



# Back to the Future or the Past? What 2022 Has in Store for Labor & Employment Laws

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**Seyfarth Shaw LLP**

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# Speakers

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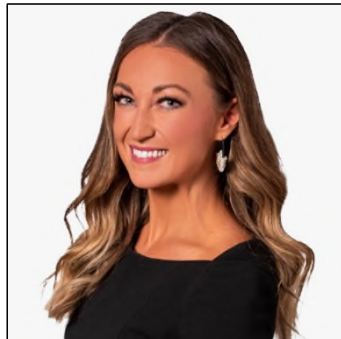
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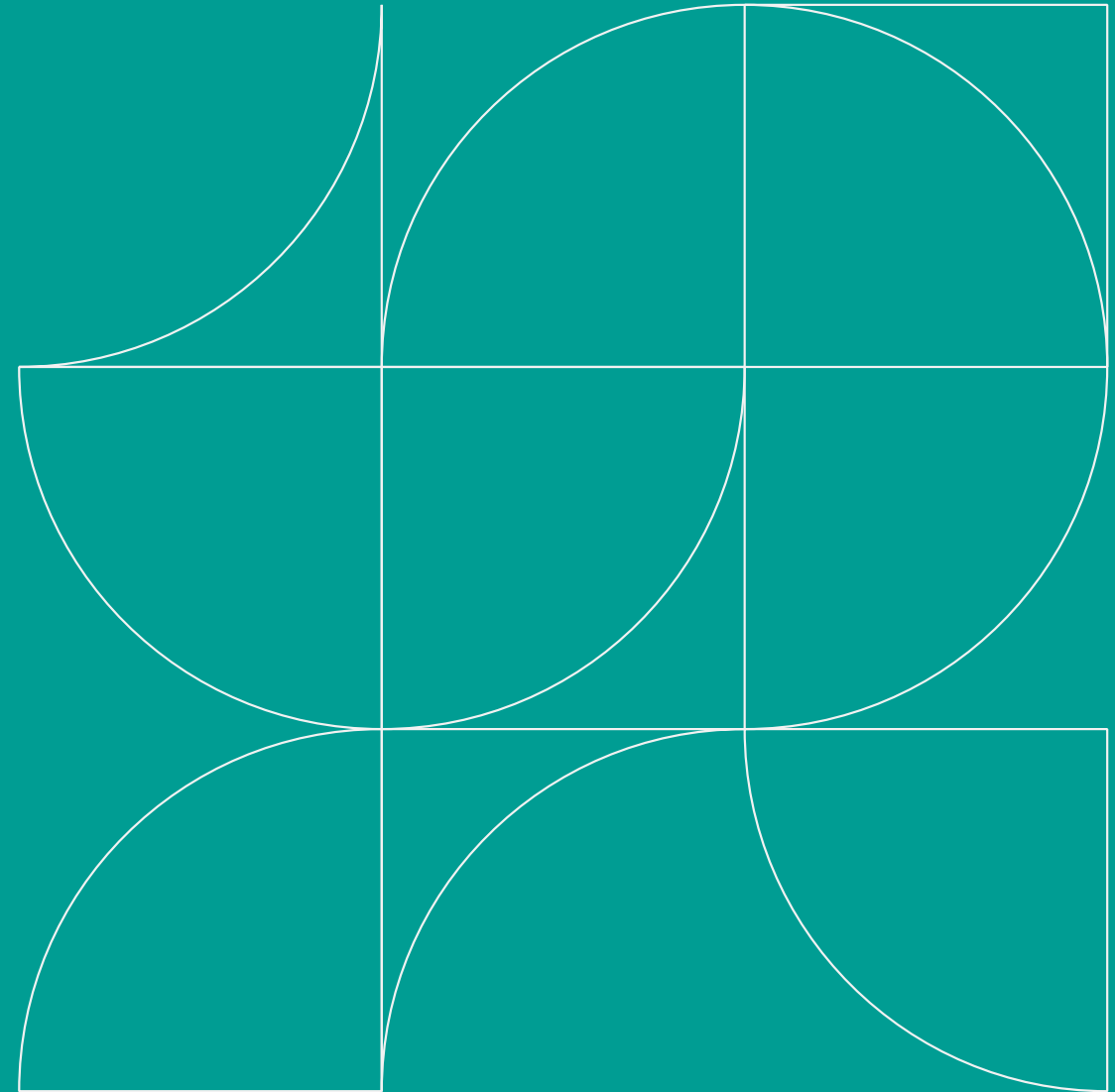
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# Agenda

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- 01** Status of ETS & Biden Mandate
- 02** NLRB: Developments and What's on the Horizon
- 03** Handbook Trends & Developments
- 04** Developments in EEOC Enforcement Initiatives and Equal Pay Legislation and Litigation
- 05** ESG: Trends in Human Capital

# Status of ETS & Biden Mandate & What to Expect in 2022



# Biden Vaccine Plan

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- Federal Contractor Mandate (Safer Federal Workforce Task Force)
  - Effective date for vaccination had been January 18, 2022
- Private Business Mandate (OSHA)
  - Employers had been required to collect data and assemble vaccination roster by December 6, 2021; date effectively mooted.
  - Employees had been required to be vaccinated or start weekly testing by January 4, 2022
- Health Care Mandate (Centers for Medicare & Medicaid Services (“CMS”))
  - Health care facilities had been required to have vaccination policy by December 6, 2021.
  - Health care employees had been required to be vaccinated by January 4, 2022

# Biden Plan Under Assault in Federal Courts

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- Federal Contractor Mandate (Safer Federal Workforce Task Force)
  - Federal Court (E.D. Kentucky) issued preliminary injunction halting enforcement in OH, KY, TN.
  - Federal Court (S.D. Georgia) issued nationwide preliminary injunction.
- Private Business Mandate (OSHA)
  - Federal Appellate Court (Fifth Circuit) issued nationwide stay of enforcement.
  - Pending federal challenges consolidated to Sixth Circuit Court of Appeals
    - December 10, 2021 briefing date on Government’s motion to dissolve stay
    - Government motion for expedited briefing schedule denied.
- Centers for Medicare & Medicaid Services (“CMS”)
  - Federal Court ((E.D. Missouri) issued preliminary injunction halting enforcement in AK, AR, IA, KS, MO, NE, NH, ND, SD, WY.
  - Federal Court (W.D. Louisiana) issued nationwide preliminary injunction.



# OSHA COVID-19 Emergency Temporary Standard on Vaccination and Testing

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- COVID-19 ETS
  - ETS permitted under Section 6(c)(1) of the OSH Act when:
    - employees are exposed to “grave danger” from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
    - the emergency standard is necessary to protect employees from such danger
  - Permits OSHA to avoid traditional rule making process
  - Valid for Six Months
  - State plan states in 21 states must adopt substantially similar ETS within 30 days
  - Prior ETS issued to health care employers June 21, 2021.



# Covered Employers Under ETS

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- All employers with 100 or more employees will have to require workers
  - 100 employees counted on nationwide basis
  - 100 employees at any time while ETS is in effect
  - Fully remote workers count towards the 100-employee threshold
  - Only count employer's own employees at multi-employer worksite
- Does not cover worksites that are covered by federal contractor mandate
- Does not cover worksites covered by healthcare ETS, unless health care ETS expires

# ETS Requirements for December 6, 2021

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- **Policy:** Establish policy on vaccination (paragraph (d))
- **Notification:** Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))
- **Medical Removal:** Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))
- **Employee Training:** Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j))

