Montana Employment Law Seminar

for corporate counsel, business owners & human resource professionals

SEPTEMBER 9, 2025 | RESIDENCE INN DOWNTOWN

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Presentations:

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times
Michael Judd and Paul R. Smith

I Have Seen This Movie Before . . . But I Am Not Sure How it Ends This Time
Liz M. Mellem and Mark D. Tolman

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act
Susan Baird Motschiedler and Leah Trahan

BIG SKY SHRM

A Different LEGAL PERSPECTIVE

PARSONS BEHLE & LATIMER

Montana Employment Law Seminar

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

PARSONS BEHLE & LATIMER

Michael Judd's practice centers on competition and information. He guides clients through complex litigation in varied industries, including disputes related to employee mobility, antitrust and trade secrets. He also maintains a vigorous First Amendment practice in which he represents media organizations in their news-gathering efforts.

Michael Judd

Shareholder | Salt Lake City

Contact information

801.536.6648
mjudd@parsonsbehle.com

Capabilities

Antitrust & Competition
Appeals
Business & Commercial Litigation
Employment & Labor
Employment Litigation
Trade Secret Litigation

Licensed/Admitted

Utah

Biography

Michael is a commercial litigator focused on competitive issues. His work includes employment litigation where he represents employers in cases related to employee movement, compensation and compliance with state and federal law, including the ADA, FLSA, and FMLA.

Michael's practice also includes complex business and intellectual-property matters, including trade-secret disputes, enforcement of restrictive covenants and anti-competitive business practices.

In his First Amendment practice, Michael also represents clients, including news media organizations, in matters that enable reporting and public oversight through access to government records, defense of defamation claims and similar legal issues.

Experience

Represented client against antitrust complaints (Sherman Act)
Parsons represented Ute Conference against anti-trust (Sherman Act Section 1 & 2) complaints regarding boundary rules for a youth football team. The plaintiffs also asked the federal court to enjoin the Ute Conference from enforcing boundary rules through a temporary restraining order (TRO). Parsons obtained a complete victory for the client. The judge declined to enter any aspect of the requested TRO and found for the client on likelihood of success on the merits, on irreparable harm and on the balance of harms.

Defended Client in Competitive Misconduct with Antitrust Issues
Defended a pharmacy services client in allegations of competitive misconduct with antitrust issues.

Nondisclosure, Nonsolicitation, Noncompetition Defense of Solar Sales Company
Defending a solar sales company in several lawsuits in Utah state and federal courts and Texas state court for competitive claims including nonsolicitation, nondisclosure and noncompetition claims.

Public Records Access Motion for Summary Judgment
Parsons' client The Salt Lake Tribune asked for copies of officer interviews from the City of West Jordan, as part of a project assembling a database of Utah police involved shootings. The city refused to release the records, and The Tribune challenged that access denial in an appeal to the district court. The court issued a ruling granting the Tribune's Motion for Summary Judgment and ordered West Jordan to turn over those records, with minimal redactions.

Accomplishments

Professional

"Utah Legal Elite," *Utah Business Magazine,* Civil Litigation 2022

Mountain States Super Lawyers, Rising Stars, 2019–2023

Academic

University of Iowa, J.D.

- Editor in Chief of the Iowa Law Review
- Captained the Jessup Moot Court team
- Received the Dean's Award for Constitutional Law
- Earned a joint MBA at Iowa's Tippie College of Business

Princeton University & Brigham Young University, B.A, English, Economics

Associations

Professional

Advisory Committee, Utah Rules of Appellate Procedure, Recording Secretary, 2019–present

Board Member, Utah Chapter, Federal Bar Association, 2020–present

Community

President, Alumni Association, The Waterford School, 2013 – present

Articles

"Federal Court Sides with Whole Foods in Dress-Code Dispute Over Black Lives Matter Masks," *Employment Law Update* (Jan. 30, 2023)

Presentations

I Have Seen This Movie Before . . . But I Am Not Sure How it Ends This Time (April 8, 2025)
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

Policy Evolution: Changing Your Company's Policies to Keep Up With Changing Times (April 8, 2025)
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Remote Work — Managing the Perk That's Become a Presumption (October 23, 2024)
Parsons Behle & Latimer 2024 Idaho Employment Law Seminar

Remote Work: Managing the Perk That's Become a Presumption (May 14, 2024)
Parsons Behle & Latimer/SHRM 2024 Salt Lake City Employment Law Seminar

Salt Lake SHRM's Annual Chapter Meeting (February 13, 2024)

"Every Case Really is a Story: Four State and Federal Caselaw Stories and Lessons," Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar (Oct. 5, 2022)

From providing real-time counsel, to reviewing and drafting key employment documents, training on best practices, investigating allegations of misconduct or defending against claims of wrongful termination, Paul assists employers in all facets of the employment relationship.

Contact information

801.536.6941
psmith@parsonsbehle.com

Capabilities

Employment & Labor

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

Paul R. Smith

Shareholder | Salt Lake City

Biography

Your workforce is one of your company's most valuable assets. It's also one of the trickiest to manage. As a seasoned management-side employment lawyer, Paul helps companies navigate the various facets of the employment relationship. This goes far beyond simply representing employers when they are sued for wrongful termination. The adage "an ounce of prevention is worth a pound of cure" couldn't be truer in the employment arena. But when claims arise, Paul is an experienced litigator who can vigorously defend his clients without blowing up the situation or breaking the bank.

Counseling Clients in Real Time

The best way to handle employee claims of mistreatment (e.g., wrongful termination, failure to accommodate, retaliation, etc.) is to avoid them in the first place. Paul consistently counsels companies with issues related to disability-accommodation requests, leave requests, misconduct, performance, discipline, classification (exempt vs. non-exempt, employee vs. independent contractor) and termination. Handling these issues immediately avoids escalation. And thinking through issues and putting in place preventative procedures in real time can make your case imminently easier to defend in future litigation.

Reviewing and Drafting Documents

Having the right documents in place is vital to avoiding employment disputes and mitigating risk. Carefully crafted employment agreements, offer letters, company policies, procedures and employee handbooks ensure your employees understand expectations, and if disputes arise, you're well positioned to enforce your rights. Paul analyzes companies' current employment documents to ensure they comply with

applicable law and contain proper protections. He also helps employers craft new agreements, policies and manuals, filling gaps in companies' current catalogues.

Training

Formal trainings that educate supervisors and subordinates regarding duties and legal landmines help set expectations and reduce risk. Paul presents informative and entertaining trainings for companies of all sizes, local to national, regarding harassment, discrimination, conflicts of interest and company policies. In 2023, Paul was recognized with the Outstanding Faculty Award by the National Business Institute for his trainings on employment law issues.

Investigating

Sometimes, despite employers' and managers' best efforts, allegations arise of misbehavior and injury, leaving companies to determine what happened, who is telling the truth and what they should do next. Paul commonly conducts investigations that involve interviewing witnesses, reviewing documents (including text messages, emails, Slack messages, etc.), analyzing company policies and providing factual findings that enable employers to make informed decisions on next steps and remedial measures.

Defending

From claims of discrimination (racial, gender, age, disability, etc.), harassment, failure to accommodate a disability and retaliation, Paul routinely defends companies in litigation before the Equal Employment Opportunity Commission (EEOC), state agencies like the Utah Antidiscrimination and Labor Division (UALD) and in federal district court. Such litigation also often involves settlement negotiations, including through formal mediation. Paul excels at resetting unreasonable plaintiffs' expectations from six-figure demands to nuisance-value settlements. And when settlement isn't successful, Paul has a strong track record obtaining favorable rulings from tribunals—including on motions for summary judgment—avoiding costly trials.

Paul's litigation experience extends beyond the employment sphere into general commercial and contractual disputes. He has years of experience litigating at the administrative and trial-court level (including in state and federal court)as well as at the appellate level, briefing and arguing cases before the Tenth Circuit Court of Appeals, the Utah Court of Appeals and the Utah Supreme Court.

