37th Annual Employment Law Seminar

for corporate counsel, business owners & human resource professionals

APRIL 8, 2025 | THE GRAND AMERICA HOTEL

These materials have been prepared by Parsons Behle & Latimer for informational purposes only and should not be construed as legal advice. Receipt of this information does not create an attorney-client relationship. Do not act upon this information without seeking professional counsel.

IDAHO | MONTANA | NEVADA | UTAH | WYOMING | PARSONSBEHLE.COM

SHRM® Salt Lake

A Different LEGAL PERSPECTIVE

PARSONS BEHLE & LATIMER

Table of Contents

PARSONS BEHLE & LATIMER


SHRM Salt Lake
PARSONS BEHLE & LATIMER
Salt Lake SHRM and Parsons Behle & Latimer
Present the 37th Annual
EMPLOYMENT LAW
Symposium
Network: SLSHRM
Password: SLSHRM2025
WELCOME!

1


SHRM Salt Lake
PARSONS BEHLE & LATIMER
Thank you to our sponsors!

2

SHRM Salt Lake

UTAH DAYS OF '47 RODEO
PRESENTED BY ZIONS BANK

IMA

UTAH WORKSITE WELLNESS COUNCIL

VIDVICTORY

Thank you to our sponsors!

3

SHRM Salt Lake

CANYON VIEW CREDIT UNION

elevated BACKGROUND CHECKS

MyRetire

CUI AGENCY

Thank you to our sponsors!

4


SHRM Salt Lake
FIRST ANNUAL
AWARDS
Gala
$40 FOR MEMBERS
$60 FOR NON-MEMBERS
THURSDAY, MAY 8, 2025
6:00 - 9:00 PM
HALE CENTRE THEATRE
SCAN HERE TO PURCHASE TICKETS

5


UTAH WORK ELEVATED
HUMAN RESOURCES CONFERENCE
September 22 – 23, 2025
Utah Valley Convention Center
Provo, UT
REGISTER HERE
UTAH WORK ELEVATED
HUMAN RESOURCES CONFERENCE

6

SHRM Salt Lake

SHRM Foundation

ADVANCE YOUR HR CAREER WITH A SHRM CERTIFICATION GRANT!

This grant, valued at approximately $1,500, covers the SHRM Learning System and certification exam fee—helping you gain the credentials you need to excel in HR.

SCAN ME!

2025 Grant Application Windows:

April 14 – June 13 *August 11 – October 17*

7

SHRM Salt Lake

CERTIFICATION STUDY GROUP

April - May 2025

Cost: $695 includes SHRM Learning System

REGISTRATION NOW OPEN

8


SHRM Salt Lake
PARSONS BEHLE & LATIMER
Salt Lake SHRM and Parsons Behle & Latimer
Present the 37th Annual
EMPLOYMENT LAW
Symposium
Network: SLSHRM
Password: SLSHRM2025
WELCOME!

9


SHRM Salt Lake
PARSONS BEHLE & LATIMER
Thank you to our sponsors!

10

SHRM Salt Lake

victig
BACKGROUND CHECKS

Employers Council®
Employment Law • HR • Training • Surveys

paylocity
Forward Together.

sixfifty

Thank you to our sponsors!

11

SHRM Salt Lake

ELEVATED FINANCIAL WELLNESS

ELEVATEDRETIREMENTGROUP

HUB

my529™
UTAH EDUCATIONAL SAVINGS PLAN

ADP®
Always Designing for People®

Thank you to our sponsors!

12


5.5 PDCs Offered!
2025 WORKSITE WELLNESS CONFERENCE
WELL BY DESIGN
one intentional choice at a time
REGISTER HERE
SAVE 30%
use code SHRM2025
April 30th, 2025
$195 attendee price
$95 student price

13


SHRM Salt Lake
Looking for an HR professional to join your team?
SHRM Salt Lake can share your job on our website!
CHECK IT OUT!
slshrm.org > Job Search/Job Board

14

SHRM® Salt Lake

Did you know that members can claim recertification credits by watching recordings of past events?

CHECK IT OUT!

slshrm.org/events

Note: The date of the original recording must fall within your recertification three-year window to submit as part of your recertification application.

15

16


SHRM Salt Lake
HR WEBINAR SERIES
THE GREAT KNOWLEDGE ACCELERATION: BRIDGING GENERATIONS IN THE AI ERA
SPEAKER: LUKE GOETTING
APRIL 22, 2025
11 AM - 12 PM
www.slshrm.org/events
MEMBER ONLY EVENT

17


SHRM Salt Lake
Please scan the QR Code to complete a brief survey regarding today's program.
THANK YOU!
WE WANT YOUR FEEDBACK!

18

April 8, 2025 | The Grand America Hotel – Salt Lake City

19

20

PARSONS BEHLE & LATIMER

A *Different* LEGAL PERSPECTIVE

With more than 200 attorneys and offices throughout the Intermountain West, Parsons has provided a broad range of legal expertise in various practices and industries since 1882.

20

Parsons' Employment & Labor Practice

Disability Accommodation	Discrimination, Harassment & Retaliation	Drafting and Enforcing Employment Agreements	Employee Benefits & ERISA Counseling & Litigation	Inhouse Training	Employment Litigation
FMLA & Leave Issues	Whistleblower Actions	HIPAA, Privacy & Health Information Technology (HIT)	Handbooks	Immigration	OSHA
Overtime and Wage & Hour Compliance	Preventative Counseling, Mediation & ADR	Reductions in Force & Age Discrimination	Social Media in the Workplace	Termination & Discipline	Workplace Investigations

21

21

Semi-Monthly Employment Law Update (email newsletter)

22

22

Scan the QR code or visit parsonsbehle.com/emp-seminar to download a PDF handbook of today's materials and to subscribe to Parsons' Employment Law Update.

23

23

Parsons Behle & Latimer Prize Giveaway

Make sure to stop by the Parsons booth **before Noon** to enter your name in the prize drawing that will take place during lunch. You'll have the chance to win one of the following:

Free registration to next year's 38th Annual Employment Law Seminar

Apple Airpods Pro 2

Goodr Sunglasses

24

24

For attorneys interested in receiving Utah CLE credit for this event, if you haven't already done so, please visit the registration table to sign the CLE attendance sheet.

Attorney CLE Credit

PARSONS BEHLE & LATIMER

25

Session 1: 8:30 – 9:30 a.m.

Imperial C

Religion in the Workplace: Back in the Spotlight
Christina M. Jepson & Elena T. Vetter

Imperial D

Winning the Case Before it Starts: Investigations, Documents and Lawyers
Liz M. Mellem & Sean A. Monson

Savoy

The Uses, Risks, and Benefits of AI for HR Managers
J. Kevin West & Garrett M. Kitamura

26

PARSONS BEHLE & LATIMER

26

Session 2: 9:45 – 10:45 a.m.

Imperial C

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times

Michael Judd & Paul R. Smith

Imperial D

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025

Mark D. Tolman & Elena T. Vetter

Savoy

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act

Christina M. Jepson & Susan Baird Motschiedler

27

27

Session 3: 11 a.m. – Noon

Imperial C

The Next Right Thing: Choosing Your Path Through the ADA Mine Field

Liz M. Mellem & Susan Baird Motschiedler

Imperial D

I Have Seen This Movie Before . . . But I Am Not Sure How it Ends This Time

Michael Judd & Sean A. Monson

Savoy

Ask Us Anything (About Employment Law)

Michael Patrick O'Brien & Mark D. Tolman

28

28

Keynote Speaker – Lunch Hour

PARSONS BEHLE & LATIMER

29

37th Annual Employment Law Symposium

Religion in the Workplace: Back in the Spotlight

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

Elena T. Vetter
801.536.6909 | evetter@parsonsbehle.com

SHRM® Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE
parsonsbehle.com

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Religion in the Workplace: Time for Employers to Pray for Guidance

Christina Jepson & Elena T. Vetter

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake | PARSONS BEHLE & LATIMER

2

Religion in the Workplace—Is It About to Get Crazy?

PARSONS BEHLE & LATIMER

3

Why are we discussing religion in the workplace?

Four big reasons

1. New federal government focused on religious discrimination
2. New Supreme Court decision making it harder for employers to deny religious accommodations
3. New Utah statute protecting religion in the workplace
4. Inconsistency between LGBTQ rights and religious rights with no clear answers

4

SHRM Salt Lake

PARSONS BEHLE & LATIMER

4

Why are we discussing religion in the workplace?

In case you hadn't heard, there is a new President

Trump appointed a new Chair of the EEOC—Andrea Lucas

Four priorities:

1. Rooting out unlawful DEI-motivated race and sex discrimination;
2. Protecting American workers from anti-American national origin discrimination;
3. Defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work;
4. Protecting workers from religious bias and harassment, including antisemitism

This is going to be big—religious discrimination, harassment, and accommodation

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

Why are we discussing religion in the workplace?

New Supreme Court case changes the landscape

Much more difficult for an employer to show "undue hardship" in response to a request for a religious accommodation

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

Why are we discussing religion in the workplace?

Utah also enacted a new law providing greater religious freedom in the workplace

7

7

Historical Background

8

TITLE VII OF THE CIVIL RIGHTS ACT

- Originally enacted by Congress in 1964
- Illegal to discriminate in hiring on the basis of religion

9

9

TITLE VII OF THE CIVIL RIGHTS ACT

- In 1972, Congress added to Title VII of the Civil Rights Act of 1964 an express obligation of employers to "reasonably accommodate" the religious practices of their employees if they can do so without "undue hardship"

10

10

Title VII of the Civil Rights Act

- Title VII applies to employers in both the private and public sectors that have 15 or more employees
- It also applies to the federal government, employment agencies, and labor organizations
  - Exceptions
    - Religious Organization Exception
    - Ministerial Exception
- Title VII is enforced by the EEOC (which is now chaired by Andrea Lucas)

11

SHRM Salt Lake | PARSONS BEHLE & LATIMER

11

Litigation

- Heavily Litigated Areas
  - Congress did not define:
    - "**Religion**"
    - "**Reasonable Accommodation**"
    - "**Undue Hardship**"

12

SHRM Salt Lake | PARSONS BEHLE & LATIMER

12

Litigation - Basic Law Applicable to Employees

Employee first has the burden and must show religious discrimination in employment by showing that the employee:

1) holds a sincere religious belief that conflicts with an employment requirement,
2) employee often has to inform his or her employer of the conflict (especially if not obvious), and
3) was discharged or disciplined for failing to comply with the requirement

Litigation - "sincerely held religious belief"

- "Religion" includes "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith
- Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Sikhism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.

Litigation - "sincerely held religious belief"

- A belief is "religious" for Title VII purposes if it is "religious" in the person's "own scheme of things," i.e., it is a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by . . . God."
- The Supreme Court has made it clear that it is not a court's role to determine the reasonableness of an individual's religious beliefs, and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others . . ."

15

SHRM Salt Lake | PARSONS BEHLE & LATIMER

15

Litigation - "sincerely held religious belief"

- An employee's belief, observance, or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it
  - Catholicism and vaccines
- Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."

16

SHRM Salt Lake | PARSONS BEHLE & LATIMER

16

Litigation - "sincerely held religious belief"

- Employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance
- However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information

17

17

Litigation - "sincerely held religious belief"

- Factors that – either alone or in combination – might undermine an employee's credibility include:
  - whether the employee has behaved in a manner markedly inconsistent with the professed belief;
  - whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
  - whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons or the employee has just been disciplined and requests an accommodation);
  - and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

18

18

Litigation - Basic Law Applicable to Employer

- If employee makes showing of sincerely held belief and harm due to action by employer …
  - Burden then shifts to the employer to show that it could not reasonably accommodate the employee without undue hardship
  - If the employer's efforts fail to eliminate the religious conflict, the burden remains on the employer to establish that it is unable to reasonably accommodate the employer's practices without incurring undue hardship

19

19

Litigation – "Reasonable Accommodations"

- The reasonableness of an employer's attempt accommodate is determined on a **case–by–case basis**
- But, What are Some **Examples** of Reasonable Accommodations?
  - Scheduling changes, voluntary substitutes, and shift swaps
  - Changing an employee's job tasks or providing a lateral transfer
  - Telework
  - Making an exception to dress and grooming rules
  - Use of the work facility for a religious observance
  - Accommodations relating to payment of union dues or agency fees
  - Accommodating prayer, proselytizing, and other forms of religious expression

20

20

SCOTUS Raises the Bar for Employers to Deny Religious Accommodations

PARSONS BEHLE & LATIMER

21

Religious Accommodation – Raising the Bar

In 2023, the United States Supreme Court issued a decision in *Groff v. DeJoy*—a case that reset the standard for the burden an employer must meet in demonstrating that it is not required to grant an employee's request for a religious accommodation

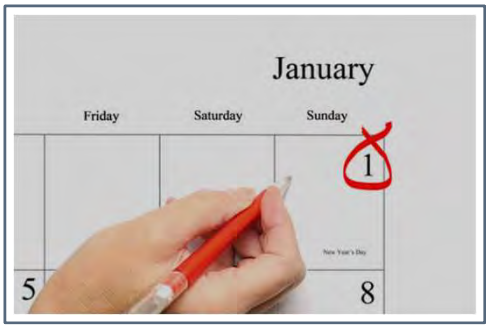
What *is* an "undue hardship"?

22

SHRM Salt Lake | PARSONS BEHLE & LATIMER

22

Religious Accommodation – Raising the Bar



An employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.

Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost"

23

23

Religious Accommodation – Raising the Bar

Similarly, the Americans with Disabilities Act (ADA) requires employers provide disability accommodations unless an employee's request imposes an "undue hardship"

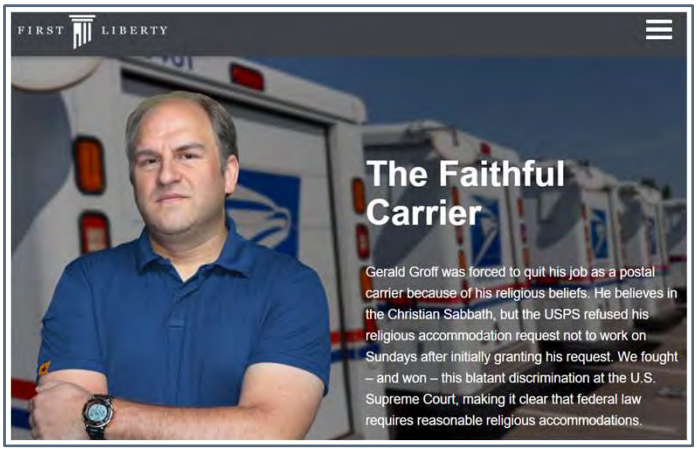
However, the standard for "undue hardship" under the ADA is far more stringent, requiring a showing of "significant difficulty or expense"

24

24

Religious Accommodation – Raising the Bar

- The plaintiff, Gerald Groff, worked for the U.S. Postal Service (USPS) and asked for Sundays off, asserting that his religion as an Evangelical Christian forbade Sunday work
- USPS asked Groff's coworkers to voluntarily trade shifts with him, but that did not work
- Ultimately, USPS denied Groff's request and then disciplined him when he missed work on Sundays
- Groff resigned and filed suit



SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

25

Religious Accommodation – Raising the Bar

A federal district court and appellate court found in favor of USPS because Groff's request for Sundays off imposed "more than a de minimis cost" because the request "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale"

But the Supreme Court reversed and rejected the "de minimis cost" standard

SHRM Salt Lake | PARSONS BEHLE & LATIMER

26

26

Groff v. Dejoy, 600 U.S. 447 (2023)

In *Groff v. Dejoy* the Supreme Court held that a religious accommodation would constitute an "undue hardship" if it "would result in **substantial increased costs** in relation to the conduct of a particular business"

In applying this test, courts must "**take into account all relevant factors in the case at hand**, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer"

"Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business . . .. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue.""

27

27

Religious Accommodation – Raising the Bar

Takeaways

The *de minimus* standard is out, but the work of making "context-specific" determinations of how to apply the undue-hardship standard for religious accommodations has been left to the lower courts

Until the courts establish a new standard, applying the ADA standard for undue hardship seems like the most conservative approach—i.e., grant a religious accommodation unless it imposes "significant difficulty or expense"

28

28

Applying *Groff - Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Brownsburg Community School Corporation's policy allowed students to change their preferred name, pronoun, and gender marker in the school's database if the student requested the change and provided a letter from a parent and a letter from a health care provider
- Teachers were required to call students by the preferred name listed in the school's database
- John Kluge, an orchestra teacher, opposed the policy on religious grounds and requested that as an accommodation he be allowed to call all students by their last name only

29

29

What did the school do?

- The School initially granted the accommodation but later revoked it after determining that the proposed accommodation harmed transgender students and was disruptive to other students and teachers
- Kluge filed suit alleging religious discrimination
- The District Court for the Southern District of Indiana granted summary judgement in favor of the School finding that the accommodation was an undue hardship because it imposed more than a "de minimis cost" and the Seventh Circuit affirmed

30

30

Kluge continued . . .

- Following the Seventh Circuit's decision, the Supreme Court issued its decision in *Groff v. Dejoy*
- The Seventh Circuit remanded the *Kluge* case back to the district court to evaluate it under the standard set forth in *Groff*

31

31

Kluge continued . . .

- On remand, the district court once again granted summary judgment in favor of the School
- The court explained that as a public school, the purpose of the school "is **providing a supportive environment for students** and respecting the legitimate expectations of their parents and medical providers" and that this "**mission can legitimately extend to fostering a safe, inclusive learning environment for all students and evaluating whether that mission is threatened by substantial student harm and the potential for liability**"

32

32

Kluge continued . . .

- The court found that the accommodation caused "emotional harm" to transgender students and "disrupted the learning environment" of all students and teachers
- "BCSC is a public-school corporation and as such has an obligation to meet the needs of *all* of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only"
- The court further noted that even if the only harm to the School's business was emotional harm to transgender students that "[a]s a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring substantially increased cost to its mission to provide adequate public education that is equally open to all."

33

33

Kluge continued . . .

- The court also found that the school suffered an undue hardship from a risk of liability
- In this case, the court acknowledged that there were several examples of Title IX litigation involving transgender students and that "it has become clear that treating transgender students differently than other students invites litigation under a variety of theories beyond Title IX, many of which have been successfully litigated"
- How will the current SC view this case if it takes up this case?

34

34

Kluge continued . . .

1. It is easier for an employee to bring a claim regarding religious accommodations
2. Under *Groff*, the undue hardship must be considered in the context of the employer's business. In this case, it was critical that BCSC was able to define its business as providing a safe and inclusive learning environment for *all* students.
3. If a proposed accommodation risks subjecting an employer to serious and disruptive litigation it can be an undue hardship
4. New EEOC Chair Andrea Lucas: "my priorities will include . . . Protecting workers from religious bias and harassment"

35

SHRM Salt Lake | PARSONS BEHLE & LATIMER

35

Litigation – "Reasonable Accommodations"

- Interactive process
  - Be flexible
  - Consider all options / Get creative
- Document accommodation dialogue

36

SHRM Salt Lake | PARSONS BEHLE & LATIMER

36

EEOC and Religion

PARSONS BEHLE & LATIMER

37

Andrea R. Lucas, Acting Chair of the EEOC

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. . . ."

38

SHRM Salt Lake

PARSONS BEHLE & LATIMER

38

Last year, the EEOC published new harassment guidance . . .

- The guidance prohibits harassment based on religious coercion or favoritism, and based on religion or the receipt of religious accommodations . . .
- The guidance also prohibits, among other things, repeatedly misgendering individuals, outing individuals, and restricting use to bathrooms or other sex-segregated facilities based on gender identity

39

39

How did Commissioner Lucas vote on the harassment guidance?

No!

Andrea Lucas' Post

Andrea Lucas
Acting Chair, United States Equal Employment Opportunity Commission (EEOC)
8mo

Today, the EEOC issued its Enforcement Guidance on Harassment in the Workplace, available here: https://lnkd.in/eaiR9Axp. I voted to disapprove the final guidance, for reasons including the guidance's assault on women's sex-based privacy and safety rights at work, as well as on speech and belief rights. My statement addressing my vote is attached to this post. The statement can be downloaded from this post for further review.

#LegalUpdate #EEOC #HR #Law #EEO #MeToo #Harassment #SexMatters

No!

40

40

That guidance now comes with a warning . . .

"When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."

41

41

And:

Discrimination claims that might conflict with Trump's executive orders, including one executive order declaring that "sexes are not changeable," will now sent to the EEOC for review, rather than follow the normal investigatory process.

A statement released by the EEOC explains: "acting Chair Lucas has directed that all charges that implicate these executive orders be elevated for review at EEOC headquarters to determine how to comply with these executive orders prior to the recission or revision of the harassment guidance," and "to the extent that a charging party requests a notice of right to sue for one of those charges, EEOC will issue that notice of right to sue, as statutorily required."

42

42

There's more . . .

- Do you remember *Bostock v. Clayton County,* 590 U.S. 644 (2020)?
- In *Bostock*, the Supreme Court held in a 6-3 decision that Title VII protects employees from discrimination based on sexuality or gender identity. The EEOC proceeded to apply that decision.
- But a recent executive order says:
  - "The Attorney General shall . . . immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent."
- If this issue were to come before the Supreme Court again, it could very well be reversed by the current Supreme Court, which has not shown much deference for precedent.

43

SHRM Salt Lake | PARSONS BEHLE & LATIMER

43

What does this have to do with religion?

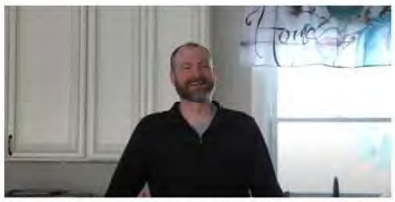
- Kluge is not alone . . .

Virginia school board pays $575K to teacher who refused student's preferred pronouns

by JACKSON WALKER | Crisis in the Classroom | Wed, October 2nd 2024 at 9:44 AM

School district pays thousands to settle with teacher fired for not using preferred pronouns

By Ryan Foley, Christian Post Reporter | Friday, March 14, 2025



Wisconsin teacher Jordan Cernek reached a settlement with his former school district after he was fired for objecting to a policy requiring staff to use trans-identified students' preferred name and pronouns. | YouTube/Wisconsin Institute for Law & Liberty

A Wisconsin teacher has reached a settlement with his former school district after facing termination due to his religious objection to referring to trans-identified students by their preferred names and pronouns.

The Wisconsin Institute for Law and Liberty announced Monday that the Argyle School District has agreed to pay a $20,000 settlement to Jordan Cernek. The teacher was fired in May 2023 for opposing a requirement that all district staff use the preferred names and pronouns of trans-identified students.

44

SHRM Salt Lake | PARSONS BEHLE & LATIMER

44

Utah Religion Statute and LGBTQ Employees

PARSONS BEHLE & LATIMER

45

H.B. 396 Workplace Discrimination Amendments

Effective May 1, 2024.

Primary bill sponsor is Rep. Brady Brammer (District 54 – Utah)

Found at: https://le.utah.gov/~2024/bills/static/HB0396.html

This bill expands religious liberty protections:

- Prohibits an employer from **compelling an employee to engage in "religiously objectionable expression,"** i.e., expression that offends a sincerely held religious belief
- Unless accommodating the employee would impose undue burden by interfering with (1) the employer's core mission or ability to conduct business in an effective manner or (2) the employer's ability to provide training and safety instructions."