# ETS Requirements for December 6, 2021

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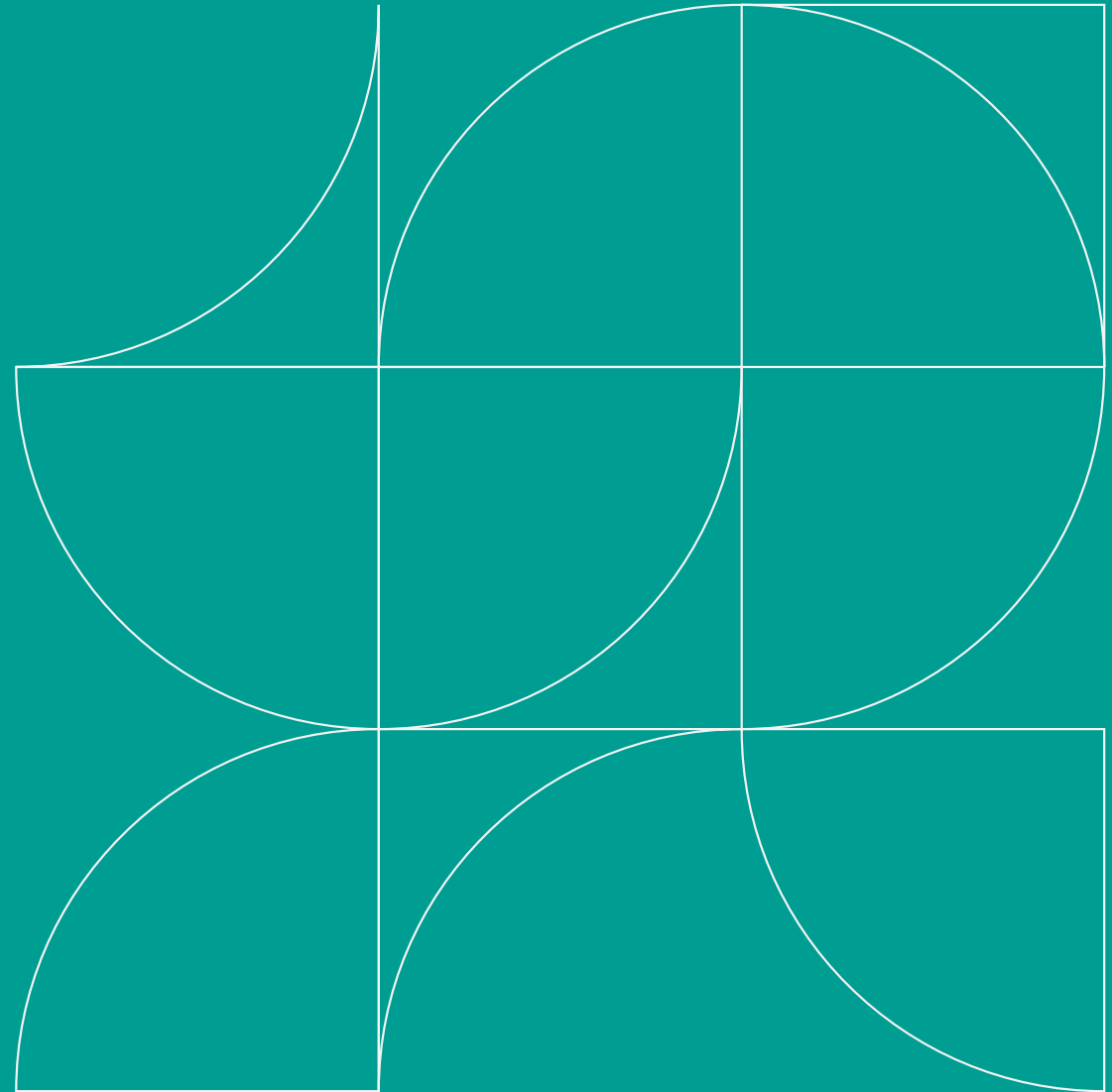
- **Support for Vaccination:** Provide support for employee vaccination (paragraph (f))
  - Vaccination expenses paid
  - Paid time for obtaining vaccine
  - Paid sick leave for adverse reactions
- **Vaccination Roster:** Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))
- **Masking:** Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))

# January 4, 2022 Testing Requirements

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- Employers must ensure that employees have received both shots of a two-dose vaccination regimen, or one dose for single-dose vaccines by January 4, 2022
- Or employees must undergo at least weekly testing or within 7 days before returning to work (if away from the workplace for a week or longer)
- Over-the-counter antigen testing is acceptable.
- Testing cannot be both self-administered and self-read unless observed by the employer or an authorized telehealth proctor.
- Testing can be unpaid.
  - May be issues where payment required, reasonable and necessary expenses.

# NLRB: Developments and What's on the Horizon



# Labor Relations

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- National Labor Relations Board
- Union Organizing
- Vaccine Mandates and Bargaining

# NLRB Process

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- **Rulemaking (rare)**

- Proposal → Comments → Revisions → Analysis → Publication → Potential Litigation/Injunction → Implementation

- **Case-by-Case Decisions**

- ULP Charges
  - Representation Cases

- **General Counsel Memos**

- Guidance on interpretation and application of the law and Board decisions
  - Directives to staff

# General Counsel Jennifer Abruzzo

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- Sworn in on July 22, 2021:
  - Formerly the Special Counsel for Strategic Initiatives for CWA
  - Former Acting GC and Deputy GC at NLRB
  - Four-year term
- “I believe that **vigorous enforcement of the Act** will help level the playing field for workers and their freely chosen representatives, **bring much needed equity** to the historically underserved members of our communities, engender safe and productive workplaces, **which is particularly critical right now as we fight a pandemic**, and build a better economy for workers, families, and communities in this country.”



# Several GC Memos in Two Short Months

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- August 12, 2021
  - Mandatory Submissions to Advice:
    - Reconsider cases where Trump Board changed precedent
    - Other initiatives and areas Abruzzo wants to carefully examine
- August 19, 2021
  - Utilization of Section 10(j) Proceedings
- September 8, 2021
  - Seeking Full Remedies
- September 15, 2021
  - Full Remedies in Settlement Agreements
- September 29, 2021
  - Student-Athletes

# Settlement Agreements and Apology Letters

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## APPENDIX B [Charged Party's Letterhead]

We, the Administration Team at [REDACTED] apologize for our egregious, irresponsible, and disrespectful behaviors. We knowingly and willingly violated our staff's rights to Weingarten representatives and to their Union representatives. We apologize for creating an unnecessarily confrontational work environment and subjecting our staff to additional stress. We apologize to [REDACTED] the [REDACTED] Representative, for the unfounded and unsubstantiated claims of racism that were made towards her. We are regretful that we behaved in an unprofessional manner, and we are hopeful that we can show our staff that they are valued. We ask staff to accept this letter of apology.

Sincerely,  
[Responsible Official Signature]  
[Responsible Official Title]