Experience

Defense of Healthcare Company Against Sex Discrimination Claim
Former employee filed charge of discrimination with Utah Labor Commission, alleging sex discrimination and retaliation. Settled matter within a month of the charge being filed for nuisance value.

Defense of Restaurant Company Against Sexual Harassment Claim
Defending company against charge of discrimination filed with Utah Labor Commission, alleging sexual harassment and retaliation. Settled case during mediation for nuisance value.

Defense of Logistics Company Against Disability Discrimination Claim
Former employee filed a charge of discrimination with Utah Labor Commission, alleging disability discrimination, failure to accommodate and retaliation. Former employee then filed lawsuit in federal district court. Case settled for nuisance value during discovery.

Employment Investigation into Sex Discrimination Allegation
Conducted investigation into allegation of sex discrimination on behalf of public employer, including interviewing numerous witnesses, reviewing documents and making factual findings in investigative report.

Employment Investigation into Sex Harassment Allegation
Conducted investigation into claims of sexual harassment on behalf of insurance company, including interviewing witnesses, reviewing documents (including police records) and making factual findings in investigative report.

Employment Investigation into Coworker Romantic Relationship
Conducted investigation into romantic relationship between CEO and subordinate and advised board of directors regarding options and strategy.

Handbook Review
Review dozens of employee handbooks for dental practices across the country to ensure compliance with federal, state and local law.

Conduct Reduction in Force
Assisted video game company in conducting complex reduction in force, including counseling client, drafting severance agreements and disclosure statements, and communicating and negotiating with departing employees.

FMLA and ADA Discrimination Defense
Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Accomplishments

Professional

Business Editor, Arizona State Law Journal

Utah Legal Elite, Civil Litigation, 2022

Best Lawyers in America “One to Watch”

National Business Institute 2023 Outstanding Faculty Award

Academic

Arizona State College of Law (J.D., cum laude, 2012, Willard H. Pedrick Scholar)

University of Utah (B.S., 2009, Major in Mechanical Engineering)

Associations

Professional

Utah State Bar

Federal Bar Association

American Bar Association

Society for Human Resource Management (SHRM)

Board Member, Jefferson Academy

Articles

"*Employment Law Update*," (January 17, 2023)

"*Employment Law Update*," (August 16, 2022)

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Policy Evolution: Changing Your Company's Policies to Keep Up with Changing Times (April 8, 2025)
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"Social Media: What's Not to Like About Social Media in the Workplace?," (October 5, 2022)
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

"Key Employment Laws Every New HR Professional Must Know," (August 30, 2022)
WECon Utah SHRM Conference

"Social Media: What's Not to Like About Social Media in the Workplace?," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

BIG SKY SHRM

Montana Employment Law Seminar

A Different LEGAL PERSPECTIVE
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PARSONS BEHLE & LATIMER
A Professional Law Corporation

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

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Sept. 9, 2025 | Residence Inn Downtown

Presenters

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Legal Disclaimer

This presentation is based on available information as of Sept. 9, 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.

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.

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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.

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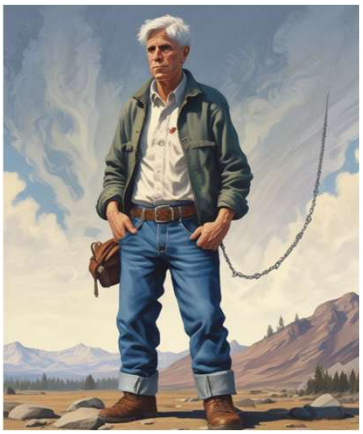
You Can't Spell "Poetry" Without Corporate Policy

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



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Corporate Pioneers: Visionaries or Wafflers?

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

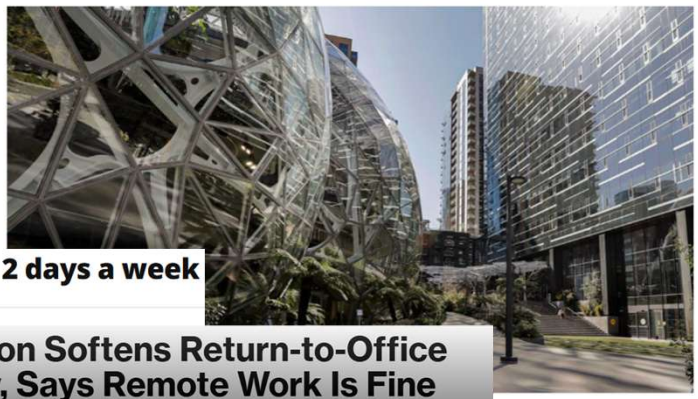
By Clare Duffy, CNN Business
5 minute read · Updated 4:49 PM EDT, Thu March 12, 2020

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

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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..."

SCHARON HARDING – SEP 25, 2024 4:15 PM 193

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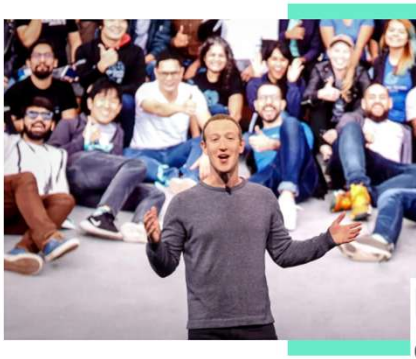
Corporate Pioneers: Visionaries or Wafflers?



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

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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."

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Policy Fads vs. Law-Based Changes

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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….

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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…

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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…

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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")

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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))

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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."**

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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

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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

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SO MANY CHANGES!!!

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

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A Question Before We Move On…

Why do we even have company policies?

- Communicating expectations to workforce and establishing culture
- Promoting consistency
- Assisting in administering discipline
- Providing protection in litigation (legitimate business reasons for termination, avoiding liability, etc.)
- Complying with legal mandates
- Recruiting tool

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Some Things to Consider…

Where do you want to fall on the stingy-vs-generosity spectrum?

- Just provide the bare minimum?
- Or do you want to be the "cool company"?

When are you going to change your policies

- In real time (e.g., as changes in the law come out)?
- According to some fixed schedule (e.g., annually)?
- Some combination of the two?

Do you even *need* the policy? Does it promote a proper purpose?

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Best Practices: *How* to Make a Change

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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.

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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.

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

PARSONS BEHLE & LATIMER

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

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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.

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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.

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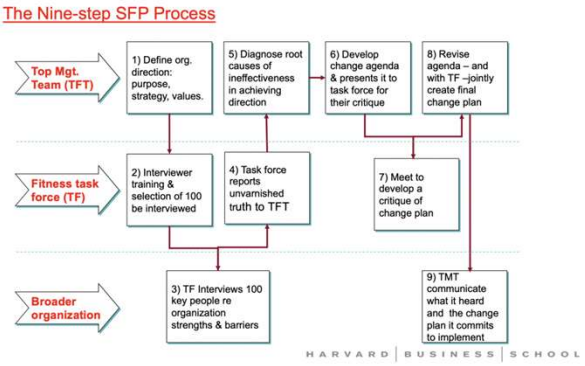
Rule 3: Secure Buy-in, in Advance

Gather input, especially for complex changes.



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

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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")

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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.

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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)

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Root Causes: When Change Isn't Enough

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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.

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.

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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.

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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.

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Workshop Time: Employee Churn

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

So . . . *now what?*

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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?

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Conclusion

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Thank You

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

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Mark D. Tolman
801.536.6932 | mtolman@parsonsbehle.com

PARSONS BEHLE & LATIMER

Liz Mellem is a skilled litigator and an experienced neutral investigator regarding employment claims. Her experience with an array of complex commercial issues, including significant employment counseling and litigation, helps guide her clients toward effective and satisfactory resolutions both in and out of court.

