

(New, Different, or Not So) Common Issues in Employment Law: A Survey of Various Employment-Related Legal Issues

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I. INTRODUCTION

The area of employment law is filled with ever-changing goal posts for employers, whether governmental or private sector. The past few years included landmark case decisions, revised statutes, and updated administrative directives. The goal of this paper is to provide updates on many of those issues, but it is in no way exhaustive. Hopefully, it will raise issues for consideration and point readers in a direction to get more detailed information if necessary.

II. THE ISSUES

A. Discrimination Claims

1. Pregnant Workers Fairness Act

Effective June 27, 2023, the Pregnant Workers Fairness Act (“PWFA”) is a federal law that requires covered employers to provide “reasonable accommodations” to a qualified worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”

An undue hardship is defined as causing significant difficulty or expense.

This is *IN ADDITION* to Title VII, the ADA, the FMLA, and the PUMP Act.

There are some accommodations that, according to the EEOC, will almost always be a reasonable accommodation under the PWFA: (1) allowing an employee to carry water and drink, as needed, in the employee’s working area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing

an employee breaks, as needed, to eat and drink. 299 CFR 1636, 89 FR 29096 at 29185.

Other possible accommodations discussed in the regulations include: (1) modification of equipment, uniforms, or devices that assist with lifting or carrying; (2) permitting the use of paid leave or providing unpaid leave for pregnancy-related conditions; (3) light duty or modified duty; (4) remote work; and (5) reserved parking spaces. 29 CFR 1636, 89 FR 29096 at 29185.

The PWFA’s accommodation provisions are based on the Americans with Disabilities Act (“ADA”). More specifically, the accommodation process borrows heavily from the interactive process required by the ADA. However, the PWFA imposes additional obligations on the employer not required by the ADA. The PWFA may require the employer to eliminate an essential job function, so long as the inability to perform the necessary function is temporary; the essential function can be performed in the near future (i.e., 40 weeks or less); and the inability to perform the essential function can be reasonably accommodated. 29 CFR 1636.3(f)(2).

PWFA applies to “known limitations.” This appears to be broader than the qualifying disabilities under the ADA. The statute defines “known limitation” to include information that the employee or the employee’s representative communicated to the covered entity. 42 USCA §2000gg(4).

The PWFA also prohibits an employer from: (1) requiring an employee to accept an accommodation without a discussion about the accommodation between the employee and the employer; (2) denying a job or other employee opportunities to a qualified employee or applicant based on the employee’s need for a reasonable accommodation; (3) requiring an employee to take leave if another reasonable accommodation can be provided that

would let the employee keep working; (4) retaliating against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding; or (5) interfering with any individual's rights under the PWFA.

In the *State of Texas v. Garland, et al.*, ___ F.3d. ___, 2024 WL 967838, No. 5:23-CV-034-H (N.D. Tex. Feb. 27, 2024), the State of Texas challenged the constitutionality of the PWFA based on Article I, Section 5 of the Constitution. The State of Texas argued that the vote on the PWFA violated the quorum clause of the Constitution. At the time of passage, the U.S. House of Representatives required 218 members for a quorum. The PWFA passed with only 205 house members physically present. The remaining 226 members voted by proxy, which was in conformity with the House's pandemic-era rules.

As a result of the ruling in the *State of Texas v. Garland* case, the Court put in place a permanent injunction, prohibiting the EEOC from accepting charges alleging violation of the PWFA and further prohibiting the EEOC from issuing a right-to-sue notice on PWFA charges. *State of Texas v. Garland*, at *51. To facilitate a charging party's ability to show she attempted to administratively exhaust her claim with the EEOC, the Court did provide that the EEOC, upon receipt of a charge alleging a violation of the PWFA, may issue a written notice to the charging party stating that they "received her charge but cannot accept it, investigate it, or issue a right-to-sue notice" based on the Court's order. *Id.*

This prohibition is limited to "the State of Texas and its divisions and agencies." *State of Texas v. Garland, et al.*, No. 5:23-CV-00034-H, Final Judgment entered Feb. 2, 2024 [Doc. #111]. The order has been appealed to the Fifth Circuit Court of Appeals. Docket No. 24-10386.

2. Sexual Harassment under the Texas Labor Code

In September 2021, the State of Texas passed amendments to the Texas Labor Code, which codified employer liability for sexual harassment in Texas.

The amendments made several important changes to sexual harassment law as it exists in Texas. First, the amendments expanded coverage to *all employees* in Texas. The amendments defined employer as a person who "employs one or more employees" or "acts directly in the interests of an employer in relation to an employee." TEX. LAB. CODE §21.141(1). Previously, only employers with 15 or more employees were covered by state law. In addition, the specific inclusion of someone who "acts directly in the interests of an employer" opens up the

possibility of individual liability for sexual harassment claims. At least one Federal Court has found that the amendments could be read to accord employer status to individual managers. *Siegel v. BWAY Corporation*, 2024 WL 1629916 at *7 (S.D. Tex. Apr 12, 2024).

The amendments also heightened the standard for employers' responses to known harassment. Previously, employers were required to take "prompt remedial action." TEX. LAB. CODE §21.0165. Now, liability is imposed if an employer fails to take "immediate and appropriate corrective action." TEX. LAB. CODE §21.142. This change will likely expose employers to disputes over the timeline of when the employer learned of the harassment compared to when action was taken, in addition to the sufficiency of the investigation.

In addition, the amendments expand the time to file claims for sexual harassment with the TWC and/or EEOC to 300 days, up from the previous 180 days. TEX. LAB. CODE §21.201. This expansion applies only to claims for sexual harassment.

3. Sexual Preference and Gender Identity as a Protected Class

In 2020, the Supreme Court of the United States issued its landmark decision in the case of *Bostock v. Clayton County*, which held that the prohibition against sex discrimination in Title VII of the City Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status. *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020).¹ In response to Justice Alito's spirited dissent, Justice Gorsuch clarified that *Bostock* decided only what *Bostock* decided: under Title VII, "[a]n employer who fires an individual merely for being gay or transgender defies the law." *Bostock*, 590 U.S. at 683.

