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Employer Services SEMINAR

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San Francisco
Wednesday, January 22, 2025

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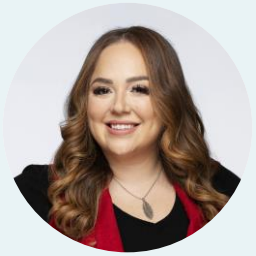

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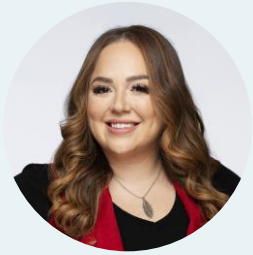

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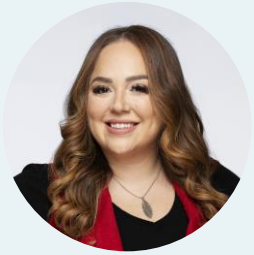

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Agenda

Introduction and Welcome	9:00 AM – 9:15 AM
New Employment Laws For 2025	9:15 AM – 10:15 AM
Labor Law Developments	10:15 AM – 11:15 AM
Navigating DEI Under the New Trump Administration	11:15 AM – 12:15 PM
LUNCH	12:15 PM – 1:15 PM
PAGA/Class Action Developments	1:15 PM – 2:15 PM
Are you calling me a liar? Assessing Credibility in Workplace Investigations	2:15 PM – 3:15 PM

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New Employment Laws in 2025

SB 1137 - Anti-Discrimination (Intersectionality)

- Before SB 1137, the FEHA prohibited discrimination and harassment based on certain protected characteristics
  - Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, veteran or military status
- The FEHA now also prohibits discrimination and harassment based on:
  - Any combination of the established protected characteristics
  - A perception that the person has any particular protected characteristic(s) or combination of characteristics
  - A perception that the person is associated with someone who has or is perceived to have any particular protected characteristic(s) or combination of characteristics

AB 1815 – CROWN Act Clarification

Revised definition of "race" in the 2020 Creating a Respectful and Open World for Natural Hair (CROWN) Act, which expanded the definition of race under FEHA and other civil rights laws

"Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

"Race" is inclusive of traits associated with race, including, but not limited to, hair texture and protective hairstyles.

"Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locs, and twists

SB 1100 – Driver's License Job Requirements

- It is unlawful for an employer to include in a job advertisement, posting or application that applicants must have a driver's license, **UNLESS**
  - The employer reasonably expects one of the position's job functions to be driving, **AND**
  - The employer reasonably believes that satisfying that job function using an alternative form of transportation would not be comparable in travel time or cost to the employer
    - This means even if driving is a function of the job, employers must evaluate other means of travel (taxis, ride-shares, bicycles, etc.) and reasonably conclude that they would not work

SB 399 – CA Worker Freedom from Employer Intimidation Act (Captive Audience Meetings)

- Prohibits employers from threatening or subjecting employees to adverse action for
  - declining to attend an employer-sponsored meeting
    - where the meeting purpose is to communicate the employer's opinion about religious or political matters
  - declining to participate in, receive or listen to any employer communications on the employer's opinion about religious or political matters
- Exceptions include certain religious entities and training to comply with employer's legal obligations (e.g., anti-harassment training)
- Violations could result in civil penalty of $500
- Legal challenges could overturn this

AB 2499 – Expands Protections for Crime Victims

- **Discrimination/Retaliation**
  - Protections are now part of FEHA instead of the Labor Code
    - But still limited to employers with at least 25 employees
  - Law prohibits discrimination/retaliation against an employee for taking time off from work to obtain relief, if the employee is a victim or has a family member who is a victim
    - Victim = someone who suffers a "qualifying act of violence"
- **Reasonable Accommodations**
  - Required for an employee who is a victim or whose family member is a victim, for the safety of the employee while at work
  - Interactive process required

AB 2499 – Expands Protections for Crime Victims (cont'd)

- **Unpaid Leave Must Be Provided**
  - But employees may use vacation, personal leave, paid sick leave, or comp time off
    - CBA cannot diminish entitlement
  - Can run concurrently with FMLA/CRFA
  - Can be limited
    - 12 weeks if employee is victim
    - 10 days if employee's family member is victim
      - » 5 days if reason for leave is to secure a new residence/enroll family member in new school/childcare
- **Written Notice to Employees**
  - Upon hire, annually, and any time an employee asks for the information or informs employer that they or their family member is a victim
  - Notice not required until CRD publishes the form (expected by July 1, 2025)

AB 2123: Eliminates Mandatory Vacation Usage for Paid Family Leave (PFL)

- **Before 2025**: Employers could require up to two weeks of earned, but unused, vacation before, and as a condition of, an employee's receipt of state PFL benefits
- **After 1/1/25**: Employees can choose whether to use their vacation before receiving PFL
- Effect: Employees may return from leave without having used their vacation balances
- Reminder: PFL only provides pay during leave; it does not guarantee leave

SB 988 – Freelance Worker Protection Act

- Written contracts are required between hiring parties and freelance workers hired or retained to provide professional services for at least $250
  - "Freelance worker" = a person or organization of one person (whether or not incorporated or using a trade name) who is hired or retained as a bona fide independent contractor
  - Penalty of $1000 for failure to provide written contract upon request
- Contract must include information such as names, dates, itemized list of services to be provided, payment terms
  - Civil action is authorized to enforce contract provisions
- Payment for services must be made on the date specified in the contract or no later than 30 days after completion of the services
  - Liquidated damages of 2x the amount of the services for untimely payment
- Prohibits discrimination/retaliation against those exercising their rights under this law

Workplace Safety Updates

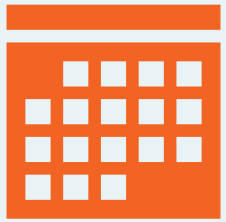
- Last year's SB 428 is now in effect:
  - A collective bargaining representative can seek a workplace TRO
  - Workplace TROs may also be sought when an employee suffers harassment
    - A "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person and that serves no legitimate purpose"
      - » Must cause a reasonable person to suffer and must actually cause substantial emotional distress
- AB 2975: directs Cal/OSHA to revise regulations to include a requirement that hospitals have a weapons detection screening policy (by 3/2027)
- AB 1976: directs Cal/OSHA to submit a draft proposal that requires employers to carry Narcan in their first aid kits and immunizes those who administer it from civil damages (by 12/2027)

Workplace Postings Updates

- Employers currently must post a list of employees' rights and responsibilities under California's existing whistleblower laws
  - Must include telephone number of the whistleblower hotline outlined in Cal. Labor Code section 1102.7
  - Must be in a common area where employees can easily review it
  - Must be in "lettering larger than size 14-point" type, for ease of reading.
  - AB 2299 requires the Labor Commissioner to develop a model poster – once available, employers who use that poster will be deemed in compliance
- AB 1870 requires an updated workers' compensation poster adding that employees may consult with a licensed attorney to advise them of their rights
- AB 3234 requires employers to post a link on their website to audit results relating to child labor law compliance, if they have voluntarily conducted a "social compliance audit"

AB 2319 - Dignity in Pregnancy and Childbirth Act

Establishes a requirement for **hospitals and alternative birth centers** to provide annual, evidence-based implicit bias training



Initial training must be provided to current providers by **June 1, 2025,** and within **six months** of their start date for new providers. Beginning **February 1, 2026**, facilities must report compliance to the Attorney General. They are also required to provide certain information to patients about their rights during pregnancy and childbirth

The AG can assess penalties against facilities for noncompliance: $5,000 for the first violation, $15,000 for each subsequent violation

Minimum Wage Updates

- Statewide minimum wage is now $16.50/hour
  - This means that the minimum salary for an exempt employee is $68,640/year
    - An employee who does not make that much is non-exempt, regardless of their duties/responsibilities, and must track hours, receive overtime, meal breaks, etc.
- Health care employers must make sure to review the minimum wages and implementation schedule applicable to their facilities (Labor Code Section 1182.14)
  - Health care employers must also post a supplemental minimum wage notice
- Make sure to check local minimum wage ordinance increases – wherever you have employees!
  - E.g., Santa Clara is now $18.20/hour; West Hollywood is now $19.65/hour

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PERB
California Public Employment Relations Board

Labor Law Developments

What Employers Need to Know – Expected Changes to the NLRB and PERB

Overview of the National Labor Relations Board (NLRB)

- **Role of the NLRB**
  - Enforces labor laws under the National Labor Relations Act (NLRA)
  - Protects workers' rights to organize and bargain collectively
  - Resolves disputes between unions and employers
- **Board Composition**
  - Five-member board, appointed by the President
  - General Counsel oversees investigations and prosecutions

The Board *Gwynne A. Wilcox, Chair* *Marvin E. Kaplan, Member* *David M. Prouty, Member*	*The General Counsel* *Jennifer A. Abruzzo, General Counsel* *Jessica Rutter, Deputy General Counsel*