Liz M. Mellem

Director and Vice President | Shareholder
Missoula | Helena | Salt Lake City

Contact information

406.317.7240
amellem@parsonsbehle.com

Capabilities

Employment & Labor Counseling

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

U.S. Dist. Court, Dist. of Utah

Montana

U.S. Dist. Court, Dist. of Montana

Biography

Liz Mellem represents companies in a wide range of employment and commercial issues including:

- Neutral investigations of internal claims of harassment, discrimination, and ethical violations
- Harassment and discrimination defense
- Wrongful termination defense
- Handbook review and revision
- Employment practices training including harassment and discrimination training of management and non-management employees
- General commercial litigation including breach of contract, trade secret misappropriation, and ownership disputes
- Pre-litigation negotiation and resolution of disputes

Liz focuses on creating innovative business solutions for her clients and zealously advocates for their interests from the beginning of a matter through resolution, including through trial.

Liz has spent much of her career representing clients in both Utah and Montana by traveling between the two states. She is active in the local running and biking communities in Missoula.

Experience

Racial Discrimination Defense
Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Nonsolicitation or Noncompete Contracts
Successfully resolved numerous cases alleging violations of non-solicitation and non-competition contract provisions.

Employee Handbooks
Worked with both large and small companies to revise and improve employee handbooks.

Wrongful Termination
Successfully defended company in alleged wrongful termination case.

Defending Client in FLSA Claims
Defending call center client against claims of violation of the Fair Labor Standards Act, Utah Wage Payment Act and Montana Wage Payment Act.

Provide Counsel in Copper and Molybdenum Mining Activities
Representing client on matters related to ongoing copper and molybdenum mining activities, including cleanup of legacy impacts and future water treatment process.

Defending a Large Gold Mine Against Royalty Claims
Representing an international gold mining company's mine against royalty claims by another world-class gold mine.

Fiduciary Duty Trial
Obtained six-figure jury verdict for plaintiff in breach of fiduciary duty case.

Fraudulent Misrepresentation
Obtained defense verdict in fraudulent misrepresentation case involving allegedly hidden assets.

UCC Product Dispute
Successfully resolved UCC “battle of the forms” dispute in pre-litigation, saving client time and expenses of litigation.

Accomplishments

Professional

Parsons Behle & Latimer, Director, Vice President and Secretary 2024 – 2026

Admissions:

Utah State Bar, 2010

United States District Court, District of Utah, 2010

State Bar of Montana, 2013

United States District Court, District of Montana, 2014

Mountain States Super Lawyers Rising Star: 2014, 2018, 2019, 2020

Academic

University of Utah, S.J. Quinney College of Law (2010, J.D.)

Montana State University (2004, B.S.) Major: Sociology

Associations

Professional

Utah State Bar Labor & Employment Section, Chairperson, 2017 – 2018

American Bar Association, Member, (2010 - Present)

Community

Missoula Economic Partnership, Board of Directors member, 2023 – present

Humane Society of Western Montana

- Board of Directors (2017 - 2023)
- President of Board (2020 - 2023)

Run Wild Missoula, member (2013 - present)

Articles

"New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes," December 23, 2020

"Montana Face Coverings Mandates," July 21, 2020

"Montana Civil Cases Can Resume, But With Significant Restrictions," May 18, 2020

"Strategies on acing the SBA's new PPP Loan Forgiveness Application," May 18, 2020

"Beware the Whistleblower: Avoiding Fraud Liability under the PPP," May 12, 2020

"Montana's Employers Can Open for Business – Sort Of," April 28, 2020

"Re-opening for Business: Employers Should Begin Planning Now," April 14, 2020

"Top Nine Takeaways from New FFCRA Regulations," April 3, 2020

Additional Guidance from the Department of Labor Including the Frequently Asked Question: "What is the 'small business exemption' under the Families First Coronavirus Response Act? March 30, 2020

"Montana's 'Stay at Home' Directive from Governor Bullock" March 30, 2020

"CARES ACT: Emergency Appropriations," March 27, 2020

"Emerging Questions for Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues," March 24, 2020

Presentations

The Next Right Thing: Choosing Your Path Through the ADA Mine Field, April 8, 2025
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

Winning the Case Before it Starts: Investigations, Documents and Lawyers, April 8, 2025
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

Handbook Updates – 2024 Policy Pointers and Pitfalls, September 25, 2024
Parsons Behle & Latimer 2024 Montana Employment Law Seminar

Documents are an Employer's Best Friend: How to Properly Document Employee Interactions with HR, May 14, 2024
Parsons Behle & Latimer/SHRM 2024 Salt Lake City Employment Law Seminar

Regulatory Hot Topics, May 9, 2023
Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Preventing and Responding to Workplace Violence and new HB 324, May 9, 2023
Parsons Behle & Latimer 35th Annual Employment Law Seminar in partnership with Salt Lake SHRM

Hiring and Firing Employees, January 23, 2023
National Business Institute (NBI) Seminar – Montana Employment Law 2023

Employee Discipline and Termination: Avoiding Problems with Effective Communication and Documentation, October 5, 2022
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

Hot Employment Topics Sessions #1 and #2, October 28, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Hot Employment Topics Session #1 and #2, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All, February 10, 2021

Remote Working Considerations in the ERA of COVID-19, November 10, 2020

Strategies on Acing the SBA's New PPP Loan Forgiveness Application, May 20, 2020

Back in Business: Information Every Idaho Employer Should Know, May 13, 2020

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020

**To view additional insights and related news items, visit parsonsbehle.com/people/liz-m-mellem#insights*

Mark is co-chairperson of the firm's Employment and Labor practice team. Mark helps his employer clients avoid disputes through preventative practices, policies and training, and advocates for them in litigation when disputes cannot be avoided.

Mark D. Tolman

Employment & Labor Practice Area Co-chairperson | Shareholder | Salt Lake City

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Capabilities

Appeals
Healthcare
Employment & Labor
Trade Secret Litigation
Employment Litigation

Licensed/Admitted

Utah
Idaho
Wyoming

Biography

Mark practices employment law and commercial litigation in matters before state and federal courts, the Utah Labor Commission and Equal Employment Opportunity Commission. He was recognized by the Utah State Bar as the 2018 Labor & Employment Attorney of the Year. Mark litigates cases involving complex factual and legal matters, including employment discrimination, harassment and retaliation, breach of fiduciary duty, covenants not to compete, solicit, or disclose confidential information, interference with contract, trade secrets and defamation. Mark has tried cases before state and federal courts and before the Adjudication Division of the Utah Labor Commission. He has also argued cases to the Utah Supreme Court, the Utah Court of Appeals and to the United States Tenth Circuit Court of Appeals. Most importantly, Mark helps his clients avoid litigation by daily counseling on employment law problems, developing preventative practices and policies and providing regular inhouse training.

Mark is an experienced independent investigator. He has conducted dozens of fact investigations involving matters of alleged harassment and abuse, discrimination and retaliation. Mark regularly trains HR professionals and others on how to conduct effective investigations.

Mark also volunteers as the Director of Legal Affairs for the Utah SHRM State Council and as Co-Director of Legal Affairs for Salt Lake SHRM. Mark is a regular presenter at SHRM events and provides a monthly *Ask a Lawyer* webinar for members of Salt Lake SHRM.

Experience

Utah's Workplace Violence Protective Order Law
Mark lobbied on behalf of Salt Lake SHRM and Utah SHRM for passage of House Bill 324, Workplace Violence Protective Order Amendments. This bill allows an employer to seek a protective order against individuals who harm, or threaten to harm, its employees or property. The bill passed and took effect July 1, 2023. For additional information on how to obtain a Workplace Violence Protective Order, please contact Mark or visit the Utah Court's website here: Protective Orders (utcourts.gov)

Independent Investigation of Sexual Harassment
Conducted an independent investigation of sexual harassment claims against Senator Gene Davis by a legislative intern.

ADA Discrimination Defense
Represented a Utah city regarding discrimination charges under the ADA and in retaliation for filing worker's compensation claims.

FMLA and ADA Discrimination Defense
Represented a large Intermountain region bank in two discrimination claims in U.S. District Court concerning FMLA and ADA.

Nondisclosure, Nonsolicitation, Noncompetition Defense of Solar Sales Company
Defending a solar sales company in several lawsuits in Utah state and federal courts and Texas state court for competitive claims including nonsolicitation, nondisclosure and noncompetition claims.