Not surprisingly, the State of Texas has taken issue with the EEOC's guidance issued in the wake of *Bostock*. Specifically, the State challenged the EEOC's interpretation of *Bostock* to include not only an employee's status (i.e., "homosexuality and transgender status") but also correlated conduct, specifically, sex-specific: (1)

¹ Although human sexuality correlates to a myriad of attractions, identifications, actions, and relationships, the Supreme Court cabined its definitions and descriptions of "being homosexual" and "being transgender" to *status*, and did not extend the definitions to cover all conduct correlating to "Sexual orientation" and "gender identity." See, *Bostock*, 590 U.S. at 655.

dress; (2) bathroom; (3) pronoun; and (4) healthcare practices.

In *State of Texas v. Equal Employment Opportunity Commission*, 633 F.Supp.3d 824 (N.D. Tex. 2022), the U.S. District Court for the Northern District of Texas granted the State's request for declaratory judgment finding the EEOC guidance unlawful, vacating and setting aside the EEOC's guidance. *Id.* at 847. The EEOC did not appeal that decision, so the judgment in the case is final.

While the EEOC guidance was overturned, Texas Courts have followed the holding in *Bostock*. See *Tarrant County College District v. Sims*, 621 S.W.3d 323 (Tex. App. – Dallas 2021)(Court “must follow *Bostock* and read the TCHRA’s prohibition on discrimination ‘because of ... sex’ as prohibiting discrimination based on an individual’s status as a homosexual or transgender person.”).

4. Discrimination against Ugly

Is it unlawful to discriminate against someone because they are not attractive? Put simply, it is not illegal to discriminate against the unattractive. However, it may be illegal to discriminate against someone because of a protected status plus another factor (in this case, unattractiveness). Courts often use the phrase “sex-plus” discrimination in these cases. See *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1045-46 (10th Cir. 2020)(“Ample precedent holds that Title VII forbids ‘sex-plus’ discrimination in cases in which the ‘-plus’ characteristic is not itself protected under the statute.”) Thus, a plaintiff in a lawsuit must present direct or circumstantial evidence of unlawful discrimination in addition to evidence of unattractiveness discrimination. See *Edcouch-Elsa Independent School District v. Bacrerera* (2022 WL 3257377 (Tex. App. – Corpus Christi-Edinburgh Aug. 11, 2022).

5. Religious Accommodations (post *Groff v. DeJoy*)

In June 2023, a unanimous Supreme Court held that to defend denial of a religious accommodation under Title VII, an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Groff v. DeJoy*, 600 U.S. 447 (2023).

Many lower courts had read a prior decision from the Supreme Court, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) to hold an “undue hardship” was “any effort of cost that is ‘more than ... de minimis,’” The *Groff* court forcefully rejected this reading, holding that a showing of “undue hardship” requires something far

greater: an employer must prove that the burden of accommodation “is substantial in the overall context of the employer’s business.” *Groff*, 600 U.S. at 468.

Post-*Groff*, an employer must be prepared to offer evidence that, not only does the proposed religious accommodation impose more than a de minimis burden, but that the burden will be “substantial.”

The decision in *Groff* will, in all likelihood, result in a very fact-specific standard, meaning cases will be examined on a case-by-case basis.

6. *Hamilton Case (5th COA) (adverse employment action)*

The Fifth Circuit, perhaps inspired by the Supreme Court in *Groff*, addressed the issue of atextual precedent and its effect on future cases. In *Groff*, the Supreme Court did away with the longstanding atextual precedent of an undue hardship requiring more than a *de minimis cost* to the employer. In *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023), the Fifth Circuit addressed the atextual restriction of adverse employment actions to so-called “ultimate employment decisions.”

Holding that a Title VII plaintiff need not show an “ultimate employment decision” to establish a plausible claim, the Fifth Circuit overruled its own prior caselaw. *Hamilton*, 79 F.4th at 499. The Fifth Circuit reviewed a long line of cases requiring an “ultimate employment decision” which relied on language not appearing in the statute at all. *Id.* at 500.² The Fifth Circuit held that to adequately plead an adverse employment action, plaintiffs need not allege discrimination with respect to an “ultimate employment decision.” “Instead, a plaintiff need only show that she was discriminated against, because of a protected characteristic, with respect to hiring, firing, compensation, or the ‘terms, conditions, or privileges of employment’ – just as the statute says.” *Hamilton*, 79 F.4th at 506.

What the Fifth Circuit did not answer, however, was what an adverse employment decision would now look like. Instead, the Justices left “for another day the precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one’s terms, conditions, or privileges of employment.” *Hamilton*, 79 F.4th at 505.

² Such “ultimate employment decisions” were generally defined as hiring, granting leave, discharging, promoting, or compensating.” *Hamilton*, 79 F.3d at 500.

Once again, Texas employers are left with what will likely be a parade of context-specific cases to be examined on a case-by-case basis to determine if liability exists for an employment action. In an odd twist of linguistics, the Fifth Circuit has “clarified” the *Hamilton* standard, explaining, “Title VII does not permit liability for de minimis workplace trifles.” *Harrison v. Brookhaven School District*, 82 F.4th 427, 431-32 (5th Cir. 2023).

7. Muldrow v. St. Louis (adverse employment action)

The Supreme Court also recently weighed in on the issue of an “adverse employment action.” In *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ---, 144 S.Ct. 967 (2014), the Court held that an employee challenging a job transfer under Title VII must show that the transfer brought about “some injury” with respect to an identifiable term or condition of employment, but that harm need *not* be significant. *Id.* at 977.

In *Muldrow*, the City of St. Louis transferred a plainclothes officer (Muldrow) in the intelligence division to a uniformed position of lower status, perks, and responsibilities. Muldrow’s pay and rank, however, remained the same. The stated reason for the move was, on its face, discriminatory. The new division commander wanted to replace Muldrow, a female, with a male officer.

The trial court granted the City’s motion for summary judgment, explaining that she failed to show that her transfer effected a “significant” change in working conditions, producing “material employment disadvantage.” *Muldrow*, 144 S.Ct. at 973. The Eighth Circuit affirmed. 30 F.4th 680, 688 (2022).

Rejecting the “significant employment disadvantage” test employed by the Circuit Court, the Supreme Court adopted the “some injury respecting her employment terms or conditions” test. *Id.* at 96-77.

There were issues with this case that justified the reversal of the dismissal. First, and most glaringly, the City all but admitted it discriminated against Muldrow.

Second, there is an existing line of cases holding that even when a transfer does not change an employee’s compensation, a transfer does change the employee’s terms, conditions, or privileges of employment. *See Chambers v. District of Columbia*, 35 F.4th 870 (DC. Cir. 2022).

