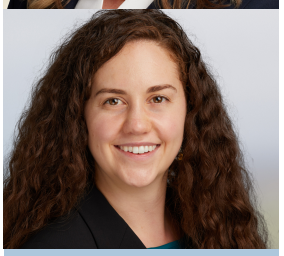
FEDERAL UPDATES

NOTABLE CASES & REGULATIONS

U.S. SUPREME COURT CASES



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***Groff v. DeJoy, Postmaster General*, No. 22-174, 143 S. Ct. 2279 (2023)**

In this Supreme Court case, the plaintiff, Gerald Groff, believes Sunday should be devoted to worship and rest rather than working and transporting worldly goods. Over the years, the United States Postal Service (USPS) expanded mail delivery to include Sundays. The union agreement with USPS created a rotation for Sunday staffing and Groff made arrangements to avoid working on Sundays. This prompted the USPS to engage in progressive discipline. Groff resigned and sued under Title VII of the Civil Rights Act of 1964, claiming USPS did not reasonably accommodate his Sunday religious observance.

The Court's decision states that it is designed to "clarify" what Title VII requires concerning reasonable accommodations for religious observances and practices. Most employers know that religious accommodation requests have been assessed under a standard in which an accommodation request may be rejected as an undue hardship if the accommodation would result in more than a *de minimis* cost to the employer. In *Groff*, the Court stated that its prior description of rejecting an accommodation that creates more than a *de minimis* cost resulted in that phrase taking on a larger role than intended. The Court described what it really meant: an undue hardship that allows rejection of a religious accommodation is shown "when a burden is substantial in the overall context of an employer's business."

Time and again in the opinion, the Court clearly indicates that the use of the phrase "more than a *de minimis* cost" resulted in rejection of minor accommodation requests, and that the substantial burden test would require those accommodations be granted. So, while not framed as a change in the law, the decision in *Groff* is likely to feel like one. Oregon employers should remember that this *de minimis* standard has not applied to requests to take time off or to wear religious clothing in Oregon, so with respect to those two items, this case has less impact.

The ultimate result of the case is that the Court sent the case back to the lower courts to apply the standard as described. The opinion instructs that the trial court needed to assess, for example, the cost of incentive pay to incentivize others than Groff to work on Sunday or coordination with nearby post stations to allow Groff to be accommodated. The opinion

notes that USPS could still prevail—if it does, USPS will have to have made a much more significant record about why it cannot accommodate Groff's Sunday Sabbath observance.

KEY TAKEAWAY

Employers should update any handbooks or policies to ensure they do not indicate that requests for religious accommodation will be rejected because the requests create more than a de minimis cost. Instead, policies should indicate that the employer will provide reasonable religious accommodations unless they are an undue hardship. Additionally, employers should ensure that they use the right language and standards when assessing reasonable accommodation requests for religious beliefs, practices, and observances. The analysis for disability accommodation requests is likely much more similar to religious accommodation requests now than it was before the *Groff* decision. Finally, employers should remember that there are unique challenges to inquiring about an employee's sincere religious beliefs. Employers must be very careful if considering rejecting an accommodation on the grounds that the employer does not consider the employee to have an actual religious belief or practice that is sincere.

***Helix Energy Solutions Group, Inc. v. Hewitt*, 589 US 39, 143 S Ct 677 (2023)**

The U.S. Supreme Court found that a highly compensated oil rig working more than forty (40) hours per week was not salaried and his employer must pay him overtime.

Michael Hewitt worked on an offshore oil rig, typically working about 84 hours per week. Helix paid Hewitt on a daily-rate basis with no overtime. He typically worked 28 consecutive days and then was off for 28 days. Helix paid Hewitt every two weeks, at the per diem rate multiplied by the number of days he worked (regardless of the number of hours); Hewitt earned over $200,000 per year. Helix argued that Hewitt was exempt under the Fair Labor Standards Act (FLSA) because he was a "bona fide executive."

