# 11th Annual Parsons Behle & Latimer
# Idaho Employment Law Seminar

**for corporate counsel, business owners & human resource professionals**

OCTOBER 12, 2023 | BOISE CENTRE EAST | BOISE, IDAHO

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# Employee Life Cycle I: Onboarding Unscathed – Navigating Hazards While Interviewing, Hiring, and Welcoming Employees

Paul R. Smith Elena T. Vetter

October 12, 2023 | Boise Centre East

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## Legal Disclaimer and PDF Handbook

*This presentation is based on available information as of Oct. 12, 2023, 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 scan the QR code to download a PDF handbook of today's seminar.

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## As an HR professional, do you ever feel like…

Peregrin "Pippin" Took?


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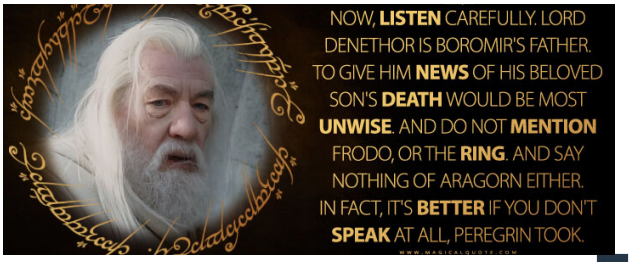
## Do you feel like there are too many competing directives?

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## What directives are you given when you're told to go out and hire someone?

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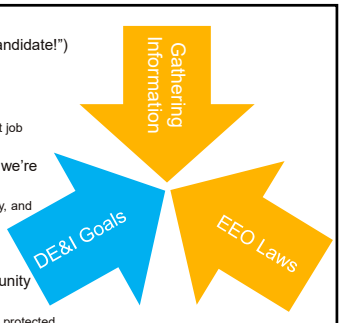
- Gathering Information ("Find us the best candidate!")
  - Your company is only as good as its people…
  - So you want to hire the best people…
  - So you want to make an informed decision…
  - So you want to know as much as possible about job applicants
- Implementing DE&I Initiatives ("Make sure we're promoting diversity, equity, and inclusion!")
  - Most companies have adopted a diversity, equity, and inclusion strategy/policy
    - 60% (Harvard Business Review)
    - 83% (World at Work)
- Complying with Equal Employment Opportunity Laws ("Don't get us sued!")
  - Making employment decisions without regard to protected characteristics

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## How do we square these seemingly conflicting directives?

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## Agenda

- Job Posting
- Screening
- Interviewing
- Onboarding

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## Job Posting

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## Job Posting

- What are we trying to do? What's the goal?
  - Informing public that we're looking to hire
  - Encouraging good candidates to apply
  - Avoiding liability

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## Job Posting

- The job posting is all about who makes it into the job-candidate pool.
- It's a great time to think about your DE&I goals
- Word choice matters
  - What you say can encourage or discourage certain groups from applying
  - E.g., gender-coded words
  - Requirements that might exclude good candidates
  - Explicitly state commitment to diversity
- Where you post matters
  - Where you post can encourage or discourage certain groups


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## Job Posting

- Preliminary Considerations
  - What will the person be doing
    - What are the essential job functions
  - Not too early to start thinking about employment type: Independent Contractor vs. At-Will vs. Contract Employee
- What to Include
  - Essential job functions (ADA)
  - Description of requirements (skills, credentials, education, etc.)

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## Applicant Screening

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## Applicant Screening

- What are we trying to do? What's the goal?
  - Filtering out candidates who don't have the requisite skills, education, certifications, etc.
  - Keeping in good candidates
  - Avoiding liability
    - Don't screen people out for illegal reasons
    - Careful of the "not a good fit" pitfall…

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## Applicant Screening

- Traditional
  - Having someone go through all the applications and resumes
- New Ways
  - Using AI software
  - Using social media

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## Traditional Screening

Be mindful of your biases—both conscious and unconscious.

Hiring and promoting only those who share your background and interests can lead to discrimination claims.

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## Protected Classes

**race**, **color**, **religion**, **age (40 and over)**, **pregnancy**, **sex**, **gender**, **disability**, **national origin**, **ethnic background**, **sexual orientation**, **gender identity**, **genetic information (including of a family member)**, **military service**, and **citizenship**.

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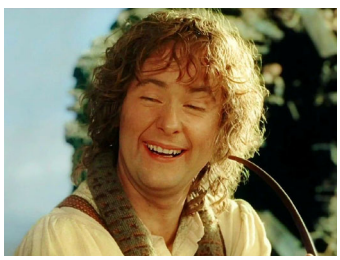
## New Screening Tool: AI Software

- Examples
  - Video analysis
  - Tests
  - Games
- Advantages
  - Save resources
  - Save time
  - Computers can't be biased, right…?



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## New Screening Tool: AI Software

- Some AI software claims to have eliminated bias as to race, gender, and other classes protected under Title VII
- But what about disability discrimination?
- The EEOC has issued a warning on AI screening…

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## EEOC Warning on AI Screening

*Employers now have a wide variety of computer-based tools available to assist them in hiring workers . . . . Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.* ***However, the use of these tools may disadvantage job applicants and employees with disabilities****. When this occurs, employers may risk violating federal [EEO] laws that protect individuals with disabilities.*

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## New Screening Tool: AI Software

- Here are some examples from the EEOC:
  - Administering a knowledge test that requires the use of akeyboard, trackpad, or other manual input devices—especially if the responses are timed.
  - A chatbot designed to engage in communications online and through texts and emails that is programmed to reject all applicants who have a gap in employment history, without checking to see if the gap was caused by a disability.
  - Video interview software that analyzes applicants' speech patterns in order to reach conclusions about their ability to solve problems, which might not score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns.
  - Gamified tests to measure abilities and personality traits, which require a 90% score, might be unfair for blind applicants.

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## New Screening Tool: AI Software

- What are the key takeaways from the EEOC's guidance?
  - Inform applicants ahead of time what steps an evaluation process will include.
  - Provide a clear way for applicants to request a reasonable accommodation, e.g., providing an alternative test.
- Employer might be liable for AI software vendor's actions…
  - If applicant asks for a reasonable accommodation and doesn't receive it, employer might be held liable
  - Even if it was the software vendor that rejects
  - Even if the employer was unaware that the applicant reported a problem to the vendor

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## New Screening Tool: Social Media

- It's a great resource because there's so much information on there
  - Evidence of good/bad judgment
  - Details about experience/education
  - And 70% of employers use it to screen candidates
- But it's a **terrifying** resource…because there's so much information on there

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## How can we get in trouble using social media as a screening tool?

- How we access it
  - Might violate Stored Communications Act (accessing without permission)
  - Might violate state internet privacy acts (even asking to access) (not in Idaho…yet)
- What we access
  - Genetic information (GINA)
    - An applicant may discuss a family history of cancer or other illness
  - Protected-class information (Title VII, ADA, state law)
    - "I had a great job interview today! Maybe I can finally get insurance benefits to care for my illness
- If you access their social media, how can you prove you didn't see that information?

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## If you decide to use social media as a screening tool, here are some suggestions…

- Limit the amount of information you're collecting by not screening every candidate
  - Only certain positions
  - Only finalists, later in the process (maybe coupled with background checks)
- Limit the amount of information you're collecting by only collecting targeted information
  - Create a list of questions for your screener to research
  - Make sure the questions are all job-related (nothing about protected classes)
- Limit the amount / type of information the decisionmaker has
  - Your decisionmaker should not be the screener
  - Have your screener create a report and submit it to the decisionmaker (nothing about protected classes)
- Document and be consistent!

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## Job Interviews

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## What About Job Interviews?

State and federal law expressly prohibit employers from actively acquiring protected class information from applicants and employees.

When it comes to protected class information, ignorance is bliss.

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## Never ask any of these questions in a job interview:

How old are you?

Are you married? Do you have kids? Are you pregnant?

What is your race?

What religious holidays do you observe? (note: you can ask if they can work a particular schedule, e.g., on weekends)

What country are you from?

Where were you born?

What type of discharge did you receive from the military?

What's your credit history like?

Are you a U.S. citizen?

Have you ever belonged to a union?


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## Don't ask applicants about disabilities or other health information.

For example, you cannot ask:

- Do you have a disability?
- Or, when a disability is obvious, "how did you become disabled?"
- What medications are you taking?
- Have you ever filed a workers' compensation claim?

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## Disability and Health Inquiries

However, if an applicant voluntarily discloses a disability or when a disability is obvious, you may ask questions like this:

Will you need a change to the work environment?

Will you need a change to the way this job is usually done?

What kind of reasonable accommodation would you need for this job?

This job requires lifting twenty-pound bags. Can you perform this function with or without reasonable accommodation?


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## Focus your interview on job-related issues like these:

- Are you interested in full- or part-time employment?
- What hours are you available for work? What hours are you unavailable for work?
- Are you willing to work nights, weekends and/or holidays?
- What experience do you have which you believe will help you learn or perform the job?
- What reservations do you have about the job?
- Did you have any performance problems with previous employers?
- What did you like least and best about your past jobs?
- What are your short- and long-range job goals?

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## More on Job Interviews…


- Avoid forming a contract of employment:
  - Avoid saying "permanent," "career job opportunity," or "long term."
  - Avoid making excessive assurances about job security or statements suggesting that employment would last as long as the employee performed well in the position.

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## Before we move on to onboarding…

- Let's go back to our three areas of tension:
  - Gathering information
  - Implementing DE&I Initiatives
  - Complying with Equal Employment Opportunity Laws
- What are the takeaways?
  - Make sure people aren't excluded from the pool based on a protected characteristics.
  - Avoid gathering information about protected characteristics.
  - Make sure the hiring decision is blind as to protected classes.

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## Onboarding

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## Onboarding: What's the point?

- What are we trying to do with onboarding? What's the goal?
  - Getting on the same page with the new hire (making sure we're all talking about the same job)
  - Protecting the company (making sure we set everything up correctly)

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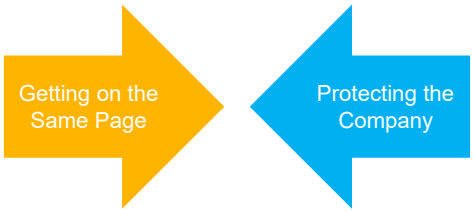
## Onboarding

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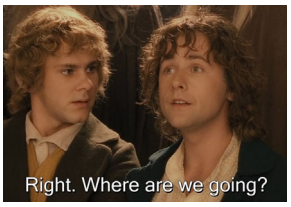
## Onboarding Presents Another Pippin Situation…

- If you say too much, you might end up establishing contractual obligations the company didn't want
- If you don't say enough, there could be confusion
  - Your new hire might think he/she is getting a different title, start date, schedule, pay, etc. than the company does

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## Offer Letters--Get on the Same Page with New Hire

**Basic Information:** start date, orientation date, full- or part-time status, applicable shift, exempt/non-exempt, at-will vs. independent contractor vs. contract employee.

**Job-Specific Information:** base salary (stated in hourly, weekly, or a per-pay-period salary amount to avoid expectation of receiving the full annual salary), equity, bonus/commissions (also state which are in the company's sole discretion), commissions, pay periods, supervisor name, performance development/evaluation periods.

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## Offer Letters--Get on the Same Page with New Hire

**Benefits Information:** summary of benefits and eligibility requirements for health care insurance, 401(k) plans, life insurance, educational assistance, flex ben accounts, STD, LTD.

**Paid Leave Information:** include holidays, PTO, vacation, sick leave, personal time.

**Terms of Employment:** drug testing, background checks, signing NDAs, compliance with immigration laws, etc.

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## Offer Letters—Protecting the Company

- Don't want it to turn into an employment agreement. So you should avoid language about:
  - Length of employment
  - Promises about future earnings/bonuses
  - Job duties and requirements
  - Grounds for termination/resignation
  - No statements about job security
- Consider having new hires attest via signature that they aren't bound by noncompetes or other restrictive covenants
- Be consistent—create a template!

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## Employee Handbooks

- What are we trying to do? What's the goal?
  - Same as offer letters: Get on same page and protect the company
- How do handbooks protect the company?
  - Helps justify disciplinary decisions
  - Insulates company from liability for EEO violations of employees
  - Avoids employment contracts (establishes at-will-employment policy)

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## Employee Handbooks

- Every employer should have one
- Give to employees as part of onboarding
- Should at least do the following:
  - Provide EEO policy
  - Identify complaint procedure
  - Have an at-will employment disclaimer
  - Have an acknowledgement (signed)
- Other policies to consider
  - PTO/Leave policies
  - Breastfeeding/lactation policy (often required in Utah)
  - Social media
  - Code of conduct (can be in separate document)

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## NLRB: Handbooks and Conduct Policies

On August 2, 2023, in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the National Labor Relations Board adopted a strict new legal standard for evaluating the validity of workplace rules under the National Labor Relations Act.

In *Stericycle*, the Board reversed precedent and held that an employer work rule is unlawful to maintain if a "reasonable employee" could interpret that rule in a way that restricts employee rights under Section 7.

- Once again, it's time to revise employee handbooks and work rules. Common categories of rules that have drawn scrutiny in the past include:
  - civility and conduct
  - confidentiality
  - conflicts of interest
  - use of employer communication systems
  - social media policies
  - communicating with media and third parties
  - restrictions on cameras and recordings
  - dress codes.

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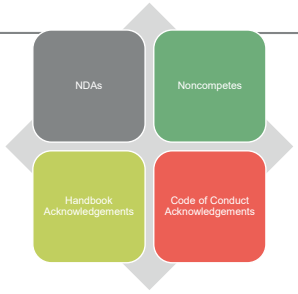
## Things you might have your new hire sign on the first day

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## Agreements

- Don't turn your codes of conduct and employee handbooks into employment contracts!
  - Have them sign an acknowledgement
  - At-will employment statements in the handbook (and acknowledgement)
  - Don't have any agreement-forming language in the handbook
  - Don't include any agreements/contracts in the handbook

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## Agreements—Noncompetes

- Do it as part of onboarding
  - Some states (not Utah) require additional consideration for noncompete when not part of new hire
  - Also, what do you do if they say no
- Have proper limits
  - In Utah, anything more than 1 year will render the provision void
  - Geographic scope
  - Type of work
- But this might not really matter….


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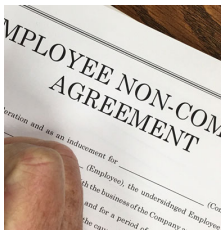
## The Biden Administration Wants to Curtail Noncompete Agreements

- July 2021—Pres. Biden signed an Executive Order calling on the FTC to "**curtail the unfair use of non-compete clauses** and other clauses or agreements that may unfairly limit worker mobility."
- We've seen a proposed rule come out from the FTC.

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## FTC Proposes Rule to Ban Noncompete Clauses

On January 5, 2023, the FTC published its Notice of Proposed Rulemaking (NPRM) to ban noncompete clauses.

The rule would make it illegal for an employer to:

- Enter into or attempt to enter into a noncompete with a worker (both employees and independent contractors);
- Maintain a noncompete with a worker; or
- Represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

**The proposed rule "would also require employers to rescind existing noncompetes and actively inform workers that they are no longer in effect."**

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## Rule Also Bans *De Facto* Noncompetes

- So… it's not just traditional non-compete clauses
- Also, contractual clauses that have the **effect** of prohibiting the worker from seeking/accepting employment or operating a business
- Examples:
  - Non-disclosure agreements
    - Written so broadly that they effectively preclude the worker from working in the same field
  - Payback clauses:
    - A contractual term that requires the worker to pay the employer or a third-party entity for training costs
    - The required payment is not reasonably related to the costs the employer incurred for training the worker

***What about non-solicit clauses?***

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## Summary

**Prior to Hire**: find the right balance between…

- Gathering information
- Implementing DE&I initiatives
- Complying with EEO laws

**Onboarding**: find the right balance between…

- Getting on the same page with the new hire
- Protecting the company

Using these tips, you can safely navigate your HR journey…just like Pippin did.

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## QUESTIONS?

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## Thank You

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11th Annual **Idaho Employment Law Seminar**

# *Confidentiality Issues Arising Under the ADA, FMLA, HIPAA*

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# Confidentiality Issues Arising Under ADA, FMLA, HIPAA

J. Kevin West

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## Official Title

**H** *ealth*
**I** *ndustry*
**P** *ortability and*
**A** *ccountability*
**A** *ct*

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## HIPAA Vocabulary

- Hipaacrat: a bureaucrat who drafts HIPAA regulations
- Hipaanosis: What happens when one reads voluminous HIPAA regs
- Hipaacrit: employers who don't protect employee health info
- Hipaatitus: disease caused by prolonged exposure to HIPAA
- Hipaachondriac: those who complain about HIPAA compliance
- Hipaadrone: someone who talks endlessly about HIPAA
- "I'm in a HIPAA trouble": what you may be saying if you don't listen carefully today!

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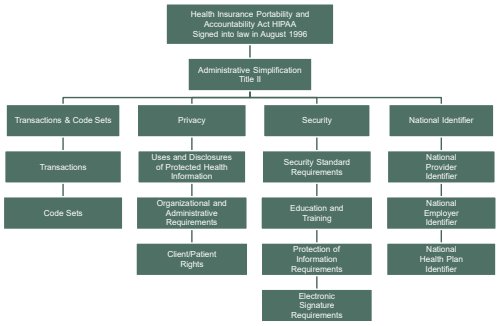


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## HIPAA History

- 2003-04 HIPAA Privacy and Security Rules take effect
- From April 2003 to 2009, there were no changes to HIPAA

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## HIPAA History

- HIPAA statute was amended in February 2009 (the "Hi-Tech Act," with most changes effective one year later)
- "Final" omnibus rules for the Hi-Tech Act issued on January 28, 2013

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## HIPAA PRIVACY:
Rules for Employers

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## Who Must Comply With HIPAA?

- Health care providers
- Clearing houses
- "Health plans"

} "Covered Entities"

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## What is a Health Plan?