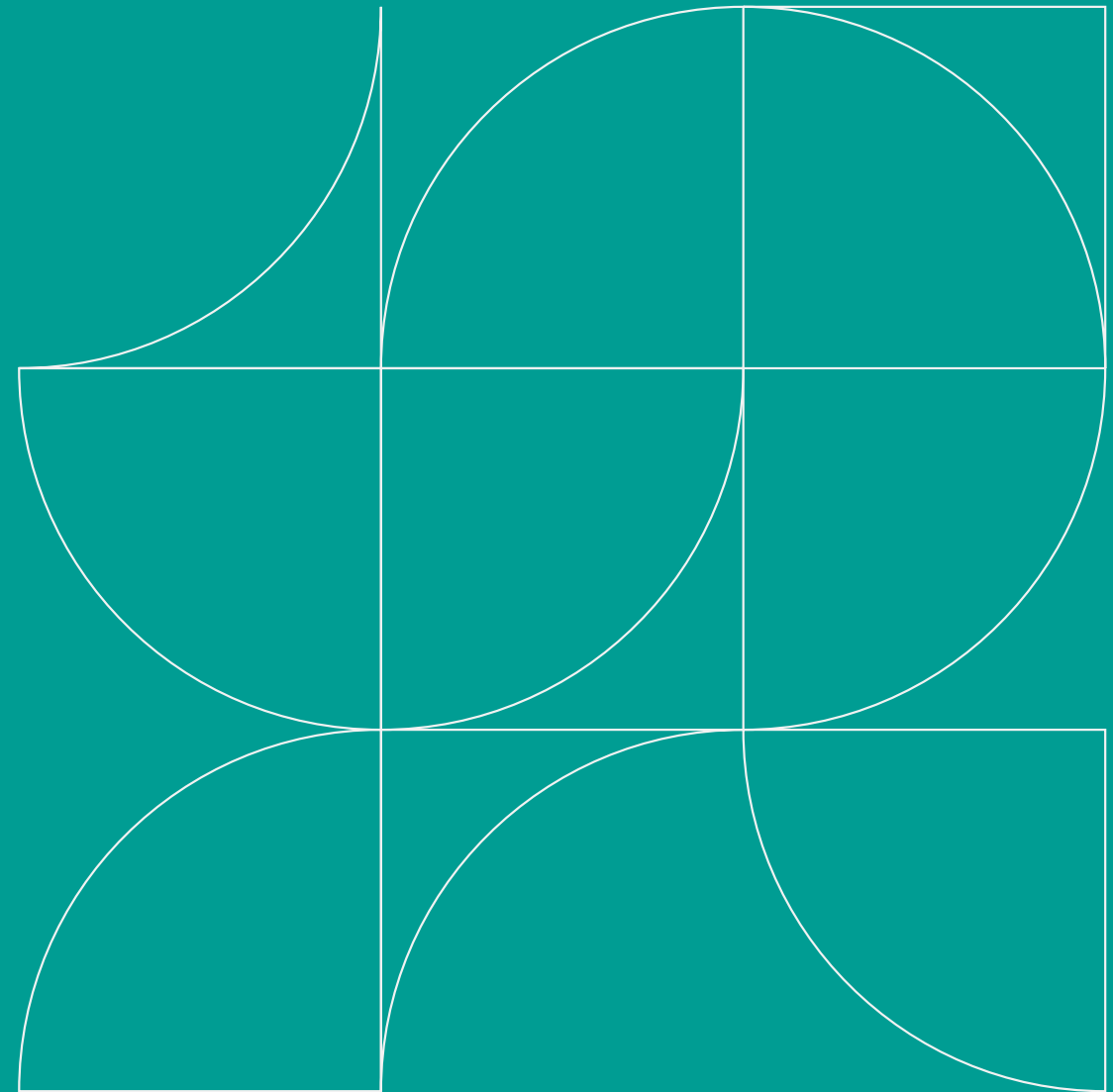
# Union Organizing

- Organizing efforts at non-union facilities targeting:
  - Industry
  - Employer
  - Region
- Pandemic as driver
- Vaccines – For or Against...use either or both positions!

# Vaccine Mandates and Bargaining

- Legal Obligation to Bargain?
- Effects Bargaining Proposals:
  - Time to get vaccinated
  - \$\$ incentives
    - For getting vaccinated
    - Staffing
- Practical Considerations

# Handbook Trends & Developments to Watch for in 2022



# Introduction – What is Driving Trends?

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- Change in administration
- Social and political issues
- Changes to the law
- How we work – effect of the pandemic

# Key Trends

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- Diversity, Equity, Inclusion & Belonging
- ESG
- Remote/Hybrid Work
- Sick Time/ Family Medical Leave
- Social Media

# Diversity, Equity, Inclusion & Belonging

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- Increased focus in this area
- Employees want to work for an organization that shares their values
- Issues can be important in attracting and retaining talent
- More employers including a statement that reflects the organization's commitment to DEI&B issues in their handbook
- Recommendation for DEI&B handbook policies
  - Keep it brief
  - Ensure that your actions match up with your words
  - Revise other policies to be consistent with commitment (e.g., use of gender neutral language, dress code, strong discrimination/harassment/accommodation policies)



# Where and How We Work

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- Remote work is here to stay
- Review and revise flexible work/remote work policies – do they reflect current practice/expectations
- Review other policies affected by remote work
  - Work hours – ensure that policies address expectations for non-exempt employees
  - Timekeeping – important to stress that non-exempt employees must record all time worked - may not work off-the-clock
  - Meal periods and breaks – employees must still take this time when working remotely where required by state law
  - Reimbursement of expenses (e.g., internet, mobile phone, office supplies, etc.) – detailed policies typically maintained outside of main handbook

# Hybrid Work Policies

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- Clearly set expectations
- Components of these policies
  - Time spent on site v. remote (flexible, set days)
  - Core hours
  - Responsiveness and mode of communication (e.g., email, instant messaging, phone, video conferences)
  - Wage and hour considerations
  - Hybrid schedules subject to change so that company can meet business needs, address performance issues, strengthen company culture, increase collaboration, etc.
    - provide notice of any change

# Sick Time and Family/Medical Leave

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- Recent years significant increase in jurisdictions (both state and local level) requiring paid sick time
- Increase in number of states that require some type of leave related to:
  - welcoming a new child
  - employee's own illness
  - care for an ill family member
  - military obligations
- Current landscape
  - [x] states have paid family/medical leave law
  - [x] states unpaid family/medical leave law
- Potential for federal family leave dwindling

# Family & Medical Leave Laws

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- Depending on governing law, leave may be paid or unpaid
  - Paid leave typically provided through the state
  - May allow employer to adopt private plan
- Typically requires employer to adopt policy specific to jurisdiction – almost impossible to craft “one-size fits most” policy
- Often requires adjustments to:
  - accrued time off policies (sick, vacation, personal); and
  - other leave policies (FMLA, employer-provided parental/disability leave)

# Social Media

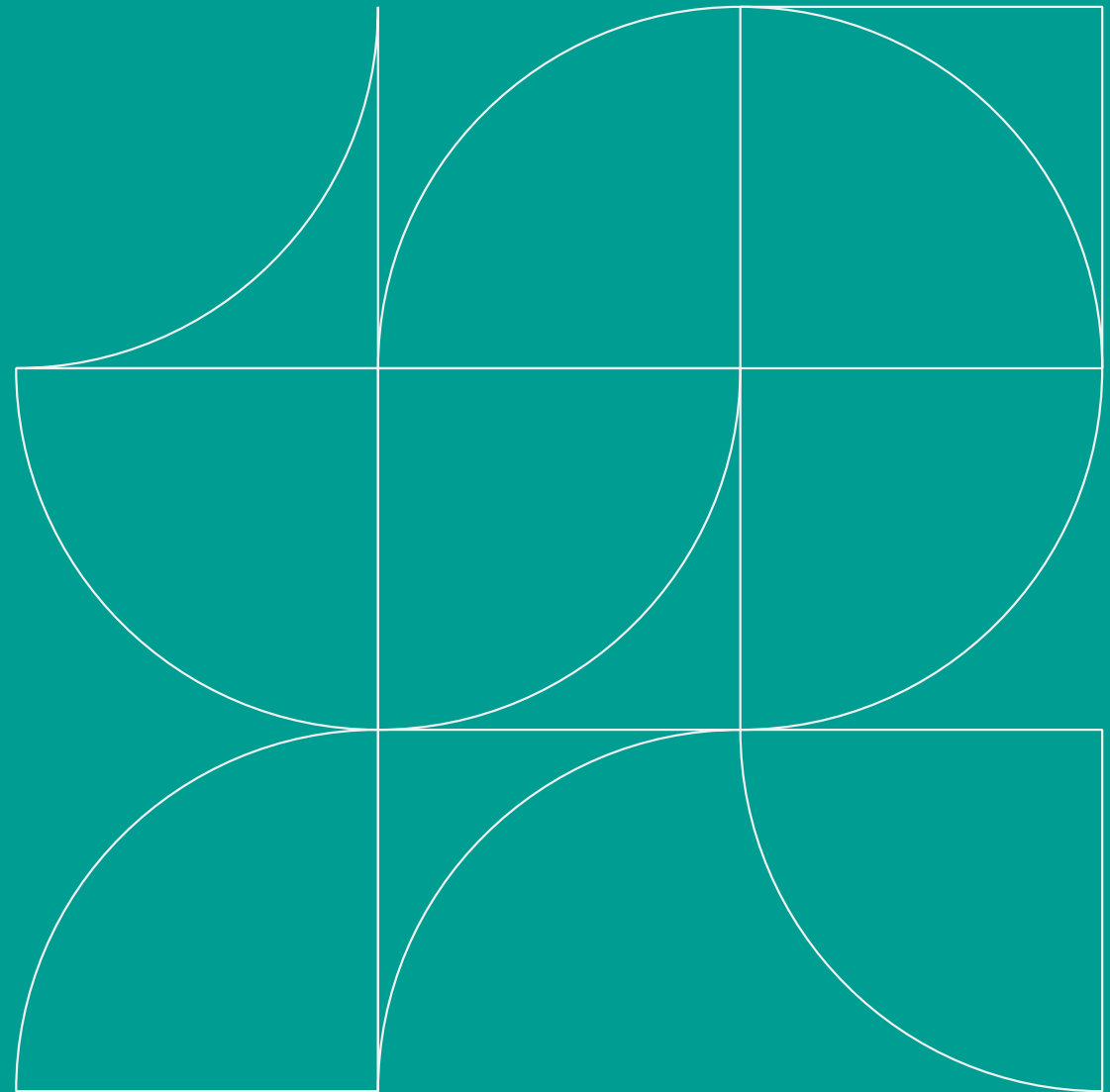
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- Most employers have a social media policy
- More employers responding to issues that arise on social media but are not directly connected to employment
  - Complaints from other employees or customers regarding posts that are offensive
- Seeing a change to the scope of these policies
  - Hold employees accountable for postings that are made
    - outside of work
    - on private social media accounts
    - that impact the workplace
  - Adding statement to policy that makes clear that employees may be subject to discipline, including termination, for posts made outside of the workplace
- Need to be cautious about policies that restrict ability of employees to engage in concerted, protected activity