Finally, there was some evidence to support a finding of employment disadvantage. Muldrow would be required to now wear a uniform, would be in a less prestigious and more administrative role, would have fewer opportunities to work on important investigations, would no longer have a set weekday schedule, and would lose the use of a take-home vehicle. In short, there was significant impact to her employment situation because of the discriminatory actions.

There is no reason to expect that the *Muldrow* case will be limited to sex discrimination cases or cases involving job transfers. It will likely be applied to unlawful discrimination of any type and will likely apply to a wide range of managerial decisions. Once again, the Supreme Court has left it for the lower courts to sift through cases on a case-by-case basis to determine if the complained-of employment action meets the now minimal “some harm” standard.

When describing potential harms, the Court referred to changes in “responsibilities, perks, and schedule,” including changes to “the what, where, and when” of an employee’s work responsibilities. *Id.* It doesn’t take too much creativity to expand possible coverage to many aspects of the modern workplace, including discriminatory changes to workplace flexibility, remote work, or flex schedules.

8. “English Only” Rules

While the Equal Employment Opportunity Commission has stated in its guidelines that “English-only” rules are unlawful, these guidelines have been challenged in Federal district court and held invalid. 29 C.F.R. § 1606.7, *Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1163 (D. Neb. 2012). However, the Nebraska District Court held that an English-only policy *would* be an unlawful violation of Title VII if the policy was enforced in a way that led to either disparate treatment or a disparate impact among workers. *Reyes*, 890 F. Supp. 2d at 1159-61. Evidence that a certain protected class has received a disparate impact from an English-only policy is enough to establish a Title VII violation, like in the case of Premier Operator Services where Hispanic employees were shown to run a higher risk of being fired as a result of an English-only rule at their workplace. *E.E.O.C. v. Premier Operator Services, Inc.*, 75 F. Supp. 2d 550, 558 (N.D. Tex. 1999).

Employers can claim that the rule arises out of a business necessity or another legitimate reason. 29 C.F.R. § 1606.7 (b). Legitimate reasons can include: requiring only English to be spoken in an operating room during

surgery; requiring that only English be spoken to prevent colleagues from feeling like they were being purposely cut out of conversations; and establishing English-only rules to ensure that employees did not use Spanish as a tool to intimidate or isolate members of other ethnic groups. See *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1177 (10th Cir. 2007); *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999); and *Long v. First Union Corp. of Virginia*, 894 F. Supp. 933, 941 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996).

9 Hot-off-the Presses EEOC Guidance Changes

On April 29, 2024, the Equal Employment Opportunity Commission issued its first updated guidelines on workplace harassment in twenty-five years, effective that day. *Enforcement Guidance on Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission, OLC Control No. EEOC-CVG-2024-1, Apr. 29, 2024, found online at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>. The new publication (the “Guidance”) compiles and supersedes the EEOC’s previously released guidance documents, the most recent having been in 1999. This release comes in the wake of the 2020 United States Supreme Court decision *Bostock v. Clayton County*, which extended the protections of Title VII to include sexual orientation and gender identity. See 590 U.S. 644 (2020). While the Guidance itself is not law, nor does it limit the EEOC’s discretion for enforcement, it is still something that will be considered when cases arise dealing with workplace harassment. This section is in no way an exhaustive summary of the voluminous document but an overview for quick reference.

A draft version of the Guidance was released to the public back in September 2023 for comments. According to the EEOC, over thirty-seven thousand comments were received. *Enforcement Guidance on Harassment in the Workplace*, Addendum Pursuant to 26 C.F.R. § 1695.6(c) on EEOC Responses to Major Comments Received on the Proposed Enforcement Guidance on Harassment in the Workplace. While mostly ignoring criticisms and reasserting that each complaint must be taken on a case-by-case basis, the final version of the Guidance is still very close to what was presented in the draft.

The Guidance first makes clear what is necessary to trigger protection thereunder. Specifically, equal employment opportunity (“EEO”) laws only apply where the alleged harassment is based on a person’s legally protected characteristic, and the Guidance makes clear “whether specific harassing conduct violates the law must be assessed on a case-by-case basis.” *Id.* at Section II.

Mere rude behavior or mistreatment in the workplace is not enough on its own qualify for EEO protection. The Guidance gives seventy-seven specific examples throughout its pages.

At its core, the Guidance expands on the EEOC interpretations of Title VII and the protections afforded therein to protected individuals based on race, color, national origin, religion, disability, age, and sex (now including sexual orientation and gender identity). To qualify as harassment, the conduct must involve either a change in the aggrieved person’s employment or create a hostile work environment. Generally, to create a hostile work environment, the conduct must be severe or pervasive. The Guidance now also includes virtual work environment and use of work-related communication systems as part of the “workplace.” However, the EEOC has broadened the standing for complaint to an individual who simply overhears or learns later of conduct with which they take offense, whether or not the conduct was directed at the complainant. In the analysis of whether a hostile work environment is created by the alleged conduct, the conduct must be offensive to a reasonable person, and the EEOC clarified that it will consider the conduct from the viewpoint of a reasonable person in the victim’s protected group.

Many of the examples given in the Guidance are in line with prior expectations of what would qualify as harassment:

- Using an ethnic or racial slur;
- Forwarding an offensive or derogatory email;
- Displaying or sharing pornography, including “revenge porn;”
- Unwanted touching or physical assault; and
- Threatening job/offering favors for sex.

Id. at Section III.

The EEOC also clarified what has been considered harassing behavior, but not specifically labelled as such before, including:

- Harassment based on pregnancy, pregnancy-related, and abortion conditions as part of harassment based on “sex;”
- Harassment between individuals of the same protected class, labeled “intra-class harassment” in the Guidance.

Id. at Section II(A)(10).

What is bound to receive most of the attention though are new behaviors the EEOC has classified as harassment:

- Intentional and repeated use of a name or pronoun inconsistent with a transgendered employee’s

- chosen gender identity;
- Refusing to allow a transgendered employee to use the restroom of his or her choice; and
- Disclosing an individual’s gender identity or sexual orientation without permission.

Id. at Section II(A)(5)(c).

A main criticism from the comments of the above examples is where they intersect with free speech and the exercise of religion issues. The EEOC avoids responding to the criticism, punting to the courts, but expects employers to comply in the meantime with EEOC’s surreptitiously predetermination of which citizens’ rights should prevail.

