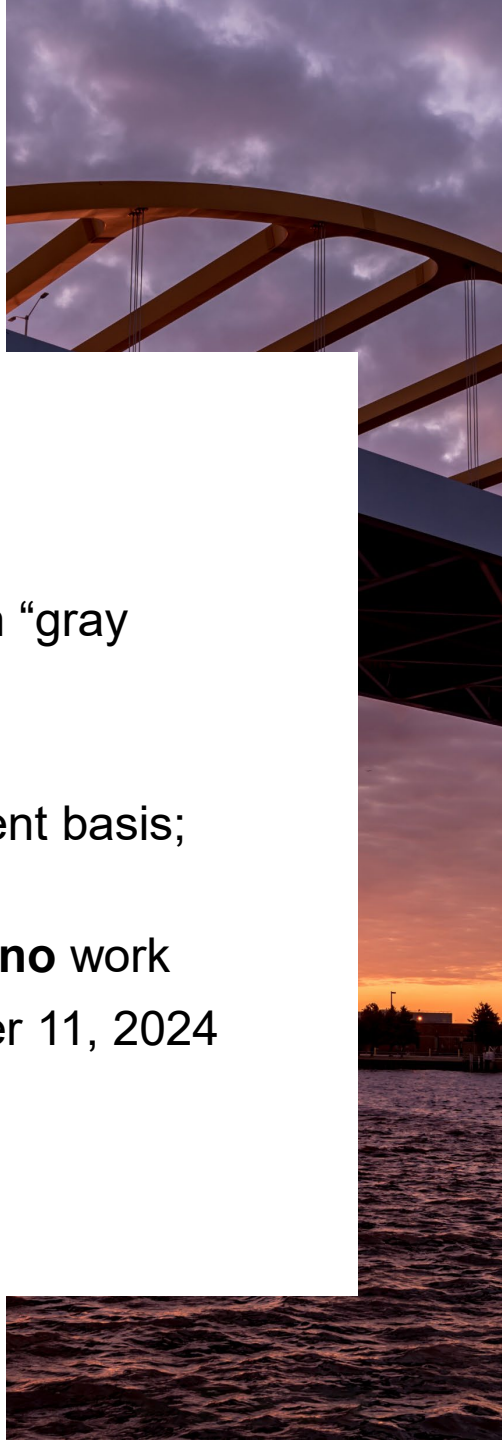
DOL Salary Basis Increases…

Vacated after Partial Implementation

Department of Labor (DOL) Salary Basis Increases

- Exempt employees must satisfy two-part test
  - Duties (e.g., executive, administrative, professional, computer, outside sales)
    - Significant litigation over whether employees meet these “duties” tests (especially in “gray areas”)
  - Salary basis (for most exemption categories)
    - Predetermined amount of compensation each pay period on a weekly or less frequent basis; cannot be reduced due to variations in quality or quantity of work
    - Exempt employees do not need to be paid for any workweek in which they perform **no** work
- Fifth Circuit upheld the DOL’s authority to include a salary basis in this test on September 11, 2024
  - *Mayfield v. U.S. Department of Labor*

