12th Annual Parsons Behle & Latimer
Idaho Employment Law Seminar

for corporate counsel, business owners & human resource professionals

OCTOBER 23, 2024 | BOISE CENTRE EAST | BOISE, IDAHO

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A *Different* LEGAL PERSPECTIVE

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The Current Status of DEI and What it Means for Your Business

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A Professional Law Corporation

The Current Status of DEI and What it Means for Your Business

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October 23, 2024 | Boise Centre East

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Digital Handbook of Today's Seminar

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Legal Disclaimer

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Introduction

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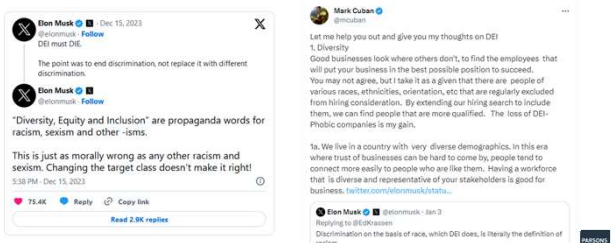
DEI in Recent Years

DEI is a high-profile issue that will continue to be debated and scrutinized



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DEI in Recent Years

- DEI initiatives have increased over the last several years
- However, DEI initiatives have increasingly come under attack by individuals claiming they are harmful and reverse racism

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Public Post Secondary Education

- Idaho Code 67-5909B -- Hiring and admission decisions at any "public postsecondary education institution . . . shall be made on merit."
- "Hiring and admission decisions shall not be conditioned on a requirement that applicants submit or ascribe to a diversity statement."
- No diversity statements may be required for hiring or admissions decisions.

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What is Diversity, Equity, and Inclusion

Diversity

- Presence of differences that may include race, gender, religion, sexual orientation, ethnicity, nationality, socioeconomic status, language, disability, age, religious commitment, or political perspective.

Equity

- Promoting justice, impartiality and fairness
- Ensures everyone has access to the same treatment, opportunities, and advancement

Inclusion

- Outcome to ensure those that are diverse actually feel and/or are welcomed
- Refers to how people with different identities feel as part of the larger group

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Business Reasons for Initiating a DE&I Program

- Organizations that recognize that they are only as good as their employees devote a great deal of time and resources to hiring the most talented individuals. By striving to build and maintain a diverse workforce, they have access to a larger pool of candidates, thus improving the odds of hiring the best people.
- Employers that put people first, regardless of their race, religion, gender, age, physical disability or sexual orientation have an advantage over competitors.

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Business Reasons for Initiating a DE&I Program

- DEI programs help create engaged and happy employees
- DEI programs foster higher degrees of engagement, productivity, and innovation that contribute to increased revenue
- Companies that are more diverse are often more successful with working with a variety of different audiences
- Higher productivity
- Increased revenue

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Business Reasons for Initiating a DE&I Program

- McKinsey's 2019 *Diversity Wins* report found that:
  - Companies in the top quartile of gender diversity on executive teams were 25 percent more likely to experience above-average profitability than companies in the bottom quartile.
  - Companies with more than 30 percent women executives were more likely to outperform companies with fewer women executives.
  - Companies that led in ethnic and cultural diversity had 36 percent more profitability than companies without such diversity.

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Business Reasons for Initiating a DE&I Program

- The U.S. population is growing increasingly diverse. If trends continue, today's minority groups are estimated to make up the majority of the population by 2045.
- Just as the workforce is becoming more diverse, so is the market.
- The combined Black, Hispanic-American, Asian-American and Native American buying power is increasing exponentially, reaching $3.9 trillion in 2018.

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Role of Management in Diversity Success

Supervisors are the role models

- Critical role of leadership and its influence on the success of diversity initiatives
- Support transparency between the different levels of the organization
- Upper management has the power to enact policy change

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Role of Management in Diversity Success

- Continual engagement in the process
- Consistent implementation and enforcement of DEI principles
- Encourage collaboration and implementation of feedback
- Oversee progress updates

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Today's Presentation

- 2023 Supreme Court Decision Regarding Affirmative Action and Its Effect on Employers
- The Current Legal Framework for Employers
- An Evolving Legal Landscape
- Impact on DEI Programs and Takeaways

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Supreme Court's Decision in *SFFA v. Harvard*

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Governing Law

THE EQUAL PROTECTION CLAUSE

- 14th Amendment provides that "**no state shall deny . . . to any person within its jurisdiction the equal protection of the laws**."
- States and state-run institutions are generally prohibited from enacting racial classifications and such classifications receive a high level of scrutiny
- Public colleges are subject to 14th Amendment

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Governing Law

TITLE VI

- Title VI: "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program of activity receiving Federal financial assistance."
- "Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin."
- Most colleges receive federal funds and Title VI applies

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Governing Law

STRICT SCRUTINY

- **Strict scrutiny**"
- First, the racial classification must "**further compelling government interests**"
- Second, the government's use of race must be "**narrowly tailored to achieve that interest**"
- For 45 years courts have allowed race to be used as a "plus factor" (not quota) in admissions

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SFAA V. Harvard

- A political activist group (led by Edward Blum) called Students for Fair Admissions sued Harvard (private) and UNC (state) regarding these admission practices
- SCOTUS found in favor of SFAA and struck down the two admissions programs overturning 45 years of precedent
- Why did SCOTUS strike down 45 years of precedent?

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The Court's Ruling

- Court noted universities can still consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise"—personal statements, essays
- Justice Sotomayor dissent: "attempt to put lipstick on a pig."
- Some private employers do something similar—diversity statements or personal essays

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The Effect of the Court's Ruling

- In 1996, California voters passed Prop 209 banning affirmative action at public universities. The first year "enrollment among Black and Latino students at UCLA and UC Berkely fell by 40% immediately." (NPR)
- CA has worked for decades to improve these statistics
- For its 2024-25 enrollment year at MIT the demographics of incoming students changed dramatically:
  - Percentage of Black students decreased from 15% to 5%
  - Percentage of Hispanic students decreased from 16% to 11%
  - Percentage of Asian students increased
  - Percentage of white students remained roughly the same

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The Effect of the Court's Ruling

- For the 2024-25 school year, Amherst college, a selective college in Massachusetts reported similar decreases in its incoming students
  - Black students decreased from 15% to 6%.
  - Hispanic students decreased from 12 % to 8%
- However, at Duke, Yale, and Princeton the percentage of incoming black students held steady
- Moreover, there is some evidence that economic diversity, with more lower income students being admitted, may also be occurring

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Effect on Employers

- The Supreme Court's decision in *SFAA v. Harvard* is unlikely to immediately affect most private employers
- Instead, the current legal framework governing private employers remains the same
- Nonetheless, the decision represents a trend in the law and private DEI programs (which may be viewed as favoring disadvantaged minorities and women) are being challenged on similar grounds

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Effect on Employers

- In a concurring opinion, Justice Neil Gorsuch said there was no reason Title VII (which applies to employers) is any different from Title VI—setting up a bull's eye on private DEI programs

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The Current Legal Framework For Employers

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Title VII

- Private employers are primarily governed by Title VII of the Civil Rights Act of 1964 which protects employees and job applicants from discrimination based on race, color, religion, sex, or national origin.
- Although Title VI and Title VII have similar language, affirmative action in the employment context is DISTINCT
- With very few exceptions, an employer **CANNOT CONSIDER RACE OR OTHER PROTECTED CHARACTERISTICS WHEN MAKING DECISIONS**.

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Affirmative Action Under Title VII

- In *United Steelworkers of America, AFL-CIO-CLC v. Webber*, SCOTUS held that an employer can adopt an affirmative action plan that favors a protected-class if:
  - The purpose is to eliminate a "manifest imbalance" which is generally demonstrated by a statistical analysis
  - The plan is narrowly tailored and does not "trammel the rights" of other workers by requiring their discharge or replacement or blocking their advancement
  - The plan is temporary and limited to the time it takes to attain a balanced workforce

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Voluntary Affirmative Action Under EEOC Guidelines

- The EEOC has also issued guidelines on when an employer can institute a "voluntary affirmative action" plan to improve employment opportunities for women or minorities (29 CFR § 1608.1, et seq.)
- An employer may take affirmative action:
  - "Based on an analysis which reveals facts constituting actual or potential adverse impact" if the adverse impact is likely to result from existing or future practices.
  - "To correct the effects of prior discriminatory practice . . . identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force."
  - Where "because of historic restrictions by employers . . . the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited."

