

Tom's Top 10



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Pregnant Workers Fairness Act

Old Law

- *Young v. UPS*, 575 U.S. 206 (2015)
 - “Pregnancy Discrimination Act”
 - Pregnant driver with a 20 lb. lifting restriction – essential job function
 - Driver argued that she should receive an accommodation to remove the essential job function
 - Supreme Court said that worker was not entitled to greater accommodations than similarly situated persons with disabilities

Pregnant Worker Accommodations

- PWFA
 - “Pregnant Workers Fairness Act” (eff. 6/27/23)
 - Amends Title VII – Employers with 15 or more employees
 - Requires reasonable accommodation for known limitations related to pregnancy, childbirth or related medical conditions
 - Exception: Undue Hardship
 - Similar analysis to ADA, but may have to temporarily eliminate an essential job function
 - Accommodations may include light duty, eating or drinking at work stations, flexible hours, frequent bathroom breaks, closer parking, etc.
 - Interactive process obligations

Pregnant Worker Accommodations

Employers cannot:

- Require employee to accept accommodation without interactive process discussion
- Deny job/employment opportunities based on need for a reasonable accommodation
- Require employee to take leave if another reasonable accommodation allows employee to continue working.
- Retaliate against an individual for reporting/opposing unlawful discrimination
- Interfere with any individual's rights under the PWFA

Pregnant Worker Accommodations

- **Healthy workers with normal pregnancies are entitled to accommodations.**
- **“Pregnancy, childbirth, or related medical conditions” include:**
 - Current, past, and potential pregnancy
 - Lactation
 - Use of birth control
 - Menstruation
 - Miscarriages and abortion
- **Examples of reasonable accommodations:** Ability to sit down when needed; drink water; closer parking; flexible hours; bigger uniforms/safety apparel; additional restroom breaks; exempt from strenuous activities, etc.

Pregnant Employees

FMLA Protections

- Provides job-protected leave for prenatal care or when an expecting mother is unable to work because of pregnancy
- Provides a right to unpaid, job-protected leave for the baby's birth or the placement of a child with adoptive or foster parents.
Includes “bonding time”
- Enforced by the US DOL Wage and Hour Division

PWFA Protections

- Covered employers must provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions unless the accommodation will cause the employer an undue hardship.
- Enforced by the EEOC as of June 27, 2023

Nursing Mothers

- PUMP Act
 - “Providing Urgent Maternal Protections for Nursing Mothers” (eff. 12/30/22)
 - Extends nursing breaks to exempt employees as well as non-exempt
 - Up to 1 year after birth of child
 - Must provide:
 - Reasonable break time to express milk (unpaid if non-exempt)
 - Private location shielded from public view (can be a temporary space created when need arises)
 - NOT a bathroom

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Religious Discrimination

SCOTUS + Religious Accommodations

- **Groff v. DeJoy**
 - Christian postal worker sued USPS
 - Asked not to work Sundays
 - USPS offered to permit shift swapping
 - Problem: Sometimes employees wouldn't swap with him. If no one would swap, Groff didn't work. USPS fired him
 - Groff argued burden of proving "undue hardship" under Title VII was too low
- **Holding:** To deny religious accommodation, must show burden of granting accommodation would result in substantial increased costs in relation to conduct of particular business

SCOTUS + Religious Accommodations

- So what?
 - No more “*de minimis*” standard
 - Rethink existing protocols for religious accommodations
- Lack of clarity: Too soon to know what the new standard means
- Worthwhile to educate managers and supervisors
- Direct accommodation requests to HR

Religious Accommodation Standard

- **New standard:** “substantial increased costs in relation to the conduct of the particular business:
 - Hardship is more than mere “burden”
 - Must rise to “excessive” or “unjustifiable” level
 - BUT – slightly less burdensome than ADA “significant difficulty or expense” standard

SCOTUS + Religious Accommodations

- Employee A applies for a job
- During interview scheduling, Employee A asks for interviews to be scheduled later in the day because she's fasting for Ramadan
- Hiring manager isn't available later in the day because she's traveling internationally
- Eager to make a hiring decision, the company hires a candidate before interviewing Employee A
- Thoughts?

