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Presenters

- Hillary Benson, Deputy General Counsel
- Dynah Haubert, Associate General Counsel
- John Mickley, Associate General Counsel

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Overview

- Preview of relevant Supreme Court OT 2024 cases
- Recent Federal Courts of Appeal cases involving CAA-applied statutes
- Recent First Amendment cases

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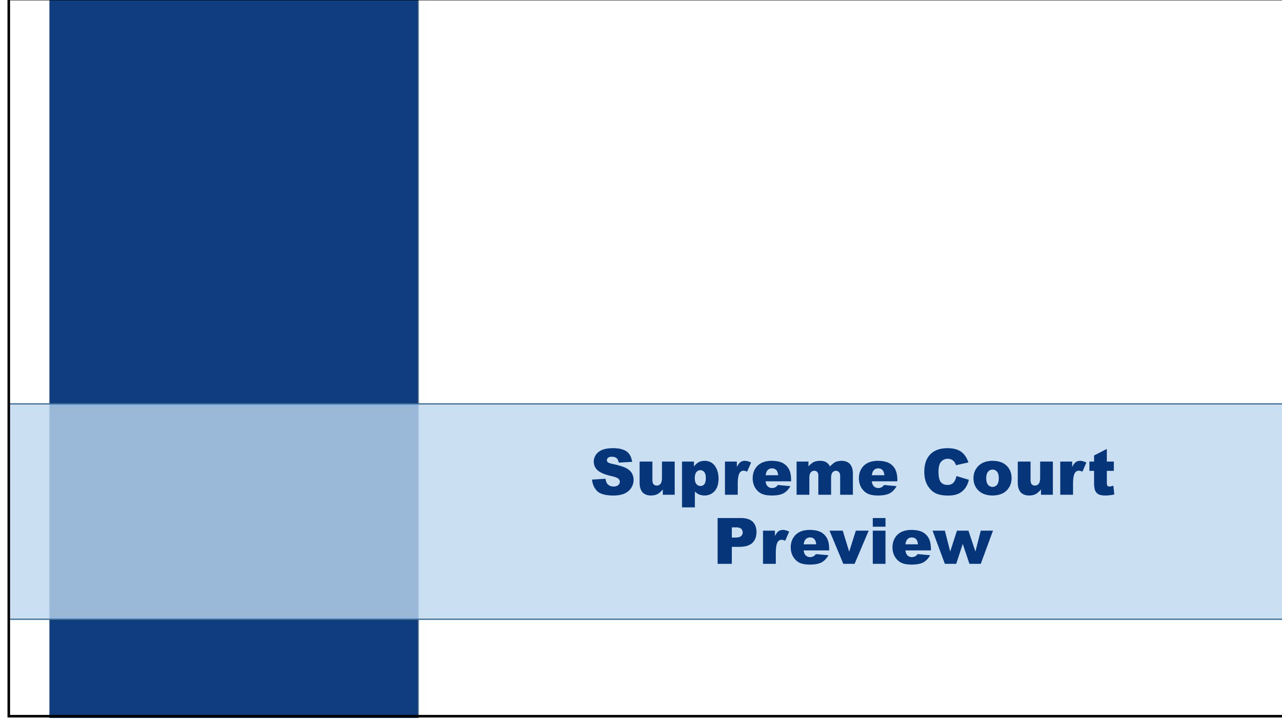

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E.M.D. Sales, Inc. v. Carrera

- Docket No. 23-217
- Lower court decision: *Carrera v. E.M.D. Sales, Inc.*, 75 F.4th 345 (4th Cir. 2023)
- Question presented: **Whether the burden of proof that employers must satisfy to demonstrate the applicability of an FLSA exemption is a mere preponderance of the evidence – as six circuits hold – or clear and convincing evidence, as the Fourth Circuit alone holds.**

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Stanley v. City of Sanford, Florida

- Docket No. 23-997
- Lower court decision: *Stanley v. City of Sanford, Fla.*, 83 F.4th 1333 (11th Cir. 2023)
- Question Presented: **Under the Americans with Disabilities Act, does a former employee – who was qualified to perform her job and who earned post-employment benefits while employed – lose her right to sue over discrimination with respect to those benefits solely because she no longer holds her job?**

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Feliciano v. Department of Transportation