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Voluntary Affirmative Action Under EEOC Guidelines

- **CAUTION**: The adoption of a voluntary affirmative action plan under the test set forth in *Webber* or the EEOC's guidelines is rare. Thus, it is highly recommended that employers consult with counsel before adopting a voluntary affirmative action plan.
- Also note, that a voluntary affirmative action plan under *Webber* or the guidelines is distinct from DEI policies implemented by many employers

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Affirmative Action For Federal Contractors

- Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act, and Section 503 of the Rehabilitation Act require federal contractors to engage in affirmative action.
- The Office of Federal Contractor Compliance Programs ("OFCCP") enforces this obligation.
- OFFCP defines "affirmative action" as "the obligation of the contractor to take action to ensure that applicants are employed, and employees are treated during employment **without** regard to their race, color, religion, sexual orientation, gender identity, national origin, disability, or status as protected veteran."

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Affirmative Action For Federal Contractors

- OFCCP regulations also require certain contractors to:
  - Develop and maintain affirmative action plans.
  - Affirmatively analyze their policies and procedures to ensure that covered protected classes are not underutilized compared to their availability.
  - To develop programs to address underutilization and to set placement goals where underutilization is present (goals and timetables).
  - To collect certain data, including asking employees to self-identify.
- **In achieving these goals, a federal contractor may not set quotas or set-aside certain jobs for protected classes**.

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EEOC
U.S. Equal Employment Opportunity Commission

Trends and an Evolving Legal Landscape

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EEOC Response

- Right after the SSFA decision, EEOC Chair Charlotte Burrows, a Biden appointee, issued a press release: the decision "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."
- Why say this if the decision has nothing to do with DEI policies?

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EEOC Response

- Jocelyn Samuels, Vice Chair of the EEOC, a Biden Appointee, wrote an opinion piece: "DEIA initiatives in employment are legally distinguishable from the race-based decisions at issue in the Harvard and UNC cases [and] that [t]hose calling for an end to DEIA efforts due to the court's decisions are wrong."

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EEOC Response

- EEOC Commissioner, Andrea Lucas, a Republican appointee: "[e]ven though the Court's ruling today does not alter federal employment law, now is a good time for employers to review their compliance with existing limitations on race- and sex-conscious diversity initiatives. Companies seriously err if they evaluate their risk under federal employment law by mistakenly referring to (now outdated) standards for higher education admissions which had approved of diversity-motivated affirmative action."

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State Attorney General Response

- On July 13, 2023, Republican AG's from thirteen states sent a joint letter to Fortune 100 CEOs warning them against "discriminating on the basis of race, whether under the label of diversity, equity, and inclusion' or otherwise" and that "the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices."

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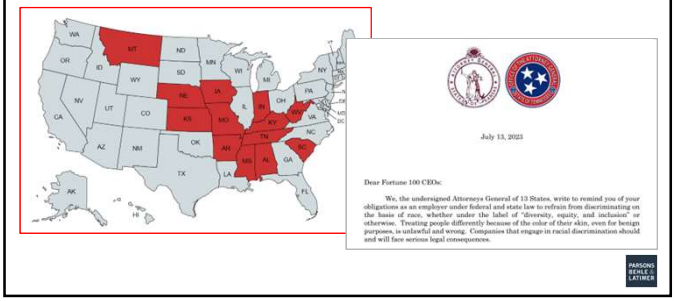
What's Next for DEI Initiatives?



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State Attorney General Response

- On July 19, 2023, twenty-one Democratic AG's responded by sending a letter to Fortune 100 CEOs: "[t]he letter received from 13 state attorney generals is intended to intimidate you into rolling back the progress many of you have made" and that the "letter's attempts to equate … permissible diversity efforts with impermissible hiring quotas is a clear effort to block opportunities for women and people of color—especially Black people. Aspirational diversity goals and concerted recruitment efforts to increase the diversity of a company's workforce are not hiring quotas, which were already unlawful…."

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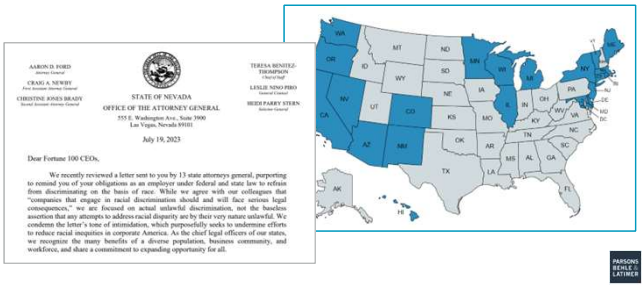
What's Next for DEI Initiatives?



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July 19, 2023

Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that "companies that engage in racial discrimination should and will face serious legal consequences," we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter's tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

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Lawsuits and Other Legal Actions

- A number of legal actions have recently been brought or threatened against companies based on the allegations that their DEI initiatives violate Title VII or other laws
- These lawsuits have been brought by employees, former employees, anti-affirmative action activists, and shareholders of companies
- An August 9, 2024, Washington Post article reported that there are 59 ongoing cases across the United States challenging DEI initiatives, including six cases specifically challenging DEI training programs

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Legal Actions

- Employees and former employees have brought lawsuits alleging DEI programs constitute reverse discrimination or harassment under Title VII
- "Courts addressing the issue have stated that an employer's efforts to promote diversity and inclusion in the workplace are permitted under Title VII and support the statute's purpose." Joyce, Practical Law The Journal (June 2024).
- In addition, courts have recognized that "merely being required to attend across-the-board diversity training is not a discriminatory practice under Title VII." *Vavra v. Honeywell Int'l Inc.,* 688 F.Supp.3d 758, 770 (N.D. Ill. 2023).
- If an "otherwise legitimate DEI policy or program is applied in an unlawful manner" issues may arise. Joyce, *supra*.
- Extreme training programs could be a problem

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Impact on DEI Programs and Takeaways –

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OVERVIEW

- **"It's a very odd place to be, to be in corporate America and trying to do something that they think is the right thing, and yet being worried about whether that's legal or not."** Ann McGinley, an employment law professor at the William S. Boyd School of Law at the University of Nevada, Las Vegas." (Bloomberg Law, October 10, 2023)

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Benefits v. Costs

- Ultimately, the decision of whether, or not, to enact or maintain a DEI program and its scope is a complicated decision that is up to each individual company and its leadership.

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Developing a DE&I Initiative

- **Developing a DE&I initiative involves four main phases:**
  1. Data collection and analysis to determine the need for change.
  2. Strategy design to match business objectives.
  3. Implementation of the initiative.
  4. Evaluation and continuing audit of the plan.

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Developing a DE&I Initiative

Employers must first know what their workforce looks like compared with the labor market, and if there are inequities based on demographics.

Demographic data may include the following:

- *Age*
- *Disability*
- *Ethnicity/national origin*
- *Family status*
- *Gender*
- *Gender identity or expression*
- *Generation*
- *Language*
- *Organization function and level*
- *Life experiences*
- *Personality type*
- *Physical characteristics*
- *Race*
- *Sexual orientation*
- *Religion, belief and spirituality*
- *Veteran status*
- *Thinking/learning styles*

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Developing a DE&I Initiative

- Once data are collected, underrepresented or problematic areas can be identified.
- Employers must determine if there are barriers impeding the employment, opportunity or inclusion of individuals from different demographic groups and take action to eliminate those barriers.

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Developing a DE&I Initiative

- Ask questions such as:
  - Is management full of older white males?
  - Do black females make less than their white counterparts?
  - Does the accounting department tend to hire only females?
  - Have promotions been limited for those with English as their second language?
  - Are employees at the West Coast branch more ethnically diverse than their East Coast counterparts?

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Developing a DE&I Initiative

- Set specific goals related to DE&I based on the company's strategic objectives and create an action plan that includes:
  - The defined initiative.
  - The person responsible for its oversight.
  - The specific action items to be taken.
  - The timeframes for completing each action.
- Identify a senior level "champion" responsible for visible support of the initiative and keeping the program on the management agenda.
- Hold managers accountable for supporting and engaging in the DE&I initiatives.

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Developing a DE&I Initiative

- Establish a committee of employees tasked with the following:
  - Promoting training and events to bring awareness to DE&I in the workplace.
  - Engaging co-workers in DE&I conversation and training.
  - Reviewing and developing policies and procedures that will promote workplace DE&I.

