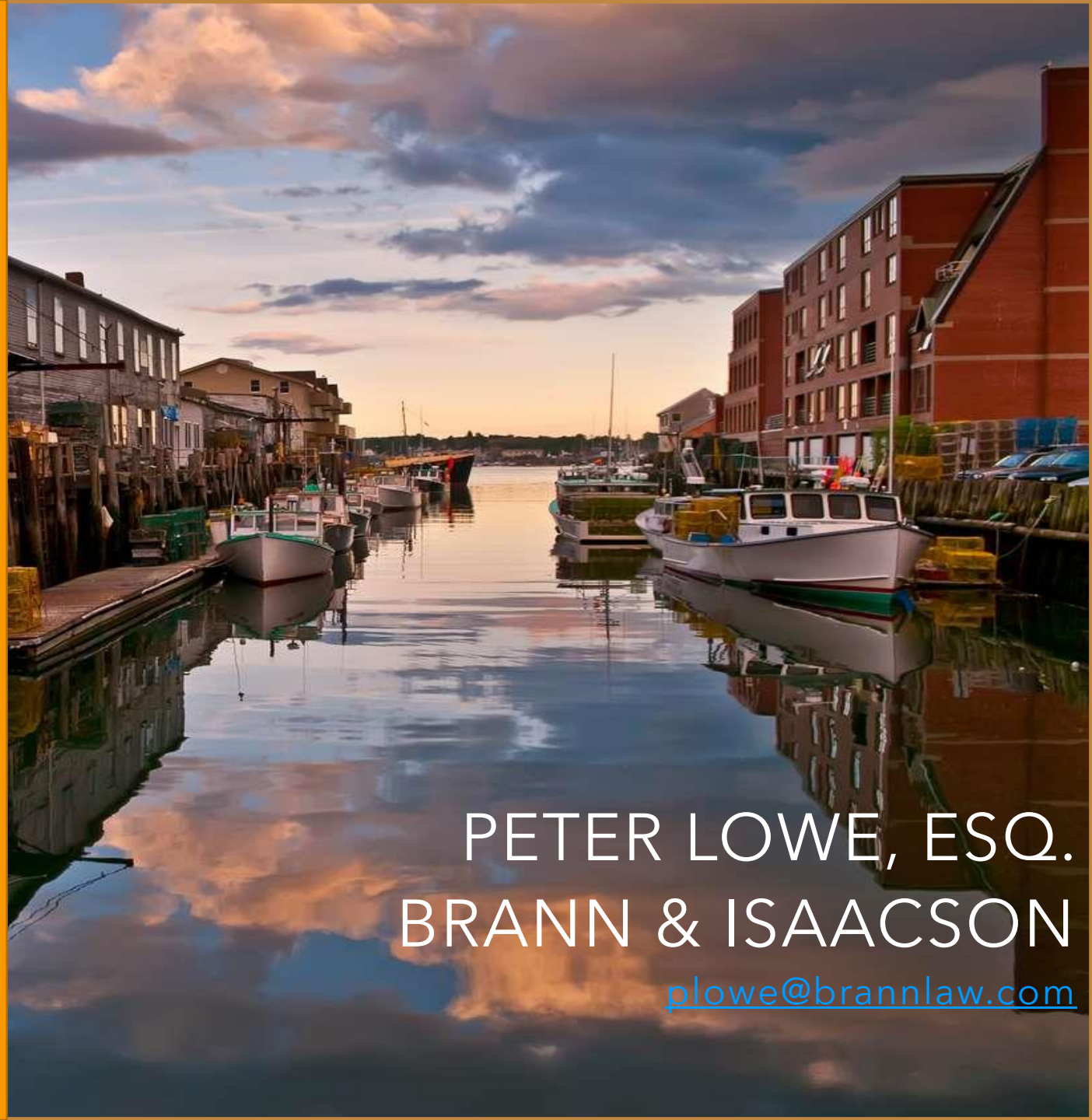


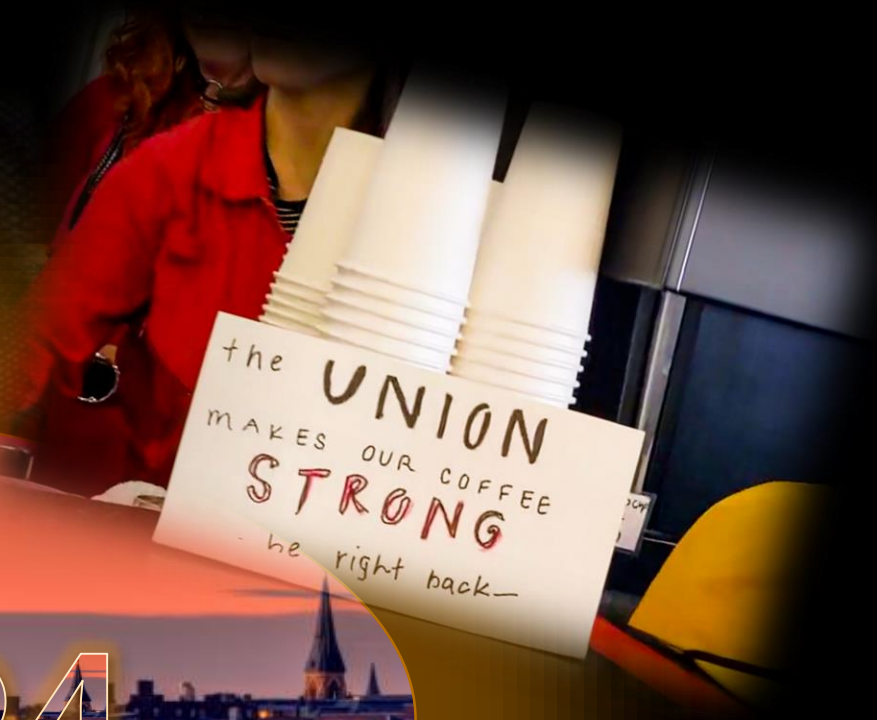
BRANN & ISAACSON LEGAL YEAR IN REVIEW

January 9, 2024

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OVERVIEW

The Ripple Effects of the Harvard Supreme Court Decision

- Impact on Employment and Internship Programs
- Impact on Minority Contracts
- Impact on DEI Initiatives

Is 2024 the Year of the Return to the Office?

- Policies
- Hiring
- Employee Presence
- Accommodations and Essential Function

New Maine and Federal Laws

- Protection from Retaliation
- Maine's Equal Pay Law
- Severance Pay
- Timely Payment for Salaried Employees
- MHRA Increased Limits on Awards
- Ban on Mandatory Employer-Sponsored Meetings
- Federal Laws

Key Cases in 2023

- Supreme Court - Groff v. DeJoy
- NLRB - Stericycle, Inc.
- NLRB - McLaren Macomb

New Developments in 2024

- ME Paid Family Medical Leave
- Mandated Retirement Plans
- Unionization of Small Businesses
- EEOC Updated Guidance on Harassment in the Workplace
- Cases to Watch

Employment Bills to Watch in 2024

- Prohibit Noncompete Clauses
- Restrictive Scheduling
- Minimum Wage
- Flexible Work Schedules
- Pay Transparency



WHAT HAPPENED?

In *Students for Fair Admissions v. President and Fellows of Harvard College* the Supreme Court held that Harvard's admissions system did not comply with the principles of the equal protection clause in Title VI of the Civil Rights Act.