# Some of the States With Recent Legal Updates 2021/2022

| California  | California Family Rights Act (CFRA)  |
|-------------|--|
| Colorado    | Paid Sick Leave; Public Health Emergency Leave; New Protected Classes          |
| Connecticut | Connecticut Paid Family and Medical Leave                                      |
| Illinois    | Chicago/Cook County Sick Leave; New Protected Classes; Kin Care Law; VESSA Act |
| Missouri    | MO Victims Economic Safety and Security Act (VESSA)                            |
| New York    | NY HERO Act  |
| Oregon      | CROWN Act; Oregon Paid Family Leave; Oregon Family Leave Act (OFLA)            |

# Developments in EEOC Enforcement Initiatives



# The EEOC's Lineup

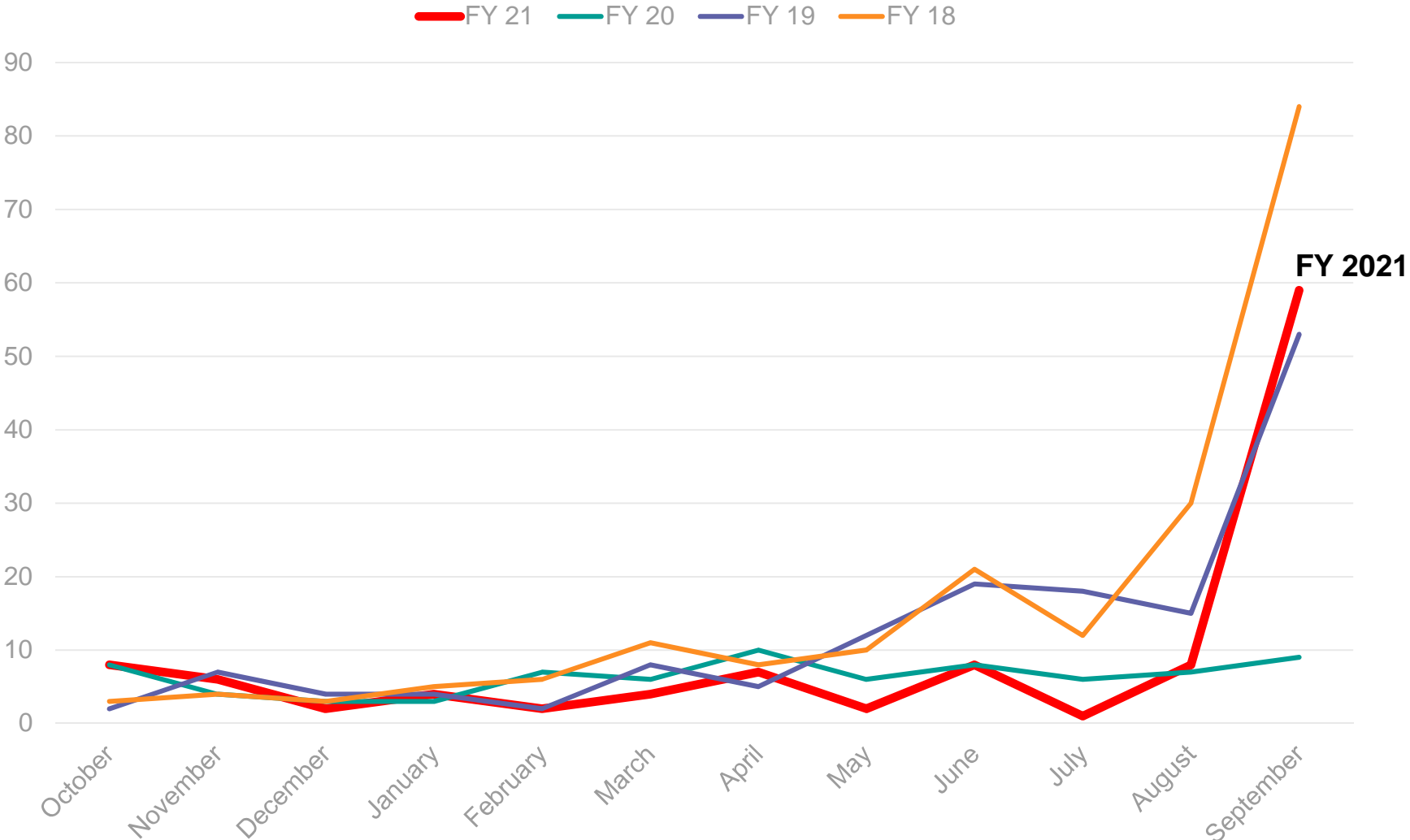
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- Why does it matter?
  - The Commissioners' new and expanded role
- Current Commissioners and their backgrounds
- The role of the General Counsel