- Private health insurance companies (Blue Cross, Blue Shield)
- Government health insurers (Medicare, Medicaid)
- Employer sponsored group health plans or HMO's
  - → Fully insured plans
  - → Self funded plans
- Includes FSA's, dental and vision plans

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## What is Not a Health Plan?

- Excluded entities:
  - → Worker's comp insurers
  - → Disability insurers
  - → Life insurance companies
  - → Property and casualty insurers

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## What is a Health Plan?

- The HIPAA law creates a legal fiction: i.e. that a health plan is a separate legal entity from the employer
- But it's not—a health plan is just a piece of paper (but keep listening!)
- Therefore, we have to talk about the health plan "sharing" information with the employer; and whether the employer is acting in its role as an employer versus acting as a health plan

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## What is Protected Health Information (PHI)?

- Protected health information (PHI)=
  1. "Individually identifiable health information," (i.e., reasonably used to identify an individual),
  2. Which concerns the person's past, present or future physical or mental health, healthcare, or payment for health care,
  3. That is created or received by a covered entity, and
  4. Is transmitted or maintained in any form or medium (e.g., oral, paper, or electronic).

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## What is Not Protected Health Information (PHI)?

The definition of PHI does NOT include "employment records held by a company in its role as an employer."

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## What is Not PHI?

- Health information kept or maintained by employers while NOT acting in the role of a health plan

**Examples:**
- sick leave info
- FMLA leave
- ADA accommodation
- STD/LTD

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## HIPAA's Basic Philosophy for Plan Sponsors (Employers)

PHI should be confidential and not be accessible to, or used by, employers in making employment related decisions.

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## HIPAA Compliance Obligations

**Q:** What Are My HIPAA Obligations?

**A:** Depends on whether the health plan is:

→ Fully insured

→ Self-insured

→ Partially self-insured

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## Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

| Description | Compliance |
|---|---|
| A. Health FSA with fewer than 50 employees and 100% internally self-administered | None (excluded from HIPAA) |

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## Types of Health Plans
(or, How Does Your Health Benefits Package Fit In?)

| Description | Compliance Obligations |
|---|---|
| B. Most other health FSA's (i.e., more than 50 employees or not self-administered) | Full HIPAA compliance |

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## Types of Health Plans
(or, How Does Your Health Benefits Package Fit In?)

| Description | Compliance Obligations |
|---|---|
| C. Dental or vision plans:<br>1. Fully insured and employer keeps/receives only summary and enrollment information<br>2. Fully insured, but employer keeps/receives PHI<br>3. Self-insured | Minimal HIPAA compliance<br>Full HIPAA compliance<br>Full HIPAA compliance |

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## Types of Health Plans
(or, How Does Your Health Benefits Package Fit In?)

| Description | Compliance Obligations |
|---|---|
| D. Fully insured health plans or HMO's:<br>1. Employer keeps/receives only summary/enrollment information<br>2. Employer keeps/receives PHI | Minimal HIPAA compliance<br>Full HIPAA compliance |

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## Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

| Description | Compliance Obligations |
|---|---|
| E. Self-insured health plans:<br>1. Less than 50 employees and totally self-administered.<br>2. Self-insured | None (excluded from HIPAA)<br><br>Full HIPAA compliance |

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## What types of employer-sponsored health plans require full HIPAA compliance?

| YES | NO |
|---|---|
| ▪ Self-insured plans<br>▪ Flex plans<br>▪ Deductible plans and HSA's<br>▪ Fully insured plans (employer keeps PHI) | ▪ Fully insured plans (employer keeps no PHI) |

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## Totally or Partially Self-Insured Health Plans: What Does "Compliance" Mean?

**Full HIPAA Compliance:**

1. Notice of Privacy Practices (provided by the health plan)
2. Privacy officer
3. Personnel training
4. Written privacy policies
5. Amendment to plan docs
6. Physical, technical & administrative safeguards
7. Business Associate contracts
8. Define and "firewall" the health benefits department
9. Rights of Plan Participants

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## What Are My Compliance Obligations?

1. Notice of Privacy Practices
   - Provided by insurer (for full insured plans)
   - Provided by employer/plan sponsor for self-insured plans
   - Must be provided to all plan participants in plan (providing to named insured is sufficient)

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## What Are My Compliance Obligations?

Notice of Privacy Practices (cont'd)

- Must be provided to all plan participants
- Must be provided to new participants upon enrolling
- Reminder notice must be provided every 3 years thereafter

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## What Are My Compliance Obligations?

2. Privacy Officer
   - Privacy Officer: Person responsible for overseeing overall compliance with HIPAA rules

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## What Are My Compliance Obligations?

3. Employee training

**WHEN**

- Must be completed for existing workforce
- Must be completed within a "reasonable time" for workforce hired later

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## What Are My Compliance Obligations?

**WHO**

- PHI may be accessed only by appropriate company personnel ('inner circle" concept):
  - Top management and executives
  - Benefits personnel
  - HR department personnel

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## What Are My Compliance Obligations?

4. Preparation of Written Policies and Procedures
   - Do you have a Privacy Manual that meets all HIPAA requirements?
   - Use a competent HIPAA attorney

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## What Are My Compliance Obligations?

5. Amendment of Plan Documents & Certification
   - To reflect HIPAA responsibilities, rights and rules
   - To affirm to insurer or TPA that plan sponsor will keep proper "separation" and fulfill other HIPAA obligations.

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## What Are My Compliance Obligations?

6. Administrative, Physical and Technical Safeguards
   - Physical plant layout
   - Storage and retention of paper records
   - Computer systems
     - Passwords
     - Location of monitors
     - Technical personnel
   - Fax and copy machines
   - Internet security

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## What Are My Compliance Obligations?

7. Identify Business Associates
   - *Definition: A person or entity who performs a function for a covered entity that involves use or disclosure of PHI.*
   - *Examples: Brokers, Third-Party Administrators*

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## What Are My Compliance Obligations?

- Covered entities must provide "satisfactory assurances" that business associates will comply with privacy restrictions
- "Satisfactory assurances" = business associate agreement

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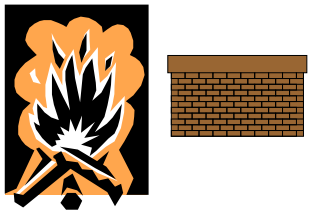
## What Are My Compliance Obligations?

8. Firewalls to Keep PHI separate
   - Employee PHI may not be accessed by anyone without legitimate need to know (i.e., without a legitimate benefits purpose)
   - "Inner circle" concept

   (Management vs. benefits department)



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## What Are My Compliance Obligations?

9. Rights of Plan Participants
   - Notice
   - Access to PHI (Paper or electronic)
   - Confidential Communications
   - Accounting
   - Amendment

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## "More Stringent" State Laws Still Apply

State law is "more stringent" if it:

- Grants individuals greater rights of access to PHI; or
- Provides greater privacy protection to the individual

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## Utah Law

- No major differences with HIPAA except as to substance abuse, mental health and HIV status.


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## What Can Happen If You Don't Comply?

- Enforcement by Office of Civil Rights (OCR)
- On-line complaint process makes it easy to complain

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## HIPAA Enforcement/Penalties

1. Civil penalties ranging from $100/day up to maximum of $1.5 million
2. If a HIPAA violation resulted from "willful neglect," a penalty is mandatory

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## HIPAA Enforcement/Penalties

3. State attorney general may investigate and enforce HIPAA
4. DHHS has additional funding and authority to audit and enforce

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## What Can Happen If You Don't Comply?

- Idaho State University
- Medical info of 17,500 employees exposed on internet due to insufficient security measures
- $400,000 settlement

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## What Can Happen if You Don't Comply?

- State of Alaska Case
- Theft of USB hard drive with data on 500 people
- No training of workforce, risk analysis etc.
- $1.7 million settlement paid

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## Concluding Comments on HIPAA Privacy

- Management personnel need to understand the difference between health plan information vs. other employee information.
- All employee health information (whether benefits related or not) is protected under:

✓ADA ✓Title VII (EEO)
✓FMLA ✓State laws

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## The HIPAA Security Rule

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## Do you . . .

- Have employee health benefits information on your computer system?
- Use email for communicating with insurance companies or other brokers?
- Have a networked computer system that has Internet access?

If so, Security Rule compliance is vital to your organization.



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What if. . .

- A virus wiped out or corrupted employee benefits records or accounting data for:
  - Last 24 hours?
  - Indefinitely?
- A fire destroyed your computer system?
- An employee or hacker crashed your system or deleted or stole key data (e.g., embezzlement)
- You failed to destroy employee benefits data on a computer that you gave away?

How would it affect:

- Your ability to administer health benefits for your employees?
- Your hardware, software, and other expensive capital?
- Your relationships with employees, brokers, insurers?



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## Basic HIPAA Security Concepts

- The Privacy Rule governs PHI in <u>any</u> form – oral, written or electronic
- The Security Rule governs only <u>electronic</u> PHI (ePHI)



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## What is ePHI?

- Information stored on computers, laptops, PDA's, floppy disks, databases, websites, etc… ("data at rest")
- Information transmitted via telephone lines, Internet, e-mail ("data in motion")

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## Examples of ePHI:

- Employee health benefits information stored on the Company's computer system
- Employee health benefits information transmitted via the Internet
- Electronic billing claims
- Electronic faxes (computer to computer faxes) but not paper to paper faxes
- NOT voicemail, video conferencing

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## Basic Security Concepts

- Three basic goals of the HIPAA Security Rule: to ensure the
  1) Confidentiality *(only the right people see it)*
  2) Integrity *(the information has not been improperly altered)*
  3) Availability *(the right people can see the information when needed)*

  of ePHI

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## Basic Security Concepts

- The Security Rule consists of 18 standards, which are grouped into 3 categories:
  1) Administrative safeguards
  2) Physical safeguards
  3) Technical safeguards

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## Basic Security Concepts

- Basic goal of the Security Rules: To prevent or minimize "security incidents" (i.e., a breach of confidentiality, integrity or availability)

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## Examples of Security Incidents

- A hacker or ex-employee accesses your Company's computer system (confidentiality)
- Your laptop is stolen with employee health benefits data on its hard drive (confidentiality and availability)
- Your computer system crashes and all employee health benefits data is lost (availability)
- A Company employee alters electronic records on your computer system without authorization (integrity)

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## A Review of the Security Rule Standards

- Administrative safeguards
- Physical safeguards
- Technical safeguards

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## Administrative Safeguards

1. Appoint Security Officer
2. Train Company personnel
3. Security management
4. Information access management
5. Workforce security
6. Security incident procedures
7. Emergency plan
8. Evaluation procedures
9. Business associate agreements

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## Physical Safeguards

1. Facility access controls
2. Computer workstation security
3. Device and media controls

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## Technical Safeguards

1. Access Controls
2. Audit Controls
3. Integrity of ePHI
4. Person or entity authorization
5. Transmission security

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## Plan Participant Notification of Breach

If there is a breach (i.e., an unsecured disclosure of plan participant's PHI) the plan participant must be notified of such

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## Other Protections to Employee Health Information

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## Other Protections to Health Information in the Workplace

1. Title VII
   - Employee health information may not be used for purposes of workplace decisions.
   - Special protections under the Pregnancy Discrimination Act: an employer may not discriminate based on pregnancy, childbirth or any medical condition related to such. Disclosure of health information by an employer related to pregnancy or childbirth is a violation of Title VII

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2. The Americans and Disability Act (ADA)
   - Protects disclosure of health information relating to disabilities and requests for accommodation (e.g. the collaborative process)
   - Health information must be kept on "separate forms," in a file separate from the personnel file and must be treated as "confidential medical record." 42 U.S.C. Section 12112(d); 29 C.F.R. Section 1630.14

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4. The Genetic Nondiscrimination Act (GINA) has special confidentiality protections for genetic information. See 29 C.F.R. Section 1635.9

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4. The FMLA

- Employee medical information relating to medical leave must be kept in separate file and be treated as a confidential medical record. 29 C.F.R. Section 825.500(g)

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4. Tort Law

- The employee may have a civil lawsuit under Utah law for the tort of Invasion of Privacy if medical records are disclosed inappropriately

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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Hot Topics: Severance Agreements, Noncompete Covenants, Employee Classification, and Overtime*

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# Hot Topics: Severance Agreements, Noncompete Covenants, Employee Classification, and Overtime – The NLRB, FTC, and DoL Flex Their Administrative Muscles

Sean A. Monson Garrett M. Kitamura

October 12, 2023 | Boise Centre East

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## Legal Disclaimer and PDF Handbook

*This presentation is based on available information as of Oct. 12, 2023, 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 scan the QR code to download a PDF handbook of today's seminar.

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## NLRB tackles confidentiality and non-disparagement clauses in severance agreements

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## NLRB: Severance Agreements

On February 21, 2023, the National Labor Relations Board (NLRB) issued a major decision (*McLaren Macomb*) that impacts severance agreements for non-management employees in both union and nonunion workplaces.

Recall: the NLRB enforces Section 7 of the National Labor Relations Act.

Section 7 gives (non-management) employees the right to engage in "concerted activity," i.e., the right to band together to discuss and complain about the terms and conditions of employment.

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## NLRB: Severance Agreements


The McLaren Macomb Hospital in Michigan had "permanently furloughed" 11 employees and offered each of them severance.

The Hospital included two standard provisions in its severance agreements: **confidentiality** and **non-disparagement**.

The NLRB concluded that the Hospital committed an unfair labor practice by even offering a severance agreement that included such provisions.

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## Provisions at Issue in McLaren Macomb

The confidentiality provision prohibited the employee from disclosing the terms of the agreement to anyone other than a spouse or a professional adviser (e.g., tax or legal).

The non-disparagement provision prohibited the employee from making statements that could disparage or harm the employer or affiliated persons and entities.

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## Why Was the Agreement in *McLaren Macomb* Unlawful?

In a press release, the Board said its decision "explains that ***simply offering employees a severance agreement that requires them to broadly give up their rights under Section 7 of the Act violates Section 8(a)(1) of the Act.*** The Board observed that the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when employees may feel they must give up their rights in order to get the benefits provided in the agreement."

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## NLRB General Counsel Issues Follow Up Guidance

In a March 22, 2023 Memorandum, the Board's General Counsel responded to questions arising from *McLaren Macomb.* She took the following positions:

- **Severance agreements are lawful absent "overly broad provisions** that affect the rights of employees to engage with one another to improve their lot as employees. This includes the rights of employees to extend those efforts to channels outside the immediate employee-employer relationship," such as the NLRB, a union, the media, legal forums, etc.
- *McLaren Macomb* **applies retroactively**, making an attempt to enforce a previously-entered severance agreement with broad confidentiality or non-disparagement provisions a potential unfair labor practice.
- A "**savings clause or disclaimer language may be useful** to resolve ambiguity over vague terms," but should not be relied upon to "cure overly broad provisions."

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## General Counsel Follow Up Guidance

- **Confidentiality clauses** in severance agreements may be lawful if they are narrowly tailored to protect proprietary or trade secret information, based on legitimate business justifications.
- **Non-disparagement provisions** may be lawful if they are limited to statements "that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."
- Other common provisions the General Counsel views as problematic include **non-compete & non-solicitation clauses, no poaching clauses, cooperation requirements** for current or future investigations, and overly broad **liability releases**.

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## General Counsel Follow Up Guidance

- The principles in *McLaren Macomb* apply to other employer communications.
- Although supervisors generally do not have Section 7 rights, the General Counsel asserts that there may be unique circumstances where an employer violates the Act by offering an overbroad agreement to a supervisor.
- Former employees have Section 7 rights, which "are not limited to discussions with coworkers." Former employees can provide evidence to the NLRB and "otherwise share information about working conditions they experienced."

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## NLRB: Severance Agreements

- What are your options?
- **Do nothing** and take your chances with an unfair labor practice (the standard may swing back under the next Republican administration).
- **Delete** entirely the confidentiality and non-disparagement clauses in your standard severance agreements for non-management employees.
- **Middle Ground:** narrowly tailor any confidentiality and non-disparagement clauses to make clear that the provisions:
- Do not prevent an employee from participating in Section 7 activity;
- Do not prevent an employee from filing an unfair labor practice charge or assisting others in doing so;
- Do not prevent an employee from cooperating with an NLRB investigation.

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## Key Takeaways

- Severance agreements should be carefully scrutinized to ensure they do not restrict Section 7 rights.
- Remember that the Board will likely apply the *McLaren Macomb* principles to other employer communications.
- Approach the enforcement of previously-entered non-disparagement and confidentiality provisions with caution.
- Consider seeking the advice of employment counsel on these matters.

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## Under the FLSA, Salary Means Salary: Highly Compensated Employees Entitled to Overtime

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## Salaried Employees

- Most common misconception we run across
- I pay Employee X a salary, they are not entitled to overtime, right? Right?
- Exemptions – salary (of at least $684 per week) plus duties
  - Executive
  - Administrative
  - IT
  - Professional
- Outside sales

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## Salaried Employees and the FLSA

- Salary means Salary
- *Helix Energy Solutions Group v. Hewitt*
- Facts
  - The employee, Michael Hewitt, a "tool pusher" working for Helix Energy Solutions Group on an offshore oil rig
  - Hewitt reported to the rig's captain and oversaw 12-14 workers
  - He typically worked 84 hours per week, seven days a week for a 28-day "hitch," after which he had 28 days off

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## Salaried Employees and the FLSA

- *Helix Energy v. Hewitt* Facts (cont.)
  - Hewitt was compensated on a daily-rate basis with no overtime
  - The daily rate ranged from $963 (the minimum) to $1,341
  - Under this compensation scheme, he earned more than $200,000 annually
- The Company argued, and two Justices agreed, that if he was paid a minimum of $963 a day, then he obviously was paid a guaranteed amount of $684 per week, so he is exempt (executive)
- Six Justices said No – the regulations measure the salary per week and he was paid on a daily, not weekly, basis

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## Salaried Employees and the FLSA

- The Act defines "salary" as a "predetermined amount," which must be paid "without regard to the number of days or hours worked"
- The Court found that "by definition," a daily-rate worker is "paid for each day he works and no others," rendering him non-exempt under the Act
- The Court found that Helix could come into compliance by adding a weekly guaranteed rate or paying Hewitt a weekly salary, but that the company's current structure (though generous) violated FLSA

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## DOL Proposes New Independent Contractor Guidelines

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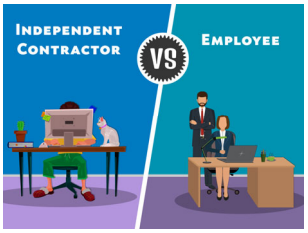
## DOL: Independent Contractor Guidelines

On October 11, 2022, the United States Department of Labor (DOL)—and the Biden Administration—proposed new independent contractor classification guidelines that are viewed as more favorable to the worker.