Title VI prohibits “discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.”



FROM PRESIDENT CLAUDINE GAY

“The Supreme Court decision on college and university admissions will change how we pursue the educational benefits of diversity—but our commitment to that work remains steadfast.”

HOW THE HARVARD SCOTUS DECISION EFFECTS EMPLOYERS

The Court's
decision has
caused reflection
on DEI initiatives
and practices.

Those seeking to
challenge employer
DEI initiatives will
cite the Court's
decision in the
Harvard case.

Employers should
anticipate an
increase in
“reverse
discrimination”
claims.



MITIGATE THE RISKS

Focus on Lawful DEI Programs

- Stay away from fixed goals and quotas for hiring or contracting minorities.
- Do not extend a preference to any prospective hire based on protected class.
- Avoid tying manager or hiring compensation to diversity goals.

Review DEI Communications and Policies

- Review internal and public-facing communications.
- Emphasize that the company is dedicated to inclusion for all.
- “Level” the playing field for everyone.
- Review company policies for any stereotypical language and ensure all benefits are applied equally.

Focus on Inclusion in the Workplace

- Train and prepare HR personnel to address or investigate any DEI related concerns.
- Continue to follow any state laws intended to increase DEI initiatives (Pay Transparency, CROWN Act, Equal Pay).
- Educate on inclusive leadership, bias, and unity.