The U.S. Supreme Court reviewed the Department of Labor regulations that clarify how a bona fide executive is determined. Under the three distinct tests—salary basis test, salary level test, and job duties test—the issue in Hewitt's case was the salary basis test. As a highly compensated employee (i.e., making more than $100,000 a year), Hewitt would only be exempt if he was paid on a *salary basis*. The Court interpreted the regulations that further qualify *salary basis* and found that daily rate workers do not qualify as being on a salary basis because salary suggests a regular weekly, monthly, or annual pay structure. Hewitt's pay each week, however, was calculated by the daily rate multiplied by the number of days he worked. Even though Hewitt was highly paid, he was not exempt, and Hewitt was required to compensate him for overtime work. The court rejected the argument that since Hewitt was paid every two weeks, he was being paid on a salary basis. The court did find, though, if an employee is paid at a daily or hourly rate, along with a guaranty of a weekly payment regardless of how many hours or days worked, then the employee may be considered exempt and not entitled to overtime pay.

KEY TAKEAWAY

Just because employees are highly paid does not mean that they will be exempt employees. The key question is how the individual's pay is calculated each pay period, i.e., the unit or method for calculating pay. For employees paid per day, like Hewitt, if there is not a set guaranteed weekly payment, a court will likely find they must be compensated for overtime work.

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303 Creative LLC, et al. v. Elenis, No. 21-476, 143 S. Ct. 2298 (2023)

In a 6-3 decision, the Supreme Court ruled that the State of Colorado cannot enforce its state anti-discrimination law , which (like the Oregon Public Accommodations Act and the Washington Law Against Discrimination) prohibits discrimination by a place of public accommodation against a business owner, if doing so would compel the business owner to engage in speech with which they disagree as that would violate their free speech rights under the First Amendment. In this particular case, the business owner created unique websites and did not want to create wedding websites for same-sex marriages, asserting that doing so would violate her belief that marriage should be reserved to unions between one man and one woman.

The Court concluded that creation of unique wedding websites was "speech" and under the First Amendment the business owner could not be required to create the websites. The majority relied heavily on the parties' stipulation that the website designer would design and produce a product that was "pure speech" and "expressive in nature." It explained that Colorado cannot "force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance." The Court also indicated that the holding was not limited to free speech related to religious beliefs but would also apply to compelling any speech which violated the person's conscience.

The majority signaled that its decision would provide similar protection to other business owners who provide "pure speech" protected by the First Amendment (e.g., artists, speechwriters, and movie directors). The decision, however, does not stand for the proposition that religious beliefs can be relied on by business owners or employers to avoid nondiscrimination laws in general. To the contrary, the Court made it clear that states could enforce their nondiscrimination statutes against business owners in regard to providing non-expressive products or services. Instead, very case specific factual circumstances (e.g., the parties' stipulations that the website designer's services were "pure speech" and "expressive in nature") drove the court's opinion.

As the dissent warned, there is an open question as to what might constitute services or products that are "expressive" in nature and are covered by this holding.

KEY TAKEAWAY

The holding in this case is narrow (it pertains to speech/expression only), and companies should not rely on *303 Creative* to avoid compliance with federal and state nondiscrimination laws. Indeed, the Court recognized that states have a compelling interest in eliminating discrimination in places of public accommodation, but when they infringe on protected speech, anti-discrimination laws will be narrowly construed. Further,

to the extent that this decision affects employers as they deal with their employees, it is limited to public sector (government) employers who must comply with constitutional strictures in the employment arena. The opinion does not affect a private sector (non-governmental) employer's ability to enforce its antidiscrimination policies in the workplace.

***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Supreme Court Case Nos. 20-1199 and 21-107j, 143 S. Ct. 2141 (2023)**

In *Students for Fair Admission*, the Supreme Court ruled that race cannot be used in college admissions decisions. Before the case, colleges and universities could consider race or potentially other protected statuses as one of many factors in evaluating potential enrollees. The Court's Opinion took pains to point out that considering an applicant's discussion about how race affected the applicant's life "be it through discrimination, inspiration, or otherwise" is different than considering race itself and is not prohibited by the Constitution or applicable nondiscrimination laws.

KEY TAKEAWAY

There are many questions about the impact of the decision on employment practices. In many ways, there should be no impact on employment practices. The public response to the case has suggested that the case puts diversity, equity, and inclusion efforts broadly in question. But Title VII of the Civil Rights Act and state employment laws already prohibit taking any employment action based on protected status. Employers seeking to enhance diversity can continue to engage in outreach to: expand circles of candidates to make the pools and potentially the workforce more diverse; engage in diversity, implicit bias, or other training efforts; and provide support mechanisms to historically underrepresented groups—so long as the employer does not exclude a person because the person's protected status.