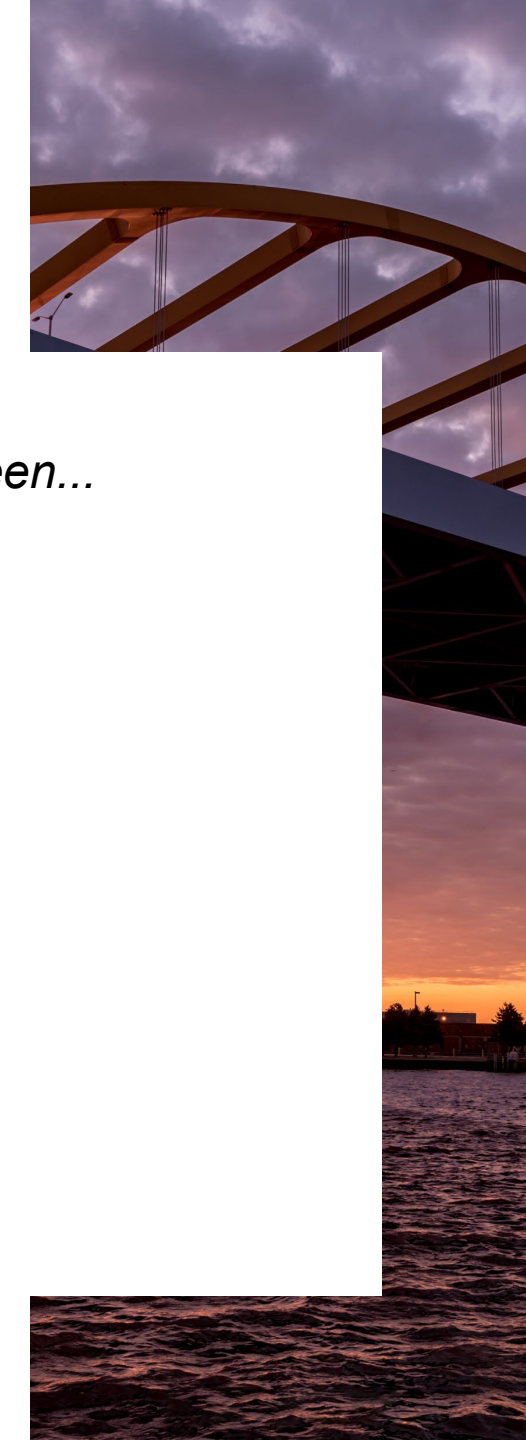


DOL Salary Basis Increases

- Just how much salary? According to the DOL's 2024 Final Rule, it *was and would've been...*

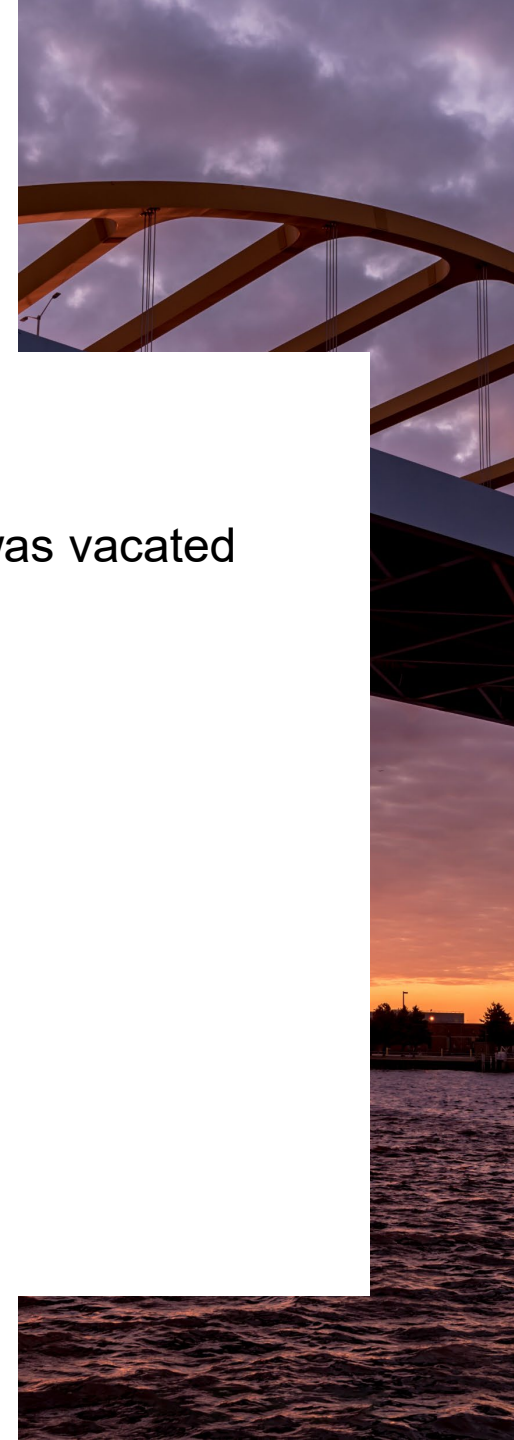
Minimum Salary Amount Before July 1, 2024	Minimum Salary Amount Beginning July 1, 2024	Minimum Salary Amount Beginning January 1, 2025
$684 per week (equivalent to a $35,568 annual salary)	$844 per week (equivalent to a $43,888 annual salary)	$1,128 per week (equivalent to a $58,656 annual salary)