In addition to addressing what is harassment, the Guidance places responsibility on employers to exercise reasonable care in taking measures to prevent harassment and to quickly end harassment once they become aware of it. That the employer has met its duty of exercising reasonable care is an affirmative defense that the employer may show by providing evidence that it took reasonable steps to prevent workplace harassment generally and to prevent, and correct, specific harassment complained of in the complaint at issue. *Id.* at Section IV(C)(2)(b).

While the Guidance is in effect now, multiple legal challenges are expected. This will definitely be an issue to watch in the next year.

B. Not Discrimination Issues

1. Fair Chance Hiring (“Ban the Box”)

Generally, “fair chance hiring” means that employers refrain from: (1) including on a job application any questions about conviction history before a conditional offer has been made; (2) asking about or considering a job candidate’s criminal history before a conditional job offer has been made; and (3) considering information about arrests not followed by convictions, participation in pretrial or post-trial diversion programs, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated. [indeed.com accessed 3/26/2024]

On the federal level, Congress passed the Fair Chance to Compete for Jobs Act of 2019, codified at 5 U.S.C. 92. The Act prohibits both federal agencies and contractors acting on their behalf from requesting an applicant’s criminal history before the agency or contractor makes a conditional offer of employment. Specific administrative regulations recently went into effect on October 2, 2023. They can be found at 5 C.F.R. Part 920. The “ban the box” regulations extend to civil service

positions. The complaint process for applicants who feel they have been subjected to a violation of these protections is found in 5 C.F.R. Part 754.

Here in Texas, generally there has not been a state-wide push to “ban the box.” However, the Texas Regulatory Consistency Act (or “Death Star Bill”), H.B. 2127, which went into effect on September 1, 2023, does apply to the Labor Code:

Section 10, Chapter 1 of the Texas Labor Code:

Sec. 1.005. PREEMPTION. (a) unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

(b) For purposes of Subsection (a), a field occupied by a provision of this code includes employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than a municipality or county. Tex. Lab. Code §1.005.

If Texas were to pass a “ban the box” bill at the state level, it would come under the purview of the Death Star Bill, and Texas municipalities would have to comply.

In the meantime, *City of Houston and City of San Antonio v. the State of Texas*, No. D-1-GN-23-003474, 2023 WL 5618634 (345th Dist. Ct., Travis County, Tex. Aug. 30, 2023) currently involves the issue. The case is currently on appeal. Briefs have been filed, and the case is ready to be heard. 03-23-CV-00531-CV

2. CROWN Act

The Texas CROWN (Creating a Respectful and Open World for Natural hair) Act passed in the 2023 legislative session. 2023 Texas House Bill No. 567, Texas Eighty-Eighth Legislature. The bill was codified in several places within the Texas Code but, most relevant to this paper, was included in the Texas Labor Code. *See* TEX. LAB. CODE § 21.1095(b); *see also* TEX. PROP. CODE § 301.0045, TEX. EDUC. CODE § 25.902. The new law prohibits any discrimination related to an employee’s protected hairstyle or hair texture that is “commonly or historically associated with race.” TEX. LAB. CODE § 21.1095(b). The law defines protected hairstyles to include braids, locks (locs), and twists. *Id.* at § 21.1095 (a). While the list appears to not be exhaustive, the City of

Austin has already expanded the list in its own local ordinance to include: afros, bantu knots, cornrows, curls, and hair that is tightly coiled or curled. Austin, Tex., Code of Ordinances No. 20220609-043 (2022). The statute prohibits employers, labor unions, and employment agencies from discriminating against employees with these hairstyles or textures. TEX. LAB. CODE § 21.1095 (c).

As an aside, Texas exempts certain types of employers from having to follow all non-discrimination laws, including the Texas CROWN Act. These exemptions include those employing direct family members, employers that are religious organizations or religious educational institutions, and employers who restrict employment based on business necessity. *Id.* at § 21.019, 21.115, 21.117. The final exception is for employers that require age, religion, sex, disability, or national origin as a bona fide occupational qualification that is necessary for the regular operations of the business. *Id.* at § 21.119.

Given the recent passage of The CROWN Act, no case law has yet developed around its interpretation in regard to labor law; however, its sister law in the Education Code had a ruling this year that made national news. Christine Hauser, *Black Student's Suspension Over Hairstyle Didn't Violate Law, Texas Judge Rules*, New York Times (May 5, 2024, 3:15 PM), <https://www.nytimes.com/2024/02/22/us/darryl-george-locs-hair-trial-texas.html> and Chandelis Duster, *Darryl George: Texas judge rules school district can restrict the length of male students' natural hair*, CNN (Feb. 22, 2024, 3:19 PM), <https://www.cnn.com/2024/02/22/us/darryl-george-crown-act-trial-texas-reaj/index.html>; *see also* TEX. EDUC. CODE § 25.902. In the case, Barbers Hill Independent School District sued a representative of a minor student under the Texas Declaratory Judgment Act, seeking a declaration that the CROWN Act did not render the ISD's dress restrictions (including the regulation of the length of students' hair) unlawful. The minor's representative removed the case to the Southern District of Texas under federal question jurisdiction. The District Court ruled federal question jurisdiction was not applicable and remanded the case to the 253rd Judicial District Court of Chambers County, Texas. *Barbers Hill I.S.D. v. Darresha G.*, Cause No. 4:23CV03681, 2023 WL 10406018 (S.D.Tx. Dec. 20, 2023)(Opinion not yet published). In the Texas court, the case went to trial. The judgment, which the representative of the minor student intends to appeal, was that while certain hairstyles cannot be disallowed by the state law, length of hair can still be regulated (even if protected hairstyles require a certain length to be worn). *See* Chandelis Duster *Darryl George: Texas judge rules school district can restrict the length of male students' natural hair*, CNN (Feb. 22, 2024, 3:19

PM), <https://www.cnn.com/2024/02/22/us/darryl-george-crown-act-trial-texas-reaj/index.html>. It is yet to be seen whether a similar interpretation of the law will be used in regards to the Labor Code.

3. The Speak Out Act

The “Speak Out Act” is a federal statute aimed at protecting employees who allege sexual assault or sexual harassment in the workplace by making any nondisclosure or non-disparagement clause—signed before the dispute arose—unenforceable. 42 U.S.C.A. § 19403. It serves to strengthen the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. *See* 9 U.S.C.A. §§ 401, 402. The Speak Out Act allows states to pass more protective laws and does not supersede any state or federal law governing the use of pseudonyms in sexual assault or sexual harassment cases. 42 U.S.C.A. § 19403 (b)-(c). The law also does not prohibit employers from protecting trade secrets or proprietary information with a nondisclosure clause. *Id.* at § 19403 (d). At this time, Texas has not yet passed a law that enshrines further protections against nondisclosure or non-disparagement for employees who have experienced sexual assault or sexual harassment in the workplace.