46

SHRM Salt Lake

PARSONS BEHLE & LATIMER

46

H.B. 396 May Create Conflict with Federal Law

What about an employee who refuses to use a transgender coworker's pronouns and preferred name?

- EEOC: "Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment."
- Consider relying on the exception that granting a request to deadname a transgender employee or to refuse to use that employee's preferred pronouns interferes with an employer's "ability to conduct business in an effective manner" because lawsuits are expensive

47

47

HB 396 policy addition

Consider this addition to your religious accommodation policy:

"The Company will provide reasonable accommodations, absent undue hardship, to excuse employees from engaging in religiously objectionable expression, i.e., an expression that offends your sincerely held religious beliefs. If you believe that the Company has asked you to express something that offends your religious beliefs, you may seek an accommodation from Human Resources. The Company will provide such accommodations, unless doing so would cause an undue hardship, such as by interfering with a core mission, our ability to conduct business in an effective manner, or our ability to provide training and safety instructions."

48

48

H.B. 460 Government Employee Conscience Protection

Effective May 1, 2024.

Primary bill sponsor is Rep. Michael Peterson (District 2 – Cache)

Found at: https://le.utah.gov/~2024/bills/static/HB0460.html

- Allows governmental employees to request that their employer relieve them from tasks that conflict with their sincerely held religious beliefs or "conscience."
- The term "conscience" is defined as "a sincerely held belief as to the rightness or wrongness of an action or inaction."
- Accommodations must be granted unless doing so results in undue hardship.

49

49

H.B. 460 Government Employee Conscience Protection -- Process

- Employees seeking to be relieved from performing tasks are required to submit a written request with an explanation for why the task would conflict with the employee's religious beliefs of conscience
- After a request is received, a governmental entity must **respond within two days**
- If the request is denied, the governmental entity must provide a detailed explanation of why excusing the task would impose an undue hardship.

50

50

H.B. 460 Government Employee Conscience Protection -- Process

- Undue hardship is defined as "a substantial increase in costs to a governmental entity's operations and budget that would result from an employee being relieved from a certain task"
- Requests also may be denied when the employee is asking "to be relieved from performing a task associated with safety or training instructions that are directly related to the responsibilities of an employee's employment"
- The bill provides anti-retaliation protections
- And also allows an employee to sue to ask a judge to excuse them from the task ("injunctive relief") and may seek damages and attorney fees

51

SHRM Salt Lake | PARSONS BEHLE & LATIMER

51

Let's Get Practical

- Employers should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion
- Be flexible about trying to reasonably accommodate and make sure accommodation process is documented
  - Generally, courts tend to view claims of undue hardship with more favor when the employer has already attempted to accommodate the employee
- Evaluate undue hardship

52

SHRM Salt Lake | PARSONS BEHLE & LATIMER

52

Let's Get Practical

- Generally, still best to avoid discussing religion in job interviews
  - EEOC still advises employers avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate

53

53

Let's Get Practical

- If employer has concerns about a particular policy conflicting with an applicant's religion:
  - Practical approach: Without referencing religion, the employer should inform the applicant of the policy and ask if there is any reason that he or she may not be able to comply.
    - If applicant doesn't indicate there is a conflict, then should be no need to discuss religion at all
    - If applicant confirms he or she may need an accommodation, then interactive dialogue

54

54

Let's Get Practical

- Reexamine if your policies require reasonable accommodation, whether for religion, age, disability or other protected categories

55

SHRM Salt Lake | PARSONS BEHLE & LATIMER

55

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

56

Thank You

- Christina Jepson
  cjepson@parsonsbehle.com
  801.536.6820
- Elena T. Vetter
  evetter@parsonsbehle.com
  801.536.6909

57

37th Annual Employment Law Symposium

Winning the Case Before it Starts: Investigations, Documents and Lawyers

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Sean A. Monson
801.536.6714 | smonson@parsonsbehle.com

SHRM Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE

parsonsbehle.com

PARSONS BEHLE & LATIMER

A Professional Law Corporation

Winning the Case Before it Starts: Investigations, Documents and Lawyers

Liz M. Mellem & Sean A. Monson

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake

PARSONS BEHLE & LATIMER

2

Agenda

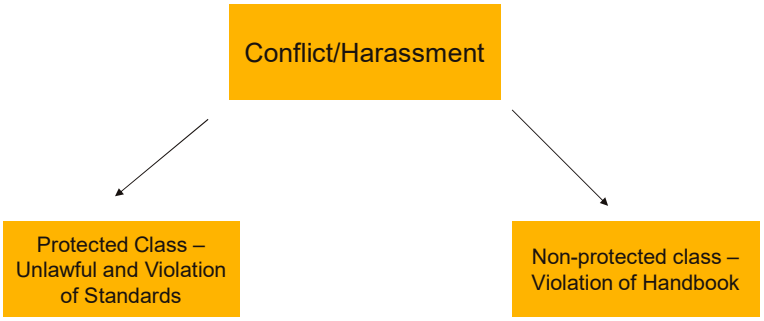
- Conduct needing documentation or an investigation
  - Non-protected class
  - Protected class
- Documentation of misconduct – practical tips
- Nuts and bolts of conducting investigation
- When to bring in outside investigator

3

SHRM Salt Lake | PARSONS BEHLE & LATIMER

3

Conflict/Harassment -- Categories



4

SHRM Salt Lake | PARSONS BEHLE & LATIMER

4

Protected Categories

- Race, color, ethnicity, or national origin
- Religion
- Sex/gender (reverse discrimination)
- Sexual orientation (perceived or actual)
- Transgender status
- Pregnancy, childbirth, breastfeeding, and related conditions
- Age (40 and over)
- Physical or mental disability
- Veteran status
- Genetic information

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

Workplace Conflict/Bullying

- Prohibit Bullying/Hazing even if it does not constitute unlawful harassment
  - Boss is a jerk v. boss is a racist or sexist
  - Approximately two-thirds of all harassment is "status-blind," and poses an occupational health hazard
  - Non-protected class harassment destroys employee morale as well

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

Examples – Non-Protected Class Bullying?

- "I don't give a s--t about what you have going on at home, get this done NOW"
- "You are so d--n stupid. Why would ever think doing that would be ok?"
- "You have got to be one of the dumbest employees I have ever had in the past 20 years"
- "Get your lazy a-- in here right now, and do some work for a f---ing change"

7

SHRM Salt Lake | PARSONS BEHLE & LATIMER

7

Handling Conflict/Bullying Issues

- You must build employee trust
- You must encourage voicing of complaints – environment where employees can voice concerns
- If there is conflict between two workers
  - Assess whether there has been a violation of your anti-bullying policy or anti-discrimination statute
  - If yes, move to investigation
  - If no, meet with employees – individually or together – out of site of other workers—explain what you observed – ask to understand the conflict – negotiate solutions

8

SHRM Salt Lake | PARSONS BEHLE & LATIMER

8

Best Practices for Employers

Documentation!

Documentation!

Documentation!

9

9

Why Document?

- Improved communications
- Uniformity in business decisions
- Lawsuit defense aids:
  - Faded memories
  - Credibility battles
  - Binding admissions

10

10

Documenting Misconduct: Nuts/Bolts

Sam Supervisor observed an incident. His report is as follows:

"There was something on the floor in the hall. I told Jerry Janitor to take care of it. He mouthed off and blew me off."

Is this helpful documentation?

Documenting Misconduct: Nuts/Bolts

A proper signed write-up might look like this:

"On 9/15/2021, I, Sam Supervisor, saw a puddle of grease on the floor in the west service hall. I told Jerry Janitor of the puddle, where it was, and to please clean it up immediately. He said, 'I'm busy right now. I'll get to that when I get around to it. If you need it sooner than then, you can $@&% well do it yourself.' I verbally warned him that his response was unacceptable, that his behavior would be noted in his file, and that further disciplinary action might be taken. Angie Assistant witnessed this exchange, and I asked her to write up a statement."

Guidelines for Corrective Actions

- What does proper documentation look like for a corrective action?
  - Objective goals
  - Detailed plan to meet goals
    - Employee's part
    - Supervisor's needed contribution
  - Ways to measure improvement/goals
  - Timeframe for improvement (keep an eye on the clock)
  - Employee or joint creation

13

SHRM Salt Lake | PARSONS BEHLE & LATIMER

13

Corrective Action Documentation

- What does proper documentation for a corrective action look like (cont.)?
  - Contains employee acknowledgements:
    - Of the performance problem
    - Of the employee's agreement to the plan
    - Of the employee's knowledge that failure to perform may result in additional disciplinary action
  - If acknowledgment is refused – document it

14

SHRM Salt Lake | PARSONS BEHLE & LATIMER

14

Corrective Action Documentation

- What does proper documentation look like for a corrective action (cont.)?
  - Contains disclaimer:
    - Plan is not a contract
    - Employer does not have to facilitate improvement

15

15

Documenting Misconduct

- How does the misconduct documentation help the employer avoid liability?
  - Encourages adequate investigation
  - Permits review
  - Promotes uniformity
  - Provides contemporaneous evidence of facts for use in lawsuits

16

16

Common Mistakes in Disciplining

- Vague communication of the expectations and consequences going forward
- Inconsistent discipline for similar infractions across the company
- Inappropriately light discipline or giving too many chances to improve
- Bringing unrelated or irrelevant issues into the documentation

17

17

Common Mistakes in Disciplining

- LYING in a performance review – Number One Problem
- Don't lie in a performance review to save someone's feelings or avoid confrontation
  - Will bite you like a rabid dog with 6-inch incisors
  - Not fair to employee – deprives them of chance to improve

18

18

Cautionary Tale: *LaCasse v. Owen*

- Plaintiff was fired by Fountain Plaza, LLC. Plaintiff alleged the termination was retaliatory and motivated by his involvement in a complaint of sexual harassment at a different company with common ownership interests
- Plaintiff was presented with a "conference report" referring to a meeting two weeks earlier where his poor performance was addressed
  - Plaintiff refused to sign the report and objected that he had never received a performance review or been told he was not performing well
- Plaintiff objected to the executive director and he was fired the next day

19

SHRM Salt Lake | PARSONS BEHLE & LATIMER

19

Cautionary Tale continued

- Fountain Plaza moved for summary judgment asserting Plaintiff could not prove causation – that his involvement in the sexual harassment complaint (rather than his poor performance) was the reason for his discharge
- Lower court granted summary judgment in favor of Fountain Plaza **despite ongoing dispute between the parties about whether the "conference report" (performance review) was fabricated and backdated**
- Appellate Court reversed and held that issue of fact was created by Plaintiff's allegation (and retention of a computer forensic expert) that performance review was fabricated

20

SHRM Salt Lake | PARSONS BEHLE & LATIMER

20

Why Should You Take the Time to Conduct an Effective, Thorough Investigation?

Evidence of a flawed or cursory investigation can support a finding of pretext to support a discrimination/retaliation case.

A jury may infer discriminatory intent when an employer "fail[s] to conduct what appeared to be a fair investigation…."

-- *Trujillo v. Pacificorp*, 524 F.3d 1149 (10th Cir. 2008)

Investigations

- Workers should be instructed to bring harassment/bullying concerns to management
- Workers do not have to approach the bully/hazer/harasser before complaining to management
- Complaints from workers who change their minds about complaining still are complaints and must be handled
- "I don't want to make a big deal about this. I just wanted to let you know. Please don't do anything about this. I don't want [name of harasser/bully] to get in trouble"

Investigations

- Respond to all complaints—harassment, retaliation, violation of public policy, OSHA, etc.
- Explain the process, and emphasize retaliation is prohibited
- Set expectations
- Start by showing willingness to believe and then listen
- Separate alleged victim and harasser/bully pending investigation – different shifts, administrative leave.
- DOCUMENT, DOCUMENT, DOCUMENT
- First document – investigation plan
  - What is the scope of the investigation
  - What documents do you need to review before interviews/after interviews
  - Outside investigator or no
  - How handle confidentiality issues
  - Timeline for completing investigation

23

SHRM Salt Lake | PARSONS BEHLE & LATIMER

23

Investigations

- No retaliation
- Who you are working for
- 5Ws – who, what, when, where, witnesses
  - Step one – Get the victim's story
    - Ask the victim -- what happened, who did it, where did it happen, and when did it happen.
    - Were there any witnesses? If yes, who?
    - Have the victim sign a statement – you do not want the story to change
- Step two – Get the witnesses' story
  - Ask the witness – 5Ws -- what did you see or hear, when and where did you see or hear it, who else was present
  - Have the witness sign a statement

24

SHRM Salt Lake | PARSONS BEHLE & LATIMER

24

Investigations

- Step Three – Confront the harasser/bully
  - Confront the harasser with the allegations
  - Give him or her a chance to respond
- Step Four – Make a decision
  - Make a decision regarding the extent to which you believe that the victim was subject to unlawful harassment/bullying
  - You will have to decide whose testimony is more credible – the victim and witnesses or the alleged harasser/bully
  - Don't make legal conclusions – "Employee X was the victim of sexual harassment"
  - Instead "I find that Employee Y said _____ to Employee X"

25

SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

Investigations

- Step Four (cont.)
  - The alleged harasser is not going to admit the behavior that he or she is accused of committing
  - Decide on discipline for the harasser, if any – write up, suspension (with or without pay depending on any applicable policies), termination
  - Document why you took action the action you did (who you interviewed, who you believed, why, and why the discipline is appropriate)
  - Disciplinary action goes in personnel file of accused
  - The interview summaries should go in a separate investigation file – not the files of the victim or the witnesses (future lawsuit)

26

SHRM Salt Lake | PARSONS BEHLE & LATIMER

26

Investigations

- Report
  - List documents reviewed and summary of what they contain
  - List witnesses interviewed and summary of testimony – note dates interviewed
  - Summarize complaint/allegations
  - Factual findings (with supporting evidence references)
  - Any evidence discounted? Why?
  - Summary of who you believed and why
  - Conclusions
    - Again, not legal conclusions – try not to say "Employee X was the victim of unlawful harassment under Title VII"
    - Can make conclusions that certain behavior violated company policies
  - Recommended actions

EEOC Enforcement Guidance

In 1999, the EEOC issued "Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors," which contains guidance on "credibility determinations":

> "If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred.

EEOC Enforcement Guidance (cont'd.)

- "Factors to consider include:
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to Falsify: Did the person have a reason to lie?

29

29

EEOC Enforcement Guidance (cont'd.)

- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past

30

30

Common Handbook Provision

Investigation Confidentiality Policies

All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

31

31

EEOC Guidance

- This is based on EEOC guidance – “need to know” basis only
- An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those **who need to know** about it. Records relating to harassment complaints should be kept confidential on the same basis.

32

32

EEOC Guidance

- A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. **Inaction** by the supervisor in such circumstances could lead to **employer liability**. While it may seem reasonable to let the employee determine whether to pursue a complaint, the **employer** must discharge its **duty** to prevent and correct harassment.

33

33

NLRB Disagrees?

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you needed to apply "individualized scrutiny" in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In *Stericycle*, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality with non-supervisors.

34

34

NLRB Disagrees

- For supervisors, there's no change. Recall that supervisors don't have Section 7 rights. Feel free to tell them to keep it secret.

35

35

Investigation Confidentiality Policy Example

Instead of: All parties involved in an investigation will keep complaints and the terms of their resolution confidential.

Consider: All supervisors involved in an investigation will keep complaints and the terms of their resolution confidential. The Company may require that non-supervisors maintain confidentiality during an investigation when confidentiality is needed, e.g., to protect the integrity of the investigation, or to protect complainants or witnesses against tampering or mistreatment.

36

36

Investigations – When to Call In the Cavalry?

- It depends:
  - Complaint involves alleged sexual harassment between two entry level employees. Something that potentially can be handled in house.
  - Advantages –
    - institutional knowledge of the Human Resource department
    - likely comfort the parties will have when they are interviewed by a friendly face.
  - Disadvantages –
    - level of involvement Human Resources has in promoting, demoting, and/or terminating employees as the greater the involvement the more likely a conflict of interest exists.

37

37

Investigations – When to Call In the Cavalry?

- It depends:
  - Complaint is made by a lower level employee against the owner/president of the company.
  - Investigation would likely need to be conducted by an outside investigator.
  - Avoids the inference of impropriety.
  - Even if Human Resources vows to be neutral and fair, the owner/president controls that individual's employment – obvious potential bias.
  - If the investigator has a prior relationship with any potential witness, inference that the witnesses' statements may be given more weight than other witnesses.

38

38

Investigations – When to Call In the Cavalry?

- It depends:
  - The investigation must be fair, impartial, and timely if you are to use the outcome of the investigation as a defense to potential civil liability.
  - If you have any doubts that the standard can be met, call in an outside investigator.

39

39

Consider Splitting the Cavalry In Two

- One person to investigate
- One person to advise
- Why?
- Attorney-Client Privilege/Work Product Doctrine
  - Investigator could potentially be deposed/called as a witness

40

40

Lessons Learned Vandegrift v. City of Philadelphia (2017)

41

41

Investigations – Lessons Learned

- The story
  - Two police officers allege sexual harassment and sexual assault by their boss
  - One officer claims that she was sexually assaulted in boss' car
  - Inspection results in a finding of physical evidence that something was going on in that car
  - The boss says, "Oh yeah, I have had sex a couple of times in the car" with a civilian woman
  - What is the next question?

42

42

Investigations – Lessons Learned

- The story
  - City did NOT do that
  - The investigators did not ask for the name of the civilian or for her description
  - Boss did not provide investigators any contact information for the civilian
  - Although victim had two witnesses who corroborated her account of the events (he had been hitting on her at a bar before the alleged assault), the investigation resulted in a finding of "not sustained"
  - Lesson One – Ask the follow up question!!

43

43

Investigations – Lessons Learned

- The story
  - The second officer complained about a litany of inappropriate, sexual comments and sexual assault by the same guy (this time in his office)
  - First response when the complaint was filed?
  - Shortly after Ms. Vandegrift made her internal EEO complaint, Captain Derbyshire spoke with his superior and told him he would transfer Ms. Vandegrift from 3 Squad to 2 Squad. The superior, an Inspector, responded, "that would be a good move." Captain Derbyshire then told Lieutenant Morton—who is responsible for 2 Squad—he would transfer Ms. Vandegrift to 2 Squad because she filed the internal EEO complaint. Ms. Vandegrift did not want to leave 3 Squad, where she worked the night shift, because she needed the night shift schedule. Ms. Vandegrift's mother normally watched her son, but at the time her mother could not because she was hospitalized.

44

44

Investigations – Lessons Learned

- The story
  - Doubling down
    - "Inspector Washington told Captain Derbyshire Ms. Vandegrift would be reassigned to the Southwest Division.
    - The Southwest Division is an extremely busy and hectic place to work. There is a perception within the Philadelphia Police Department assignment to the Southwest Division is a punishment. The Southwest Division is also a longer commute for Ms. Vandegrift than the South Division. Captain Derbyshire told Ms. Vandegrift the City reassigned her to the Southwest Division for her protection. When she asked what he meant, Captain Derbyshire said they could not move all the male detectives at once, so they were going to move her for her protection. Captain Derbyshire never spoke with Ms. Vandegrift about whether she wanted to move out of the South Division before he talked with Inspector Washington. Captain Derbyshire never considered moving the male detectives who engaged in the conduct Ms. Vandegrift had complained about."
  - Lesson Two–Don't reassign the claimant to make the problem go away!!

Investigations – Lessons Learned

- The story
  - Plaintiff submitted expert testimony and court agreed:
    - The investigators improperly applied a criminal law standard to some of Det. Vandegrift's complaints;
    - The investigators failed to investigate all claims, including no investigation of Det. Vandegrift's retaliation complaints;
    - The investigators failed to interview or investigate, or attempt to interview or investigate anyone not currently employed by the Philadelphia Police Department;
    - The investigators' questioning methods were unreasonably brief and shallow;

Investigations – Lessons Learned

- The story
  - Plaintiff submitted expert testimony and court agreed:
    - The investigations should have been conducted by a single investigator;
    - The investigators failed to review or consider background information about the alleged harassers;
    - The investigators failed to judge the credibility of the complainant, witnesses and alleged harassers.
  - Lesson Three—Apply the correct standard of "fact finding"!!
  - Lesson Four—Interview all the witnesses; ask the 5Ws, persistently!!
  - Lesson Five—Consider and explain credibility decisions

47

SHRM Salt Lake | PARSONS BEHLE & LATIMER

47

Investigations – Lessons Learned

- The story (not the most helpful investigator)
  - Lieutenant Raymond Saggese has been an investigator in the internal affairs division for sixteen years
  - During Lieutenant Saggese's interview of Ms. Vandegrift during the investigation, Lieutenant Saggese told Ms. Vandegrift certain employees have "carte blanche" to act the way they do, and he had "run into a brick wall" regarding other investigations
  - He also told Ms. Vandegrift other sexual allegations against "higher-ups" are swept under the rug
  - Lesson Six – Choose your investigator wisely!!

48

SHRM Salt Lake | PARSONS BEHLE & LATIMER

48

Investigations – Lessons Learned

- The story—
  - On July 29, 2014, Ms. Vandegrift sent a Facebook message to four of her male colleagues in her squad which included a picture of a baby whose facial expression reminded her of Detective Ruth and included quotes from Detective Ruth:

    John Ruth at 6 months. He's saying—'yo Jim this job won't make me money' 'My payroll number is ...' 'Get off my Dick' 'a good detective is knowing when to work hard on a job and when to put the crap aside' 'this is silly' 'you alright buddy?' Yep, 30 years later and not much has changed lol.
  - Vandegrift is disciplined for this even though, in violation of Police Department policy, no one asks her about the message – i.e. there was no investigation, just discipline
  - Lesson Seven—Follow your policies!! (In all things, not just investigations)

49

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Investigations – Lessons Learned

- The story--
  - Chief Inspector Christopher Flacco testified the City disciplined Ms. Vandegrift for the Facebook message because she complained about similar conduct:
    - Q. So do you agree with me, then, that the reason why Vandegrift is being written up for the Facebook message is because she made the complaint about similar conduct herself?
    - A. You can make that assumption, yeah, that's part of it.
  - Lesson Eight—Prepare for your deposition!! With your lawyer!!