Accomplishments

Professional

Recognized in *Best Lawyers in America*

Utah Business Magazine's Legal Elite, Labor and Employment

Recognized in *Chambers USA*, Labor & Employment – Utah, 2017 - 2025

Mountain States Super Lawyers (Employment & Labor)
2015 "Outstanding Mentor Award," Utah State Bar

Academic

University of North Carolina at Chapel Hill (J.D., with honors, 2004)

Weber State University (B.S., *summa cum laude*, Economics, 2001)

Associations

Professional

Member, Society for Human Resource Management (SHRM)

Director of Legal Affairs, Utah State SHRM Council

Co-Director of Legal Affairs, Salt Lake Chapter of the Society for Human Resource Management (SHRM)

Community

Weber State University Business Advisory Council

Articles

"Congress Passes the Speak Out Act, Outlawing the Use of NDAs to Silence Victims of Sexual Harassment and Assault," (November 30, 2022)

"*Employment Law Update*," (June 29, 2022)

Presentations

Ask Us Anything (About Employment Law), (April 8, 2025)
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

One Unlikely Rise, One Potential Demise: The Realities of Reverse Discrimination Claims and DE&I Initiatives in 2025, (April 8, 2025)
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

Quiz Game: Test Your Knowledge of Recent Legal Developments (October 23, 2024)
Parsons Behle & Latimer 2024 Idaho Employment Law Seminar

Handbook Updates – 2024 Policy Pointers and Pitfalls (September 25, 2024)
Parsons Behle & Latimer 2024 Montana Employment Law Seminar

Handbook Updates: 2024 Policy Pointers and Pitfalls (May 14, 2024)
Parsons Behle & Latimer/SHRM 2024 Salt Lake City Employment Law Seminar

SE Idaho SHRM Half-Day Employment Law Conference (October 19, 2023)
Southeast Idaho SHRM Chapter

Conducting Effective Workplace Investigations (May 9, 2023)
Parsons Behle & Latimer 35th Annual Employment Law Seminar with SL SHRM

"Parsons Attorneys to Present at SHRM Annual Employment Update," (February 14, 2023)
Salt Lake SHRM

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (October 5, 2022)
Parsons Behle & Latimer 10th Annual Idaho Employment Law Seminar

"Common Mistakes and Horror Stories," (August 31, 2022)
WECon Utah SHRM Conference

"2022 Legislative and Regulatory Update," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Key Employment Laws Every New HR Professional Must Know," (August 30, 2022)
WECon Utah SHRM Conference

"Everything You Want to Ask Your Lawyer But Are Afraid to Ask," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"The ADA, FMLA and Other Leave Essentials," (June 16, 2022)
34th Annual Parsons Behle & Latimer Employment Law Seminar

"Emerging Employment Law Issues and Trends for Municipal Employers," (June 3, 2022)
Utah Municipal Attorneys Association

BIG SKY SHRM

Montana Employment Law Seminar

A Different LEGAL PERSPECTIVE
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PARSONS BEHLE & LATIMER
A Professional Law Corporation

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

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Sept. 9, 2025 | Residence Inn Downtown

Presenters

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Legal Disclaimer

This presentation is based on available information as of Sept. 9, 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.

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Trump 2.0: does it feel like we've seen this movie before?

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What to expect from President Trump's Second Administration

1) Big swings may be ahead at the National Labor Relations Board, including a likely return to the pre-*Stericycle* pro-employer standard for workplace conduct policies.
2) "No" Taxes on Tips or Overtime.
3) Prepare for ICE Raids and I-9 Audits.
4) DEI under attack.

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No taxes on tips or overtime? Really? Payroll Tax Implications of the OBBB

PARSONS BEHLE & LATIMER

New Temporary Deductions for Tips and OT

- New Temporary Deduction
  - The OBBB creates a new deduction for certain tip and overtime income.
  - Name is misleading – there is some tax on tips and OT.
  - Effective only for calendar years 2025 through 2028.
  - It's a deduction–must be claimed on tax return.

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PARSONS BEHLE & LATIMER

"No" Tax on Tips – Deduction Amount & Eligibility

- Deduction Amount
  - Up to **$25,000 annually** of qualified tips may be deducted.
  - Deduction phases out by $100 for every $1,000 of modified adjusted gross income above $150,000 ($300,000 for joint filers).
  - **But who is eligible**?
- Qualified Tips
  - "The term 'qualified tips' means cash tips received by an individual in an occupation which customarily and regularly received tips on or before December 31, 2024 . . . ."
  - IRS must publish the official occupation list by October 2, 2025.

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"No" Tax on Tips – Payroll Practices

Current Year

- For 2025, tips remain subject to income tax withholding and FICA and FUTA.
- Deduction is claimed on employee's federal income tax return, not through payroll.
  - Employers should use reasonable methods to track qualified tips and the service provider's occupation.

Future Years

- Although qualified tips will likely be excluded for income tax withholding purposes, they remain subject to FICA and FUTA.
- IRS will likely revise forms to include a specific box or code for qualified tips.
- Employees still must claim the deduction.

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“No” Tax on Overtime – Deduction Amount

- Up to **$12,500 annually ($25,000 for joint filers)** of qualified overtime compensation may be deducted.
- Deduction phases out by $100 for every $1,000 of modified adjusted gross income above $150,000 ($300,000 for joint filers).
- Deduction only applies to FLSA OT (i.e., 40+ hours in a workweek). Any heightened state overtime requirements are not eligible for deduction.

61

“No” Tax on Overtime – Payroll Practices

Current Year

- For 2025, qualified overtime remains subject to federal income tax withholding, FICA and FUTA.
- Deduction is claimed by the employee on their federal income tax return, not through payroll.
- Employers should use reasonable methods to track qualified overtime.

Future Years

- Although qualified overtime will likely be excluded for federal income tax withholding purposes, it will remain subject to FICA and FUTA.
- Employees still must claim the deduction on their income tax return.
- IRS will likely revise payroll forms to include a specific box or code for qualified overtime.

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Trump 2.0: ICE Raids and I-9 Audits

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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.”

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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.

65

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.
  - Judicial warrant → authorizes a search in specific areas, for specific things, and during a specific timeframe (signed by a judge and specifies what is being searched for/seized)
  - Administrative warrant → does NOT authorize a search (but can sometimes authorize an arrest/seizure), issued by an agency (e.g., DHS) and allows agent to gather documents

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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.

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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.

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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.
- 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.
- Ask for a copy of the list of items seized during the search. The agents are required to provide an inventory.

69

Make a Plan!

- Be proactive in preparing for an ICE visit.
- Discuss with management the protocols that the company will follow.
  - 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.

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Trump 2.0: DEI Under Attack

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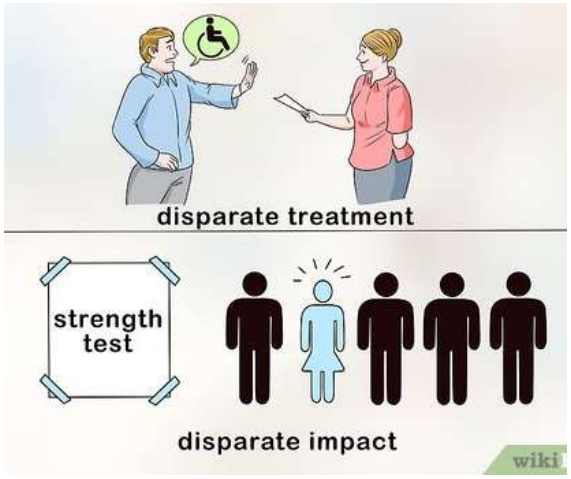
Let's look at those Executive Orders

Executive Order 12250

On April 23, 2025, President Trump issued an Executive Order entitled **"Restoring Equality of Opportunity and Meritocracy"**

The Purpose: "eliminate the use of **disparate-impact liability** in all contexts to the maximum degree possible."

The Rationale: Disparate-impact liability "all but requires individuals and businesses **to consider race** and engage in racial balancing to avoid potentially crippling legal liability."