4. Political expression in the workplace

The proliferation of social media has made the First Amendment more relevant than ever. While previous generations had to put some effort into expressing potentially divisive positions, now all it takes is a brief post on Facebook, a response to someone else's post, a re-posting of a controversial meme, or even just “liking” a post.³ Ease of expression combined with some rather polarized political positions in the current political climate result in a potential powder-keg in the free-speech arena.

Unlike private sector employees, public sector employees in Texas enjoy significant protection for First Amendment activities in two significant areas: (1) protection of public employees from retaliation for the exercise of their First Amendment right to free speech; and (2) protection of public employees from retaliation based on their First Amendment right to free association based on political affiliation.⁴

³ The authors may be tipping their generational membership by referring to Facebook as an example of social media.

⁴ For a much more in-depth look at First Amendment issues in the public employment arena, the authors suggest *Can They Say That? Employee Speech for Public*

Any legal challenge based on a public employee's First Amendment rights must meet the test first announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

First, the court must determine whether the public employee spoke as a citizen on a matter of public concern. If the employee was speaking as an employee, rather than a citizen, there is no claim for retaliation. Likewise, if the speech was not on a matter of public concern, there is no claim for retaliation.

If the employee can meet this test, the burden shifts to the **employer** to present an adequate justification for treating the employee differently from any other member of the general public.

Some 55 years after *Pickering* was decided, there have been few, if any, wrinkles introduced by courts around the country. Some details have been worked out, but the analysis has stayed basically the same. In doing so, courts must necessarily engage in “compar[ing] incomparable interests.” *Bennett v. Metro. Gov’t of Nashville & Davidson Cty.*, 977 F.3d 530, 554 (6th Cir. 2020)(Murphy, J., concurring). On one hand, there is the government’s operational interests as an employer. On the other hand are the employee’s First Amendment interests. Once again, each case is likely fact-intensive, involving costly and lengthy litigation before an answer is found.

5. Whistleblower Protection for City Employees (Denton v. Grim)

In a recently decided landmark opinion, the Texas Supreme Court confirmed that the actions of a single council member are not to be construed as the actions of the city itself. *City of Denton v. Grim*, No. 22-1023, 2024 WL 1945118, *3 (Tex. May 3, 2024) A city councilmember’s actions are only the actions of the city as a whole if he or she is appointed as an agent of the city or the city otherwise empowers that councilmember to act unilaterally on behalf of the city. *Id.* at *4.

In *Grim*, a city councilmember for the City of Denton unilaterally released information to the press about the construction of a new powerplant. *Id.* at *1. The councilmember’s actions were alleged by Plaintiffs to be a violation of the Open Meetings Act and the Public Information Act. *Id.* Plaintiffs, city employees working in

the municipally-run electric company, reported the actions of the councilmember to the city attorney’s office. *Id.* Several months later, an internal investigation was conducted by the city manager on possible improper influences by vendors being placed on city employees during the procurement process for the powerplant. *Id.* at *2. The employees who reported the city councilmember’s actions were found to have accepted fishing and/or hunting trips from a vendor and, according to the city, were not forthcoming about said trips during the investigation. *Id.* The employees were placed on leave and eventually fired. *Id.* Plaintiffs sued the city, alleging that the actions of the city were retaliation for their whistleblowing. *Id.* Under the Whistleblower Act, a government employee is protected from adverse personnel action by his or her employer in the event that the employee made a good faith report about the employer’s violation of law. TEX. GOV’T CODE § 554.002.

The Supreme Court of Texas held that the plaintiffs’ report was unrelated to any misconduct of their employer, the city, because the councilmember was not acting as an agent of the city. *Grim*, at *4. The Whistleblower Act does not protect all reports of violations of law associated with government business, but rather “only when there is a report of a violation of law by ‘the employing governmental entity’ or by ‘another public employee.’” *Id.* at *3. The Court also chastised the Fort Worth and El Paso Courts of Appeals for their decisions in *City of Cockrell Hill v. Johnson* and *Housing Authority of the City of El Paso v. Rangel*, respectively, for making aspirational statements speculating on the intent of the legislature in drafting the Whistleblower Act instead of just reading and interpreting the Act as read. *Id.* at *6 (citing *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887 (Tex. App.—Fort Worth 2001, pet. denied) and *Housing Authority of the City of El Paso v. Rangel*, 131 S.W.3d 542 (Tex. App.—El Paso 2004, pet. granted, judgment vacated w.r.m.)). Ultimately, the Court of Texas reversed the District and Dallas Appellate Court, rendering judgement in favor of Denton, explaining the Plaintiffs had failed to state a Whistleblower claim against the city. *Id.*

6. Lifestyle Issues

a. Remote Work (as an accommodation)

Setting aside (at least for the moment) whether remote work is desirable for employers, if nothing else, the pandemic demonstrated that remote work can be effective. As such, the question arises, “can remote work be a reasonable accommodation under the Americans with Disabilities Act?” Surprisingly, the pandemic didn’t change the answer. Remote work has always been a

Employers, by Melissa Cranford and Cameron Saenz, presented at the 2021 TCAA Summer Conference and available through the TCAA website.

possible reasonable accommodation for an employee with disabilities. In its 1999 Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, the EEOC found that allowing an individual with a disability to work at home may be a form of reasonable accommodation.

The Fifth Circuit recently reviewed work-from-home as an accommodation for a disability. In *Montague v. United States Postal Service*, 2023 WL 4235552 (5th Cir. Jun. 28, 2023), the Fifth Circuit examined whether it was reasonable for an employee to work from home in the mornings as needed and at the office in the afternoons. The Court focused on whether providing the plaintiff with the requested accommodation was reasonable.

A proposed accommodation is not reasonable if it “fundamentally alter[s] the nature of the service, program, or activity.” *Cadena v. El Paso County*, 946 F.3d 717, 724 (5th Cir. 2020). A job is “fundamentally altered if an essential function is removed.” *Credeur v. Louisiana*, 860 F.3d 785, 792 (5th Cir. 20-17). The Court then analyzed whether a particular job function is an essential function of the position at issue. Following Fifth Circuit precedent, the Court listed seven (non-exhaustive) factors to guide the essential-function inquiry: (1) the employer’s judgment; (2) written job descriptions; (3) the amount of time spent performing the function; (4) the consequences of not requiring the incumbent to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of past incumbents; and (7) the current work experience of incumbents in similar jobs. *Montague*, 2023 WL 4235552 at *2, quotations removed.