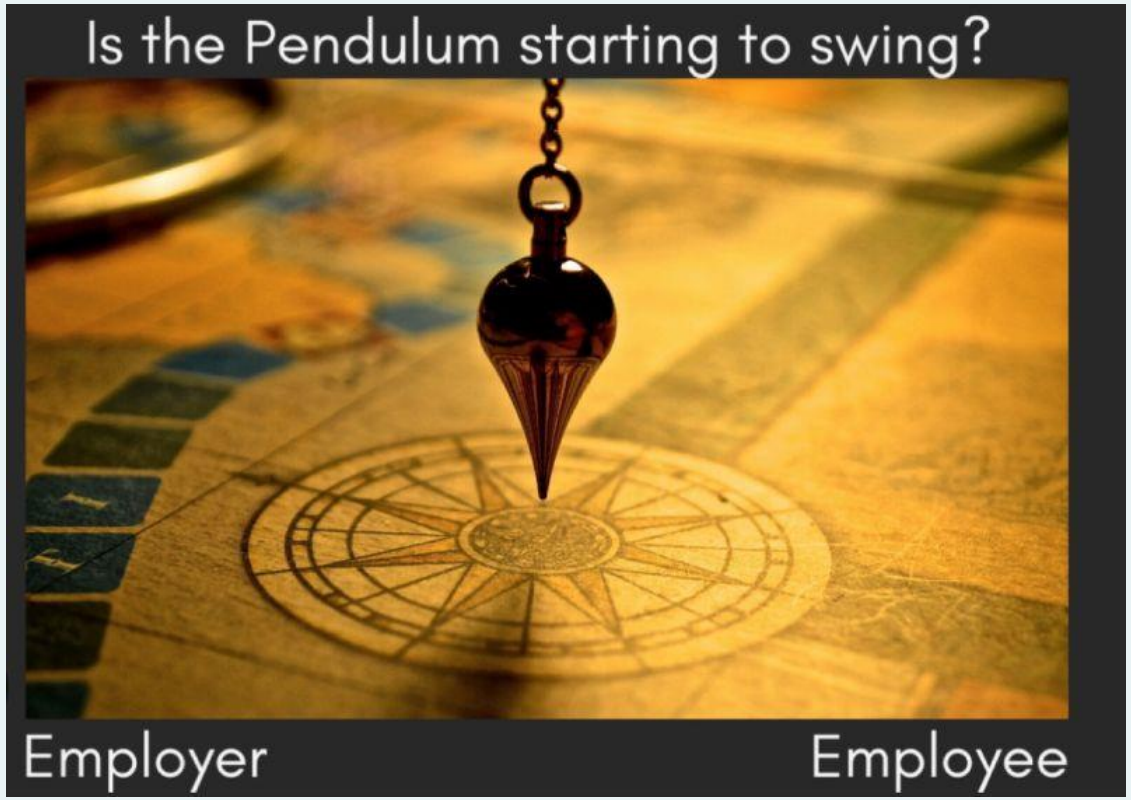
The Smith Seat Term expires on August 27 of years ending in 6 and 1.	The Madden Seat Term expires on August 27 of years ending in 5 and 0.	The Carmody Seat Term expires on August 27 of years ending in 8 and 3.	The Murdock Seat Term expires on December 16 of years ending in 7 and 2.	The Gray Seat Term expires on December 16 of years ending in 9 and 4.	Party in Control of the Board	From	To
David M. Prouty	Kaplan	**Wilcox**			Dem	12/17/2024	Present

The NLRB Under Biden Administration

- Employee-friendly rulings
- Support for union organizing and expansion of worker rights
- Reversal of Trump-era decisions limiting union and worker protections
- Broader interpretation of protected concerted activity under section 7

Anticipated Shifts Under Trump Administration

- **Policy Directions:**
  - Focus on employer-friendly policies
  - Likely reversal of Biden-era decisions
  - Shift toward a narrower interpretation of labor rights



Expected NLRB Composition Changes

- **New Appointments:**
  - Two Republican members to replace Democratic appointees
  - Pro-business General Counsel likely to reshape enforcement priorities

- **Impact of Republican Majority**
  - Predictable tilt toward management-friendly rulings
  - Greater scrutiny of union activities

Potential Reversal of Key Precedents

- ***McLaren Macomb*** – the board restricted the use of confidentiality and nondisparagement provisions in severance agreements
- ***Stericycle*** – overruled existing precedent and adopted a stricter test regarding the lawfulness of facially neutral handbook policies and workplace rules
- ***CEMEX*** – in which the NLRB made it easier for unions to establish representation
- ***Atlanta Opera, Inc.*** – in which the board returned to an employee-friendly test for purposes of independent contractor classification
- ***Thryv, Inc***. - the Board expanded its standard make-whole remedy for employees to include compensation for "all direct or foreseeable pecuniary harm."

Changes to Union Organizing Rules

- **Union Elections:**
  - Longer timelines to organize elections
  - Stricter requirements for union representation
- **Union Access to Employees:**
  - Limitations on union access to employer property

Impact on Workers' Rights

- **Protected Concerted Activity:**
  - Narrower interpretation under Section 7 of the NLRA
  - Potential challenges for employees engaged in collective action

Practical Implications for Employers

- Reduced federal regulatory scrutiny
- Greater defense against unfair labor practice charges
- Lower risk of union organizing efforts

Legislative and Judicial Interplay

Congressional Oversight:

Republican-majority Congress likely to support NLRB changes

Judicial Challenges:

Anticipated legal battles over new rulings and reversals

Action Plan for Employers

- ✓ Review and update handbooks and policies
- ✓ Management training on labor law compliance
- ✓ Stay updated on NLRB decisions and adjust strategies accordingly

Key Takeaways

- Trump's NLRB is expected to favor employer flexibility and reduce union influence
- Employers should stay informed and maintain up to date policies as changes arise

Brief Update on California Public Employment Relations Board

- New Board Member and Chief ALJ
- State Legislation
- *Alliance v. PERB*
- Other potential changes in 2025

PERB
California Public Employment Relations Board

California PERB Board Member Krausse

- Appointed in June 2024 and reappointed in December 2024.
- Former Director of State Agency Relations for Pacific Gas and Electric.
- Former Executive Director for Fair Political Practices Commission.
- Since June 2024, Krausse wrote for the Board in only two opinions; both sided with the union.

New Chief Administrative Law Judge

- Eric Cu
- Longest continuously serving employee at PERB
- Before becoming an ALJ, worked in Office of General Counsel
- Short stint at a union-side law firm before PERB
- Has decided over 140 cases

Status of State Legislation

- AB 2404
  - Barred public employers from disciplining employees who honor a strike or refuse to enter premises or perform work for a public employer engaged in a primary strike
  - Died in Assembly Appropriations Committee

- AB 2421
  - Barred public employers from questioning employees about confidential communication between employee and his or her union representative.
  - Passed the Assembly but died in Senate.

Alliance v. PERB: Appellate Court Blesses PERB's Broad Reading of PEDD

- Prohibition on Public Employers Deterring or Discouraging Union Membership
- PEDD violation: "tend to influence" employee choice even if communication is noncoercive or nonthreatening
- Civil penalties, attorney fees and costs for violation
- PEDD does not violate First Amendment

Other Potential Changes

- PERB Office of General Counsel likely to consider electronic voting for representation elections
  - Federal Labor Relations Authority permits this method
  - NLRB in 2010 issued a RFI suggesting that it was considering electronic voting
- Minor Regulatory Changes
  - In December 2024, Board approved regulatory language setting word limits for appeals of dismissals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Questions?

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Navigating DEI Under the New Trump Administration

What We'll Cover

- Refresher on *Students for Fair Admissions*
- The Litigation Landscape Since *Students for Fair Admissions*
- The Rest of the Landscape Since *Students for Fair Admissions*
- What to Expect Under the New Trump Administration
- Level-Setting on DEI Programs and Initiatives
- Where Do We Go From Here
- Questions