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Separation and Severance Agreements

NLRB: Severance Agreements

- Opposition to non-disparagement provisions & confidentiality clauses in separation/settlement agreements
 - Unless...made very clear they maintain Section 7 rights
 - What language is needed? Unclear
 - Is a disclaimer enough? Unclear

NLRB: Severance Agreements

- (Biden) Board (*McLaren McComb*): Conditioning the benefits under a severance agreement on forfeiting statutory rights has a reasonable tendency of interfering with, restraining, or coercing the employee's exercise of those rights.
 - Language of severance agreement must be analyzed to determine if it violates the NLRA
 - Simply offering agreements with overly restrictive language is an unfair labor practice.
 - **This is true irrespective of whether the employer is unionized**

NLRB GC Guidance on Severance Agreements

- **Why should the circumstances surrounding the proffer not necessarily matter?**
 - Surrounding circumstances do not matter when objectively analyzing whether a provision is facially lawful or not; employer has no interest in maintaining language
- **What if an employee does not sign the severance agreement?**
 - Whether an employee actually signed the severance agreement is irrelevant for determining a violation
- **Does the decision apply retroactively?**
 - Yes
- **Would the entire severance agreement be null and void if there is just one overbroad provision?**
 - Regions encouraged to void provisions that are not compliant as opposed to voiding the entire severance agreement, but with the caveat that it is necessary to “review the facts of each and every case” individually

NLRB GC Guidance on Severance Agreements

- **The law set forth in *McLaren Macomb* could be extended to invalidate non-compete clauses, non-solicitation clauses, and post employment cooperation clauses.**
 - According to NLRB General Counsel Jennifer Abruzzo
- **Does the decision apply retroactively?**
 - Yes, according to NLRB General Counsel Jennifer Abruzzo
- ***Harper Holdings, LLC*, filed in Cincinnati, is the first case to challenge the validity of a non-compete agreement. Stay tuned.**

New General Counsel Sets Agenda

- NLRB is politically charged
- General Counsel speaks through Memoranda e.g., 23-08
- Look for reversal of prior board directives
- Impacts non-union employers as well as union employers

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Union Elections/Petitions

New “Ambush Election” NLRB Process

- Cemex Construction Materials Pacific, LLC and IBT, 372 NLRB, No. 130 (Aug. 25, 2023).



New NLRB Election Process

1. Union informs Employer that it has majority support ($\geq 50\%+1$ signed cards) and demands recognition / bargaining
2. Employer choice:
 - a) Recognize the Union and begin bargaining; or
 - b) Within 2 weeks of Union's demand, file an NLRB Election Petition (RM Petition)

New NLRB Election Process

- New rule (eff. 12/26/23) ditches 20-day waiting period before election
- Directs officials to schedule votes for “the earliest date practicable” after election petitions are approved
 - Decisions regarding individual inclusion in bargaining unit will be determined *after election*

Impact: Union will have much more time to campaign than you

New NLRB Election Process

- NO ULP during “critical period” – between filing of Petition and end of election
- What happens if the Employer commits ULPs during critical period?
 - NLRB decides between a bargaining order or an election rerun
 - Election will be set aside unless violation(s)... “are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results”

Union Organizing

- Even the best companies have activity
- Activity can be unexpected
- Employee concerns constantly change
- Business environments will change
- Report all activity to HR/legal for support

Union Organizing

Important Take-Aways:

- Know TIPS/FOE; Do's and don'ts
- Train supervisors and above
- Be aware of what's going on
- Address card signing ASAP
- Stay tuned: New process could make its way to SCOTUS

Union Organizing

Union Communication Guidance

CANNOT ENGAGE IN



Threats

It is **illegal** to threaten employees because of their support for a union.



Interrogation

It is **illegal** to question employees about their alignment with union messages or ask them about the alignment of their peers.



Promises

It is **illegal** to promise or grant special favors or benefits in exchange for a vote for the company instead of a vote for the union.



Surveillance

It is **illegal** to engage in any surveillance or to spy on lawful union activity

CAN SHARE



Facts

It is **legal** to share publicly available facts from the National Labor Relations Act, the website unionfacts.com and other reputable sources.



Opinions

It is **legal** to share why you feel a union is not needed for employees at your worksite. Use your company's position statement and the aforementioned TIPS as your guide.



Examples

It is **legal** to share real examples and stories of others to highlight why a union might not be the right choice.