In other words, these guidelines would make it more difficult to maintain the contractor classification.

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## Background on DOL's Interest in Contractor v. Employee Classifications

DOL enforces the Fair Labor Standards Act (FLSA), the federal law that requires minimum wage and overtime for non-exempt employees

As a result, DOL has taken an interest in independent contractor misclassifications and has provided various tests over the years for the employee/contractor analysis

The current test, implemented during the Trump administration and viewed as favorable to employers, emphasizes two factors:
(1) degree of control and (2) opportunity for profit of loss

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## DOL: Independent Contractor Guidelines

The 2022 proposed rule clarifies that the ultimate inquiry in deciding whether a worker is properly classified as a contractor is "**economic independence**"

The focus of the proposed rule is whether the worker is in business for themselves rather than the amount the worker earns

According to the DOL, "an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income"

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## DOL: Independent Contractor Guidelines

Other factors traditionally relied on by DOL will still be considered, e.g., degree of control, skills required, permanence of the working relationship, whether the work is integral to the company's business, and the opportunity for profit or loss

But economic independence will be the primary analysis under the Proposed Rule

The comment period for the Proposed Rule closed on December 13, 2022

The final rule is expected any day! (Still waiting)

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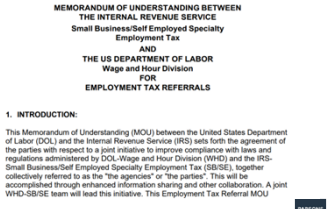
## DOL & IRS Combine Forces

On December 14, 2022, DOL and IRS signed and published a Memorandum of Understanding for Employment Tax Referrals—joining forces to combat contractor misclassifications.



MEMORANDUM OF UNDERSTANDING BETWEEN
THE INTERNAL REVENUE SERVICE
Small Business/Self Employed Specialty
Employment Tax
AND
THE US DEPARTMENT OF LABOR
Wage and Hour Division
FOR
EMPLOYMENT TAX REFERRALS

1. INTRODUCTION:

This Memorandum of Understanding (MOU) between the United States Department of Labor (DOL) and the Internal Revenue Service (IRS) sets forth the agreement of the parties with respect to a joint initiative to improve compliance with laws and regulations administered by DOL-Wage and Hour Division (WHD) and the IRS-Small Business/Self Employed Specialty Employment Tax (SB/SE), together collectively referred to as the "the agencies" or "the parties". This will be accomplished through enhanced information sharing and other collaboration. A joint WHD-SB/SE team will lead this initiative. This Employment Tax Referral MOU

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## Federal Trade Commission (FTC) Proposes Rule to Ban Noncompete Agreements

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## The Biden Administration Wants to "Curtail" Noncompete Agreements

July 2021—Pres. Biden signed an Executive Order calling on the FTC to "**curtail the unfair use of non-compete clauses** and other clauses or agreements that may unfairly limit worker mobility."

The Executive Order did not actually change the law on non-competes

We've been waiting on the FTC to engage in rulemaking.


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## FTC Proposes Rule to Ban Noncompete Clauses

On January 5, 2023, the FTC published its Notice of Proposed Rulemaking (NPRM) to ban noncompete clauses.

- A company may NOT enter into or attempt to enter into a noncompete with a worker (both employees and independent contractors) >> so no **new** noncompetes
- A company may NOT maintain a noncompete with a worker >> so no **old** noncompetes
- A company may NOT represent to a worker that the worker is subject to a noncompete >> so no **pretending**

**Must rescind existing noncompetes and actively inform workers that they are no longer in effect**

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## How Does FTC Define a Noncompete?

"Non-compete clause means a contractual term between an employer and a worker that prevents the worker from **seeking or accepting employment** with a person, or **operating a business**, after the conclusion of the worker's employment with the employer."

- Also, contractual clauses that have the **effect** of prohibiting the worker from seeking/accepting employment/operating a business
- In other words… no ***de facto*** noncompetes

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## Examples of *De Facto* Noncompetes

- Non-disclosure agreements
  - Written so broadly that they effectively preclude the worker from working in the same field
- Payback clauses:
  - A contractual term that requires the worker to pay the employer or a third-party entity for training costs
  - The required payment is not reasonably related to the costs the employer incurred for training the worker

***What about non-solicit clauses?***

***Are there any exceptions?*** ***Yes, when an owner/partner sells a business…but that's pretty much it, for now…***

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## Federal Trade Commission (FTC) to Propose New Regulation Governing Online Marketing

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## FTC to Propose Rule to Combat Deceptive Reviews and Endorsement

The Federal Trade Commission announced in October that it is:

"[E]xploring a potential rule to combat deceptive or unfair review and endorsement practices…."

"Companies should know by now that fake reviews are illegal, but this scourge persists….We're exploring whether a rule that would trigger stiff civil penalties for violators would make the market fairer for consumers and honest businesses."

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## Categories of Deceptive/Unfair Practices FTC Wants to Target

- **Fake reviews**
- **Review-reuse fraud**
- **Paid reviews**
- **Review suppression**
- **Buying followers**
- **Insider reviews:** Reviews written by a company's executives or solicited from its employees **that don't mention their connections** to the company.


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## Some Examples in the Employment Context

***Q:*** *Can employees mention and review company products online?*

**A: Yes, if the employee discloses the relationship. (No, listing the employer in profile isn't enough.)**

***Q:*** *Can employers ask employees to spread the buzz about company products?*

**A: Yes, but…(1) don't ask employees to say anything that isn't true; and (2) instruct employees to disclose relationship.**

***Q:*** *What instruction should we give to employees? How much disclosure is required? Is "#employee" good enough?*

**A: Consumers may be confused by "#employee." Better: "#[Company Name]_Employee." Best: Use the words "my company" or "employer's" in the body of the message.**

***Q:*** *Can employees use their personal social networks to "like" or "share" company posts without relationship disclosure?*

**A: Maybe. If the post is akin to an ad, then relationship-disclosure is required. That's easy with a "share." It's hard with a "like."**

"We realize that some platforms – like Facebook's "like" buttons – don't allow you to make a disclosure. [Companies] **shouldn't encourage** endorsements using features that don't allow for clear and conspicuous disclosures. Whether the [FTC] may take action would depend on the overall impression, including whether consumers take 'likes' to be material in their decision to patronize a business or buy a product."

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## How Do You Stay out of Trouble with the FTC?


- **DISCLOSURE!**
- Tell your employees to be as clear as possible about their affiliation with the company

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## Pregnancy Protection

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## Pregnant Workers Fairness Act

- The EEOC recently issued proposed regulations to implement the Pregnant Workers Fairness Act, passed by Congress in late 2022.
- The Act requires employers to make reasonable accommodation and adjustments in the workplace if necessary to enable pregnant employees do their job.
- Beginning Aug. 11, 2023, the public will have 60 days to comment on the proposed rules.

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## Pregnant Workers Fairness Act

- The proposed rules identify four accommodations that should be granted in almost every circumstance: allowing covered employees (1) to have extra time for bathroom breaks; (2) to have food and drink breaks; (3) to drink water on the job; and (4) to sit or stand as necessary.
- The Act requires employers to make accommodations "related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship." The EEOC recently issued proposed regulations to implement the Pregnant Workers Fairness Act, passed by Congress in late 2022.
- The Act requires employers to make reasonable accommodation

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## Pregnant Workers Fairness Act

- For example, an employee may seek an exception to a dress standard to allow for religious garb, or ask for a Saturday or Sunday off for worship, etc.
- Courts have long maintained that employers must provide such religious accommodations unless the request imposes an "undue hardship," defined as "more than a de minimis cost."

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## Pregnant Workers Fairness Act

- The proposed rule contains a "non-exhaustive list" of conditions covered by the Act which includes current pregnancy, past pregnancy, potential pregnancy, lactation (breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth and "having or choosing not to have an abortion." The proposed rule also states that the Act covers postpartum anxiety and depression.
- The EEOC began accepting charges claiming violations of the Act on June 27, 2023.

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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Employee Life Cycle II: Managing Without Missteps – Responding to Workplace Conflict and Anticipating Trouble in a Changing Climate*

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# Employee Life Cycle II: Managing Without Missteps – Responding to Workplace Conflict and Anticipating Trouble in a Changing Climate

Mark D. Tolman Michael Judd

October 12, 2023 | Boise Centre East

1

## Legal Disclaimer and PDF Handbook

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You can scan the QR code to download a PDF handbook of today's seminar.

2

## 20 HR issues during employment: Where to begin?

- Performance evaluation.
- Leave & Remote Work.
- Accommodation.
- Workplace rules and culture.
- Protecting company information.
- Promotions and demotions.
- Job descriptions.
- Dress codes.
- Discipline.
- Pronouns.
- Investigating workplace incidents.
- Bathrooms.
- Drug and alcohol testing.
- Managing workplace conflict.
- Wages, overtime, and hours.
- Avoiding retaliation.
- Health and safety.
- Concerted employee activity; unions.
- Fringe benefits.
- Responding to allegations of harassment

3

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## How do we get performance reviews right?

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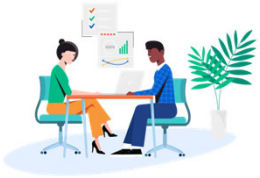
## Getting Performance Reviews Right

Performance reviews that do not accurately reflect performance hurt an employer—and an employee—in numerous ways. A manager must appropriately document performance, and performance problems, in annual reviews and in written warnings.



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## Getting Performance Reviews Right

*Be smart about what you document*

**Actual Employee Evaluations**

- "Since my last report, this employee has hit rock bottom and has started to dig."
- "His men would follow him anywhere, but only out of morbid curiosity."
- "I would not allow this employee to breed."
- "He sets low personal standards and then consistently fails to achieve them."
- "This employee should go far – and the sooner he starts the better."
- "This employee is depriving a village somewhere of an idiot."

7

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## Case Study: be smart about what you document! Ann Hopkins v. Price Waterhouse—Supreme Court

***Ann Hopkins v. Price Waterhouse*:** story of an evaluation gone bad (and resulting in a legal dispute)

- "macho"
- "overcompensated for being a woman"
- "needs a course in charm school"
- "matured from a masculine manager to an appealing lady partner candidate"
- "should walk, talk and dress more femininely, wear makeup, get her hair styled and wear jewelry"

8

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## Getting Performance Reviews Right

*C.A.P.*

**C**onduct

**A**ttendance

**P**erformance

9

9

## Getting Performance Reviews Right

**Golden Rule of Employment Documentation**

***IF IT IS NOT IN WRITING, IT DID NOT HAPPEN!!!***

10

**Avoiding retaliation claims—the most frequently filed EEO claim.**

PARSONS BEHLE & LATIMER

11

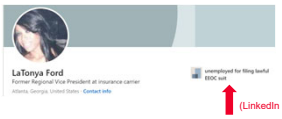
## Retaliation

- State and federal anti-discrimination laws prohibit **retaliation** for reporting a concern about possible discrimination or harassment.
- Retaliation claims are the most frequently filed form of discrimination filed with the Equal Employment Opportunity Commission—and are often paired with other types of discrimination.

12

## Case Study: Perils of Retaliation
## Ford v. Jackson Nat'l Life Insurance—10th Cir.

*Ford v. Jackson Nat'l Life Ins.*, 45 F.4th 1202 (10th Cir. 2022)




**Employee background.** La'Tonya Ford spent four unhappy years at Jackson National where, according to Ford's account, her coworkers were crude, misogynistic and racist.

(LinkedIn post not a judicially binding conclusion)

Business Development Consultant at racist Jackson National - Prudential PLC (Located in UK)
Jackson
Feb 2006 - Oct 2010 · 4 yrs 9 mos
Greater Denver Area

(not the actual name of Ford's former employer)

13

13

## Case Study: Perils of Retaliation
## Ford v. Jackson Nat'l Life Insurance—10th Cir.

**Employee complaint.** Ford eventually complained to management. After that complaint, Ford applied for a new, better position—which she'd done unsuccessfully several times in the past. She didn't get it.

A month later, La'Tonya resigned. She (and the EEOC) sued Jackson for alleged discrimination and retaliation.

**Trial court decision.** A Colorado federal district court granted summary judgment to the employer on all claims, and appeal to the Tenth Circuit was taken.

**. . . the wrinkle.** You'd better believe that La'Tonya's lawyers got all the employer's internal emails…

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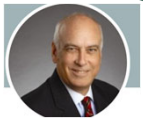
## Case Study: Perils of Retaliation
## Ford v. Jackson Nat'l Life Insurance—10th Cir.

Jackson National VP James Bossert, meet Gary Stone at HR.



*"She has posted for the vacant desk director position in RBD East. I firmly believe that she would attempt to leverage that position into an opportunity to work against the company's interests by furthering her complaint."*

*"You should not express in e-mails sentiments like the one you expressed."*

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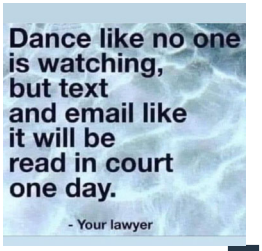
## Case Study: Perils of Retaliation
## Ford v. Jackson Nat'l Life Insurance—10th Cir.

**The result on appeal.** Ford lost on her discrimination claim. But the Tenth Circuit allowed her *retaliation* claim to go forward to a jury trial, calling the VP's email a "key piece of evidence."

**Takeaways**

When a manager lashes out at an employee for complaining about discrimination, even "behind closed doors," the situation goes from bad to worse.

Unless you are speaking with legal counsel, all the things you've said and written about an employee will be "discoverable" in the event of a lawsuit.

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**Take investigations seriously—you may just avoid liability.**

PARSONS BEHLE & LATIMER

17

## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

*Parker v. United Airlines, Inc.*, 49 F.4th 1331 (10th Cir. 2022)

The *Parker* case applies the the "cat's paw theory" of liability, under which a supervisor's improper motive may be "imputed" to an employer.

**Key takeaway.** Given the risks posed by this "cat's paw theory," effective investigation policies and practices may help shield a company from liability.

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## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

**Statutory framework.** The Family & Medical Leave Act (FMLA) prohibits employers from retaliating against employees who exercise their rights under that law by, for example, disciplining or firing an employee for taking medical leave.

**Employee background.** Jeannie Parker worked for United Airlines in its call center as a customer service representative. She took leave under the FMLA for her own health condition (a vision disorder) and to care for her father due to his health condition (cancer).


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## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit


**Supervisor response and recommendation.** Jeannie's supervisor believed she had call-avoidance problems and recommended that United fire her.

- Jeannie spoke to a customer for 4 minutes but failed to disconnect the call for an additional 54 minutes—a "hung call."
- Jeannie placed a customer on hold for 15 minutes while chatting with a coworker and then hung up on the customer.
- Jeannie placed another customer on hold for 20 minutes to "regroup her emotions," and then (allegedly) hung up on the customer.

**Employee response.** Jeannie denied she had call-avoidance problems, that customers ended the calls and/or that delays were the result of computer problems. She believed her supervisor made up the reasons for termination to retaliate against her for taking FMLA leave.

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## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

**Additional independent investigation.** United took a critical additional step here. Prior to terminating Jeannie, United independently investigated the matter by appointing an independent manager to review the call-avoidance concerns. After meeting with Jeanie and reviewing the call record, this manager sided with the supervisor, agreeing with her recommendation to fire Jeannie.

**Formal appeal process.** United's policies also allowed Jeannie to appeal her termination by submitting a grievance to a second independent manager. Jeannie did. On appeal, the second manager also concluded that Jeannie had violated the company's call-avoidance policies and upheld the termination decision.

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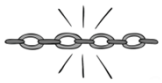
## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

**The trial court decision.** On that record, the district court granted summary judgment in favor of United. Jeannie appealed, arguing that the district court misapplied the "cat's paw" theory of liability.

> *Remember, the "cat's paw theory" of liability theory imputes a supervisor's unlawful motive to an employer if the motive influenced the employer's decision.*

**Key issue on appeal.** The Tenth Circuit assumed for the sake of argument that Jeannie's supervisor *wanted* to retaliate. "With that assumption," the Court explained, "we'd need to decide whether United's procedures had broken the causal chain between the supervisor's retaliatory motive and the firing."



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## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

**Tenth Circuit decision on appeal.** In affirming the district court's summary judgment in United's favor, the Tenth Circuit held:

> *"In our view, United broke the causal chain by directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation."*

The Court added that the "cat's paw theory" of liability doesn't apply when independent decisionmakers—who are "higher up in the decision-making process" than the allegedly biased supervisor—"conduct their own investigations without relying on biased subordinates."

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## Case Study: Value of Independent Investigations
## Parker v. United Airlines—10th Circuit

**Takeaways**

Thorough investigations not only will help you reach the right result but also can provide a defense to liability—i.e., will take the "cat's paw liability theory off the menu.

Finding the right investigator is key—prioritize independence and neutrality.

For United, it's independent review "broke the chain" only because it was *truly* independent—the reviewers didn't rely on the positions taken by the allegedly biased supervisor.