50

SHRM Salt Lake | PARSONS BEHLE & LATIMER

Common Mistakes in Terminating Employees

- NO DOCUMENTATION
- Not giving a complete, written reason for the termination to employee
- Terminating without having exhausted the ADA reasonable accommodation process
- Termination for retaliatory reasons (known to the decision maker, but not to HR)
- Overlooking procedural requirements
- Bringing unrelated or irrelevant issues into the documentation
- Sugar-coating or leaving out some reasons for termination – if it is not noted in a contemporaneous document, it did not happen
- Getting HR or counsel involved too late – after a bad decision has been made or bad documentation has been created

51

SHRM Salt Lake | PARSONS BEHLE & LATIMER

51

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

52

Thank You

- Liz M. Mellem
  amellem@parsonsbehle.com
  406.317.7240
- Sean A. Monson
  smonson@parsonsbehle.com
  801.536.6714

53

37th Annual Employment Law Symposium

The Uses, Risks, and Benefits of AI for HR Managers

J. Kevin West
208.562.4908 | kwest@parsonsbehle.com

Garrett M. Kitamura
208.562.4893 | gkitamura@parsonsbehle.com

SHRM Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE

parsonsbehle.com

PARSONS BEHLE & LATIMER

A Professional Law Corporation

The Uses, Risks, and Benefits of AI for HR Managers

J. Kevin West & Garrett M. Kitamura

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

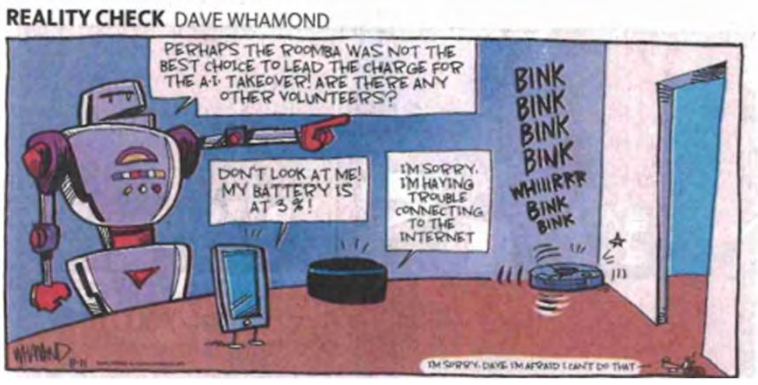
SHRM Salt Lake PARSONS BEHLE & LATIMER

2

AI Trends in Human Resources

PARSONS BEHLE & LATIMER

3



4

SHRM Salt Lake

PARSONS BEHLE & LATIMER

4

AI Trends: 2024 SHRM Survey

- In January 2024, 2,366 HR professionals answered a SHRM survey on AI
  - 26% of respondents say they use AI to support HR-related activities
- Of HR professionals who use AI, the most common uses were:

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

AI Trends: 2024 SHRM Survey (cont.)

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

AI Trends: 2024 SHRM Survey (cont.)

- Of respondents who use AI (approximate percentages):
  - 90% say AI saves time or increases efficiency in recruiting, interviewing, or hiring
  - 67% use AI to help generate job descriptions
  - 32% find AI enables “somewhat better” or “much better” recruiting, interviewing, or hiring of diverse candidates
  - 10% say AI allows them to access underrepresented pools of talent they weren’t previously reaching

7

7

AI Trends: 2024 SHRM Survey (cont.)

- Of respondents who use AI (approximate percentages):
  - 40% have concerns about security and privacy of data used by AI tools
  - Only 34% say the vendor(s) they purchase AI from are **very transparent** about the steps taken to ensure the tools prevent or protect against discrimination/bias
- Reasons why organizations do not use AI (approximate percentages):
  - 42% lack knowledge about what AI tools would best fit their needs
  - 29% have concerns that AI may accidentally overlook/exclude qualified applicants/employees
  - 20% are concerned that AI can repeat/exacerbate patterns of bias because it learns from past data

8

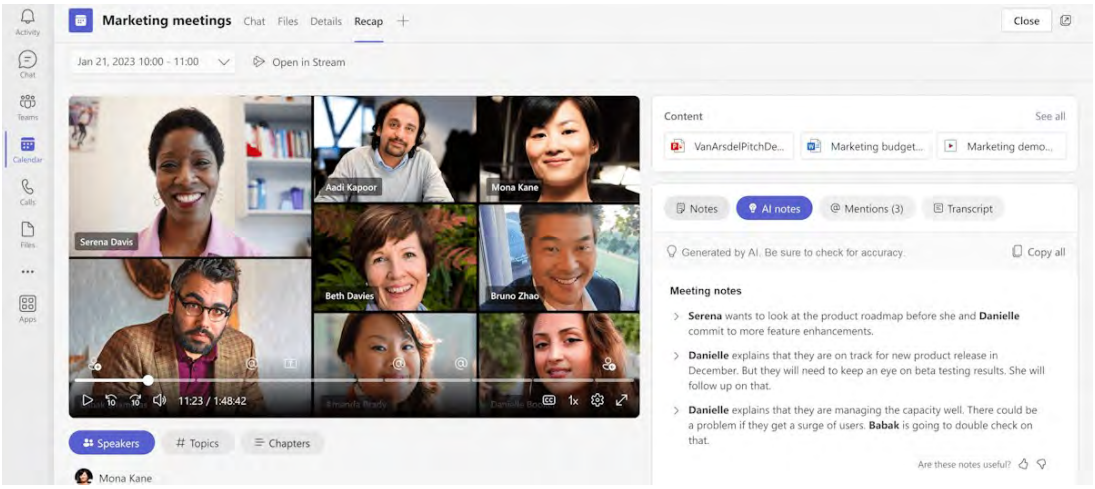
8

Uses & Benefits of AI in HR

PARSONS BEHLE & LATIMER

9

Meeting Assistant (e.g., Teams' Intelligent Recap)



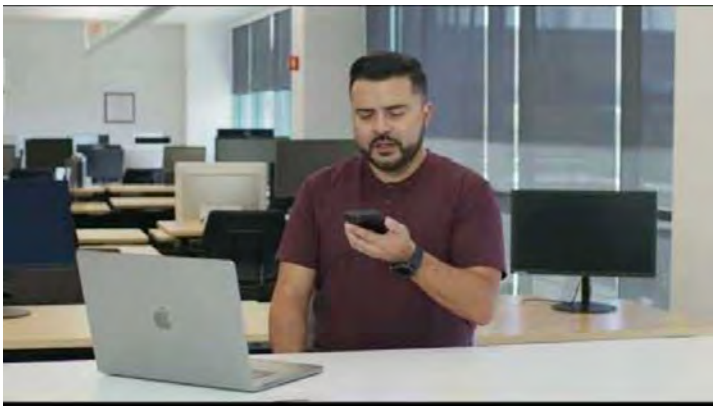
10

SHRM Salt Lake

PARSONS BEHLE & LATIMER

10

AI Agent for HR

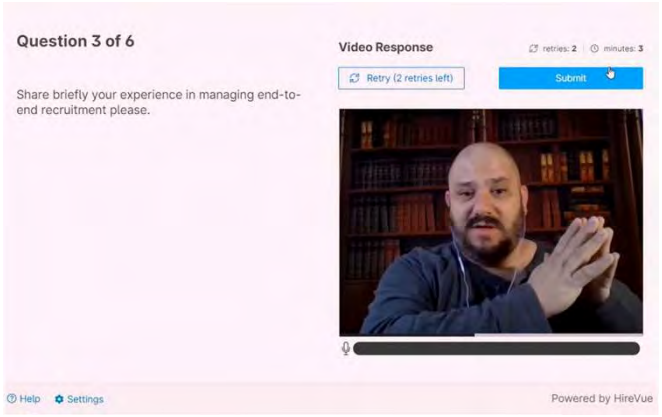


11

11

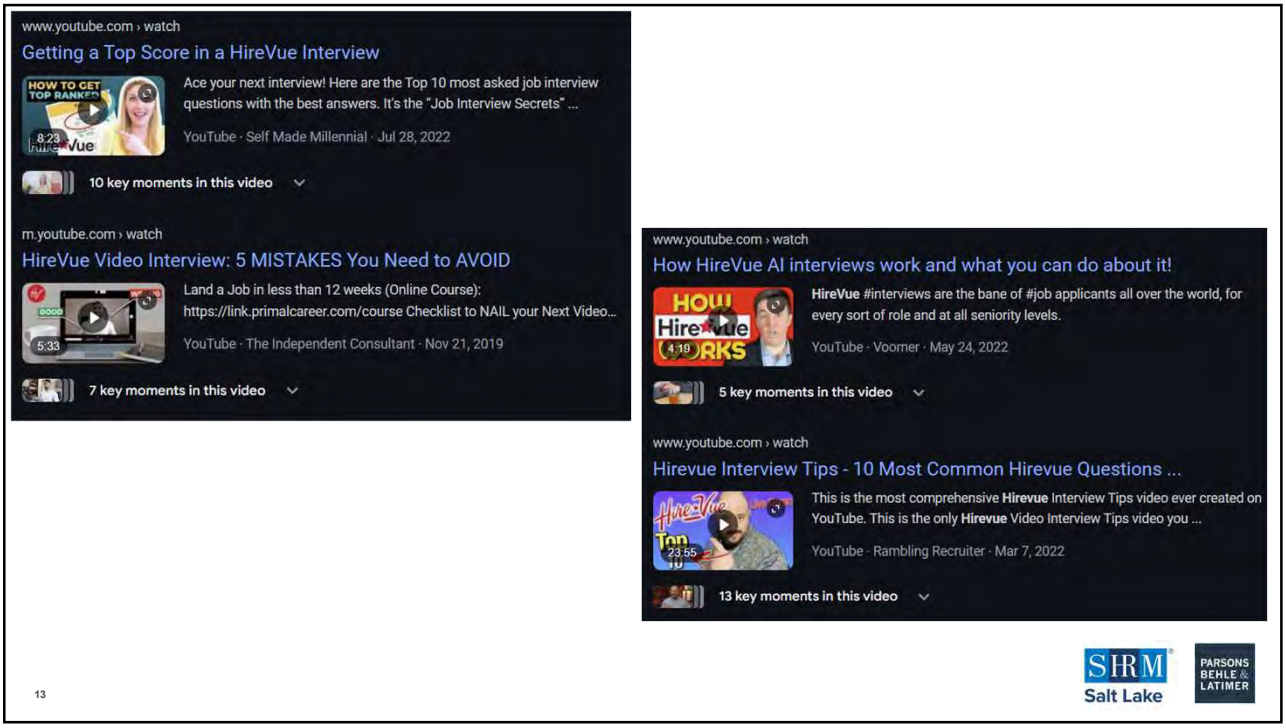
Virtual Interviews (e.g., HireVue)

- Candidates can participate in on-demand interviews outside traditional business hours
- AI "scores" candidates interview responses
- AI considers physical and vocal responses to questions
- HireVue: "We've learned a lot by conducting over 70 million interviews. With this data, our models focus on skills, behaviors, and competencies specific to the job and not on irrelevant information like how someone was dressed, which university they attended, or which keywords are in their resume."



12

12



13

AI and Employment Law

PARSONS BEHLE & LATIMER

14

AI Use in HR Can Implicate Federal Employment Laws

- Title I of the Americans with Disabilities Act of 1990
  - Prohibits employment discrimination against qualified individuals with disabilities who can perform essential functions of the job with or without accommodation
  - Requires the employer to provide reasonable accommodations to qualified individuals with disabilities unless doing so would cause the employer an undue hardship

15

15

Implicated Federal Employment Laws (cont.)

- Equal Employment Opportunity Commission (EEOC) Guidance (May 2023) (Rescinded)
  - EEOC cautions that use of AI for HR tasks can violate the ADA
  - AI tools may unlawfully disadvantage or screen out qualified applicants or employees with disabilities
  - Inquiries or decisions by AI concerning individual's disability or medical history could violate the ADA
  - Employer can be liable for ADA violations even if the AI tools are administered by a third-party vendor

16

16

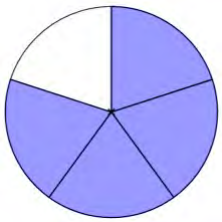
Implicated Federal Employment Laws (cont.)

- Title VII of the Civil Rights Act of 1964
  - Prohibits employment discrimination based on race, color, religion, sex, or national origin
- EEOC Guidance (May 2023) (Rescinded)
  - AI decision-making that adversely affects a particular social group (e.g., race, religion, sex) will violate Title VII unless employer can show that use of the AI tool is "job related and consistent with business necessity"

17

Implicated Federal Employment Laws (cont.)

- To avoid Title VII violations, EEOC suggests following the "Four-Fifths Rule"
  - "Four-Fifths Rule" is a rule of thumb can be used to determine if treatment of one group is "substantially"(i.e., illegally) different than the other.
  - "Four-Fifths Rule": Rate of selection between two groups is "substantially" if ratio is less than four-fifths (80%)



18

Implicated Federal Employment Laws (cont.)

- Example of "Four-Fifths Rule": AI helps to select 20% of black applicants for a position and 80% of white applicants for the same position
  - Ratio of black to white applicants selected is 20/80 (or 25%)
  - Because 20/80 (or 25%) is lower than 4/5 (or 80%), the Four-Fifths Rule indicates that selection rate of black applicants is substantially different than selection rate of white applicants
  - This can indicate discrimination but is not determinative. Again, it's a rule of thumb.
- EEOC caution: Even if Four-Fifths Rule satisfied, statistically significant differences in hiring can create liability Title VII discrimination

19

SHRM Salt Lake | PARSONS BEHLE & LATIMER

19

Implicated Federal Employment Laws (cont.)

- Age Discrimination in Employment Act of 1967
  - Prohibits employment discrimination against anyone age 40 years of age or older
  - Among other nuances, AEDA requires waiver agreement in severance package must clearly note that the employee is waiving AEDA rights and must provide said employee 21 days to consider the agreement

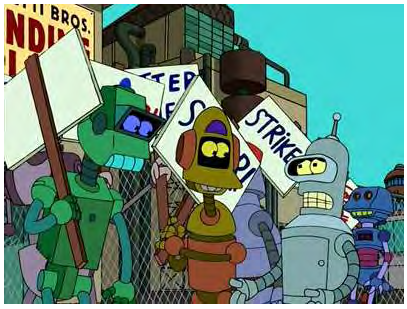
20

SHRM Salt Lake | PARSONS BEHLE & LATIMER

20

Implicated Federal Employment Laws (cont.)

- National Labor Relations Act of 1935
  - Prohibits employers from interfering with union activity or inferring with employees making concerted efforts to improve working conditions
- Family Medical Leave Act of 1993
  - Requires employers to provide eligible employees with job-protected leave for certain family or medical reasons
- Genetic Information Nondiscrimination Act of 2008
  - Prohibits discrimination against employees or applicants because of genetic information



21

21

And Then There's State and Local Laws

- State Human Rights Laws
  - State-level civil rights acts that can provide even broader discrimination protection
- State-specific Wage and Hour Laws
  - Does your payroll AI know about tip credits in Oregon???
- Polygraph Tests
  - Many states have laws prohibiting or heavily restricting the use of lie detector tests in hiring and employment
  - These state laws can be more stringent than the federal Employee Polygraph Protection Act

22

22

Risks and Liabilities

PARSONS BEHLE & LATIMER

23

Cautionary Tale: *Baker v. CVS Health*

- Brendan Baker applied to work at CVS in Massachusetts
  - Part of his application included a virtual HireVue interview
  - According to Baker, HireVue claims it can detect whether an applicant "has an innate sense of integrity and honor" and can screen out "embellishers"
- Federal law and Massachusetts law prohibit lie-detector tests in pre-employment screenings
  - Baker filed suit against CVS in early 2023, seeking to certify a class-action lawsuit
  - Federal judge denied CVS's motion to dismiss
  - CVS settled in July 2024

HireVue

24

SHRM Salt Lake | PARSONS BEHLE & LATIMER

24

Federal Action on AI in Employment: Past and Present

- Biden-era agency actions and guidance focused on the risk of employment discrimination stemming from biased AI,
  - Brought action against companies and supported employee lawsuits
- Trump-era agencies have rescinded guidance for use of AI in employment
  - Agencies appear less poised to bring action against employers or implement stringent regulation/guidance
- It is a question of when, not if, federal agencies will return to scrutinizing the use of AI in employment

25

SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

Biden-era Agency Actions

- *EEOC v. iTutorGroup, Inc.* (E.D.N.Y., 2022)
  - iTutorGroup hired remote English tutors for students in China
  - EEOC alleged iTutor's hiring software "intentionally discriminated against older applicants because of their age" by "automatically reject[ing] female applicants age 55 or older and male applicants age 60 or older."
  - Alleged violation of federal Age Discrimination in Employment Act
  - iTutorGroup settled: $365,000 payment to rejected applicants

26

SHRM Salt Lake | PARSONS BEHLE & LATIMER

26

Biden-era Agency Actions (cont.)

- *Mobley v. Workday* (N.D. California, 2023)
  - **Workday**: AI-powered applicant screening tool
  - **Derek Mobley**: Used Workday to apply for over 100 jobs between 2017 and 2024
  - All of Mobley's Workday applications were rejected
  - Mobley alleged Workday's AI could infer that he was black, over 40, mentally disabled

27

27

Biden-era Agency Actions (cont.)

- *Mobley v. Workday* (N.D. California, 2023)
  - Mobley alleged the AI incorporated illegal biases and prejudicial training data
  - Mobley alleged Workday acted as agent of hiring employers, subjecting Workday to federal labor laws (e.g., ADA, Title VII)
  - Biden EEOC filed brief in support of this theory and the Court agreed
  - Mobley currently seeking class-action certification

28

28

Emerging Laws

PARSONS BEHLE & LATIMER

29

Current and Forecasted AI Laws

- States and Cities
  - Private-sector AI governance bills pending in about 20 state legislatures
  - Utah, Colorado, and California currently have AI laws on the books
  - Existing and proposed state legislation generally focused on consumer protection
  - New York City passed “first-of-its-kind plan” to address use of AI in employment decisions

30

SHRM Salt Lake

PARSONS BEHLE & LATIMER

30

Current and Forecasted AI Laws (cont.)

- Federal
  - No expected action from Congress in the current or next session
  - No sign of action from federal agencies
  - No anticipated executive action

31

31

Utah's Artificial Intelligence Policy Act

- Effective May 1, 2024
- Focused on consumer protection
  - Requires business/individual to disclose generative AI use upon inquiry (e.g., customer asks AI chatbot if it's a chatbot)
  - Prominent mandatory disclosure of generative AI use if it is used for services in "regulated occupations" (e.g., doctors, dentists, lawyers)

32

32

Utah's Artificial Intelligence Policy Act (cont.)

- Penalties up to $2,500 for each violation
- Act also establishes Artificial Learning Laboratory Program ("Program") and Office of Artificial Intelligence Policy ("Office")
  - The Program limits liability for qualified participants helping to test/develop generative AI technologies
  - The Office will administer the Program and will establish rules and regulations for generative AI

Office of Artificial Intelligence Policy

33

SHRM Salt Lake | PARSONS BEHLE & LATIMER

33

New York City's "Bias Audit Law"

- Local Law 144 is effective January 1, 2023
  - Automated employment decision tools (AEDTs) prohibited in employment decisions unless certain criteria are met, including notice of use and independent bias audits
  - Applies to AEDT use "in the city," which includes:
    - Job located in an office in NYC, at least part time;
    - Fully-remote job associated with an office in NYC; or
    - Employment agency using the AEDT is in NYC.
  - Civil penalties:
    - $500 maximum fine for first violation
    - $500 to $1,500 fines for each subsequent violation

34

SHRM Salt Lake | PARSONS BEHLE & LATIMER

34

Forthcoming Federal Regulations?

- Executive Order 14179 (signed January 23, 2025): "Removing Barriers to American Leadership in Artificial Intelligence"
  - Sec. 2: "It is the policy of the United States to sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security."
  - Sec. 4: "Within 180 days of this order [July 22, 2025], the [various agency assistants to the President] shall develop and submit to the President an action plan to achieve the policy set forth in section 2 of this order."

35

SHRM Salt Lake | PARSONS BEHLE & LATIMER

35

Federal Agency Guidance

PARSONS BEHLE & LATIMER

36

2022 Dep't of Justice Guidance: AI Hiring & Disability Discrimination

- How AI might screen out individuals with disabilities in violation of the ADA
  - AI face or voice analysis may screen out candidates with autism or speech impairments
  - AI resume reviews may screen out people who have been historically excluded from jobs because of a disability
  - Game- or test-based interview activities might exclude those with sensory, manual, or speaking disabilities
  - AI-generated questions or activities may unlawfully seek medical or disability-related information

37

37

2022 Dep't of Justice Guidance (cont.)

- Be prepared to give reasonable accommodations
  - Employers should provide enough information about the technology, activities, and evaluation standards that will be in the interview so applicant can determine if they need an accommodation
  - Employers should provide and implement clear procedures for applicants to request reasonable accommodations for interviews

38

38

2024 Dep't of Labor's AI Best Practices (Rescinded)

- Biden Dep't of Labor issued document "Artificial Intelligence and Worker Well-Being: Principles and Best Practices for Developers and Employers." (No longer available on DoL website.)
  - Pursuant to Biden EO 14110: "Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"
  - EO 14110 was rescinded and superseded by earlier-mentioned Trump EO 14179
- This guidance is worth examining for its general best practices a guide to prepare for future government regulation/scrutiny

39

39

Dep't of Labor's AI Best Practices (cont.)

- Employers should establish AI governance and human oversight
  - Provide appropriate training about AI to as broad a range of employees as possible (e.g., how to use AI, what AI should or should not be used for, information to not share with AI)
  - Do not rely solely on AI (or information collected through electronic monitoring) to make significant employment decisions

40

40

Dep't of Labor's AI Best Practices (cont.)

- Employers should establish AI governance and human oversight
  - Identify and document significant employment decisions informed by AI and automated systems: let employees and applicants know the role these systems are playing
  - Document and implement procedures for appealing (to a human) significant employment decisions made by AI
  - Ensure worker-impacting AI systems are independently audited

41

41

Dep't of Labor's AI Best Practices (cont.)

- Employers should provide transparency about AI use
  - Provide employees and their representatives advanced notice and disclosure of worker-impacting AI
  - Provide clear disclosures about what information will be collected, how long it will be stored, and what it will be used for
  - Where feasible, allow workers to request, view, and submit corrections for individually-identifiable data used to make significant employment decisions

42

42

Dep't of Labor's AI Best Practices (cont.)

- Employers should protect labor and employment rights
  - Do not use AI systems that interfere with or have a chilling effect on protected activities like improving working conditions
  - Worker-impacting AI should not be used to reduce employees' wages, break time, or benefits

43

Dep't of Labor's AI Best Practices (cont.)

- Employers should protect labor and employment rights
  - Ensure AI used to prioritize or schedule work is helping to implement fair and predictable scheduling practices (as opposed to creating unpredictable or erratic schedules)
  - Avoid collecting, retaining, or otherwise handling employee data that is not necessary for a legitimate and defined business purpose

44

Closing Thoughts

PARSONS BEHLE & LATIMER

45

Closing Thoughts

- Treat AI for what it is: a helpful tool that (like any tool) needs monitoring and upkeep
- AI-driven decisions in HR should always be subject to human oversight
  - Especially true for major decisions
- Scrutinize the AI and its developer
  - Test the AI internally before implementation
  - Audit the AI during use
  - Get employee feedback on AI
  - Check on the about the developer's credibility (e.g., reputation, mission statement, past liabilities)

46

SHRM Salt Lake

PARSONS BEHLE & LATIMER

46

Closing Thoughts (cont.)

- Apply best practices
  - Promotes efficiency
  - Reduces liability
  - Prepares your company for future government regulation/oversight
- When in doubt, consult with an employment and labor attorney

47

SHRM Salt Lake | PARSONS BEHLE & LATIMER

47

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

48

Thank You

- J. Kevin West
  kwest@parsonsbehle.com
  208.562.4908
- Garrett M. Kitamura
  gkitamura@parsonsbehle.com
  208.562.4893

49

37th Annual Employment Law Symposium

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times

Michael Judd
801.536.6648 | mjudd@parsonsbehle.com

Paul R. Smith
801.536.6941 | psmith@parsonsbehle.com

SHRM® Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE

parsonsbehle.com

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times

Michael Judd & Paul R. Smith

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake

PARSONS BEHLE & LATIMER

2

Nothing Lasts

PARSONS BEHLE & LATIMER

3

You Can't Spell "Poetry" Without Corporate Policy

ORIGINAL POETRY.