Refresher on *Students for Fair Admissions*

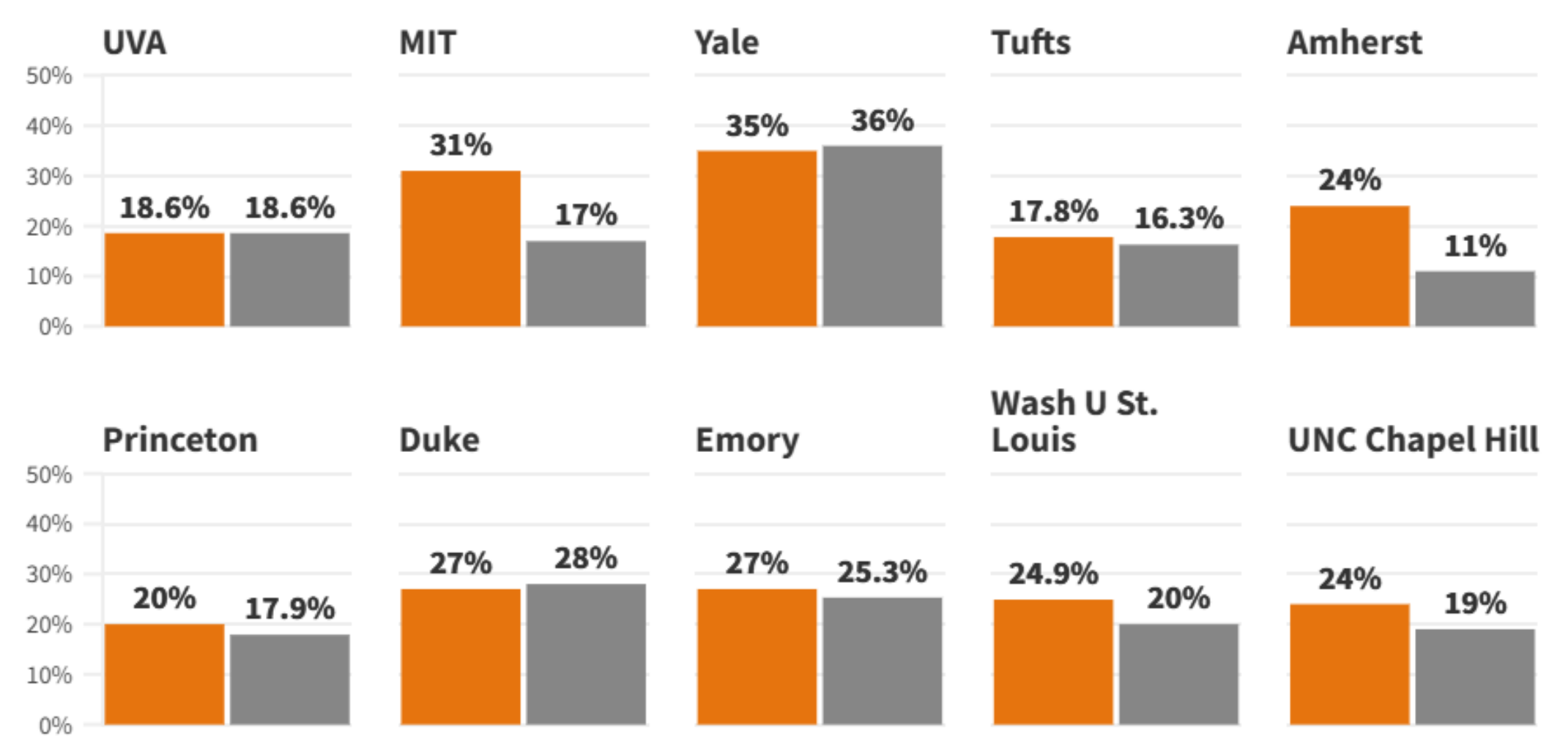
Relevant Points from *SFFA*

- Students for Fair Admissions is a private organization specifically dedicated to dismantling affirmative action and overturning prior precedent, *Grutter v. Bollinger* (2003); led by conservative activist Ed Blum (not a student)
- Challenged admissions policies at University of North Carolina (public) and Harvard (private)
  - Schools argued that their admissions policies followed *Grutter* – used race and other protected categories in a holistic, narrowly tailored way; just a "plus factor" not a determining factor
- Holding – cannot consider race or other protected category as a factor in admissions; limited to education context (Title VI and Title IX; *not* Title VII)
- Policy undercurrent – discrimination no longer as relevant as it was when *Grutter* was decided

Relevant Points from *SFFA*

- Nothing in the opinion prevents educational institutions from pursuing diversity goals, including racial diversity, through race-neutral or even race-conscious practices (e.g., targeted recruiting, collecting and monitoring racial data), so long as they do not give admissions preferences to students based on their race
- Justice Roberts work around: can't consider race… but can consider "racialized experiences"
  - Specifically, can consider "statement of interest" where an applicant talks about how race or other protected category has been a part of adversity they have had to overcome
- Justice Gorsuch concurrence: tries to connect language and standard of Title VI to Title VII, stating that together the laws "codify a categorical rule of individual equality, without regard to race"

Effect of *SFFA* on Campus Diversity



Congressional/Administrative Actions

- **June 29, 2023** **Official Statement from EEOC Chair, Charlotte Burrows**: "*SFFA* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."
- **July 13, 2023** **Republican AGs of 13 states** sent letters to Fortune 100 CEOs based on *SFFA*, citing Gorsuch's concurrence, and warning that race-based employment and contracting decisions are unlawful and related programs would be heavily scrutinized
- **July 17, 2023** **Sen. Tom Cotton (R-Arkansas)** sent letter to 51 BigLaw firms, threatening investigations and litigation if the firms continued advising clients on DEI programs and maintaining programs of their own: "Congress will increasingly use its oversight powers—and private individuals will increasingly use the courts—to scrutinize the proliferation of race-based employment practices."
- **July 19, 2023** **Democratic AGs of 21 States** send own letter to Fortune 100 CEOs in response to Tom Cotton's and Republican AG's letters, calling those letters pure intimidation, affirming that corporate DEI programs are permissible and necessary, even post-*SFFA*
  - Key point: reminder of still lingering discrimination against underrepresented groups that could be exacerbated if DEI programs are rolled back

The Litigation Landscape Since *SFFA*

Blum/American Alliance for Equal Rights

- 2023 law firm lawsuits and threats – primarily targeted 1L diversity scholarships; firms revised outdated language and lawsuits dismissed as moot
- Fearless Fund – Section 1981 claims (not Title VII) against Atlanta-based venture capital firm that explicitly invests only in Black-women-led companies
  - Preliminary injunction halting program issued in November 2023; appealed to 11th Circuit – upheld in beginning of June 2024
- 2023 SEC lawsuit – challenged Nasdaq rules that required companies listed on the exchange to disclose the race, gender, and sexual orientation of their board members on the theory that the rules "disadvantage white men" under the Equal Protection Clause; lawsuit dismissed on ground that Section 1981 claims only apply to governmental entities
- 2023 lawsuit against Department of Labor challenging rule allowing (but not requiring) fiduciaries of ERISA retirement plans to consider ESG factors when selecting plan investments and exercising shareholder rights; rule upheld by district court, Fifth Circuit appeal pending

Blum/American Alliance for Equal Rights

- 2024 lawsuit against Alabama Real Estate Appraisers Board challenging state law that required Alabama Governor to consider racial representation in making appointments to the Board – court denied preliminary injunction while case is pending
- 2024 lawsuit against Merck Pharmaceuticals, alleging that Diverse Leader Acceleration Program for Black, Latinx, and Native American employees unlawfully discriminates against white and Asian people – still active
- 2024 lawsuit against Smithsonian Museum for the American Latino, alleging an internship program that was race-neutral but made targeted outreach efforts to Latinx applicants was discriminatory; case settled after Smithsonian made tweaks to its language clarifying eligibility for all for the program

Blum/American Alliance for Equal Rights

- The latest: December 2024 ruling by Texas district court judge in *Doe v. Southwest Airlines* – lawsuit challenged Southwest's twenty-year program providing free roundtrip flights to Latinx undergraduate and graduate students to see family in Latin American countries on school breaks
  - The parties settled when Southwest agreed to end the program and fully pay the damages pled in the Complaint… 1 cent
  - When the parties moved to dismiss the case after settlement, the district court judge refused despite the lack of an active injury (standing)
  - Major potential sea change; likely to be appealed

Other Relevant Litigation

- July 2023, *Ultima Services Corp. v. U.S. Dep't of Agriculture* – challenged the federal Small Business Act, which sets forth a "rebuttable presumption" to award federal government contracts to members of socially disadvantaged groups, which included racial minorities
  - Tennessee District Court enjoined the Act, finding that it does not serve a compelling government interest and is not narrowly tailored
  - Practical result: instead of rebuttable presumption they are requiring a "narrative process" in applications, new form that requires applicants to explain how they have experienced discrimination in starting or running a business
- August 2023, *Hamilton v. Dallas County* – Fifth Circuit upended long-standing precedent and held that a plaintiff is not required to show an "ultimate employment decision" in order to prove they were subjected to an "adverse employment action"; currently on appeal to SCOTUS
  - In a concurring opinion, Justice Ho (Trump appointee) specifically notes that this decision can be used to challenge DEI initiatives

Other Relevant Litigation – Amazon

- September 2023, *Correll* – white male plaintiff alleged he wanted to sell collectible coins and comic books on Amazon, but was so turned off by the minority business initiatives he saw on the website that he chose not to sell on the site; admitted he wasn't excluded from contracting, but said he lost an opportunity because he refused to participate in a biased marketplace
  - California district court dismissed the Section 1981 claim on standing grounds – no discrimination based on speculative deterrence
- April 2024, *Bolduc* - class action challenge to Amazon's "diversity grant" program in which eligible Black, Latino, and Native American "delivery service partners" receive $10,000 to assist with startup costs; named plaintiff admitted she didn't actually apply to the program, just that she wished to
  - Texas district court dismissed Section 1981 claim on standing grounds; appeal pending
  - *Alexandre* case with identical allegations currently pending before the Ninth Circuit after plaintiff also appealed dismissal of Section 1981 claim
- But, November 2024 – new "traditional discrimination" lawsuit filed against Amazon by Black female plaintiff based, in part, on allegation that she was held back from promotions despite her qualifications because of the fear she would be perceived as a "DEI hire"

Other Relevant Litigation

- December 2023 – EEOC announces landmark settlement with Groupon after investigation into systemic discrimination practices against Black employees; settlement requires Groupon to contribute $350k towards establishing an educational fund dedicated to improving high school and college STEM education for Black students, and report annually to the EEOC on recruitment activities and hiring demographics
- February 2024, *Coalition for TJ v. Fairfax County School Board* – SCOTUS denies petition for review of Fourth Circuit decision upholding an elite VA high school's use of geography, socioeconomic factors, and "student experiences" as an allowable race-neutral admissions policy
- March 2024, *Nuziard v. Minority Business Development Agency* – Texas district court invalidated Minority Business Development Agency's "presumption" that certain racial groups are automatically deemed economically/socially disadvantaged, allowing access to resources/funds
  - Read in conjunction with *Ultima Services Corp.* – must prove more narrowly tailored disadvantage specific to context of government benefits

Other Relevant Litigation

- March 2024, *Do No Harm v. Pfizer* – Second Circuit upholds dismissal of challenge to Pfizer diversity program, and most importantly, requires advocacy group to name individuals actually harmed in order to have standing to proceed
- March 2024, *Honeyfund.com, Inc. v. Desantis* – Eleventh Circuit holds that Florida's Stop WOKE Act, which sought to ban employer-mandated DEI trainings, is unconstitutional on First Amendment grounds
- April 2024, *Muldrow v. City of St Louis* – SCOTUS holds that plaintiffs are not required to show "significant disadvantage" to prove that employer decisions are discriminatory
  - While seemingly a victory for employees, there is now concern that this lower bar could be used to challenge DEI initiatives like the training at issue in *Young v. Colorado Department of Corrections*
  - Considered a companion case to *Hamilton v. Dallas County*