73

Executive Order 14151

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

Federal agencies required to terminate all (i) DEI offices and positions, (ii) "equity" initiatives, programs, grants or contracts, and (iii) DEI "performance requirements for employees, contractors or grantees."

74

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.

75

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 to (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.

76

EEOC follows the White House's EO.

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

The EEOC also filed motions to dismiss six lawsuits it had filed on behalf of transgender or gender nonconforming employees, citing the executive order declaring that the government would recognize only two "immutable" sexes.


POLITICS

EEOC seeks to drop transgender discrimination cases, citing Trump's executive order

February 15, 2025 / 7:00 PM EST / AP

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The EEOC also added a disclaimer to its 2024 harassment guidance.

- Among other things, the EEOC's 2024 guidance on workplace harassment made clear that harassment of transgender employees may include misgendering and restricting use to bathrooms or other sex-segregated facilities based on gender identity.
- Now, that guidance 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."

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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.

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

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

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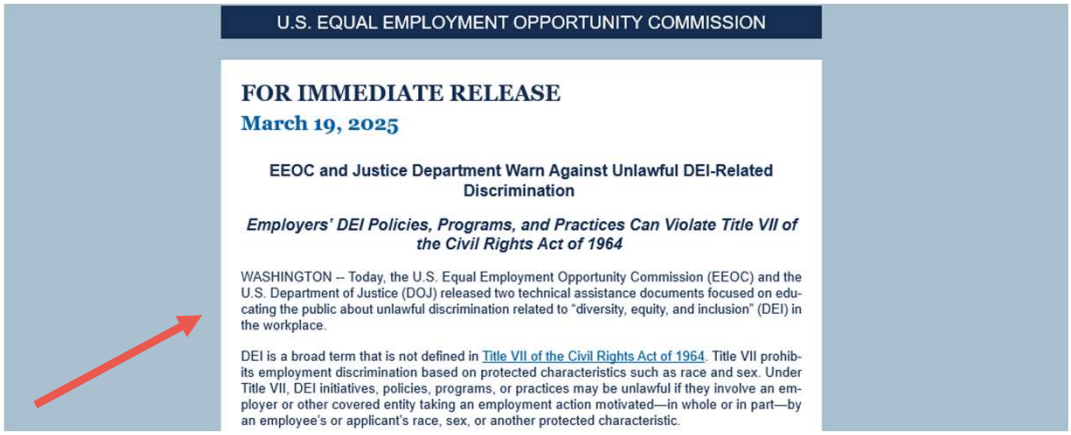
Specifically, she's interested in:

- "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."

81

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.

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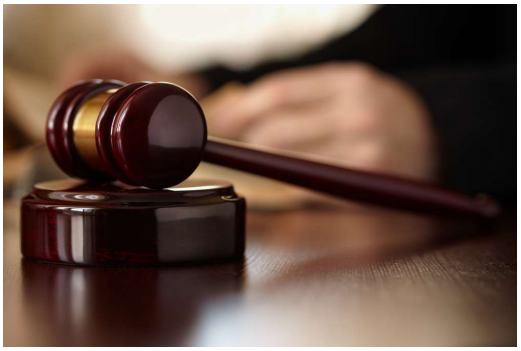
What does the new guidance say?

Under Title VII, DEI policies and practices may be unlawful if they involve an employer 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:

- Exclusion from training or mentoring programs, internships, etc.
- Implementation of "diverse slate" interview practices.
- Limiting membership in workplace groups, clubs, ERGs, or affinity groups.



Case Study: How Not to DEI

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?

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Duvall continued . . .

- Novant's DEI plan 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.

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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

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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"

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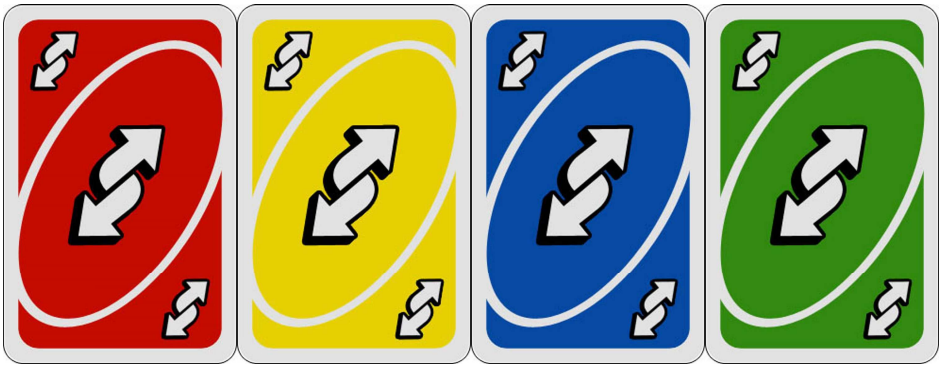
Lessons from *Duvall*

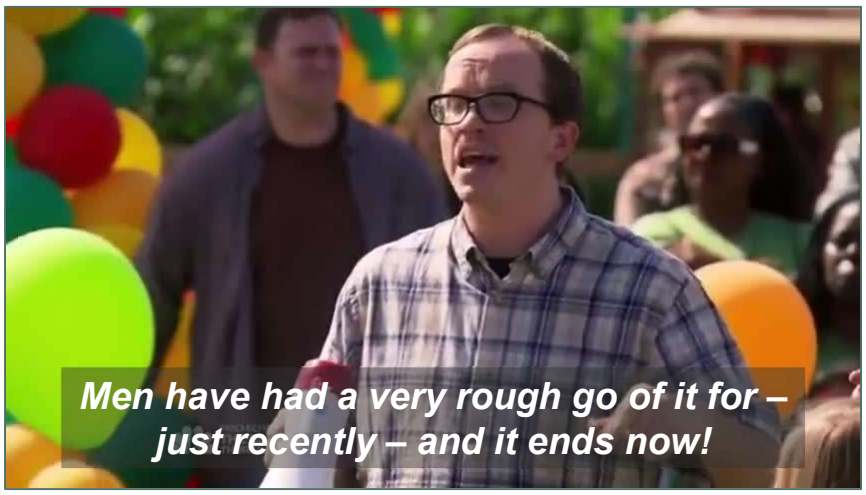
- Don't use DEI quotas
  - DEI programs should be about expanding the applicant pool (outreach and removing barriers), not about meeting hiring/promotion quotas
- Document performance issues and be consistent.
- When terminating an employee, provide the actual reason—don't say "not a good fit" or "going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

89



The Rise of "Reverse" Discrimination Cases

The Rise of "Reverse Discrimination" Claims



91

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)**
  - Majority-group plaintiffs had to show something more:
  - "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

On June 5, 2025, the U.S. Supreme court resolved the split in *Ames v. Ohio Department of Youth Services.*

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Ames v. Ohio Department of Youth Services

In *Ames*, a district court applied the heightened standard and dismissed a majority-group plaintiff's sexual-orientation-discrimination case

- Marlean Ames is a heterosexual woman with 30 years of public service.
- Ames applied for promotions, but did not get them.
- Instead, the promotions were given to a gay woman and a gay man.

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Ames v. Ohio Department of Youth Services

In a unanimous U.S. Supreme Court decision, authored by Justice Kentanji Brown Jackson, the background circumstances test for majority-group plaintiffs was rejected.

"Congress left no room for courts to impose special requirements on majority-group plaintiffs alone."

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Strategies to avoid *reverse* discrimination claims:

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

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Thank You

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Montana Employment Law Seminar

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

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PARSONS BEHLE & LATIMER

Susan Motschiedler provides deep employment and labor experience primarily to medium and small businesses on routine and crisis administrative matters; long-term growth planning and protection; and employment litigation. Her collaboration with multidisciplinary teams benefits clients in matters of business structure; acquisition; acquisition planning and more.