In what is becoming a theme throughout employment cases in the Fifth Circuit, the Court reiterated that these types of reviews will be fact intensive and should be undertaken on a “case-by-case” basis. *Id.* In this particular case, the Fifth Circuit found that the employee raised fact issues precluding summary judgment. Specifically, the Court found that the plaintiff raised a fact issue on whether travel was an essential part of her job. Among other things, the Court noted that the plaintiff’s job description did not mention travel as an essential part of the job. Another factor was that two people who performed the same job functions (albeit in a different office) both had some form of modified work-from-home arrangement. *Id.*

The Court then looked at some alternative accommodations provided by the employer. Specifically, the USPS proposed that plaintiff have her husband drive her to work or take a taxi on days she couldn’t drive in the morning. The Fifth Circuit determined the jury could find

such alternatives unreasonable, particularly given the conflicting schedules between plaintiff and her husband and the prohibitive costs of taxis.

The take aways from *Montague*: (1) it is no longer automatic that being in the office is an essential job function; (2) if you are going to say something is an essential job function, it might be a good idea to put it in the written job description⁵; (3) before denying an accommodation request, look at similar positions to see if the accommodation could be reasonable; and (4) alternative accommodations don’t always favor the employer.

b. “Volun-told” for City Events

Let’s say your city is putting on a special event – perhaps a Fourth of July celebration in your downtown square (completely hypothetical, of course). Can your City Manager ask city employees to *volunteer* to help out with the event?

The answer is “yes.” The Fair Labor Standards Act specifically excludes from the definition of “employee” any individual who volunteers to perform services for a political subdivision of a state, provided that individual is not performing the same type of services which the individual is employed to perform for such entity. 29 U.S.C. § 203(e)(3).

To be deemed a “volunteer,” a person performing unpaid services for a public agency must be motivated at least in part by civil, charitable, or humanitarian reasons, although such reasons need not be the exclusive or even predominant reason. *Todaro v. Township of Union*, 40 F.Supp.2d 226 (D.N.J. 1999).

Furthermore, and this should go without saying, the volunteering must be, well, voluntary. An employee may not be forced to volunteer or pressured to volunteer.

As for what constitutes the “same type of services” for purposes of the FLSA, examples in the regulations include a nurse employed by a state hospital cannot volunteer to perform nursing services at a public health clinic. 29 C.F.R. §553.103(b). On the other hand, a City police officer may volunteer as a referee in a City-

⁵ Previous job descriptions may not specifically include presence at the workplace as an essential function of the job, not because it wasn’t expected, but because it was always just understood that an employee had to come to work.

sponsored basketball league or a city parks employee may serve as a volunteer firefighter.

c. Misuse of legal terms of art.

The internet is a great resource. With a few keystrokes, any employee can get information on whether they may “have a case.” Unfortunately, the unregulated nature of the internet means that there is no effective way to separate good legal observations from pure legal trash.⁶ As legal advisors, we are often faced with employees who have “done their research” and are firm in the belief that they are entitled to some form of relief. Explaining this to the aggrieved employee is often harder than it should be. A brief (and incomplete) list of some of the misunderstood or misapplied legal concepts in employment law follows.

i. “Unfair” and “illegal” are not synonymous.

One of the authors, in a previous life, spent time as a plaintiff’s employment attorney. Part of the job was talking to people about whether they had a claim. Every caller got 10 minutes (minimum) on the phone with an attorney to make their case. Most did not succeed. One of the most common phrases the author used (and still can recite today) is “in Texas, you can be fired for any reason – good reason, bad reason, or no reason at all – but you cannot be fired for an illegal reason (usually summarized as because of your age, race, sex, religion, disability, etc.). This advice was not always well received.

But it’s true. All too often, internet “legal advisors” spend too much time focusing on whether an employee was treated unfairly, rather than illegally.

ii. An “unpleasant workplace” does not mean “hostile work environment.”

In the employment context, there are certain “terms of art” that don’t always mean what they sound like they should mean. One of those is “hostile work environment.” The term has been adopted by people with no regards to context. “Hostile work environment” has a very specific legal definition. The elements of a hostile-work-environment claim are: (1) the employee belongs to a protected class; (2) the employee was subject to unwelcome harassment; (3) the harassment was based on

⁶ After contemplating this topic in the legal context, as a frequent patient of “Dr. Google,” one author would like to apologize to every medical provider who had to listen to his self-diagnosis before patiently explaining what was really wrong from a trained medical position.

the employee’s protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take adequate remedial action. *See, El Paso County Water Improvement District No. 1 v. Trevizo*, 2023 WL 7109919 (Tex. App. – El Paso Oct. 27, 2023).

“Hostile work environment” does not mean that a supervisor was rude, inconsiderate, or just plain mean. While those traits could certainly constitute elements of a true hostile work environment, it takes much more than that to be actionable.

Cases in which the Supreme Court has found a hostile work environment “involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs’ work environment... The extreme facts recited in those cases highlight the intensity of the objectionable conduct that must be present in order to constitute an actionable hostile environment claim.” *Indest v. Freeman Decorating, Inc.* 164 F.3d 258, 264 (5th Cir, 1999), (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Consequently, many comments and actions, even unarguably offensive comments and actions, do not rise to the level of an actionable “hostile work environment.” This is not to say, however, that if these lesser actions and comments are found to be present in a workplace, an employer shouldn’t take immediate and effective corrective action to address them. Certainly, over time and without remediation, a true hostile work environment may develop.

iii. Can we all agree that “toxic” is just overused?

From a legal perspective, there is no such thing as a “toxic work environment.” While certainly actionable conduct may be such to create what is generally referred to as a “toxic work environment,” there is no cause of action for a “toxic work environment.” The toxicity must fit into one of the legally actionable categories in order to lead to a successful suit.

As an employer (or a representative of an employer) you should, however, not hear “toxic work environment” and shut down your investigation. Ask

questions about *why* the work environment is toxic. In most cases, the employee complaining is not well-versed in the terms of art used in the employment-law context. It is incumbent on you, as the employer, to determine what it is that makes the workplace toxic and, once that has been determined, whether such toxicity is actionable.