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24

## Managing workplace conflict: watch for lurking discrimination claims.

PARSONS BEHLE & LATIMER

25

## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

*Carter v. Transport Workers Union of Am.*, 602 F. Supp. 3d 956 (N.D. Tex. 2022)

*What do I do when my employees fight online?*

> [37] Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). "The term [*577] 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Thus, "[a]n employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but it is not required to incur undue hardship." *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000).

***What does Title VII require?***

- Title VII prohibits employers from discriminating against employees based on their religion.
- Employers must accommodate employees' religious practice unless doing so would cause an "undue hardship."

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## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

- What might this look like in practice?
- Audrey Stone (left) was the president of a flight attendants' union.
- That union represented Charlene Carter (right), who was a Southwest Airlines flight attendant from 1996 to 2017.
- Carter had a long-running dispute with the union, which stretched back to at least 2012.

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## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

- In January 2017, some union members, including Stone, participated in the "Women's March on Washington, D.C."
- Union members posted pictures from the Women's March on social media and their attendance was profiled in the union newsletter.
- Carter says that Southwest provided support for those attendees.

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## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

First off I do not want your Propaganda coming to my inbox...that being said I Support the RIGHT TO WORK Organization 100% ABOVE what I have to pay you all in DUES! YOU and TWU-AFL-CIO do not Speak For Me or over half of our work group...We have a RECALL right now that we want adhered to with over the 50+ 1% and growing. WE WANT YOU all GONE!!!!!

---

P.S. Just sent The RIGHT TO WORK more money to fight this.... YOU all DISGUST ME!!!!! OH and by the WAY I and so many other of our FAs VOTED FOR TRUMP....so shove that in your Propaganda MACHINE! [sic]

- In February 2017, Carter sent a series of angry Facebook messages to Stone.
- Stone complained to management, who brought Carter in for a "fact-finding meeting."
  - Carter says that at that meeting, Southwest told her that she "cannot post ideological views on a personal Facebook page with a connection to the workplace."
- Southwest fired Carter a week later.

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## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

- Carter sued Southwest, arguing that her religious beliefs "require her to share with others" her views on religious issues, including abortion, and that Southwest fired her "for engaging in the religious practice of sharing religious beliefs" on her personal Facebook page.
- Finding that Carter had shown "more than a sheer possibility that her religious beliefs and practice were a factor" in her firing, the Texas court allowed her claims to go forward to trial.
- At a July 2022 trial, a jury sided with Carter, and awarded her $5.1 million in damages.

***What could Southwest have done differently?***


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## Case Study: Managing Workplace Conflict
## Carter v. Transport Workers Union—N.D. Texas

### Coda: Judge Brantley Starr and a Damages Cap

MEMORANDUM OPINION AND ORDER

BRANTLEY STARR, UNITED STATES DISTRICT JUDGE

P1 Bags fly free with Southwest. But free speech didn't fly at all with Southwest in this case. Charlene Carter—a pro-life Christian—worked as a Southwest Airlines Co. ("Southwest") flight attendant for over two decades. After Carter expressed her pro-life beliefs to her union president, Southwest fired Carter. A jury found that Southwest and the flight attendants' union, Transport Workers Union Local 556 ("Local 556"), discriminated against Carter for her protected speech about religion and unions, and it awarded her compensatory and punitive damages. Carter now moves for entry of judgment on that verdict. [Doc. No. 351].

d. Political Views

[51] Lastly, Southwest decries Carter's "controversial" Facebook posts about "George Floyd; transgender issues; COVID-19 conspiracy theories; alleged manipulation of COVID-19 death numbers; and the alleged evils of George Soros, Bill Gates, and Anthony Fauci." [52] Southwest may "wanna get away" from flight attendants with whom it disagrees politically, but that won't fly in this motion. [53]

P6 Perhaps Southwest missed the point of the jury verdict, so the Court must state it again. The problem in this case was not speech. The problem was intolerance of speech. In reinstating Carter, the Court is not concerned with Carter's future speech. The Court is concerned with how Southwest will treat her because of her future speech.

"Title VII caps the amount of punitive and compensatory damages from an employer with 'more than 500 employees' to '$300,000.'"

[99] *Self-Own*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/self-own (last visited Nov. 27, 2022) (defining "self-own" as "a statement or an act in which you unintentionally embarrass yourself").

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## Managing remote work ADA accommodations.

32

## Employees Who Want Remote Work as an Accommodation

- Recall that under the ADA, you do not need to excuse an essential job function as an accommodation.
- As a result, if onsite work is essential, you do not need to excuse it for an employee who cannot return to onsite work because of a disability (although you may need to provide other accommodations).
- Anticipate that employees may claim that onsite work is non-essential and head those arguments off with clear communication.

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## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir. 2022

*Mobley v. St. Luke Health System, Inc.*, 53 F.4th 452 (8th Cir. 2022)

- Joseph Mobley worked as a Patient Access Supervisor for the St. Luke's Hospital system in Kansas City, MO.
- He supervised a team of customer service employees who assisted patients with insurance questions via telephone.
- Like all other supervisors, Joseph worked a hybrid schedule—three days onsite and two days remote.
- The Hospital expected Joseph to work three days onsite to supervise.

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## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir. 2022

- Mobley suffers from Multiple Sclerosis.
- He asked for an accommodation of additional time at home during MS flareups.
- The Hospital denied Mobley's request on the ground that onsite work was essential for Mobley to effectively supervise his team.
- But the Hospital offered an alternative accommodation—leave when needed for flareups.

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## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir.

Mobley resigned and sued his employer, alleging that it had failed to accommodate his disability as required by the ADA.

**The hospital's argument.** The Hospital asked the court to enter summary judgment dismissing Mobley's claims instead of moving forward with a jury trial, on the grounds that: (a) onsite work was essential, and (b) it provided an alternative leave accommodation.

**The trial court's decision.** The district court sided with the Hospital, ruling that it saw no "continuous pattern of discriminatory conduct or a change in job responsibilities." Mobley appealed.

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## Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir.

**A mixed ruling on appeal.** The 8th Circuit rejected the Hospital's argument that onsite work was essential.

The Court noted that the Hospital offered only its own conclusory opinion that onsite work was essential and failed to provide evidence that Joseph could not effectively perform all essential functions remotely.

> By allowing Mobley to consistently work remotely aside from his medical condition, St. Luke's implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time. Moreover, while working remotely, Mobley continued to receive positive performance reviews, reflecting that he was able to effectively supervise his employees despite not being on site.

***However, the Court still found in favor of the Hospital because it agreed that the Hospital provided an alternative leave accommodation.***

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## Case Study: Remote Work as an Accommodation Mobley v. St. Luke Health—8th Cir.

**Takeaways**

If you provide a hybrid schedule of telework and onsite work, you may face steeper challenges to deny an ADA accommodation for additional telework.

If you deny a telework accommodation request because you deem onsite work essential, document the specific ways that telework is essential.

Better yet, plan ahead by documenting the essential nature of onsite work in your **job descriptions.**

If you provide a provisional telework accommodation, document that you are temporarily excusing some essential job functions and provide that context in your performance reviews.

Always analyze alternative accommodations, including leave and reassignment to a vacant position, before closing out your accommodation analysis.

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**Train your supervisors and managers to take concerns about harassment seriously.**

39

## *Case Study: train managers to take harassment seriously Fried v. Wynn Las Vegas*—9th Cir. 2021

**Title VII:**

Whose actions can create a hostile work environment for the purposes of a sexual harassment complaint?

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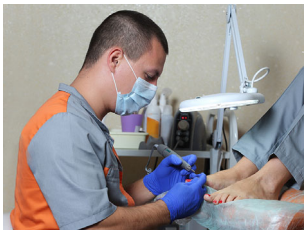
## *Case Study: train managers to take harassment seriously Fried v. Wynn Las Vegas*—9th Cir. 2021

- Fried was a manicurist at the hotel.
- Fried was assigned to provide a pedicure to a male customer. The customer asked Fried to give him a massage. Fried responded the salon did not offer that kind of service, and the customer made an explicit sexual proposition. Fried immediately reported the conduct to his manager.
- In response, Fried's supervisor ***directed him to finish the pedicure and "get it over with."***
- Fried attempted to speak with the manager about the incident on two occasions afterward, but she told him she would talk to him "when she got a chance." She never did.



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## *Case Study: train managers to take harassment seriously Fried v. Wynn Las Vegas*—9th Cir. 2021

- Fried sued Wynn, alleging that he was the victim of a hostile work environment.
- The district court disagreed and granted Wynn's motion for summary judgment. Fried appealed.

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## *Case Study: train managers to take harassment seriously*
## *Fried v. Wynn Las Vegas*—9th Cir. 2021

**The Ninth Circuit Reversed the District Court . . .**

- The Court said: the supervisor's response to the customer's unwelcome sexual advances could create a hostile work environment, because the supervisor not only failed to take immediate corrective action, but also directed Fried to return to the customer and complete the service. The supervisor's direction not only discounted and condoned the customer's sexual harassment but also conveyed that Fried was expected to tolerate it as part of his job.

**Of course, it didn't help that the manager was too busy to intervene!**

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## *Case Study: train managers to take harassment seriously*
## *Fried v. Wynn Las Vegas*—9th Cir. 2021

**Takeaways**

- State and federal anti-discrimination laws protect employees from harassment in all their interactions as an employee. As a result, an alleged harasser could be an employee, a customer, or a vendor—anyone an employee interacts with in connection with their job.
- Supervisors and managers must take concerns about possible harassment seriously.
- When managers learn about possible harassment (they've observed it or someone told them about it), they immediately intervene. Empower managers to separate an employee from the alleged perpetrator of harassment if needed. And to get the matter in the hands of HR right away!

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## Thank You!


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11th Annual **Idaho Employment Law Seminar**

# *Navigating the ADA: Case Studies on Reasonable Accommodation*

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# Navigating the ADA: Case Studies on Reasonable Accommodation

Christina M. Jepson

October 12, 2023 | Boise Centre East

1

## Legal Disclaimer and PDF Handbook

*This presentation is based on available information as of Oct. 12, 2023, 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 scan the QR code to download a PDF handbook of today's seminar.

2

2

## Reasonable Accommodation Under The ADA

ADA
Americans with Disabilities Act

The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . Unless such covered entity covered entity can demonstrate that an accommodation would be an undue hardship."

3

3

## Reasonable Accommodation Under The ADA

An "otherwise qualified individual" is an individual who:

1) can perform their essential job functions of a job in spite of their disability; or
2) who can perform the essential functions of their job with a reasonable accommodation.

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## Reasonable Accommodation Under The ADA

Reasonable accommodations include, for example, the following:

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquisition or modification of equipment of devices
- Adjustment or modifications of examinations, training materials, or policies
- The provisions of qualified readers or interpreters
- Other similar accommodations

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## Reasonable Accommodation Under The ADA

The ADA **does not** require an employer to do any of the following as a reasonable accommodation:

- Relieve an employee of any essential job function
- Modify an employee's essential job function
- Reassign existing employees or hire new employees

"Essential job functions" are those that "bear more than a marginal relationship to the job at issue."

Essential job functions are determined by looking at the employer's judgement, employee's written job description, the amount of time performing the job function, and the consequences of not requiring the employee to perform the function.

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## Reasonable Accommodation Under The ADA

When a qualified individual with a disability requests a reasonable accommodation the employer and employer are required to engage in a flexible interactive discussion to determine the appropriate accommodation.

An employer **must** engage in the interactive process.

However, an employer **need not** accept an employee's preferred accommodation and **may choose** an accommodation that is less expensive or easier to provide.





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## Case Study #1

8

## Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- Nicholas Stover was hired as a seasonal customer service representative at an Amazon Call Center.
- Amazon tracked call center employee's "aux" (auxillary) status that indicated whether the employee was on a call, in a meeting, going on break.
- Eleven days after hire, Stover told HR he had a "**chronic illness**" that required him to "frequently visit the restroom" without notice and requested "additional break time to visit . . . the restroom, as needed."
- Amazon interpreted this as a request for accommodation and gave him paperwork to complete.



9

## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

- Stover did not complete the paperwork, and Amazon administratively closed the request.
- After several months, Stover was hired as a non-temporary worker, reopened his accommodation request, and completed the necessary paperwork.
- Stover stated he had a gastrointestinal issue that "required more breaks for bathroom use" and necessitated him "missing work or taking time off" to attend to his condition.
- The paperwork also included a note from Stover's gastroenterologist that said Stover needed to have a bathroom "readily available" to him.

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## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

Because the nature Stover's request was unclear, Amazon asked for more information.

In response, Stover requested

- his shift be reduced from 40 to 32 hours and
- he be provided the ability to "**use the restroom whenever he had an episode**."

Amazon asked for additional medical documentation from a health care provider. Stover did not provide additional documentation. Amazon closed the request.

Stover testified that because he had been "**told no**" on "**multiple accommodations**" that he "**was done**" with the process.

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## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

Stover was assigned a new manager Michelle Nemeth. Stover felt that they had a "personal" conflict and that Nemeth maintained an "overall malaise" towards him. While Nemeth was his supervisor, she:

- Issued Stover a written warning for having the lowest customer service rating on his team. **Stover responded with an email** that said he was "**pissed**" about how the company was treating its "most influential employee" and that Nemeth would find herself facing a "**shit storm that [would] funnel larger and larger**."
- Warned Stover he was taking excessive break time and personal time. **Stover blamed food poisoning**.
- Warned Stover he had more missed time than any other employee. Stover **blamed his computer and it was replaced.**

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12

## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

- Nemeth formally counselled Stover about his excessive breaks. Stover then said it was **due to his Crohn's disease**.
- Nemeth recommended he make an accommodation request to HR, but Stover refused to do so.
- Stover continued to blame computer issues for his excessive breaks. Nemeth discovered Stover had been routing his calls to other employees at the end of his shift.
- In light of this "egregious" behavior Stover was fired.

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13

## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

- Stover sued Amazon alleging that they had **failed to provide a reasonable accommodation for his disability**.
- Stover argued that **two reasonable accommodations** would have accommodated his disability:

  (1) to have "**bathroom facility access** as required by his disability" and

  (2) **to adjust his schedule once approximately every 56 days** to receive infusions to treat his condition.

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## Stover v. Amazon.com, LLC, No. 21-5421
2022 WL 94608 (6th Cir. Jan 10, 2022)

- The court found that Stover **had not requested** either of these reasonable accommodations. **First**,
- Stover's "initial requests—proposals like 'more breaks' or a 'readily available' restroom—were . . . **lacking in specificity, so much so that they were tantamount to failing to make any accommodation request whatsoever."**
- **To qualify as a accommodation request, the request "**must reasonably inform an employer about the nature of the requested accommodation, thereby putting the employer on notice of whether and what type of accommodation might be appropriate."
- Stover's failure to provide the additional requested documentation did not provide "Amazon fair notice of his needs."

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## Stover v. Amazon.com, LLC, No. 21-5421

2022 WL 94608 (6th Cir. Jan 10, 2022)

- **Second**, the Court found:
- Stover had the burden to "show that he requested the specific accommodation," as "**a plaintiff may not rely on accommodations that he did not request.**
- Stover "failed to establish that he requested a scheduling change to receive medical treatment for his condition every eight weeks."
- Even if the Court were to "generously" interpret Stover's request for a scheduling change as identical to the one claimed in his lawsuit, he "**never provided Amazon with supporting material demonstrating the nature of the requested accommodation, even after Amazon explicitly requested that information.**"

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## Case Study #2

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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

Erin Ryerson was a tax auditor for the Jefferson County Commission in Alabama

Ryerson had ulcerative colitis—chronic inflammatory bowel disease

She requested that as a reasonable accommodation:

- She be allowed to work a flexible schedule – meaning permitting her to come in late when necessary and make up the time by staying late or coming in early another day; or
- She be allowed to work from home

The County said she needed to work at the office or in the field during business hours

Thoughts?



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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

Pivotal question: whether the essential functions of the job of tax auditor required Ryerson to work on site during regular business hours

- Employer's judgment
- Written job description—especially if before advertising or interviewing
- Past performance

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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- What did the written job description say:
  - Prepare for and conducts external audits and personal property appraisals
  - Prepares audits reports
  - Enforcement of revenue laws
  - Tax advice and responds to questions from taxpayers and members of public
  - Examination of financial records, operations, and accounting systems
  - Verifying, analyzing, and reconciling financial records
  - May require travel outside of County
- Thoughts? What does this not say?

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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- Email correspondence about job:
  - Before accommodation became an issue
  - "Performed primarily in the field at the office location of the business"
- Employer's judgment
  - Cannot be performed at home because of sensitive and confidential nature of financial records
  - County did not allow auditors to access its tax software remotely
  - Records must be viewed at the taxpayer's office or at the revenue office
  - Must work regular business hours so they can schedule and perform audits at taxpayer's offices and to answer questions from taxpayers and public

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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

- Ryerson argued that she had the ability to work at home and County did not show that teleworking would cause undue hardship
- 11th Circuit focused on confidential records and need to examine records at taxpayer's office
- Attendance records
  - Absent entire day more than 75% of the time
  - Came to work 27 of 106 workdays
  - Was generally late between 20 minutes and several hours
  - Never worked more than 27.75 hours in a week and many weeks she did not work at all

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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

"Although a modified work schedule may be a reasonable accommodation in some circumstances, the ADA does not require an employee to eliminate an essential function of a job in order to accommodate a disabled employee."

The Court ruled in favor of the County because the employee needed to review confidential documents at work or in the field and needed to conduct work during regular business hours




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## Ryerson v. Jefferson County Commission

No. 20-1684, 2021 WL 3629906 (11th Cir. Aug. 17, 2021)

What could the employer have done better?

What is the lesson from this case?

What if the employee really only needed to come in late occasionally or work a modified schedule?




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## Case Study #3

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- John Thompson was employed by Microsoft as an account technology strategist.
- In 2015, requested accommodations for his Autism Spectrum Disorder ("ASD") including
  - working on only one project at a time,
  - being provided an assistant to assist with administrative tasks, and
  - permission to work from home.
- During discussions regarding the accommodations requested, Thompson expressed interest in transferring to an Enterprise Architect ("EA") position - a "senior level executive position" serving as a liaison between Microsoft and its clients.