- Docket no. 23-861
- Lower court decision: *Feliciano v. Dep't of Transp.*, No. 2022-1219, 2023 WL 3449138 (Fed. Cir. May 15, 2023)
- Question Presented: **Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.**

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Americans with Disabilities Act

- *Hampton v. Utah Dep't of Corr.*, 87 F.4th 1183 (10th Cir. 2023) – The fact that Plaintiff's accommodation request would violate department policy did not by itself make the accommodation unreasonable. He raised a genuine issue of material fact as to whether his employer's requirement that officers carry a certain brand of handgun was an essential function of his employment.
- *Howard v. City of Sedalia, Mo.*, 103 F.4th 536 (8th Cir. 2024) – Employer's failure to provide a "benefits and privileges accommodation" did not violate the ADA where employee seeking to bring her service dog to work could not identify an employer-sponsored or employer-provided benefit or privilege of employment that the dog would enable her to access.

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Americans with Disabilities Act (cont'd)

- *Sanders v. Union Pac. R.R. Co.*, 108 F.4th 1055 (8th Cir. 2024) – A doctor's recommendation did not insulate an employer from liability on a "regarded as" claim. Separately, employer was obligated to engage in interactive process to identify a reasonable accommodation for a fitness-for-duty exam.
- *Haulmark v. City of Wichita*, No. 22-3243, 2024 WL 3219677 (10th Cir. June 28, 2024) – After the Supreme Court's decision in *Lindke v. Freed*, a mayor's Facebook page could be required to be accessible under Title II.

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Age Discrimination in Employment Act

- *Katz v. Wormuth*, No. 22-30756, 2023 WL 7001391 (5th Cir. Oct. 24, 2023) – A seventy-three-year-old civilian army doctor was terminated and replaced with a military doctor half his age. His termination was part of written policy to "put uniformed personnel in leadership roles as career development opportunities for young Officers."
  - District Court granted summary judgment for the Army.
  - Fifth Circuit affirmed, agreeing that the doctor established a prima facie case with direct evidence of unlawful motive, but the Army proved that it would have replaced him because he was a civilian, regardless of his age.

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Age Discrimination in Employment Act (cont'd)

- *Milczak v. Gen. Motors, LLC*, 102 F.4th 772 (6th Cir. 2024) – GM transferred a long-time employee in his 60s during "retooling" of a plant to produce EVs. Managers called employee names like "old fart" and told him that the company was "getting rid of the older guys." GM transferred him to a later shift with less overtime opportunity.
  - District court granted summary judgment for GM, finding that he failed to show required comparator evidence.
  - Sixth Circuit affirmed, holding that the transfer met the "some harm" standard from the Supreme Court's decision in *Muldrow v. City of St. Louis* but that the case could not proceed without comparators.

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Title VII – *Muldrow* "Some Harm" Standard Applied in Non-Transfer Cases

- *Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868 (6th Cir. 2024) – Teacher alleged paid suspension was discriminatory based on race
- *Peifer v. Bd. of Prob. & Parole*, 106 F.4th 270 (3d Cir. 2024) – Parole board agent alleged failure to grant her requested pregnancy accommodation violated Title VII and the Pregnancy Discrimination Act
- *Cole v. Grp. Health Plan, Inc.*, 105 F.4th 1110 (8th Cir. 2024) – Physical therapist alleged that her employer treated her in a discriminatory manner and failed to accommodate her religious beliefs regarding the COVID-19 vaccine

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Title VII – Disparate Treatment

- *Buckley v. Sec'y of Army*, 97 F.4th 784 (11th Cir. 2024) – Federal-sector Title VII claims only require a showing that an employment action was "tainted by" unlawful discrimination, not that discrimination was the "but-for" cause of the action, and therefore *McDonnell Douglas* burden-shifting framework is inappropriate, "like requiring the plaintiff to move a boulder when she need only push a pebble."
- *Amos v. Lampo Grp., LLC*, No. 24-5011, 2024 WL 3675601 (6th Cir. Aug. 6, 2024) – The analysis of religious discrimination claims is the same whether a plaintiff argues he was discriminated against for his own religious beliefs or for not conforming to the employer's religious beliefs.

