



# Navigating the Future: Class and Collective Actions in the Modern Legal Landscape

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# What We Will Cover

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- Increased activity by government agencies into discrimination claims
- Trends in class/group claims brought by government and private attorneys
- Impact of SFFA/Harvard SCOTUS decision on DEI claims and programs generally
- What is the Supreme Court up to



# Increased Government Activity: Federal Level

- The EEOC has been active.
- **Commissioner Charges** (separate from individual charges) have sharply increased.
- The EEOC filed 94 **lawsuits** in fiscal 2022, a slight decrease from the 114 it filed in fiscal 2021, but the EEOC has shown a focus on pursuit of pattern and practice lawsuits in court.
- The EEOC and other labor agencies' top 10 class action settlements recovered a combined **\$403 million** in 2022 (more than doubling the top 10 settlements in 2021).

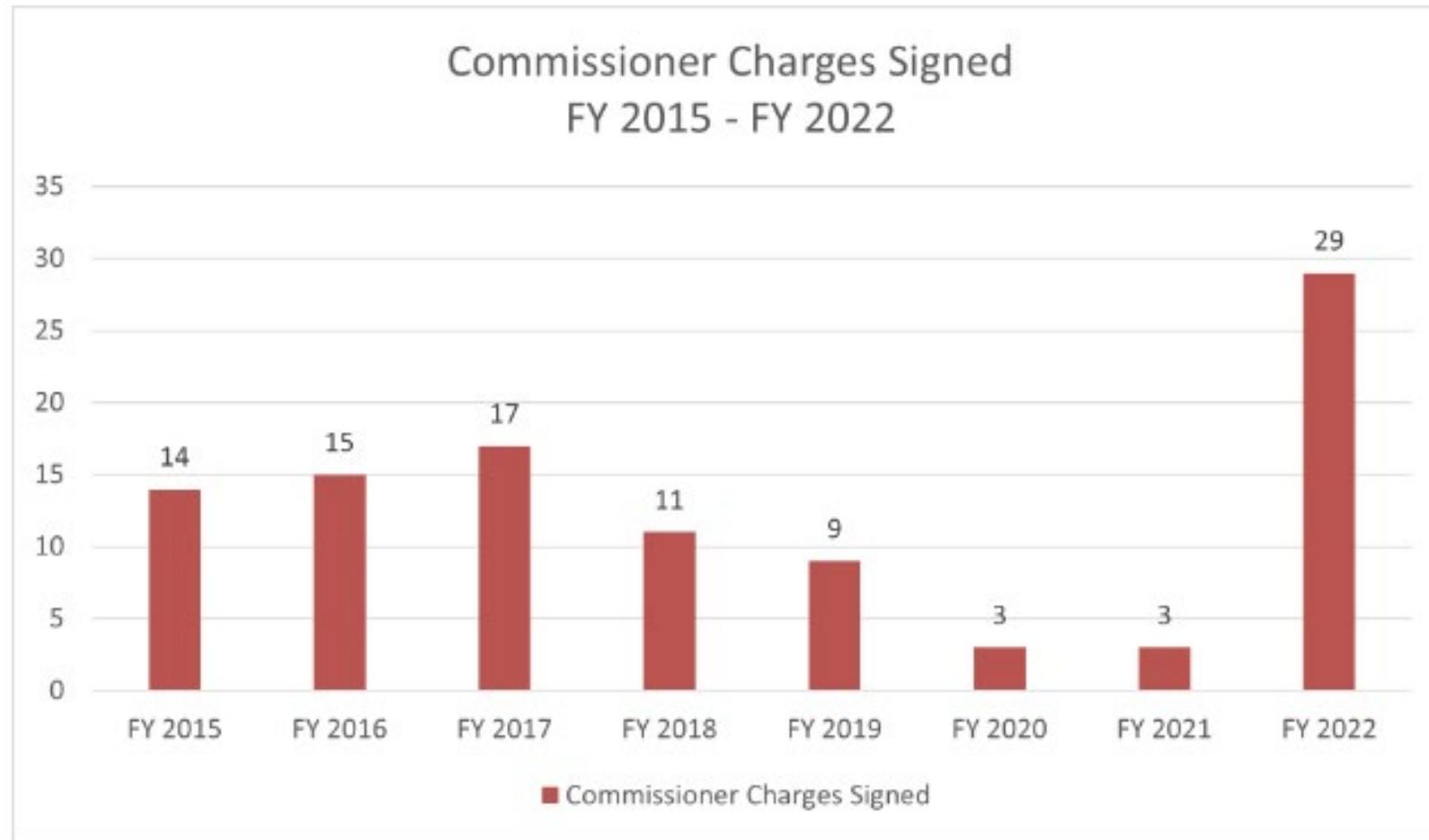






# EEOC Commissioner Charges

# EEOC Commissioner Charges



Source: [Commissioner Charges and Directed Investigations | U.S. Equal Employment Opportunity Commission \(eoc.gov\)](https://www.eeoc.gov/commissioner-charges-and-directed-investigations)

# EEOC Commissioner Charge Areas of Focus

- EEOC has shown a focus on:
  - Failure to provide religious accommodation
  - Sex and race discrimination
  - Failure to hire based on race, age, national origin, disability
  - Failure to promote
  - Retaliation against workers who complain about sexual harassment



# Commissioner Charge Investigations



- EEOC can initiate a charge to investigate a company/organization.
  - These investigations trend toward investigating allegations of systemic/companywide discrimination claims.
  - **No “reasonable cause”** needed to initiate these investigations.
- Commissioner charge investigations are confidential to the public, but the EEOC uses this information as a basis for discovery to bring EEOC class action lawsuits.
  - Example: *EEOC v. Tesla Inc. (CA)*
- Settlements of Commissioner Charges often involve press coverage and monitoring