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Developing a DEI Initiative -- Metrics

- Communicate the DE&I program's return on investment and value-add to all stakeholders.
- Communication tools can include infographics for senior leadership meetings, employees and public affairs, and videos on the company's website for potential candidates.
- Continuously monitor the organization's progress and adjust DE&I goals to reflect changing business needs and strategy.

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Review of DEI Policies – General

- Review DEI current and potential policies to assure that they align with the company and its leadership's values.
- Review DEI goals to determine if they align with the company's commitments and are achievable.
- Review the data collected as part of DEI initiatives, who has access to it, and when, how, and if it is disseminated.
- Ensure that decisionmakers are trained regarding the DEI policies and what is, or is not, permissible to consider when making employment decisions.
- Ensure that leadership, HR, and legal compliance are on the same page regarding the company's DEI priorities, goals, and programs.

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Review of DEI Policies – Legal

- Companies who decide to undertake DEI programs, or who have current DEI programs, should review those initiatives to ensure that they comply with current law.
- In particular, it is important to recognize that many of the concerns raised by the letter from Republican Attorney Generals or the letter from Tom Cotton, and several of the lawsuits arise from alleged situations that are likely impermissible under current law, *e.g.*, the use of quotas or race-conscious employment decisions.
- Companies may also wish to review other employment-related actions to ensure that they do not discriminate. For example, Enterprise has recently been sued by the EEOC for age discrimination based on its recruitment of management trainees on colleges campuses.

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Review of DEI Policies – Legal

Permissible Actions

- DEI training, such as training on implicit bias or diversity issues, compliant with state law.
- Creation of a structured interview process to ensure candidates of diverse backgrounds are evaluated equally
- Targeted recruiting that focuses on certain populations to ensure a diverse candidate pool if performed as part of a larger recruitment effort.
- The creation of a non-discriminatory training program to address a lack of qualified applicants.
- Offering remote-work or flexible hours.

Potentially Impermissible Actions

- Creating jobs or job openings that are only open to specific genders or races or ages.
- Creating training or internship programs that are only open to specific genders or races or ages.
- Firing or refusing to hire or promote white or male employees in favor of minorities or women.
- Hiring or firing to maintain a racial balance in the workforce.
- Creating numerical quotas or set-asides for women or minorities unless in connection with an affirmative action program compliant with Title VII or EEOC guidelines.

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Future Legal Developments

- This is a rapidly evolving area of the law and as, *SFAA v. Harvard,* demonstrates all it takes is one test case to change the law in the area.
- Companies should monitor developments in this area carefully and consult with counsel if they have any questions or concern.
- Parsons publishes a bi-monthly Employment Laws Newsletter which tracks recent developments in employment law. Please contact us to be added to the email list. Our emails are at the end of presentation

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Takeaways

- Nothing has changed in employment law as a result of *SFAA v. Harvard* for now.
- If your DEI policy was legally compliant before the decision it still is.
- The likelihood of legal challenges to DEI is increasing.
- The likelihood of a Supreme Court ruling adverse to DEI has also increased due to the Court's current composition.
- Now is a good time to evaluate your company's DEI policies generally and for legal compliance.
- This is an area that should be monitored in the future.

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Thank You

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Remote Work — Managing the Perk That's Become a Presumption

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Remote Work as an Entrenched Expectation

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Remote Work as an Entrenched Expectation

Managers want workers back—but workers have other ideas

make it

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

SCRIPPS NEWS

U.S.

Remote work has significantly shifted employee expectations

An expert on remote work says employers need to create environments that are enticing to workers for hybrid models.

WORKPLACE OCTOBER 9, 2023

The Future of the Office Has Arrived: It's Hybrid

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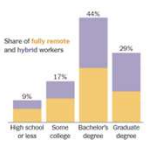
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

Workers with bachelor degrees—but not graduate degrees—are most likely to work remotely.

The New York Times



Who Still Works From Home?

By Ben Casselman, Emma Goldberg and Ella Koeze March 8, 2024

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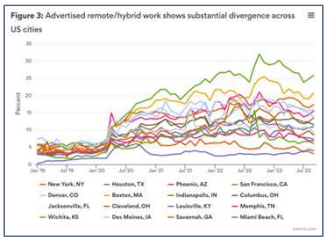
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

Remote-work expectations are highest on the coasts, but cities like Denver and Des Moines don't lag far behind.



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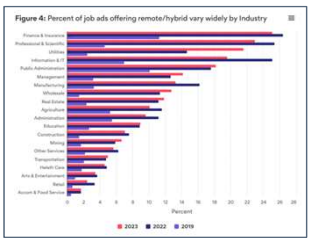
Remote Work as an Entrenched Expectation

Practices vary widely by region, industry, and education level

While remote work is more prevalent in certain industries, the trend towards remote work appears in virtually every sector—and is proving sticky.



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Today's Agenda and Take-Away Topics

- What happens when remote work makes your company a **multi-state employer**?
- How might remote work change how we think about **wage-and-hour** issues?
- How does remote work affect how we think about **the ADA**?

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Becoming a Multi-State Employer…by Accident

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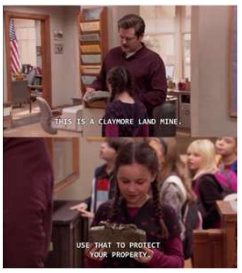
Remote Work Can Subject You to a Multi-State Minefield

- If you have employees working remotely in another state, you most likely need to comply with the employment laws of that state
- That could lead to some land mines:
  - California Labor Code Section 2802: employees are entitled to be reimbursed by their employer "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer" (e.g., equipment, materials, training, business travel, and uniforms)
  - Different payroll taxes, worker's comp insurance
  - Registering as a business
  - Mandatory sick leave (e.g., California, Washington, Oregon, Minnesota)



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Remote Work Can Subject You to a Multi-State Minefield

- Some employers try to avoid the consequence of the multi-state minefield by classifying workers as independent contractors
  - Serious risks associated with misclassification:
    - Lawsuits (including collective actions under the FLSA)
    - Audits (by the IRS and the DOL)
  - Multi-factor test:
    - Control
    - Opportunity for profit/loss
    - Permanency of relationship
    - Integral to business
    - Investment by the parties
    - Skill and initiative

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12

Some Ideas for Dealing with the Multi-State Minefield

- Include authorized location/state in the offer letter (e.g., "You are being hired to work in Utah")
- Adopt and communicate a policy requiring notice and approval
- Establish an assessment and approval process
  - Document the process to evaluate requests to ensure consistent treatment.
  - Research applicable employment laws for the new state (taxes, wage and hour, leave laws, registering as a business)
- Update your handbook to include state-specific addenda
- Check-in periodically with remote workers

13

But *Where* Will My Remote Employees Sue Me?

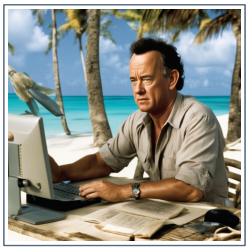
Avey v. Clearbridge Tech. Grp., 2023 WL 8622603 (D. Haw. Dec. 13, 2023)

WARNING: Jurisdictional issues incoming.

14

But *Where* Will My Remote Employees Sue Me?

Avey v. Clearbridge Tech. Grp., 2023 WL 8622603 (D. Haw. Dec. 13, 2023)



Avey worked in Hawaii for a company working on Covid-vaccine distribution. The company was headquartered on the east coast.

Avey alleges that after she hosted a company Black History Month event by videoconference, she was marginalized. She filed a grievance, and was fired hours later.

Are those good facts for Clearbridge?
They are not.

15

But *Where* Will My Remote Employees Sue Me?

Avey v. Clearbridge Tech. Grp., 2023 WL 8622603 (D. Haw. Dec. 13, 2023)

Avey alleged that she supported work in the Pacific region and that she was told she was "only hired because she lived in Hawaii."

But the court still concluded that Avey couldn't bring her lawsuit in Hawaii.

Key facts:

- No facilities in Hawaii
- No work-related reason to live in Hawaii
- No work meetings in Hawaii

16

Remote Work Can Subject You to a Multi-State Minefield

Workers love remote work.

But what if, instead of one "castaway," we have one hundred?

17

The FLSA: Tasks and Time While Remote

18

The FLSA: Properly Paying Remote Workers

What does the FLSA require?