https://www.dol.gov/agencies/whd/overtime/salary-levels



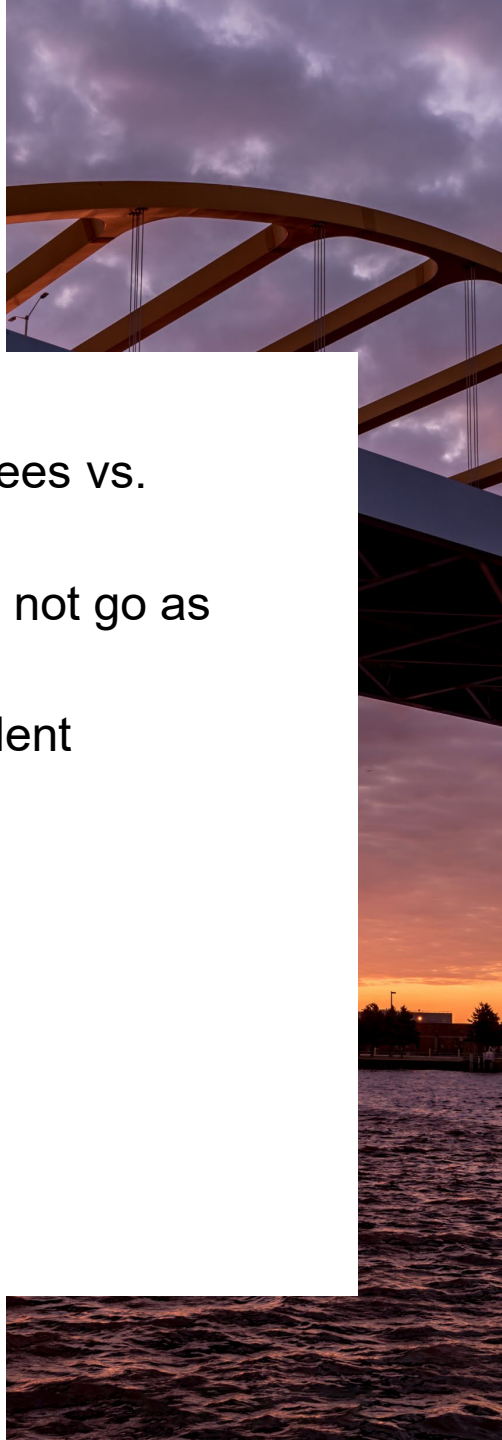
DOL Salary Basis Increases – Vacated

- On November 15, 2024, a court in Texas nullified the Final Rule, with nationwide effect
  - So, after the July increases — but before the January 1 increases — the Final Rule was vacated
  - The salary basis reverts to the pre-Final Rule level of $684/week ($35,568 annual)
  - Most employers are not seeking to claw-back prior raises
  - Many employers deciding how to handle any planned January 1 increases
    - Consider whether raises were communicated and impact on morale



DOL Independent Contractor Rule

- In March 2024, DOL issued final rule for determining classification of workers as employees vs. independent contractors
  - Returned to “totality of circumstances” test more likely to find employee status, but did not go as far as “ABC” Test adopted in California and other states that presumes employment
- Under Trump Administration, DOL could shift back to rule more likely to uphold independent contractor status
  - Prior rule focused on two “core factors” (control and opportunity for profit or loss)