Susan Baird Motschiedler

Of Counsel | Salt Lake City

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Capabilities

Employment & Labor

Employment Litigation

Business & Commercial Litigation

Licensed/Admitted

Utah

U.S. Court of Appeals, 10th Circuit

Biography

Susan Baird Motschiedler is a member of Parsons Behle & Latimer's employment and labor law and litigation practice groups. With an eye toward avoiding litigation, she excels at providing up-front advice and counsel to business owners and management regarding employment discrimination, harassment and retaliation; disciplinary action and documentation; disability accommodation issues; benefits; employment policies and practices; employee leave laws; layoffs; protection of trade secrets and other confidential and proprietary information through the use of confidentiality, noncompetition and nonsolicitation agreements; wage and hour laws; and other employment-related issues. Susan also regularly conducts real world client training programs for employers on topics including harassment and discrimination, disability accommodation, hiring and firing, conducting investigations, record keeping and coaching/disciplining employees. When disputes arise, Susan confidently defends clients in litigation, administrative proceedings and alternative dispute resolution forums.

Susan regularly counsels and represents employers in lawsuits in a variety of areas including:

- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- Americans with Disabilities Act, disability and employee medical issues
- Wrongful termination

- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, and wage issues
- Independent contractor issues
- Drug and alcohol testing
- Family Medical Leave Act and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees

Ms. Motschiedler also maintains a practice of black lung defense counsel in workers' compensation claims brought under the federal Black Lung Benefits Reform Act.

She has represented employers with coal mine or other non-coal mine operations in Utah, Colorado, Kentucky, West Virginia, Tennessee, and Alabama before the Department of Labor Office of Administrative Law Judges, the Benefits Review Board, and in appellate proceedings before the United States Court of Appeals for the Tenth Circuit.

Experience

Racial Discrimination Defense
Defending client against claims of race discrimination and national origin discrimination under Title VII, Section 1981 and breach of contract, breach of duty of good faith and fair dealing.

Accomplishments

Professional
Recognized in Utah Legal Elite, 2013, 2014, 2017, 2018, 2019, 2020, 2021

Recognized by *Mountain States Super Lawyers* as Rising Star in Business Litigation, 2012, Employment & Labor, 2015

Academic
University of Utah, S.J. Quinney College of Law (J.D., 2005)

Rhodes College (B.A., 1994)

- Major: Anthropology/Sociology
- Major: German

Universität Tübingen, Germany (1992-1993)

Associations

Professional
Utah State Bar
Ethics Advisory Committee
Member

Women Lawyers of Utah
Past President
Co-author, "The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms"
(October 2010)

David K. Watkiss Sutherland II Inn of Court
Member

Salt Lake County Bar Association
Member

Articles

Employment Law Update, April 13, 2023

Did Twitter's Mass Layoff Violate Federal (and State) Law?, November 17, 2022

Employment Law Update, June 15, 2022

DOL Issues Proposed Rule Easing Factors for Classifying Workers as Independent Contractors for Purposes of the FLSA, October 6, 2020

Looking Forward: How to Manage Your Workforce In 2020 and Beyond, June 30, 2020

OSHA Issues New Enforcement Policies Regarding Workplace Inspections And Employer Recording Requirements For Covid-19, May 22, 2020

Re-opening for Business: Employers Should Begin Planning Now, April 14, 2020

Top Nine Takeaways from New FFCRA Regulations, April 3, 2020

Presentations

Wage and Hour: Hot Topics and Real-Life Examples of Employers Running Afoul of the Fair Labor Standards Act, April 8, 2025
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

The Next Right Thing: Choosing Your Path Through the ADA Mine Field, April 8, 2025
Parsons Behle & Latimer/SHRM 2025 Salt Lake City Employment Law Symposium

Drugs and Alcohol in the Workplace, October 23, 2024
Parsons Behle & Latimer 2024 Idaho Employment Law Seminar

"I Have a Note From My Doctor" - Engaging with Employees' Medical Providers on ADA Accommodation and Fitness for Duty Issues, September 25, 2024
Parsons Behle & Latimer 2024 Montana Employment Law Seminar

Drugs and Alcohol in the Workplace, May 14, 2024
Parsons Behle & Latimer/SHRM 2024 Salt Lake City Employment Law Seminar

Parsons Attorneys to Present at SHRM Annual Employment Update, February 14, 2023
Salt Lake SHRM

Employee Discipline and Termination: Avoiding Problems Through Effective Communication and Documentation, June 16, 2022
34th Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, October 27, 2021
33rd Annual Parsons Behle & Latimer Employment Law Seminar

Conducting an Effective Internal Investigation, September 22, 2021
Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar

COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at Al,l February 10, 2021

Trends in Employment Law Cases Related to COVID-19, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

Getting Your Company Ready for a Sale or Acquisition: How to Get Your Employment House in Order, November 10, 2020
32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual

What Every Employer Should Know Before Resuming Business in Utah, May 12, 2020
Visit Salt Lake

Moving Forward: Resuming Business in a Changed Environment, May 7, 2020
Missoula Economic Partnership

Employer Considerations To Successfully Reopen A Business, May 5, 2020
South Valley Chamber

Leah Trahan is a member of the firm's Litigation Group. With more than eight years' legal experience in both the public and private sector, Leah brings her varied experience to the table to provide practical solutions to complex problems for her clients.

Leah Trahan

Associate | Missoula

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Capabilities

Business & Commercial Litigation

Civil Rights Including Title VII and Title IX

Employment & Labor

Employment Litigation

Insurance Litigation

Medical Malpractice and Hospital Negligence

Plaintiffs Litigation

Licensed/Admitted

Montana

Utah

U.S. Court of Appeals, 9th Circuit

Biography

Leah Trahan is a member of the firm's Litigation and Employment & Labor practice teams. Since 2014, Leah has worked in various legal roles in both the public and private sector. During this time, Leah gained valuable experience in a wide variety of practice areas, including Title VII and Title IX defense, administrative proceedings, insurance defense, tribal tax law and employment counseling for both private and government employers. Leah's current practice focuses on civil litigation, including employment litigation and commercial litigation.

In 2022, Leah earned her J.D. with high honors from the Alexander Blewett III School of Law. During law school, Leah mentored new law students as a member of the school's Academic Success Program and was a Constitutional Law teaching assistant.

When not in the office, Leah enjoys traveling with her family, gardening, and experimenting with new recipes.

Accomplishments

Academic

Associate Dean of Students Award for Highest Academic Achievement in Legal Writing, Legal Analysis, Administrative Law, and Business Transactions.

Associations

Professional

Montana Bar Association

Utah Bar Association

Articles

"We're Clearing the Docket, Whether You Like It or Not," ABA Litigation Section News, January 29, 2025

"What's in a Name? Judge Says Plenty, ABA Litigation Section News," January 22, 2025

"Attorney Can Take Business Without Compensating Former Firm," ABA Litigation Section News, September 9, 2024

"Montana Court Rules the State Can't Ignore Climate Change in Project Permitting," August 15, 2023

Presentations

"I Have a Note From My Doctor" - Engaging with Employees' Medical Providers on ADA Accommodation and Fitness for Duty Issues, September 25, 2024 - Parsons Behle & Latimer 2024 Montana Employment Law Seminar

Documents are an Employer's Best Friend: How to Properly Document Employee Interactions with HR, May 14, 2024 - Parsons Behle & Latimer/SHRM 2024 Salt Lake City Employment Law Seminar

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Montana Employment Law Seminar

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PARSONS BEHLE & LATIMER
A Professional Law Corporation

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

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Sept. 9, 2025 | Residence Inn Downtown

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Legal Disclaimer

This presentation is based on available information as of Sept. 9, 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.