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FLSA – Wage and Hour

FLSA Proposed OT Rule

- DOL unveils new rule to raise overtime threshold
 - Proposed rule increases minimum annual salary **from \$35,568 to \$55,000**
 - Effect: Millions of exempt workers will no longer be exempt even if duties tests are met
- 60 day comment period after rule was published (Aug. 30th)

Issues

- Re-evaluate positions
- Big adjustment when former exempt employees are required to be timekeepers
- Significant impact for small employers, non-profits, hospitality and retail
- Doesn't take into account market factors and cost of living influences.
- Duties tests remain in place



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DEI

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (2023)

- Holding is limited to college admissions
- However, serves as a signal of SCOTUS's view of DEI and affirmative action policies of private employers
- DEI programs that encourage representation and participation of diverse groups of people remain viable
- Poorly structured voluntary diversity programs pose both legal and practical risks for companies
- Programs that create quotas or race-based hiring decision have always been and continue to be unlawful

LGBTQIA / Gender Identity

- ***Bostock v. Clayton County (2020)***
 - US Supreme Court rules that Title VII “sex” discrimination prohibits discrimination on the basis of sexual orientation and/or gender identity
 - These are now protected class statuses

EEOC – Gender Identity

- Evidence of gender identity discrimination includes:
 - Repeated and deliberate use of a wrong name
 - Repeated and deliberate use of a wrong gender pronoun
 - Shaming an employee not to act or dress in a way that reflects the sex the employee was assigned at birth
 - Not allowing an employee to use a restroom associated with their gender identity
 - Other offensive comments or conduct related to gender identity

Case Law

- *State of Texas v. EEOC* Case No. 2:21-cv-00194-Z (10/1/2022)
 - Texas Federal District Court struck down EEOC guidance holding that the EEOC improperly interpreted *Bostock v. Clayton County, Ga*, 140 S. Ct. 1731 (2020), the landmark case prohibiting job discrimination based on sexual orientation or gender identity.
 - While the law protects against discrimination, the Texas federal court does not protect the “correlated conduct.”
 - Stay tuned

LGBTQIA / Gender Identity

- Over 65 cases in two years interpreting *Bostock* ruling
- Many are “direct evidence” cases: Meaning decision-maker expressly identified gender identity as the basis for adverse action or made derogatory comments about worker’s identity

Gender Identity

- Accommodation issues on basis of gender identity / expression:
 - Bathroom use
 - Locker rooms
 - Pronouns/honorifics
- **OSHA: Access to appropriate bathroom is a workplace safety issue**
- **Pronouns/honorifics: Generally more about respect**

Gender Identity

- **OSHA: Guide to Restroom Access for Transgender Workers:**
 - All employees should have access to restrooms that correspond to their gender identity
 - Best practices may include various options:
 - Single occupancy gender-neutral (unisex) facilities
 - Multiple-occupant, gender-neutral restroom with lockable, single-occupant stalls

Gender Identity

- Send clear message of respect.
 - Open communication with impacted employee
 - Allow for grace
 - Be on guard for intentional harassment/malicious treatment



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OSHA

Reporting Requirements.

- New Rule: Effective January 1, 2024
- Amends regulations to require electronic reporting of certain information
- Requires employers in “high-hazard industries” with 100 or more employees to submit both their OSHA Form 300 and Form 301 electronically using OSHA's Injury Tracking Application (ITA)
- List of “high hazard industries” contained in Appendix B
- Broader than you would think

National Emphasis Program

- Comprehensive Safety Inspection Programs
- Randomly selected
- Employers who have warehousing and distribution center operations, mail/postal processing distribution centers, certain high injury rate retail establishments
- Inspections will focus on power vehicle operations, material handling and storage, walking/working surfaces, means of egress, and fire protection
- Heat hazards will also be an area of focus

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I-9 Reporting

New I-9 Form

- New streamlined and shortened I-9 form became available beginning on August 1st
- The new form must be used after October 31, 2023
- Use of the old form will subject employer to penalties
- Reminder: COVID-19 flexibilities to the Form I-9 requirements ended on July 31st and are expected to reach compliance by physically inspecting original identity and employment eligibility documents for all individuals whose documents were inspected remotely

Remote Verification Process

- Only available to employers enrolled in E-Verify
- Required training for all E-Verify managers and users

New Procedure

- Offer (but not require) the new procedure
- Comply with E-Verify requirements
- Receive and retain clear and legible copies of documents presented to complete Form I-9 (review for authenticity)
- Conduct a live video interaction with the individual – confirm authenticity
- Complete the Form I-9 indicating that an alternate procedure was used to examine documentation to complete Section 2 or for reverification