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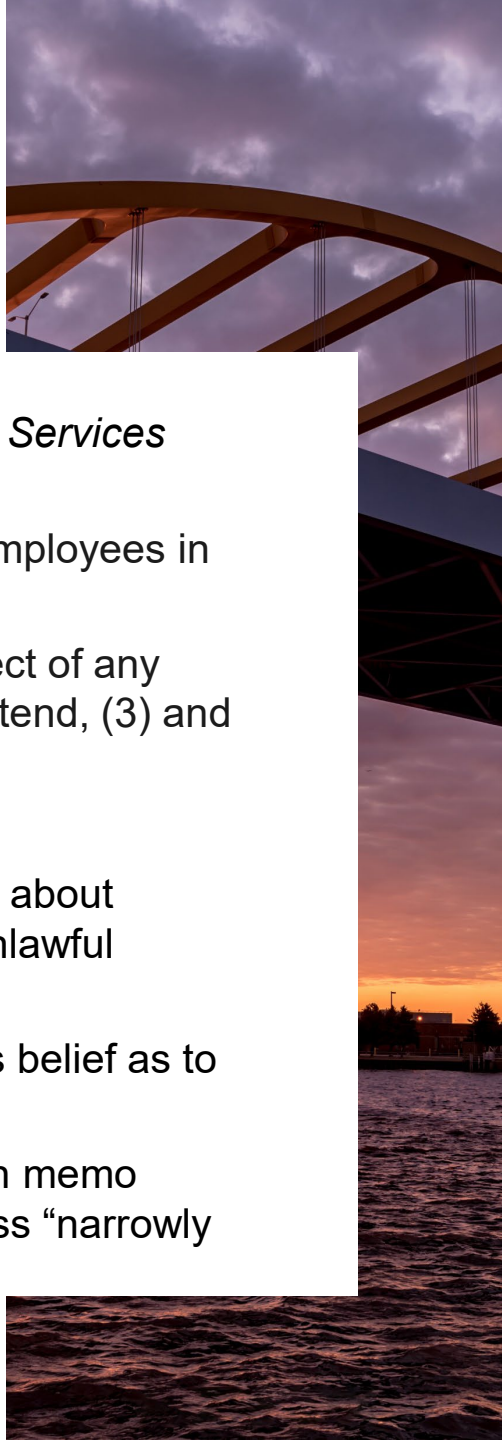
National Labor Relations Board

Ban on Captive Audience Meetings and Other Changes

National Labor Relations Board (NLRB) Developments



- Ban on “Captive Audience” Meetings
  - On November 13, 2024, the NLRB held that captive audience meetings are unlawful in *Amazon.com Services LLC* — overruling 75-year-old precedent!
  - Board majority found that such meetings have a “reasonable tendency to interfere with and coerce employees in the exercise of their Section 7 rights”
  - Employers can still express their views on unionization if they (1) provide advance notice of the subject of any such meeting, (2) confirm that attendance is voluntary with no adverse consequences for failure to attend, (3) and guarantee that no attendance records of the meeting will be kept
- Expansion of Prohibited “Threats”
  - On November 8, 2024, the NLRB overruled 40-year old precedent, holding that employer statements about unionization preventing employees’ ability to address issues individually with the company may be unlawful “threats”
    - Such statements “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control”
- NLRB General Counsel continued to focus on new areas, and expanded on non-compete guidance with memo declaring training and education repayment agreements (“stay or pay”) as presumptively unlawful, unless “narrowly tailored,” in October 7, 2024, guidance

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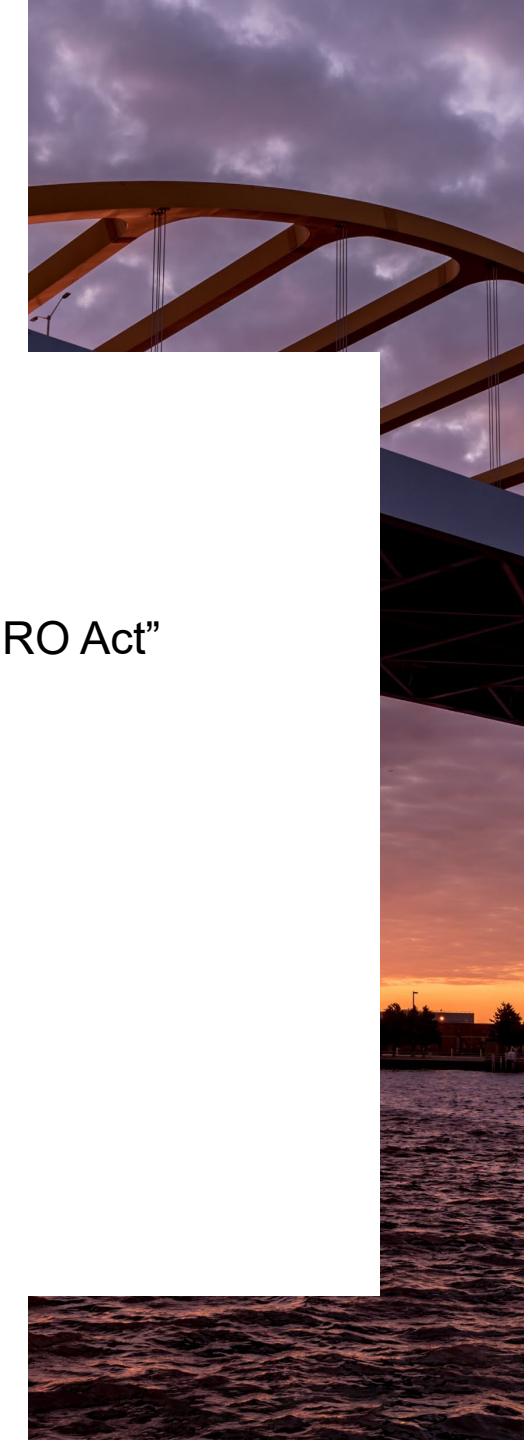
What to Expect Under a Second Trump Administration