17

Title VII – Hostile Work Environment

- *Banks v. Gen. Motors, LLC*, 81 F.4th 242 (2d Cir. 2023) – Incidents can support a claim even if not directed at the plaintiff or if she was not present, if they contribute to her experience of a hostile work environment.
- *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024) – Sexual harassment is still actionable even if it occurs outside the workplace, such as on social media, if it affects the employee's working environment in an objectively severe or pervasive manner.
- *Young v. Colo. Dep't of Corr.*, 94 F.4th 1242 (10th Cir. 2024) – Equity, Diversity, and Inclusion training did not give rise to a hostile work environment, even though the content may have been viewed as offensive, because it was only given once and did not lead to hostility from coworkers.

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Title VII – Retaliation

- *Vavra v. Honeywell Int'l, Inc.*, 106 F.4th 702 (7th Cir. 2024) – Plaintiff's termination for refusing to take unconscious bias training was not unlawful retaliation; because he had not taken the training, he did not know its contents, and therefore could not have had a reasonable belief that he was opposing conduct made unlawful by Title VII.
- *Stratton v. Bentley Univ.*, 113 F.4th 25 (1st Cir. 2024) – Retaliatory hostile work environment claims are subject to the same evidentiary standard as claims of retaliatory employment actions – i.e., plaintiffs must show that the work environment would have dissuaded a reasonable person from engaging in protected activity under Title VII – not the "severe or pervasive" standard applied to discriminatory hostile work environment claims.

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Family and Medical Leave Act

- *Tanner* v. *Stryker Corp. of Mich.*, 104 F.4th 1278 (11th Cir. 2024) – The FMLA did not provide an expectant parent who was neither pregnant nor married to a pregnant spouse with pre-birth leave so that he could await the child's birth away from work.
- *Perez v. Barrick Goldstrike Mines, Inc.*, 105 F.4th 1222 (9th Cir. 2024) – The FMLA does not require an employer to provide contrary medical evidence before contesting the validity of the original certification from a health care provider that an employee has a serious health condition.
- *Lapham v. Walgreen Co.*, 88 F.4th 879 (11th Cir. 2023), *petition for cert. docketed*, No. 23-1283 (U.S. June 7, 2024) – The Eleventh Circuit held that the "but-for" causation standard applies to FMLA retaliation claims, deepening a circuit split.

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Family and Medical Leave Act (cont'd)

- *Wayland v. OSF Healthcare Sys.*, 94 F.4th 654 (7th Cir. 2024) – Under the FMLA, an employer is not required to adjust its performance standards for the time an employee is actually on the job, but the FMLA can require that performance standards be adjusted to avoid penalizing an employee for being absent during approved leave.

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Fair Labor Standards Act

- *Perry v. City of New York,* 78 F.4th 502 (2nd Cir. 2023) – Employer must pay for overtime even if employees did not follow required process for requesting the pay. "Whether an employer knows an employee is not being paid is irrelevant to FLSA liability."
- *Adams v. Palm Beach Cnty.*, 94 F.4th 1334 (11th Cir. 2024) – Golf course volunteers, who were compensated with discounted rates, sued public course alleging that they were employees entitled to a minimum wage and overtime. Court analyzed job posting, actual job duties, and reduced course fees and found that they met "public agency volunteer" exemption because they "perform hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered."

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Equal Pay Act

- *Boyer v. United States*, 97 F.4th 834 (Fed. Cir. 2024) – VA hired two pharmacists, one male and one female, and paid the male more because his prior salary was higher.
  - Federal Circuit decides that employers can rely on prior pay if either: (1) employer can prove that the prior pay was not based on sex; or (2) prior pay is considered with other, non-sex-based factors.
  - Either way, employer has burden to prove that prior pay with or without other factors is actual reason for the pay decision and not pretextual ex-post basis.