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Expansion of Paid Leave

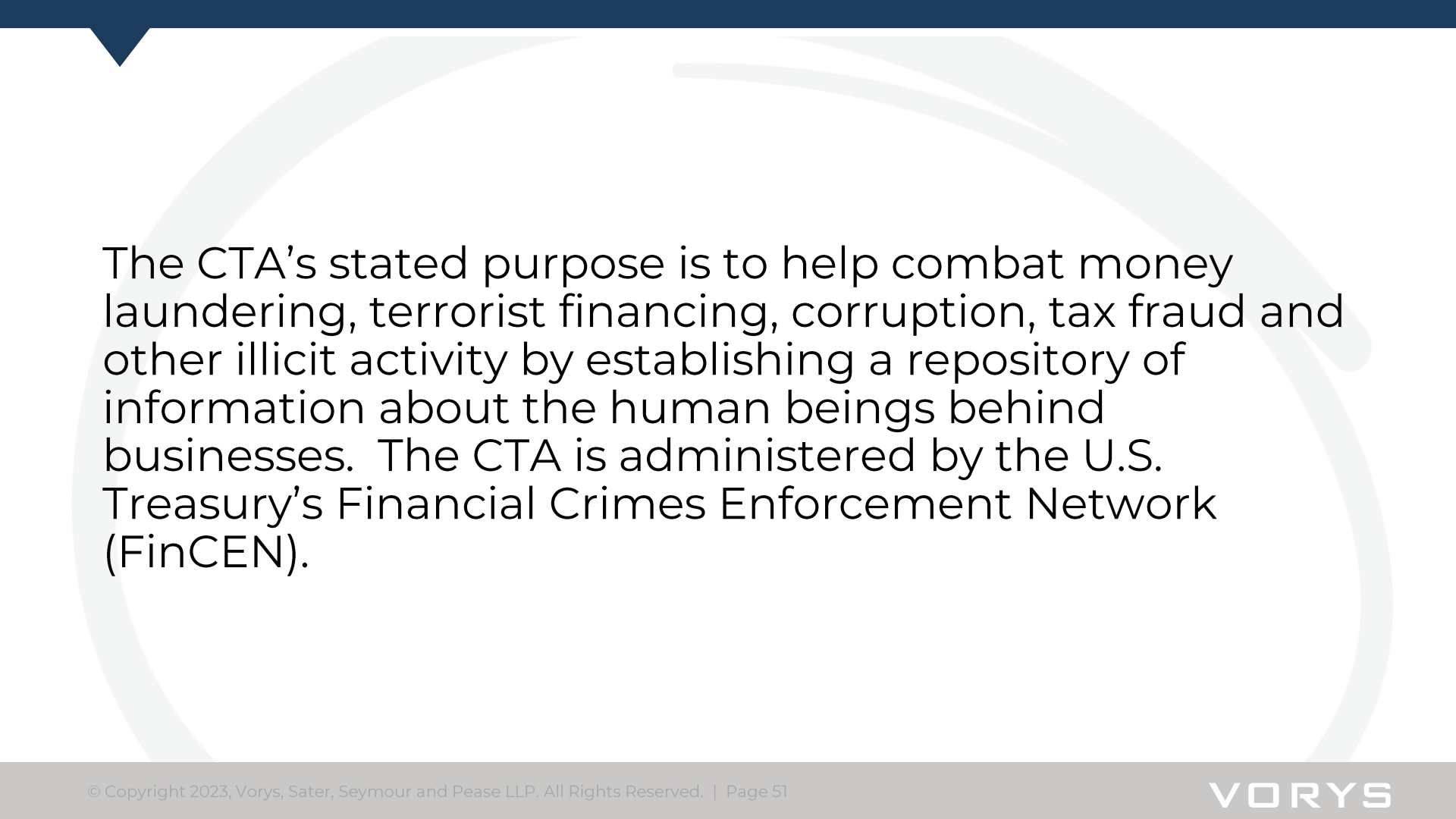
Keep Your Eye on the Trend

- Availability of paid family and sick leave increased in 2023
- State and local laws
- Examples of local municipalities, LA, Berkley, Washington DC, Chicago, Cook County, Bloomington, Bernalillo County, NM, New York City, Westchester County, Portland, Seattle
- Types of leave – Family leave, sick leave, organ donor leave, domestic violence leave, sexual abuse leave, reproductive loss leave, etc.