To Return or Not to Return? That is the Question

90% of companies say they'll return to the office by the end of 2024—but the 5-day commute is 'dead,' experts say

Published Mon, Sep 11 2023 10:00 AM EDT

Work Advice: More standoffs over return to-office mandates loom in 2024

Amazon CEO says 'it's probably not going to work out' for employees who defy return-to-office policy

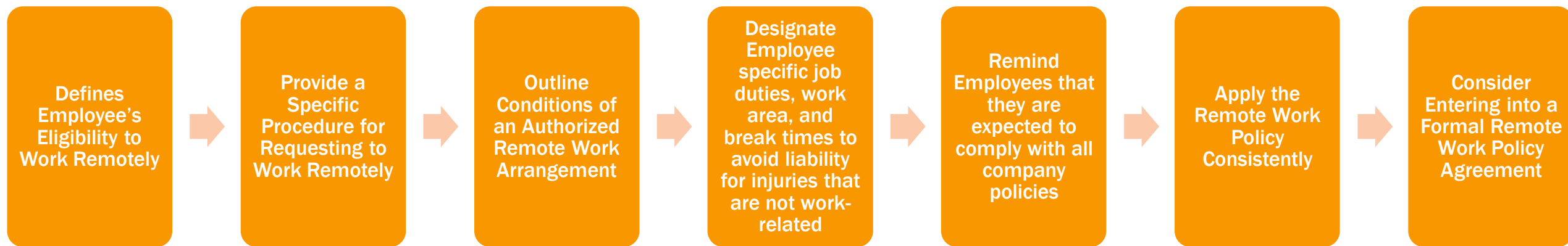
2023 was the year return-to-office died. Experts share remote-work trends expected in 2024



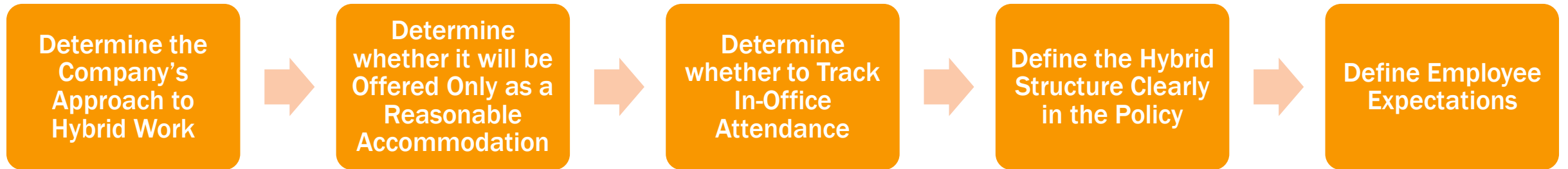
Bailey Schulz
USA TODAY

Tech CEO says he was hit with up to \$30,000 in surprise taxes and fees after a software engineer worked remotely in California and Texas without telling the company

REMOTE WORK POLICY



HYBRID WORK POLICY





WHAT DID THE CEO OF BLACKROCK HAVE TO SAY?

At the firm, we enjoy a culture of collaboration and apprenticeship that benefits our clients and enriches the experience of our people. Career development happens in teaching moments between team members, and it is accelerated during market-moving moments, when we step up and get into the mix. All of this requires us to be together in the office. Bringing our people into the room to observe and contribute is how we grow the next generation of leaders and stay ahead of our clients' needs. Therefore, we are evolving our Future of Work (FoW) pilot to match these needs.

IS WORKING FROM THE OFFICE AN ESSENTIAL JOB FUNCTION?

From the EEOC: “Essential functions are basic job duties that an employee must be able to perform, with or without reasonable accommodation. You should carefully examine each job to determine which functions or tasks are essential to performance.


Factors to consider in determining if a function is essential include:

- whether the reason the position exists is to perform that function,
- the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- the degree of expertise or skill required to perform the function.”

Supporting Caselaw:

- *Credeur v. Louisiana*: *Credeur* (5th Circ. 2017) was an Assistant AG for the DOJ. She was granted an accommodation to work from home after a surgery. She then took an FMLA leave after experiencing some complications from the surgery. *Credeur* was not keeping up with her caseload and other job responsibilities. *Credeur* was told she could no longer work from home on a long-term basis because it placed strain on supervisors and staff. The Court agreed with the employer, “The EEOC’s informal guidance on teleworking reinforces this point. The agency recognizes that for some jobs, the essential duties can only be performed in the workplace.”
- *Credeur* is supported by a variety of other cases from the Circuit Courts of Appeals.