OZYMANDIAS.

I MET a Traveller from an antiqúe land,
Who said, "Two vast and trunkless legs of stone
Stand in the desart. Near them, on the sand,
Half sunk, a shattered visage lies, whose frown,
And wrinkled lip, and sneer of cold command,
Tell that its sculptor well those passions read,
Which yet survive, stamped on these lifeless things,
The hand that mocked them, and the heart that fed:
And on the pedestal these words appear:
"My name is OZYMANDIAS, King of Kings."
Look on my works ye Mighty, and despair!
No thing beside remains. Round the decay
Of that Colossal Wreck, boundless and bare,
The lone and level sands stretch far away.

GLIRÁSTES.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

4

4

You Can't Spell "Poetry" Without Corporate Policy

NOTHING GOLD CAN STAY

NATURE'S first green is gold,
Her hardest hue to hold.
Her early leaf 's a flower;
But only so an hour.
Then leaf subsides to leaf.
So Eden sank to grief,
So dawn goes down to day.
Nothing gold can stay.

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

You Can't Spell "Poetry" Without Corporate Policy

Both poems were actually written by poets desperate to excuse their 90s fashion faux pas.

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

Corporate Pioneers: Visionaries or Wafflers?

Big tech firms ramp up remote working orders to prevent coronavirus spread

By Clare Duffy, CNN Business
5 minute read · Updated 4:49 PM EDT, Thu March 12, 2020

BREAKING

Amazon Extends Work From Home Policy Until January

Rachel Sandler Former Staff
I cover the world's richest.

Jul 15, 2020, 04:36pm EDT

Amazon now says remote work OK 2 days a week

by The Associated Press | Thu, June 10th 2021 at 5:54 PM

Amazon Softens Return-to-Office Policy, Says Remote Work Is Fine

- CEO says managers will decide when employees return to office
- Company wanted workers to resume office work in January

SHRM Salt Lake | PARSONS BEHLE & LATIMER

7

7

Corporate Pioneers: Visionaries or Wafflers?

Amazon tells staff to get back to office five days a week

17 September 2024

Written by Andy Jassy, CEO of Amazon

September 16, 2024
6 min read

The message below was shared with Amazon employees today.

Hey team. I wanted to send a note on a couple changes we're making to further strengthen our culture and teams.

First, for perspective, I feel good about the progress we're making together. Stores, AWS, and Advertising continue to grow on very large bases, Prime Video continues to expand, and new investment areas like GenAI, Kuiper, Healthcare, and several others are evolving nicely. And at the same time we're growing and inventing, we're also continuing to make progress on our cost structure and operating margins, which isn't easy to do. Overall, I like the direction in which we're heading and appreciate the hard work and ingenuity of our teams globally.

When I think about my time at Amazon, I never imagined I'd be at the company for 27 years. My plan (which my wife and I agreed to on a bar napkin in 1997) was to be here a few years and move back to NYC. Part of why I've stayed has

Getty Images

RETURN TO OFFICE OR THE CLASSIFIEDS?

Most Amazon workers considering job hunting due to 5-day in-office policy: Poll

"My morale for this job is gone..."

SOMMON HARDING · SEP 25, 2024 4:35 PM

SHRM Salt Lake | PARSONS BEHLE & LATIMER

8

8

Corporate Pioneers: Visionaries or Wafflers?

Facebook executive: We're trying to double our diverse workforce in 4 years, even if it doesn't work

Published Mon, Feb 10 2020•9:01 AM EST • Updated Mon, Feb 10 2020•10:13 AM EST

SHRM Salt Lake | PARSONS BEHLE & LATIMER

9

9

Corporate Pioneers: Visionaries or Wafflers?

Jan 10, 2025 - Technology

Illustration: Sarah Grillo/Axios

Exclusive: Meta kills DEI programs

State of play: Friday's memo by Gale — announcing changes to "our hiring, development and procurement practices" — was posted for Meta employees in Workplace, the company's internal communications tool.

- "The legal and policy landscape surrounding diversity, equity and inclusion efforts in the United States is changing," Gale wrote.
- "The Supreme Court of the United States has recently made decisions signaling a shift in how courts will approach DEI. … The term 'DEI' has also become charged, in part because it is understood by some as a practice that suggests preferential treatment of some groups over others."

SHRM Salt Lake | PARSONS BEHLE & LATIMER

10

10

Policy Fads vs. Law-Based Changes

PARSONS BEHLE & LATIMER

11

12

SHRM Salt Lake

PARSONS BEHLE & LATIMER

12

Keeping Up with the Joneses

How often do we enact policies just because of what we see in the market

- Maybe it's for recruiting purposes
- Maybe it's because we think if big companies are doing it, it must be best practice

But the market can do dumb stuff sometimes….

13

Corporate Fads

Remember when everyone was promising **unlimited PTO**?

It sounds nice on paper. . .

but administering it is a nightmare.

- What about FMLA?
- What about states that require PTO payout on separation?
- What about employees who abuse the system?

What about **remote work**?

What about **marijuana use**?

Sometimes companies really try to **force** things that just aren't going to happen…

14

Fads in the Law

Sometimes it's not corporations that drive policy changes…

. . . it's the **government**

These changes sometimes come from **congressional** action

For example: the PWFA, the PUMP Act

But because Congress can almost never get anything done…the changes usually come from government **agencies**

…Even when they might not be in the right **place** to make those changes…

15

15

Changes to Title VII-Related Issues

Expansion of protected classes (hairstyles, age (not just over 40), marital status, nepotism)

Anti-DEI (EEOC encouraging plaintiffs to bring reverse discrimination claims)

Mandatory anti-harassment training

Religious Discrimination (*Groff v. DeJoy*: undue hardship no longer means something more than *de minimis* cost, now it's "substantial increased costs")

Adverse Action (now just "some harm")

16

16

Changes to Employment and Post-Employment Agreements

Ban on mandatory arbitration in harassment cases (Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA))

Ban on confidentiality provisions related to sexual misconduct (federal Speak Out Act (pre-dispute agreements); Utah Employment Confidentiality Amendments (condition of employment))

17

17

Section 7 Activity

Stericycle

Under the new standard, the Board analyzes whether an employee **"would reasonably construe"** the applicable rule or policy as **chilling protected conduct** under Section 7 of the National Labor Relations Act.

To avoid a violation, employers must now show that workplace conduct rules are **narrowly tailored** to special circumstances justifying any infringement on employee rights.

Miller Plastics

The Board overruled a 2019 decision that established a checklist of easy-to-follow factors to determine whether complaints raised by an individual are tantamount to group activity protected under the NLRA.

The Board found the checklist unduly narrowed the scope of legally protected conduct, returning to a broad and ambiguous standard where the question of whether an employee has engaged in concerted activity is a factual one based on the **"totality of the record evidence."**

18

18

Wage-and-Hour Issues

FLSA-exemption threshold (from $35,568 to $58,656; for Highly Compensated Employees, from $107,432 to $151,164—stayed by federal courts)

Donning and doffing (time must be paid if "integral" and "indispensable")

State rest/meal break laws

19

19

Miscellaneous Changes

PUMP Act (*non-bathroom* space to pump milk)

PWFA (protections for pregnancy, childbirth, related medical conditions; not the same as ADA)

Ban the box (restricting employers from asking about criminal history on initial job applications)

ADA (focus on interactive process / reasonableness of accommodation)

Noncompetes

- State specific
- FTC and NLRB

20

20

SO MANY CHANGES!!!

Doesn't keeping up with all these changes sometimes feel like....

SHRM Salt Lake

PARSONS BEHLE & LATIMER

21

21

Best Practices: *How* to Make a Change

PARSONS BEHLE & LATIMER

22

Five Rules for Effective Policy Changes

1. Reckon with your motivation. Be honest about what's driving the policy change.
2. Build on an existing foundation. Identify and incorporate established values and policies.
3. Secure buy-in, in advance. Gather input, especially for complex changes.
4. Get the writing right. Ensure that a policy is clearly written and properly shared.
5. Pre-plan your next check-in. Decide what success looks like and plan for refinement.

23

23

Rule 1: Reckon with Your Motivation

Be honest about what's driving your policy change.

~~"Theory E" – Economic Value~~

"Theory L" – Potential Liability

"Theory O" – Organizational Capability

Dimensions of Change	*Theories E and O Combined*
Purpose	Explicitly embrace the paradox between economic value and organization capability driven change.
Leadership	Set direction from the top and engage the people below.
Focus	Focus simultaneously on the hard (structures and systems) and the soft (corporate culture).
Planning	Plan for spontaneity.
Motivation	Involvement is used to motivate; compensation is used to recognize, not motivate.
Consultants	Consultants are expert resources who empower employees.

24

Michael Beer, "Transforming Organizations," HBR Handbook of Organizational Development (2007).

24

Rule 1: Reckon with Your Motivation

Be honest about what's driving your policy change.

Ask:

Are we simply trying to reduce the risk of litigation?

Or are we trying to create a policy that attracts or retains employees?

The answer to that question dictates what benefits you're weighing against the cost of the program—and also how that policy is framed.

Example: Parental leave policies

25

25

Rule 2: Build on an Existing Foundation

Identify and incorporate established values and policies.

One reason "borrowed policy approaches" fail is that they don't account for a "borrowing" company's strengths.

For marketing purposes, your company has a value proposition and points of differentiation. That understanding should drive the way you craft policies, as well.

26

26

Rule 2: Build on an Existing Foundation

Identify and incorporate established values and policies.

Example: Drug-testing policies

What considerations would drive a drug-testing policy for a transportation company?

A medical-services provider?

A tech company?

A retailer?

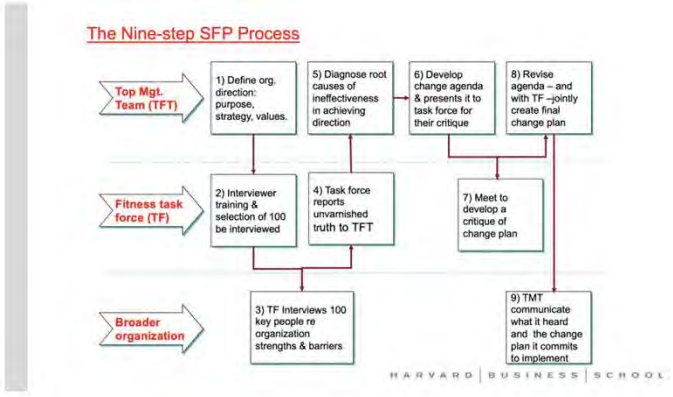
Note: Don't start with a blank slate if you don't have to—rely on existing handbooks or value statements.

27

27

Rule 3: Secure Buy-in, in Advance

Gather input, especially for complex changes.



28

Michael Beer, "Combatting Organizational Silence," Open Access Government (2024).

28

Rule 3: Secure Buy-in, in Advance

Gather input, especially for complex changes.

Solicit input early in the process—aim for "joint diagnosis of the problem" rather than trying to sell a preset solution to a captive audience.

Example: Remote work (with "bonus risks")

29

29

Rule 4: Get the Writing Right

Ensure that a policy is clearly written and properly shared.

Unwritten policies and inconsistently enforced policies create real headaches for employers—they're fodder for discrimination claims and they rankle employees.

Consider not only "writing" that announces the policy, but also the "writing" that managers use to track implementation of the policy.

30

30

Rule 5: Pre-plan Your Next Check-in

Decide what success looks like and plan for refinement.

Consider: *Muldrow v. City of St. Louis* (2024)
BUT!!: *Groff v. DeJoy* (2023)

SHRM Salt Lake | PARSONS BEHLE & LATIMER

31

31

Root Causes: When Change Isn't Enough

PARSONS BEHLE & LATIMER

32

Workshop Time: Employee Churn

Imagine we've launched a business. We're hiring U.S. Supreme Court justices to sell snow-removal services, door to door.

We've even created hoodie robes for the occasion.

The justices will receive a $100 commission for each home that buys a season-long "dry sidewalks" subscription.

We immediately encounter a problem. Three competitors quickly launch and begin recruiting our justices.

33

33

Workshop Time: Employee Churn

Competition is intense. Justice Kavanaugh's phone is ringing off the hook with job offers from those competitors…

…and he hasn't even figured out what shovel people use to shovel their walks yet.

The good news is, the justices all signed non-compete agreements.

In an all-hands meeting, we tell the justices that if they leave to join a competitor, we'll see them in court.

34

34

Workshop Time: Employee Churn

But those threats don't seem to be working. The next morning, Justice Thomas tells us, sullenly, that competitors have been wining and dining Justice Kagan.

They took her bowling!

Justice Kagan *loves* bowling.

35

35

Workshop Time: Employee Churn

The first domino falls the next day. Justice Sotomayor doesn't show up for work.

And later that same morning, Justice Barrett sees Justice Sotomayor driving a brand-new snowblower—and using it to clear the driveway of one of the company's prize customers.

36

36

Workshop Time: Employee Churn

Morale is low. Not even the arrival of American flag beanies can cheer up Justice Alito.

So . . . *now what?*

37

37

Workshop Time: Employee Churn

What options does our company have with respect to *policy changes*?

But what if this isn't a policy problem at all? What if this is a *culture* issue at the firm?

What might be going on? And what might we do to fix the problem . . . before it's too late?

38

38

Conclusion

39

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

40

Thank You

- Michael Judd
  mjudd@parsonsbehle.com
  801.536.6648
- Paul R. Smith
  psmith@parsonsbehle.com
  801.536.6941

37th Annual Employment Law Symposium

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

Elena T. Vetter
801.536.6909 | evetter@parsonsbehle.com

SHRM® Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE
parsonsbehle.com

PARSONS BEHLE & LATIMER
A Professional Law Corporation

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025

Mark D. Tolman and Elena T. Vetter

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

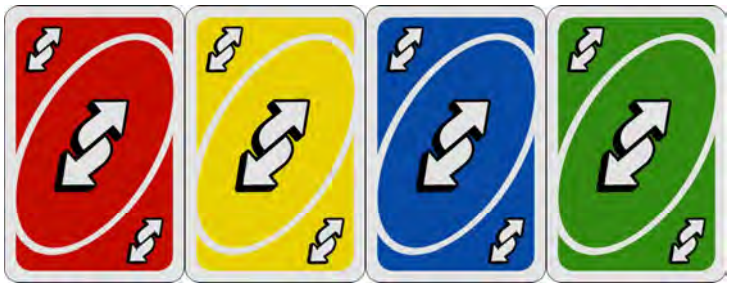
SHRM Salt Lake | PARSONS BEHLE & LATIMER

2

One More Disclaimer . . .

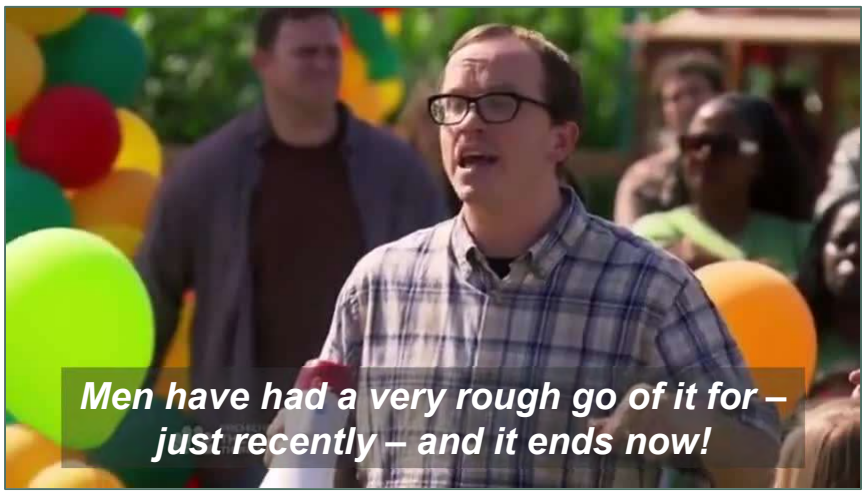
This presentation is based on recent legal updates, caselaw developments, and breaking news, not Mark or Elena's points of view.

3



Rise of Reverse Discrimination Claims

Rise of Reverse Discrimination Claims



5

5

What even *is* reverse discrimination?

Two Perspectives

- Discrimination against majority-group plaintiffs, e.g., discrimination against a male, white, American, or straight employee.
- "The EEOC's position is that there is no such thing as 'reverse' discrimination; there is only discrimination." What You Should Know About DEI-Related Discrimination at Work.

https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work#_edn26

6

6

Lewick v. Sampler Stores, D. Kansas 2022

- Richard Lewick was employed at a Rally House in Wichita, Kansas.
- He wanted to be promoted to a management position and was told that he'd be "seriously considered."
- But then, the unthinkable. According to Richard, "less-qualified (outside) female candidates" were hired into the management roles he wanted.
- He filed a lawsuit in federal court alleging that he was discriminated against based on his status as male.

7

7

Lewick v. Sampler Stores, D. Kansas 2022

- Sampler Stores filed a Motion to Dismiss at the earliest stage of litigation.
- The district court granted that motion, concluding that:
- "[R]everse discrimination claims are different. . . . [and] require a stronger showing."

8

8

Lewick v. Sampler Stores, D. Kansas 2022

- **In failure to promote cases, a plaintiff must allege:**
  - (1) he was a member of a protected class; (2) he applied for and was qualified for the role; (3) he was rejected; and (4) the position was filled by someone of a different class.
  - The analysis is "perfunctory, and liability turns on whether the defendant's stated explanation for the adverse employment action is pretextual."
- **But in reverse discrimination cases in the Tenth Circuit, the first element is modified:**
  - A majority-group plaintiff must show "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority"; or
  - "indirect evidence to support the probability that ***but for*** the plaintiff's status he would not have suffered the challenged employment decision"

9

SHRM Salt Lake | PARSONS BEHLE & LATIMER

9

Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- Plaintiff Marlean Ames is a heterosexual woman who, after 30 years of public service, applied for a promotion to a Bureau Chief position and was instead demoted.
- The promotion to Bureau Chief was given to a "gay woman," and her position was given to a "gay man."
- The decisionmakers for the promotion/demotion were heterosexual.
- The district court granted summary judgment to the employer and appeal was taken to the 6th Circuit.

Ohio
Department of Children & Youth

10

SHRM Salt Lake | PARSONS BEHLE & LATIMER

10

Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- Reviewing the lower court's decision, the 6th Circuit applied the "background circumstances" test to Ames' reverse discrimination claim, i.e., it asked whether Ames had established "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."
- The court observed that "otherwise [i.e., if Ames had alleged that she was gay and that a straight person was promoted] Ames's prima facie case was easy to make."

11

Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- The court explained that the background circumstances test can be established by:
  - Showing that a "member of the relevant minority group (here, gay people) made the employment decision at issue; or
  - Statistical evidence showing a pattern of discrimination against the majority group.
- Concluding that Ames had not made such a showing, the 6th Circuit affirmed summary judgment in favor of the employer.

12

Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- In a concurring opinion, Judge Kethledge criticized the "background circumstances" standard for reverse discrimination claims.
- "The 'background circumstances' rule is not a gloss upon [Title VII], but a deep scratch across its surface. The statute expressly extends its protection to 'any individual'; but our interpretation treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids. . . . Respectfully, our court and others have lost their bearings in adopting this rule."

13

13

Reverse Discrimination—Circuit Split

- **The Majority (7 Circuits)**
  - The test to show "reverse discrimination" is the same as any other discrimination
  - Circuits: 1st 2nd 3rd 4th 5th 9th 11th
- **The Minority (5 Circuits)**
  - "Background circumstances" or
  - "Evidence that there is something 'fishy' going on"— "indirect evidence to support the probability that ***but for*** the plaintiff's status he would not have suffered the challenged employment decision"
  - Circuits: D.C. 6th 7th 8th 10th

14

14

The U.S. Supreme Court Has Taken Up the Issue

- SCOTUS granted cert and heard argument in *Ames v. Ohio Dep't of Youth Services*
- The central question before the Supreme Court is whether Title VII imposes a heightened evidentiary standard on majority-group plaintiffs.
- Based on the tenor of questions from the justices, we anticipate that the Court will reject the higher reverse discrimination standard.

For example, "conservative" Justice Amy Coney Barrett observed that the burden of proof should be the same for all individuals, whether they are straight, gay, or otherwise.

And "liberal" Justice Elena Kagan pressed the employer on whether the Sixth Circuit's ruling effectively penalized Ames for being heterosexual.

PARSONS BEHLE & LATIMER

15

15

Strategies to Avoid Reverse Discrimination Claims

PARSONS BEHLE & LATIMER

16

Does this require a whole different approach?

17

17

Strategies to avoid *all* discrimination claims:

- Be clear in all communications, and policies, that all employment decisions are merit-based.
- Include those clear communications in your regular anti-discrimination and anti-harassment training.
- Take allegations of discrimination and harassment by employees seriously.
- As you would with any employee, thoroughly investigate allegations of misconduct against a majority-group employee before moving to discharge, including by interviewing the accused employee.
- Ensure your DEI practices and DEI communications are legal.

18

18

Image: South Florida Business Journal

The Decline of DE&I?

PARSONS BEHLE & LATIMER

19

What's been going on?

20

SHRM Salt Lake

PARSONS BEHLE & LATIMER

20

Let's start with the Executive Orders . . .

. . . there have been a lot of them!

We'll focus on three.

21

21

Executive Order 14151

EO (14151), titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," requires the termination of all "discriminatory programs, including illegal [DEI] mandates, policies, programs, preferences and activities in the Federal Government, under whatever name they appear."

It requires that federal agencies and contractors terminate all (i) DEI offices and positions, (ii) "equity" plans, actions, initiatives or programs and "equity-related" grants or contracts, and (iii) DEI "performance requirements for employees, contractors or grantees."

22

22

Executive Order 14173

EO (14173), titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," rescinds a six-decade old EO that required federal contractors to adopt affirmative action practices for hiring/promoting women and minorities.

Requires federal contractors to end "illegal DEI" practices and to certify that their DEI programs do not violate anti-discrimination law.

23

23

Executive Order 14168

EO (14168), titled "Defending Women from Gender Ideology Extremism," defines "sex" as an individual's "immutable biological classification as either male or female," removing any concept of "gender identity."

Directs federal agencies to "remove all statements, policies, regulations," etc., that "inculcate gender ideology" and prohibits the use of federal funds to promote gender ideology.

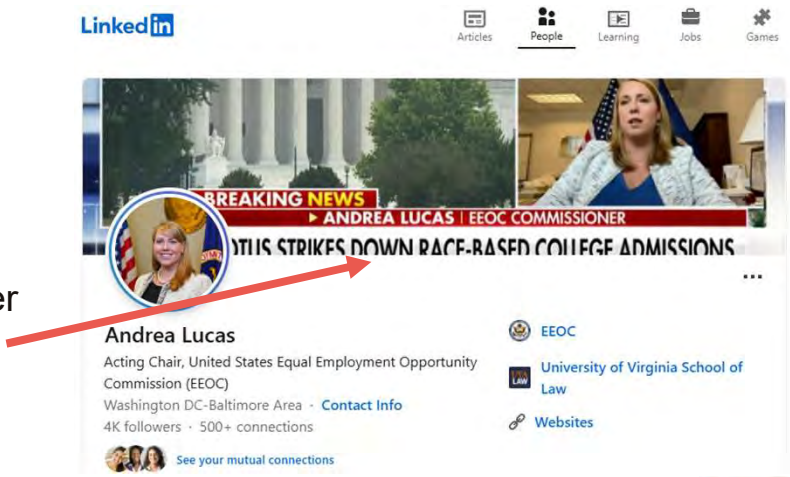
The order instructs the attorney general (i) clarify that Title VII does not require gender identity-based access to single-sex spaces and (ii) ensure the "freedom to express the binary nature of sex" and right to single-sex spaces.