Other Relevant Litigation

- May 2024, *Khatibi v. Medical Board of California* – lawsuit against California Medical Board by conservative medical organization dismissed; plaintiffs challenged 2019 law requiring continuing education courses involving direct patient care to include implicit bias training
  - Dismissal on grounds that such courses are "government speech," which is not subject to First Amendment protection; plaintiffs appealed in August
- May 2024, *Doe v. NYU* – lawsuit against NYU Law Review dismissed; plaintiff claimed "bias against straight white men" under Titles VI and IX of the Civil Rights Act, due to Law Review's goal of seeking a "diverse staff of editors" and "statement of interest" requirement for applicants
  - Dismissal on grounds that claims were too speculative and that "diversity" included aspects beyond protected categories
- June 2024 – California Civil Rights Department announces landmark settlement with Snapchat for gender discrimination and harassment; settlement requires Snapchat to conduct pay equity studies, and hire an independent consultant to evaluate its pay and promotion practices

Spotlight on *Young v. Colorado DOC*

- Young alleged he was forced to resign after suffering discrimination from a single DEI training module: "The fact that his non-white colleagues were viewing the same content, and absorbing the idea that he — as a white individual — was contributing toward racism and their oppression, was too much for him."
- Training model included:
  - A glossary of terms, which included "white fragility," "privilege," and "BIPOC"
  - A video about residential redlining and its history
  - A list of recommended books about anti-racism
- Majority opinion (written by Trump appointee) upheld dismissal of lawsuit because Young couldn't prove how the training module affected his actual workplace experience
  - Called the training module "troubling" and the "product of ideological messaging," and said it could encourage racial preferences in hiring/promotion, or make white employees targets in the workplace
- Concurring opinion written by Obama appointees on the court, specifically calling out majority's commentary about DEI programs in general and other hypothesizing as inappropriate and irrelevant

Young v. Colorado DOC – Related Cases

- February 2024, *De Piero v. Pennsylvania State University* – Pennsylvania district court refuses to dismiss lawsuit against Penn State by professor alleging that DEI programs and trainings constituted a hostile work environment; likely a case of "bad facts making bad law"
  - One of the trainings plaintiff was required to attend was called "White Teachers Are a Problem"
  - Evidence that professors encouraged to establish different student grading standards based on race
- March 2024, *Chislett v. New York City Dep't of Education* – New York district court dismisses lawsuit by employee alleging hostile work environment after she was required to attend mandatory implicit bias and anti-racism trainings; court held that implementation of such trainings is not evidence that race is a determinative factor in hiring decisions
- May 2024, *Vavra v. Honeywell Int'l, Inc.* – Seventh Circuit upholds dismissal of lawsuit by plaintiff alleging he was fired because he refused to participate in implicit bias training that was "inherently racist"; court cited the fact that when EEOC settles cases/investigations, they often require the offending company to provide training to employees to prevent discrimination, which is a lawful action

Spotlight on *Ames v. Ohio Dep't of Youth Svcs*

- In 2004, the Ohio Department of Youth Services hired Ames, a heterosexual woman, who later became the Department's Administrator of the Prison Rape Elimination Act in 2014
- In 2017, Ames was assigned to a new supervisor, and two years later she was demoted from her role, replaced by a younger gay man; she also alleged she faced additional personnel changes that favored LGBTQ+ candidates – Ames sued, alleging discrimination based on sexual orientation and sex under Title VII
- Both the district court and the Sixth Circuit ruled against her, holding that a plaintiff who belongs to a *majority* group needs to show "background circumstances" indicating that their employer is an unusual one that discriminates against the majority to make a prima facie case for discrimination; in other words, a higher bar for "reverse discrimination" claims
- Currently on appeal to SCOTUS; likely to be major ruling this year

Litigation Lessons – There's Hope!

- Standing remains critical, especially with employment-related claims – must be able to point to *someone* that was actually harmed, rather than relying on speculation of future harm or mere "deterrent effect"
- Informational-based initiatives (e.g., disclosing composition of boards, requiring training on bias) are hard to challenge – cannot point to actual harm connected to employment action
- Narrative requirements (Roberts' "personal statement") upheld as an alternative solution
- Demographic tracking not in and of itself evidence of discrimination
- Still no resolution on "underrepresented groups" as an umbrella category
- Special note for public agencies – most risky areas for DEI are grant programs, resource programs, relief initiatives, lending programs, housing assistance, guaranteed income programs, Community Development Financial Institutions, public board composition requirements; Section 1981 still a different bar than workplace anti-discrimination laws

The Rest of the Landscape Since *SFFA*

Legislative Actions

- 30+ states have introduced some form of DEI-related bills or constitutional changes; nearly all of these states are "red"
  - Legislation that seeks to constrain or ban public agencies from implementing DEI initiatives in contracting and procurement, funding, or appointments
  - Legislation that seeks to limit use of ESG criteria in financial matters
  - Legislation that seeks to limit what private employers can "train" on
  - Legislation that modifies existing anti-discrimination laws to address DEI initiatives and/or "reverse discrimination"
- Most of these laws are modeled after suggested legislation by the Goldwater Institute, an activist organization with the specific goal of "stopping woke takeover"

Legislative Actions

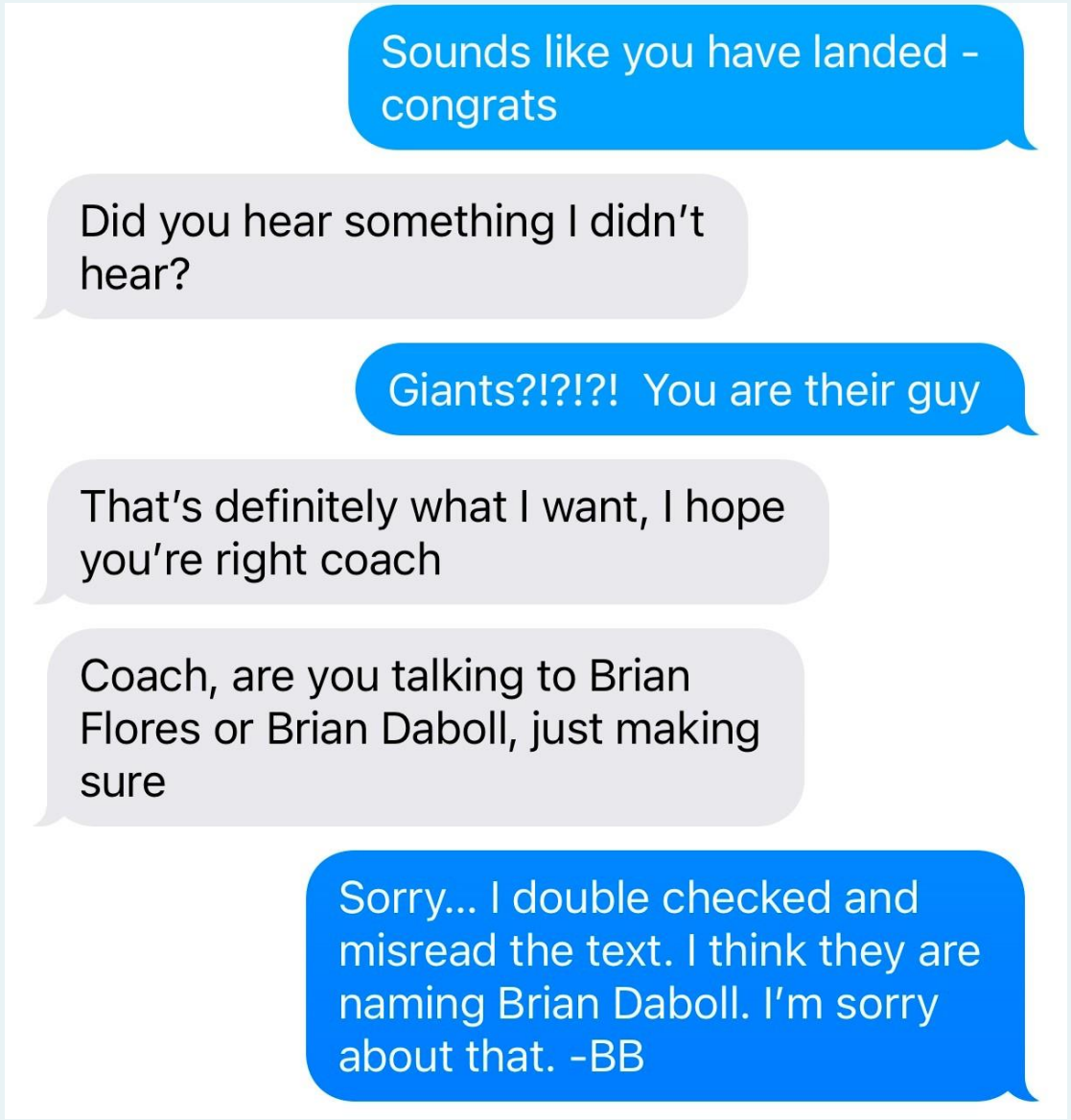
- No California laws that restrict, rollback, or ban anything DEI-related
- If anything, new laws support DEI initiatives
  - SB164, Diversity Reporting Law - Intended to address lack of funding for diverse-owned businesses; requires "venture capital companies" with a connection to California to file an annual report with the Department of Financial Protection and Innovation detailing demographic data about founding team members of the businesses in which VCs invest, the total amount of money invested in such businesses, and a breakdown of diverse and non-diverse businesses and founding teams
  - AB101, Ethnic Studies as High School Graduation Requirement – Will require that all California public high school students receive education in ethnic studies in order to graduate, beginning with 2024-2025 school year; school districts may either develop their own lesson plans or use a model curriculum created by the State Board of Education
  - AB2925 – Will require state colleges and universities to include anti-semitism training as part of DEI protocols

Shareholder Actions

- May 2022 – JPMorgan receives shareholder letter alleging 10 of its DEI programs are discriminatory/unlawful; undergoes rebranding but doesn't rollback
- August 2024, *Nat'l Center for Public Policy Research v. Schultz* – dismissed shareholder challenge to Starbucks' DEI policies under Section 1981, Title VII, and several state laws, finding plaintiff did not "fairly and adequately" represent shareholder interests
- December 2024 – Florida district court allows shareholder lawsuit to proceed claiming that Target's Pride Month merchandise led to loss of revenues after public backlash
- January 2025, both Costco and Apple boards of directors makes very public statement rejecting shareholder proposals to rollback DEI initiatives
- Risk of shareholder litigation great enough that many businesses (e.g. JetBlue) have started to signal in security filings that DEI initiatives may present a risk, both if they do too much or too little on diversity