NINTH CIRCUIT CASES

***Buero v. Amazon.com Services, Inc.*, 61 F4th 1031 (9th Cir 2023)**

The Ninth Circuit, relying on the Oregon Supreme Court's interpretation of Oregon's wage and hour law, dismissed a case brought by Amazon.com employees seeking compensation for time passing through security screenings.

The potential class action was brought first in Oregon state court and then removed to federal court by Amazon. The Amazon employees were warehouse workers in a facility with a secure area for storage of merchandise. At the end of their shifts, Amazon requires employees to clock out and then undergo a security screening to control theft and ensure employees do not remove any merchandise from the secure area.

When presented with a specific question that was not answered under Oregon law, the Oregon Supreme Court told the Ninth Circuit that Oregon wage and hour laws should be interpreted consistently with the FLSA, and that under Oregon law—just like under federal law—the time spent doing a task before or after a shift is only compensable if it is (1) an

integral and indispensable part of the employee's principal activities or (2) compensable as a matter of contract, custom, or practice. In this case, the employees did not allege either of these two exceptions was present and, as a result, the case was dismissed.

KEY TAKEAWAY

Whether a claim is brought in state court or federal court, based on Oregon Wage and Hour Laws or federal Wage and Hour Laws, the interpretation *should* be the same. When determining whether time is compensable, employers should explore the two exceptions to see if they may apply. For an example of a case in which the Ninth Circuit found pre-clock-in time to be compensable, see *Cadena v. Customer Connexx LLC* below.

***Cadena v. Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022)**

The Ninth Circuit held that time spent by call center employees turning on and logging into their computers was compensable under the FLSA.

Customer Connexx operates a call center in Nevada where hourly-paid customer service representatives work in person scheduling functions for appliance recycling customers. Connexx requires its employees to clock-in and clock-out of their workdays through an online timekeeping program. Employees must boot up their computers and *first* clock in before they can access the programs required to do the tasks of their job. The employees reported that the time to start up the computers, log in, and start up the time-keeping program took from one to twenty minutes, with the average time between 6.8 to 12.1 minutes. Similarly, the employees claimed that the time to log off and boot down computers at the end of the day took from 4.75 to 7.75 minutes. The employees brought this action claiming Connexx did not pay employees for these periods at the beginning and the end of each workday.

The Ninth Circuit examined the requirements of the FLSA affirming that activities that are required before and after the workday are only compensable if they are "an integral and indispensable part of the principal activities" of employment. This test is tied to the work the employee is employed to perform and not all activities that an employer requires. If the action is one an employee must do to perform their principal activities, then they must be compensated for that time.

Because the Connexx employees' principal task was answering phone calls and scheduling tasks, dependent on a functioning computer, turning on their computers was an integral and indispensable part of that task. This time spent waiting for the computer to boot up was part of the continuous workday and should have been recognized as the first task of the day when compensable timekeeping should begin. Because there were some factual questions of the requirements for shutting down computers at the end of the day, the court did not make a decision, however, whether the time at the end of the day was compensable.

KEY TAKEAWAY

Not all activities required by employers are compensable under the FLSA. Nevertheless, those activities that bear such a close relationship to the tasks of an employee's workday

and cannot be removed from the tasks of the day will likely be compensable. An employer must first identify the principal activity of employees' workday and if the requirements are such that the employees cannot do their job without them, then these tasks are likely compensable.

***Chen v. Albany School District*, 56 F4th 708 (9th Cir. 2022)**

The Ninth Circuit waded back into the choppy waters of student online and off-campus speech following the U.S. Supreme Court's June 2021 ruling in *Mahanoy Area School District v. B.L.* and found that a school was justified in disciplining two students for their egregiously offensive online speech that targeted specific students.