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Corporate Transparency Act

The CTA will require millions of companies to report to the federal government the identity and personal information of individuals who directly or indirectly exercise substantial control over the company or directly or indirectly own or control 25% or more of the company.



The CTA's stated purpose is to help combat money laundering, terrorist financing, corruption, tax fraud and other illicit activity by establishing a repository of information about the human beings behind businesses. The CTA is administered by the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN).

WHO

Practically all business entities will be subject to the CTA reporting requirements, unless an exemption applies.

WHO

- Including:
 - U.S. entities created by filing a document with a secretary of state—like corporations, LLCs, limited partnerships, LLPs and business trusts
 - AND non-U.S. entities registered to transact business in a U.S. state by making a filing with a secretary of state
- But excluding business arrangements without a secretary of state filing:
 - Typical U.S. trusts
 - U.S. general partnerships

WHO (cont'd)

- Who's exempt?
 - 23 categories of exempt companies
 - Companies *already* subject to state or federal reporting/regulatory regimes
 - So-called “large operating companies”
 - Companies exempted for some other policy reason

WHO (cont'd)

- Examples of exempt companies*:
 - SEC reporting companies
 - Highly regulated companies—such as banks, investment advisors, broker/dealers, investment companies, insurance companies, accounting firms, utilities
 - “Large operating companies”—at least 20 US employees, \$5m in gross receipts or sales in the previous year (including tax-consolidated affiliates) and an operating presence at a physical office within the US
 - “Subsidiaries” of many types of exempt companies—controlled or wholly owned, directly or indirectly
 - Tax-exempt entities
 - Governmental entities
 - Inactive entities that were in existence prior to January 1, 2020

*All exemptions are subject to the detailed criteria in the regulations.

WHAT

- Bottom line:
 - Non-exempt companies will be required to disclose to the US Treasury’s Financial Crimes Enforcement Network (FinCEN)--and keep current--information about the company and its “Beneficial Owners”
 - There are civil and criminal penalties, including steep and escalating fines (\$500 per day up to \$10,000 per violation) and imprisonment for up to two years, for failure to comply

WHAT (cont'd)

- Who's a Beneficial Owner?
 - Those individuals (meaning the human beings, not the legal entities) who:
 - Exercise “substantial control” over the reporting company (*directly or indirectly*) OR
 - Own or control 25% or more of the “ownership interests” of the reporting company (*directly or indirectly*)

WHAT (cont'd)

- **The “control” prong of Beneficial Owners--What counts as “substantial control”?**
 - Any “**senior officer**”—such as president, CEO, COO, CFO or general counsel
 - Authority to appoint or remove any senior officer or a majority of the governing board
 - Authority to direct or determine, or exercise substantial **influence over, important decisions** the company makes (the regulation lists particular types of “important decisions”)
 - OR “any other form of substantial control”—**(so much for a bright line test!)**

WHAT (cont'd)

- What Company information is required to be reported?:
 - Name and trade names
 - Street address of principal place of business
 - Jurisdiction of organization
 - Taxpayer identification number

WHAT (cont'd)

- What Beneficial Owner or company Applicant information is required to be reported?:
 - Name, date of birth, address (typically the residence address)
 - Unique identifying number (such as a driver's license or passport), and a copy of the applicable document
- Special rule for upstream exempt entities
 - If an exempt entity has a direct or indirect ownership interest in a company, and a person is a Beneficial Owner of the company solely by virtue of the person's ownership interest in the exempt entity, then the report may include the name of the exempt entity instead of the personal information about the person
 - Other scenarios—**upshot: Gotta read the rules**

WHAT (cont'd)

- What's the deal with FinCEN IDs?
 - A person may obtain their own FinCEN ID# by filing the applicable information with FinCEN (the final application form is not yet available)
 - A company may report a Beneficial Owner's or Applicant's FinCEN ID# in lieu of the detailed personal information otherwise required
 - Using FinCEN IDs for entities in the ownership chain (this topic remains open, subject to **proposed** regs):
 - A reporting company receives its own FinCEN ID# upon filing its initial report
 - Under certain limited circumstances: If an entity with its own FinCEN ID# has a direct or indirect ownership interest in a reporting company, and a person is a Beneficial Owner of the reporting company solely by virtue of the person's interest in the entity with its own FinCEN ID#, then the reporting company may report the other entity's FinCEN ID# instead of the personal information about the person
- **TIP:** Many investors and company Applicants should obtain a FinCEN ID#, to simplify the filing and updating process and to reduce the sharing of sensitive personal information.

