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MUNICIPAL BULWARKS: THE BATTLE FOR CORPORATE ACCOUNTABILITY

Local governments are a transformative force in redressing a wide range of injuries to their communities, achieving significant settlements and changing corporate behavior.

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Significant Employment Law Changes in 2023 and Signs of Future Trends

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2023 brought unprecedented changes in labor and employment laws across the country through state legislative bills and two groundbreaking decisions issued by the U.S. Supreme Court. Employers should be aware of the many legal shifts in employment law to ensure compliance and avoid potential liability. If not already considered, decision-makers with hiring and firing authority should also work with employment counsel to update workplace policies, managerial practices, and training methods. Below, we we highlight significant legal developments in 2023 taking place across the United States.

2023 State Employment Law Changes[1]

Expansion of Anti-Discrimination and Pay Disclosure Laws

In 2023, Michigan, Nevada, and Pennsylvania amended their laws governing employment discrimination, clarifying the statuses of sexual orientation, gender expression, and gender identity as protected classes.[2] Minnesota may soon follow.[3] Arizona, Arkansas Minnesota, Michigan, Pennsylvania, and Texas joined more than a dozen states (including Colorado) that have already passed CROWN acts, which prevent employers from discriminating on the basis of natural and cultural hairstyling practices. An attempt to pass similar legislation on a federal level was cut short by the Senate in 2022. Both Minnesota and New York modified workplace requirements related to breastfeeding employees, with the former strengthening employee rights to lactation breaks and the latter requiring many employers to provide on-site pumping areas for nursing mothers. In order to combat age-discrimination, employers in Colorado will soon be prohibited from asking age-related questions to applicants on their initial application.[4] California added new restrictions on when and how employers can inquire into an applicant's criminal history before making a conditional job offer. The new law also mandates employers to complete an individualized assessment when a job applicant's criminal record is discovered before making a final decision not to hire an applicant.[5]

In 2023, a number of states introduced measures in the hopes of increasing pay transparency. Beginning January 1, 2024, Colorado employers have amended disclosure requirements for job postings by requiring employers to publicize information on openings to current employees, including the salary and benefits of the position as well as basic information about the position and how it will be filled.[6] Illinois adopted an amendment requiring midsize and larger employers to include the corresponding pay scale and benefits for all job openings and notify current employees about promotion opportunities.[7] Minnesota now prohibits employers from considering an applicant's past salary when determining future compensation or benefits.[8] We expect other states to follow with adoptions or amendments to pay and disclosure laws in 2024.

Public Sector Collective Bargaining and Employee Health Benefits

In 2023, 24 states amended legislation or enacted bills related to public sector employees, notably in Colorado where most county employees were allowed to move forward with an elections and collective bargaining process.[9]

In states like California and New York, which have already passed similar laws, the number of public employees forming unions continues to grow. California amended its rules governing legislative staff, joining Maine and Oregon allowing these employees to unionize.[10] Minnesota and Washington also made it easier for unions to communicate with

public employees.[11] In 2023, Michigan became the first state to repeal its Right to Work laws. As of March 2024, collective bargaining agreements in Michigan may include clauses requiring the payment of union dues as a condition of employment.

In addition to strengthening collective bargaining rights, many states expanded mandatory benefits for blue collar workers. In Colorado, the Healthy Families and Workplaces Act requires employers to provide at least 48 hours of paid sick leave per year.[12] Illinois went a step further, requiring all employers to provide at least 40 hours of paid leave per year that may be used for any purpose.[13] In Connecticut, non-exempt service workers will be able to use sick time to take a "mental health wellness day."[14] Georgia now requires employers to give employees time off to vote, either on election day or on a designated early-voting day.[15] Colorado has created a wage theft enforcement fund to directly repay employees who have been the victims of wage theft and to seek reimbursement from employers.[16]

Although not directly related to the public sector, 2023 saw major strikes in entertainment, healthcare, education, and automobile manufacturing industries, while strikes of rail transit and UPS workers were narrowly avoided. Organized labor seems to be experiencing a resurgence across the nation, signified by President Biden joining United Auto Workers on the picket line in Detroit last September, a first for a sitting president. States and the federal government appear to be prioritizing laws that strengthen collective bargaining and increase employee benefits, and employers should be prepared for more legislation of this nature in 2024.