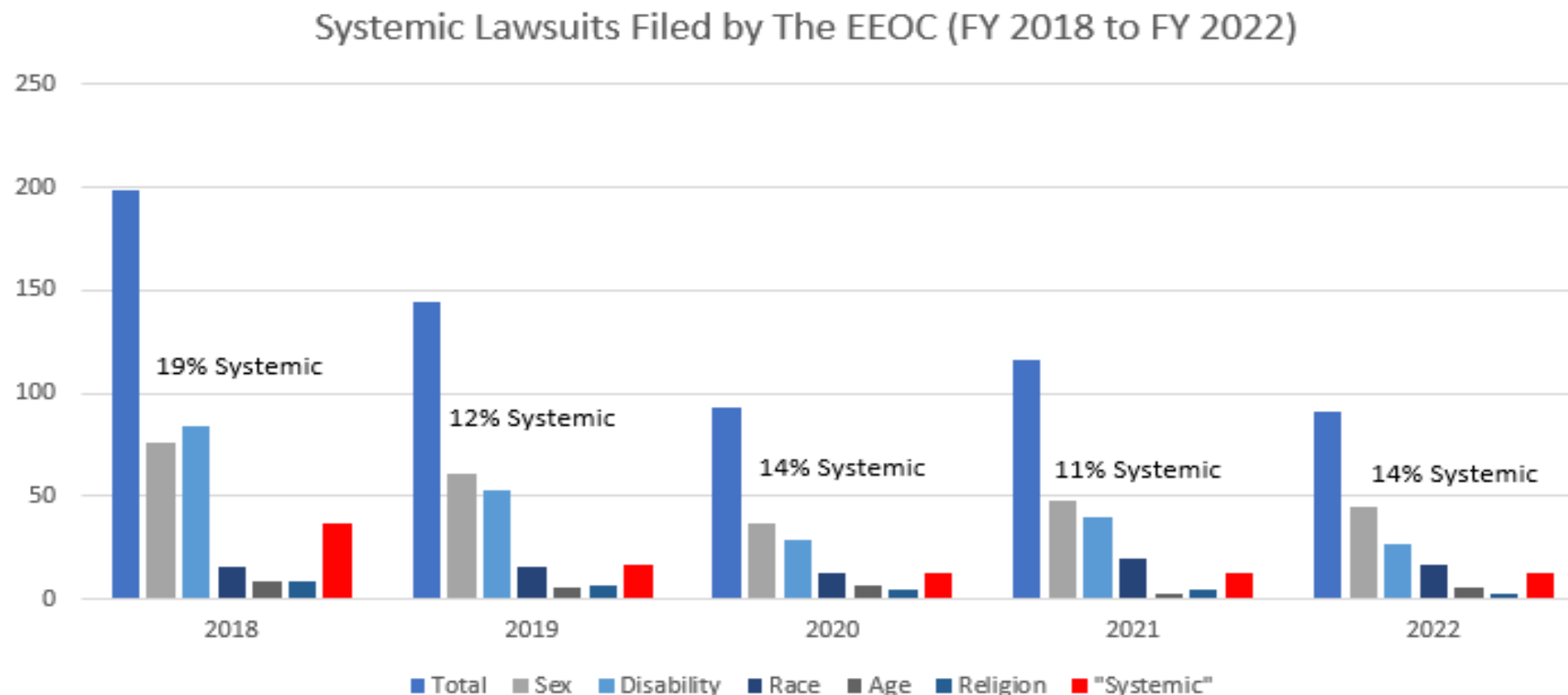


# COMMISSIONER CHARGES → LAWSUITS



# Systemic Lawsuits

Cases focused on alleged pattern, practice, or policy where discrimination is alleged to have a broad impact on an industry, profession, or geographic location



# Current, Prominent EEOC Class Action Lawsuits

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## ***EEOC v. Radiant Servs. Corp. and BaronHR LLC:***

- Class action brought against commercial laundry facility and national staffing agency, alleging race discrimination in hiring practices.
- This case began as a Commissioner Charge investigation.

## ***EEOC v. 'Murica, LLC:***

- “Systemic” class action lawsuit in which owner of restaurant/dancehall was accused of subjecting both female *and male* employees to a sexually hostile work environment.