- Employees must be paid for all hours worked in a workweek
- In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday
- Also included is any additional time the employee is allowed (i.e., suffered or permitted) to work

19

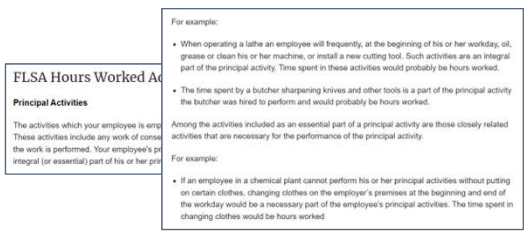
The FLSA: Properly Paying Remote Workers

How can we make sure we're paying remote workers properly?

- Use of remote-monitoring technology
  - Tracking includes monitoring of work computer usage, employee e-mails or internal communications, work phone usage, and employee location or movement.
- Workplace monitoring is subject to a variety of federal and state laws
- Make sure you give your employees advanced, conspicuous notice of surveillance
  - Disclose situations where employees won't have a reasonable expectation of privacy
  - Make sure your policies and authorizations deal with employees using personal devices for work purposes?

20

FLSA Background: Donning and Doffing Cases



FLSA Hours Worked Ac

Principal Activities

The activities which your employee is emp
These activities include any work of conse
the work is performed. Your employee's pr
integral (or essential) part of his or her prin

For example:

- When operating a lathe an employee will frequently, at the beginning of his or her workday, oil, grease or clean his or her machine, or install a new cutting tool. Such activities are an integral part of the principal activity. Time spent in these activities would probably be hours worked.
- The time spent by a butcher sharpening knives and other tools is a part of the principal activity the butcher was hired to perform and would probably be hours worked.

Among the activities included as an essential part of a principal activity are those closely related activities that are necessary for the performance of the principal activity.

For example:

- If an employee in a chemical plant cannot perform his or her principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be a necessary part of the employee's principal activities. The time spent in changing clothes would be hours worked

21

FLSA Background: Donning and Doffing Cases

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005)

What pre-work activities completed by meatpacking employees are compensable under the FLSA?

- Walking to and from changing areas ✓
- Putting on protective gear ✓
- Waiting in line to *get* protective gear ✗
- Waiting in line to *return* protective gear ✓
- Waiting in line for protective gear to *arrive* ✓

22

Peterson v. Nelnet: An FLSA "Boot Up" Case

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

Do we have to pay employees for their boot-up time?

- The setup: Employees at a student-loan call center spend the first few minutes of every shift booting up their computers and launching software programs.
- Employees weren't paid for that "boot-up time"—but it was only 2 to 3 minutes per shift.

Does that count as compensable working time under the FLSA?

23

23

Peterson v. Nelnet: An FLSA "Boot Up" Case

Do we have to pay employees for their boot-up time?

- The answer to that question involves a two-part test:
  - (1) Was the boot-up time integral and indispensable to the work?
  - (2) Was the boot-up time something more than *de minimis*?
- The lower court sided with the employer: While boot-up time was integral and indispensable, the time was *de minimis*.

24

Peterson v. Nelnet: An FLSA "Boot Up" Case

Do we have to pay employees for their boot-up time?

- The Tenth Circuit reversed: Boot-up time was not *de minimis*, meaning that it must be paid (and figured into overtime calculations).

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.

25

Peterson v. Nelnet: An FLSA "Boot Up" Case

Do we have to pay employees for their boot-up time?

- The Tenth Circuit 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.

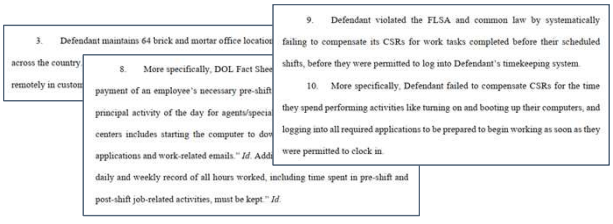
***Note: The Nelnet call center employees* were onsite and not remote workers.**

But it's not hard to imagine this decision being applied to remote workers whose workdays begin with log-in tasks needed to access an employer's system from home.

26

Peterson v. Nelnet: An FLSA "Boot Up" Case

Welcome to Utah, specialized FLSA counsel.



3. Defendant maintains 64 brick and mortar office location
across the country
remotely in custom

8. More specifically, DOL Fact Shee
payment of an employee's necessary pre-shift
principal activity of the day for agents/specia
centers includes starting the computer to dow
applications and work-related emails." *Id.* Add
daily and weekly record of all hours worked, including time spent in pre-shift and
post-shift job-related activities, must be kept." *Id.*

9. Defendant violated the FLSA and common law by systematically failing to compensate its CSRs for work tasks completed before their scheduled shifts, before they were permitted to log into Defendant's timekeeping system.

10. More specifically, Defendant failed to compensate CSRs for the time they spend performing activities like turning on and booting up their computers, and logging into all required applications to be prepared to begin working as soon as they were permitted to clock in.

27

Peterson v. Nelnet: An FLSA "Boot Up" Case

What do damages look like?

- The *Nelnet* case settled on remand.
  - $96,392.48 to settle claims;
  - of that, $87,492.48 went to back pay and liquidated damages, and the remainder went to "service awards" ($6,000 to named plaintiff, $100 to each deposed witness); and . . .
  - $1.6 *million* in attorneys' fees.

28

The ADA: Remote Work as an Accommodation

29

What if your company doesn't like remote work?

- If an employee simply prefers remote work, you may simply tell them no.
- 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.

30

When employees list a health reason for their reluctance to work onsite.

- 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:
  - Does the employee have an ADA-covered disability?
  - Can the employer provide an accommodation without undue hardship, e.g., remote work.

31

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.

32

Lamm v. DeVaughn James, LLC

Lamm v. DeVaughn James, LLC, 2022 WL 353500 (10th Cir. Feb. 7, 2022)

Allison Lamm worked for DJ as a litigation case manager.

She was diagnosed with Generalized Anxiety Disorder ("GAD") and panic attacks in May 2016.

She asked to be permitted to work half-days "on the days that [she] experience[s] intense anxiety" as an accommodation under the ADA. She could not predict when such flareups would occur.

The Firm denied that request. After additional absences, it terminated Allison's employment.

33

Lamm v. DeVaughn James, LLC

A trial court dismissed Lamm's case and she appealed.

On appeal, the firm argued that Lamm was not qualified to perform an essential function of her job—***regular and predictable attendance***.

Lamm contended that her physical presence in the office was not an essential function.

34

Lamm v. DeVaughn James, LLC

"Lamm's focus on physical presence in the office is a red herring because she did not ask to work remotely, but to simply *not work* for half the day when she was feeling overwhelmed by her anxiety on a unilateral as-needed basis and with no advance notice to her employer."

The Court held that Lamm's request for "indefinite" flexibility to work half-days whenever she was experiencing anxiety was "unreasonable."

"The accommodation Lamm proposed—not working for half days—would do nothing to enable her to fulfill the essential functions of her job," i.e., to regularly and predictably work full days.

Because Lamm could not perform the essential functions of her job, and no reasonable accommodation was available, she was not a "qualified individual" under the ADA.

35

Mobley v. St. Luke Health System

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.

36

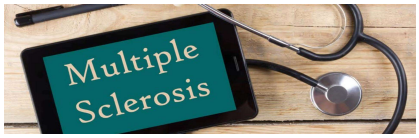
Mobley v. St. Luke Health System

Joseph suffers from Multiple Sclerosis.

He asked for an accommodation of additional time at home during MS flareups.

The Hospital denied Joseph's request on the ground that onsite work was essential for Joseph to effectively supervise his team.

But the Hospital offered an alternative accommodation—leave when needed for flareups.



37

Mobley v. St. Luke Health System

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

The Hospital asked the court to enter a "summary judgment," dismissing his 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.

A trial court granted the Hospital's motion and Joseph filed an appeal to the Eight Circuit Court of Appeals (a counterpart to the Tenth Circuit for midwestern states like Missouri).

38

Mobley v. St. Luke Health System

The 8th Circuit rejected the Hospital's argument that onsite work was essential.

- By allowing Joseph to work remotely two days per week, the hospital "implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time."
- "While working remotely, [Joseph] continued to receive positive performance reviews, reflecting that he was able to effectively supervise his employees despite not being onsite."
- The Court also observed 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.