WHAT (cont'd)

- Are real-time updates for changes in Beneficial Owner information mandated? Yes!
 - Changes in Beneficial Owners can be due to:
 - Issuances or redemptions of ownership interests (direct or indirect)
 - Transfers of ownership (direct or indirect)
 - Voluntarily, or by operation of law (such as by death, divorce, bankruptcy, incapacity, when a minor child reaches the age of majority, changes of trustees or beneficiaries of trusts, distributions by trusts, dissolutions of entity owners, etc.)
 - Changes in senior officers and board members of the company
 - Changes in the persons controlling entities that in turn control the reporting company
 - Changes to the information or the identifying document previously submitted
 - A company that formerly reported becoming exempt from the reporting requirements

WHERE

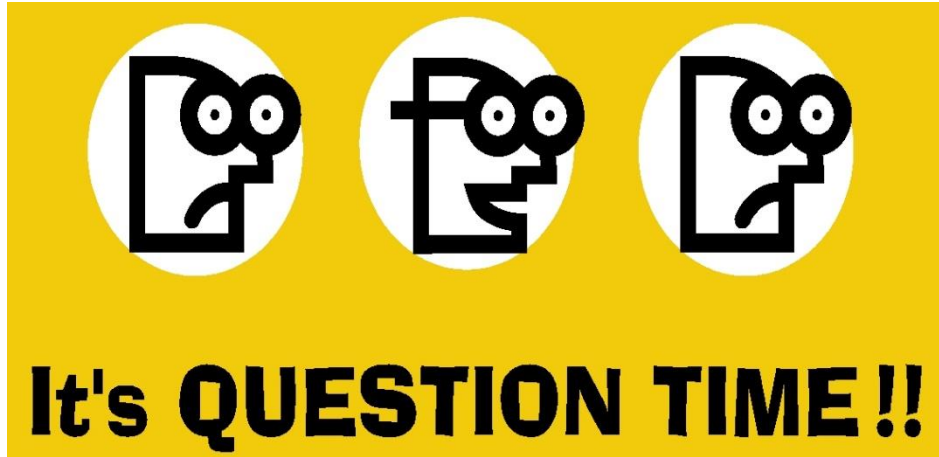
- CTA reports are filed with FinCEN
- FinCEN currently is designing and building a new IT system called the Beneficial Ownership Secure System (BOSS) to house CTA reports
 - BOSS is not yet available, and CTA reports will not be accepted prior to January 1, 2024

WHEN

- Deadlines for CTA reporting requirements:
 - Reporting begins January 1, 2024
 - Companies created or registered before January 1, 2024 will have until January 1, 2025 to file their initial reports
 - Companies created or registered on or after January 1, 2024 will have 30 days after receiving notice of their creation or registration to file their initial reports
 - Companies will have 30 days to report changes to the information in their previously filed reports and must correct inaccurate information in previously filed reports within 30 days of when the company becomes aware or has reason to know of the inaccuracy of information in earlier reports
 - Companies that were exempt but no longer meet the exemption criteria will have 30 days after the date they no longer meet the exemption to file a report
 - Individuals with FinCEN IDs will have 30 days to report changes to the information in their previously filed application and must correct inaccurate information in a previously filed application within 30 days of when the individual becomes aware or has reason to know of the inaccuracy of information in the filing
 - The regulations address other scenarios

RESOURCES

- FinCEN CTA website: <https://www.fincen.gov/boi>
- Regulations (proposed and final) and accompanying releases, FAQs and other notices and alerts are available on the FinCEN CTA website
- CTA citation: Corporate Transparency Act, Title LXIV of the 2021 National Defense Authorization Act, Public Law 116-283 (January 1, 2021)
- Small Entity Compliance Guide—Beneficial Ownership Information Reporting Requirements, published by FinCEN (version 1.0, September 2023); available on the FinCEN CTA website
- The Corporate Transparency Act Compliance Guide—A Guide for Lawyers, Accountants, and Business Owners, 2023 Edition, Jonathan B. Wilson (Matthew Bender)



Thank You



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