Limitations on Employer COVID Vaccination Requirements

Since 2020, COVID hospitalizations and deaths have declined substantially. The Biden Administration suspended vaccine requirements for federal employees and contractors on May 11, the same day it declared the end of the COVID public health emergency.[17] In 2023, several states have taken it a step further, barring private employers (with few exceptions) from requiring employees to be vaccinated for COVID, including Idaho,[18] Florida,[19] and Utah.[20] Texas's ban on employee vaccine mandates takes effect in 2024.[21] Given the current trajectory of the COVID pandemic, these bans might have little practical impact as fewer and fewer employers look to prioritize full COVID vaccination among their employees. However, a resurgence in COVID infection rates would thrust these prohibitions into the spotlight and potentially result in legal controversy.

National Trend Against Non-Competes

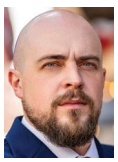
For those public employers that are a part of projects or agreements that include restrictive covenants, the legal trend across the country is towards limiting or prohibiting non-compete agreements. At the federal level, various agencies are taking aim at non-compete agreements. In January 2023, the Federal Trade Commission (FTC) proposed a new rule that could supersede state laws to invalidate all employment-based non-competes, arguing that these agreements drive down wages, stifle innovation, and harm markets.[22] The FTC will vote on the proposed rule in 2024. The National Labor Relations Board (NLRB) has already taken a similar stance against non-competes.[23] Even before the federal campaign against non-competes, states throughout the country had already been introducing significant limitations on these agreements. Four states currently bar all employment-based non-competes: California, Minnesota, North Dakota, and Oklahoma. New York is likely to join this list with a bill now awaiting Governor Hochul's signature.

Many states that have not banned non-competes have drastically limited their terms or restricted the number of employees who can be bound by them. Since 2022, Colorado has limited non-compete provisions to "highly compensated" employees, requiring these agreements to be no broader than necessary and be limited in scope to the protection of trade secrets.[24] In 2023, Maryland amended its labor codes to prohibit non-competes for employees who earn less than or equal to 150% of the state's minimum wage.[25] Washington now prohibits non-competes for employees making less than $100,000 per year.[26] Other states have barred employers from extending non-competes to specific types of employees. Indiana recently invalidated non-competes for primary care physicians, make it easier for other types of physicians to buy their way out of previously binding non-competes, and render unenforceable future non-compete agreements for physicians who are terminated from employment without cause or at the end of their current contracts.[27]

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State laws against non-competes (as well as proposed federal rules) generally have carve-outs preserving employment-based non-solicit or non-disclosure agreements, especially if these agreements can be plausibly linked to the preservation of trade secrets or confidential information. However, the writing is on the wall that employers across the country will have fewer and fewer options to ensure that today's employees don't quickly become tomorrow's competitors.

Major Supreme Court Employment Law Decisions

In 2023, the United States Supreme Court issued two landmark decisions with widespread ramifications for employers. The first, deciding *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et* al[28] did not directly concern employment law. Regardless, it may still have significant downstream consequences for employers seeking to diversify their workforce or to shield themselves from liability from discrimination claims. The second case, *Groff v. DeJoy*,[29] heightened the standard for employers to deny requests for religious accommodations. These two decisions are examined below, as well as one important case currently being considered by the Court that could transform the analysis of "adverse employment actions" in workplace discrimination lawsuits.

In *Harvard*, Students for Fair Admissions, Inc. (SFFA) claimed discrimination against Asian-American applicants in the school's admission practices. SFFA alleged that Harvard used a soft quota system that essentially froze the number of Asian-Americans admitted each year despite a growing proportion of qualified Asian-American applicants. They argued this was accomplished through a grading system that consistently ranked Asian-American applicants lower on personality scores, whereas other racial groups scored higher in personality metrics despite having lower academic ratings. Harvard argued that its ranking system complied with prior Supreme Court rulings[30] and that race was but one of a multitude of factors considered during its admissions process. The school claimed a completely race-neutral applicant analysis would not allow it to meet its goals for maintaining a diverse student body.

Harvard's policy was upheld both by the District Court and the First Circuit before certiorari was granted. At the Supreme Court, amicus briefs in favor of Harvard's ability to consider race in its admission policies were filed by the American Bar Association, the American Civil Liberties Union, the NAACP Legal Defense and Education Fund, and the United States Solicitor General.