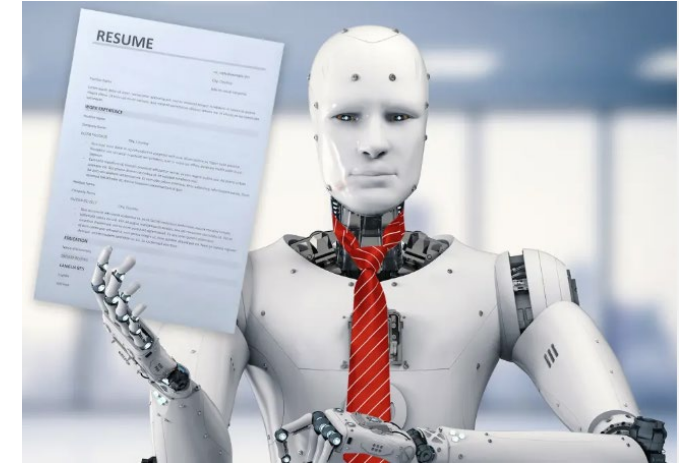


# EEOC: What's New and on the Horizon?



# EEOC Lawsuits: What's New and on the Horizon?

- **Artificial Intelligence: *EEOC v. iTutorGroup, Inc.***
  - First ever AI-based hiring case brought by the EEOC.
  - EEOC alleged that iTutorGroup's hiring software automatically rejected female applicants over age 55 and male applicants age 60 and older in violation of the Age Discrimination in Employment Act.
  - Settled in August 2023 for \$365,000.



- **More Religious Accommodation Lawsuits**
  - *EEOC v. Hank's Furniture*: EEOC filed its first lawsuit over an employer policy that failed to provide a religious exemption for the Covid-19 vaccine.
  - This litigation comes on the heels of the Supreme Court's decision in *Groff v. DeJoy*, which raised the bar for employers to deny a religious accommodation.