Social Media and Other Public Campaigns

- America First Legal ("AFL") has sent more than a dozen letters to the EEOC asking it to investigate DEI initiatives, including those at Disney, Kellogg, McDonald's, NASCAR, Macy's, IBM, the MLB, and the NFL
- And let's talk about the NFL for a minute…


Sounds like you have landed - congrats
Did you hear something I didn't hear?
Giants?!?!?! You are their guy
That's definitely what I want, I hope you're right coach
Coach, are you talking to Brian Flores or Brian Daboll, just making sure
Sorry... I double checked and misread the text. I think they are naming Brian Daboll. I'm sorry about that. -BB

Social Media and Other Public Campaigns

- America First Legal ("AFL") has sent more than a dozen letters to the EEOC asking it to investigate DEI initiatives, including those at Disney, Kellogg, McDonald's, NASCAR, Macy's, IBM, the MLB, and the NFL
- Similarly, AFL has asked the Office of Federal Contract Compliance Programs to investigate DEI-related policies and practices at companies including Sanofi, United Airlines, Southwest Airlines, and American Airlines
- Robby Starbuck (podcaster and failed congressional candidate) social media campaigns against companies with "conservative" customer profiles, e.g., John Deere, Ford, Lowe's
- Elon Musk campaign on Twitter against Black pilots and airlines' diversity programs

Voluntary Pull Back by Employers

- Passive: not actually rolling back DEI, just no longer speaking publicly about it
- Active: public statements confirming DEI program rollback and/or elimination of DEI roles – Tractor Supply, Walmart, Harley Davidson, John Deere, Lowe's, Jack Daniel's, Ford, University of Kentucky, University of North Carolina
- Somewhere in the middle
  - Society of Human Resources Management announcing renaming of its DEI function to drop "equity" as too problematic
  - Walmart announcing it will not longer use the phrase "DEI," but reiterating that "every decision comes from a place of wanting to foster a sense of belonging, to open doors to opportunities for all our associates, customers, and suppliers and to be a Walmart for everyone"
- And remember, some are boldly doubling down!

What to Expect Under Trump 2.0

Congressional Investigations and Action

- January 2024 – Congressman Adam Smith (R-NJ) expands House Ways & Means Committee investigation into tax-exempt status of universities that have DEI programs
- March 2024 – Congressman Burgess Owens (R-UT) holds House Education Committee hearing on DEI programs, funding, and personnel at public colleges and universities; special focus on medical schools
- June 2024 – Congressman Comer (R-KY) holds House Oversight Committee hearing on why the EEOC is not prosecuting more companies because of their DEI initiatives
- October 2024 – Congressman Ted Cruz (R-TX) releases House Commerce Committee investigative report on Biden Administration's "politicized use of taxpayer dollars meant for scientific research," targeting grants given to companies with DEI programs

Congressional Investigations and Action

- Investigations expected/signaled in new legislative session:
  - Higher education issues – DEI programs, ESG, campus protests, speech codes
  - Tax-exempt status of nonprofits, especially those dedicated to racial justice
  - "Woke capitalism" – DEI programs in the private sector
- Resurrecting the "Dismantle DEI Act" (passed House in fall 2024 but died in Senate) – original bill introduced by then-Senator JD Vance (R-Ohio) proposed adding DEI to the list of banned discriminatory practices under the Civil Rights Act, preventing government agencies from awarding contracts/grants to companies with DEI initiatives, and prohibiting companies from using DEI criteria to appoint board members
- Resurrecting the "End Woke Higher Education Act" (passed House in fall 2024 but died in Senate) – original bill bars accrediting organizations from requiring schools to adopt DEI policies and measures as a condition of accreditation

DOJ/DOL Investigations and Litigation

- Although he is *in* the executive branch, Stephen Miller's America First Legal has filed anti-DEI complaints before various federal agencies, including the Department of Labor's Office of Federal Contract Compliance Programs
- Trump announced he intends to appoint Harmeet Dhillon as Assistant Attorney General for the Civil Rights Division, specifically praising her for her experience "suing corporations who use woke policies to discriminate against their workers"
- Under Attorney General Pam Bondi and Dhillon, DOJ will likely take amicus positions actively hostile to DEI (as it did during the first Trump Administration)
- Bondi/Dhillon DOJ likely to initiate additional investigations and "reverse discrimination" lawsuits following *Ames* decision by SCOTUS
  - Similar action expected under new Department of Labor

Other Executive Branch Actions

- Executive Orders – in 2020, Trump issued the "Executive Order on Combating Race and Sex Stereotyping," which prohibited executive departments and agencies, uniformed services, federal contractors and grant recipients from conducting workplace training on "divisive concepts," including "race or sex stereotyping" and "race or sex scapegoating"; Biden reversed
- Project 2025 – recommends that the Federal Trade Commission create an "ESG/DEI collusion task force" and prohibit the Securities and Exchange Commission from requiring companies to disclose certain information about their workforces
- Newly proposed "Department of Government Efficiency" – Musk, Ramaswamy have already signaled EEOC and certain DOJ divisions could be on the chopping block
- Although the EEOC will retain a Democratic majority until 2026, Trump will have the opportunity to name a new Chair; top contender, current-Commissioner Andrea Lucas, has already publicly railed against DEI initiatives

Emboldened Action by Trump Loyalists

- Stephen Miller named Deputy Chief of Policy under new Trump Admin – he's the guy behind "America First Legal" (e.g., funded NYU law review lawsuit)
- December 2024, at Mar-a-Lago club, conservative activist and CEO of Azoria Partners, announces new "anti-woke" investment fund that will mirror the S&P 500 index but will not include companies that are deemed to use "diversity quotas" in hiring and promotions
- Trump's eldest son, Donald Trump Jr., who recently joined the 1789 Capital venture firm to invest in a "parallel economy" of companies and products popular with conservatives including Tucker Carlson's media company; also recently joined the board of parent company to PublicSquare, a "woke-free online marketplace"

So, Now What? … First, Some Level-Setting

What DEI *Actually* Does

- Recognize that diverse workplaces produce better business outcomes, which is something employers should encourage
- Ensure that workplace decisions are as free from bias as possible, and at minimum, do not perpetuate systemic discrimination
- Re-evaluate practices so that policy decisions are made with thoughtfulness and intentionality
- Ensure that all people feel safe coming to the workplace as their authentic selves
- Ensure that all people feel like they are valued and heard

What DEI *Actually* Does

- Multiple studies confirm that diverse workplaces where people feel included are:
  - 2.2 times more likely to exceed financial targets
  - 2.4 times more likely to have positive customer experiences
  - 3.7 times more likely to adapt well to change
  - 4.3 times more likely to innovate effectively
  - 5.1 times more likely to retain talent
- Surprise: when you focus on ensuring a positive and fair experience for the underrepresented, *everyone* benefits

What DEI *Is Not*

- "Entitlement programs" for women and people of color
  - Quotas are still impermissible
  - Assuming that someone is in a position because of their background and not their qualifications is a *you* problem
- Movement to "color blindness"
- White or male or straight "guilt"
  - Recognizing that macro systems of bias exist ≠ individual people are evil
  - Recognizing that *everyone* has unconscious bias ≠ individual people are evil

Where Do We Go From Here?

What the Experts Are Saying – Likely Safe

- Programs designed to make processes more equitable for all
- Initiatives that focus on aspects of diversity beyond race, e.g., socioeconomic background, education, first generation status, etc., even where there is some correlation with race
- Policies tied to outreach and effort rather than decision making (e.g., expanding where recruiting is done vs. requiring a specific number of diverse candidates in a specific hiring process)
- Collection and analysis of demographic information and other data
- Purely informational initiatives, like trainings (but be careful)

What the Experts Are Saying – Potential Risk

- Policies requiring specific percentage of diversity in interview slates
- Limiting opportunities (e.g., scholarships, leadership programs) for a specific protected category
- Basing leadership compensation decisions on achievement of certain diversity goals/results
- Requiring specific percentage of diversity on boards of directors or in leadership
- Ineffective trainings or targeted trainings
- Remember special situation for public agencies

Decision Points for Your Organization

- The big picture
  - Consider that *SFFA* may have been wrongly decided and does not apply to the workplace in any event; we already have a well-known workplace framework
  - Republican AGs, Blum, and others are threatening and litigating based on a fundamental misunderstanding (even intentional misrepresentation) of what DEI programs look like and are about – they are activists with a specific goal, not neutral justice seekers
  - The fear is the point… and we should not let fear drive us to help Ed Blum
  - Well-structured DEI programs remain beneficial for *all* employees
- While there is risk of "reverse discrimination" challenges to DEI initiatives, there is greater risk in pulling back from these initiatives
  - Risk to culture, recruiting, branding, relationship with the public
  - Risk of other discrimination claims – and remember this is huge!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PAGA Amendments:

Key Changes Employers Should Know

What We'll Cover

- What Has Changed
- Reduced Penalties for Taking "Reasonable Steps" To Comply
- Reduced Penalties for Cured Violations
- The Cure Process
- Changes to Civil Penalties
- Changes to PAGA Standing
- Practical Tips For Employers To Mitigate Risks
- Recent California Supreme Court Decisions To Consider

Reform to the Private Attorneys General Act (PAGA)

- For the last 20 years, PAGA has allowed individuals to serve as a proxy for the state and file lawsuits on behalf of themselves and other aggrieved employees seeking penalties for Labor Code violations, resulting in costly litigation for employers

- In July 2024, legislation was signed bringing much needed reforms to the PAGA. This reform was in response to threats of a ballot measure seeking to repeal and replace the PAGA statute

- The PAGA reforms apply to PAGA notices filed on or after June 19, 2024

Reduced Penalties for Taking "Reasonable Steps" To Comply

Pre-Notice vs. Post-Notice

Pre-Notice "Reasonable Steps" = 15% Cap on Civil Penalties

Lab. Code §2699(g)(1):

- If, **prior to** receiving the PAGA Notice, or **prior to** receiving a records request (pursuant to Lab. Code §§ 226, 432, or 1198.5), the employer alleged to have committed the noticed violation "has taken **all reasonable steps** to be in compliance with all provisions identified in the notice, the civil penalty that may be recovered in a civil action pursuant … **shall not be more than 15 percent of the penalty sought …** ."