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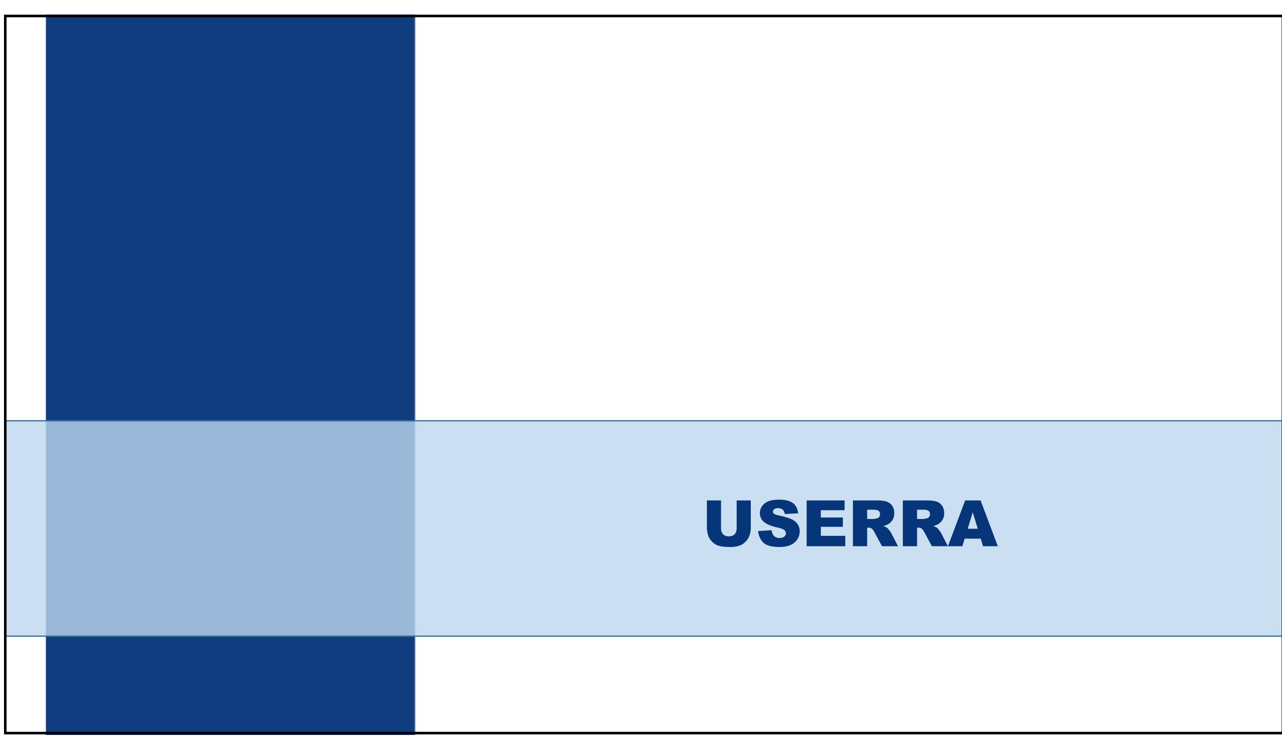

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Uniformed Services Employment and Reemployment Rights Act

- *Scanlan v. Am. Airlines Grp., Inc.*, 102 F.4th 164 (3d Cir. 2024) – A reasonable jury could find that pilots' short-term military leave was comparable, for USERRA purposes, to their employer airline's jury duty and bereavement leave, based on the average duration, purpose, and employee control over timing of each type of leave.

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Occupational Safety and Health Act

- *J.D. Abrams, L.P. v. OSHRC*, No. 22-60610, 2024 WL 1618354 (5th Cir. Apr. 15, 2024) – The “unpreventable employee misconduct” defense failed, because although the company had cave-in protection rules and had communicated them to employees, it lacked a meaningful program to detect violations, and could not show that it enforced the safety rules or disciplined employees for violating them.
- *Eustis Cable Enterprises, Ltd. v. Su*, No. 23-6151-AG, 2024 WL 3264144 (2d Cir. July 2, 2024) – The employer was cited after a fatality because it had failed to train the employee on the safety practices and precautions for the work he was performing when he was killed; the company could not simply rely on the employee’s history of working in the telecommunications construction industry, without verifying that he had received appropriate safety training for this type of work in his previous jobs.

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National Labor Relations Board

- *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (Aug. 2, 2023) – the Board returned to pre-*Boeing* standard for evaluating whether workplace rules are facially unlawful. The standards ask whether an employee could reasonably interpret a rule to have a coercive meaning. If so, employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that interest cannot be advanced with a more narrowly-tailored rule.