# EEOC: What's New and on the Horizon? (Continued)

- **EEOC Asserts Its Territory in Agency “Turf Wars”**

- EEOC has recently shown a willingness to prioritize its enforcement efforts over objections from state agencies.
- Notably, The EEOC and California’s Civil Rights Division both investigated Activision Blizzard.
- The EEOC sued Activision after the CRD, but the EEOC settled first for \$18 million, and included a broad consent decree against both federal and state law claims.
- The CRD has tried to block the settlement in court – to no avail so far.



- Last week, the EEOC announced a lawsuit against Tesla, but the CRD already has a lawsuit pending against Tesla concerning the same types of claims.





# State Agency and Private Actions



# State **Attorney General** Actions and Investigations: Trends



- States' Attorneys General are teaming up to take down bigger targets
  - Is public discourse (and public outrage) spurring AG investigations?
    - TikTok, Ticketmaster

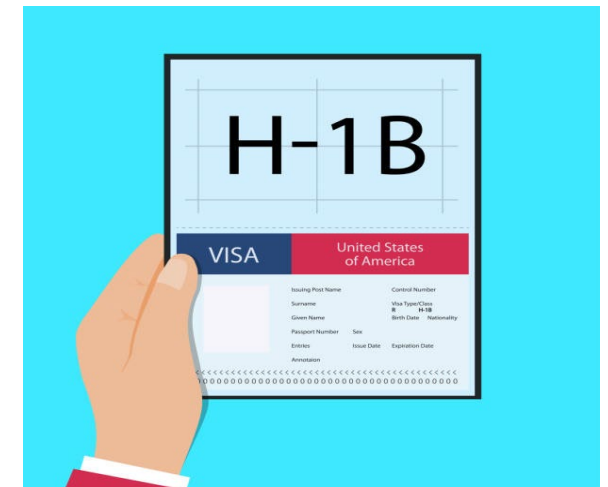
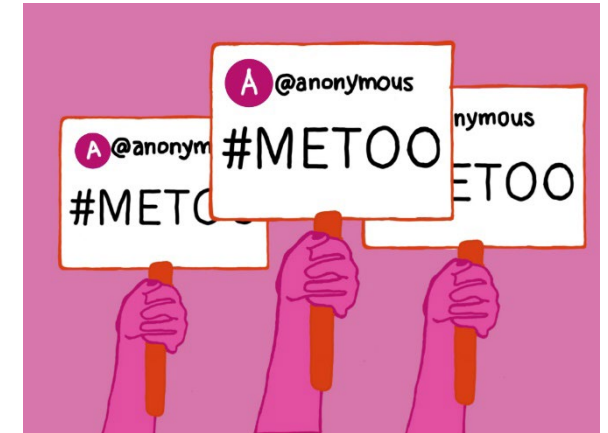
- AGs can be motivated by political issues and election cycles
  - AGs want to act on issues important to their voters with an eye towards election cycles
  - 13 AGs sent a letter to major corporations warning about their DEI programs
  - Coalition of 21 state AGs have issued subpoenas to asset managers regarding ESG investing
  - 15 state AGs issued a letter to Target regarding LGBTQ+ discrimination and harassment.
- A note of caution:
  - Investigatory subpoenas can have a *lengthy temporal scope*



# Attorney General Investigations: No One is Safe?

The AG coalitions are starting to turn their attention toward workplace issues

- Since the #MeToo movement, sex discrimination claims, harassment, and systemic workplace issues have been of paramount importance to voters.
- **Some recent examples:**
  - **California's** AG has instigated an “investigative sweep” of major employers’ compliance with protecting personal information of employees and applicants
  - **Washington** mushroom farm paid \$3.4m to settle gender and immigration status discrimination lawsuit brought by the state AG office.



# Attorney General Investigations: No One is Safe? (cont'd)

AGs are looking towards bigger, highly-publicized targets for workplace issues:

- CA and NY Attorneys Generals announced joint investigations into allegations regarding discrimination and workplace culture issues at a sports league in May 2023
  - Prior to this, in April 2022, six state attorneys general from MA, NY, IL, WA, OR, and MN announced they would investigate the same league.
- IL and NY Attorney Generals wrote an open letter in December 2022 to another league in connection with an independent investigation into incidents of sexual misconduct, harassment and abuses by coaches.