"Reasonable Steps" Include (Non-Exhaustive List)

- Conducted periodic payroll audits **and** took action in response to the results of audit
- Disseminated lawful written policies
- Trained supervisors on applicable Labor Code and Wage Order compliance
- Take appropriate corrective action with regard to supervisors

Post-Notice "Reasonable Steps" = 30% Cap on Civil Penalties

Lab. Code §2699(h)(1):

- If **within 60 days** after receiving the PAGA Notice, the employer alleged to have committed the noticed violation "has taken **all reasonable steps** to prospectively be in compliance with all provisions identified in the notice, the civil penalty that may be recovered in a civil action under this part **shall not be more than 30 percent of the penalty sought** … ."

"Reasonable Steps" Include (Non-Exhaustive List)

- Conduct audit of alleged violations **and** took in response to results of audit
- Disseminate lawful written policies
- Train supervisors on applicable labor code and wage order compliance
- Take appropriate corrective action with regard to supervisors

What Steps Are Considered "Reasonable?"

Lab. Code §§ 2699(g)(2),(h)(2):

- "Whether the employer's conduct was reasonable shall be evaluated by the totality of the circumstances and take into consideration the size and resources available to the employer, and the nature, severity and duration of the alleged violations."
- The existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps

Reduced Penalties for Cured Violations

Violations That Can Be Cured

Wage Statement Violations (Lab. Code § 226)

- Previously only curable defects were inclusive dates of the pay period and name/address
- Now allows ***all*** wage statement claims to be cured (for PAGA notices filed on or after 06/19/24)
- Allows cure by providing "digital access" to compliant wage statements

Claims for "Unpaid Wages" and Others

- Minimum Wage
- Overtime
- Meal Periods/Premiums
- Rest Breaks/Premiums
- Reimbursement
- Misc. (fringe benefits, vacation, make-up time)

Curing Wage Statement Violations

- **Incorrect Employer Name or Address:** Employer **must** provide written notice of correct information **to each aggrieved employee**
  - "Such notice may be provided in summary form but shall identify correct information for each pay period in which a violation occurred."
- **All Other Violations:** Employer **must** provide, at no cost to employees, a **fully compliant,** itemized wage statement **to each aggrieved employee** for "each pay period during which the violation occurred" going back 3 years prior to the PAGA Notice
  - If wage statements are customarily provided in digital form, the employer may provide each aggrieved employee "reasonable access to a digital or computer-generated record or records maintained in the ordinary course of business containing the same information required on a fully compliant, itemized wage statement…" (Lab. Code § 2699(d)(2)(B))
- **Successful Cure** = No civil penalty for wage statement violations cured

Curing Unpaid Wages

Lab. Code §§ 2699(d)(1)

- "Cure" means that the employer:
  - (1) corrects the violation alleged by the aggrieved employee;
  - (2) is in compliance with the statutes specified in the PAGA Notice; ***and***
  - (3) each aggrieved employee is "**made whole**."

Curing Unpaid Wages – Undisputed vs. Disputed

Undisputed Unpaid Wages

- An employee who is owed wages is "**made whole**" when:
  - (1) the employee has received an amount sufficient to recover any owed unpaid wages due under the statutes specified in the PAGA Notice **dating back three years from the date of the notice;**
  - (2) Plus 7 percent interest;
  - (3) Any liquidated damages (if required by statute); **and**
  - (4) "reasonable lodestar attorney's fees and costs to be determined by the agency or the court."

Curing Unpaid Wages – Undisputed vs. Disputed

Dispute Over Amount of Unpaid Wages

"In case of a dispute over the amount of unpaid wages due, nothing in this part prohibits an employer from curing the alleged violations by **paying amounts sufficient to cover any unpaid wages that the agency or court determine could reasonably be owed to the aggrieved employees based on the violations alleged in [PAGA] notice**."

Should Employers Take Reasonable Steps *And* Cure Unpaid Wages?

Reasonable Steps + Cure Violation = NO PENALTIES:

- "An employer who satisfies subdivision (g) or (h) [reasonable steps] and cures a violation shall not be required to pay a civil penalty for that violation." Lab. Code § 2699(j)

Cure Only (No Reasonable Steps) = $15 Per Employee, Per Pay Period

- "Any other employer shall pay a civil penalty of no more than fifteen dollars ($15) per employee per pay period … for any violations that the employer cures."
- So, once you have paid:
  - "an amount sufficient to recover unpaid wages," going back 3 years to all "aggrieved employees,"
  - PLUS 7 percent interest,
  - PLUS Liquidated damages,
  - PLUS "Reasonable loadstar attorneys' fees and costs,"
  - **You still owe $15.00 per aggrieved employee, per pay period, for each alleged violation even after paying to cure**

The Cure Process

Small Employers vs. Large Employers

The Cure Process for "Small Employers"

"Small Employers" = Employ fewer than 100 employees

- **Step 1** → Within 33 days of PAGA Notice, Small Employers may submit a confidential proposal to the LWDA to cure one or more of the alleged violations
- **Step 2** → LWDA "may" set a conference to evaluate the sufficiency of the proposed cure within 14 days of the employer's proposal. The conference may be electronic, telephonic, or in person
- **Step 3** → If LWDA sets a conference and finds the cure sufficient, the employer must complete the cure within 45 days of the conference
  - If cure includes payment of unpaid wages, LWDA may request the employer pay the proposed amount into escrow.
  - If LWDA determines that the violation is not cured or does not provide timely notice, the aggrieved employee may file a PAGA lawsuit (65 days after PAGA Notice).
  - If LWDA determines that the alleged violation has been cured, an aggrieved employee may request a hearing to dispute that finding. The Labor Commissioner's Office will preside over the cure hearing.

The Cure Process for "Large Employers"

"Large Employers" = Employ 100 or more Employees

- **Early Evaluation Conference (EEC)**
  - Employer may file a request for an EEC in court **prior to or simultaneous with** defendant's responsive pleading or other initial appearance in the court action
  - An Employer's EEC request must include a statement regarding whether the employer intends to cure any or all of the alleged violations, specify the alleged violations it will cure (if applicable), and identify the allegations it disputes
  - Employer may also request a stay of the court proceedings, and court must stay proceedings, absent good cause for denying stay

The Cure Process for "Large Employers"

"Large Employers" = Employ 100 or more Employees

- **Proposed Cure Plan In Advance of ECC**
  - Employer must submit plan to cure and/or basis for disputing any allegations within 21 days of order scheduling EEC
  - Plaintiff must also submit a statement detailing their allegations and response to Employer's cure plan within 21 days of receiving the Employer's cure plan
  - If the neutral evaluator accepts the employer's proposed cure plan, the defendant shall present evidence within 10 calendar days demonstrating that the cure has been accomplished
  - If the neutral evaluator and the parties agree that the employer has cured the alleged violations that it stated an intention to cure, the parties shall jointly submit a statement to the court setting forth the terms of their agreement. If no other claims remain, this will serve as the parties' PAGA settlement

The Cure Process for Wage Statement Violations Only

If the only alleged violation the employer seeks to cure is a wage statement violation, the following procedure shall apply:

- **(A) The employer may cure the alleged violation within 33 calendar days of the PAGA notice.**
  - The employer must give written notice within that 33-day period by certified mail to the aggrieved employee and by online filing with LWDA, including a description of actions taken to cure
- **(B) If the aggrieved employee disputes that the alleged wage statement has been cured, the aggrieved employee must provide written notice to the LWDA and by certified mail to the employer, including specified grounds to support that dispute.**
  - Within 17 calendar days of the receipt of the employee's notice, the LWDA shall review the actions taken by the employer to cure the alleged violations and provide written notice of its decision
  - If LWDA determines that the alleged violation has not been cured or fails to provide any notification, the employee may proceed with the civil action
  - If LWDA determines that the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court

Changes to Civil Penalties

Civil Penalties - Changes to Wage Statement Violations (Lab. Code §2699 (f))

- Typically, the civil penalty is $100 for each aggrieved employee, per pay period
- **Except that:**
  - If violation is incorrect employer name or address, but employee "**would not be confused or misled about the correct identity of their employer,"** the penalty is only **$25 per employee, per pay period**
  - For any other wage statement violation, if employee can "**promptly and easily determine**" accurate information from wage statement, the penalty is only **$25 per employee, per pay period**
  - If the alleged violation resulted from an **isolated, nonrecurring event** that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods, the penalty is only **$50 per employee, per pay period**

Civil Penalties – Additional Changes

- **No Stacking Penalties**: An aggrieved employee shall not collect a civil penalty for any violation of Sections 201, 202, 203 of the Labor Code, or for a violation of Section 204 or 226 that is neither willful or intentional, "**that is in addition to the civil penalty collected by that aggrieved employee for the underlying unpaid wage violation**."