California high school student, Cedric Epple, set up a private Instagram account, limiting followers to a small group of friends. Epple thought the site could be a place to "share funny memes, images and comments with close friends that [they] thought were funny, but which other people might not find funny or appropriate." Epple's posts, though, escalated from immature teasing to "vicious" posts that targeted specific Black classmates, using references to slavery and violence of the Ku Klux Klan, including lynching, as well as highly offensive racist insults. Another student, Kevin Chen, actively followed Epple's account, liking posts and contributing his own racist content as comments. Albany's students, including students targeted in the posts, learned of the account, and shared it with Albany's administrators. Knowledge of the account and its contents rapidly spread throughout the high school, causing general upset and school-wide disruption, and additionally, specific trauma to the students targeted in the posts. Albany suspended both Epple and Chen, and later expelled Epple.

The Ninth Circuit found that a school can discipline students for off-campus speech when there is a foreseeable risk of substantial disruption to school activity or threatened harm to the rights of others—but a school should be careful to undertake a case-by-case analysis and document its rationale for the discipline. While K-12 students do have limited First Amendment rights, these rights may be curtailed when the speech constitutes harassment or creates a hostile-educational environment. Additionally, the court recognized that racist slurs directed to specific students are not the type of off-campus student speech the First Amendment protects.

KEY TAKEAWAY

The analysis of this case is specific to our school clients, but provides a glimpse of how the Ninth Circuit looks at online speech in general. As schools continue to explore monitoring and regulating online off-campus speech, the Ninth Circuit has made it clear that schools maintain some authority to discipline students for speech occurring online when it is not just unpopular or an ideological message, but the impact starts to affect the school day. In fact, the Ninth Circuit suggested and recognized that had Albany HS not responded as it did to the vicious posts, it could have faced potential liability had it not addressed the "racially hostile environment" and harassment of particular students once it learned of it. The First Amendment does not prevent a school from taking steps to properly protect students from mistreatment or harassing behavior.

***Sharp v. S&S Activeware, L.L.C.*, 69 F4th 974 (9th Cir. 2023)**

Stephanie Sharp worked for S&S Activewear in its 700,000-square-foot warehouse in Reno, Nevada. She, along with seven other former employees, brought a lawsuit alleging sex-based harassment in violation of Title VII based on music played throughout the workplace.

According to Sharp, S&S permitted its managers and employees to routinely play sexually graphic, violently misogynistic music with lyrics that denigrated women, including terms commonly understood to be derogatory of women and glorifying prostitution. One song in particular detailed a pregnant woman being stuffed into the trunk of a car and purposely driven into the water. Employees were allowed to blast the offensive music from commercial-strength speakers placed throughout the warehouse and mounted on forklifts driven around the warehouse, making the music difficult to avoid. The music also allegedly fueled abusive conduct from some male managers and coworkers who would make sexually graphic gestures and explicit remarks, yell obscenities, and openly share pornographic videos. Despite almost daily complaints from multiple employees, S&S management supported the music because they believed it motivated productivity and let it play for nearly two years.

In response to Sharp's civil complaint, S&S argued that offensive music could not constitute Title VII sex-based discrimination because the music was audible throughout the warehouse and offended women and men equally. As such, the music didn't target any particular individual because of sex. The district court agreed and dismissed Sharp's complaint.

On appeal, the Court analyzed the case under core principles of employment discrimination law. In doing so, the Court noted that offensive conduct need not target a specific individual to establish a claim under Title VII. Instead, the Court held that offensive music that infused the workplace with sexually demeaning and violent language may be sufficient to alter the terms and conditions of employment. The Court also rejected the "equal opportunity harasser" defense and held that whether conduct is offensive to multiple genders is not determinative and does not bar a discrimination claim under Title VII. Thus, sexually graphic and misogynistic music can pollute the workplace, giving rise to a Title VII violation even when it offends all genders equally.

KEY TAKEAWAY

This decision is a good reminder that any offensive material in the workplace, including music, can create an actionable hostile working environment—even when it may not target a particular individual, but permeates the workplace as a whole. Conduct that is equally offensive or directed towards all genders is not a de facto defense to Title VII sex-based discrimination claims. Employers should ensure that any complaints related to vulgar or obscene language or content in the workplace are promptly and effectively addressed. Additionally, periodic trainings should be conducted to keep staff and managers reminded about appropriate standards of behavior, as well as the mechanisms for addressing complaints. These actions can all be critical to avoid claims such as this. Likewise, employers that allow music to be played openly in the workplace should consider whether they may want to update their policies to avoid these issues or explore alternatives, such as allowing employees to listen to earphones where they don't present safety issues.