2023 STATE AND FEDERAL LAWS PASSED



Maine Protection from Retaliation

Maine Equal Pay Law

Maine Severance Pay

Maine Payout of Vacation Pay

Maine Timely Payment to Salaried Employees

Maine Human Rights Act Increased Limit on Awards

Maine Ban on Mandatory Employer-Sponsored Meetings

Federal Speak out Act

Federal PUMP & PWFA

Federal Non-Compete

Federal I-9 Procedure

KEY CASES IN 2023



Grodd v. Dejoy, Postmaster General

Stericycle, Inc.

McLaren Macomb

NEW DEVELOPMENTS IN 2024

ME Paid Family Medical Leave – L.D. 1964

- Provides up to 12 weeks of paid leave per year to all eligible employees in the private and public sectors regardless of employer size. The state will impose a 1% payroll tax split evenly between the employer and employee. Rulemaking begins in Spring 2024, contributions begin on January 1, 2025, and benefits begin on May 1, 2026.

State and Federal Changes to the Minimum Salary Threshold

- As of January 1, 2024, the new minimum salary threshold for Maine is \$816.35 per week/\$42,450.20 per year.
- Federal has not changed but the Biden administration has proposed to raise the minimum salary threshold from \$684 to \$1,059 per week/\$35,568 to \$55,068 per year. The “highly compensated employee” threshold would be changed from \$107,432 to \$143,988 per year.

ME Mandated Retirement Plans – L.D. 1622

- Requires employers in business for at least two years with 5 or more employees that do not have a qualified retirement savings plan to withhold employee wages and put them in the state-sponsored IRA, unless the employee opts out of the program. The law went into effect for employers with 25 or more employees on April 1, 2023, 15 or more employees on October 1, 2023, and will go into effect on April 1, 2024 for employers with 5 or more employees.

EEOC Proposed Updated Workplace Harassment Guidance

- The updated guidance reflects notable changes in law and explains the legal standards and employer liability in workplace harassment claims. It provides numerous updated examples that reflect a wide range of scenarios. The guidance is likely to be finalized in 2024. This is the first update to the guidance since 1999.

NEW DEVELOPMENTS IN 2024

UNIONIZATION OF SMALL BUSINESSES

Successful strikes affecting major industries and well-known corporations in 2023 may prompt similar demands among employees of smaller businesses. Employers should prepare for potential organizing efforts.

- Take a proactive approach
- Formulate a reply that shows the employer has really listened
- Tread lightly on perceived “union-busting efforts”
- Pay disparity is among the top motives for employee discontent

MITIGATE THE RISK TIPS

Ensure that all supervisors and managers understand what conduct is permitted and prohibited

No Threats

Discharging or punishing employees

Increasing work

Telling employees they would have had a wage increase if it weren't for the union campaign

Telling employees the union campaign will result in the end of employment benefits or the business closing

No Interrogation

Do not ask if the employee signed a union card

Do not ask an applicant about their membership in a union or opinions on unions

Do not ask an employee intends to vote in a union campaign

Do not ask about their union activities, contents or meetings, dates of meetings, or who is in charge

No Promises

Of pay raise, increase in benefits, or a bonus

No Surveillance

Observing the union hall

Videotaping or recording employee conversations

No impressions that union activities are being monitored

No Solicitation

Do not begin conducting new methods of employee questionnaires or grievances

Non-Solicitation & Non-Distribution Policies

Soliciting employees during working hours for charitable contributions or purchase products

Third Parties distributing handouts or literature on employer premises

Limit off-duty employee access to the inside of the employer facility

Posting on employer owned bulletin boards

KNOW THE SIGNS

Employees acting secretly

Employees talking amongst themselves in small groups or shying away from supervisors

Union literature in the workplace

Complaints made by groups instead of individuals

Strangers or former employees on the premises

Increased interest in employer policies, wages, or benefits

Argumentative questions in meetings

Increase in employee requests to see their employee file

Questions on the employer's view of unions

Sudden use of labor terminology (i.e. grievance, labor practice, seniority, bumping, job security)

Employees asking for lists of coworkers' names, addresses, phone numbers



Bills to Watch in 2024

L.D. 1496 – An Act to Prohibit Noncompete Clauses

L.D. 1190 – An Act to Require Minimum Pay for Reporting to Work

L.D. 1376 – An Act to Increase the State Minimum Wage to \$15 per Hour

L.D. 187 – Flexible Work Schedules

L.D. 936 – An Act to Require Employers to Disclose Pay Ranges and Maintain Records of Employees' Pay History

L.D. 949 – Employer Surveillance



**THANK YOU &
HAPPY NEW YEAR!**