In a 6-2 vote, the Court found that Harvard's race-based affirmative action programs in college admissions violate the Equal Protection clause of the Fourteenth Amendment.[31] Chief Justice Roberts wrote for the majority that "[e]liminating racial discrimination means eliminating all of it" and that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[32] Though the case only concerned college admissions, its potential impact on future discrimination claims, especially those in the employment field, was evident. On June 29, 2023, the same day the decision was released, the chair of the Equal Employment Opportunity Commission (EEOC) issued a statement decrying the decision in *Harvard*, asserting that "[i]t 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."[33] Two weeks later, the Attorneys General of thirteen states[34] issued a letter to the CEO of every Fortune 100 company referencing *Harvard* and demanding these companies comply with "race-neutral-principles in [their] employment and contracting practices" or "face serious legal consequences."[35] In August, the American Alliance for Equal Rights[36] sued two of the largest law firms in the country, challenging diversity fellowships offered for law students by arguing the programs violated federal anti-discrimination laws.[37]

In the employment context, hard racial quotas, or setting aside a certain percentage of positions for members of an underrepresented race or ethnicity, was already a controversial practice. In the wake of *Harvard*, such blunt tactics appear legally perilous. It should be noted that *Harvard* does leave a carve-out for universities to consider an applicant's race so long as this analysis is individualized to the applicant's unique life experiences.[38] Like university applicants, prospective employees may have faced unique hardships related to race, and examining how the applicant overcame these hardships would not be outside the proper purview of a hiring authority.

The second case from the Court's 2022-23 Term with major implications for employment law is *Groff v. DeJoy*.[39] Gerald Groff began working as a mail carrier for the United States Postal Service (USPS) in 2012. As an evangelical Christian, Groff requested a religious exemption from working Sundays. Although his request was accommodated for some time, USPS eventually informed Groff that he would again be assigned shifts on Sundays. Groff refused, was repeatedly sanctioned, and resigned as a result in 2019. He filed suit,

alleging religious discrimination and failure to accommodate his request for an exemption. USPS argued it had a non-discriminatory justification for requiring Groff to work Sundays and that accommodating Groff's request would result in undue hardship for the organization. The Eastern District of Pennsylvania agreed, ruling in favor of USPS and finding that employers were not required to accommodate an employee's religious practices if it would impose anything more than a *de minimis* hardship on the employer. The Third Circuit affirrmed, and the Supreme Court granted certiorari in January 2023.

In a unanimous decision released on the same day as *Harvard*, the Court clarified that the "more than a *de minimis* cost" standard was not sufficient for demonstrating that an employer would suffer an "undue hardship" in providing an employee's religious accommodation. The court clarified that, in order to reject an employee's request for religious accommodation, the burden placed on the employer by the accommodation must "result in substantial increased costs in relation to the conduct of its particular business."[40] The judgment below was vacated and the case was remanded back to the Third Circuit to determine whether USPS could demonstrate that accommodating Groff's religious exemption from working on Sundays represented a substantial, rather than merely more than *de minimis*, burden.

The Court declined to provide a new definition "undue burden" with regards to religious accommodation, stating that the analysis was still a "fact-specific inquiry." As a result, employers deciding whether to grant religious accommodations must take into account the actual expense of granting the employee's request and whether their organization actually has (or could have) the staffing flexibility to adjust to these changes. The heightened undue burden standard in *Groff* represents a meaningful escalation from the prior "more than *de minimis*" analysis, resulting in less leeway for employers. Consequently, it might be prudent for employers to show deference to credible religious accommodation requests rather than risk liability under a new and vaguely defined standard.

Harvard and *Groff* are already upending long-standing assumptions about discrimination and accommodation claims in the employment sphere. Another case to be decided in the current term, *Muldrow v. City of St. Louis*,[42] could short-circuit the adverse employment action requirement for employees asserting discrimination claims, reducing or eliminating the need for the employee to demonstrate they suffered a "significant disadvantage" as a result of the alleged discrimination. In 2020, Sergeant Jatonya Muldrow of the St. Louis Police Department filed a lawsuit alleging that City discriminated and retaliated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964.[43] Muldrow alleged, inter alia, that her transfer to an arguably less desirable position and the Department's refusal to grant her request to transfer out of that position was based on sex discrimination and constituted an adverse employment action by the Department.