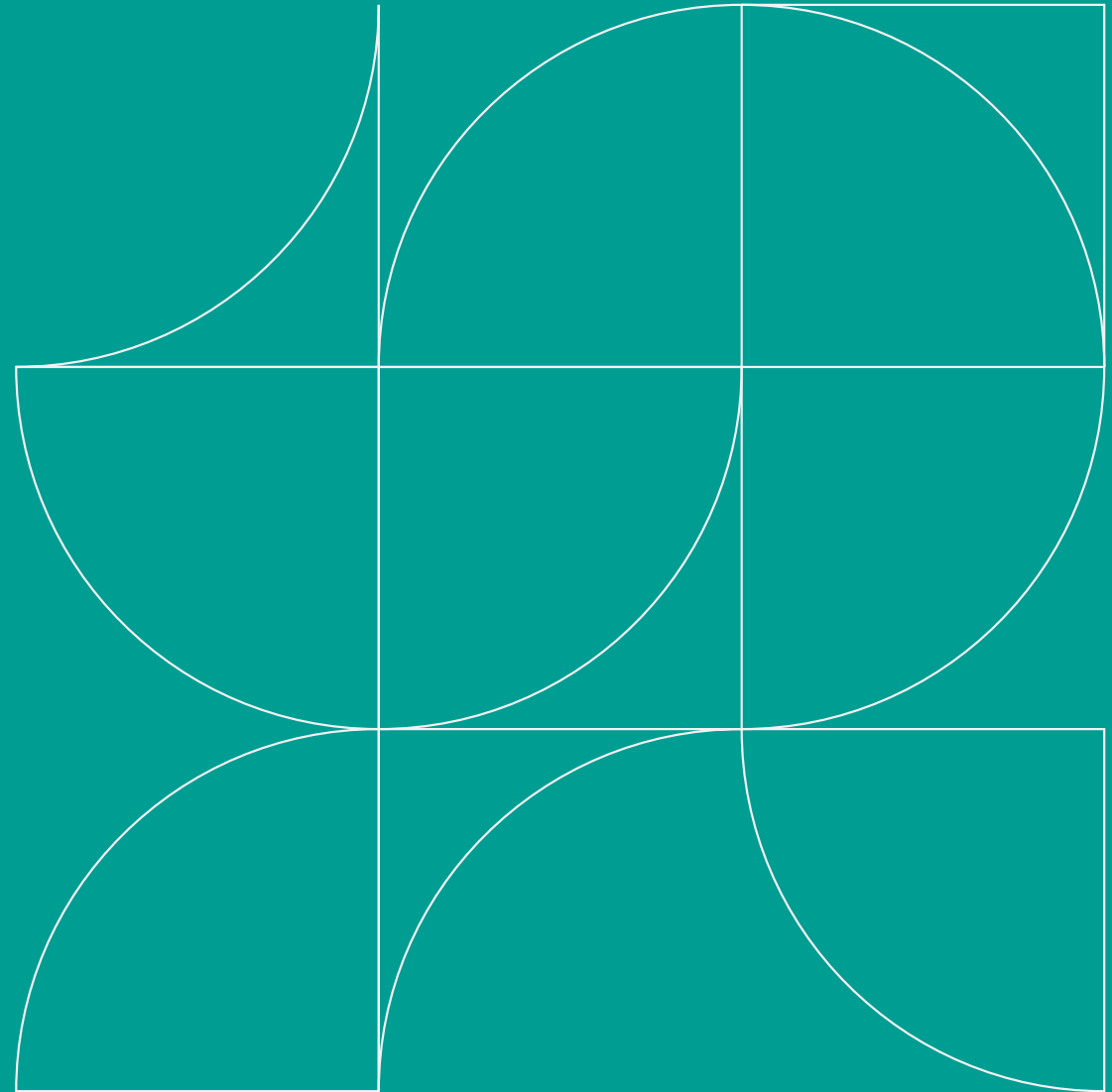


# Cases Filed By Month FY 2018-2021



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# Developments in Equal Pay Legislation and Litigation



# Equal Pay Act Litigation - Proving The Prima Facie Case

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- Identifying one or more **comparators**
  - Choosing the right “establishment”
  - Just one comparator is often sufficient
  - Some courts look to see if other members of opposite gender paid more
- Establishing a **wage disparity**
  - What counts as compensation? What counts as *more* compensation?
  - The role of statistics
- Showing “**equal work**”
  - Often depends on employer’s industry and employee’s position
  - Relying on proxies to show that work is equal

# Employers' Affirmative Defenses

1. Seniority system
2. Merit system
3. System that measures earnings by quantity or quality of production
4. Any other factor other than sex
  - Reliance on salary history
  - Salary negotiations
  - Job related

**Plaintiffs can show that proffered reasons are *pretext* for unlawful discrimination**

# Class And Collective Action Litigation

## Class Actions

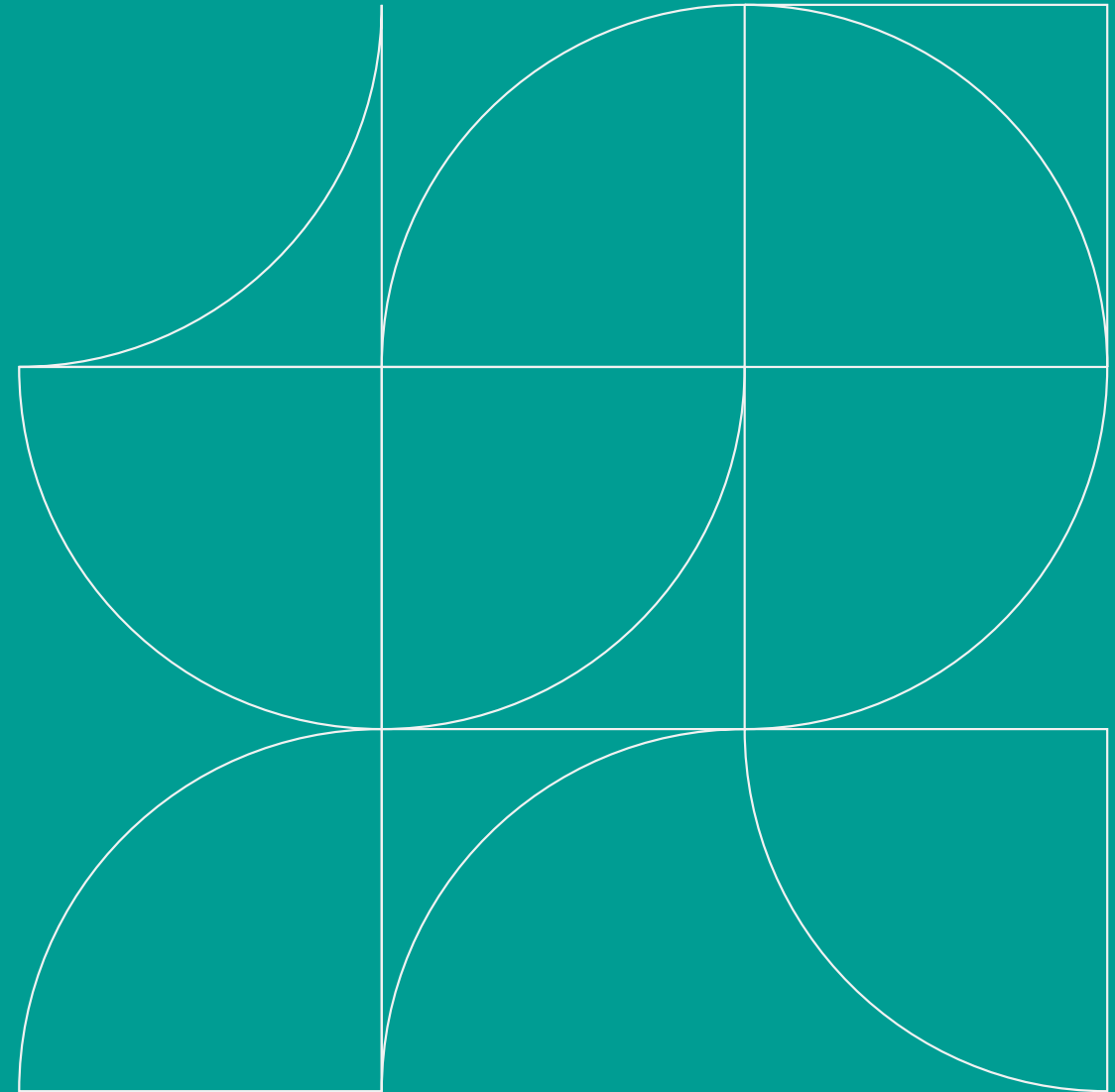
- Rule 23 (or state law) standards for Title VII and state law claims
- Generally a one-time certification process that is more rigorous
- Opt-out class means that class members are part of the case unless they choose to opt out

vs.