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

39

Montague v. U.S. Postal Service

Montague v. U.S. Postal Serv., 2023 WL 4235552 (5th Cir. June 28, 2023)

Dionne Montague worked as a public relations employee for the US Postal Service.

She suffered from peripheral neuropathy, a nerve condition that often flared up in the morning. But she could drive to the office in the afternoon.

So she asked for remote work in the mornings, on-site work in the afternoons.

The Postal Services denied her request

Montague sued.

40

Montague v. U.S. Postal Service

The Post Office moved for summary judgment

The district court found that driving and travel were essential to Montague's job, so it granted summary judgment to the Postal Service.

Montague appealed to the Fifth Circuit.

41

Montague v. U.S. Postal Service

The Fifth Circuit reversed

…which wasn't great news for the Postal Service…

"Montague's written job description does not mention travel as an essential part of her job."

Montague's coworker worked a hybrid schedule: four days on-site, one day at home.

Former employee worked remotely "at all times" and was able to do his job.

42

Montague v. U.S. Postal Service

The Fifth Circuit was not convinced by the Post Office's two alternative accommodation options: have your husband drive you in the morning or take a taxi.

Her husband had to start his commute long before Montague's job began.

Taxis were too expensive, and the Post Office never offered to reimburse her.

43

Jordan v. School Board (City of Norfolk)

Principal for Sherwood Forest (Elementary)

44

Jordan v. School Board (City of Norfolk)

Jordan v. Sch. Bd. (Norfolk), 2023 WL 5807844 (E.D. Va. Sept. 7, 2023)

From July 2007 to August 2021, Cheryl Jordan was an elementary school principal

During the height of the Pandemic, from approximately March 2020 through March 2021, the school conducted 100% virtual learning and Jordan performed most of her duties as principal of remotely

45

Jordan v. School Board (City of Norfolk)

Cheryl suffered from asthma

And the school wasn't the best environment for her…or the students

The Virginian-Pilot

Exterminators told her they'd found years' worth of mold, rat feces, and urine in the ceiling. Rats had been seen throughout the building and had chewed through office files and phone cords.

She thought it was what made her sick, and many of her students and staff, too.

46

Jordan v. School Board (City of Norfolk)

The Norfolk school district didn't tell parents there were any problems at all until more than a week later, when they got a message Oct. 7 that the school had experienced "some pest control issues recently." The message didn't mention anything about the illnesses students and staff were reporting, or that contractors were coming in that week to test the air quality in the building.

47

Jordan v. School Board (City of Norfolk)

- Cheryl provided a doctor's note:
  - This is to confirm that Cheryl Jordan is followed in our office for asthma. Symptoms are exacerbated by environmental exposures specifically at place of employment. Encourage mediation of environmental hazards such as mold or animal/insect infestations as appropriate. Failing this, the patient would benefit [from] accommodations such as remote work as feasible.
- Cheryl submitted an accommodation request form:
  - Jordan requested: "[t]elework during the 6-month period of new treatment," and a "[m]odified schedule for appointments, asthmatic episodes and treatments."
- Cheryl also submitted additional doctor's notes that no other accommodation was available

48

Jordan v. School Board (City of Norfolk)

- The school denied her request, saying that being on-site was an essential function of her job as the school's principal
- The school said it had remediated environmental factors and offered to provide her with an air filter.
- As far as the modified schedule was concerned, the school said she could request leave under the FMLA

49

Jordan v. School Board (City of Norfolk)

- Cheryl sued, claiming that the school had failed to provide her a reasonable accommodation
- The school sought summary judgment, arguing that Cheryl could not perform the essential
- Cheryl argued that she performed remotely during the COVID-19 pandemic, so she could work remotely again and accomplish all essential functions of her position

50

Jordan v. School Board (City of Norfolk)

- The court wasn't convinced: "During the COVID-19 pandemic, employers permitted telework and frequently excused performance of one or more essential functions. However, these temporary pandemic-related modifications of certain essential functions does not mean that the essential functions have somehow changed. Thus, once [the school] required students and employees to return for in-person instruction, [the plaintiff] was required to resume her job's essential functions as they were in the pre-COVID era."
- The court was also persuaded by the school's significant evidence regarding essential work and the job description

51

Remote Work as an ADA Accommodation

Key Takeaways

Be clear when you grant a remote work accommodation—it's not the same as a leave accommodation (law firm case)

Note the distinction between the ADA and the FMLA—your ability to deny unpredictable flare up leave is more limited under the FMLA (law firm case)

The ADA does not require employers to permanently or indefinitely excuse essential functions (hospital case)

Indefinite attendance flexibility likely is not required for most jobs (hospital case)

Explore alternative accommodations (hospital case)

But the alternatives have to be reasonable accommodations—i.e., they have to work (Post Office case)

52

Remote Work as an ADA Accommodation

Key Takeaways (continued)

If you provide a hybrid schedule or if you provide it to your star employee, you may face steeper challenges to deny an ADA accommodation for additional telework (Hospital case and Post Office case)

Balance consistency/planning with case-by-case analysis

Detailed job descriptions go a long way (rat school case)

Be prepared to back up essential-function arguments with real evidence (rat school case)

Pandemic-ear remote work might not come back to bite us—especially if we can show that there is a material difference between now and then (rat school case)

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.

53

To download a PDF handbook of today's seminar, scan the QR code or visit parsonsbehle.com/idaho-seminar

54

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55

12th Annual **Idaho Employment Law Seminar**

"I Have a Note From My Doctor" – Engaging with Employees' Medical Providers on ADA Accommodation and Fitness for Duty Issues

J. Kevin West
208.562.4908 | kwest@parsonsbehle.com

Garrett M. Kitamura
208.562.4893 | gkitamura@parsonsbehle.com

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"I Have a Note From My Doctor": Engaging with Employees' Medical Providers on ADA Accommodation & Fitness for Duty Issues

J. Kevin West
kwest@parsonsbehle.com

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gkitamura@parsonsbehle.com

October 23, 2024 | Boise Centre East

1

Digital Handbook of Today's Seminar

You can scan the following QR code or visit parsonsbehle.com/idaho-seminar to download a PDF handbook of today's seminar.

2

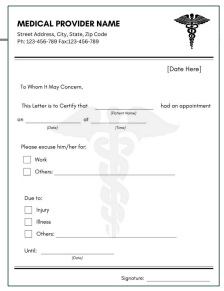
Legal Disclaimer

This presentation is based on available information as of Oct. 23, 2024, 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.

3

Common Scenario

- Your employee presents a note from his/her doctor (or chiropractor, therapist, etc.).
  - The note states that the employee has an ailment and/or work restriction.
  - These notes are often vague or request onerous restrictions.
  - Sometimes the note is unsolicited; sometimes the employer requested it.
- As the employer, you believe that you must take the note at face value. No questions asked.
  - Today's presentation dispels this myth.



MEDICAL PROVIDER NAME
Street Address, City, State, Zip Code
Ph: 123-456-789 Fax:123-456-789

[Date Here]

To Whom It May Concern,

This Letter is to Certify that _____ [Patient name] had an appointment on _____ [Date] at _____ [Time]

Please excuse him/her for:
- ☐ Work
- ☐ Others: _____

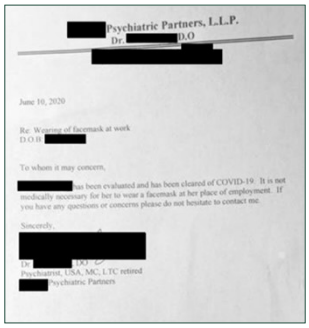
Due to:
- ☐ Injury
- ☐ Illness
- ☐ Others: _____

Until: _____ [Date]

Signature: _____

4

The signing physician is a psychiatrist and a relative of the patient.



[redacted] Psychiatric Partners, L.L.P.
Dr. [redacted] D.O.
[redacted]

June 10, 2020

Re: Wearing of facemask at work
D.O.B. [redacted]

To whom it may concern,

[redacted] has been evaluated and has been cleared of COVID-19. It is not medically necessary for her to wear a facemask at her place of employment. If you have any questions or concerns please do not hesitate to contact me.