The Eastern District of Missouri granted the City's motion for summary judgment, finding that Muldrow could not demonstrate an adverse employment action. The Eighth Circuit affirmed. It concluded that, although an undesirable transfer or failure to grant a transfer request could constitute an adverse employment action if it produced a "material employment disadvantage,"[44] Muldrow did not show she "suffered a significant change in working conditions or responsibilities and, at most, expresse[d] a mere preference for one position over the other."[45] The court listed relevant factors that might constitute a material employment disadvantage, including a reduction in pay, supervisory duties, or prestige, a shift to undesirable schedule or hours, or lessened promotion potential. However, it found Muldrow had not met her burden with regards to these metrics.

The Supreme Court granted Muldrow's petition on the limited question of whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer caused a "significant disadvantage." Muldrow argues that Title VII categorically prohibits all discrimination based on protected classes such as sex and that, consequently, there is no requirement to show said discrimination led to a material employment disadvantage. The case was argued on December 8, 2023. If the Court rules in favor of Muldrow, employers could face expanded legal liability for any employment decision that implicates protected characteristics, even if the decision itself does not result in a material employment disadvantage. And, as noted by EEOC Commissioner Andrea Lucas in a recent statement, *Muldrow* could significantly curtail employers' diversity programs.[46] Employers might be compelled to ignore race, color, religion, and sex entirely in management of their organizations if the Supreme Court finds for Muldrow.

Public employers should now be especially cautious when considering a protected class (e.g., race) for hiring, promoting/demoting, and termination decisions. Although race-based quotas have been illegal for decades, employers should continue to set aspirational goals for improving diversity. But after the Court's rulings in 2023, employers should also be careful to avoid practices that may be viewed as allowance of race-based preferences or illegally setting aside certain

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4944102 (Colo. O.P.D.J. Aug. 12, 2015) (18-month suspension for online response including confidential/sensitive client information); People v. Isaac, 470 P.3d 837 (Colo. O.P.D.J. 2016)(six-month suspension for response revealing confidential information).
12. *See, e.g.,* Mo. Bar Informal Op. 2018-08 (2018)("If Attorney chooses to post a response to an online review, the response may acknowledge an attorney's obligation to comply with professional obligations and must reveal no information related to the representation in violation of Rule 4-1.6."); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020); Nassau County Ethics Op. 2016-01 (2106); Penn. Ethics Op. 2014- 200; W.V. Legal Ethics Op. 2015-02. *See* also In re: Conry, OSB 18-104 (Or. Sup Ct. 2022) (reprimanding responding attorney).
13. ABA Op., *supra* note 1, at 1.
14. Mich. Op., *supra* note 6, at 1.
15. Fla. Bar Ass'n Formal Op. 21-1 at 2 (2021); *see also* N.C. Op., *supra* note 7. *But see* Model Rules, *supra* note 3 at 1.18 for prospective clients, which could apply depending upon the circumstances.
16. Mich. Op., *supra* note 6, at 2.
17. *See* Ore. Bar Ass'n Formal Op. 2022-201 at 8 (2022)("Some sites that allow professional service reviews may remove reviews upon receipt of a report that the reviewer was not an actual client or customer.").
18. ABA Op., *supra* note 1, at 7.
19. Pa. Bar Ass'n, Formal Op. 2014-200 at p. 1 (2014).
20. Fla. Op., *supra* note 15, at 2.
21. Ky. Op., supra, at 1.
22. Mich. Op., *supra* note 6, at 2.
23. Ore. Op., *supra* note 17, at 5.
24. Id. at 8.
25. Fla. Op., *supra* note 15, at 2, quoting ABA Op., *supra* note 1.
26. N.C. Op., *supra* note 7 (lawyer may post response that is "professional and restrained").
27. Los Angeles County Ethics Op. 525 at 1 (2012)(in discussing a former client's disparaging comments, a public response cannot disclose confidential information, cannot injure former client's legal position, and is "proportionate and restrained").
28. Ore. Op., *supra* note 17, at 8 ("Oregon RPC 1.6 is not, without more, a bar to the attorney's ability to seek legal redress, such as a claim for defamation."); N.C. Op., *supra* note 7 ("If there is a basis in law and fact for a defamation suit … the Rules of Professional Conduct do not prohibit Lawyer from filing such a suit.").

Employment *cont'd from page 9*

job positions based on race.
By now, most employers have reviewed their anti-discrimination policies as well as DEI programs and avoid relying on race as a factor for employment decisions, especially in hiring job applicants. Governmental decision-makers will need the advice of counsel well-versed in Title VII and state anti-discrimination laws and regulations, with expertise to assist with DEI initiatives while avoiding discriminatory practices for all applicants, and the ability to recommend more compliant policies.