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NLRB in Circuit Courts

- *United Nat. Foods, Inc. v. NLRB*, 144 S. Ct. 2708 (2024) – The Supreme Court vacated and remanded the Fifth Circuit's decision affording *Chevron* deference to question of whether "prosecutorial discretion" in NLRA allows Acting NLRB GC to withdraw a complaint.
- *Hospital de la Concepcion v. NLRB*, 106 F.4th 69 (D.C. Cir. 2024) – Employer reduced employees' work hours without bargaining with the union and refused to provide information which the union requested. Board found employer violated NLRA. In a decision one week after *Loper Bright*, D.C. Circuit affirmed Board decision with "a very high degree of deference."

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Federal Service Impasses Panel

- *NTEU & U.S. Dep't of Energy*, 23 F.S.I.P. 041 (Oct. 19, 2023) – Agency proposed "hoteling" employees unless they worked six days in-office per pay period. The union proposed that employees could keep their own office if they were present five days per pay period. FSIP put burden on agency to demonstrate necessity for this number of days and agency failed because they could not explain why one less day in the office would break the bank.

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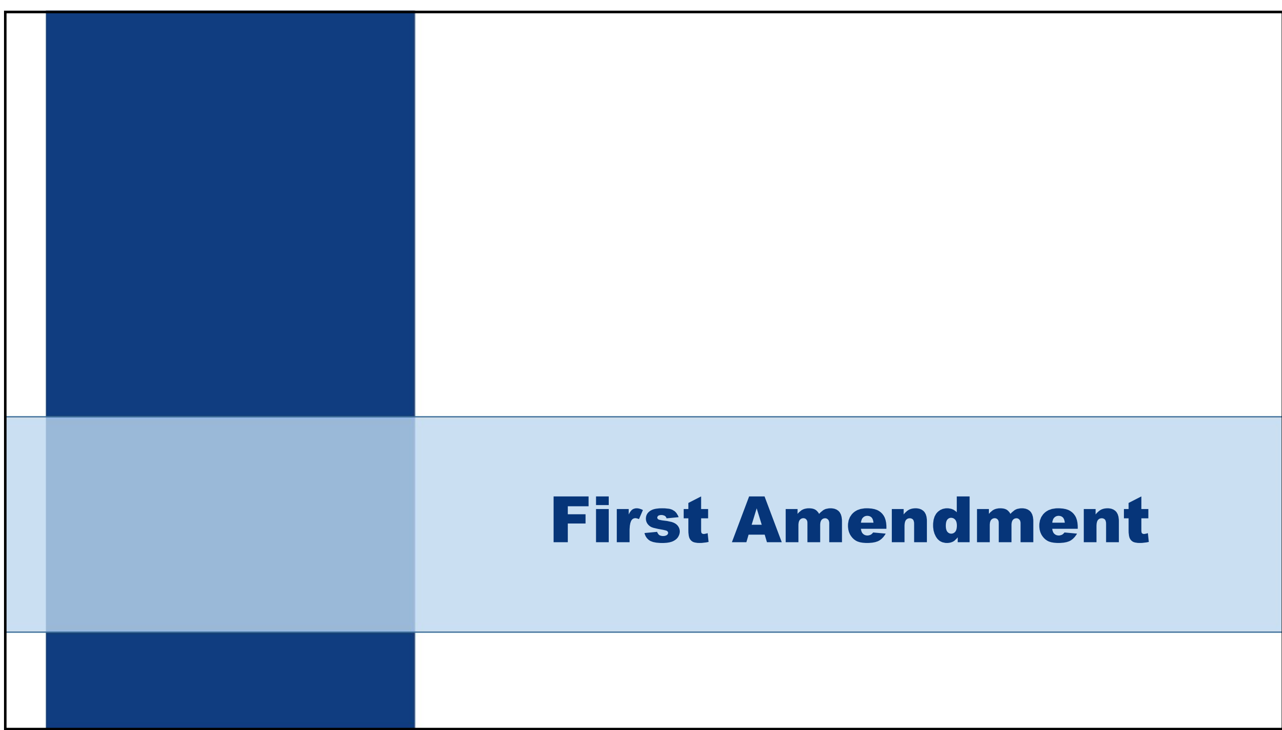

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First Amendment

- *MacRae v. Mattos*, 106 F.4th 122 (1st Cir. 2024) – The school district's interest in preventing disruption to the learning environment outweighed the teacher's interests in making racist and anti-LGBTQ+ posts on TikTok; the *Garcetti* test still applied even though the posts were made prior to her employment by the school district.
- *Noble v. Cincinnati & Hamilton Cnty. Pub. Libr.*, 112 F.4th 373 (6th Cir. 2024) – A library security guard's free speech rights were violated when the library fired him over an anti-BLM meme he briefly posted on his private Facebook page.