***Hartstein v. Hyatt Corp*, 2023 WL 6167607 (Sept. 22, 2023, 9th Cir.)**

In a case hailing from the COVID-19 pandemic, California employees alleged that their former employer (a hotel corporation) violated the California Labor Code by failing to pay them immediately for accrued vacation time at the start of a temporary layoff. The employer agreed that vacation time would be due at the termination of employment, but argued that because the layoffs were temporary, they could not be considered a discharge. The Ninth Circuit sided with the employees. In doing so, the Court adopted the position of the California Division of Labor Standards Enforcement's (DLSE's) Policies and Interpretations Manual: "if an employee is laid off without a specific return date within the normal pay period, the wages earned up to and including the lay-off date are due and payable," under California Labor Code Section 201(a). The Court reasoned that a temporary lay-off with no guaranteed end date was an unenforceable promise to the employee, which could result in a delayed payment of earned wages. Accordingly, the DLSE's interpretation of Section 201(a) furthered the important public policy of providing prompt payment of earned wages to a departing employee.

KEY TAKEAWAY

If a California employee is laid off without a specific return date within the normal pay period, the wages earned up to, and including the lay-off date, are *immediately* due and payable.

OREGON DISTRICT COURT CASES

***Hanson v. Oregon Legislative Assembly*, 2023 WL 22196 (D. Or. Jan 3, 2023) and *Longhorn v. Oregon Dep't of Corr.*, 2023 WL 3602780 (D. Or. May 23, 2023)**

These two cases are out of our local federal district court and have rulings about what actions an employer takes that the employer can be sued for under discrimination and retaliation laws—in other words, what constitutes an "adverse employment action."

In *Hanson*, Judge Michael Simon rejected the employer's argument that if an employee is put on administrative leave with pay, the employee cannot sue because it is not an adverse employment action. Finding that the Ninth Circuit Court of Appeals, which controls Oregon and Washington district courts, takes a broad view of what can constitute an adverse employment action, Judge Simon found that a 10-month paid administrative leave could, in the eyes of a jury, be an adverse action that leads to liability. The court seemed to leave open the possibility that short paid leaves for a prompt investigation might not be adverse actions as a matter of law.

In *Longhorn*, Judge Michael McShane considered whether an employer's failure to investigate claims of harassment could be an adverse employment action for purposes of a retaliation claim. The court considered the rule that an adverse action is one that would dissuade a reasonable employee from engaging in protected activity. Judge McShane found the claim that failure to investigate was "unique" as an adverse action, as it conceivably could be, because by failing to investigate, the employer was not providing an employment benefit available to employees in general and not doing so might deter a reasonable person from reporting.

KEY TAKEAWAY

With respect to paid administrative leave, it is probably a necessary undertaking in many instances. Employers should make sure that they are clear about the reason for administrative leave and that they take steps to keep it as short as possible to reduce the risk that it creates exposure to a discrimination or retaliation claim. Similarly, there may be times when an employee seeks an investigation, but the employer determines it is not warranted. The employer will want to have a clear policy basis for not investigating.

FEDERAL REGULATIONS

Pregnant Workers Fairness Act, Proposed Regulations, 88 Fed. Reg 54714, 29 CFR 1636, Aug. 11, 2023

On August 11, 2023, the Equal Employment Opportunity Commission (EEOC) proposed regulations under the Pregnant Workers Fairness Act (PWFA). The PWFA took effect on June 27, 2023, and requires that employers with at least 15 employees make reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related medical conditions. While other federal employment laws provide rights related to pregnancy in some situations, the PWFA fills gaps in federal law, such as those related to pregnancy without a specific disability (meaning the ADA does not apply) or for employers with fewer than 50 employees not covered by the Family Medical Leave Act. Notices of proposed regulations typically have very detailed descriptions of proposed rules, and the August 11 notice of proposed rules is no exception. And although the regulations are currently just proposed, most, if not all, might be enacted, and they provide guidance on interpreting the statute before regulations become final.