24

24

Meet Andrea Lucas, the Newly Appointed Acting Chair of the Equal Employment Opportunity Commission.

And check out her LinkedIn profile header.



25

SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

Here's what she says she's hoping to do:

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. . . ."

26

SHRM Salt Lake | PARSONS BEHLE & LATIMER

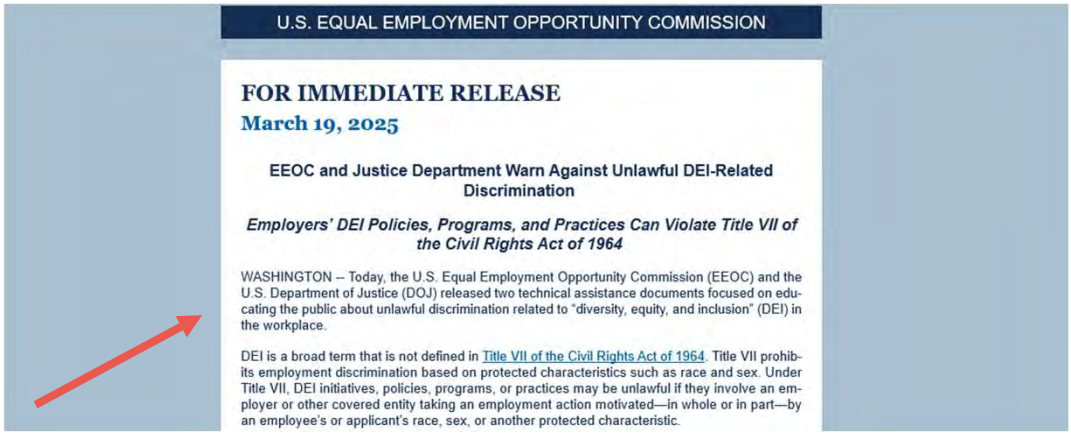
26

Specifically, she's interested in:

- "rooting out unlawful DEI-motivated race and sex discrimination";
- "protecting American workers from anti-American national origin discrimination";
- "defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work"; and
- "protecting workers from religious bias and harassment, including antisemitism."

27

New EEOC Guidance Documents . . .



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FOR IMMEDIATE RELEASE
March 19, 2025

EEOC and Justice Department Warn Against Unlawful DEI-Related Discrimination

Employers' DEI Policies, Programs, and Practices Can Violate Title VII of the Civil Rights Act of 1964

WASHINGTON -- Today, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice (DOJ) released two technical assistance documents focused on educating the public about unlawful discrimination related to "diversity, equity, and inclusion" (DEI) in the workplace.

DEI is a broad term that is not defined in Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based on protected characteristics such as race and sex. Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic.

28

Discrimination based on protected classes has long been illegal.

In the past five years, DEI policies, programs, and practices have become increasingly prevalent in many of our nation's largest and most prominent businesses, universities, and cultural institutions. The widespread adoption of DEI, however, does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment.

To help educate the public about how well-established civil rights rules apply to employment policies, programs, and practices—including those labeled or framed as "DEI"—the EEOC and the DOJ today released a joint one-page technical assistance document, "What To Do If You Experience Discrimination Related to DEI at Work." The EEOC also released a longer question-and-answer technical assistance document, "What You Should Know About DEI-Related Discrimination at Work." Both documents are based on Title VII, existing EEOC policy guidance and technical assistance documents and Supreme Court precedent.

"Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in 'diversity, equity, or inclusion.' But no matter an employer's motive, there is no 'good,' or even acceptable, race or sex discrimination," said EEOC Acting Chair Andrea Lucas. "In the words of Justice Clarence Thomas in his concurrence in *Students for Fair Admissions*, 'two discriminatory wrongs cannot make a right.'"

Lucas emphasized, "While the public may be confused about what rules apply to DEI, the law itself is clear. And there are some serious implications for some very popular types of DEI programs. These technical assistance documents will help employees know their rights and help employers take action to avoid unlawful DEI-related discrimination."

29

29

More EEOC Press Releases . . .

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FOR IMMEDIATE RELEASE

Feb. 19, 2025

EEOC Acting Chair Vows to Protect American Workers from Anti-American Bias

WASHINGTON -- Today, U.S. Equal Employment Opportunity Commission (EEOC) Acting Chair Andrea Lucas announced "The EEOC is putting employers and other covered entities on notice: if you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop. The law applies to you, and you are not above the law. The EEOC is here to protect all workers from unlawful national origin discrimination, including American workers."

Rigorously enforcing existing—but sometimes under-enforced—labor and employment laws is one key to shifting the economic incentives of businesses and workers. The EEOC will help deter illegal migration and reduce the abuse of legal immigration programs by increasing enforcement of employment antidiscrimination laws against employers that illegally prefer non-American workers, as well as against staffing agencies and other agents that unlawfully comply with client companies' illegal preferences against American workers.

30

30

What does the new guidance say?

Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated**—in whole or in part—by an employee's race, sex, or another protected characteristic.

In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

- Disparate treatment (exclusion from training or fellowships, hiring, or promotion)
- Limiting membership in workplace groups, or separating employees into groups based on protected class
- Harassment
- Retaliation

31

SHRM Salt Lake | PARSONS BEHLE & LATIMER

31

Case Studies: How Not to DEI

PARSONS BEHLE & LATIMER

32

Duvall v. Novant Health, Inc. (4th Circuit 2024)

- David Duvall
- Hired in 2013 as Novant Health's VP of Marketing and Communications
- Evidence at trial demonstrated that Duvall "performed exceptionally in his role"
  - He received strong performance reviews
  - Received national recognition for himself and the program he developed
- Novant fired Duvall in July 2018
- What happened?

33

33

Duvall continued . . .

- Novant adopted a DEI plan that included an express commitment to add diversity to the executive and senior leadership teams, including with quotas and targets.
- Novant adopted this philosophy: "Our team members should reflect our communities. Our leadership should reflect our team members."
- In 2019, Novant's DEI Council celebrated its achievement of increasing Black representation in leadership.

34

34

Duvall continued . . .

- In July 2018, Novant fired Duvall and replaced him with a white woman and two Black women
- When Duvall's supervisor told him he was being fired, he simply said the company was "going in a different direction"
- No prior indication that his job was in jeopardy
- At trial, the supervisor testified that Duvall was fired because he "lacked engagement" and "support from the executive team"
- But that testimony stood in stark contrast to statements the supervisor made in December 2018 to a recruiter, when he praised Duvall's performance

35

35

Duvall continued . . .

- The jury awarded Duvall $10 million in punitive damages
- The *Duvall* court highlighted several things
  - The use of racial quotas
  - The race of the individuals who replaced Duvall
  - The supervisor's "shifting, conflicting, and unsubstantiated explanations for Duvall's termination" were "merely post hoc rationalizations invented for the purposes of litigation and therefore unworthy of credence"

36

36

Lessons from *Duvall*

- Don't use DEI quotas
  - DEI programs should be about expanding the applicant pool (outreach and removing barriers), not about meeting hiring/promotion quotas
- Document performance issues and be consistent.
- When terminating an employee, provide the actual reason—don't say "not a good fit" or "going in a different direction"

37

37

Dill v. IBM (W.D. Michigan March 26, 2025)

- Randall Dill worked as a consultant for IBM.
- For seven years, his reviews were stellar.
- Then, Randall was put on a performance improvement plan . . .
- Eventually, Randall's employment was terminated.

38

38

Dill continued . . .

- Randall sued for race and gender discrimination.
- He said that IBM implemented a policy that incentivized management to terminate white male employees and seek a higher percentage of minorities and women in the workplace.

39

39

Dill continued . . .

- IBM moved to dismiss the complaint
- The court denied that motion, noting:
  - IBM's policy provided a bonus multiplier for managers hiring diverse candidates
  - IBM's CEO stated "specific quotas" for minority and female employees at a company meeting, and IBM Annual Reports listed specific representation goals
  - The PIP tasked Dill with wholly new tasks, and therefore could have been pretextual

40

40

Lessons from *Dill*

- The court listed the following ways to analyze "whether a diversity policy goes beyond mere aspirational goals" and violates Title VII:
  - Does the policy define specific quotas based on protected classes?
  - Does the policy "refer[] to any caste system designating a hierarchical preference for certain racial groups over others"?
  - Does the policy provide specific plans for how to achieve diversity goals?
  - Does the policy place managers under pressure to increase minority representation in the workplace (by, e.g., compensating them to do so)?

41

SHRM Salt Lake | PARSONS BEHLE & LATIMER

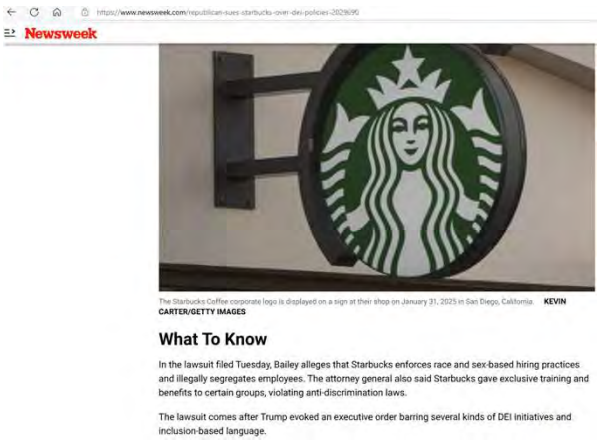
41

So what does effective and legal DE&I look like?

PARSONS BEHLE & LATIMER

42

For starters . . . no quotas



Newsweek

The Starbucks Coffee corporate logo is displayed on a sign at their shop on January 31, 2025 in San Diego, California. KEVIN CARTER/GETTY IMAGES

What To Know

In the lawsuit filed Tuesday, Bailey alleges that Starbucks enforces race and sex-based hiring practices and illegally segregates employees. The attorney general also said Starbucks gave exclusive training and benefits to certain groups, violating anti-discrimination laws.

The lawsuit comes after Trump evoked an executive order barring several kinds of DEI initiatives and inclusion-based language.

In February, Tennessee AG sued Starbucks.
The company had published goals of achieving 30% BIPOC (Black, Indigenous, and People of Color) representation at corporate levels, and 40% at retail and manufacturing levels by 2025.

SHRM Salt Lake | PARSONS BEHLE & LATIMER

43

43

What to do:

- Get decisionmakers together, and start making a plan
- Review existing materials and programs to ensure legal compliance
- Think about messaging—especially public-facing materials, which may create the highest legal risk
- Think outside the box: DE&I is a buzzword, but each of its independent components may not be. And think about these alternatives:
  - fairness, belonging, inclusion, respect, tolerance, thoughtfulness

SHRM Salt Lake | PARSONS BEHLE & LATIMER

44

44

What to do:

- Document your approach to DE&I in writing
  - How do you define that acronym (or any new terms you've adopted)?
  - What are your practices for outreach, recruitment, retention, training, promotion?
  - What data collection do you do—if any?
- Train managers on how to communicate about—and implement—your initiatives
- Work with your legal team
- Watch for updates

45

45

Harvard Business Review Tip:

"DEI communications create legal risk when a statement suggests that the organization engages in what we call the 'three Ps' by conferring a ***preference*** on a ***protected group*** with respect to a ***palpable benefit***."

46

46

Think About Your Messaging

- Re: your DE&I initiative, instead of "DEI uplifts historically disadvantaged groups to ensure equal outcomes," try:
  - "Talent is everywhere but opportunity is not. DEI closes the gap." (HBR)
  - "DEI enables people of all identities and backgrounds to feel welcome and do their best work." (HBR)
  - We value the unique perspective each individual brings to our organization.
  - We believe anyone, from any background, is capable of excellence.

47

47

Think About Your Messaging

- In messaging about hiring and promotion, instead of "We use diversity hiring to recruit people from underrepresented racial and ethnic backgrounds," use:
  - "While we strive for a diverse mix of candidates, all employment decisions are made without regard to race, sex, or other protected characteristics." (HBR)
  - "We look for candidates of any background who will advance our culture." (HBR)
  - We hire and promote based on individual excellence.

48

48

What *not* to do:

- Set quotas or targets about employees or leaders hired or promoted based on protected classes
- Require a "diverse slate" of interview or final round candidates
- Give incentives—either carrots or sticks—based on recruiting candidates with certain protected-class profiles
- Make specific benefits, grants, or participation in groups available only to employees of certain protected classes
- Panic, and call the whole thing off

49

49

What about affinity groups?

- Make sure groups are inclusionary, not exclusionary
- Set a focus on creating an atmosphere of respect, good communication, and dignity at work
- Watch out for benefits or training available *only* to members of certain protected classes . . .
  - In *Muldrow v. City of St. Louis*, a 2024 SCOTUS decision, the court lowered the standard for the degree of harm an employee must experience to claim Title VII discrimination from "material" or "significant" harm to "some harm."

50

50

What about diversity training?

- Set goals:
  - To help foster an atmosphere of respect
  - To help create an environment where everyone feels valued
  - To help identify unconscious motivations, so that your awareness helps you make conscious decisions
  - To help provide tools and tips to make the workplace more respectful and productive
- Make it inclusionary, not exclusionary
- Share the science behind it
- Base the training on behaviors, not beliefs
- Don't make broad statements about any groups of people

51

SHRM Salt Lake | PARSONS BEHLE & LATIMER

51

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

52

Thank You

- Mark D. Tolman
  mtolman@parsonsbehle.com
  801.536.6932
- Elena T. Vetter
  evetter@parsonsbehle.com
  801.536.6909

53

37th Annual Employment Law Symposium

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

SHRM Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE

parsonsbehle.com

PARSONS BEHLE & LATIMER

A Professional Law Corporation

Wage and Hour: Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act

Christina Jepson & Susan Baird Motschiedler

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake

PARSONS BEHLE & LATIMER

2

THE FAIR LABOR STANDARDS ACT

PARSONS BEHLE & LATIMER

3

FAIR LABOR STANDARDS ACT

- The FLSA is the primary federal law governing wage and hour standards including minimum wage and overtime pay for most public and private employers
- FLSA requires covered employers to pay nonexempt employees at least:
  - The federal minimum wage for all hours worked
  - Overtime compensation of at 1.5 time the employee's regular rate of pay for all hours worked over 40 in any workweek

4

SHRM Salt Lake PARSONS BEHLE & LATIMER

4

FAIR LABOR STANDARDS ACT

- The Wage and Hour Division ("WHD") of the Department of Labor ("DOL") enforces the FLSA by suing or imposing civil monetary penalties on employers
- In 2024, the DOL reported it recovered over $149.9 million in back wages from employees on behalf of 125,301 employees

VIOLATION	BACK WAGES	NO. OF EMPLOYEES
Overtime	$126,967,097	101,043
Minimum Wage	$15,306,067	21,543
Tip Related	$7,410,410	10,651
Retaliation	$274,596	60

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

FAIR LABOR STANDARDS ACT

- Employees may bring a private action for unpaid minimum wages, overtime, tip violations, and retaliation
- These actions can be brought individually or as class actions (have your employees sign a class action waiver)
- Prevailing plaintiffs may also be awarded attorney's fees and costs
- In 2024, 5,354 actions related to the FLSA were filed in United States Federal Courts
- Thoughts on whether Trump II Administration will change enforcement efforts?

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

PRELIMINARY AND POSTLIMINARY TIME

PARSONS BEHLE & LATIMER

7

Compensation for Time Spent Before and After Work

- Whether employees have to be compensated for time spent at work before they start working (preliminary time) or after working (postliminary time)
- Compensable time does not include preliminary or postliminary time that **is not** related to the employee's principal activities
- An employee's principal activities includes the principal activities themselves and all other activities which are an integral and indispensable part of the principal activities

8

SHRM Salt Lake

PARSONS BEHLE & LATIMER

8

Integral and Indispensable Test

- Activities which are an integral and indispensable part of the principal activities
  - Intrinsic element of those principal activities and an activity the employee cannot dispense with if they are to perform their principal activities
  - Whether the activity is tied to the productive work the employee is to perform

De Minimis Time Need Not Be Compensated

- Even if an activity is found to be a principal activity it may not be compensable if it is de minimis
- The de minimis doctrine provides that "insubstantial or insignificant periods of time which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."
- Courts balance three factors: (1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the employee performed the work on a regular basis

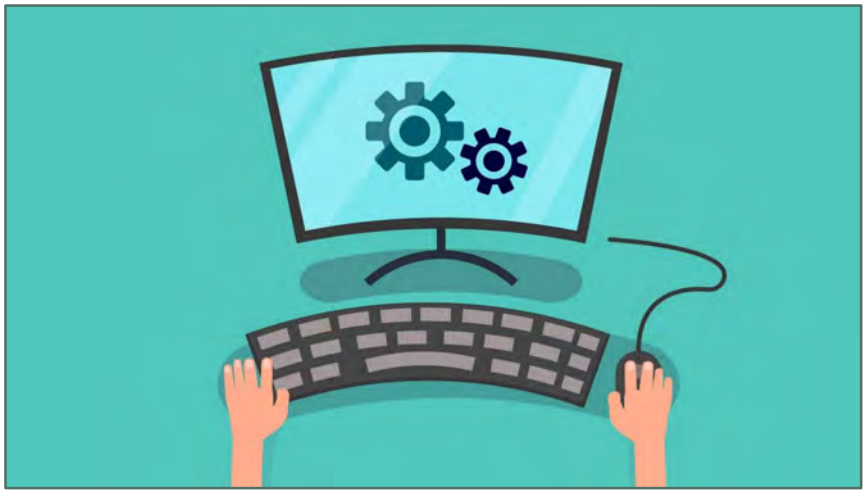
Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

- Call center employees whose principal activities included servicing loans and communicating with borrowers were required to boot up their computers and launch software before clocking in each day
  - Is this integral?
- These preshift activities took approximately two minutes per shift
  - Is this de minimis?
- A call center employee filed a class action, which over 350 individuals joined. Total lost wages were alleged to be approximately $32,000.
- Nelnet argued that these preshift activities were not part of the employee's principal activities and that the time was de minimis

SHRM Salt Lake

PARSONS BEHLE & LATIMER

What Did the Court Decide?



SHRM Salt Lake

PARSONS BEHLE & LATIMER

Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

- Tenth Circuit held that the plaintiffs needed to be paid for this preshift time of booting up computers and logging in software
- The court held that "[t]he preshift activities of booting up a computer and launching software are integral and indispensable to the [plaintiff's] principal duties of servicing student loans by communicating with borrowers over the phone and by email. Booting up a computer and launching software is 'an intrinsic element of' servicing student loans and communicating with borrowers because the data and tools necessary to those principal duties exist on the computer. Likewise, Nelnet could not have eliminated these activities 'without impairing the employee's ability to complete their work.'"

13

SHRM Salt Lake | PARSONS BEHLE & LATIMER

13

Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

- The court further found that the costs were not de minimis because:

(1) Nelnet failed to establish that it could not estimate the boot up time;

(2) even though the total claim was only $32,000, the size of the aggregate claim was not so small to be considered de minimis; and;

(3) the plaintiff employees were required to boot up every day, satisfying the regularity requirement

14

SHRM Salt Lake | PARSONS BEHLE & LATIMER

14

Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021)

What did Nelnet have to pay in settlement?

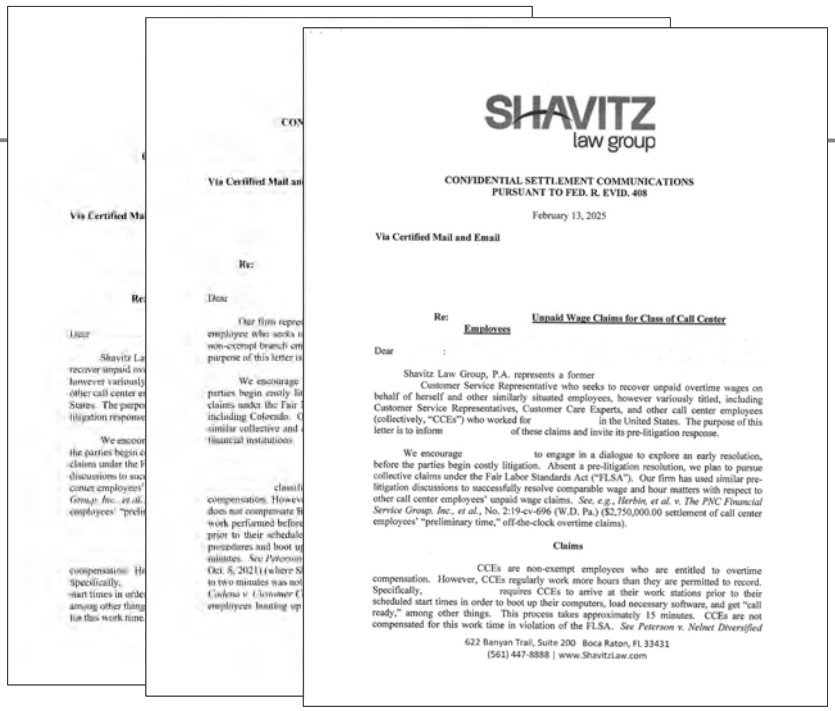
$6,000 to class lead

$100 to each of 29 opt-in plaintiffs

Attorneys fees of $1,600,000

15

15



SHAVITZ
law group

CONFIDENTIAL SETTLEMENT COMMUNICATIONS
PURSUANT TO FED. R. EVID. 408

February 13, 2025

Via Certified Mail and Email

Re: Unpaid Wage Claims for Class of Call Center Employees

Dear :

Shavitz Law Group, P.A. represents a former Customer Service Representative who seeks to recover unpaid overtime wages on behalf of herself and other similarly situated employees, however variously titled, including Customer Service Representatives, Customer Care Experts, and other call center employees (collectively, "CCEs") who worked for in the United States. The purpose of this letter is to inform of these claims and invite its pre-litigation response.

We encourage to engage in a dialogue to explore an early resolution, before the parties begin costly litigation. Absent a pre-litigation resolution, we plan to pursue collective claims under the Fair Labor Standards Act ("FLSA"). Our firm has used similar pre-litigation discussions to successfully resolve comparable wage and hour matters with respect to other call center employees' unpaid wage claims. *See, e.g., Herbin, et al. v. The PNC Financial Service Group, Inc., et al.*, No. 2:19-cv-696 (W.D. Pa.) ($2,750,000.00 settlement of call center employees' "preliminary time," off-the-clock overtime claims).

Claims

CCEs are non-exempt employees who are entitled to overtime compensation. However, CCEs regularly work more hours than they are permitted to record. Specifically, requires CCEs to arrive at their work stations prior to their scheduled start times in order to boot up their computers, load necessary software, and get "call ready," among other things. This process takes approximately 15 minutes. CCEs are not compensated for this work time in violation of the FLSA. *See Peterson v. Nelnet Diversified*

622 Banyan Trail, Suite 200 Boca Raton, FL 33431
(561) 447-8888 | www.ShavitzLaw.com

16

16

INDEPENDENT CONTRACTORS

PARSONS BEHLE & LATIMER

17

EMPLOYEE OR INDEPENDENT CONTRACTOR?