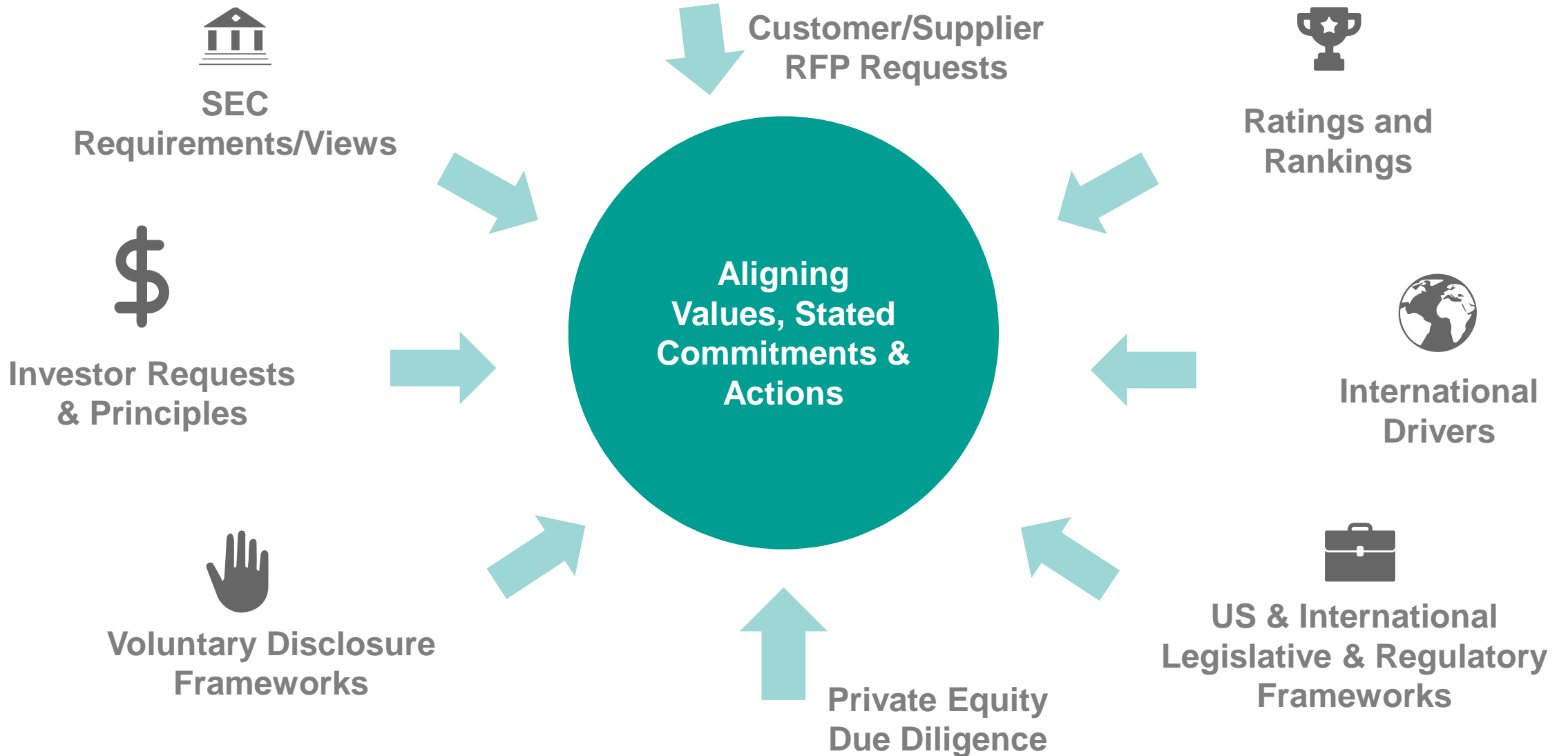
## Collective Actions

- Judicially-created procedures under the FLSA for EPA claims
- Certification is a two-stage process with a more lenient initial standard
- Opt-in collective action means that employees must affirmatively choose to join the lawsuit