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The Fair Labor Standards Act

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

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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

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Back Wages Recovered by Industry

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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

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Preliminary And Postliminary Time

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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**

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

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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

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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

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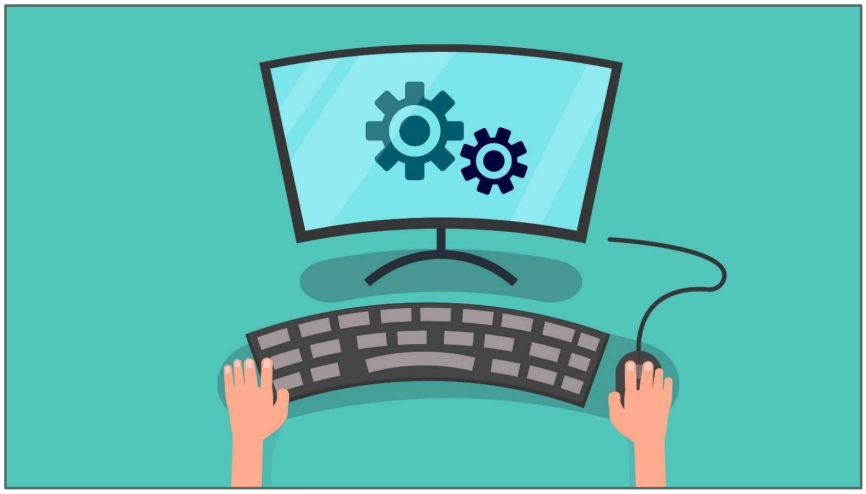
What Did the Court Decide?



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

On October 8, 2021, the Tenth Circuit held that employees of a call center who spent 2-3 minutes per day booting up their computer needed to be paid for that time.

- 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

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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

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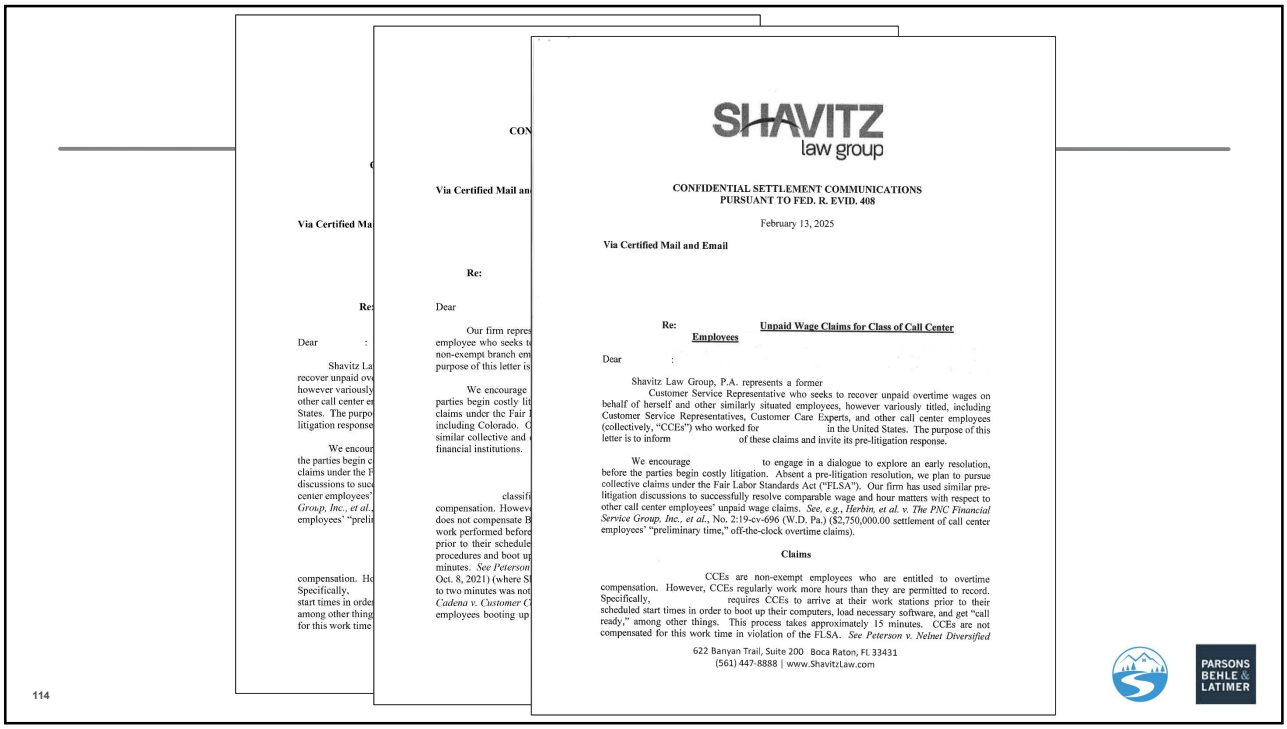

SHAVITZ law group

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*

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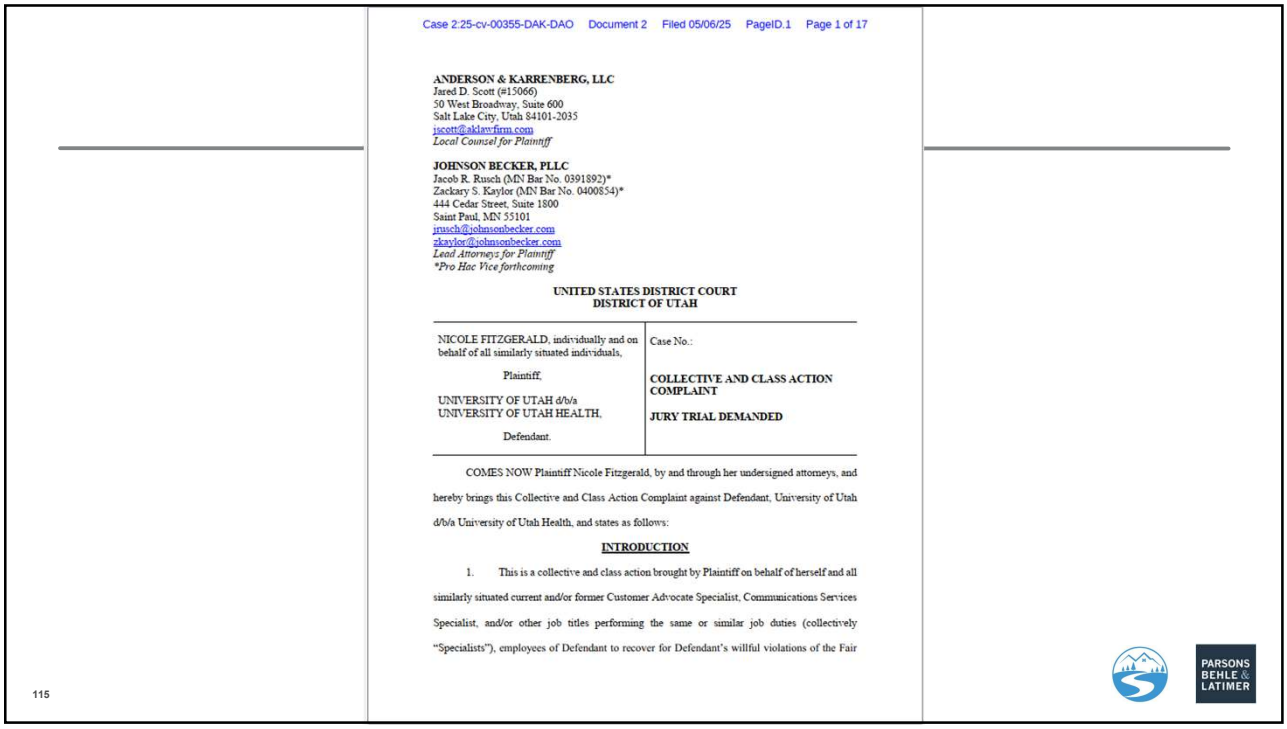

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**Pro Hac Vice forthcoming*

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

NICOLE FITZGERALD, individually and on behalf of all similarly situated individuals, Plaintiff, UNIVERSITY OF UTAH d/b/a UNIVERSITY OF UTAH HEALTH, Defendant.	Case No.: **COLLECTIVE AND CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

COMES NOW Plaintiff Nicole Fitzgerald, by and through her undersigned attorneys, and hereby brings this Collective and Class Action Complaint against Defendant, University of Utah d/b/a University of Utah Health, and states as follows:

INTRODUCTION

1. This is a collective and class action brought by Plaintiff on behalf of herself and all similarly situated current and/or former Customer Advocate Specialist, Communications Services Specialist, and/or other job titles performing the same or similar job duties (collectively "Specialists"), employees of Defendant to recover for Defendant's willful violations of the Fair

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Independent Contractors

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Montana Independent Contractors

– What is an independent contractor?