- To be protected by the minimum wage and overtime pay requirements of the FLSA, a worker must be an "employee" of the employer
- Independent contractors are not protected by the FLSA
- Courts use a six-factor "economic reality" test to determine if an employment relationship exists
  - The goal is to determine if the worker is **economically dependent** on the employer for work **or is instead in business for themselves**
  - No single factor is determinative, and courts look to the **totality of the circumstances**

18

SHRM Salt Lake

PARSONS BEHLE & LATIMER

18

ECONOMIC REALITY TEST

1. Opportunity for profit or loss depending on managerial skill
   - Does the worker earn profits or suffer losses through their own independent effort and decision making?
2. Investments by the worker and the employer
   - Does the worker make investments that are capital or entrepreneurial in nature?
3. Permanence of the work relationship
   - What is the nature and length of the work relationship?
   - Work that is sporadic or project based with a set end date that allows the worker to take on other jobs favors independent contractor status
   - Work that is continuous, has no end date, or is exclusive favors worker status

19

SHRM Salt Lake | PARSONS BEHLE & LATIMER

19

ECONOMIC REALITY TEST

4. Nature and Degree of Control
   - What level of control does the employer have over the performance of the work and the economic aspects of the work relationship?
   - Does the potential employer control hiring, firing, scheduling, prices, pay rates, supervise the work, have the right to discipline worker, or limit the worker's ability to work for others?
5. Is the work performed integral to the employer's business?
   - If the work performed is critical, necessary, or central to the employer's principal business this favor employee status
6. Special Skills and Initiative
   - Does the worker use their own specialized skills and efforts to support or grow the business?

20

SHRM Salt Lake | PARSONS BEHLE & LATIMER

20

Brant v. Schneider National (7th Cir. 2022)

- Schneider National Inc. ("Schneider") is a freight carrier that owns thousands of trucks
- Schneider hired most of its drivers as employees, but in 2020 designated more than a quarter of is drivers as independent contractors
- In this industry, such independent contractors are known as "owner-operators." They often own their own trucks and drive for carriers of their own choosing.
- Brant was hired as an owner-operator. As part of his hiring, Brant entered into two contracts with Schneider: (1) a Lease of the truck; and (2) an Operating Agreement.

Brant v. Schneider National (7th Cir. 2022)

- Under the Lease, Brant who did not own his own truck agreed to lease a relatively new truck from Schneider.
- Under the Operating Agreement (the "Agreement"), Brant agreed to lease the truck back to Schneider and to receive 65% of the gross revenue for shipments he hauled for Schneider. The Agreement also provided that:
  - "Owner-Operator shall determine the manner, means, and methods of performance of all Freight Transportation Services."
  - Brant could choose which shipments to accept or reject and that he could hire other drivers to take some or all responsibility for a shipment
  - Brant was responsible for providing his own truck, could select routes, manage his schedule, weigh and inspect shipments, and pay for all his own operating costs including fuel

Brant v. Schneider National (7th Cir. 2022)

- However, Schneider also retained a number of rights under the Agreement:
  - Schneider required Brant to comply with the same operational standards and policies as employee drivers
  - Scheider retained the right to remotely gather and monitor data about Brant's schedule, to use the data "for any reason," and to terminate the agreement for traffic law violations
  - A fee would be charged if Brant hired another driver
  - Schneider had sole discretion to deny Brant permission to haul for other carriers and, if it did allow him to, Brant would have to pay for third- party monitoring
  - If Brant terminated the Agreement, it would result in a default of the Lease, unless Brant secured Schneider's permission to enter a new agreement with Schneider or another carrier. In the event of default, Brant would be required to pay all remaining sums due on the Lease.

23

SHRM Salt Lake | PARSONS BEHLE & LATIMER

23

Brant v. Schneider National (7th Cir. 2022)

- Brant sued Schneider for misclassification as an independent contractor and failure to pay minimum wage. The trial court dismissed the claim and relied on the contract's statement that he was an independent contractor
- Brant alleged the following:
  - He struggled to haul enough profitable shipments from Schneider to pay his operating costs and charges
  - He had to accept as many loads from Schneider as he could even if they were undesirable.
  - In one week, he drove over 3,000 miles but after the expenses Schneider deducted, he received zero net pay
  - He sought to terminate the Agreement to haul freight for another carrier but he could not because the security deposit sought by Schneider was so high

24

SHRM Salt Lake | PARSONS BEHLE & LATIMER

24

Brant v. Schneider National (7th Cir. 2022)

- Schneider's position was as follows:
  - That the terms of the Lease and the Agreement showed that Brant was an independent contract who could manage his own operations, hire additional drivers, and haul loads for other carriers
  - That it extended credit to Brant to allow him to operate a truck and operate his own independent business
  - That Brant freely agreed to haul freight for Schneider and could accept or reject any shipments he choose while retaining full operational control of his business

What did the Appeals Court Decide?

Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

- Court dismissed the idea that the contract on its face controls:

"[i]f we looked only at the face of Brant's contracts with Schneider, we would agree with the district court that Brant could not be deemed an employee. It is well established, however, that the terms of a contract do not control the employer-employee issue under the Act. We look instead to the 'economic reality of the working relationship' to determine who is an employee covered by the FLSA."

- The court then applied the six-factor economic reality test

27

SHRM Salt Lake | PARSONS BEHLE & LATIMER

27

Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

- Although the Agreement appeared to give Brent control over the business that the "economic realities were different."
  - Schneider controlled advertising, billing, and negotiation with customers and required Brant to comply with its internal policies
  - Schneider remotely monitored Brant's driving, and he was subject to discipline
  - Even though he was allowed to hire other drivers, margins were so tight that the additional fee charged under the Agreement made this impossible
  - Although he was required to supply his own truck, in fact he was just leasing it from Schneider
  - Even though he could pick his own routes, the timeframes for the jobs were so tight that he had little practical control over his route

28

SHRM Salt Lake | PARSONS BEHLE & LATIMER

28

Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

Profit and Loss:

- The opportunity for profit and loss factor weighed in favor of finding that Brant was an employee.
- Although "Brant had the ability to modulate the kind and volume of his work [and] could even pick up additional work from other carriers to add to his income" that this was not the economic reality.
  - Brant could not turn down shipments from Schneider for more profitable options because the risk of defaulting was too high, and Schneider did not provide information on what the alternatives were
  - Brant was not allowed to turn down unprofitable shipments and his contract would be terminated if he refused assignments
  - The system to request permission to drive for other carriers was so complex and onerous that drivers did not use it and the fact that he had to pay for third-party monitoring would have made it cost-prohibitive

29

SHRM Salt Lake | PARSONS BEHLE & LATIMER

29

Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

Investment Factor:

- Schneider argued that Brant's lease of the truck for $40,000 per year was a substantial investment on Brant's part
- The court rejected this argument noting that Schneider offered the truck with no down payment, no payment during the first week of work, and no out of pocket investment. "Thus, Brant was totally dependent on Schneider's credit."

Permanency and Duration Factor:

- Schneider argued that the Lease was for a two-year term, that the Agreement was for a one-year term, and that neither automatically renewed
- The court rejected this argument explaining that it appeared that the Agreements were regularly renewed, and that Schneider sent reminder notices to drivers who failed to sign new contracts

30

SHRM Salt Lake | PARSONS BEHLE & LATIMER

30

Brant v. Schneider National, 43 F.4th 656 (7th Cir. 2022)

Special Skills:

- The special skills factor weighed in favor of finding Brant an employee. The court noted that although "Commercial truck-driving requires skills beyond those of automobile drivers . . . the skills demanded by Schneider do not set Brant apart from the many other commercial truck drivers whom Schneider treats as employees."

Integral Part of Employer's Business:

- Finally, the court found that the "integral part of employer's business" factor weighed in favor of finding Brant was an employee because "Schneider was a freight hauling company and Brant alleges that he hauled shipments for Schneider in the same way as the company's employee-drivers"

Takeway: Contract language will not outweigh evidence of conflicting economic realities

SHRM Salt Lake | PARSONS BEHLE & LATIMER

OFF THE CLOCK WORK

PARSONS BEHLE & LATIMER

Off-The-Clock Work

- Off-the-clock work is time a nonexempt employee spends working for which they are not properly compensated
- Under the FLSA, an employe must pay for all work **it knows about**, even if the employer:
  - Did not ask an employee to perform the work
  - Did not want an employee to perform the work
  - Has a rule against performing unauthorized work
- DOL regulations note that "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. § 785.13.

33

SHRM Salt Lake | PARSONS BEHLE & LATIMER

33

Off-The-Clock Work

- However, under the FLSA, an employer does not have to pay work that it does not know about or have reason to know about
- "An employer has constructive knowledge of an employee's work if it should have acquired knowledge of that work through reasonable diligence." *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017).
- "One way an employer can exercise reasonable diligence is by establishing a reasonable process for an employee to report uncompensated work time." *Id*.
- However, "an employer's formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice." *Id*.

34

SHRM Salt Lake | PARSONS BEHLE & LATIMER

34

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The Chicago Police Department's Bureau of Organized Crime investigates gangs, narcotics, and human trafficking
- Employees had scheduled shifts. However, due to the nature of their work they were sometimes required to work outside their shift.
- To obtain overtime compensation members of the Bureau would submit "time due slips to their supervisors"
- The time due slips were small pieces of paper with a spot to write in what work was done
- "Officers usually put a short vague, phrase in the space. The slip does not ask how the work was done, and officers do not typically include that information. Supervisors approve the time, and the slips are sent to payroll to process."

35

SHRM Salt Lake PARSONS BEHLE & LATIMER

35

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The department issued mobile electronic devices (BlackBerrys) which employees sometimes used in their off-duty work
- Allen and fifty-one other officers filed a class-action lawsuit against Chicago alleging that they were not paid overtime for off-duty work they did on their BlackBerrys from 2011 to 2014
- The following facts were established at trial:
  - Some of the work Plaintiff's performed on their BlackBerrys was compensable
  - Supervisors knew plaintiffs sometimes performed off-duty work on their BlackBerrys
  - Supervisors did not know, or have reason to know, that plaintiffs were not submitting slips and were not being paid for that work
  - That it would have been impractical for supervisors to check the slips and compare them with what they knew the plaintiff did that day
  - Plaintiffs never told their supervisors they were not being paid for such work

36

SHRM Salt Lake PARSONS BEHLE & LATIMER

36

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- Plaintiffs also provided four categories of evidence they said showed a policy not to compensate them for off-duty work on their BlackBerrys:

  (1) A Bureau-Wide belief that officers should not turn in slips for BlackBerry work. Evidence on this point was contradictory.

  (2) Written policies to that effect:

  - Officers would only be compensated for such use if the officer was on a particular type of assignment or if superior directed and authorized the overtime. Officers were required to sign a compliance statement acknowledging they would not be compensated for accessing a device off-duty.
  - A 2013 General Order on the same topic which said that off-duty officers "will not use" devices under those circumstances.
  - The trial court found that these orders were described as "guidelines" and that the "orders actually had no effect on plaintiffs or their supervisors" based on uniform testimony to that effect.

37

SHRM Salt Lake | PARSONS BEHLE & LATIMER

37

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

(3) Pressure to reduce overtime in general. Supervisors would occasionally discuss the topic or send emails to that effect. However, the court noted that "this was not a concerted effort, and it was unsuccessful."

(4) Pressure not to seek compensation for BlackBerry work specifically. The court found that the examples provided by the plaintiffs concerned overtime generally and that supervisors did not tell officers not to submit slips for BlackBerry work.

38

SHRM Salt Lake | PARSONS BEHLE & LATIMER

38

What did the Court Decide?

39

39

Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017)

- The trial court found that the plaintiffs had worked overtime on their Blackberrys. However, the trial court denied the claim because the plaintiffs failed to show that the "Bureau actually or constructively knew they were not reporting that work."
- The Seventh Circuit Court of Appeals affirmed. The court explained that an employer did not have a duty to investigate further when an employee "worked time they were scheduled to work, sometimes with their supervisor's knowledge," and "had a way to report that time, but they did not use it, through no fault of their employer."
- The court further rejected plaintiff's argument that the Bureau could have compared time slips to call and email records generated by the Blackberrys. The court explained that the constructive knowledge standard only asks the court to consider what the employer should have known with reasonable diligence not what it could have known.

40

40

EXEMPT EMPLOYEES

PARSONS BEHLE & LATIMER

41

Exempt Employees

- FLSA exempt categories :
  - Administrative Employees
  - Commissioned Sales Employees
  - Computer Professional Employees
  - Executive Employees
  - Highly Compensated Employees
  - Outside Sales Employees
  - Professional Employees

42

SHRM Salt Lake PARSONS BEHLE & LATIMER

42

Exempt Employees

- In order to be classified as **Administrative Employee** under the FLSA:
  - The employee must be compensated on a salary or fee basis at $684 a week
  - The employee's primary duty must be:
    - The performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; **and**
    - include the exercise of discretion and independent judgment on significant matters.

43

SHRM Salt Lake | PARSONS BEHLE & LATIMER

43

Exempt Employees

- In order to be classified as **Highly Compensated Employee** under the FLSA:
  - An individual must earn a total annual compensation of at least **$107,432**, which must include at least $**684** paid on a salary of fee basis
  - The employee's primary duty must include performing office or non-manual work
  - The employee must customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt administrative, executive, or professional employee.
    - Exempt **administrative** duties include: (1) exercising discretion and independent judgment with respect to matters of significance; (2) performing a "quality control function"; (3) performing "safety and health" duties; (4) performing work related to legal and regulatory compliance; and (5) performing work "directly related to the management or general operations of the employer's customers.
    - Exempt **executive** duties include (1) managing a customarily recognized department or subdivision; (2) directing the work of two or more employees; (3) training employees; and (4) planning the work at a job site.

44

SHRM Salt Lake | PARSONS BEHLE & LATIMER

44

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- Plaintiff were employed by Schlumberger Technology Corporation ("Schlumberger"), an oilfield services company, as "Field Specialists."
- Plaintiffs worked on location at oil rigs and provided "measurement while drilling services" which gave clients 'downhole" information such as drilling trajectory, pressure, temp
- Upon arriving at a location, plaintiffs would spend three to six hours "rigging up" which "involved gathering the necessary tools, wires, and cables to be used for downhole measurements."
- Plaintiff would then connect these tools to computers in an on-site trailer office known as the "shack" and set up the necessary software.

45

SHRM Salt Lake | PARSONS BEHLE & LATIMER

45

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- Plaintiffs would then return to the shack and monitor the computers for incoming data.
- The computers would use various software programs to generate "'surveys containing different downhole measurements and data points."
- Surveys were displayed in green or red depending on whether they were considered good (green) or bad (red) based on certain pre-determined numbers and ranges.
- If the survey was good, plaintiffs would accept the data and notify a driller who steered the drill (the "directional driller") who would use the information to guide and steer the drill along the drilling path.

46

SHRM Salt Lake | PARSONS BEHLE & LATIMER

46

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- If the survey was bad, plaintiffs told the directional driller and other employees who then would run the survey again.
- If the survey continued to be bad, plaintiffs would try "would try several basic fixes and then contact employees in Schlumberger's off-site "Operations Support Center," who would work to solve the problem.
- The Operations Support Center would take a variety of actions, including requesting files and screenshots from Plaintiffs, communicating with Plaintiffs by phone or by messaging software, and taking remote control of Plaintiffs' computers."

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- Once a job assignment was finished, Plaintiffs would undergo a "rigging-down" procedure.
- Plaintiffs would complete a final survey, remove their tools and cable from the rig, gather information from the computer system about the well, send various reports to the company, and compile a final end-of-well packet for Schlumberger's client.
- Plaintiffs occasionally attended safety meetings but **did not provide input** during the meeting.
- **"Training":** Plaintiffs worked with trainees, who shadowed the Plaintiffs, but Plaintiffs did not provide formal instructions. Plaintiffs would fill out performance evaluations and provide input but did not directly participate in hiring and firing decisions.
- Plaintiffs **prepared forms and reports.**
- One of the plaintiffs would also prepare certain documents required by the state of Texas which were then reviewed signed and filed by a higher-level employee.

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- The position "did not require formal education beyond a high school diploma, but did require in-classroom and on the job training"
- Plaintiffs would be assigned to a location for two to six weeks at a time. Plaintiff typically worked 12-hour shifts and performed between 15 to 50 surveys per shift.
- Plaintiffs were classified as exempt employees and not paid overtime
- Plaintiffs sued alleging misclassification seeking unpaid overtime pay, liquidated damages, court costs, attorney's fees, and pre-and post-judgment interest.
- Schlumberger argued that employees were exempt as Administrative Employees or as Highly Compensated Individuals
- **With regard to the highly compensated individual exception the parties stipulated the salary test was met because Gilchrist was paid $216,420.47 during the relevant period and Brockman was paid $277,312.93 during the relevant period. The parties also stipulated that the work involved office or non-manual labor. Thus, the court had to decide whether Plaintiffs' performed any of the required job duties.**

49

SHRM Salt Lake | PARSONS BEHLE & LATIMER

49

What did the Court Decide?

50

SHRM Salt Lake | PARSONS BEHLE & LATIMER

50

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- The court held that neither the Highly Compensated Employee or Administrative Employee exception applied to the Plaintiffs.
- Under the Highly Compensated Employee Exception an individual must perform at least one Administrative, Executive, Professional job duty.

51

51

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

Schlumberger argued that Plaintiffs performed these four executive job duties:

- Plaintiffs **managed a customarily recognized department of subdivision** because they had the title of "lead" Field Specialists and therefore "supervised" junior Field Specialists trainees.
  - However, Plaintiffs testified they did not supervise junior field specialists and the trainees they worked with only shadowed them and asked occasional questions.
- Plaintiffs customarily and regularly directed the work of two or more employees because Plaintiffs occasionally worked with other Field Specialists or trainees and also supervised the oil rig crew during the rigging-up and rigging-down procedures. **However, the only direction was occasional directions or hand signals.** Plaintiffs did not direct the work or other field specialists or field specialist trainees on the same job site.

52

52

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

Schlumberger also argued:

- Plaintiffs trained junior field specialists.
  - However, the trainees merely shadowed the plaintiffs. Plaintiffs also did not participate in hiring decisions and only had a trainee with them approximately 50% of the time.
- Plaintiffs engaged in planning the work at a job site by participating in pre-job planning tasks - they received receive packets of information about upcoming jobs and occasionally attend meetings before arriving on location. Plaintiffs testified he primarily used the pre-job packet to get directions to the job site and testified that his role in the meetings was listening to the client give information to a directional driller.

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- The Company also argued that Plaintiffs performed the following **five administrative job duties**.
- Plaintiffs exercised discretion and independence with respect to matters of significance **when deciding whether to accept or reject surveys**. Specifically, plaintiffs had discretion to reject green field surveys or to accept red surveys and that Field Specialists could also troubleshoot problems.
  - However, the testimony showed Plaintiffs never rejected a green survey, never accepted a red survey, and that if a survey came up their primary troubleshooting method was to re-run and/or contact the Operations Support Center. Thus, the court found that they did not exercise discretion and independence and instead just followed policies and procedures.
- Plaintiffs performed a "quality control" function when reviewing surveys and monitoring logs.
  - However, case law had held that a worker does not perform a quality control duty service under the FLSA's administrative exception if their work is more "functional than conceptual." Here, the court found that the work was more functional because it largely related to whether the directional driller could safely drill along the drill path.

Gilchrist v. Schlumberger Tech. Corp., 575 F.Supp.3d 761 (W.D. Tex. 2021)

- Plaintiffs performed "safety and health duties" because they assumed responsibility for the safety of the rig crew while rigging-up and rigging-down.
  - However, Plaintiffs testified that they **would only occasionally give the crew hand signals** where to drill, that they would discuss safety during safety meetings and **then only when asked**. Moreover, the records indicated that the safety meetings they attended mostly consisted of general advice like **"drink plenty of water" and "keep hard hats on."**
- Plaintiffs performed duties related to "legal and regulatory compliance" because they filled out state-required forms.
  - However, Gilchrist would submit this form to Schlumberger for a hire level employee to review and he did not know what they did with it.
- Plaintiffs performed work "directly related to the management of general business operations of customers" because while performing the surveys they acted as advisors and consultants to customers. The court found that these activities were unrelated to the **client's general management**.

SHRM Salt Lake

PARSONS BEHLE & LATIMER

LIQUIDATED DAMAGES

PARSONS BEHLE & LATIMER

Liquidated Damages

- Double damages
- However, "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA, the court may, in its sound discretion, award no liquidated damages or award any amount less than the equivalent of the unpaid overtime compensation." *Su v. E. Penn Manufacturing Co., No. CV 18-1194, Inc.,* 2023 WL 6849033 (E.D. Pa. Oct. 17, 2023).
- An employer has a "plain and substantial burden of proving entitlement" to this relief. *Id*. "This burden can be a difficult one to meet and double damages are the norm, single damages are the exception." *Id*.

57

SHRM Salt Lake | PARSONS BEHLE & LATIMER

57

Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033 (E.D. Pa. Oct. 17, 2023)

- East Penn Manufacturing Company ("East Penn") "is a large manufacturer of lead acid batteries, battery accessories, wires, cables, and related components. Because lead exposure is a hazard, East Penn requires most of its hourly employees to wear uniforms" and to take post-shift showers.
- The Department of Labor sued East Penn "alleging that East Penn failed to appropriately compensate its employees for clothes changing and showering activities." East Penn policies paid its employees for a "reasonable" amount of time for these tasks but not for the actual amount of time
- After a two-month trial, the jury returned a verdict, unanimously finding that East Penn had violated the FLSA and owed $22,253,087.56 in back wages.
- The Department of Labor then submitted a motion for liquidated damages which would have required East Penn to pay double that amount - an additional $22,253,087.56 in damages!

58

SHRM Salt Lake | PARSONS BEHLE & LATIMER

58

Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033 (E.D. Pa. Oct. 17, 2023)

- Since 1995, East Penn had retained the law firm Stevens & Lee to advise the company on labor and employment law
- In 2003, Gary Melchionni, a lawyer at Stevens & Lee became aware of settlements between the Department of Labor and various companies involving allegations that the companies were not paying their employees for time spent donning and doffing their uniforms
- Following a 45-minute phone call with East Penn's Personnel Director, Allison Snyder, Melchionni drafted a memorandum reviewing the case law in this area and his understanding of East Penn's policies. The memorandum recommended, among other things, that "[p]erhaps the simplest solution, although one that will decrease productivity is to include the clothes changing time as compensable work time during each shift."
- In 2003, East Penn adopted a Uniform Policy, drafted in part by Snyder, which implemented a five-minute grace period at the beginning and end of each shift during which employees could don and doff their uniforms. The company did not conduct an investigation into the actual amount of time it took but instead determined that five minutes was a reasonable amount of time to complete their donning, doffing, and showering activities

59

SHRM Salt Lake | PARSONS BEHLE & LATIMER

59

Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033, at *4 (E.D. Pa. Oct. 17, 2023)

- Prior to adopting the 2003 policy, the company had another telephone conference about the policy. Their lawyer also reviewed and endorsed the final policy.
- In 2016, an employed complained to OSHA that East Penn did not provide enough time for showering. East Penn again sought the lawyer's advice, "and he approved an update to the 2016 Uniform Policy that increased the amount of paid time allotted for showering from five minutes to ten minutes."
- That same year, the Department of Labor began an investigation of East Penn which culminated in the lawsuit and jury verdict.
- Were these actions sufficient to constitute good faith on East Penn's part such that liquidated damages may not be awarded?