Take Notice Public Employers: Changes in Collective Bargaining and Severance Agreements

While the National Labor Review Act (NLRA) does not apply to federal, state or local governments, states are moving towards the creation of expansive, pro-labor rights for public sector employees. The composition of the NLRB saw no changes in 2023, but it issued three notable decisions with far-reaching consequences. Two NLRB decisions addressed employers' duty to bargain during contract negotiations, *Wendt* and *Tecnocap*.[47] Another, *Mclaren Macomb*,[48] limited employers' ability to create severance agreements with terms that conflict with the NLRA. All three decisions and their implications are examined below.

In *Wendt*, an employer had dismissed several employees after their union had been certified but while negotiations for a collective bargaining agreement were still ongoing. In its arguments, the employer, citing *Raytheon*,[49] argued that these dismissals were justified as consistent with its past practice of conducting layoffs during downturns to its business. The NLRB disagreed, overruling *Raytheon* and deciding that unilateral conduct during a bargaining period was permissible only when the employer has demonstrated a regular and consistent past practice that was not subject to a large measure of discretion. The NLRB found that the dismissals at issue were discretionary and thus unjustified. The NLRB also clarified that an employer may not "defend a unilateral change in terms and condition of employment that would otherwise violate Section 8(a)(5) by citing a past practice of such changes before its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union." [50]

In *Technocap*, the NLRB considered a similar issue to that decided in *Wendt*. The *Technocap* employer unilaterally altered employee schedules while the employees were negotiating a collective bargaining agreement. The employer and the union had previously had a collective bargaining agreement that allowed the employer to unilaterally alter employee schedules. However, the NLRB found that, since the clause that had enabled the employer to modify employee schedules had expired, it could not be used to as a basis for discretionary and irregular unilateral conduct like the alteration of employee schedules. Nor could an employer use the now expired clause to demonstrate adherence to past practice. Between *Wendt* and *Technocap*,

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employers are substantially limited from unilaterally modifying employee working conditions during collective bargaining agreement negotiations.

In *Mclaren Macomb*, an employer offered a severance agreement to eleven bargaining unit employees that had been permanently furloughed. The severance agreement prohibited the employees from making disparaging comments about the employer or from revealing the terms of the agreement itself. The NLRB decided the severance agreement was unlawful, concluding that it would have required the employees to waive their rights under the NLRA. In the NLRB's view, this would also have the undesirable effect of preventing employees from communicating about the conditions of their employment and might chill participation in future NLRB investigations. *Mclaren Macomb* suggests the NLRB might begin taking a more hands-on approach to other common terms of employee severance agreements, including non-compete, non-solicit, and no poaching clauses. In fact, a May 2023 memorandum issued by theNLRB's General Counsel Jennifer Abruzzo took the position that, except in limited circumstances, non-compete agreements violated the NLRA.[51]

Conclusion

Employment law in 2023 saw widespread expansion of employees' rights in the public sector in numerous states as well as through two landmark decisions in the Supreme Court. Governmental decision-makers should ensure that their employment policies, rules, template agreements, and everyday practices that govern the workplace have been carefully reviewed by an experienced employment attorney. Employers should also check the websites of their state's civil rights divisions as well as the departments of labor for amended governing rules and procedures. Stay tuned for more employment law changes and enactments in 2024 as public sector employees' rights across the U.S. will continue to expand. **ML**

Notes

1. Colorado had perhaps the most updates to employment regulations of any state over the last five years: Colorado Chance to Compete Act (C.R.S. § 8-2-130) prevents employers from inquiring about applicant's criminal history in initial application or barring persons with criminal histories from applying; Colorado Wage Payment Act, (C.R.S. § 8-4-101) strengthens penalties and definitions of wage theft; Create a Respectful and Open World for Natural Hair Act (C.R.S. § 24-34-301) includes hair texture, types, styles associated with race for employment discrimination claims; Sexual Orientation Employment Discrimination Act (C.R.S. § 24-34-402) adds gender identity/expres-