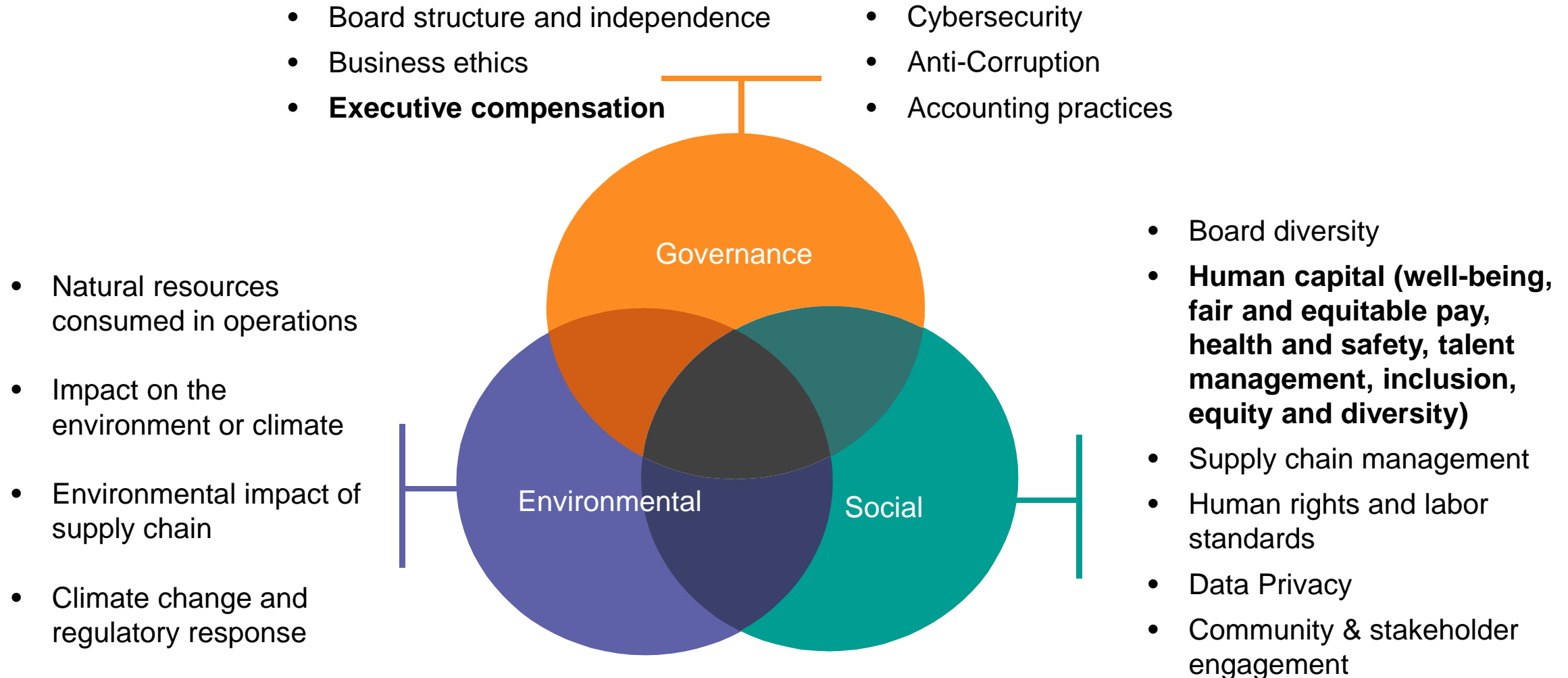
# ESG: Trends in Human Capital



# ESG IS EVERYWHERE – THE WHY

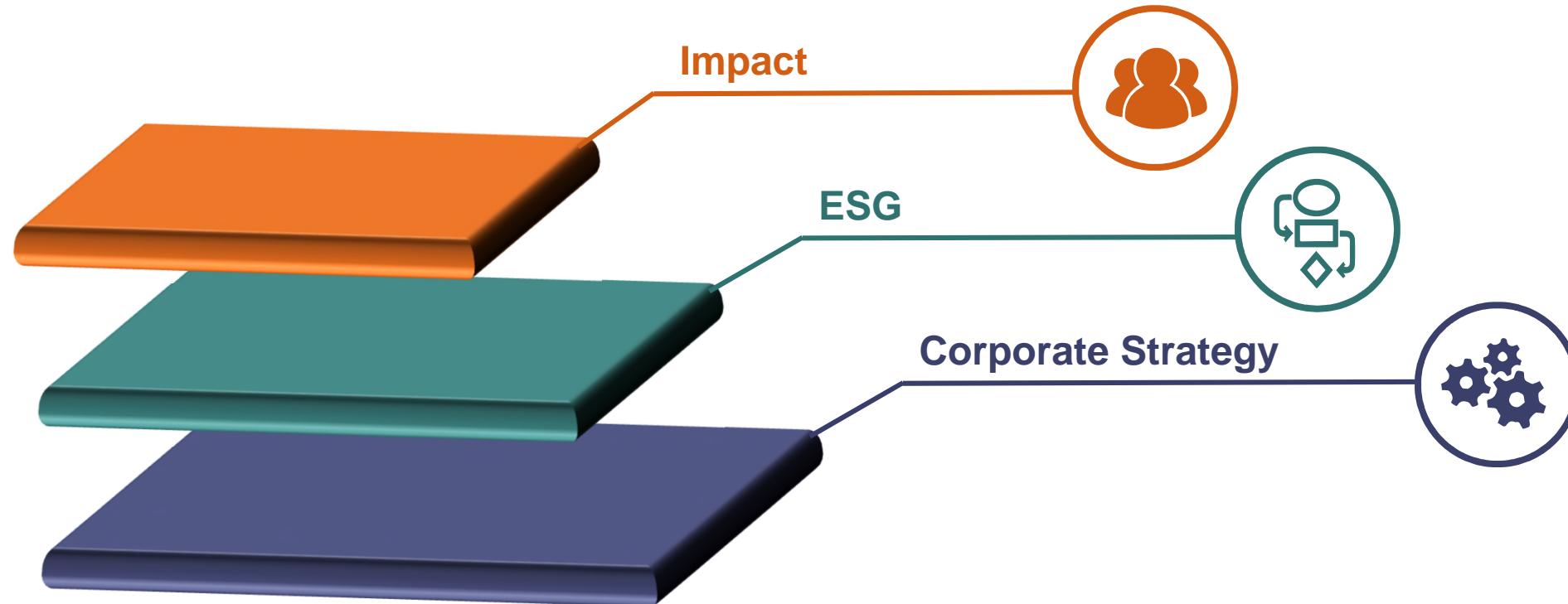


# ESG, Not Just About Disclosure – The What





# Integrating Corporate Strategy and ESG – The How



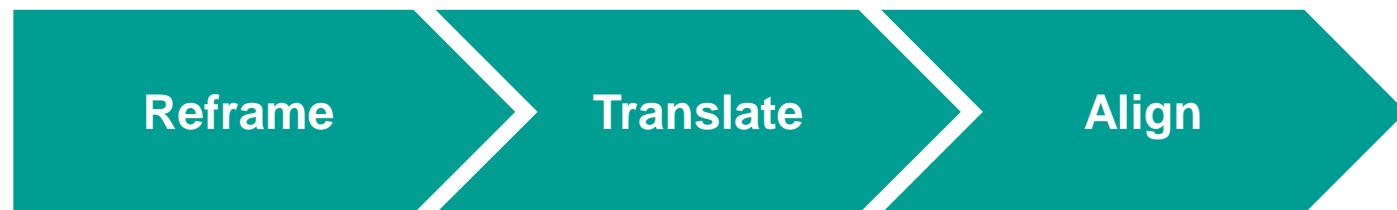
### Primary Legal Risks:

- Federal securities law exposure for materially misleading or false statements in any public report or statement &/or omissions
- State corporate law breach of fiduciary duty by the board

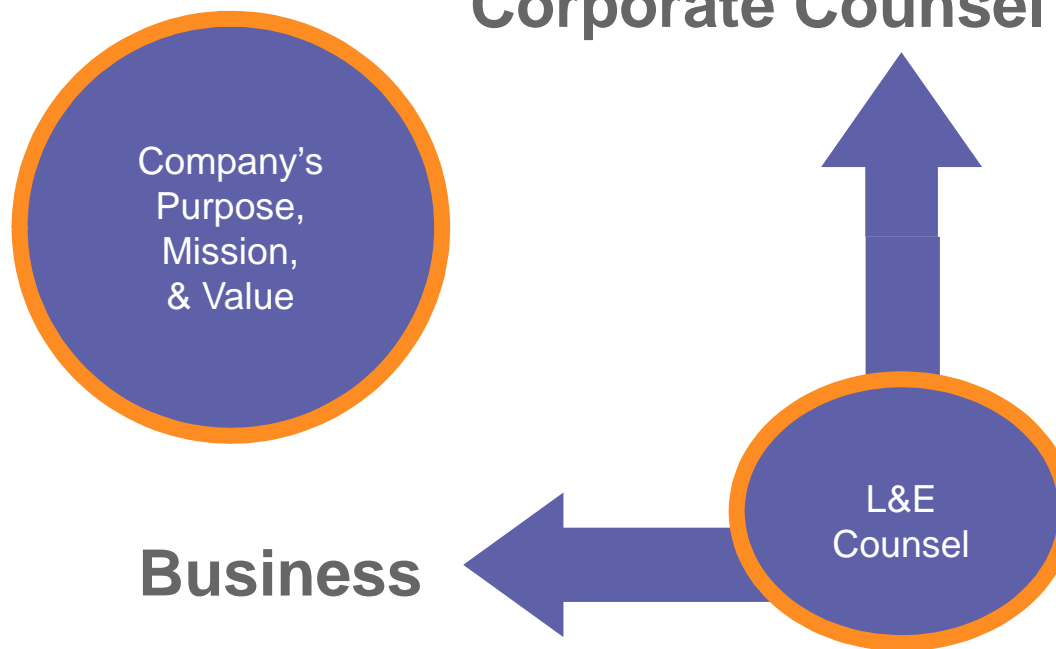
### Business Risks:

- Brand/reputational
- Economic
- Compliance / regulatory
- Operational
- Supply chain
- Physical risks (e.g., due to climate)
- Transition
- Human capital

## Changing Role of L&E Counsel



## Corporate Counsel & Board



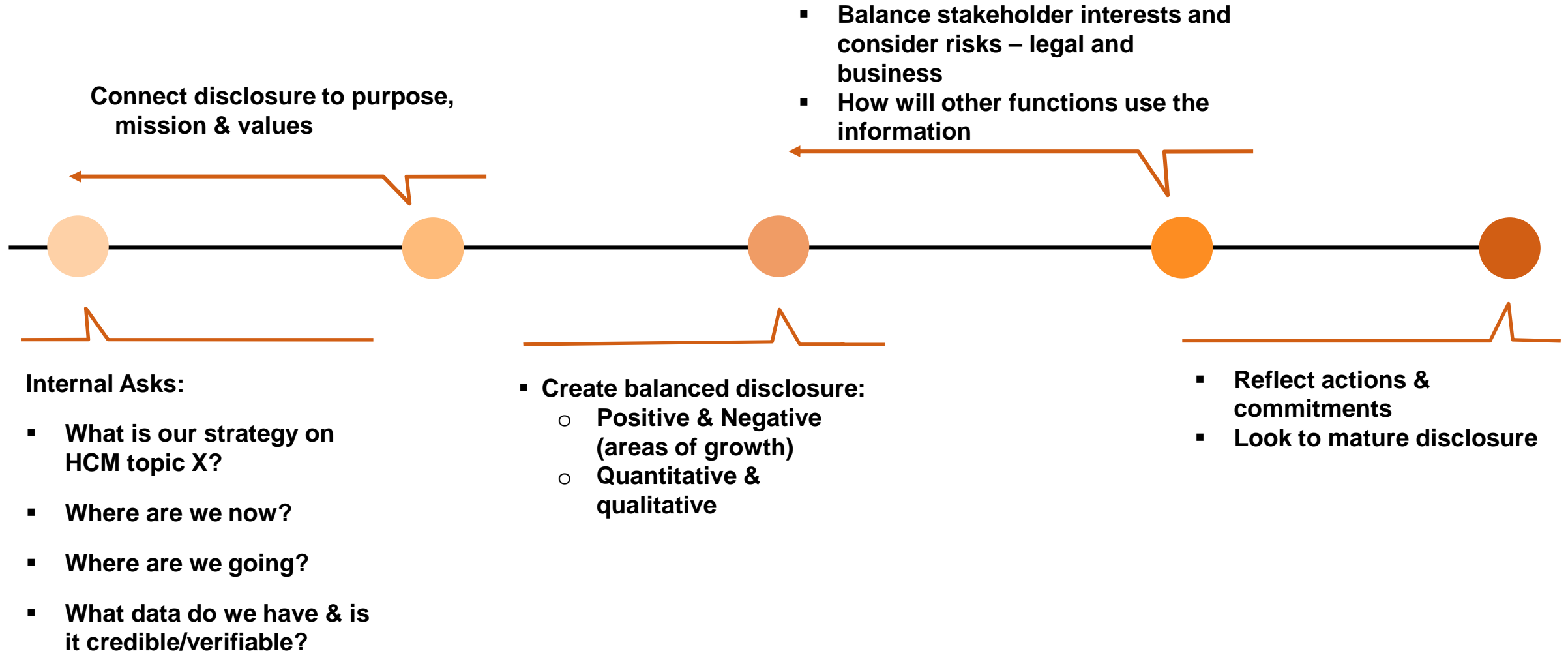
# Human Capital Management Disclosures – More Asks

- New SEC Requirements – November 2020
  - Principles based not prescriptive
  - Human capital measures or objectives focused on in managing the business
  - Examples - development, attraction and retention of personnel
- First year of disclosures widely varied
- Disclosure standards in flux
- Customer Asks