- **Distribution**: 65 percent to LWDA, 35 percent to aggrieved employees
  - *Previously, the distribution was 75% to LWDA and 25% to aggrieved employees*

- **Weekly Pay Periods**: Penalty reduced by half for employers with weekly pay periods

Changes to PAGA Standing

PAGA Plaintiff's Standing

- Employee must have suffered the violation(s) alleged in the LWDA letter and complaint
- Must have experienced the alleged violation within the 1-year statute of limitations (specified 1-year SOL)
- **Exception:** Old rules still apply to a "nonprofit legal aid organization that has obtained Section 501(c)(3) tax-exempt status" and has brought PAGA cases for at least 5 years prior to January 1, 2025

“Aggrieved” Employees

- Aggrieved employees are only those who **experienced the same violation** as the named plaintiff

- Must have experienced violation **within the 1-year statute of limitations**

Practical Tips For Employers To Mitigate Risks

Reduce the Risk

- Regularly review wage and hour policies and practices, including via regular payroll audits, for compliance with the Labor Code
  - As a result of audits make corrections (if applicable)
  - Train HR, supervisors, and managers on Labor Code compliance
  - Focus on areas where lack of knowledge creates exposure e.g. meal and rest breaks, off-the-clock work, etc.
- Maintain up-to-date and comprehensive written wage and hour policies
- Review PAGA notices **immediately** and promptly discuss with your HB counsel

Recent California Supreme Court Decisions To Consider

Huerta v. CSI Electrical Contractors
15 Cal.5th 908 (March 2024)

Guidance on what constitutes employer "control" to make certain time at the job site compensable under Wage Order No. 16 (construction, drilling, mining, or logging industries)

- **Time spent waiting for and undergoing security screening?** → Yes
  - Plaintiff was subject to the employer's control because he had to wait in line in his car, present his badge for scanning, and submit to a visual inspection or possible vehicle search
- **Time spent driving on employer property?** → No
  - Plaintiff alleged he was required to drive to and from the security gate and employee parking lots while obeying certain "rules of the road," including speed limits
- **Restrictions on employee's activity during meal breaks?** → Yes
  - Meal break is not off duty when an employer prohibits leaving the premises or a particular area forecloses the employee from engaging in activities he or she could otherwise engage in if permitted to leave

Naranjo v. Spectrum Security Services, Inc., 15 Cal.5th 1056 (May 2024)

Employer's "Good Faith" Belief

- **Wage Statement Claim**: "knowing and intentional" failure to include certain information on wage statements
- ***Naranjo* Holding**: employer does not violate law if it reasonably and in good faith believed that it was providing complete accurate wage statement
- **Practical Implications:** easier for employer to defeat wage statement claims

Turrieta v. Lyft, Inc.
16 Cal.5th 664 (Aug. 2024)

In Turrieta, multiple California plaintiffs filed separate PAGA claims against the rideshare company Lyft alleging similar legal violations of the state's Labor Code

One plaintiff, Tina Turrieta, reached a settlement in her representative PAGA action, and the court scheduled a settlement approval hearing. Two other plaintiffs had each filed their own separate PAGA suits alleging overlapping or similar PAGA violations. They attempted to intervene in Turrieta's PAGA action, objected to the settlement, and filed motions to vacate the final judgment. The trial court rejected the attempted intervention, and the Court of Appeal affirmed.

The California Supreme Court held that a plaintiff in one representative PAGA action does not have a right (1) to intervene in another PAGA action that includes overlapping or similar claims, (2) to object to a proposed settlement in that other PAGA action, or (3) to move to vacate a judgment in that other PAGA action

Stone v. Alameda Health System
16 Cal.5th 1040 (Aug. 2024)

The California Supreme Court held that public entities are exempt from obligations under the Labor Code unless specifically stated and that PAGA penalties do not apply to public employers

In reaching its decision, the California Supreme Court found that the statutory language of PAGA which references definitions in the Labor Code, does not include public employers. The legislative history of PAGA also indicated that it was not intended to apply to public employers

While public employers have raised this defense in the past, there has been sporadic and limited authority on this issue. The *Stone* decision settled the matter and highlighted the limited reach of state wage and hour provisions against public employers


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Are You Calling Me a Liar?

Assessing Credibility in Workplace Investigations

What We'll Cover

Importance of Assessing Credibility in Workplace Investigations

Credibility Factors to Assess

Incorporating Assessments into the Investigation Report

Importance of Assessing Credibility in Workplace Investigations

Consequences of an Improper Credibility Analysis:

Mendoza v. Western Medical Center of Santa Ana (2014) 222 Cal.App.4th 1334

- Plaintiff claimed he was terminated in retaliation for reporting allegations of sexual harassment and a jury found in his favor
- Expert testimony found numerous shortcomings in the investigation conducted by the employer following the employee's complaint
- **It was opined that a more thorough investigation might have disclosed additional character & credibility evidence for the employer to consider before making the decision to terminate the employee**

Importance of Assessing Credibility in Workplace Investigations

- Overcome He Said/ She Said
- Undergo a Timely, ***Thorough*** and ***Independent*** Investigation
- Make Objective Findings Based on a Preponderance of the Evidence

Credibility Assessment

Credibility:

- ***"the quality or power of inspiring belief"*** (Merriam Webster)
- ***"the fact that someone or something can be believed or trusted"*** (Cambridge Dictionary)
- ***"…the capacity for being believed; the quality that renders something (testimony, evidence, a witness, etc.) worthy of belief; believability."*** (Wex Definitions Team)

Credibility Assessments

Must be based on reliable factors.

- **<u>Resources include:</u>**
  - **EEOC guidelines** (*EEOC Enforcement Guidance: Vicarious Employer Responsibility for Unlawful Harassment*, No. 915.20, p. 10 [June 18, 1999]; *see also EEOC Enforcement Guidance on Harassment in the Workplace* [April 29, 2024])
  - **Case law, scientific research/studies**

Credibility Assessment

Factors to Consider:

- Corroboration
- Plausibility
- Bias
- Demeanor
- Motive to Falsify (i.e. lie)
- Manner of Responding to Questions
- Past Record

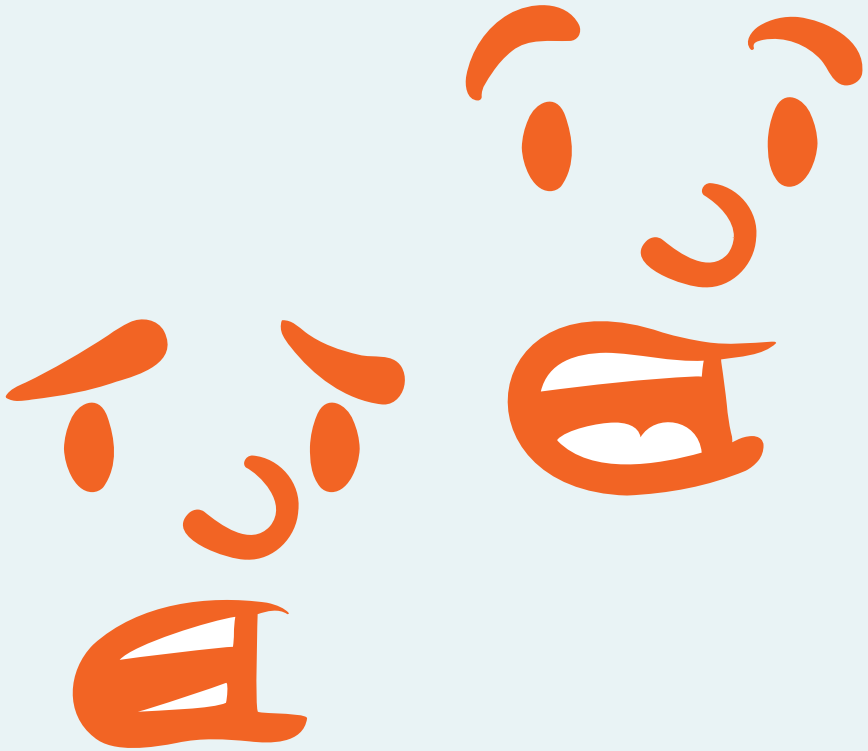
None of these factors are determinative.

Corroboration:

Evidence that confirms or supports a statement.

Examples:

- Witness testimony that corroborates other testimony
- Physical evidence that corroborates testimony (written documents, e-mails, surveillance footage, etc.)
- Contemporaneous reporting



Corroboration *(Continued)*

For example:

- Were the complainant's allegations about Tom sending inappropriate text messages ***supported*** by actual text messages?

- Were the complainant's allegations about Tom sending inappropriate text messages ***reinforced*** by testimony of witnesses who saw the text messages?

Plausibility

Is the explanation reasonable?

Is this person in the best position to know these facts?

Plausibility *(Continued)*

For example:

- Was it believable that Alicia was sexually harassed by Monica when Monica has been on a leave of absence for the past six months?

- Did the evidence show it was reasonable for David to think he was being singled out by his supervisor by his age?

Bias

Consider the source / context

Implicit v. Explicit

Bias *(Continued)*

For example:

- Did witness Cindy have bias against subject Joanne because they both dated the same co-worker?

- Did Trevor bolster his credibility by testifying as to his bias for Pete given their close friendship?

Demeanor

- Body Language
- Tone of Voice/ Change in Voice Pattern
- Facial Expressions
- Eye Contact (or Lack Thereof)

Be cautious in using.

Demeanor *(Continued)*

For example:

- Did the subject start circling around the question rather than answer it?
- Did the witness roll her eyes when asked about the incident?
- Did the complainant look at you directly when explaining the treatment she experienced?