- iv. There are surprisingly few laws saying your boss can't be a jerk.

It has been generally stated that “discrimination laws are not designed to set forth a general civility code for the American workplace.” *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006). What does that mean to a rank-and-file employee? It means your boss can be a jerk without getting sued for it.

- v. There is (generally) no “probationary period” in Texas Law for general employees.

Often, employees, including supervisory employees, are under the impression that there is some (usually undefined) probationary period where an employee is at elevated risk of termination. In fact, one unnamed Texas city familiar to the author actually had a “probationary period” built into its City directives.⁷

Legally, however, absent a collective bargaining agreement or contractual agreement, and outside the Chapter 143 context, there is no legal basis for assigning someone “probationary employee” status. As an at-will employee, an employee’s job can be terminated for any non-illegal reason, or no reason, at any time – regardless of whether that employee has worked for the employer for 20 days or 20 years.

It should be noted that Chapter 143 of the Texas Local Government Code provides for a probationary period of one year for any fire fighter, police officer, or academy trainee in certain municipalities. In this context, a probationary employee may be terminated or disciplined without regard to Chapter 143 protections. However, absent 143 protection, “probationary employee” is a meaningless term.

C. The Rise of Artificial Intelligence

⁷ The author is pleased to state that this unnamed City has recently changed the reference to a “probationary period” to a “post-hire evaluation period.”

The use of Artificial Intelligence (“AI”) programs is becoming more and more prevalent. While some employers are seeking to discourage use, others are actively embracing it. As the use of AI grows, and indeed as the AI programs “learn” more and update, it appears that even those employers seeking to avoid use will have to address it. In furtherance to show the current status of AI, the rest of this section has been written by ChatGPT4. We have left the prompts and its responses intact with no changes for your consideration.

Prompt 1: List common Human Resources issues in Texas

Response: Common human resources issues in Texas can be reflective of broader HR challenges across various industries, but they also include specific regional concerns due to the state's laws, economic environment, and workforce demographics. Here's a list of HR issues commonly faced by employers in Texas:

1. **Compliance with State and Federal Laws:** Navigating the complex landscape of state and federal employment laws can be challenging. Texas employers must comply with regulations regarding wages (such as the Texas Payday Law), workplace safety, anti-discrimination laws, and more.
2. **Workforce Diversity and Inclusion:** Promoting a diverse and inclusive workplace is increasingly important. Texas, with its diverse population, requires HR policies that encourage inclusivity and equality, while also addressing any unconscious bias or discrimination.
3. **Employee Retention and Engagement:** Keeping employees motivated and engaged is crucial for reducing turnover rates. This includes offering competitive benefits, fostering a positive workplace culture, and providing opportunities for growth and development.
4. **Immigration Compliance:** Given Texas's proximity to the Mexican border, employers must ensure compliance with federal immigration laws, including the verification of employees' eligibility to work in the U.S. through Form I-9 and potentially navigating visa issues for non-U.S. workers.
5. **Managing Remote Work:** With the rise of remote and hybrid work models, Texas employers face the challenge of managing a dispersed workforce, ensuring productivity, and maintaining company culture across digital platforms.
6. **Health and Safety Regulations:** Ensuring a safe work environment is paramount, especially

in industries prone to accidents such as construction, manufacturing, and oil and gas. This includes complying with Occupational Safety and Health Administration (OSHA) standards and addressing COVID-19 safety protocols.

7. **Handling Harassment and Discrimination Claims:** Employers must have clear policies and procedures in place to prevent and address harassment and discrimination in the workplace, ensuring a safe and respectful environment for all employees.

8. **Wage and Hour Disputes:** Navigating wage and hour laws, including overtime pay, minimum wage requirements, and classifications of employees versus independent contractors, remains a complex issue for many Texas employers.

9. **Employee Benefits Management:** Offering competitive and compliant employee benefits packages, while managing costs, is a constant challenge. This includes health insurance, retirement plans, and other perks that attract and retain talent.

10. **Adapting to Technological Changes:** Keeping up with technological advancements and integrating them into the workplace, including training employees and updating HR systems, is an ongoing process that requires resources and planning.

Addressing these HR issues effectively requires a combination of legal compliance, strategic planning, and fostering a positive workplace culture. Employers in Texas, like those elsewhere, must stay informed about changes in laws and best practices in human resources management to navigate these challenges successfully.

Prompt 2: Does the topic of "Adapting to Technological Changes" include the implementation of AI into the workflow?

Response: Yes, the topic of "Adapting to Technological Changes" definitely includes the implementation of Artificial Intelligence (AI) into the workflow. As technology evolves, AI and machine learning are becoming increasingly important tools for improving efficiency, productivity, and decision-making processes within organizations. Implementing AI into the workflow can involve several considerations:

1. **Automation of Routine Tasks:** AI can automate repetitive and time-consuming tasks, freeing up employees to focus on more complex and strategic activities. This can include data entry, scheduling, customer service through chatbots, and more.

2. **Data Analysis and Decision Support:** AI systems can analyze large volumes of data much more quickly and accurately than humans, providing valuable insights that can inform decision-making. This can apply to areas such as market trends, customer behavior, and HR analytics.

3. **Enhancing Customer Experiences:** AI can be used to personalize customer interactions and improve service quality. For example, recommendation algorithms on retail sites provide personalized shopping experiences based on user behavior and preferences.

4. **Talent Acquisition and Management:** AI tools can assist in the recruitment process by screening resumes, analyzing candidate responses, and even conducting initial interviews. They can also help manage employee performance by tracking achievements and suggesting areas for improvement.

5. **Training and Development:** AI-driven training programs can offer personalized learning experiences for employees, adapting the training material based on the learner's progress and performance.

6. **Ethical and Privacy Considerations:** As AI is integrated into the workplace, organizations must navigate ethical considerations, such as bias in AI algorithms, and ensure that the use of AI complies with privacy laws and regulations.

7. **Change Management:** Successfully implementing AI into workflows requires managing change effectively, including training employees to work with new technologies, shifting organizational culture to embrace digital transformation, and addressing any resistance to change.

8. **Cybersecurity:** With the increasing use of AI and digital technologies, cybersecurity becomes even more critical. Organizations must ensure that their AI systems are secure and that data is protected against unauthorized access or breaches.