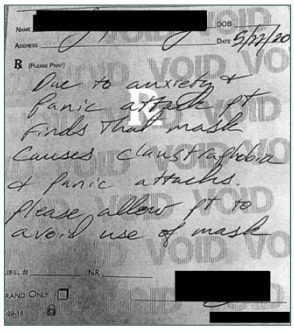
Sincerely,

[redacted]
Dr. [redacted] D.O.
Psychiatrist, USA, MC, LTC retired
[redacted] Psychiatric Partners

5

"Due to anxiety and panic attacks, patient finds that mask causes claustrophobia and panic attacks. Please allow patient to avoid use of mask."

(Written by the patient's chiropractor.)



Name [redacted] DOB
Address _____ Date 5/22/20
℞ (Please Print)
Due to anxiety & panic attacks pt finds that mask causes claustrophobia & panic attacks. Please allow pt to avoid use of mask
VOID
LIC. # _____ NR _____
RAND ONLY ☐
[redacted]

6

June 4, 2020

Patient: [redacted]
Date of Birth: [redacted]

To Whom it May Concern:

Patient is currently under my care. It is my medical opinion that patient should not be required to wear a mask at work due to health concerns. Please make accommodations to this patient's work environment so that she is able to work in an area without wearing a mask. Please contact my office with any questions or concerns [redacted]

Sincerely,

[redacted], FNP

7

7

Primer on Title I of the Americans with Disabilities Act (ADA)

PARSONS BEHLE & LATIMER

8

Title I of the ADA

- Title I of the ADA prohibits employers with 15 or more employees from discriminating against a qualified employee/applicant with a disability.
  - ***Disability***: a disability within the meaning of the ADA exists where an individual…
    - … has a physical or mental impairment that substantially limits one or more major life activities,
    - … has a record of such impairment, or
    - … is regarded as having such a physical or mental impairment.
- Title I requires employers to provide reasonable accommodations for qualified applicants/employees with disabilities unless doing so would cause an undue hardship.

9

9

Title I of the ADA (cont.)

- ***Qualified applicant/employee***: The individual satisfies the requisite skill, experience, education and other job-related requirements of the job and, with or without reasonable accommodation, can perform the essential functions of such position.
- ***Essential Functions***: The fundamental job duties of the employment position.
  - Duties are fundamental when they are the reason the job exists, there are limited employees that the duties can be distributed to, or the duties are for a highly-specialized position.

10

10

Title I of the ADA (cont.)

- ***Reasonable accommodation***: Modifications or adjustments that enable qualified employees/applicants to (1) be considered for the job, (2) perform the essential functions of the job, or (3) enjoy the benefits/privileges of the job.
- ***Undue hardship***: Significant difficulty or expense incurred by employer.
  - Relevant factors include the nature and net costs of accommodations, financial resources of facilities, effect on expenses and resources, impact on operations, and impact on the employer's ability to conduct business or for other workers to perform duties.

11

11

Title I of the ADA (cont.)

- Reasonable accommodation often requires an "interactive process."
  - ***Interactive Process***: an informal process where employer and employee identify the limitations from the disability and potential reasonable accommodations that could overcome the limitations.
  - An employer cannot require the employee to accept an accommodation that is neither requested nor needed.
  - An employer does not have to make the accommodation requested by employee if there are other viable alternatives.

12

12

Title I of the ADA (cont.)

- The ADA analysis also applies to pregnancy-related limitations.
  - In December 2022, President Biden signed into law the Pregnant Workers Fairness Act (PWFA). The PWFA went into force June 27, 2023.
  - The PWFA requires employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

13

13

Title I of the ADA (cont.)

- Final point: The duty to accommodate is triggered only if the employee's disability is known to the employer.
- An employer is not expected to be a mind reader.
  - Employees with nonobvious disabilities bear the obligation of initiating the interactive process by disclosing their disability and need for accommodation.
  - Examples of nonobvious disabilities: diabetes, depression, ADHD.

14

14

Title I of the ADA (cont.)

- Sometimes, the disability and need for accommodation are obvious (visible).
  - Where the employee's disability and need for accommodation are obvious, the employer is obligated to initiate the interactive process.
  - Examples of obvious/visible disabilities: wheelchair, prosthetic limbs, cochlear implants.

15

15

Obtaining Necessary Information to Provide an Accommodation

16

Guidelines for Obtaining Disability Documentation

- An employer has the right to request "reasonable" documentation regarding an employee's disability.
  - ***"Reasonable" documentation***: Documents that show (1) the employee has a disability, and (2) the employee needs a reasonable accommodation for the disability.
- An employer cannot ask for documentation if (1) the disability and need for accommodation are obvious, or (2) the employee has already provided sufficient information to substantiate the disability and need for accommodation.

17

17

Guidelines for Obtaining Disability Documentation (cont.)

- When needed, a doctor's note should come from the appropriate healthcare professional and should address (1) the disability and (2) the functional limitations caused by the disability.
  - ***Appropriate healthcare professional***: Someone who has expertise in the condition at issue and direct knowledge of the employee's impairment and its functional limitations.

18

18

Guidelines for Obtaining Disability Documentation (cont.)

- To obtain information about an employee's disability, the employer may take one or more of the following steps:
  - (1) Engage in an informal discussion with the employee regarding his/her disability and its functional limitations.
  - (2) Obtain "reasonable" documentation from the employee's healthcare provider regarding the employee's disability and its functional limitations.
  - (3) Engage an employer-chosen healthcare provider to evaluate the employee's disability and its functional limitations.

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Guidelines for Obtaining Disability Documentation (cont.)

- Again, an employer may not request medical documentation if…
  - The disability and need for accommodation are obvious, or
  - The employee has already provided sufficient information to substantiate his/her disability and need for accommodation.

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Step 1: Informal Discussion

- The employer should meet with the employee to discuss the nature of the employee's disability and its functional limitations.
  - This should be the first step in any interactive process.
- The employer should limit the inquiry to the disability for which the employee is seeking an accommodation.
  - The employer should make clear why it is requesting this information: to verify the existence of a disability within the meaning of the ADA and to verify the need for a reasonable accommodation.
  - The employer should not ask about the employee's medical history that is unrelated to determining the existence of the disability and need for accommodation at issue.

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Step 2: Requesting Information from the Employee's Doctor

- The employer can ask the employee to sign a limited release allowing employer to submit a list of specific questions to the employee's healthcare provider regarding this disability and need for accommodation at issue.
  - The employer can request that the documentation come from an appropriate healthcare provider (e.g., a chiropractor's note regarding the employee's depression is not appropriate).
- The employer cannot ask for documentation that is unrelated to determining the existence of a disability and the need for accommodation.
  - In most situations, the employer cannot request the employee's complete medical records because they are likely to contain information unrelated to the disability and need for accommodation at issue.

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Step 3: Sending the Employee to an Employer-Chosen Healthcare Professional

- The employer can require the employee to go to an appropriate health professional of the employer's choice.
  - The employer should first explain why the provided documentation is insufficient and allow the employee an opportunity to provide missing information in a timely manner.
  - The examination must be limited to determining the existence of an ADA disability and the functional limitations that require reasonable accommodation.

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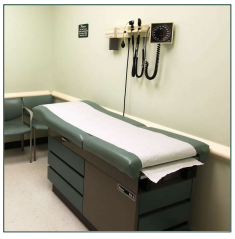
Step 3: Sending the Employee to an Employer-Chosen Healthcare Professional (cont.)

- If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).
- This step is only appropriate if the employee-provided documentation is insufficient to clearly explain the employee's disability and need for accommodation.



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Case Study #1: Disclosing Therapy

- Jane Doe was employed as an assistant and later as a technician for a healthcare provider.
- Over the course of six years, Jane frequently clashed with her coworkers and providers—sometimes in front of patients.
  - In the course of her employment, Jane was transferred to work with a different provider on five occasions.
  - Each of her supervising providers documented her continued pattern of unprofessional behavior.
- One day, Jane disclosed to a supervisor that she had been seeing a therapist to work on her professional and personal interactions.
  - Jane admitted she had not always been in control of her emotions.

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Case Study #1: Disclosing Therapy (cont.)

- Not long thereafter, Jane experienced a loss in her family and had to care for her grandmother.
  - Jane disclosed this to her supervisor, saying she was feeling "burnt out" and "needed a break."
  - Jane also disclosed that she was feeling suicidal. Her supervisor suggested that Jane use her PTO.
- After a verbal confrontation with a coworker, Jane's supervising provider informed HR that he could no longer have Jane on his team.
  - HR reassigned Jane to another provider, warning that her behavior needed to improve, or she would be terminated.
- Six days later, a patient emailed the clinic with a detailed complaint regarding Jane's rude and unprofessional behavior during his exam.
  - Jane was terminated the next day.