Demeanor "Cons"

- Can require the interpretation of culture.
- Empirical studies have consistently shown that assumptions about demeanor evidence are very flawed.
- Common "cues" (i.e., not maintaining eye contact, facial expressions, body movements) do not occur more often when an individual is lying vs. telling the truth.
  - See Bella M. DePaulo, Julie I. Stone & G. Daniel Lassiter, Deceiving and Detecting Deceit, in THE SELF AND SOCIAL LIFE 323–370, 339 (Barry R. Schlenker ed., 1985) ("[S]ome of our favorite cultural stereotypes about liars do not withstand the test provided by the existing empirical data.…***[T]he studies that have been conducted so far do not support the notion that liars have shifty eyes- nor even shifty bodies; neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth.***").

Demeanor "Pros"

- Can be helpful to credibility analysis if used ***"in addition to"*** instead of solely on its own.
- Can signal that more questions need to be asked.
- Can provide an opportunity to establish rapport with the witness (i.e., demeanor is indicating witness is nervous, closed off).

Motive to Lie (Or Lack of Motive)

For example:

- Did the complainant withdraw her allegations after she was promoted?
- Did the witness double down on his statements even after confronted with evidence to the contrary?
- Consider Context, Outside Factors, Other Influences
- **Remember**: Motive to Lie ≠ Lying

Manner in Responding to Questions

Consider:

- Inconsistencies
- Change in Responses
- Evasive Responses
- Omissions

Manner in Responding to Questions *(Continued)*

For example:

- Was the subject direct in his responses?
- Was the complainant upset? Angry? Calm?

Past Record/Reputation for Veracity

Consider:

- Did complainant / subject have a history of past similar behavior?
- Basis for reputation
- Source and reliability for reputation

Similar past behavior is not evidence that behavior was engaged in again.

Potential Pitfalls in Credibility Determinations

- Not Obtaining the Complete Picture
- Failure to Objectively Consider Credibility Factors

Incorporating Credibility Assessments into the Investigation Report

Investigative Report: Credibility Assessments

What did the witness say?

Do you believe them?

Post-Interview; Pre-Writing

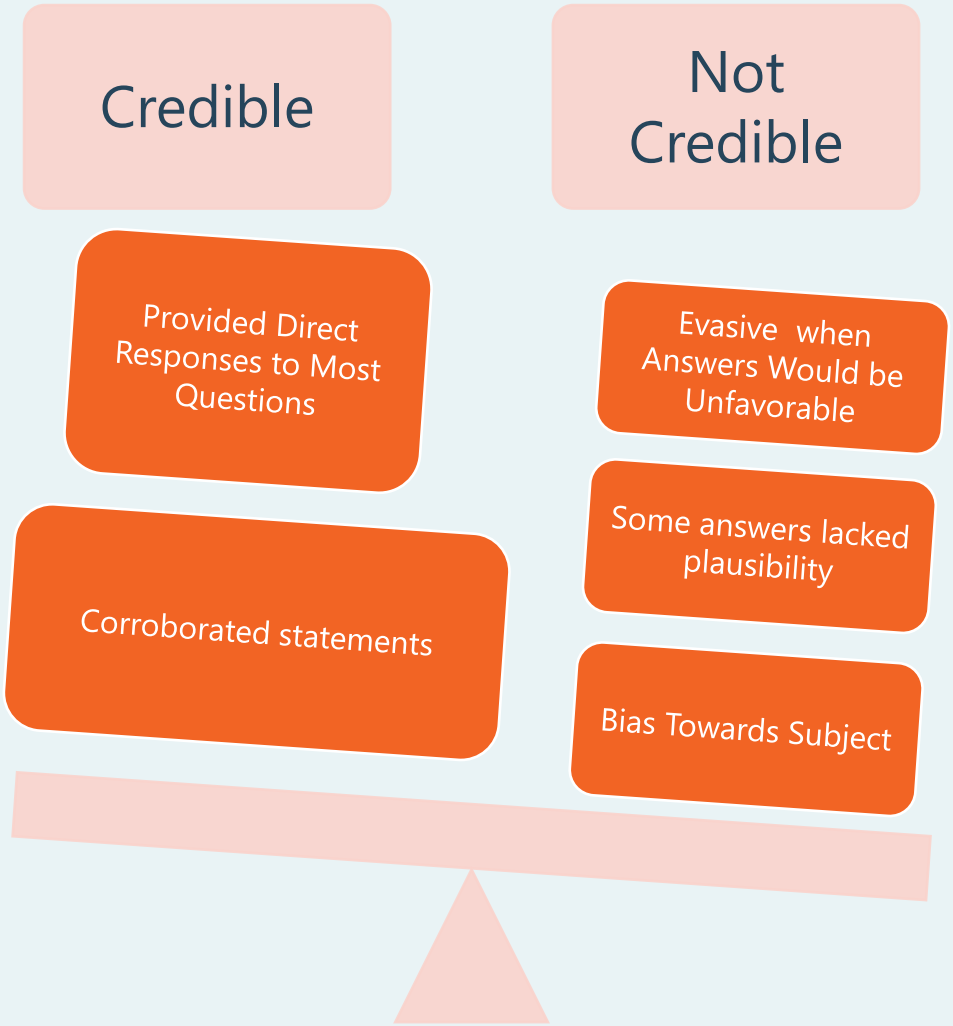
Consider Preparing Written Notes

- Witnesses' general attitude, language and demeanor
- Contemporaneous documentation of credibility points
- The way witness responded (forthcoming, evasive, defensive, hostile, etc.)
- Whether any topics caused the witness distress or to act differently
- Consistency of the responses by the witness
- Whether the explanations provided by the witness were plausible

Was the witness lying?
If yes…

WHY?

Preparing Credibility Analysis: Complainant



Preparing Credibility Analysis: Subject

Demeanor

Initially, the Subject was combative and hostile toward simple questions; although the Investigator found this may have been a result of nervousness.

Corroboration (Or Lack Thereof)

Subject provided contemporaneous e-mails that initially negated some of the allegations against him. However, these e-mails appeared to be altered/ omitted other communications which affected his credibility.

Plausibility

Subject's response to two of the four allegations were logical, although the Subject's response to the remaining allegations were not reasonable to the Investigator which detracted from his credibility.

Bias

The Subject noted he may appear bias towards one of his co-workers because she is related to him by marriage. This admission strengthened his credibility.

Manner in Responding to Questions

The Subject initially provided evasive responses to the Investigator's questions and would attempt to reframe questions to his benefit.

Motive to Lie

Any Subject has an inherent motive to lie but this Subject's statements were supported by contemporaneous evidence (e-mails) and he directed the Investigator to surveillance footage which further bolstered his credibility.

Investigative Report: Credibility Analysis Example No. 1

The Investigator found that McKenzie was credible in the information she provided to the Investigator in her first interview. She was calm and polite and had moments where she was emotional and teared up recounting the content of her complaint. She was able to recall specific dates and related details from her complaint.

The Investigator credited most of McKenzie' statements concerning the October 9, 2023 interaction in the Facility. Specifically, the Investigator credited McKenzie's recollection that her supervisor called her a "conceited bitch" in the presence of others in the Facility. The Investigator credited McKenzie in that the statement made her feel uncomfortable and disrespected. Her recollection of the incident was corroborated by other witnesses including Smith, David, and Jimenez. The Investigator did not credit McKenzie's statements, however, concerning her position that Mr. Timms conveyed the "conceited bitch" comment in a manner suggesting Timms had called her a "conceited bitch" in the presence of Mr. Stewart. No other witness present for the incident corroborated this part of McKenzie's allegation.

Example Credibility Assessment Cont'd

The Investigator also credited McKenzie's statements concerning Mr. Timms making statements, at work, about him having a friend who goes to Tijuana to "fuck whores". The Investigator specifically credited this statement because it was corroborated by Mr. Jimenez who confirmed he heard Mr. Timms make this statement in the Facility.

Alternatively, the Investigator did not credit McKenzie's allegation that Mr. Timms discussed, in the workplace, sustaining an injury while having rough sex with his girlfriend outdoors. This statement McKenzie alleged Mr. Timms made in the workplace was not corroborated by any other witness. Only Smith recalled this comment being made, but many years prior and outside of work.

Example Credibility Assessment Cont'd

During McKenzie's second interview on January 17, 2024, the Investigator found that McKenzie was combative, rude, and unable to provide responses to basic questions that detracted from her credibility. McKenzie started the interview calm, but after the first substantive follow up question her tone shifted to being hostile and curt. She equivocated at times when presented with simple questions, and contradicted herself multiple times. McKenzie became angry and emotional during the interview. The Investigator found that McKenzie lacked credibility in her second interview and credited the information she provided accordingly.

Example Credibility Assessment Cont'd

The Investigator did credit McKenzie's statements that prior to her returning from her leave post-June 7, 2023, she had several inappropriate memes and postings in her office. (See Exhibit A.) The Investigator did not credit her explanation for taking them down upon her return, which was that she was transferring out of positions soon and started tidying her workspace by taking down her personal effects. McKenzie downplayed what and how many items she took down until the Investigator presented her with photos of the items. McKenzie downplayed ownership by repeatedly saying the items were gifts and contained in cards that Mr. Sanchez's wife gave her.

Example Credibility Assessment Cont'd

Also, the purported timeline of when she took them down was inconsistent. First McKenzie claimed she took them down when she came back from her leave in June 2023 because she was leaving the Facility. It appeared more likely to the Investigator that given the nature of her complaint against Mr. Timms, which in part alleged he fostered a work environment that permitted less than professional language and behavior from the employees, that McKenzie removed these items to shade potential evidence of her participation in that same environment and behavior that formed, in part, the substance of her complaint. These images (Exhibit A) were clearly inappropriate and leaving them posted could detract from the legitimacy of portions of her complaint against Timms.

Example Credibility Assessment cont…

Despite some issues of credibility that arose with McKenzie during the investigation, the Investigator found that McKenzie was consistent and credible concerning Mr. Timms' inappropriate statements in the Facility on October 9, 2023. Timms admitted he made the inappropriate remarks, and many witnesses confirmed the incident.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