Adapting to technological changes, including the implementation of AI, requires a strategic approach that considers these and other factors to ensure that technology enhances the workplace without introducing new challenges.

Prompt 3: Expound on the topic of "Ethical and Privacy Considerations"

Response: The topic of "Ethical and Privacy Considerations" in the context of implementing Artificial

Intelligence (AI) and other technologies in the workplace is complex and multifaceted. It encompasses a range of issues that organizations need to address to ensure that their use of technology respects ethical norms and protects individual privacy. Here's an in-depth look at key considerations:

1. Bias and Fairness

- AI systems can inadvertently perpetuate or even amplify biases present in their training data. This can lead to unfair outcomes in hiring, promotions, and employee evaluations, disproportionately affecting certain groups based on gender, race, or other characteristics. Ethical considerations include actively working to identify and mitigate biases in AI algorithms to ensure fairness and inclusivity.

2. Transparency and Explainability [sic]

- Many AI systems, especially those based on deep learning, are often described as "black boxes" because their decision-making processes are not easily understood by humans. This lack of transparency can be problematic in sensitive applications, such as employee performance evaluations. Ethical practices involve developing and deploying AI systems in a manner that is transparent and whose actions can be explained and justified to users.

3. Privacy

- The implementation of AI often requires collecting and analyzing large volumes of data, including personal information about employees or customers. Ensuring the privacy of this data is a paramount concern, requiring compliance with data protection laws (such as GDPR in Europe or CCPA in California) and adopting best practices for data security. Organizations must be clear about what data is being collected, for what purpose, and who has access to it, ensuring that individuals' privacy is respected.

4. Consent

- Closely related to privacy, ethical considerations also include obtaining informed consent from individuals before collecting and using their data. This means providing clear information about how their data will be used and ensuring that consent is given freely, without coercion.

5. Security

- With the increased use of digital technologies and data, cybersecurity becomes an ethical issue as well as a practical necessity. Organizations are responsible for protecting the data they collect from unauthorized access, theft, or breaches, which could have serious

implications for individuals' privacy and financial security.

6. Impact on Employment

- The automation of tasks through AI can lead to job displacement and changes in the nature of work. Ethically, organizations should consider the impact of these changes on employees and explore ways to mitigate negative effects, such as through retraining programs, job redesign, or other support mechanisms.

7. Accountability

- When AI systems make decisions or take actions that have serious implications, determining who is responsible for those decisions can be challenging. Ethical considerations include establishing clear lines of accountability for AI decisions, ensuring that there are mechanisms in place to address any negative outcomes or errors.

Addressing these ethical and privacy considerations requires a comprehensive approach that includes stakeholder engagement, ethical guidelines, regular audits, and continuous improvement. By proactively addressing these issues, organizations can harness the benefits of AI and technology more broadly while maintaining trust and integrity in their operations.

Prompt 4: Can you expound on the idea of using AI-generated work product as one's own?

Response: Using AI-generated work products as one's own raises significant ethical, legal, and professional considerations. As AI technologies become more sophisticated and integrated into various fields—ranging from academic research, journalism, content creation, to software development and design—the lines around authorship, ownership, and responsibility become increasingly blurred. Here's a deeper look into the implications and considerations of using AI-generated work as one's own:

Ethical Considerations

- **Transparency:** There's a growing consensus on the importance of transparency when using AI-generated content. Presenting AI-generated work as entirely human-created without disclosure can mislead audiences or stakeholders about the nature of the work and its origins, impacting trust and credibility.
- **Originality and Creativity:** In creative fields, using AI to generate content raises questions about originality. The value placed on human creativity and the unique perspectives individuals bring to their work can be undermined if AI-generated content is not appropriately

credited or disclosed.

- **Academic Integrity:** In academic contexts, using AI tools to generate essays, research papers, or other scholarly work without disclosure is considered plagiarism. Educational institutions emphasize the development of critical thinking, analysis, and original thought, which are compromised when students submit AI-generated work as their own.

Legal Considerations

- **Copyright and Ownership:** The legal landscape regarding the copyright of AI-generated content is complex and evolving. Determining the ownership of AI-generated work—whether it belongs to the creator of the AI, the user, or is considered public domain—is not straightforward and varies by jurisdiction.
- **Liability:** When AI-generated content is used in decision-making or published under someone's name, questions about liability arise if the content is inaccurate, biased, or causes harm. The lack of clear legal frameworks around AI-generated content complicates matters of accountability.

Professional Considerations

- **Quality and Reliability:** AI-generated content may not always meet the quality standards expected in professional settings. Relying on AI without proper review or understanding of the underlying processes can result in errors or oversights that could impact professional reputation and outcomes.
- **Skill Development:** Overreliance on AI for tasks such as writing, design, or analysis may hinder the development of these skills among professionals. The ability to critically evaluate, create, and innovate remains crucial in most fields, beyond what AI can provide.

Guidelines for Ethical Use

- **Disclosure:** Clearly disclosing the use of AI in creating work products is essential for maintaining transparency and trust with audiences or stakeholders.
- **Review and Oversight:** Human oversight of AI-generated content ensures that the work meets quality standards, aligns with ethical guidelines, and is free from biases or inaccuracies.
- **Understanding Limitations:** Recognizing the limitations of AI and using it as a tool to augment human capabilities, rather than replace them, can help maintain the integrity and quality of work.

In summary, while AI offers significant potential to

enhance productivity and creativity, navigating the ethical, legal, and professional considerations is crucial. Balancing the benefits of AI with a commitment to transparency, integrity, and human oversight will be key to responsibly integrating AI-generated work into various fields.

...And now back to the human-written part of this paper: In conclusion, while at the moment AI programs have a tendency to repeat themselves and the speech manner isn't quite human, it's certainly getting closer. While it may have its advantages, it is not at a place where it can be without human oversight and confirmation. How much to allow employees to use AI will necessarily fall to each employer.

III. CONCLUSION

Navigating recent changes in Human Resources law and guidance can feel like trying to work your way through a minefield. As Court opinions seem to tell us repeatedly, each issue will need to be analyzed on a fact-specific, case-by-case basis. Add that to the fact of changing guidance from federal agencies, and multiple legal challenges to both statutes and guidance alike, it is beyond the scope of this paper, or the authors' intent, to give you a good answer for any specific HR-related issue you have. The best we can do is point you to the materials on issue, which we have attempted to do here. There is no doubt that when the 2025 TCAA Summer Conference rolls around, this topic will be just as ripe.