60

SHRM Salt Lake | PARSONS BEHLE & LATIMER

60

What did the Court Decide?

61

61

Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033, at *4 (E.D. Pa. Oct. 17, 2023)

- The trial court found that East Penn had shown good faith because "East Penn demonstrated that it actually took affirmative action to ascertain its FLSA obligation each time an issue on clothes-changing or showering arose, well before Wage and Hour commenced its investigation in 2016. "
- "East Penn relied in good faith on the advice of a properly experienced labor and employment attorney who, at East Penn's request, specifically attempted to ascertain whether East Penn's policies regarding donning, doffing, and showering complied with the FLSA."
- East Penn "tailored its policies in response to, and consistent with, the information and guidance it received from its attorney."
- "East Penn submitted evidence that Ms. Snyder and other members of management are members of the Society of Human Resource Management, a professional society that regularly discusses FLSA coverage. In sum, there is sufficient evidence that East Penn took affirmative steps to ascertain, and endeavored to meet, its obligations under the FLSA. Based on this evidence, the Court concludes as a matter of law that although East Penn violated the FLSA, it did so in good faith."

62

62

Su v. E. Penn Mfg. Co., No. CV 18-1194, 2023 WL 6849033, at *4 (E.D. Pa. Oct. 17, 2023)

- The trial court also found that East Penn was objectively reasonable.
- The evidence showed that "East Penn was not aware when it adopted its 2003 Policy that it needed to pay for actual, as opposed to 'reasonable,' time employees spend on clothes-changing and showering.
- "In his 2003 memorandum on the subject, Mr. Melchionni described for East Penn the state of the law regarding donning and doffing as 'unsettled, and did not advise East Penn that it needed to change its pay policies to comply with the unsettled FLSA law . . . .Likewise, East Penn was not on notice that it needed to pay employees based on the actual time it took them to don, doff, and shower when it increased paid shower-time in 2016"

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

- Christina Jepson
  cjepson@parsonsbehle.com
  801.536.6820
- Susan Baird Motschiedler
  smotschiedler@parsonsbehle.com
  801.536.6923

65

SHRM Salt Lake

PARSONS BEHLE & LATIMER

65

37th Annual Employment Law Symposium

The Next Right Thing: Choosing Your Path Through the ADA Mine Field

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

SHRM Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE
parsonsbehle.com

PARSONS BEHLE & LATIMER
A Professional Law Corporation

The Next Right Thing: Choosing Your Path Through the ADA Mine Field

Liz M. Mellem & Susan Baird Motschiedler

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake | PARSONS BEHLE & LATIMER

2

Americans with Disabilities Act: A Brief Overview

PARSONS BEHLE & LATIMER

3

The ADA

- Title I of the ADA prohibits discrimination in the terms and conditions of employment based on an employee's (or an applicant's) disability
- Law passed in 1990 and went into effect in 1992, amended in 2008
- Applies to private employers (and others) with 15 or more employees
  - Be aware of State equivalents of the ADA – the threshold application levels may be different (e.g., Montana's version of the ADA applies to businesses with **one or more** employees)
- In 2024, EEOC filed 48 ADA cases (nearly *half* the merits litigation filed by agency)

4

SHRM Salt Lake | PARSONS BEHLE & LATIMER

4

The Relevant Language of the ADA

"No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other, terms, conditions, and privileges of employment"

- Let's break that down:
  - What is a disability?
  - What is an "essential function"?
  - What is a "reasonable accommodation"?

5

What is a "disability" under the ADA?

6

Disability is:

- A physical or mental impairment that substantially limits one or more major life activities of a person;
  - "major life activities" = caring for onseself, seeing, hearing, eating, sleeping, walking, lifting, speaking, breathing, learning, concentrating, communicating…
  - Includes major bodily functions – immune system functioning, digestive system, bowel, bladder, neurological, endocrine, reproductive, circulatory…
- A record of such impairment; or
- Being regarded as having such an impairment
  - An actual or perceived physical/mental impairment whether or not that impairment limits or is perceived to limit a major life activity
  - Does not apply to minor/transitory impairment – impairment that lasts 6 months or less

7

SHRM Salt Lake | PARSONS BEHLE & LATIMER

7

Example: Stomach Bug is NOT a Disability

Cook v. Warren Screw Products, Inc. (6th Cir. March 27, 2025)

- Paul Cook hired to be a delivery truck driver for Warren
- Six days after starting work, he called in sick because of a stomach bug
  - Diarrhea and stomach cramps
  - Cook described his situation as being "in and out of the bathroom" between deliveries
- Cook obtained antibiotics and two different notes from his Doctor saying he couldn't return to work for a total of two weeks

8

SHRM Salt Lake | PARSONS BEHLE & LATIMER

8

Cook v. Warren continued

- Warren's HR representative called Cook asking if he could work part time to get a few "mandatory runs" completed
- Cook rejected the proposal
- Cook returned to work two weeks later and was informed he was fired
- Cook sued alleging disability discrimination and retaliation for seeking a reasonable accommodation
- District Court granted summary judgment to Warren. Cook appealed

6th Circuit: Stomach Bug Not a Disability

- Sixth Circuit affirmed District Court
  - Stomach bug is too transitory to be considered a disability despite possibly affecting a major life function (working) in minor ways
  - Cook presented no evidence that he could not perform "an entire class of jobs or a broad range of jobs," only that he could not perform this delivery job
  - "a plaintiff is not disabled simply because he cannot perform a discrete task or a specific job"

But . . . Some temporary conditions CAN be a disability

Shields v. Credit One Bank, (9th Cir. 2022)

- Karen Shields hired as an HR Generalist I for Credit One Bank
- After suspecting she had bone cancer, Shields had bone biopsy surgery and was hospitalized for 3 days
- Shields could not perform several major life activities – couldn't use her right arm, shoulder, and hand to lift, pull, push, type, write, tie her shoes or use a hair dryer
- She also was substantially limited in "sleeping, lifting, writing, pushing, pulling, and manual tasks"

11

SHRM Salt Lake | PARSONS BEHLE & LATIMER

11

Shields v. Credit One Bank continued

- Shields was unable to return to work for several months
- Credit One fired her while she was out on medical leave and her healthcare coverage was terminated one week later. Credit One claimed her position was being eliminated.
- Shields sued for disability discrimination under the ADA claiming Credit One had failed to reasonably accommodate her disability
- District Court dismissed her complaint because she failed to allege any "permanent or long-term effects for her impairment"

12

SHRM Salt Lake | PARSONS BEHLE & LATIMER

12

Shields v. Credit One Bank continued

- 9th Circuit reversed and remanded concluding even though Shields was impaired for approximately two months, her impairment qualified as an actual disability
- Take Away: an impairment does not need to be "permanent or long-term" to constitute a disability

SHRM Salt Lake | PARSONS BEHLE & LATIMER

What is an "essential function" under the ADA?

PARSONS BEHLE & LATIMER

Essential Function is:

- Essential functions are the fundamental job duties that you must be able to perform on your own or with the help of a reasonable accommodation
- Determined by:
  - Employer's judgment about which functions are essential
  - Job descriptions that were written before a job was posted
  - Amount of time spent performing the function
  - Consequences of not requiring the person to perform the function
  - Terms of a collective bargaining agreement
  - Work experience of other employees who worked in same/similar positions

15

SHRM Salt Lake | PARSONS BEHLE & LATIMER

15

Brown v. Advanced Concept Innovations (11th Cir. 2022)

- Brown worked as a customer service representative
- She had a major health condition that caused severe nausea and vomiting
- While on leave for this condition, she learned to manage the symptoms by spitting regularly into a cup
- Upon return from leave, she requested an accommodation to bring the spit cup to work
- Most of her job functions were **clerical** and **performed in an administrative area**

16

SHRM Salt Lake | PARSONS BEHLE & LATIMER

16

Brown v. Advanced Concept Innovations continued

- Did the Company grant her request for accommodation?
  - No.
  - Brown performed approximately ***20% of her time*** performing her job duties in a clean production area
  - Company asserted the sanitation requirements could not be met if they accommodation were granted
  - Granting accommodation would require removing an essential function of her job
- Brown sued in Florida Federal District Court
  - Jury found in her favor

17

17

Brown v. Advanced Concept Innovations continued

- Eleventh Circuit looked at whether the clean area work was an essential function of Brown's job:
  - Position was primarily clerical and **unrelated to production**
  - **She spent no more than 20% of her time in the production area**
  - Her job description did not **list being in the production area** among the job's "Essential Duties and Responsibilities"
  - Her work team (customer service) had a system where production area duties could be shared
  - She could still do the job's essential functions, **including those normally done in the production area**, from her desk in the administrative area

18

18

Brown v. Advanced Concept Innovations continued

- Eleventh Circuit affirmed jury's verdict
- Takeaways:
  - 20% is – apparently – potentially not that significant
  - Look at what is important
    - Actual work or location of work
  - How does it fit with the employee's job position
  - Look at how employee teams split or share work
  - Put it in the job description!

What is a reasonable accommodation?

Reasonable Accommodation is:

- Any modification or adjustment to a job or the work environment that
  - enables a qualified individual with a disability to participate in the application process,
  - perform essential job functions, **or**
  - enjoy benefits and privileges of employment equal to those of employees without disabilities,
  - as long as it doesn't cause undue hardship for the employer.

21

21

Tudor v. Whitehall Central School District (2nd Cir. 2025)

- Angel Tudor was a HS teacher with PTSD and anxiety that arose from sexual harassment and assault at a former workplace
- Tudor's disability caused neurological function problems, a stutter, severe nightmares, and impaired ability to perform daily tasks
- Workplace was a trigger for the symptoms
- School granted accommodation to leave school campus for 15 minutes in morning and afternoon to manage her symptoms

22

22

Tudor v. Whitehall Central School District continued

- After a change in school administrations, teachers were prohibited from leaving school during prep periods
- Tudor did anyway because she thought she had an accommodation
  - Was disciplined
- Took FMLA leave to participate in outpatient program to treat PTSD
- Upon return, the district allowed a morning break off campus and an addition break in the afternoon – provided a librarian could watch her students during study hall
- Eventually, nobody could cover the afternoon and Tudor left anyway

Tudor v. Whitehall Central School District continued

- Tudor said that taking the breaks away worsened her anxiety because she knew she was violating school policy
- She sued the school district for failure to accommodate her disability as required under the ADA
- During discovery, Tudor **admitted that she could perform the essential functions of her job, regardless of whether she received an accommodation**, but only "under great distress and harm"
- School District filed for summary judgment, alleging that because she could do the job without an accommodation, it was fatal to her failure to accommodate claim

Tudor v. Whitehall Central School District continued

- Second Circuit disagreed:

> *A straightforward reading of the ADA confirms that an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation. Ability to perform the essential functions is relevant to a failure-to-accommodate claim, but it is not dispositive.*

25

SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

Tudor v. Whitehall Central School District continued

- Second Circuit continued:

> *This inference [that if an employee can perform the essential functions of the job without an accommodation] cannot be squared with the ADA's plain text.*

- And added:

> *[A]n employee with a disability is qualified to receive a reasonable accommodation under the ADA even is she can perform the essential job functions without one. The text of the ADA is unambiguous and affords no other reasonable interpretation. . . .* ***If Congress had wanted employers to make only necessary accommodations, rather than reasonable ones, it would have said so.***

26

SHRM Salt Lake | PARSONS BEHLE & LATIMER

26

Tudor v. Whitehall Central School District continued

- Takeaway:
  - A reasonable accommodation does not need to be tied to an essential function of the job
- A reasonable accommodation is any modification or adjustment to a job or the work environment that
  - enables a qualified individual with a disability to participate in the application process,
  - perform essential job functions, **or**
  - enjoy benefits and privileges of employment equal to those of employees without disabilities,
  - as long as it doesn't cause undue hardship for the employer.

27

27

Undue Burden and Reasonable Accommodation

Searls v. John Hopkins Hospital (D. Maryland 2016)

- Searls was deaf prospective employee; applied and was offered job of nurse
- Johns Hopkins Hospital (JHH) Nurse job description/essential job functions:
  - highly effective verbal communication and interpersonal skills to establish working relationships
  - "communication"
  - "listening actively to opinions, ideas and feelings expressed by others and responding in a courteous and tactful manner"
  - "communicating unresolved issues to appropriate personnel"
  - "general physiologic monitoring and patient care equipment such as defibrillator and glucometer monitor"

28

28

Searls v. John Hopkins Hospital continued

- Offer contingent on health screening and clearance by Office of Occupational Health Services (OHS)
  - Requested a full time ASL interpreter from OHS
  - Request was forwarded to ADA/Accessibility Consultant
  - Investigation of requirement and costs
    - 1or 2 full time interpreters?
    - $40,000-$60,000/interpreter annually
    - Hiring unit (annual budget = $3.4 million) was part of JHH's Department of Medicine (annual budget = $88 million)
    - Internal conversations (email) with radiology Director, ADA consultant, VP of nursing, OHS

29

SHRM Salt Lake | PARSONS BEHLE & LATIMER

29

Searls v. John Hopkins Hospital continued

- Emails:
  - "I know we can't afford this"
  - "They are expecting the department pay for this. Why isn't the hospital responsible"
  - Searls "is qualified" but given the cost and financial issues "first response to this . . . Is to respond that I cannot accommodate this."
  - Concerns that having an interpreter could create scheduling issues; interpreter might tell nurse to give wrong medicine in an emergency situation
  - Searls "is bright and would be a good hire other than this hearing issue."
  - "I want to be sure we have thoroughly investigated all avenues as [she] is a qualified applicant, and we are part of the larger JHH"
  - "try to include as much [info] to illustrate **hardship** on the organization" and "demonstrate we have shown a good effort"

30

SHRM Salt Lake | PARSONS BEHLE & LATIMER

30

Searls v. John Hopkins Hospital continued

- Offer rescinded; Searls sued
- Searls hired by another hospital and was provided a FT interpreter
  - Supervisor testimony: Searls' deafness and use of interpreter never affected patient care, response to alarms, or participation in codes
  - Searls exceeded standards on performance reviews and had received several promotions
- District Court found ASL interpreter was reasonable accommodation and looked at whether it would impose an undue burden.

31

31

Searls v. John Hopkins Hospital continued

- Because JHH had relied primarily on the cost as the reason for undue burden, Court considered budgets of JHH, department, and hiring unit
- Cost of providing American Sign Language interpreter for deaf prospective nurse employee = $120,000/year
  - Hospital budgeted $0 for reasonable accommodations
  - Hospital's operational budget was **$1.7 billion**
  - **$120,000/$1,700,000,000 = 0.0007% of annual hospital operating budget**
- Court found this was not an undue burden on the hospital

32

32

Searls v. John Hopkins Hospital continued

- Takeaways for undue burden:
  - Consider all financial sources (including up the chain) and demonstrate why is an undue burden
  - Do not limit consideration of accommodation budget or HR budget
  - Court specifically found that JHH relied on the $0 accommodation budget and "did not consider" larger $1.7 billion budget

33

SHRM Salt Lake | PARSONS BEHLE & LATIMER

33

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

34

Thank You

- Liz M. Mellem
  amellem@parsonsbehle.com
  406.317.7240
- Susan Baird Motschiedler
  smotschiedler@parsonsbehle.com
  801.536.6923

35

37th Annual Employment Law Symposium

I Have Seen This Movie Before . . . But I Am Not Sure How it Ends This Time

Michael Judd
801.536.6648 | mjudd@parsonsbehle.com

Sean A. Monson
801.536.6714 | smonson@parsonsbehle.com

SHRM® Salt Lake

PARSONS BEHLE & LATIMER

37th Annual Employment Law Symposium

A Different LEGAL PERSPECTIVE

parsonsbehle.com

PARSONS BEHLE & LATIMER

A Professional Law Corporation

I Have Seen This Movie Before . . . But I'm Not Sure How It Ends This Time

Michael Judd & Sean A. Monson

SHRM Salt Lake

April 8, 2025 | The Grand America Hotel – Salt Lake City

1

Legal Disclaimer

This presentation is based on available information as of April 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

SHRM Salt Lake

PARSONS BEHLE & LATIMER

2

The Thing About Sequels

PARSONS BEHLE & LATIMER

3

There are sequels . . .

SHRM Salt Lake

PARSONS BEHLE & LATIMER

4

4

. . . and there are *sequels*.

5

SHRM Salt Lake | PARSONS BEHLE & LATIMER

5

Today's topic: A political sequel.

6

SHRM Salt Lake | PARSONS BEHLE & LATIMER

6

Agenda

Immigration. How can employers prepare for increased immigration enforcement?

Workplace discrimination. Will a new type of workplace-discrimination claim emerge?

Identity and culture at work. How can employers manage culture-war issues at work?

Other policies—retreat and chaos. What should employers expect later this year—and beyond?

SHRM Salt Lake | PARSONS BEHLE & LATIMER

7

7

Trump 2.0: Immigration

PARSONS BEHLE & LATIMER

8

Preparing for ICE Audits -- Call your Lawyer!

- When ICE arrives at the worksite, direct the receptionist/managers to contact legal counsel.
- The receptionist should state “Our company policy is to call our lawyer, and I am doing that now.”

9

SHRM Salt Lake | PARSONS BEHLE & LATIMER

9

Basic Rule—Searching/Access to Private Areas Requires a Warrant

- ICE can mill about public areas (lobbies/parking lots/common areas) etc. without any kind of warrant.
- In order to access an area normally reserved for employees or otherwise not accessible to the public, they have to have a warrant.

10

SHRM Salt Lake | PARSONS BEHLE & LATIMER

10

Understand Different Types of Warrants – Judicial Warrant

- A "judicial warrant" is a formal written order authorizing a law enforcement officer to make an arrest, a seizure, or a search. A judicial warrant is issued by a judicial court (federal or state).
- ICE officers are permitted to enter any public areas of your workplace but must have a valid search warrant or the company's consent to enter non-public areas. I would recommend not consenting to any search in areas outside the scope of the search warrant.
- A valid judicial search warrant must be signed and dated by a judge. It will include a timeframe within which the search must be conducted, a description of the premises to be searched, and a list of items to be searched for and seized (e.g., payroll records, employee identification documents, Forms I-9, SSA correspondence, etc.).

11

SHRM Salt Lake | PARSONS BEHLE & LATIMER

11

Understand Different Types of Warrants – Judicial Warrant

- You can accept the warrant but not consent to the search. If you do not consent to the search, the search will proceed, but you can later challenge it if there are grounds to do so.
- Examine the search warrant to ensure that it is signed by the court, that it is being served within the permitted timeframe, and that the search is within the scope of the warrant (the area to be searched and the items to be seized).

12

SHRM Salt Lake | PARSONS BEHLE & LATIMER

12

Understand Different Types of Warrants – Administrative Warrant

- Conversely, an "administrative warrant" is a formal written document authorizing a law enforcement officer from a designated federal agency, such as an ICE agent, to usually ask for documents.
- Sometimes it is served with I-9 audit notice (this is a completely different animal than an ICE raid).
- An administrative warrant is issued by a federal agency such as DHS and can be signed by an "immigration judge" or an "immigration officer." Unlike a judicial warrant, an administrative warrant does not authorize a search. Therefore, an ICE agent who has only an administrative warrant may not conduct a search based on the warrant, though, in certain circumstances, the administrative warrant would authorize the agent to make a seizure or arrest.
- Compare I-9 Audit Notice (which requires 3 days for compliance)—warrants can require immediate compliance.

13

SHRM Salt Lake | PARSONS BEHLE & LATIMER

13

What Can ICE Do?

- ICE may demand that equipment be shut down and that no one leave the premises without permission. You should comply.
- ICE may move employees into a contained area for questioning.

14

SHRM Salt Lake | PARSONS BEHLE & LATIMER

14

Employer's Best Practices

- Write down the name of the supervising agent (and identifying badge number) and the name of the U.S. attorney assigned to the case.
- Have at least one company representative follow each agent around the facility. That representative may take notes or videotape the officer but must not interfere with the search. The person should note any items seized and ask if copies can be made before they are taken.
- If agents have a valid search warrant covering locked areas, give them access to those areas if they request.

15

15

Employer's Best Practices

- If agents insist on taking a document that is vital to your business operations, explain why it is vital and ask for permission to photocopy it before the original is seized.
- Do not block or interfere with the agents' activities. But, again, you are not required to give the agents access to non-public areas if they did not present a valid search warrant for those areas.
- Object to a search outside the scope of the warrant. However, do not engage in a debate or argument with the agent about the scope of the warrant. Simply state your objection to the agent and make note of it.

16

16

Employer's Best Practices

- If agents wish to examine documents designated as attorney-client privileged material (such as letters or memoranda to or from counsel), inform them that the documents are privileged and request that attorney-client documents not be inspected by the agents. If agents insist on taking such documents, you cannot prevent them from doing so. If such documents are seized, try to record in your notes exactly which documents were taken by the agents and your efforts to explain to the agents that the documents were privileged.
- Ask for a copy of the list of items seized during the search. The agents are required to provide an inventory.

17

17

Employer's Best Practices

- Company representatives should not give any statements to ICE or allow themselves to be interrogated before consulting with an attorney.
- You may inform employees that they may choose whether to talk with ICE during the raid, but **do not** direct them to refuse to speak to agents when questioned.
- Do not hide employees or assist them in leaving the premises without permission.

18

18

Employer's Best Practices

- Do not provide false or misleading information, falsely deny the presence of named employees, or shred or otherwise obscure documents.
- Enforcement actions can sometimes last for hours. If an employee requires medication or medical attention, or if employees have children who need to be picked up from school, communicate these concerns to ICE.
- If an employee is detained or taken into custody, ensure that you assign someone to contact the family, and pay them any money owed for wages.

19

SHRM Salt Lake | PARSONS BEHLE & LATIMER

19

Employee Rights

- Employees have the right to remain silent and the right to hire an attorney if they choose.
- Ask if your employees are free to leave. If they are not free to leave, they have a right to hire their own attorney. While you should not instruct your employees to refuse to speak to federal agents, they also have the right to remain silent and do not need to answer any questions.
- Employees do not need to answer questions about their immigration status, where they were born, or how they entered the United States. They may exercise their right to remain silent and may ask to speak to an attorney.

20

SHRM Salt Lake | PARSONS BEHLE & LATIMER

20

Employee Rights

- If ICE tries to determine your employees' immigration status by asking them to stand in groups according to status, they do not have to move, or they can move to an area that is not designated for a particular group.
- Employees may also refuse to show identity documents that disclose their country of nationality or citizenship.
- If an employee has valid immigration documents, they may present them. They should never present false documents.

21

21

Make a Plan!

- Be proactive in preparing for an ICE visit.
- Discuss with management the protocols that the company will follow based on the above points. Think of every logistical issue that could arise ("clean room" areas, logistics of turning off equipment, where employees can gather if requested, etc.)
- Create a plan/template to follow so that you are not making decisions clouded by stress.

22

22

Make a Plan!

- I-9 audit/e-verify
  - Directive – each agent, 5 I-9 audits per week
    - Penalties for I-9 mistakes
  - New employees
  - Existing employees (only under certain circumstances)
  - Note that e-verify is actual knowledge.

Trump 2.0: Workplace Discrimination

Agency Rosters in Flux

DIVE BRIEF

Andrea Lucas renominated to EEOC, pledges 'evenhanded' civil rights enforcement

The acting chair's new five-year term, if approved by the U.S. Senate, would still leave the civil rights agency without a quorum.