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- HR informed Thompson that some of his accommodations were incompatible with the EA role because it "required strong leadership and people skills" and "executive-level interpersonal, verbal, written and presentation skills."
- Thompson **withdrew his request for accommodation** and **asked that his new manager not be informed of his ASD diagnosis.**
- Thompson applied and was hired for an open EA position and moved from New Jersey to Austin for his job.

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- Although he initially received some positive feedback, Thompson did not do well with his **first and only assignment**:
  - His supervisor indicated he lacked the "skillset, experience and ability to lead and develop the required business architecture and framework."
  - He did not deliver on time and the quality of his work was subpar.
  - The client requested he not continue on the project.
  - Thompson was removed and not assigned to another EA project.
- **During a performance review Thompson told his manager he had ASD**.
- Thompson's manager instructed him to contact human resources to discuss reasonable accommodations.

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

Thompson requested the following accommodations:

- A noise-cancelling headset;
- A specialized job coach with experience coaching executives and/or technologists with ASD;
- Training classes on managing ASD and ADHD in the workplace,
- Specialized software to support time management and organization for individuals with ASD and ADHD;
- An individual to assist in translating/interpreting information provided verbally by Thompson into the appropriate written format (i.e. PowerPoint, Word, email, etc.);
- A scribe to record meeting notes for Thompson;
- An individual to assist with administrative tasks, such as travel booking, time and expense reporting, meeting scheduling, routine paperwork, etc., as well as with monitoring timeliness and providing reminders;
- A handheld voice recorder and access to a voice transcription service;
- Provision of specialized training in managing individuals with ASD and ADHD to Thompson's managers; and
- Permission for Thompson to bring an advocate to performance reviews.

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- Microsoft agreed to provide most of the accommodations, but **rejected** the following because they would excuse Thompson from **performing essential job functions:**
- **Request** for an individual to assist in translating his verbal information into writing because **EAs were expected to clearly communicate their ideas to clients and 'the work product would be unacceptably watered down if filtered through a person with less or no experience in basic role requirements of architecture, strategic development, business alignment . . . and other areas.'"**
- **Request** for individuals to help him with administrative tasks and recording meeting notes because **the EA role requires responding to clients and others quickly and under dynamic conditions**.
- **Request** to hire full-time assistance to handle basic email and administrative tasks because these were "**essential EA functions**."

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- Microsoft and Thompson engaged in negotiations to see if Thompson could suggest alternate accommodations that Microsoft would find reasonable.
- Thompson continued to insist on accommodations which Microsoft had rejected.
- Microsoft ultimately decided it could not reasonably accommodate Thompson's request and decided to reassign him. Thompson objected to the reassignment but said that he would be willing to work with Microsoft to make alternative arrangements.
- Microsoft placed Thompson on job reassignment. Thompson gave his resume to Microsoft but did not pursue any other job because he would not relocate or accept a lower salary.
- Thompson took long term disability and never returned to work.

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

The court concluded that Thompson was not a **qualified person under the ADA** because:

- His "requests for individuals to assist him with translating verbal information into written materials, recording meeting notes, and performing administrative tasks were unreasonable because they would exempt him from performing **essential functions**."
- The court **relied on the EA job description** stated the role is a consulting role involving "constant interaction with the Account Team dedicated to their customer" and "working closely with other Architects, Consultants, and other experts. Qualifications and requirements" included "strong people skills, the ability to coordinate physical and virtual resources and initiatives, executive-level interpersonal, verbal, written and presentation skills, [and] the ability to provide a trusted voice at the decision-making table."
- The court also noted that the "requested accommodations interfered with the EA's essential functions involved in communicating with the client and managing multiple complex projects in a fast-paced environment."

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## Thompson v. Microsoft Corporation
2 F.4th 460 (5th Cir. 2021)

- Finally, the court relied on Microsoft's argument that "Thompson's requests would **require hiring someone** to work with Thompson **on a full-time basis**, indicating that EAs spend a considerable amount of time on functions Thompson was seeking to have someone else do. **As such, these requests excused him from performing essential functions."**
- Finally, Microsoft's placement of Thompson in the job-reassignment program is **precisely one of the possible accommodations the ADA contemplates**, so by attempting to reassign Thompson, Microsoft was continuing the interactive process rather than terminating it. Because Microsoft had the "ultimate discretion to choose between effective accommodations," it was justified in placing Thompson on job reassignment over his objections.

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## Case Study #4

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Mia Bennett was a nursing student who suffered from generalized anxiety disorder and panic attacks.

Bennett took Ativan to treat her panic attacks. Ativan could stop her panic attacks within five to ten minutes. Otherwise, the panic attacks could last up to an hour.

Bennett's pet Pembroke Welsh Corgi, Pistol, was a medical alert dog who was trained to recognize an oncoming panic attack and to signal Bennett to take her medication to stop the attack.

Pistol was home trained by Bennett

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

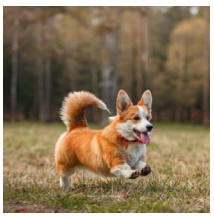
Bennett was assigned to intern at Hurley Medical Center on floor 7E which included numerous infectious disease and immunocompromised patients. Her internship was a clinical nursing rotation.

Two weeks before she started her internship Bennett emailed Hurley's Human Resources Department to apply for an accommodation to allow Pistol to accompany her during her rotation.

She submitted a statement from her health care provider stating Pistol would alert Bennett to oncoming panic attacks and allow her to take steps to avoid the attack.

Hospital did not request further information.

The request was approved by Hurley's Benefit, Compensation, and Recruitment manager, Summer Jenkins, provided that the use of the service dog complied with Hurley's Policy on the use of service animals.



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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

- Policy stated in part:
  - "A Service Animal is permitted in areas of the Facility where patients or the public are allowed, provided the presence of the animal does not require modification of policies, practices or procedures, if such modification would fundamentally alter the good, services, program, or activity of the Facility; or would jeopardize the safe operation of the Facility . . ."
  - "A Service Animal is generally permitted in inpatient and outpatient areas unless an individualized assessment is made to exclude a Service Animal."
  - Generally cannot be permitted in "patient units where a patient is immunosuppressed or in isolation."


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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On Bennett and Pistol's first day, a clerk on Floor 7E suffered a severe allergic reaction to Pistol that required medical treatment and caused her to be sent home leaving the nursing station short-staffed.

That same day a patient also had a mild allergic reaction to Pistol.

It was also discovered that another nurse who worked on Floor 7E, but who was off for the day, also had a severe dog allergy. She was removed from Wednesdays for the rest of Bennett's rotation.


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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Jenkins decided to reevaluate the decision to accommodate.

Bennett and Jenkins spoke over the next week about a possible solution including putting Pistol in a shed defender which is a "lycra type of body suit" that minimizes allergic reaction.

However, Bennett was unable to find a shed defender that would fit Pistol and emailed Jenkins saying she was looking into other options. Bennett did not follow up. The Hospital did not follow up.

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

After another discussion with Bennett, on September 15, human resources sent an emailing rescinding the accommodation. However, they offered to allow Pistol to come to work with Bennett and to be crated during patient care time.

On September 16, Bennett came to the internship without Pistol.

On September 17, Bennett sent an email stating the proposed accommodation would not work and that she would like to have a meeting, including with representatives from the University (Director of Nursing and Disability Services Coordinator), to discuss the issue further. Human resources agreed to the meeting.

On September 21 a meeting took place where the University representatives aggressively advocated to allow Bennett to have her service dog accompany her.

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On September 22, human resources sent an email to Bennett stating that they could not accommodate Bennett's request due to the risk of allergies among patients.

- The email noted that the University representatives' suggestions that staff or patients with allergies be relocated to other floors during the internship were unworkable and would compromise patient care.
- The email also cited Hurley's policy on the use of service animals which required an individual assessment, and which prohibited the use of service animals that would "jeopardize the safe operation of the facility."
- The email explained that after consultation with human resources, risk and legal, and medical care providers and based on objective evidence that accommodating Bennett's request would jeopardize patient safety.
- In the email, the hospital offered to allow Pistol to be crated on the 8th floor, to allow numerous breaks to visit Pistol, and to make every effort to accommodate unscheduled breaks

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

On October 6, following additional conversations among Hurley's staff, Jenkins sent another email to Bennett stating that she could crate Pistol on the 8th floor during her internship and reiterating that she would be given breaks and that unscheduled breaks would be accommodated.

At some point Hurley also offered to provide Bennett with tutoring to make up for time she could not spend on her rotation. However, Bennett rejected this offered because tutoring "could not replicate the patient experience"

Bennett finished her rotation without Pistol and without suffering panic attacks.

Subsequently, Bennett completed one rotation at another facility without Pistol and two rotations at other hospitals where she was allowed to have Pistol accompany her and received no patient complaints.

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

Bennett sued alleging that Hurley violated the ADA by denying her request for reasonable accommodation.

The trial court granted summary judgment to Hurley on the grounds that Pistol jeopardized the health and safety of patients of staff.

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

First, the court found that Hurley had conducted a proper individual assessment because it had consulted with a medical provider, its risk and legal department, and considered objective evidence before making it decisions.

Second, the court also found that the decision was not based on speculation or generalization's because the decision was only made after Pistol had actually caused allergic reactions.

Third, the court found that the hospital had properly assessed whether a modification could mitigate the risk by offering to allow Pistol to stay in a crate on the 8th floor.

The trial court also found that it was reasonable for Hurley to conclude that Pistol posed a considerable and direct threat to health. In less than a day Pistol had cause allergic reactions. This risk was especially great because Bennett was working on Floor 7E with immunocompromised patients.

Finally, the court noted that even if Hurley could have rearranged nursing schedule to find nurses without dog allergies this would interrupt continuity of care and endangering patients.


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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

The court also rejected Bennet's argument that Hurley had failed to engage in the interactive process by revoking her accommodation without consulting her and never responding to her email about the shed defender.

The court found that Hurley had consulted with Bennett the week before withdrawing the accommodation and in the email withdrawing the accommodation had indicated that it was "remained open to continue dialogue on the matter."

The court also found that Hurley had not failed to follow up on the shed defender email because Bennett had said she was looking for other options and didn't inquire further.

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## Bennett v. Hurley Medical Center

No. 21-CV-10471, 2023 WL 319925 (E.D. Mich. Jan. 19, 2023)

What did the employer do right?

What could they have done better?

Do you need a service animal policy?

What if one employee needs a service dog? Another employee is allergic? And a third employee is Muslim and being around dogs is inconsistent with their religious beliefs? A fourth employee has a dog phobia?



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## Case Study #5

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## Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Jennifer Harkey worked for NextGen Healthcare Incorporated.

Harkey attended an out-of-town conference with several other NextGen employees.

One night, around midnight, Scott O'Donnell, another NextGen employee at the conference heard a knock at his hotel room door and opened it.

Harkey was standing at the door wearing nothing but a black cotton robe**. Harkey entered the room, got in O'Donnell's hotel bed, pulled up the sheets, and fell asleep.**

O'Donnell was unable to wake Harkey. O'Donnell contacted NextGen's director of human resources, Jill Burke, who was also at the conference. Burke woke Harkey and got her back to her hotel room.




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## Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Harkey apologized and stated that she must have been sleepwalking which she had done infrequently since she was a child.

The next morning Burke suspended Harkey, placed her on paid leave, sent her home from the conference and told her to conduct a doctor.

Harkey conducted a doctor and informed Burke she had scheduled an appointment. However, before the appointment could take place Harkey was fired.

Harkey sued alleging NextGen violated the ADA by terminating because of her sleepwalking.

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## Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

Harkey sued, alleging NextGen violated the ADA by terminating her because of her disability, i.e., sleepwalking.

The Fifth Circuit affirmed on the grounds that "even if her sleepwalking disorder was a 'disability' under the ADA, she was fired because of what happened when she sleepwalked."

"She entered a male co-worker's room just after midnight, uninvited and wearing only a robe, and got into his bed. Set aside any peripheral explanations for her actions, NextGen now had a situation on its hands. A male employee had an unconscious-but-somehow-active female in his hotel room, under the covers in his bed, while he was on a work trip."

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## Harkey v. Nextgen Healthcare Inc.

No. 21-50132, 2022 WL 2764870 (5th Cir. July 15, 2022)

- Harkey could not show she was fired **because she had a sleepwalking disorder**. She was fired because of **what she did** when she was sleepwalking.
- Fifth Circuit cited two cases where an employee was fired **for inappropriate behavior that could potentially have been caused by a disability**:
  - In one case, a court found that an employer did not violate the ADA by firing an employee with PTSD after he got in angry and confronted his manager with profanity. The Court found that even if the outburst was arguably caused by his PTSD that the "**ADA does not insulate emotion or violent outbursts blamed on an impairment**."
  - In another case, an employee with bipolar disorder verbally abused his supervisor for denying a vacation request. The employee was fired for insubordination and the court found that, even if the employee's reaction was caused by his bipolar disorder, he could not use the ADA as an aegis **and thus avoid accountability for his own actions**.

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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Out of Sight, Not Out of Mind: Compliance and Collaboration for a Remote Workforce*

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# Out of Sight, Not Out of Mind: Compliance and Collaboration for a Remote Workforce

Elena T. Vetter Andrew V. Wake

October 12, 2023 | Boise Centre East

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## Legal Disclaimer and PDF Handbook

*This presentation is based on available information as of Oct. 12, 2023, 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 scan the QR code to download a PDF handbook of today's seminar.

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## It's In the Headlines . . .

Workers Are Moving First, Asking Questions Later. What Happens When Offices Reopen?


Facts of NPR news story:

- Denver, Colorado couple moved to Minnesota.
- At first, they did not tell their employers about the move.
- Later, they told employers it was only temporary (not mentioning they bought a house).
- Finally, they confessed the move was permanent.

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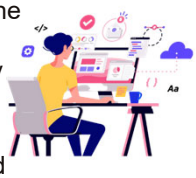
This same story is happening all over the country, perhaps fueled in part by the pandemic and the increased availability of remote work.



The remote law challenges of Idaho-based employees are manageable, and we'll discuss how to manage them today.

The challenges of remote employees located outside Idaho, if unplanned, are another matter.

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- Since 2020, about 2.4% of Americans, or 4.9 million people, say they've moved because of remote work, according to surveys from freelance marketplace Upwork.
- Upwork's recent polling shows the migration is poised to continue: Almost 1 in 10 Americans plan to move to work remotely.
- Since January 2020 in the US, monthly remote job postings have tripled, according to Tecna, a tech industry trade group association, and quintupled for tech roles such as software developers.
- The share of HR professionals confident they knew where the majority of their employees were working declined from 60% in 2021 to 46% this year, according to Topia, which helps companies manage distributed workforces.

"Compensation Is Becoming an Even Bigger Headache in the Remote-Work Era"
By Matthew Boyle and Olivia Rockeman, May 20, 2022
Bloomberg Businessweek: https://apple.news/ABgJjqMyxTcyMrtKX-RRsXg

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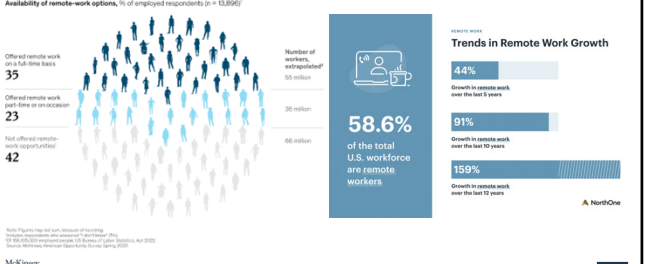
**Of job holders in the United States, 58 percent—the equivalent of 92 million people—say they can work remotely at least part of the time.**




McKinsey & Company

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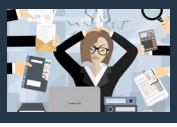
## A Partial List of Some of the Problems of Unplanned Remote Work:

- The United States has a national government, state governments, and local governments. They each have powers over employers and make laws that typically apply to and protect people subject to the various jurisdictions. And these laws are NOT ALWAYS UNIFORM!
- Minnesota employment laws likely now apply to the NPR couple.
- Minnesota tax issues arise, such as state employment and business taxes.
- Minnesota business licenses required?
- Will your worker's compensation and health insurance policies apply in Minnesota?
- Recruiting: will employees still want to work for you if you do not allow them to live where they want?



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## Examples of the Scope of the Legal Problems, Just in the West:

- California employment laws…enough said.
- Lots of variation in state laws related to COVID-19, masks, vaccines, etc.
- Arizona law requires paid leave.
- Montana law prohibits age discrimination against any age, not just 40 and above, and prohibits termination without "good cause" as defined by the statute. Idaho does not do either of these things.

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## Examples of the Scope of the Legal Problems, Just in the West:

- Nevada law requires daily overtime (for more than 8 hours in a day).
- Colorado law strictly limits the use of non-competes and makes violation of that law a crime. Not true in Idaho law.
- International issues?

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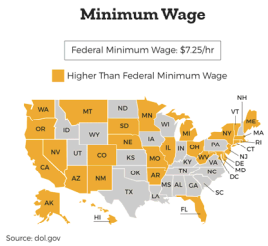
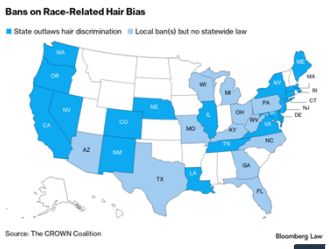
## State Laws: How Can They Conflict?

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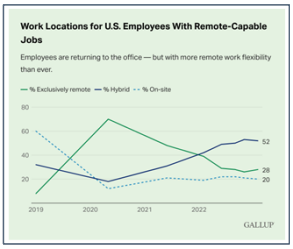
## Avoiding Problems Before They Arise

*Taking a proactive approach to remote and hybrid workforces*




- After being forced to adopt remote-work policies in 2020, employers are increasingly adopting hybrid models.