# Private Class Action Lawsuits: Areas to Watch

- Pay Equity Lawsuits and Settlements:



- ***Graham v. Vassar College (S.D.N.Y.)***: Three dozen female professors have signed onto a class action gender pay gap lawsuit. Vassar conducted a pay equity study in 2020 that confirmed the existence of a gendered pay gap, but the professors allege nothing changed.
- ***Chen-Oster v. Goldman Sachs, Inc. (S.D.N.Y.)***: This 13-year-old gender pay and promotion discrimination lawsuit brought by 2800 female associates and vice presidents just settled for **\$215 million** (and additional requirements on Goldman to conduct promotion practice analyses and pay equity studies).

# Private Class Action Lawsuits: Areas to Watch (cont'd)

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- **Biometric Data Lawsuits in Illinois**



- Many employers use biometric data in their time keeping practices; suits are on the rise in Illinois
- In an ongoing case against White Castle brought by a class of 9,500 workers who were required to clock in and out by scanning their fingerprint, the fast-food chain estimates that it could be liable for over **\$17 billion in damages**

- **Reverse Discrimination Lawsuits – Fallout from *Students for Fair Admission?***



# DEI: The New Landscape for Employers



# DEI: *SFFA/Harvard* Supreme Court Decision and its Implications

- The decision effectively eliminated the use of affirmative action programs in higher education admissions.
- Lawyers and advocacy groups have already started using this as precedent to attack DEI programs in the private employer sector and as ammunition for reverse discrimination claims.
- Risks associated with DEI programming has increased dramatically.



# EEOC: What's New and on the Horizon? (cont'd)

## Conflicting positions on DEI Policies?

- After the release of *SFFA v. Harvard*, EEOC Chair Charlotte A. Burrows released an official statement that the decision does “not address employer efforts to foster diverse and inclusive workforces” and stated, “It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”
- However, Commissioner Andrea Lucas issued an opinion article to the contrary, stating that the risks of running “poorly structured voluntary diversity programs” are even higher post-*SFFA*.



# DEI: New Litigation Trends After *SFFA/Harvard* Decision

## “Ex-Morgan Stanley executive alleges reverse discrimination in lawsuit”

He said he was unfairly terminated in the interest of Morgan Stanley's diversity and inclusion goals

Source: [Ex-Morgan Stanley executive alleges reverse discrimination in lawsuit](#)  
- The Washington Post

## “Discrimination Against White Job Applicants And Employees, Or Is It Racial Equity?”

Source: [White Job Applicants and Workers Suing For Reverse Discrimination \(forbes.com\)](#)

- *SFFA/Harvard* represents a new opportunity for social activism groups to use this decision to start directly attacking diversity hiring initiatives and DEI programs in the private sector.
- Law Firms *Perkins Coie* and *Morrison Foerster* [sued over their DEI programs](#), which are fellowships aimed at hiring diverse candidates.
- [Lawsuit](#) against a [VC fund](#) that supports black-women owned businesses. A federal Judge just denied a preliminary injunction that would block the fund from considering grants only from businesses lead by black women pending litigation.
- *Meyersburg v. Morgan Stanley & Co. LLC*: Meyersburg (white male) alleged in New York federal court that he was unfairly terminated from his role as managing director due to DEI initiatives. He brings Section 1981, NYSHRL and NYCHRL sex and race discrimination claims.
- *Bradley v. Gannett Co. (E.D. Va.)*: Major newspaper publishing company was recently sued by five white male employees who allege the company is favoring minority employees in its promotion practices.
- *Phillips v. Starbucks (D.N.J.)*: Jury awarded \$25.6m to a Starbucks manager who alleged she and other white employees were punished as part of a corporate response to a workplace incident they allegedly weren't involved in.