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First Amendment (cont'd)

- *Norgren v. Minn. Dep't of Hum. Servs.*, 96 F.4th 1048 (8th Cir. 2024) – Mandatory training on race and gender identity did not violate employees' free speech rights where they were not compelled to adopt the messages of the training as their own speech, and there was no consequence for them disagreeing with the content of the trainings.
- *Goldstein v. Pro. Staff Cong./CUNY*, 96 F.4th 345 (2d Cir. 2024), *petition for cert. docketed*, No. 23-384 (U.S. July 23, 2024) – Plaintiffs' First Amendment rights were not violated just because they were included in a bargaining unit whose exclusive representative espoused political viewpoints with which the plaintiffs disagreed; plaintiffs were free to resign their union membership and to publicly dissent against the union's views.

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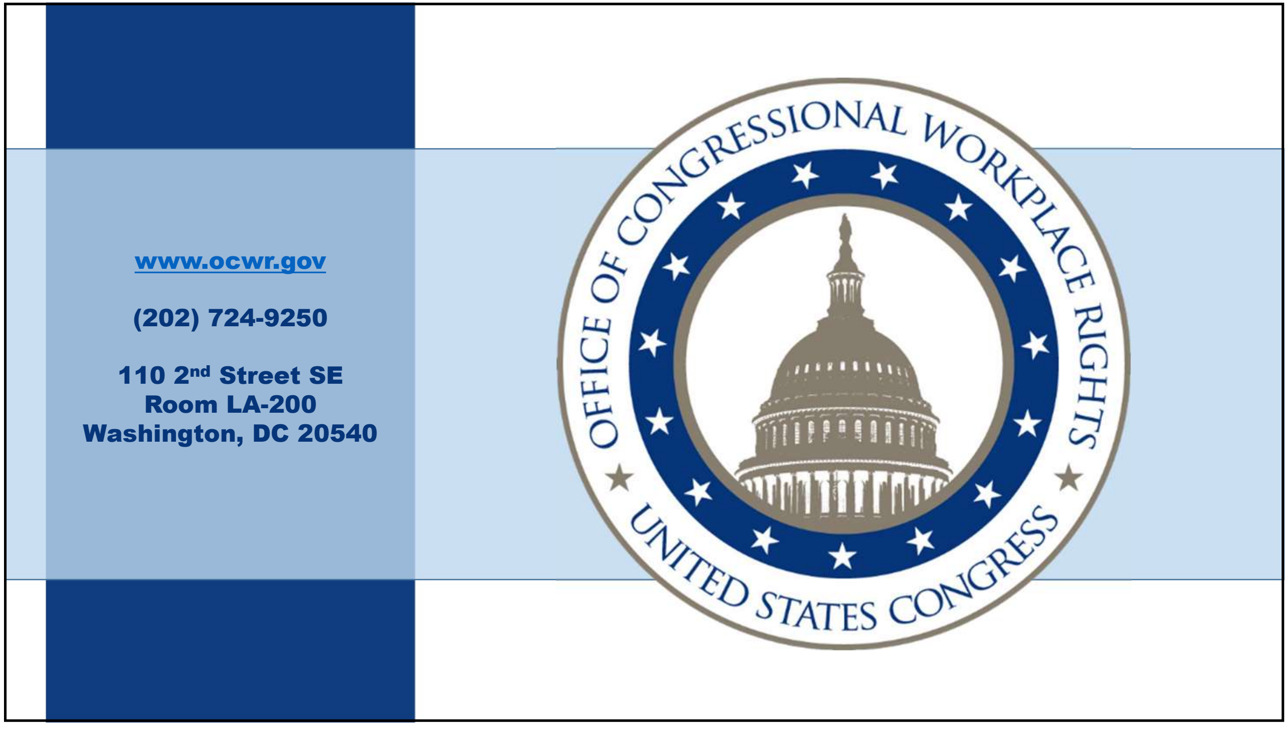

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