*What does that mean for workplace policies?*

- Compliance with multiple state laws.
- Impact of this new compliance obligation on your policies and handbooks.

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## Tips from National SHRM and Parsons:

- Keep track of where employees live and work; require notice of a move out of state before it occurs. Condition employment on your right to decide whether the employee can work for you from anywhere.
- Ignorance is not a defense against violating local law. If you allow remote work, learn about and comply with applicable law.
- Employers should frequently check in with remote workers to verify their location and compliance with agreements.

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## Tips from National SHRM and Parsons:

- Update policies and handbooks on remote work rules.
- Offer letters and remote-work agreements should define where work can be done and should require permission before moving out of state.
- Be prepared to end relationships with workers who move to places that do not work for you.

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## With so many teleworkers, at least we should not need to worry as much about harassment claims. Right?

**Wrong…**

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## Workplace Harassment in the Remote Era

**"Wouldn't You Like to Work a Little Closer to Home?"**

Over half of HR managers surveyed said reports of harassment had increased during the pandemic.

**Multiple surveys have shown an increase in workplace harassment during the pandemic.**

- Respondents to two different surveys (the Purple Campaign and Project Include) reported a 25% increase in gender-based harassment during the pandemic.
- One also showed a 23% increase in age-based harassment of workers over 50, and 10% in race-based harassment.
- A Deloitte survey revealed 52% of women reported experiencing some form of harassment or microagression in the past year.
  - Likelihood increased with the intersectionality of another protected characteristic such as race, age, or sexual orientation.

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## Workplace Harassment in the Remote Era

**What's Causing the Uptick in Harassment Claims?**

- Increased communication in one-on-one settings (chat, text, e-mail, phone) where it may feel like no one can overhear. Zoom may also reveal private information (e.g., same-sex relationship, religion, national origin).
- Employees may be more casual in conversation, saying things they would not feel comfortable saying in the physical office.
- No personal connection to colleagues when they have never met in person or haven't been in an office together for an extended period.

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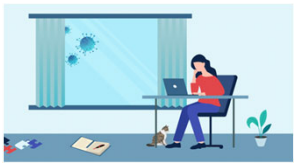
## Workplace Harassment in the Remote Era

**What's Causing the Uptick in Harassment Claims?**

- Heightened stress of the pandemic. 85% of workers surveyed, at all levels, reported increased general anxiety during the pandemic.
- E-mail, text, and chat communications make it harder to decipher tone and intent.
- Quick move to remote work left employers unprepared for the challenge.



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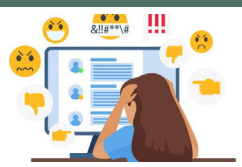
## Workplace Harassment in the Remote Era

***"Since the start of the pandemic, employees have felt as if online environments are the Wild West, where traditional rules do not apply."***

- Jennifer Brown, Diversity, Equity and Inclusion Expert.



**Remote Harassment Might Look Like:**

- Sexual or otherwise offensive comments over chats, text, e-mail, Zoom.
- Comments on private social media account.
- Berating employee in front of others in online meetings.
- Sharing links to inappropriate content.
- Taking screenshots of colleagues during meetings and distributing them with inappropriate captions.

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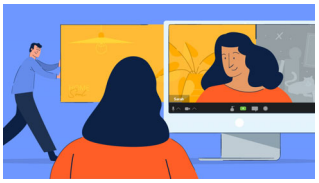
## Workplace Harassment in the Remote Era

**What Should Employers Do?**

- Company policies should be revised as needed to expressly apply in remote work situations.
- Specifically, address what professionalism looks like in remote work settings. Consider a standard virtual meeting background, dress code expectations, etc.
- Ensure appropriate document retention on Company-owned devices or systems.



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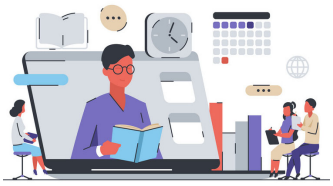
## Workplace Harassment in the Remote Era

**What Should Employers Do?**

- Training should evolve to reflect the remote work environment.
- Examples of harassment should include remote work scenarios.
- Bystander intervention focus.



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## Workplace Harassment in the Remote Era

**What Should Employers Do?**

- Minimize obstacles to reporting.
- Recognize remote workers, especially those who have never been in the office, may be hesitant to report concerns and have less trust in HR or a supervisor.
- Provide multiple avenues for reporting concerns.

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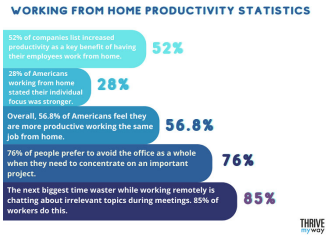
## Compliance with Company Policies: Monitoring Work Performance




- Establish Working Hours
- Train on Company Policies
- Set Expectations
- Define Company Security Requirements
- Have Disciplinary Steps In Place
- Keep Leaders and HR In the Loop

22

## Compliance with Policies: Moonlighting

- A remote work movement referred to as "overemployment" advocates holding more than one full-time remote job, while concealing the fact of additional employment. Proponents claim to work fewer than 40 hours total per week for all jobs.
- The term "overemployment" was coined by the website Overemployed, which offers advice and sells coaching services to promote holding multiple remote jobs.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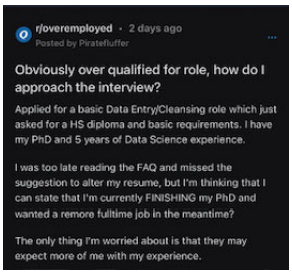
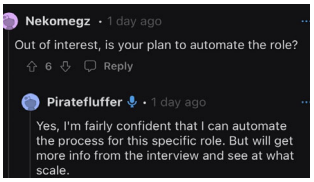
## Moonlighting

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## Moonlighting

How Common Is Remote Work Moonlighting?

- A recent survey by Resume Builder revealed 69% of remote workers had a second job.
- 37% of those have a full-time second job.
- Almost 40% of those with two remote jobs say they do not work more than forty hours total for both jobs.
- Forbes reported on a survey that revealed approximately 50% of respondents had worked for another employer while on the clock.

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## Remote Workforce Moonlighting

Decide what limitations the company will set on outside employment and communicate those limitations to your employees and applicants. Possible limitations on outside employment include:

- Does not interfere with job performance or availability during expected work hours.
- Is not for a competitor of the company.
- Does not create a conflict of interest, including but not limited to work involving a customer or vendor of the company.
- Does not involve the use or disclosure of protected company information.
- Does not use company-provided equipment or resources.
- Does not occur on company time (including taking paid sick leave to perform the outside job).

Enforce relevant company policies, and train managers to effectively address performance issues.

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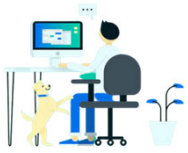

**What if We Don't Want to Allow Remote Work for a Particular Position or Employee? Do We Have to Allow Remote Work Anyway?**

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**It depends…**

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## …On Why They Don't Want to Return

- If an employee simply prefers remote work, you may compel them to return onsite.
- But if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for leave under the Family & Medical Leave Act (FMLA) or an accommodation under the Americans with Disabilities Act (ADA) and related state law.

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## Employees Who Resist Onsite Work

- When employees list a health reason for the reluctance to return to onsite work…
- FMLA-covered employers should initiate the FMLA process by providing eligible employees with the FMLA's Notice of Eligibility and Rights and Responsibilities form.

- Employers also should initiate the ADA's interactive process to determine if the employee's condition qualifies as a disability under the ADA and if the employer can provide an accommodation without undue hardship, e.g., remote work.

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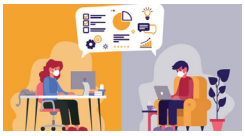
## Employees Who Resist Onsite Work

- Recall that under the ADA, you do not need to excuse an essential job function as an accommodation.
- As a result, if onsite work is essential, you do not need to excuse it for an employee who cannot return to onsite work because of a disability (although you may need to provide other accommodations).
- Anticipate that employees may claim that onsite work is non-essential and head those arguments off with clear communication.



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## Employees Who Resist Onsite Work

- If you provided remote work only in response to the pandemic, will that be some evidence that onsite work really isn't essential? Here's what the EEOC has said:

31

## Employees Who Resist Onsite Work

- From Q&A D.16 of the EEOC's COVID guidance:
- "…the temporary telework experience could be relevant to considering [a] renewed request [for telework post-pandemic]. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."

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## Employees Who Resist Onsite Work

If you believe onsite work is essential, here are some strategies to avoid telework as an accommodation post-pandemic:

- Document how telework was a challenge.
- Review your job descriptions—is there something there about onsite work? If not, add it.
- Consider a statement like this when you communicate with employees about returning onsite:

**"We are excited to return to onsite work so that you can resume all of the essential functions of your job."**


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## Remote Work Accommodations and the ADA

If an employee asks for a remote work accommodation because of their own disability, follow these **FIVE** steps to ensure ADA compliance.

1. First, consider if onsite work is essential – i.e., does the employee have a job where you should require onsite presence?

   If onsite work is essential, the inquiry ends here (although you may need to consider alternative accommodations).

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## Remote Work Accommodations and the ADA

2. Second, if needed, ask the employee to verify that they have a disability (physical or mental) that prevents them from working onsite (i.e., get a doctor's note).
3. Third, engage in the interactive process and evaluate "undue hardship" and alternative accommodations.
   - Undue hardship = "significant difficulty or expense"
   - EEOC: "consider all the options before denying an accommodation request", e.g., telework, isolation, heightened safety protocols, and reassignment.

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## Remote Work Accommodations and the ADA

4. Fourth, if no hardship or reasonable alternative exists, and if onsite work is non-essential, then you should grant a disabled employee's request for a remote work accommodation.

   How should you respond to non-disabled employees who think it is unfair that their coworker received telework and they have to come onsite?
   - EEOC: "it is unlawful for employers to disclose that an employee is receiving an accommodation . . . ."
   - EEOC: you may explain that the company is "acting for legitimate business reasons or in compliance with federal law."

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## Remote Work Accommodations and the ADA

5. Document, Document, Document!

**The Golden Rule of Human Resource Risk Management:**

***If it's not in writing, it did not happen!***

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## Employees Who Resist Onsite Work

- What if an employee lives with someone who has health problems, and they are worried they may contract an illness at work and bring that illness home?
- Consider FMLA leave.
- However, ADA accommodations are not required. The EEOC has said, "The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated."

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## Who Pays for the Expense of a Remote Work Setup – The Employee or the Employer?

**It depends…**

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## …On Three Issues

- Does the employee need to work from home as part of an approved disability accommodation?
- How important is data security?
- State and local laws

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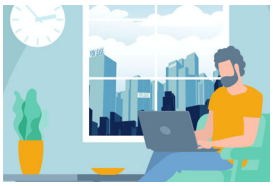
## If Telework is Provided as Part of an ADA Accommodation...

- An employer generally should pay the expenses associated with an approved ADA accommodation.
- And remote work accommodations are no different.



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## If Telework is Not Part of an ADA Accommodation...

- …then no Idaho law would require the employer bear the expense of outfitting the employee's remote work environment. But note, this may vary state-to-state.
- However, if data security is an issue, you likely should supply a remote employee's computer and any other devices needed by the employee to store company data.
- There's just no easy way to claw back data that you've allowed to be stored on an employee's own devices.

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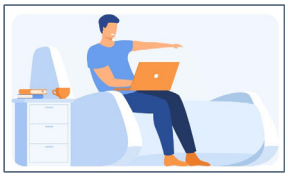
## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir.

- Mobley suffers from Multiple Sclerosis.
- He asked for an accommodation of additional time at home during MS flareups.
- The Hospital denied Mobley's request on the ground that onsite work was essential for Mobley to effectively supervise his team.
- But the Hospital offered an alternative accommodation—leave when needed for flareups.



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## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir.

Mobley resigned and sued his employer, alleging that it had failed to accommodate his disability as required by the ADA.

**The hospital's argument.** The Hospital asked the court to enter summary judgment dismissing Mobley's claims instead of moving forward with a jury trial, on the grounds that: (a) onsite work was essential, and (b) it provided an alternative leave accommodation.

**The trial court's decision.** The district court sided with the Hospital, ruling that it saw no "continuous pattern of discriminatory conduct or a change in job responsibilities. Mobley appealed.

44

## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir.

**A mixed ruling on appeal.** The 8th Circuit rejected the Hospital's argument that onsite work was essential.

The Court noted that the Hospital offered only its own conclusory opinion that onsite work was essential and failed to provide evidence that Joseph could not effectively perform all essential functions remotely.

> By allowing Mobley to consistently work remotely aside from his medical condition, St. Luke's implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time. Moreover, while working remotely, Mobley continued to receive positive performance reviews, reflecting that he was able to effectively supervise his employees despite not being on site.

***However, the Court still found in favor of the Hospital because it agreed that the Hospital provided an alternative leave accommodation.***

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## Case Study: Remote Work as an Accommodation
## Mobley v. St. Luke Health—8th Cir.

**Takeaways**

If you provide a hybrid schedule of telework and onsite work, you may face steeper challenges to deny an ADA accommodation for additional telework.

If you deny a telework accommodation request because you deem onsite work essential, document the specific ways that telework is essential.

Better yet, plan ahead by documenting the essential nature of onsite work in your job descriptions.

If you provide a provisional telework accommodation, document that you are temporarily excusing some essential job functions and provide that context in your performance reviews.

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## Another Question . . .

If employees must take time each morning log in to a secure server or time keeping system before they start work, do we need to compensate them for that time?

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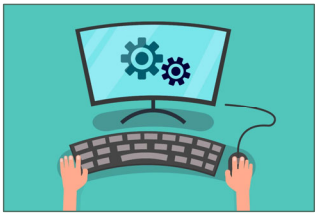
## *Peterson v. Nelnet*

Do employees need to be paid for computer boot up time, even if it only takes just a few minutes to boot up?



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## *Peterson v. Nelnet*

**On October 8, 2021, the Tenth Circuit Handed a Win to Call Center Employees in FLSA Collective Action.**

At issue was the time employees spent at the beginning of every shift booting up their computers and launching software applications used to perform their job of communicating with student loan borrowers.

The booting up tasks took about two to three minutes.

Was this boot up time compensable working time under the Fair Labor Standards Act (FLSA)?

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## *Peterson v. Nelnet Diversified Solutions, LLC*

**The answer to that question involves a two-part test:**

**First**, was the boot up time integral and indispensable to the work?

**Second**, was the boot up time something more than *de minimis*.

Initially, a federal district court handed a win to the employer. The court concluded that the computer boot up time was integral and indispensable to the call center employees' work. However, the court ruled in favor of the employer on the ground that this time was *de minimis*.

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## *Peterson v. Nelnet Diversified Solutions, LLC*

But the Tenth Circuit reversed, finding that the boot up time was not *de minimis* and must be paid to employees (and figured into the OT calculation).

**What does *de minimis* mean?**

The court applied its balancing test to determine if work time is *de minimis*: (1) the practical administrative difficulty of recording the time, (2) the size of the collective employees' time in the aggregate, and (3) whether the employees performed the work on a regular basis.

The court found: (1) Nelnet failed to establish that it could not estimate the boot up time; (2) the size of the aggregate claim was not so small to be considered *de minimis* (even though the total claim was only $32,000); and (3) the employees were required to boot up every day, satisfying the regularity requirement.

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## *Peterson v. Nelnet Diversified Solutions, LLC*

**Note: the call center employees at issue in the Nelnet case were onsite and not remote workers.**

However, it's not hard to imagine application of this decision to remote workers who must spend time everyday logging into their employer's computer systems from home.

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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Employee Life Cycle III: Termination Trepidation – Identifying and Avoiding the Risks Associated with Employee Terminations and Discipline*

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# Employee Life Cycle III: Termination Trepidation – Identifying and Avoiding the Risks Associated with Employee Terminations and Discipline

Susan Baird Motschiedler

October 12, 2023 | Boise Centre East

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## Legal Disclaimer and PDF Handbook

*This presentation is based on available information as of Oct. 12, 2023, 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 scan the QR code to download a PDF handbook of today's seminar.

2

## Effective Discipline

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3

## Effective Discipline of Employees: 5 Foundations

Good Job Descriptions
Good Policies
Training on Policies
Even Application of Policies
DOCUMENTATION


4

4

## Have Good Job Descriptions

**Each Job Description Should Have:**

- Title
- Duties and Expectations
- Essential Job Functions
- Environmental and physical demands
- Minimum and preferred qualifications
- Grade or level (may include pay range)
- Exempt vs. non-exempt (include key FLSA words)
- Schedule (FT/PT/Temp), location
- Supervisory Structure
- EEO, At-Will Statements


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## Have Good Job Descriptions

- Consider comparable jobs that are substantially similar in:
  - Knowledge
  - Skill
  - Effort
  - Responsibility
  - Working Conditions
- Do job descriptions in the same class or with multiple levels "fit" together
  - Are they differentiable and defensible?