# DEI Programming: Risk Analysis

DEI Initiative	Risk	Description
<i>Monetary Incentives for Diverse Employment Actions</i>	High	Compensation or other monetary incentive practices directly linked to consideration of race, ethnicity and/or gender in decision-making.
<i>Voluntary Affirmative Action Plans</i>	High	Explicit consideration of race, gender or other protected characteristics in hiring and other employment decisions.
<i>Diversity Fellowship or Internship Programs</i>	High	These can be considered as akin to affirmative action plans when open only to diverse candidates.
<i>Diversity Employment Requirements</i>	High	Requirement that an organization employ a certain number or percentage of diverse individuals.
<i>Diverse Mentorship and/or Sponsorship Programming</i>	Medium	Mentorship or sponsorship programs open only to diverse candidates which pairs employees from diverse backgrounds with a mentor or sponsor.
<i>Workforce Diversity Hiring Goals</i>	Medium	Specific goals listed with the aim of increasing representation of diverse employees.
<i>Commitment to measures resulting in increased diverse hiring</i>	Low	Include a variety of employer initiatives, including but not limited to: posting all vacancies and promotions; ensuring posts are easily searchable; increasing recruitment efforts at HBCUs; and increasing number of diversity candidates interviewed.
<i>Supporting Affinity Groups</i>	Low	Supporting the formation and continuation of affinity groups for minorities but should ensure that groups do not limit membership to the demographic the group intends to support.



# Options for Navigating DEI in the New Landscape



- Evaluation of risk tolerance.
- Balancing legal compliance with respect for organizational values.
- Reconsider use of monetary and other incentives to increase diversity.
- Expansion of current mentoring programs.
- Review current DEI strategies and public facing documents.
- New areas for DEI exploration:
  - Socioeconomic status
  - First generation/unique circumstances
  - Single family household\*
  - Geographic diversity (zip codes, urban/rural)
  - Commitment to culture/diversity
  - Partnerships with colleges, especially those that support underserved communities



# The Supreme Court's Past Term

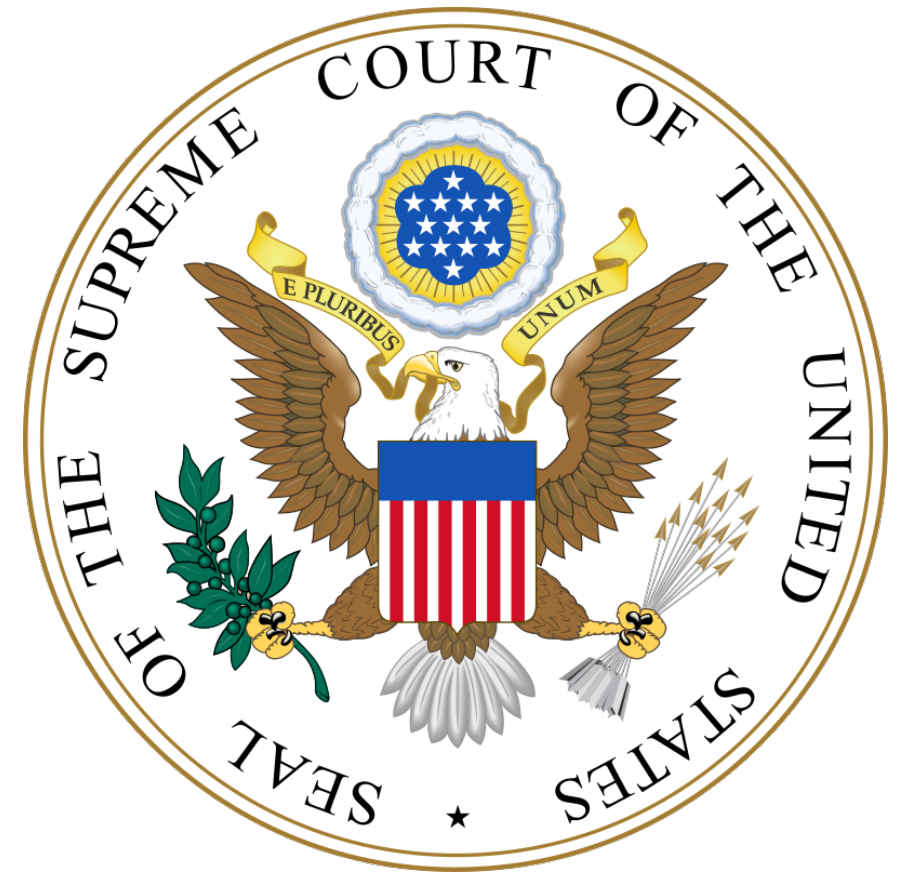
- **What we saw last term:**
  - **Arbitration**
  - *Coinbase v. Bielski*: An immediate appeal from a denial of a motion to compel arbitration automatically stays a litigation in federal district court
  - **DEI and Civil Rights**
  - *303 Creative LLC v. Elenis*: Website business in Colorado could not be compelled by state's anti-discrimination statute to create a wedding website for a same-sex couple, which went against the business owner's religious beliefs.
  - *SFFA v. Harvard*: Effectively eliminated college and universities' ability to use affirmative action programs
  - **Expanding Forums**
  - *Mallory v. Norfolk Southern Railway Co.*: Court held that a company registered to do business in Pennsylvania consents to personal jurisdiction there, even where the company is not a Pennsylvania company and where the relevant conduct did not occur there