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sion into statutes prohibiting discrimination; Colorado Healthy Families and Workplaces Act (C.R.S. § 8-13.3-401) employers must provide at least one hour paid leave per 30 hours worked, expands when employees can use paid leave; The Restrictive Employments Agreement Act (C.R.S. § 8-2-113) drastically limits classes of employees bound by non-compete and non-solicitation agreements, breadth of agreements, and the notice required for enforcement; Collective Bargaining by County Employees Act (C.R.S. § 8-3.3-101) allows many county employees to unionize/collectively bargain; Equal Pay for Equal Work Act (C.R.S. § 8-5-201) requires employers to publicize job opportunities to all current employees, including pay, benefits, eligibility and application deadlines; must announce name/job titles of persons selected; must publicize career progression requirements; Job Application Fairness Act (C.R.S. § 8-2-131) prohibits employers from inquiring about age in initial job application; Wage Theft Act (C.R.S. § 8-4-113) creates wage theft enforcement fund to repay employee victims of wage theft; Protecting Opportunities and Workers' Rights Act (C.R.S. 24-34-407) lowers standard of proof for workplace harassment claims, limits non-disclosure agreements to allow more reporting of alleged discrimination.

2. Colorado adopted gender identity and gender expression into statutes prohibiting discrimination against members of a protected class in 2021.

3. Minn. HF1655.

4. C.R.S. § 8-2-131.

5. C.C.R. Title 2, Section 11017.1.

6. C.R.S. § 8-5-201.

7. Il. HB3129.

8. Minn. SF 2909.

9. Larry Lee and Javier Heres, *Unionization of Public-Sector Jobs in Colorado: The Collective Bargaining by County Employees Act,* Municipal Lawyer vol. 63, no. 6, November-December 2022, pp. 20-21, 31, 34-35

10. Cal. AB 1, Legislature Employer-Employee Relations Act.

11. M.S.A. § 179A.07; Wash. S.B. 1200.

12. C.R.S. § 8-13.3-401.

13. 820 ILCS 192.

14. Conn. S.B. 2.

15. O.C.G.A. § 21-2-404

16. C.R.S. § 8-4-113.

17. The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities (May 1, 2023).

18. I.C.A. § 73-503.

19. F.S.A. § 381.00316.

20. U.C. § 34-56-201

21. Tex. S.B. 7 Health & Safety Code Sec. 81D.001.

22. Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (January 5, 2023).

23. Non-Compete Agreements that Violate the National Labor Relations Act, Memorandum GC 23-08 (May 30, 2023).

24. .R.S. § 8-2-113.

25. M.C.A., Lab. & Empl. § 3-716.

26. Wash. RCW 49.62.020.

27. I.C.A. § 25-22.5-5.5.

28. 600 U.S. 18, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023).

29. 600 U.S. 447, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023).

30. Primarily Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

31. Justice Jackson recused herself in Harvard; she participated in North Carolina, where the vote was 6-3.

32. *Harvard*, 143 S. Ct. at 2147.

33. Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs (June 29, 2023), https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

34. The thirteen states included Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia.

35. Letter from 13 State Attorneys General to Fortune 100 CEOs (July 13, 2023), www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

36. Led by the same legal activist who spearheaded SFFA's claim in *Harvard*, Edward Blum.

37. Both cases were dismissed after the two firms named as defendants, Perkins Coie and Morrison Foster, changed the eligibility requirements for the fellowship programs.

38. "[N]othing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." *Harvard*, 143 S. Ct. at 2147.

39. 143 S. Ct. 2279.

40. *Id*. at 2295.

41. *Id*. at 2294.

42. 143 S.Ct. 2686.

43. No. 4:18-CV-02150-AGF, 2020 WL 5505113, at *2 (E.D. Mo. Sept. 11, 2020), aff'd sub nom. Muldrow v. City of St. Louis Missouri, 30 F.4th 680 (8th Cir. 2022).

44. Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 688 (8th Cir. 2022), cert. granted in part, 143 S. Ct. 2686 (2023) (quoting Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 926 (8th Cir. 2007)).

45. *Id*. at 688-89.

46. Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs,* Reuters (June 29, 2023), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

47. Wendt Corp., 372 NLRB No. 135 (Aug. 26, 2023); Tecnocap LLC, 372 NLRB No. 136 (Aug. 26, 2023).

48. Mclaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023).

49. Raytheon Network Centric Sys., 365 NLRB No. 161 (Dec. 15, 2017).

50. Wendt Corp., 372 NLRB No. 135 (Aug. 26, 2023).

51. Non-Compete Agreements that Violate the National Labor Relations Act, Memorandum GC 23-08 (May 30, 2023).