6

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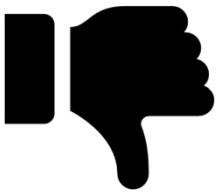
## Good Job Descriptions DO NOT Use these words:

- Youthful or Energetic or Vibrant
- Able-bodied
- Physically fit
- Recent college graduate
- Local or Native English Speaker
- Minimum years experience
- Digital native or tech savvy
- Gendered language or titles (Chairman, Waitress, Foreman, Saleslady)



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## Have Good Policies/Information

- ***AT WILL POLICY***
- EEO Policy
- Anti-Harassment & Anti-Retaliation Policy
- I-9 Verification
- Drug Policy
- **Disciplinary Policy**
- Review Policy
- Leave Policy
- Confidential Information Policy
- **Flexibility, discretion, and wriggle Room**
- Disclaimers and Safe Harbors
- **Employee Signatures** on: Offer Letter, Job Description, Restrictive Covenants, Handbook

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8

## Train All Employees and Supervisors

- Train upon Hire and Periodically/Continuously Thereafter On:
  - Specific Job Duties and Skills
  - Work Policies and Expectations
    - EEO Policy
    - Anti-Harassment and Anti-Retaliation Policy
    - Disciplinary Policy
  - Safety Training
- Train on How to Manage and Supervise
  - How to Train Employees
  - How to give Feed Back and Discipline

9

9

## Apply the Policies Consistently

- Consistent Training
- Forms for Coaching and Write ups
- Procedures for Issuing write ups, corrective actions, and PIPs
- Easy Methods for inputting the documentation
- Never a single person deciding to issue a PIP, issue serious disciplinary measures, or terminate employment
- Fair and Just

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## Document Everything

**IF IT IS NOT IN WRITING, IT DID NOT HAPPEN!**

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## Ideal Documentation of Performance

- Requires Communication to the Employee:
- Communication = oral and written
  - Conveys information regarding job duties, expectations, performance feedback, corrective actions, etc.
  - Frequent and early communication and intervention will help avoid employment claims and protect an employer when claims are brought
- **Documentation can be a form of communication AND evidence of communication**

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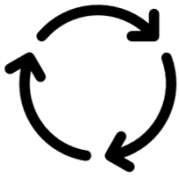
## Best Practices for Documentation

- Outline the lifecycle of an employee and identify all communication possibilities:
  - Hiring
  - Training
  - Day-to-day Feedback/Daily Meetings
  - Biannual Reviews
  - Write Ups/Performance Improvement Plans
- Outline the ideal way to communicate performance expectations and document performance along the way



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## Event – Documentation Outline

| HIRE / EVENT | DOCUMENTATION/ COMMUNICATION |
|---|---|
| First Sign of Serious Problem ↓ | Apart from regular coaching, at this point there should be a discussion with the employee. Document the discussion with a note to file or email. Depending on seriousness, escalate to HR and perhaps discipline. Early HR involvement can hasten a resolution and minimize risks. |

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## Event – Documentation Outline

| HIRE / EVENT | DOCUMENTATION/ COMMUNICATION |
|---|---|
| Ongoing Discipline ↓ | Escalate discipline (last chance notice). Document these **FOUR** things:<br><br>1) nature of the problem;<br>2) how it can be fixed;<br>3) clear timetable for doing so; and<br>4) consequences of failure to do so (such as discharge). |

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## Event – Documentation Outline

| HIRE / EVENT | DOCUMENTATION/ COMMUNICATION |
|---|---|
| Trigger for Discharge | There should be some event that moves the situation towards termination.<br>Examples include:<br>1) Expiration of a last chance time period without needed improvement;<br>2) Additional major mistake or misconduct. |

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## Event – Documentation Outline

| HIRE / EVENT | DOCUMENTATION/ COMMUNICATION |
|---|---|
| Discharge | Here is the main goal of the whole process: anyone who might try to second guess you should conclude there was clear **explanation of expectations, notice of problems** and a **documented chance to improve** before discharge.<br>HR involvement should ensure company-wide consistency and that the written record supports the termination decision. Make sure supervisors know they do not have unilateral power to terminate. |

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## Event – Documentation Outline

| HIRE / EVENT | DOCUMENTATION/ COMMUNICATION |
|---|---|
| Discharge Letter or Memo to File | Document what happened and why, in clear terms but with as few words as possible. List all reasons for discharge, but don't overstate your case. Be truthful, don't say "reorganization" unless that is the case.<br><br>Remember this will be "Exhibit A" in any post-termination dispute, so do it properly. |

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## Terminations without Trepidation

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## Conducting a Termination

- Try to conduct terminations in person.
- Always have two people from the company in the room – HR and one other senior level.
- Familiarize yourself with state law requirements for final paycheck .
- Take any necessary security measures in advance.
- Provide termination letter at termination.


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## To offer a severance agreement…?

- Varies by company and employee type.
- Some companies don't like to set the standard of giving severances, some require it.
- If you're going to offer severance, make sure it's tied to a *release agreement.*

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## CASE STUDIES


22

22

## *Berling v. Gravity Diagnostics*, LLC, No. 19-CI-01631 (KY)

- Berling submitted a request to forgo his office birthday celebration
- Gravity's chief of staff forgot to inform others of Berling's request.
- Workplace hosted a birthday celebration in the break room, Berling had a panic attack.

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## *Berling v. Gravity Diagnostics*, LLC, No. 19-CI-01631 (KY)

- Next day, Berling met with his supervisors. Informed them for the first time that he suffered from anxiety and panic attacks.
- Supervisors accused him of "stealing other coworkers' joy."
- Consequently, Berling started to have another panic attack.
- Berling was escorted from premises.

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## *Berling v. Gravity Diagnostics*, LLC, No. 19-CI-01631 (KY)

- Berling was fired for violating Gravity's workplace violence policy because Berling's supervisors felt physically threatened and unsafe when they met with him.
- At trial, the jury unanimously decided that Berling had a disability and that he was fired because of that disability. Berling was awarded $450,000.

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25

## *Berling v. Gravity Diagnostics*, LLC, No. 19-CI-01631 (KY)

***Principles***

- Employees need not utter "**magic words**" to invoke their rights under the ADA
- Employers need to be prepared to appropriately recognize and handle requests that might be legally protected

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26

## *Berling v. Gravity Diagnostics*, LLC, No. 19-CI-01631 (KY)

***Takeaways***

- Two tools Gravity **failed to employ**: the employer's
  - (1) right to request documentation of the need for the accommodation,
  - (2) right to conduct reasonable, disability-related inquiries and medical examinations when it believes an employee poses a direct threat.


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## *Dennis v. Fitzsimons*—D. Colo.

- In 2016, Officer Dennis was promoted to Detective Sergeant.
- But in July of that year, Dennis was charged for domestic abuse.

***How should an employer respond?***

***What considerations may come into play?***


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## *Dennis v. Fitzsimons*—D. Colo.

- Dennis's supervisor—Sheriff Fitzsimons—immediately placed Dennis on paid leave, but directed him to be available (on duty) the next day from 9:00-5:00pm and to contact the office at the start and end of the "shift."
- The next day, Dennis went to the jail for arraignment but was tested and blew a .107 (BrAc), which is impaired.
- Dennis failed three more tests that day and was unable to be arraigned. He remained in custody and failed to call in as directed.
- A corporal at the jail, called the sheriff and let him know what happened.

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## *Dennis v. Fitzsimons*—D. Colo.

- Sheriff Fitzsimons met with his staff and decided to terminate Dennis.
- Dennis violated a number of policies:
  - Dennis behaved in a manner that discredited the sheriff's office and himself.
  - Dennis consumed enough alcohol that it impaired his performance on duty.
  - Dennis consumed alcohol within an eight-hour window before going on duty.

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## *Dennis v. Fitzsimons*—D. Colo.

- Dennis sued under ADA claiming he was discriminated against for having the disability of alcoholism.
- District court sided with the Sheriff, saying that the plaintiff couldn't prove that the termination was based on the officer's alcoholism, but rather on his conduct.


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31

## *Dennis v. Fitzsimons*—D. Colo.

- The record showed:
  - Sheriff promoted him to detective after learning of negative incidents associated with drinking.
  - Sheriff knew of his alcoholism for over a year before taking action in response to Dennis's conduct.

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## *Dennis v. Fitzsimons*—D. Colo.

***Principles***

- Alcoholism as a disability is a protected class, but misconduct is not protected.
- The ADA does not "protect egregious or criminal action 'merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability.'"
- Under the ADA, an employer can still prohibit an employee from being under the influence of alcohol at the workplace and hold an alcoholic employee "to the same qualification standards for employment" as other employees.

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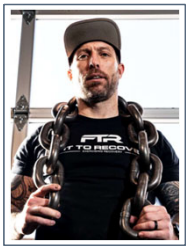
## *Dennis v. Fitzsimons*—D. Colo.

***Takeaways***

- Be mindful about the ways you discuss alcohol and drug-related discipline.
  - Avoid characterizing an employee as a "drunk" or an "alcoholic."
  - Focus instead on conduct.
  - Be alert to reasonable accommodations, such as allowing leave for treatment or AA meetings.
  - Also be attuned to side effects of alcoholism, such as depression.



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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Preventing and Responding to Workplace Violence – Best Practices in an Increasingly Dangerous World*

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PARSONS BEHLE & LATIMER

11th Annual Parsons Behle & Latimer
Idaho Employment Law Seminar

A Different LEGAL PERSPECTIVE
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# Preventing and Responding to Workplace Violence and new HB 324

Sean A. Monson

October 12, 2023 | Boise Centre East

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## Legal Disclaimer and PDF Handbook

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You can scan the QR code to download a PDF handbook of today's seminar.

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## Assault Fifth Leading Cause of Workplace Deaths


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## What is Workplace Violence?

- Workplace violence is any **act or threat** of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults and even homicide. It can affect and involve employees, clients, customers and visitors. (OSHA; NIOSH)
- Threats
  - Letter, email, text message, verbal
- Assault (sometimes sexual), hitting, slapping, punching, pushing, poking, and kicking
- Shouting, name-calling, use of derogatory language
- May include use of a firearm, bomb, or knife

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## OSHA on Workplace Violence

- General Duty Clause, Section 5(a)(1)
  - Employers are required to provide their employees with a place of employment that "is free from recognizable hazards that are causing or likely to cause death or serious harm to employees"
- General Duty Clause duty includes inspecting the workplace to discover and correct a dangerous condition or hazard in the workplace and to give adequate warning of its existence
- OSHA: **"Employers have both a legal duty and a moral obligation to provide a safe workplace. To prevent loss of life and injuries and to limit financial losses and potential liability, employers should institute policies and procedures to prevent violence from occurring in their workplaces"**

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## Four Categories of Workplace Violence Relationships

- Criminal intent (hate crimes, outsiders targeting business)
  - Based on status or business practices
- Customer/client
  - Recipient of services
- Worker-on-worker
  - Also, ex-employees or associates of employee
- Personal relationships (overwhelmingly targets women)
  - Family member, spouse, partner, significant other

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## Workplace Violence – Injuries

- According to the Bureau of Labor Statistics, more than 20,000 private industry workers experience trauma from nonfatal workplace violence in 2020. These incidents required days away from work.
- Of the victims that experienced trauma from workplace violence:
  - **73% female**
  - 62% aged 25 to 54
  - 76% worked in healthcare and social assistance industry
  - 22% required **31 or more days** away from work to recover
  - 22% involved 3 to 5 days away from work

(Source: CDC, National Institute for Occupational Safety and Health)

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## Workplace Violence - Fatalities

- According to the Bureau of Labor Statistics, 392 U.S. workers were victims of workplace homicide in 2020.
- The makeup of the victims:
  - **81% were men**
  - 44% were aged 25 to 54
  - 28% were Black
  - 18% were Hispanic
  - 30% of victims were performing retail-related tasks such as tending a retail establishment or waiting on customers

(Source: CDC, National Institute for Occupational Safety and Health)

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## Workplace Violence – Government Workers

- Men and women working in government have greater number and higher rate of assaults than private sector employees
- Assaults against women working in state government is 8.6 times higher than women in the private sector

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## Know the Warning Signs

- Warning signs that might indicate future violence:
  - Excessive use of alcohol or drugs
  - Unexplained absenteeism, change in behavior or decline in job performance
  - Resistance to changes at work or persistent complaining about unfair treatment
  - Emotional responses to criticism, mood swings
  - Depression, withdrawal or suicidal comments

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## Know the Warning Signs – Level One

- Level One (Early Warning Signs)
- The person is:
  - intimidating/bullying;
  - discourteous/disrespectful;
  - uncooperative; and/or
  - verbally abusive

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## Know the Warning Signs – Level One

- Response When Early Warning Signs Occur at Level One
  - Observe the behavior in question.
  - Report concerns to your supervisor to seek help in assessing/responding to the situation.
  - If the offending employee is the reporting employee's immediate supervisor, the employee should notify the next level of supervision.
  - If the offending person is not an employee, the supervisor of the employee reporting the incident is still the appropriate individual to receive and provide initial response.
  - Document the observed behavior in question.

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## Know the Warning Signs – Level One

- Supervisor should meet with the offending employee to discuss concerns. Follow these procedures:
  - Schedule private time and place.
  - Coordinate any necessary union participation.
  - Get straight to the point.
  - Ask the employee for his or her input.
  - Ask the employee what should be done about the behavior.
  - Ask how you can help.

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## Know the Warning Signs – Level One

- Supervisor should meet with the offending employee to discuss concerns. Follow these procedures:
  - Identify the performance and/or conduct problems that are of concern.
  - Identify the steps you would like to see to correct problems.
  - Set limits on what is acceptable behavior and performance.
  - Establish time frames to make changes and subsequent consequences for failing to correct behavior and/or performance.
  - Review company policies.

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## Know the Warning Signs – Level Two

The person:

- argues with customers, vendors, co-workers, and management;
- refuses to obey company policies and procedures;
- sabotages equipment and steals property for revenge;
- verbalizes wishes to hurt co-workers and/or management;
- sends threatening messages to co-worker(s) and/or management; and/or
- sees self as victimized by management (me against them).

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## Know the Warning Signs – Level Two

Response When the Situation Has Escalated to Level Two:

If warranted, call 911 and other appropriate emergency contacts, particularly if the situation requires immediate medical and/or law enforcement personnel.

Immediately contact the supervisor and, if needed, the supervisor will contact other appropriate official(s) to seek help in assessing/responding to the situation.

If necessary, secure your own safety and the safety of others, including contacting people who are in danger (make sure emergency numbers for employees are kept up-to-date and accessible).

Document the observed behavior in question.

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## Know the Warning Signs – Level Two

- Supervisor should meet with the employee to discuss concerns and, if appropriate, begin or continue discipline. The supervisor should follow these procedures:
  - Call for assistance in assessing/responding, if needed.
  - Avoid an audience when dealing with the employee.
  - Remain calm, speaking slowly, softly, and clearly.
  - Ask the employee to sit down; see if s/he is able to follow directions.
  - Ask questions relevant to the employee's complaint such as:
    - What can you do to try to regain control of yourself?

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## Know the Warning Signs – Level Two

- Supervisor should meet with the employee to discuss concerns and, if appropriate, begin or continue discipline. The supervisor should follow these procedures:
  - Ask questions relevant to the employee's complaint such as:
    - What can I do to help you regain control?
    - What do you hope to gain by committing violence?
    - Why do you believe you need to be violent to achieve that?
  - Try to direct the aggressive tendencies into another kind of behavior so that the employee sees s/he has choices about how to react.

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## Know the Warning Signs – Level Three

- The person displays intense anger resulting in:
  - suicidal threats;
  - physical fights;
  - destruction of property;
  - display of extreme rage; and/or
  - utilization of weapons to harm others.

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## Know the Warning Signs – Level Three

- Any individual observing violent or threatening behavior which poses an immediate danger to persons or property is expected to:
  - Call 911 and other appropriate emergency contacts, particularly if the situation requires immediate medical and/or law enforcement personnel.
  - Remain calm and contact supervisor.
  - Secure your personal safety first.
  - Leave the area if your safety is at risk.
  - Cooperate with law enforcement personnel when they have responded to the situation.

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## Know the Warning Signs – Level Three

- Once law enforcement personnel are on the scene, they will assume control of the situation.
- Witnesses should be prepared to provide a description of the violent or threatening individual, details of what was observed, and the exact location of the incident.
- Document the observed behavior in question.

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## Profiling the Lethal Emploee

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## Profiling the Lethal Employee

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## Profiling the Lethal Employee

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  - uwtwy~%yt%wjxtq{nsl%tw%fr jqtwfynsl%nwynhfq%nxzjx%gjktwj%fqq%jqcj



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## Dealing with an Angry Co-Worker

- Worker on the right has responded to the angry worker by pointing his finger back and yelling. He is also leaning toward the angry worker. This confrontational style can only make a tense situation worse.

**Do not argue or raise your voice at the angry worker**

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## Corrected Situation

- The worker being yelled at is responding to the situation in a better way. He had stepped away from the angry worker.
- Arms are out to his side is a non-threatening posture and indicates that he is ready to listen. He is not yelling or even talking and instead is listening to the angry person.

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## Know the Warning Signs – Domestic Violence

- Except when those involved in domestic violence are co-workers, most incidents are perpetrated by individuals outside the company.
- There will, however, be early warning signs that this type of violence is escalating outside the workplace. The victim may show symptoms such as:
  - increased fear
  - emotional episodes,
  - and/or signs of physical injury.
- Victims, as well as perpetrators, also show signs of work performance deterioration.

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## Know the Warning Signs – Domestic Violence

- In the event the perpetrator shows up at work with the intent of harming the employee and any others who happen to be in the way or involved, follow the procedures described in Level Three in responding to the immediate crisis.

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## Know the Warning Signs – Domestic Violence

- If it is known that an employee is being affected by domestic violence, whether or not the perpetrator has shown up at work, it is important to provide support and assistance. Not only is the person at risk for more and usually escalated violence, but it has an impact on the safety and productivity of the entire work force. Below are some tips for supervisors when helping an employee affected by domestic violence.
  - Talk with the employee about your concern of the possibility of the violence extending into the workplace and recommend that the employee contact any applicable Employee Assistance Program.
  - Develop an individualized workplace safety plan be developed in case the perpetrator shows up at the workplace.
- Don't be a hero if the perpetrator shows up at work.
- Follow the safety plan and go for help.

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## Intervention: Face-to-Face with an Armed Aggressor

- Don’t try to disarm the aggressor
- Do what you are told
- Don’t make any sudden moves
- Speak carefully and sparingly
- Go for cover or run only if safe to do so

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## What if a threat of violence is reported?

- Alert employees potentially under threat ASAP
- Contact law enforcement to report the threat; ask for increased patrols or protection
- Install security cameras in vulnerable areas
- Lock gates/doors
- Hire private security to protect the workplace for a period of time after the threat
- File for and secure a TRO/PO against the employee who has made the threat

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## What can employers do?