# The Supreme Court: What is Next on the Horizon

## More Expansive Discrimination Claims

- ***Muldrow v. City of St. Louis, Missouri, No. 22-193:***  
Court will weigh in on whether a non-requested transfer to a different role, with the same pay but different responsibilities and benefits, constitutes an adverse employment action in a Title VII sex discrimination claim.
- ***Murray v. UBS Securities LLC, No. 22-660:***  
Court will determine whether under the Sarbanes-Oxley act a whistleblower must prove his employer acted with a “retaliatory intent” as part of his case in chief or whether that is part of an affirmative defense on which the employer bears the burden of proof.



# The Supreme Court: What is Next on the Horizon (cont'd)

## More Arbitration:

- ***Smith v. Spirrizzi, No. 22-1218***: Issue is whether the FAA requires district courts to stay a lawsuit pending arbitration or whether they have discretion to dismiss when all claims are subject to arbitration, and therefore dismissal. **Cert pending.**
- ***Bissonnette v. LePage Bakeries Park St., LLC, No. 23-51***: Consider whether an exemption from federal arbitration law for workers engaged in interstate commerce can apply only to someone who works for a transportation company.
  - Petitioners allege that they were misclassified as independent contractors and denied wage and hour protects such as overtime pay.
- ***Coinbase v. Suski, No. 23-3***: Whether, where parties enter into an arbitration agreement with a delegation clause, an arbitrator or a court should decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation. **Cert pending.**
- ***Argent Trust Co. v. Harrison, No. 23-30***: Whether a participant in an ERISA-governed plan who asserts a statutory claim under that statute can be compelled, pursuant to binding arbitration provision, to submit his claims to individual arbitration. **Cert pending.**







# Questions?

# Biographies

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**Elise Bloom**  
Partner, Co-Head Class & Collective  
Actions Group

- **Elise M. Bloom** is widely hailed as one of the nation's top employment lawyers and one of the most creative and effective discrimination, wage and hour, class/collective action trial lawyers. She is particularly well-known for handling high profile, bet-the-company matters on behalf of significant national employers. Elise is the former co-chair of Proskauer's Labor & Employment Department and currently a co-head of the Class & Collective Actions Group.



**Mark Batten**  
Partner, Co-Head Class & Collective Actions Group

- **Mark W. Batten** represents employers nationwide at all stages of complex employment litigation, including class and collective actions on wage and hour matters and discrimination claims. Ranked by Chambers USA, Mark is hailed as “a fabulous lawyer, handling interesting and complex cases.” Clients “highly recommend him to anyone seeking litigation counsel in the Boston area,” as well as note “he is responsive, pragmatic and team-oriented, and offers excellent legal advice.” Mark is current a co-head of the Class & Collective Actions Group.

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