# Human Capital Management Report Mentions



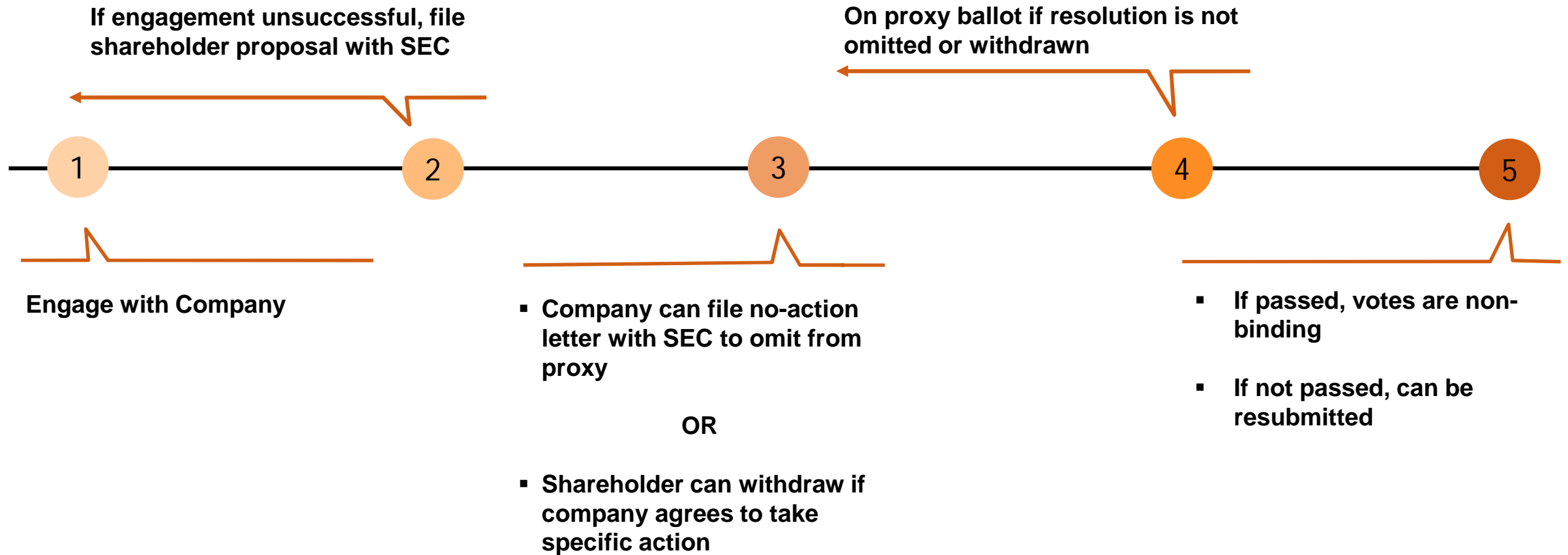
# Disclosure Roadmap



# Shareholder Proposals – Focusing on the “S”

- Activist investors becoming more active
- Expect more ESG focused proposals requesting HCM information
  - DE&I
  - Pay equity
  - Racial equity audits
- SEC opening the door for more ESG proposals

# Shareholder Proposals – Focusing on the “S”

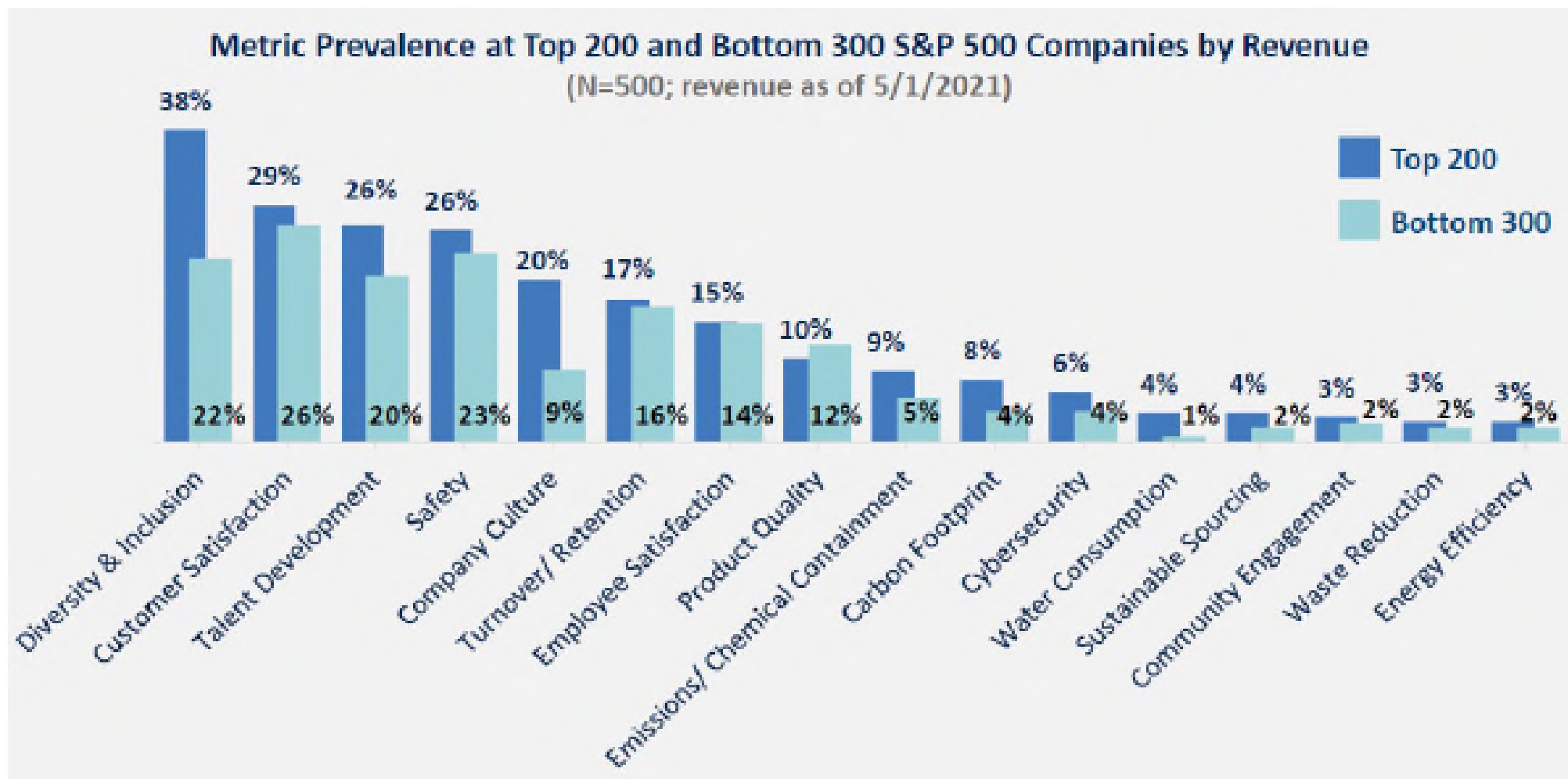


# Accountability Through Executive Compensation

- Increased Prevalence of “S” Metrics
- DE&I is the leading “S” metric
- Design Considerations
  - Operational vs. Sustainability Metrics
  - Annual vs. Long-Term
  - Formula vs. Discretionary
- No one size fits all; keyed to ESG strategy



# Prevalence of ESG Metrics in S&P 500 Companies



\*Harvard Law School Forum on Corporate Governance, "2021 ESG & Incentives Report," Posted by John Borneman, Tatyana Day and Olivia Voorhis, Semler Brossy Consulting Group LLC, July 8, 2021

# Designing ESG Metrics in Executive Compensation

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- Identify ESG issues that are strategic priorities for the company
- Determine what is the gap and what can be measured
- Prioritize business' ESG goals when developing metrics – may vary by industry
- Understand disclosing ESG goals/metrics measures for pay will send a positive message when attaining goals but could have opposite effect if do not
- Investors want transparency, accountability, and comparability

# Questions?

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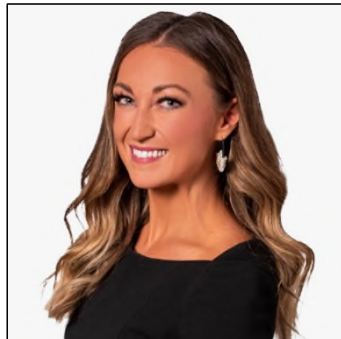
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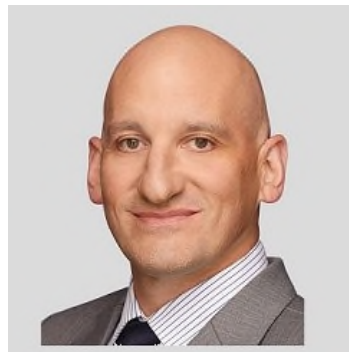
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**Thank you!**