Trump Administration Take Two

- Wage & Hour
  - No taxes on tips?
  - No/minor increase in federal minimum wage
- Pro-Worker Policies?
  - Nominee for Secretary of Labor, U.S. Rep. Lori Chavez-DeRemer (Oregon), supported “PRO Act” (Protecting the Right to Organize) and has some union support
- Pushback on DEI efforts
  - Executive orders regarding DEI training
  - Shift in general discourse, especially around LGBTQIA+ community
- Pushback on regulations
  - NLRB, OFCCP, OSHA shake-ups
- Immigration reform
  - Impact of threatened deportations and visa/green card changes
- Labor relations, and more!



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Questions?

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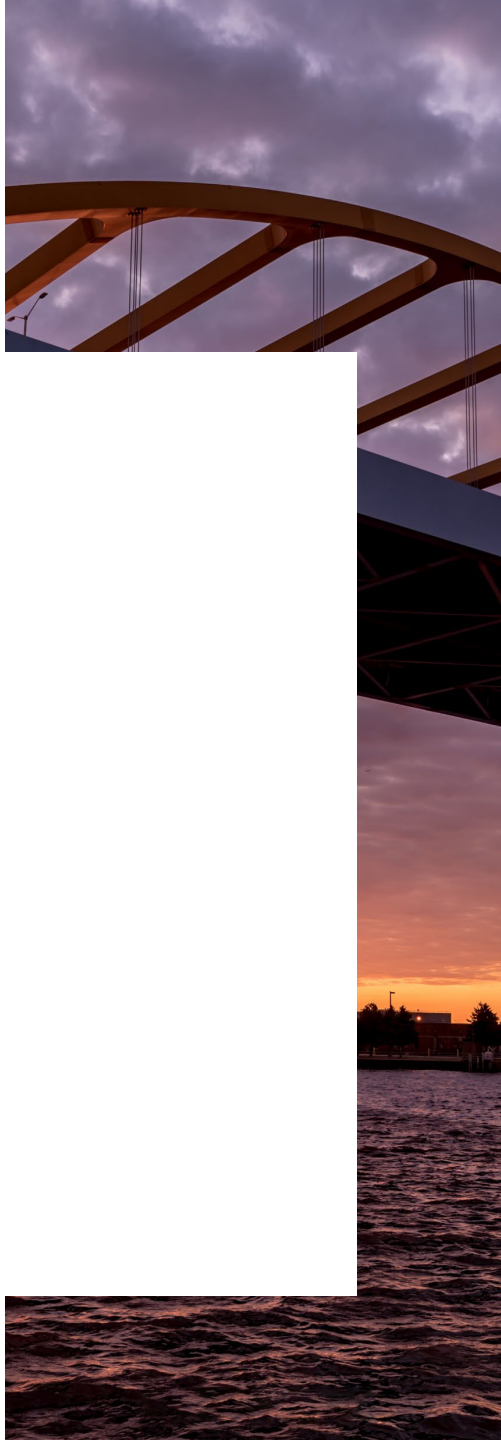

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