Published March 26, 2025

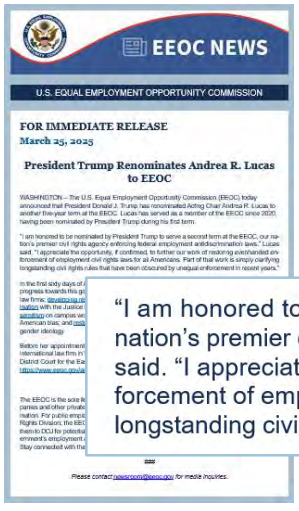
Split D.C. Circuit Panel Rules Trump Can Remove Wilcox from NLRB – NLRB to Stay Without a Quorum

SHRM Salt Lake | PARSONS BEHLE & LATIMER

25

25

EEOC Promise: "Evenhanded Enforcement"



EEOC NEWS

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FOR IMMEDIATE RELEASE
March 25, 2025

President Trump Renominates Andrea R. Lucas to EEOC

WASHINGTON – The U.S. Equal Employment Opportunity Commission (EEOC) today announced that President Donald J. Trump has renominated Acting Chair Andrea R. Lucas to another five-year term at the EEOC. Lucas has served as a member of the EEOC since 2020, having been nominated by President Trump during his first term.

"I am honored to be nominated by President Trump to serve a second term at the EEOC, our nation's premier civil rights agency enforcing federal employment antidiscrimination laws," Lucas said. "I appreciate the opportunity, if confirmed, to further our work of restoring evenhanded enforcement of employment civil rights laws for all Americans. Part of that work is simply clarifying longstanding civil rights rules that have been obscured by unequal enforcement in recent years."

###

Please contact newsroom@eeoc.gov for media inquiries.

What does "evenhanded enforcement" mean?

EEOC moves to drop transgender discrimination cases to comply with Trump's order

"I am honored to be nominated by President Trump to serve a second term at the EEOC, our nation's premier civil rights agency enforcing federal employment antidiscrimination laws," Lucas said. "I appreciate the opportunity, if confirmed, to further our work of restoring evenhanded enforcement of employment civil rights laws for all Americans. Part of that work is simply clarifying longstanding civil rights rules that have been obscured by unequal enforcement in recent years."

SHRM Salt Lake | PARSONS BEHLE & LATIMER

26

26

EEOC Promise: "Evenhanded Enforcement"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

STATE OF TENNESSEE *et al.*,
Plaintiffs,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *et al.*,
Defendants.

Civil Action No. 3:24-cv-00223
Judge Charles E. Atchley, Jr.
Magistrate Judge Debra C. Poplin

NOTICE OF EXECUTIVE ORDER AND UNOPPOSED MOTION TO VACATE HEARING DATE

Defendants respectfully provide notice to the Court of a recently issued Executive Order and also request that the Court vacate the oral argument pertaining to Plaintiff's Motion for Preliminary Injunction on January 27, 2025, at 10:30 a.m. ET.

1. This case involves Plaintiffs' challenge to a document issued by the Equal Employment Opportunity Commission ("EEOC"), entitled Enforcement Guidance on the Workplace ("Guidance"). On May 31, 2024, Plaintiffs filed a Motion for Preliminary Injunction, which sought an order enjoining Defendants from enforcing, implementing, or otherwise acting pursuant to the portions of the Guidance Plaintiffs Doc. 32.

2. This Court set an in-person oral argument for January 27, 2025, ordered the parties to be prepared to discuss the substantive issues raised by Plaintiffs

What does "evenhanded enforcement" mean?

Jan. 27, 2025, 9:09 AM MST

Trump DOJ Retreats From Defense of EEOC Gender Identity Guidance

5. Defendants respectfully suggest that these developments warrant vacating the oral argument. The position of the United States is reflected in the President's Executive Order, notwithstanding any prior position taken by the Defendants in this case. In light of that position, the President has directed the EEOC to rescind the Guidance.

SHRM Salt Lake | PARSONS BEHLE & LATIMER

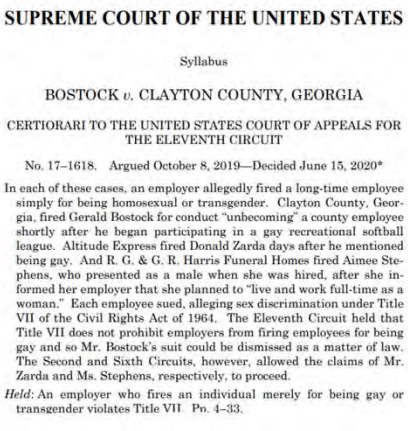
Timeout: What about *Bostock*?

Though the Trump administration has retreated from EEOC positions regarding treatment of LGBTQ employees, *Bostock* remains good law.

Under *Bostock*, discrimination based on sexual orientation or gender identity constitutes sex discrimination under Title VII.

Bostock therefore protects employees from adverse action based on those characteristics.

Open issue: Sex-segregated bathrooms, locker rooms, dress codes.



SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK *v.* CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned being gay. And R. G. & G. R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed.

Held: An employer who fires an individual merely for being gay or transgender violates Title VII. Pp. 4–33.

SHRM Salt Lake | PARSONS BEHLE & LATIMER

What "DEI Enforcement" May Look Like

Principles

The RSJ Division's work is grounded by five principles. We use principles pillars to guide our decision-making and strategies.

- Center those most impacted.
- Justice should be the first consideration, not the last.
- Healing is a necessary pathway to justice.
- Inclusion is intersectional.
- Reflection is a means of r/evolution.

RACE & SOCIAL JUSTICE INITIATIVE

RSJI

What We Do

RSJI embeds racial equity and social justice principles into the City's programs, budgets, and culture. Our holistic work focuses on organizing for racial justice, capacity building, foundational knowledge about race, and personal accountability to advancing equity.

RSJI's strategies for change focus on Culture Shift, Gatherings, and Partnerships.

29

SHRM Salt Lake | PARSONS BEHLE & LATIMER

29

What "DEI Enforcement" May Look Like

COLORADO
Department of Corrections

Diversity, Equity, Inclusion & Belonging and the GRAACE Alliance

Projects and Initiatives:

The fundamental values of DEI-B touch every aspect of the department's mission, goals, and vision. This is reflected in our strategic plan.

30

SHRM Salt Lake | PARSONS BEHLE & LATIMER

30

What "DEI Enforcement" May Look Like

The Setup

2025 WL 446753
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

Joshua A. DIEMERT, Plaintiff,
v.
CITY OF SEATTLE, Defendant.

CASE NO. 2:22-cv-1640
|
Signed February 10, 2025

Plaintiff Joshua Diemert, a white man, alleges that his employer, Defendant City of Seattle ("City"), discriminated against him because of his race. He argues that the City's Race and Social Justice Initiative ("RSJI")—the City's D.E.I. program—created a hostile-work environment by "infusing race into ***all*** City functions" and "reduc[ing] [him] to an embodiment of his race." Dkt. No. 67 (emphasis in original). He also alleges the City retaliated against him when he opposed the supposed harassment.

31

31

What "DEI Enforcement" May Look Like

The Setup

94 F.4th 1242
United States Court of Appeals, Tenth Circuit.

Joshua F. YOUNG, Plaintiff - Appellant,
v.
COLORADO DEPARTMENT OF CORRECTIONS; Dean Williams; Jill Hunsaker Ryan, Defendants - Appellees.

No. 23-1063
|
FILED March 11, 2024

While Joshua Young was an employee for the Colorado Department of Corrections, he alleges that the Department implemented mandatory Equity, Diversity, and Inclusion training that subjected him to a hostile work environment. After resigning from the Department because of the training program, Mr. Young sued, asserting claims under Title VII and the Equal Protection Clause. In his complaint, he alleged that the training program violated Title VII by creating a hostile work environment and violated the Equal Protection Clause by promoting race-based policies. In particular, he alleged the training demeaned him because of his race and promoted divisive racial and political theories that would harm his interaction with other corrections' personnel and inmates. At the motion-to-dismiss stage, the district court dismissed both claims without prejudice.

32

32

What "DEI Enforcement" May Look Like

The Conduct

Diemert:

during the 2019 Undoing Institutionalized Racism presentation, one of the co-trainers went "off into a rant about ... white people, [and] [Christopher] Columbus and being cannibals." Dkt. No. 73-2 at 20. According to Diemert, the co-trainer stated that "there was a lie that Christopher Columbus went to the Caribbean and that [the indigenous people living there] were cannibals" when "the real truth is that all white people are cannibals[.]" *Id.* Diemert also testified in his declaration that the trainers said, "racism is in white people's DNA" and that "white people are like the devil." Dkt. No. 69 ¶ 42. After the training, Diemert heard second-hand from his supervisor that his co-workers called him a "white supremacist" and "racist" in response to his comments during the training. *Id.*

Young:

One of the recommended videos had one of the interviewees using the N-word in the context of describing discriminatory housing practices. *Id.* ¶ 31. The training advises trainees to be careful of exclusionary "white norms," *id.* ¶ 41, and critiques "white exceptionalism," *id.* ¶ 24(d), a "fakequity" belief that "white allies" are "an exception to white racism" that "perpetuates white supremacy." *Id.*

33

SHRM Salt Lake | PARSONS BEHLE & LATIMER

33

What "DEI Enforcement" May Look Like

The Critiques

Diemert:

At least some of the comments that Diemert takes issue with were made during RSJI trainings. Racially charged comments made in this setting, while still potentially harmful, are better framed as attempts to express perspectives or challenge ideas within the training's scope. Such comments made in the presence of a skilled facilitator can be addressed constructively, turning the moment into a learning opportunity, not a personal attack. This is very different than comments made, for example, on a production room floor that serve no educational purpose.

Even viewed cumulatively, comments about Diemert being a "colonist" or "white people being cannibals" were too infrequent to surpass the type of "joking or teasing [the Ninth Circuit] [has] held to be part of the ordinary tribulations of the workplace."

Young:

If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging. Taken seriously by managers and co-workers, the messaging could promote racial discrimination and stereotypes within the workplace. It could encourage racial preferences in hiring, firing, and promotion decisions. Moreover, employees who object to these types of messages risk being individually targeted for discriminatory treatment—especially if employers explicitly or implicitly reward discriminatory outcomes.

34

SHRM Salt Lake | PARSONS BEHLE & LATIMER

34

What "DEI Enforcement" May Look Like

The Outcome

Diemert:

The claim that efforts to address racism in the workplace—such as D.E.I. initiatives—are themselves racist presents a striking paradox. According to their proponents, these programs aim to promote fairness and inclusion by acknowledging and addressing racial disparities—they are designed to ensure that all individuals have access to opportunities. Critics, however, argue that explicitly focusing on race or addressing racial inequalities perpetuates division and unfairness. For them, the cure is worse than the disease. The tension between these views underscores the complexity employers face when talking about race and equity.

While such conversations may prompt discomfort or spark debate, they do not necessarily violate anti-discrimination laws. Multiple courts in recent years have reached the same conclusion.

Young:

True, the racial rhetoric contained in the Department of Public Health & Environment's online training materials echoes the racist views espoused by the co-workers and supervisors in *Lounds* and *Tademy*. But the lack of racial animus manifesting itself in Mr. Young's day-to-day *work environment* distinguishes his case from those that have ratified a racially-hostile workplace claim. In short, Mr. Young has not plausibly alleged severe or pervasive harassment that altered the terms or conditions of his employment to create an abusive work environment.

35

SHRM Salt Lake

PARSONS BEHLE & LATIMER

35

Trump 2.0: Identity and Culture at Work

PARSONS BEHLE & LATIMER

36

Bostock -- Background

- Gerald Bostock, was fired for conduct “unbecoming” a county employee right after he joined a gay recreational softball league.
- Bostock sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964.
- In a 6-3 ruling in Bostock v. Clayton County, Georgia, the Court held that an employer who fires an individual merely for being gay or transgender violates the law.

37

SHRM Salt Lake | PARSONS BEHLE & LATIMER

37

Bostock -- Background

- The Court explained, “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”

38

SHRM Salt Lake | PARSONS BEHLE & LATIMER

38

Bostock -- Background

- The Court continued, “By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals’ sex, even if it never learns any applicant’s sex.”
- The Court concluded with these words, “Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: **An employer who fires an individual merely for being gay or transgender defies the law**.”

39

SHRM Salt Lake | PARSONS BEHLE & LATIMER

39

Biden EEOC Guidance

- “Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual’s sexual orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person’s sex; **repeated and intentional** use of a name or pronoun inconsistent with the individual’s known gender identity (**misgendering**); or the denial of **access to a bathroom** or other sex-segregated facility **consistent** with the individual’s gender **identity**.”

40

SHRM Salt Lake | PARSONS BEHLE & LATIMER

40

Trump EEOC Responds

- Trump has issued an executive order titled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"
- The order mandates the federal government to recognize two "biological sexes" as determined "at conception." Among other things, the order requires the EEOC and DOL to prioritize litigation related to these issues
- The executive order conflicts with Biden EEOC guidance and potentially *Bostock* (note: ***Bostock* says it was not deciding bathroom issue**)

41

41

Trump EEOC Signals Disapproval

- The EEOC guidance remains on the EEOC website but with this statement: "When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."
- However, because Trump fired two commissioners at the EEOC before their terms were set to end, there is no quorum at the EEOC. The Trump administration wants to end the guidance but can't yet because there is no quorum.

42

42

Bathrooms

- When EEOC guidance under the Biden administration was initially passed, Andrea Lucus said, while voting against the guidance, “Every female worker has privacy and safety rights that necessitate access to single-sex workplace bathrooms limited to biological women”
- Whether an employer should abide by the existing guidance is unclear. (It is ultimately going to go away, I believe; its just a matter of time)
- Moreover, it is unclear whether EEOC guidance has any value regardless of what it says. Last year, the Supreme Court overruled Chevron deference toward agency interpretations. *Loper Bright v. Ramondo*, 603 U.S. 369 (2024)
- This means that any agency’s interpretation about the laws it enforces (such as the EEOC and anti-discrimination laws), no longer has to be given deference by a court

43

SHRM Salt Lake | PARSONS BEHLE & LATIMER

43

Bathrooms—It’s a Three Body Problem

- Supreme Court -- *Bostock* – transgender status and sexual orientation is protected
- Trump EEOC – that does not mean bathrooms (or pronouns)
- Supreme Court – *Loper Bright* – courts don’t have to defer to what agencies, including the EEOC, think about the laws they enforce
- So, a court can give two hoots about what the Trump EEOC says about Title VII, ADA, ADEA, etc.
- What is a law-abiding, well meaning employer supposed to do?

44

SHRM Salt Lake | PARSONS BEHLE & LATIMER

44

What's an Employer Supposed to Do?

45

45

Utah Legislature Shows the Way?

- 34A-5-110. Application to sex-specific facilities.
- This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, provided that the employer's rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.

46

46

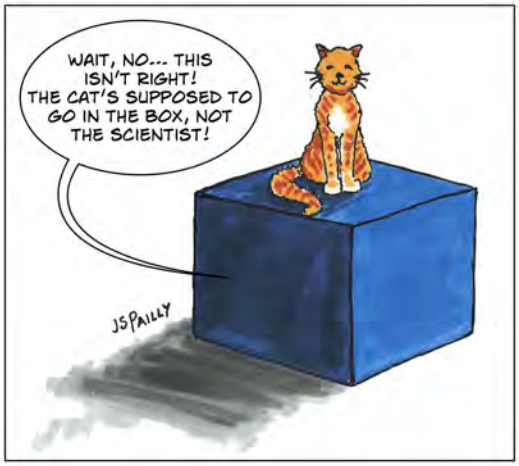
Utah Legislature Shows the Way?

- If, in the future, federal government says no longer required to let employees use bathroom of choice. (Extremely likely)
- Utah Code "reasonable accommodation" may be the pathway to take
- But, regardless of what the Trump EEOC says, a federal could say under *Bostock* that employers are required to let employees use bathroom of choice, despite state law

47

47

Schrodinger's Cat (or Legal Advice)



48

48

Pronouns

- Another issue is religion and gender identity
- The EEOC's current harassment guidance states that employers did not need to grant religious accommodations if the accommodations would create a hostile environment for other employees
- For instance, employers did not have to grant an accommodation to allow an employee to deliberately misgender people because of their religious beliefs
- But, as noted in the earlier slide, that guidance is in limbo and will likely go away

49

49

Pronouns

- Further, as you know, the Utah legislature passed a law in 2024 giving employees free speech rights in the workplace including the right to not engage in "religiously objectionable expression"
- This was passed to allow employees to misgender other employees when using certain pronouns is religiously objectionable to that employee
- For employers there will be no easy answers. Whether the employer sides with the employee with the religious accommodation request or the LGBTQ employee, there is a risk that the employer may be sued
- Call your lawyer. (My prediction is that most employers will end up deciding to comply with state law because the current EEOC guidance stating that intentional misgendering is unlawful is going to disappear)
- But, again, *Bostock*
- Possible solution? Don't use employee's pronoun when there is a conflict; refer to employee by name

50

50

Trump 2.0: Policies in Retreat or Chaos

PARSONS BEHLE & LATIMER

51

Impact of “Efficiency Wars”

Whatever its ideological aims, DOGE’s budget-slashing impacts agencies’ ability to handle the accustomed workload.

Pressing responsibilities to the state level makes rulings less predictable and risks overloading those agencies.

The speed of these changes also leaves many agencies in limbo.

52

SHRM Salt Lake

PARSONS BEHLE & LATIMER

52

Impact of "Efficiency Wars"

Uncertainty at the NLRB and the EEOC, in particular, affects employers.

POLITICS

Judge finds Trump's firing of member of National Labor Relations Board was illegal

Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation and the Commission's Interest in Information Concerning Appeals

mike ginn
@shutupmikeginn

My "Not involved in human trafficking" T-shirt has people asking a lot of questions already answered by my shirt.

8:11 PM · Nov 20, 2013

53

SHRM Salt Lake | PARSONS BEHLE & LATIMER

53

Loper Bright and Agency Influence

(Slip Opinion) OCTOBER TERM, 2023 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LOPER BRIGHT ENTERPRISES ET AL. *v.* RAIMONDO, SECRETARY OF COMMERCE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22–451. Argued January 17, 2024—Decided June 28, 2024*

The Court granted certiorari in these cases limited to the question whether *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, should be overruled or clarified. Under the *Chevron* doctrine, courts have sometimes been required to defer to "permissible" agency interpretations of the statutes those agencies administer—even when a reviewing court reads the statute differently. *Id.*, at 843. In each case below, the reviewing courts applied *Chevron*'s framework to resolve in favor of the Government challenges by petitioners to a rule promulgated by the National Marine Fisheries Service pursuant to the Magnuson-Stevens Act, 16 U. S. C. §1801 *et seq.*, which

54

The recent overruling of *Chevron* means that agency influence was set to decrease even *before* the 2024 elections.

With some exceptions, this administration's appointees seem determined to reduce their respective agencies' policymaking roles.

But that power has to go *somewhere*—and turning this power over to courts makes enforcement less predictable, and likely more time-consuming (and costly).

SHRM Salt Lake | PARSONS BEHLE & LATIMER

54

Loper Bright and Agency Influence

The administration has also sought greater control over what remains of agency decisionmaking—including at the NLRB and FTC.

Trump Issues Order to Expand His Power Over Agencies Congress Made Independent

The president has already challenged statutory protections against summarily firing officials overseeing such agencies without cause.

Those agencies include the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission and the National Labor Relations Board. Still, the order applies only partly to one particularly powerful agency, the Federal Reserve, covering issues related to its supervision and regulation of Wall Street, but exempting its decisions related to monetary policy, like raising and lowering interest rates.

55

55

Legislative Balance Adds to Uncertainty

*Rep. Matt Gaetz (R-FL) resigned effective 11/13/2024 and did not take the oath of office for the 119th Congress.

*Rep. Michael Waltz (R-FL) resigned effective 1/20/2025.

*Rep. Sylvester Turner (D-TX) died 3/5/2025.

*Rep. Raul Grijalva (D-AZ) died 3/13/2025.

Administration's quick action in 2025 reflects, in some degree, concern about legislative balance.

A flipped house—or even the size of the R margin—has serious impact on how aggressive the administration can be in pressing its agenda.

56

56

Rollback Candidate: PWFA

Position of Acting Chair Lucas Regarding the Commission's Final Regulations Implementing the Pregnant Workers Fairness Act

Acting Chair Lucas voted against the Final Rule when it came up for a vote in April 2024. Consistent with the views she expressed last April, Acting Chair Lucas remains opposed to the Commission's construction of the phrase "pregnancy, childbirth, or related medical conditions" described in the Final Rule. However, the Office of the Chair cannot unilaterally rescind or modify this (or any other) Final Rule under the APA, in whole or in part. Once a quorum is re-established at the Commission, Acting Chair Lucas intends for the Commission to reconsider portions of the Final Rule that she believes are unsupported by law.

57

SHRM Salt Lake | PARSONS BEHLE & LATIMER

57

Lurking Surprises: Competition

Perhaps-unexpected warmth towards FTC, including its prior efforts at instituting a noncompete ban.

Conflict between populism and corporate ties makes it tough to predict administration's approach to competition.


THE HILL

Vance: Biden FTC chief is 'doing a pretty good job'

BY REBECCA KLAR - 02/27/24 11:55 AM ET

Google News

Greg Nash

58

SHRM Salt Lake | PARSONS BEHLE & LATIMER

58

Lurking Surprises: Labor

Donald J. Trump
@realDonaldTrump

Just finished a meeting with the International Longshoremen's Association and its President, Harold Daggett, and Executive VP, Dennis Daggett. There has been a lot of discussion having to do with "automation" on United States docks. I've studied automation, and know just about everything there is to know about it. The amount of money saved is nowhere near the distress, hurt, and harm it causes for American Workers, in this case, our Longshoremen. Foreign companies have made a fortune in the U.S. by giving them access to our markets. They shouldn't be looking for every last penny knowing how many families are hurt. They've got record profits, and I'd rather these foreign companies spend it on the great men and women on our docks, than machinery, which is expensive, and which will constantly have to be replaced. In the end, there's no gain for them, and I hope that they will understand how important an issue this is for me. For the great privilege of accessing our markets, these foreign companies should hire our incredible American Workers, instead of laying them off, and sending those profits back to foreign countries. It is time to put AMERICA FIRST!

9.27k ReTruths 37.4k Likes Dec 12, 2024, 5:05 PM

What are the odds of Republican-driven labor reform?

Note connection between Trump administration and national labor leaders, particularly with respect to automation and manufacturing.

Keep an eye on the "PRO Act" (for organizing). But independent-contractor test and joint-employer rule may be targets in the *other* direction.

SHRM Salt Lake | PARSONS BEHLE & LATIMER

59

59

To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/emp-seminar

Thank You

PARSONS BEHLE & LATIMER

60

Thank You

- Michael Judd
  mjudd@parsonsbehle.com
  801.536.6648
- Sean A. Monson
  smonson@parsonsbehle.com
  801.536.6714

61

SHRM Salt Lake

PARSONS BEHLE & LATIMER

61

37th Annual Employment Law Symposium

Ask Us Anything

(About Employment Law)

Michael Patrick O'Brien
801.536.6715 | mobrien@parsonsbehle.com

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

SHRM Salt Lake

PARSONS BEHLE & LATIMER