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Case Study #1: Disclosing Therapy (cont.)

- Jane filed a complaint with the Idaho Human Rights Commission (IHRC), alleging that her termination constituted disability discrimination.
- In her IHRC complaint, Jane made the following allegations:
  - She is disabled. She has depression, PTSD, and anxiety.
  - She disclosed her "mental health struggles" to supervisors but they criticized her rather than engage with her.
  - Her unprofessional behavior followed her therapist's recommendations: She was "setting healthier boundaries" which included "not allowing [employer] to take advantage of [her] or treat [her] poorly."
  - She was demoted and ultimately terminated on the pretense that she was not getting along with coworkers, "but [she] believe[d] it was because [she] had finally started setting boundaries for [her] mental health."

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Case Study #1: Disclosing Therapy (cont.)

- IHRC reviewed Jane Doe's complaint, finding no probable cause to believe unlawful discrimination occurred.
  - Jane did not show that the employer failed to accommodate her alleged disabilities.
    - Jane did not submit evidence to establish that she has a disability, that she informed her employer of her disability, or that she requested an accommodation.
    - The evidence indicates that Jane's employer was unaware of any disabilities Jane may have had.

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Case Study #1: Disclosing Therapy (cont.)

- (IHRC findings cont.)
  - Jane failed to show that her demotions and discharge were due to her alleged disability.
    - Again, Jane failed to show that she has a disability.
    - Jane did not submit evidence to refute employer's claim that her performance was unsatisfactory.
    - "Consequently, [employer's] actions did not give rise to an inference of disability discrimination. Rather, [employer] gave [Jane] numerous opportunities to correct her performance before ultimately transferring her and then discharging her; therefore, [Jane] cannot prevail on this charge."

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Takeaways from Case Study #1

- An employee's mere disclosure of receiving healthcare treatment is generally not enough to put the employer on notice that the employee has a disability and needs accommodation.
- Documentation of disciplinary action can rebut a false charge of disability discrimination.
- An employee's disclosure of "burnout" and even suicidal ideation does not automatically put an employer on notice of a disability or need for accommodation.
  - As a best practice, such disclosures should obviously be addressed in some manner.
  - But the employer's obligation to engage in the ADA interactive process is not triggered until the employee establishes that the problems are linked to a disability for which the employee is seeking accommodation.

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Takeaways from Case Study #1 (cont.)

- Keep thorough records of employee issues and how they were addressed.
  - In this case study, employer records provided a thorough timeline that showed how Jane received clear and direct feedback and was plainly notified that her behavior was unacceptable and would lead to her termination.
  - The employer's file on Jane did not show any medical evidence of a disability.

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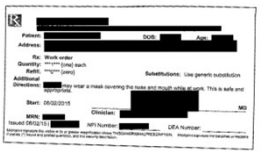
Case Study #2: Masking

- John Doe was employed as a cashier and food prepper in a fast-food establishment.
- One day, John wore a mask to work. (This was ~5 years before the COVID-19 pandemic.)
  - Supervisors were concerned that the mask would cause customers to think John was ill.
  - When a supervisor asked John why he was masking, John said he didn't like the smell of the restaurant.



- Without further inquiry, the supervisor asked John to get a doctor's note.
  - John obtained a doctor's note (pictured).
  - John then commented that he had a dust allergy and did not want to get coworkers/customers sick.
  - John reiterated that he didn't like the smell of the restaurant.

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Case Study #2: Masking (cont.)

- The employer reached out to us for legal counsel. We gave the following advice:
  - A minor allergy to dust or pollen is not a disability under the ADA.
    - Furthermore, there was no litter or dust in the restaurant.
    - John's issue was clearly with the smell of the restaurant—not allergies.
  - The supervisor's request for a doctor's note was premature.
    - It needlessly escalated the matter into a medical situation.

34

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Case Study #2: Masking (cont.)

- How it should have been handled:
  - John should have been informed this is how restaurants smell; if he's not happy with that, he should reconsider his employment.
  - The supervisor should have explained that the mask was not allowed because of its adverse impact on customers.
    - (Again, this was pre-pandemic.)
  - Requesting a doctor's note should only have occurred if John had disclosed a true disability related to the mask.

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Takeaways from Case Study #2

- Don't jump the gun: Employers should not assume a disability where one may not exist.
  - If an employee gives a non-medical reason for his/her conduct, don't turn it into a medical situation.
  - Unless the disability and need for accommodation are obvious, the employee bears the obligation to initiate the interactive process.
- A doctor's note does not magically create a disability or a need for accommodation.
  - This is especially true if the letter is vague or lacks references to a medical condition.

36

36

Takeaways from Case Study #2 (cont.)

- Could John have been "regarded as" having a disability?
  - No. The employer did not treat John as having a disability or take adverse action against John based on the belief that he had a disability.
- The ADA limits the scope of "regarded as" by excluding impairments that are "transitory and minor."
  - "Transitory" impairments are conditions that last 6 months or less.
  - "Minor" impairments are not defined but are commonly evaluated by the severity of the impairment, symptoms, and required treatment.
  - The "minor and transitory" exception was added to the ADA to prevent the "obligation to accommodate people with stomach aches, a common cold, mild seasonal allergies, or even a hangnail."

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Case Study #3: *Christner v. American Eagle Airlines, Inc.* (N.D. Illinois 2003)

- John Christner worked as ground support director for American Eagle Airlines, Inc. ("AEA").
- On April 9, 1997, an AEA mechanic returned from medical leave after suffering head injury at work.
  - Christner, the mechanic's direct supervisor, did not believe the mechanic had sufficient medical verification to justify leave.
  - Christner mocked the mechanic, calling him pathetic.
  - Christner slammed his own head against a filing cabinet, telling the mechanic that he (Christner) was "not running to medical."
  - Christner denied making these statements or mocking the mechanic, but admitted to slamming his head and saying, "See? No bumps, no bruises, and I'm not taking two weeks off."
- Christner was demoted and given 60 days to find a non-management position in accordance with AEA procedure.

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Case Study #3: *Christner v. American Eagle Airlines, Inc.* (cont.)

- "But here is the twist that forms the basis of Christner's claim in the suit."
  - In 1996 (~1 year before the mechanic incident), Christner suffered an on-the-job injury.
  - At the time, AEA knew of the injury, but not its severity.
  - Christner had surgery on both arms, missed four days of work, and never requested medical leave.
- In March 1998 (~11 months after the mechanic incident), Christner's doctor cleared him to return to light duty.
  - At that point, Christner provided the doctor's documentation to AEA.

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Case Study #3: *Christner v. American Eagle Airlines, Inc.* (cont.)

- AEA allowed Christner to go on two-year medical leave if he did not find a new position within the normal 60-day period and gave him access to AEA computers to search for a new position.
  - Christner never used the AEA computer and never applied for a new position in his 60-day period or two-year medical leave period.
  - In July 1998, Christner filed a complaint with the Equal Employment Opportunity Commission (EEOC), complaining of his demotion.
  - After failing to land another position, AEA terminated Christner in July 1999 at the conclusion of medical leave.

40

Case Study #3: *Christner v. American Eagle Airlines, Inc.* (cont.)

- After receiving a "right to sue" letter from the EEOC, Christner sued AEA, claiming:
  - AEA refused to accommodate his disability when his doctor cleared him to return to light duty in March 1998.
  - AEA retaliated against him for filing a complaint with EEOC by refusing to restore his ground support supervisor position. (The demotion was a year before the EEOC complaint.)
- The Court ruled in favor of AEA on both counts and dismissed Christner's suit.

41

Case Study #3: *Christner v. American Eagle Airlines, Inc.* (cont.)

- Christner's "failure to accommodate" claim fails.
  - Christner's deposition testimony about matters like "not being able to adjust the collar of his shirt" was "a far cry from not being able to perform he variety of manual tasks necessary to care for himself on a daily basis."
  - Documentation from Christner's doctor was "vague" and did not establish that Christner was disabled within the meaning of the ADA.
  - "But there is an even more fundamental flaw in Christner's failure to accommodate claim: **Christner never requested a reasonable accommodation.**"
- "Christner's retaliation claim is frivolous."
  - American Eagle's continued refusal to reverse Christner's demotion following his EEOC complaint "is not a fresh act of discrimination that can support a retaliation claim."
  - "Christner admitted as much in his deposition, testifying that he was unaware of any actions by American Eagle against him because of his 'opposition to discrimination.'"