- Build employee trust, encourage voicing of complaints
- Employee training – spotting risk factors, reporting behavior or instances
- Creating an emergency action plan
- Conducting mock training exercises – active shooter simulation; lockdown drill
- Have a policy that prohibits workplace harassment, violence, and bullying (even if not unlawful harassment)
  - Zero-tolerance toward workplace violence, bullying, harassment (should cover all workers, patients, clients, visitors, contractors, customers, and anyone else who can come in contact with company personnel)

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## What to do about the employee who made the threat?

- Investigate the threat
- **Document** investigation, results of investigation, and course of action chosen by company (discipline, termination, etc.)
- If discharging the employee, consider:
  - Discharging them remotely (don't bring them into the office)
  - Avoid giving advance notice of the impending termination
  - If doing it onsite, don't let employee return to their desk/office/work vehicle
  - Alert security in advance and have them prepared to escort employee out

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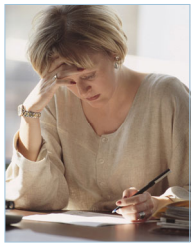
## Incident Reports

- Date, time, and location
- Name of aggressor
- Name of complainant/victim
- Witnesses
- Summary of incident
- Action taken
- **5Ws**



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## Bullying and Hazing is Included

- What is it?
  - Inter-personal mistreatment, harassment and/or psychological violence
  - Can be directed at someone due to their protected class (race, sex, disability, religion, etc.)
  - Can also be unrelated to protected class - Approximately two-thirds of all harassment is "status-blind," and poses an occupational health hazard
  - Boss is a jerk v. boss is a racist/sexist/etc.

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## Examples – Non-Protected Class Bullying?

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

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## Know the Warning Signs

- Signs of a workplace bully:
  - Screaming/yelling, public attempts to humiliate, seeking to do battle when and where supervisor chooses, needs to compete and "win" to feel good
  - Controls all resources (time, budget, support, training) so as to prevent the victim from being successful in performance of job, job undermining, setting the victim up to fail
  - Constant, personal verbal assaults on the victim's character, name calling, belittling, zealous attention to unimportant details, committed to systematic destruction of the victim's confidence in abilities
  - Manipulates the impression others have of the victim, splits the work group into taking sides, defames the victim with higher-ups and at next job, killing the victim's reputation

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## Bullying and Hazing – Why Does it Happen?

- Hazing and bullying tend to happen in occupations where there is a culture of toughness that prevails or perceived to be desirable
- Workers who feel that their jobs demand toughness sometimes decide to haze or bully new employees as some sort of initiation ritual
- Workers who feel that others aren't carrying their weight sometimes decide to bully or harass those employees in hopes that they will quit

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## Bullying and Hazing – Psychological

- Making statements that are
  - False
  - Disrespectful
  - Malicious
  - Abusive
  - Disparaging
  - Obnoxious
  - Derogatory
  - Insubordinate
  - Rude
  - With intent to hurt other's reputation

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## Bullying and Hazing – Physical Intimidation

- Holding
- Impeding
- Blocking one's movement
- Following
- Stalking
- Touching
- Any other inappropriate contact or advances

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## Nevada Case Study

**NRS Chapter 33**

- Defines harassment broadly as acts causing or threatening to cause bodily harm, harm to property, or substantial harm to physical or mental health and safety. *NRS 33.240.*
- Allows employer to file verified application for temporary order of protection if "employer or an authorized agent of an employer reasonably believes that harassment in the workplace has occurred." *NRS 33.250.*

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## Troubling Texts

- Employee terminated. Denied unemployment.
- Started texting the company phone:
  - "I will most likely end up in prison. Not before I take a couple of you f** out though."
  - "I will take your life just as you helped take away mine."
  - "I pray you die before me so I can piss straight on your grave."
- Seen driving around the mine site and outside the homes of some of the men.

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## Filing the *ex parte* application

- Mine contacted their employment lawyers.
- Filed an *ex parte* verified petition on November 23 (day before Thanksgiving).
- Court had never seen this type of filing or used the statute.
- Granted a temporary order.

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## Order

- Extended order was issued in December 2022 after a hearing.
- One month later, the former employee appeared at an employee's home in threatening manner.
- Law enforcement was unsure about what the order covered.
- Company's attorney sought amended order from the Court.
- Since amended order issued, no reports of difficulty with enforcement.

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## Thank You


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11th Annual **Idaho Employment Law Seminar**

# *Conducting Effective Workplace Investigations*

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# Conducting Effective Workplace Investigations

Mark D. Tolman Jason R. Mau

October 12, 2023 | Boise Centre East

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## Why should you investigate?

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## Why Should You Investigate?

- A timely investigation can prevent minor problems from becoming major problems.
- Failure to address concerns and complaints leads to disruption and discontent.
- Demonstrates commitment to maintaining a safe and productive workplace.
- Get to the right result when there are factual disputes.

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## Why Should You Investigate? (continued)

In harassment cases, investigations are a key element of a defense.

- The U.S. Supreme Court explained in the companion cases of *Ellerth* and *Faragher* that an employer is not liable for alleged harassment when it has exercised reasonable care to prevent and promptly correct harassing behavior.
- To avail itself of this defense, an employer must (1) adopt a strong anti-harassment policy, (2) thoroughly investigate concerns about harassment, and (3) take prompt remedial action.

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

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

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

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

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## When should you investigate?

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## When Is an Investigation Needed?

1. When you become aware of employee conduct that, if true, could create legal exposure for the company, like:
   a. Discrimination/harassment – race, color, religion, sex, national origin, citizenship, age, disability, veteran status, retaliation, etc.
   b. Retaliation/whistleblower – i.e., allegations that an employee has been punished for reporting possible discrimination/harassment or a legal compliance issue
   c. Violations of other legal obligations – securities, financial, tax fraud, etc.

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## When Is an Investigation Needed? cont.

2. When you become aware of employee conduct that violates company policies or is creating problems within the company, like:
   a. Employee theft or dishonesty
   b. Unprofessionalism/Dereliction of duties
   c. Confidentiality breaches
   d. Workplace accidents and potentially unsafe conditions

**Conducting sound investigations prior to termination will help you resolve factual disputes and provide solid evidence that your reason(s) for termination are not a pretext for discrimination or retaliation.**

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## How Do You Become Aware an Investigation Needed?

1. Your own observations
2. Rumors of inappropriate/unlawful behavior
3. Employee complaint/report
4. Customer or third-party complaint
5. Notification through established company procedures, e.g., a hotline, online portal.
6. Any other way you learn of a possible problem (i.e., be flexible and don't ignore complaints when not filed through a formal process).

**Develop policies for tracking and triaging all complaints so nothing falls through the cracks.**

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## Interim Measures

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## Interim Safety/Preservation Measures

- Are there any interim measures that need to be implemented against any individuals to ensure no misconduct during investigation?
  - Against whom?
  - What measures?
  - Separate the complainant and respondent?
- Are there any preservation of evidence measures needed to prevent the magical "disappearance" of evidence?
  - What measures?
  - For what evidence?

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## Who should investigate?

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## Select the Right Investigator

- Investigator should have working knowledge of the applicable law and company policy.
  - Importance of issue spotting.
- Investigator should be trained and experienced.
  - Trained in how to conduct effective investigations.
- Investigator should be impartial.
  - No tie to either party (not parties' supervisors or managers).
  - Autonomy -- the respondent should have no supervisory authority over the investigator.
  - Maintain neutrality.
  - Separate from the decision-maker (i.e., not the judge, jury, and executioner).

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## The Right Investigator

- Investigator should be a good communicator (verbally and in writing) with strong interviewing skills (*e.g.*, ability to develop rapport, ability to follow up without reliance on rigid outline).
- Investigator should be organized.
- Investigator must have credibility (*e.g.*, no conviction record, no history of termination for misconduct or incompetence).
- Investigator should be able to testify competently and hold up in the witness chair.

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## The Right Investigator

Options:

- Senior manager (but not the direct supervisor) – not ideal
- Human resources director or other in-house HR professional
- In-house counsel
- Outside counsel
- Independent third-party investigator or consultant

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## Internal v. Outside Investigator

- Internal Investigation Advantages
  - No cost
  - Greater familiarity with the company and its policies and culture
  - Less interference with the ordinary course of business
- Internal Investigation Disadvantages
  - Lack of objectivity
  - Witness distrust of "company" investigator
  - Time commitment
  - May not ask tough questions
  - Lack of employment law knowledge and/or experience as investigator.

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## Internal v. Outside Investigator

- External Investigation Advantages
  - Expertise in employment law elements and investigations – well analyzed/drafted reports
  - Independence
  - Credibility
  - Option of attorney-client privileged investigation
- External Investigation Disadvantages
  - Cost
  - Loss of employer control
  - Less familiarity with the company and its policies and culture
  - Distrust of outsiders

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## Lawyer as Investigator: Privilege Concerns

- An investigation is not protected by the attorney-client privilege just because a lawyer investigates.
- If a lawyer's work is purely fact-based (i.e., gathering facts, reaching conclusions about disputed factual issues, etc.), and is not for the purpose of providing legal advice, that work likely is not privileged.
- Consider also that you may want to disclose your investigation report in response to a claim (i.e., to show prompt remedial action, etc.), and doing so could waive the privilege not only to the investigation and report, but to any legal advice provided by the investigator.

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## Do You Want a Privileged Investigation?

- Consider at the outset if you want an attorney-client privileged investigation, i.e., an investigation you'll never have to disclose and that is protected from disclosure.
- How will you show that you took prompt action to investigate and remediate concerns if the investigation itself is privileged?
- Consider a divide and conquer approach:
  - engage an investigator to make factual findings;
  - engage a separate attorney to provide legal advice about how to respond to the investigator's findings.

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## If You Want the Privilege, Protect It.

- Legal counsel directs investigation.
- Make it clear at the outset that the investigation is being conducted in anticipation of litigation and/or for the purpose of providing legal advice.
- Written report should refer to litigation risks and should state it has been prepared at the direction of legal counsel.
- Dissemination of investigation should be limited to those with a need to know (to avoid waiver of ACP).

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## How to start your investigation

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## Develop a Game Plan

- Develop investigation plan: assess the complaint and create a plan of action, including scope of the investigation.
  - Identify parties and how and when complaint was received (and other background); summarize allegations/issues.
  - Identify and review relevant policies.
  - Identify potential documents to review.
  - Identify potential witnesses to interview who may have relevant knowledge.
  - Prepare an outline of questions for each witness.
  - Determine order of witnesses (usually complainant, witnesses, respondent)

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## Your Witness Interview Outlines

- Topics to cover:
  - Introductory comments (introduce self/role, confidentiality, no retaliation, etc.)
  - Witness background
  - Witness credibility
    - Any biases (e.g., friendship, anything to gain, etc.)
    - Basis for information (e.g., first-hand observation, second-hand report)
  - The incident(s) (consider preparing a chronology) – spend the most time here
  - Witness documentation
  - Other witnesses
  - Closing comments (return to confidentiality, no retaliation)

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## Confidentiality Instructions

- For supervisors, it's easy: you may instruct them to keep the investigation confidential during and after the investigation.
- What about non-supervisors? **There's a new sheriff in town with some strong opinions about this!**




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## Confidentiality Instructions to Non-Supervisors

- In 2019, the NLRB ruled that employer rules requiring employee confidentiality during open investigations are lawful. But you need to apply "individualized scrutiny" in each case to maintain confidentiality post-investigation, e.g., to protect the integrity of the investigation, or to protect the complainant against mistreatment or retaliation.
- In 2023, the NLRB overruled their 2019 decision with respect to confidentiality instructions during the pendency of the investigation. Now, you need a specific reason—during and after the investigation—to maintain confidentiality.



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## Contacting the complainant, witnesses and respondent

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## Sample Email to Complainant

Thank you for reporting your concerns about [name of respondent or issue]. The Company takes these issues very seriously and has asked me to investigate your concerns. I would like to interview you and will send you a meeting invitation. [For a videoconference: Please turn on your camera and ensure you are in a private location with no one else present.]

[*If applicable*] To protect the integrity of the investigation process and the privacy of those involved, please treat this investigation as a confidential matter. While the investigation is pending, please do not share the fact of the investigation or anything you learn during this process with others, including other employees, your leaders, and anyone outside of the Company. If you need to inform your direct leader of your need to meet with me, please tell them only that you have been asked to attend a confidential meeting by [Legal, Human Resources, etc.]. If there are any concerns, please refer your leader to me.

Please know that the Company has a strict no retaliation policy that protects complainants and other participants in investigations from any direct or indirect retaliation. As such, please be honest and forthright in answering the investigator's questions, without fear of repercussion.

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## Sample Email to Witness (not respondent)

I am writing to let you know that you have been identified as a witness in an investigation the Company is conducting. Please note there are no allegations against you. Instead, you have been identified as someone who may have information important to an investigation.

Include the same points about:

- Confidentiality [*if applicable*]
- Retaliation protections

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## Sample Email to Respondent

Consider calling the Respondent first with a follow up email.

Your email could begin: As mentioned on our call today, I am writing to let you know that I have been asked to be a neutral investigator in a pending investigation.

Include the same points about:

- Confidentiality [*if applicable*]
- Retaliation protections

And add a specific anti-retaliation instruction, like this one: You may not directly or indirectly retaliate against other team members participating in the investigation.

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## Interviewing Tips

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## Interviewing Tips

- Keep body language and mood neutral
- At the start of your interview, explain purpose and process:
  - Discuss confidentiality
  - Discuss policy against retaliation
  - Requirement of truthful participation
  - Stress your neutrality ("no horse in the race" or "no dog in the fight")
- Keep questions simple
- Avoid leading questions and instead use neutral phrasing
  - "What do you remember Sue saying," not "Did you hear Sue use a racial slur" or "Isn't it true that Sue used a racial slur"

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## Interviewing Tips (cont.)

- Start with broad, open-ended questions. Narrow down as necessary ("funnel" approach). Be sure to follow up and close out.
- Ask the complainant how they would like to see the situation resolved.
- If witnesses (including the respondent) are unwilling to cooperate:
  - Explore the reasons for the unwillingness.
  - If they refuse to participate, document and proceed with the investigation anyway.
  - Let witness know you will proceed without their input.

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## Interviewing Tips (cont.)

- Conclude interview by:
  - Asking if they have now shared everything about the issues you discussed – and if there is anything else they would like to share.
  - Asking for relevant witnesses and documents.
  - Reiterating expectations regarding confidentiality.
  - Reminding them about the company's anti-retaliation policy.
  - Providing your contact information and encouraging the witness to contact you if they have any additional information.

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## Completing your investigation

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## Completing the Investigation

- Do **four** things:
  1. Confirm you have gathered all the evidence
  2. Reach findings
  3. Draft investigation report
  4. Draft wrap-up communications to Complainant and Respondent

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## (1) Confirm You've Gathered All the Evidence

- Return to your game plan and review it carefully –
  - Review your notes and documents.
  - Have you talked to everyone you meant to?
  - Have you received all the documents from everyone who said they had some?
  - Don't be afraid to follow up, i.e., to return to your investigation.

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## (2) Reach Findings cont.

- Separate the fact-gathering, findings, and policy conclusion phases of your investigation.
- Avoid legal conclusions and branding conduct as "harassment" or a "hostile work environment." Instead, just state the facts:
  - Instead of "he harassed her," write that "he said or did X to her."
  - Instead of "she was negligent," write that she "failed to use good judgment when…"
- Your findings must be supported by the weight of the evidence you have gathered. Use a preponderance standard: what most likely occurred on a 51% to 49% scale.

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## Preponderance of the Evidence Standard

According to SHRM, a "handy standard" for workplace investigations "is what courts call 'preponderance of the evidence.' Using it, you don't have to be absolutely certain. Rather, if you find that a fact is more likely than not true, you can use that fact to support your conclusion and action plan. In other words, 51 percent true to 49 percent false is good enough, as long as there is a supportable basis for your finding."

https://www.shrm.org/hr-today/news/hr-magazine/pages/0804legltrends.aspx

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## (2) Reach Findings – Assessing Witness Credibility

- **Corroboration** – Witness testimony, text message or email exchanges, video or photo evidence, also assessing reliability of testimony with a witness's recollection of events
- **Consistency** – Is there witness testimony or physical evidence that is consistent with the complainant's testimony? Or are there inconsistencies that make you doubt credibility?
- **Inherent plausibility** – Does the testimony make sense? Which version of the events seems more plausible? Is there a plausible reason for inconsistencies?
- **Motive to falsify/bias** – Is there motivation to lie (fear of retaliation, a witness who wants to protect someone, etc.)?
- **Material omission** – Did someone omit something that was important, despite having an opportunity to provide the information?

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## (3) Draft your report

- Your investigation report should have at least three sections.
  - **Introduction:** summarize the complaint, state the questions you investigated, list who you interviewed, and summarize the documents you reviewed.
  - **Summarize your investigation:** try to tell a story based on the facts you gathered. Remember, a judge or jury might read this one day!
    - Alternative approach: summarize material facts from witnesses/key documents.
  - **State your findings:** restate the questions, answer them yes/no (based on what most likely happened), and justify why you reached those findings.

Potential additional section [if asked to do so]:

- **State your policy conclusions**: If substantiated, were policies violated?

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## (4) Wrap-up Communications

- Send wrap-up communication to the Complainant
  - Thank them again for bringing their concerns forward
  - Say something like: "I have completed my investigation and reported my findings to [leadership, HR, etc.], who will be in touch with you."
  - Advise Complainant that he/she should let you [or someone else] know immediately if a problem persists, or if there are any other concerns
  - Consider post-investigation confidentiality instruction (OK for supervisors; you'll need a specific, documented reason for all others)
  - Remind Complainant about no retaliation policy
- Send wrap-up communication to the Respondent
  - Add instruction that the Company prohibits retaliation against anyone who raises concerns and those they may perceive participated in the investigation.

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## Thank You


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