The rules include:

- Guidance on a "temporary period" of inability to perform an essential function and ability to perform "in the near future." The PWFA's obligations arise for an individual who is a "qualified employee." A qualified employee includes someone who is unable to perform an essential job function for a "temporary period" when the function can be performed "in the near future," with or without reasonable accommodation. The statute obviously leaves room for a lot of interpretation. The proposed rule sets a very specific point of reference, however, and provides that "in the near future" means generally forty weeks from the start of the temporary suspension of an essential function. Note that the statute and proposed rule still require that the employer be able to reasonably accommodate the essential function, and that if the inability to perform creates an undue hardship, an employer need not accommodate. An employer that denies an accommodation on the grounds that there is no way to reasonably accommodate, or that accommodation would be an undue hardship, should have a strong record of describing why (in the specific factual context) that is the case.
- The definition of "essential function" is familiar. Helpfully, the proposed rule adopts the definition of "essential function" from the Americans with Disabilities Act (ADA) regulations. Most employers are very familiar with the definition. Remember, when

assessing if a function is essential, employees in the position must actually perform the function. Evidence is often (and hopefully) in the job description, and in the way incumbents in a position would describe it.

- The proposed rules are replete with examples of accommodations under an expanded definition of "reasonable accommodation." The definition of reasonable accommodation begins with a definition that tracks the ADA: modifications or adjustments that enable the person with a known limitation to perform the essential functions. The proposed regulations also add to the definition of reasonable accommodation because of differences in the PWFA compared to the ADA. The additions include describing the temporary suspension of essential functions that can be performed in the "near future" and providing examples of accommodations in this context; describing how leave, including intermittent leave, may be a reasonable accommodation; and accommodations related to lactation.

The proposed rules outlined above can look intimidating at first glance, but employers should review the examples on pages 54729 to 54733—there can be no doubt that if there is enforcement of the PWFA (or a claim under it), if an example seems applicable to the situation an employer faces, the employer will likely need to rely on the example or have a strong showing of why the facts make an example inapplicable.

KEY TAKEAWAY

Oregon and Washington already have more robust protections for pregnant and parenting employees than pre-PWFA federal law, such as Oregon's and Washington's laws providing for accommodations during pregnancy and post-childbirth. So, while Pacific Northwest employers will have to evaluate and ensure PWFA compliance, compliance may not result in major changes from current practices. Nonetheless, Oregon and Washington employers with 15 or more employees must evaluate the PWFA when assessing possible accommodations, as well as when those accommodations might be required. Finally, although the proposed rules are just proposed, they provide insight into how accommodations are likely to be evaluated. As indicated above, the examples are worth reviewing and considering in accommodation situations. Of course, these are proposed rules, and so when the final rules are enacted, those should be used.

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 FR 62152, 88 FR 62152, Aug. 30, 2023

On August 30, 2023, the Department of Labor issued a proposed rulemaking that would raise the minimum salary threshold for overtime exemptions for "white-collar" salaried employees. White-collar salaried employees are employed in an executive, administrative, or professional (EAP) capacity. They are currently exempt from minimum and overtime wage requirements under the FLSA because so long as they perform specific duties or types of work (defined by the Department) and are paid a minimum weekly salary. The minimum threshold is currently set at $684 per week ($35,568, annually). The proposed rule would raise that threshold to $1,059 per week ($55,068 annually).

The proposed rule would also raise the threshold for highly compensated employees (HCEs), from $107,432 to $143,988 per year, of which at least $1,059 per week would need to be paid on a salary or fee basis.

The Department's proposal also includes automatic updates to earning thresholds every three years, without additional rulemaking or legislation and based on then-available earnings data. These automatic updates would pause in the case of unforeseen economic (or other conditions) that would warrant a delay or while the Department engages in rulemaking.

The proposed rulemaking will be open for public comment for 60 days, which is set to expire on November 7, 2023. It is possible that this deadline could be extended, or that the rules could face legal challenges if enacted.

KEY TAKEAWAY

Employers in some states—for example, Washington—are already contending with salary thresholds that exceed both current and the proposed salary levels, and therefore may not see much impact. Others should prepare to implement the changes on a short timeline after passage (or resolution of any legal challenges) by identifying jobs within a range of $55,000 annually and considering how to communicate changes to employees.