An independent contractor in Montana is a person who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession or business.

Additionally, an independent contractor must obtain either an independent contractor exemption certificate or self-elected coverage under a Montana workers' compensation insurance policy. Refer to MCA, 39-71-417.

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**

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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

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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?

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

- Schneider National Inc. ("Schneider") is a freight carrier that owns thousands of trucks
- In 2020, Schneider designated more than a quarter of is drivers as independent contractors
- These 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. But Brant did not own his own truck.
- Instead, Brant leased a truck from Schneider and signed (1) a Lease of the truck; and (2) an Operating Agreement.

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Operating Agreement

Brant:	Schneider:
○ Leased the truck back to Schneider/ Received 65% of the gross revenue for shipments hauled for Schneider ○ Determined "the manner, means, and methods of performance of all Freight Transportation Services." ○ Chose which shipments to accept or reject; Could hire other drivers to take some or all responsibility for a shipment ○ 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	○ Required Brant to comply with the same operational standards and policies as employee drivers ○ Right to remotely gather/monitor data about Brant's schedule, use data "for any reason," and terminate the agreement for traffic law violations ○ Charged a fee if Brant hired another driver ○ Sole discretion to deny Brant permission to haul for other carriers; Charge for third-party monitoring to haul for other carriers. ○ Would default lease if Brant terminated Agreement without permission; Brant would be required to pay all remaining sums due on the Lease.

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

- Brant sued Schneider for **misclassification as an independent contractor** and **failure to pay minimum wage**.
- Brant argued:
  - 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

The trial court dismissed the claim and relied largely on the provisions of the contract, which "gave him considerable control over his business"

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What did the Appeals Court Decide?

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

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

  If 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.

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

- Although the Agreement appeared to give Brant 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**

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

Profit and Loss (Employee)

- 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.

Investment Factor (Employee)

- Although Brant leased a truck for $40,000 per year, 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."

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

Permanency and Duration Factor (Employee)

- Even though the Agreements were for terms, the Agreements were regularly renewed, and that Schneider sent reminder notices to drivers who failed to sign new contracts

Special Skills (Employee)

- "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 (Employee)

- "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

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U.S Department of Labor
Wage and Hour Division

WHD

May 1, 2025

Field Assistance Bulletin No. 2025-1

MEMORANDUM FOR: Regional Administrators
District Directors

FROM: Donald M. Harrison, III
Acting Administrator

SUBJECT: FLSA Independent Contractor Misclassification Enforcement Guidance

This Field Assistance Bulletin provides guidance to WHD field staff regarding the analysis to apply when determining employee or independent contractor status for purposes of enforcing the FLSA.

Background

A number of lawsuits are pending in federal courts challenging the legality of the rule entitled Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, ("2024 Rule"), which outlined the framework for determining employee or independent contractor status under the FLSA. The Department has taken the position in those lawsuits that it is reconsidering the 2024 Rule, including whether to rescind the regulation. Specifically, WHD is currently reviewing and developing the appropriate standard for determining FLSA employee versus independent contractor status.

Enforcement Guidance

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Off-The-Clock Work

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 employer 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.

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*.

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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
- Due to the nature of their work, employees were sometimes required to work outside their scheduled 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."

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

- The department issued **Blackberrys** which employees sometimes used in their off-duty work.
- Allen and fifty-one other officers filed a **class-action** lawsuit 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 work Plaintiffs 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** or being paid for that work
  - 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

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

- Plaintiffs argued the Department had a policy not to compensate them for off-duty work on their BlackBerrys because:

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

  (2) There were **written policies** to that effect, including:

  - A General Order stating officers would only be compensated for off-duty use if the officer was on a particular type of assignment or if a superior directed and authorized the overtime. Officers signed 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 except under the circumstances allowed.
  - 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.

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.

What Did the Court Decide?

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

- 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.

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Exempt Employees

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Exempt Employees

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

  A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part. 29 CFR § 541.2.

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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.
- To meet the first requirement “an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” 29 CFR § 541.201 .
- Also known as the “administrative-production dichotomy.” *McKeen-Chaplin v. Provident Sav. Bank, FSB*, 862 F.3d 847, 851 (9th Cir. 2017).

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Marcus v. Am. Cont. Bridge League, 80 F.4th 33, 47 (1st Cir. 2023)

- American Contract Bridge League is the largest bridge organization in the world, with over 162,000 members
- ACBL promotes bridge and serves the "bridge-related interests of its members"
- ACBL sanctions bridge tournaments, running National tournaments and providing staff to direct and support regional and sectional tournaments.

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Marcus v. Am. Cont. Bridge League, 80 F.4th 33, 47 (1st Cir. 2023)

Tournament Directors	• "Supervise a duplicate bridge contest" • Rule on disputes; Maintain discipline; Ensure timely play; Issue penalties
National Tournament Directors	• Also supervise bridge contests • Additional duties such as training and mentoring other directors; Drafting tournament regulations
Field Supervisors/Area Managers	• Tournament planning/organization, operations, and directing • Hiring/firing, promotions, recruiting, and training • Referee game play while supervising direct reports • Client relations

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Which employees are “Administrative Employees”?

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Which employees are “Administrative Employees”?

- Tournament Directors?
  - **No.** Tournament Directors “provide the service that [ACBL] is in the business to provide” and thus are “producing the good or service that is the primary output of [ACBL’s] business.”
- National Tournament Directors?
  - **No.** Although they have additional duties, “these duties all go towards producing an ACBL-sanctioned bridge tournament.”

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Which employees are "Administrative Employees"?

- Field Supervisors/Area Managers
  - **Yes!** Although they also direct tournaments "the character of the employee's job as a whole reveals that their primary duty . . . Relate[s] to ACBL's management or general business operations."
  - **Keeping clients happy and maintaining the overall reputation of the employer:** They participate in strategic planning, focusing on maintaining the standards of player satisfaction to ensure satisfaction of ACBL's customers.
  - **Focusing on improving customer service and satisfaction:** They engage in "high-level customer service-oriented responsibilities" such as being the first point of contact for issues and establishing and maintaining effective relationships with sponsors.
  - **Supervision of other employees:** They have significant supervisory responsibility over employees.
  - **Substantial effect on business operations; commit the company in matters that have significant financial impact; and bind the company on significant matters.**

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Liquidated Damages

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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 Fair Labor Standards Act**" a Court has the discretion not to award liquidated damages. 29 USC § 260.
- An employer has the burden to show liquidated damages are inappropriate, and "[d]ouble damages are the norm, single damages the exception." *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003).

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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") required most of its hourly employees to wear uniforms and to take post-shift showers, as it manufactured lead batteries, accessories, wires, cables, and related components.
- East Penn paid employees "reasonable" amount of time for showering/donning uniforms but not the actual time.
- Jury unanimously found that East Penn violated the FLSA and **owed $22,253,087.56 in back wages** for failing to pay actual time.
- The Department of Labor requested an **additional $22,253,087.56 in liquidated damages**

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

- The trial court **declined to award liquidated damages**:
- "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.
- "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**.

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Resolve FLSA and FMLA Violations Quickly and Avoid Litigation

The Wage and Hour Division (WHD) offers the Payroll Audit Independent Determination (PAID) program to help employers resolve potential minimum wage and overtime violations under the Fair Labor Standards Act (FLSA), as well as certain potential violations under the Family and Medical Leave Act (FMLA). This program allows employers to correct mistakes efficiently and ensure employees receive back wages or other remedies promptly, all while avoiding litigation.

Under PAID, employers are encouraged to conduct audits and, if they discover FLSA or FMLA violations, to self-report those violations. Employers may then work in good faith with WHD to correct their mistakes and to quickly provide 100% of the back wages due or other remedies to their affected employees.

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Thank You

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