42

Takeaways from Case Study #3

- Employers are not liable for an employee's failure to either disclose a nonobvious disability or request a reasonable accommodation.
- Unless an employee's disability and need for accommodation are obvious, an employer is not obligated to proactively engage in the interactive process.
  - Under the current version of the ADA, the court might have found that Christner had a disability.
    - Christner's case was decided before the 2008 ADA amendments, which broadened the definition of disability.
  - It is unclear how obvious Christner's alleged disability was, but Christner probably would have still lost his case because he failed to seek an accommodation.

43

Case Study #4: Elbow Restrictions

- Pam was employed by Dunder Mifflin Eye Care (DMEC), an optometry center with multiple locations and providers across Scranton, PA.
  - Pam duties included sorting and filing patient charts, preparing eye exam equipment, and taking calls at the front desk
- One day, Pam injured her left elbow while rearranging patient charts in the filing room.
  - Pam filled out an incident report and provided written updates, noting that her left elbow was sore to the touch and kept her up at night.
  - Pam later presented a doctor's note to her supervisor, Jan.

Activity Status Report - 01/21/22

Name: [redacted] Date of Birth: [redacted]
Employer: Date of Injury: 12/6/2021
Time In: 1/21/2022 12:41 PM Time out:

VISIT SUMMARY
Reason for Visit: Arm injury
1. Lateral epicondylitis of left elbow
2. Numbness and tingling in left arm

Medication(s) Ordered
Prescription: No
Over-the-Counter: Yes
Anti-inflammatory
Tylenol/acetaminophen
Diagnostic Testing: None
Other Orders: Ice, Heat, Brace / Support
Next Appointment Here: 2/4/2022 11:30 AM Video Visit

ACTIVITY STATUS
Full Activity: No
Off Work: No

Restricted Activities (NOTE – If applicable, Mr. [redacted] is able to perform activities that do not exceed these restrictions. Restrictions apply 24 hours / day, 7 days a week to all work and non-work activities. Unless otherwise stated, restrictions are temporary, and remain in effect until the next appointment. Per O.D.L., "rarely" means less than 5% of shift; "occasionally" means less than 33% of shift.):

Upper Extremity / Hand Restrictions: Left
No lift / push / pull over 1 lbs
Firm / forceful / repetitive gripping or twisting: Rarely

Today's Examiner: [redacted], MD

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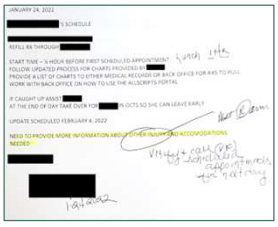
Case Study #4: Elbow Restrictions (cont.)

- Pam's supervisor, Jan, drafted a schedule for Pam based on Pam's left-elbow disability and supporting doctor's note.
- Pam then disclosed an alleged disability with her right arm.
  - Pam said she could not use her right arm to carry anything heavier than 1 lb. because of an injury 25 years prior that resulted in a permeant disability.
  - Jan asked Pam to provide documentation regarding Pam's right arm and explained that such documents were necessary before right-arm accommodations could be made.



JANUARY 24, 2022

[redacted]'s SCHEDULE

[redacted]

REFILL RX THROUGH [redacted]

START TIME – ½ HOUR BEFORE FIRST SCHEDULED APPOINTMENT

FOLLOW UPDATED PROCESS FOR CHARTS PROVIDED BY [redacted]

PROVIDE A LIST OF CHARTS TO EITHER MEDICAL RECORDS OR BACK OFFICE FOR AVS TO PULL

WORK WITH BACK OFFICE ON HOW TO USE THE ALCSMYTS PORTAL

IF CAUGHT UP ASAP [redacted]

AT THE END OF DAY TAKE OVER FOR [redacted] IN OCTS SO SHE CAN LEAVE EARLY

UPDATE SCHEDULED FEBRUARY 4, 2022

NEED TO PROVIDE MORE INFORMATION ABOUT OTHER INJURIES AND ACCOMODATIONS NEEDED

[redacted]

[redacted]

45

Case Study #4: Elbow Restrictions (cont.)

- One month later, Pam presented Jan with instructions from her physical therapist: Pam should use a hands-free headset at all times when operating phones.
  - DMEC installed a hands-free headset on Pam's work phone.
  - DMEC encouraged Pam to ask her coworkers for help to the extent that Pam's unverified right-arm disability inhibited her ability to put on the headset.

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Case Study #4: Elbow Restrictions (cont.)

- Pam then had a string of workplace issues.
  - Pam was caught using her personal cell phone behind her desk—despite her arm injuries—in violation of DMEC's phone policy.
  - One of the providers, Dr. Schrute, complained that Pam was improperly preparing patients' eye tests. Dr. Schrute requested that Pam be removed from his team.
    - Based on Pam's work restrictions and Dr. Schrute's team needs, DMEC could not find an accommodation-appropriate job for Pam on Thursdays (when Dr. Schrute worked).
    - Pam was removed from the Thursday schedule, and Pam's supervisor suggested that she file a worker's comp. claim if she was concerned with her working hours.
  - Pam filed a worker's comp. claim for her reduced hours but failed to provide information requested by the claim manager.

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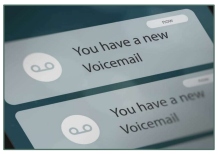
Case Study #4: Elbow Restrictions (cont.)

- DM Eye Center then learned that Pam had not been keeping up on (or even checking) patient voicemails.
  - There was a backlog of over 40 voicemails going as far back as 3 weeks.
- Pam said she did not need to check voicemails, citing a text message from Jan and an updated doctor's note.
  - Jan's text made no mention of voicemails, and Pam had not provided an updated doctor's note.
  - When Pam finally presented the updated doctor's note, it lacked any restrictions related to voicemails.
  - Pam also conceded that she failed to even alert coworkers or supervisors about the backlog of voicemails.



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Case Study #4: Elbow Restrictions (cont.)

- During the same meeting regarding voicemails, Pam requested a new incident report form, alleging that she had recently injured her right elbow.
  - Pam said her right elbow "snapped" while she was writing a patient chart.
- Jan instructed Pam to schedule an appointment with her doctor and have the right-elbow issue evaluated.
  - At Jan's direction, Pam was not allowed to return work until she provided a report from her doctor regarding her right elbow.
  - Pam never provided a doctor's note and did not answer calls from Jan.
  - Pam was terminated from her position with DMEC one week later.

49

49

Takeaways from Case Study #4

- An employer may request that an employee provide documentation for a nonobvious disability, even if the employee already has a documented disability and accommodation for a similar—but unrelated—disability.
  - An employer does not have to take an employee's word about disability X merely because employee has already demonstrated that they have disability Y.
- Accommodations should be in writing and include specific details about duty modifications.
- If an employee is not able or willing to fulfill the essential job requirements (with or without accommodation), the employer is not required to retain the employee.
  - A workplace accommodation is not a carte blanche that excuses an employee from being a collaborative member of the work team.

50

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Recap

- Unless a disability and need for accommodation are obvious, the employee bears the obligation to initiate the interactive process.
  - Employers are not expected to be mind readers.
- As part of interactive process, an employer should first engage with the employee informally and ask them to provide reasonable documentation/information regarding the disability and its limitations.
  - A doctor's note or an employee's claim of personal hardships are not necessarily notice of a disability and need for accommodation.
  - An ADA accommodation for one disability does not automatically excuse an employee from establishing a disability and need for accommodation for another disability (e.g., Case Study #4: separate issues with each arm)

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51

Recap (cont.)

- The employer can only seek reasonable documentation if (1) the disability and need for accommodation are not obvious, or (2) the information provided by the employee is insufficient to establish the disability and need for accommodation.
- The employer can ask the employee to provide reasonable documentation from the appropriate healthcare professional.
  - The employer can ask employee to sign release for documents that are necessary to establish the disability and need for accommodation.
  - Requesting the employee's complete medical history is generally not permissible.
- If documents are still insufficient, the employer can send the employee to the appropriate provider of the employer's choosing and at employer's expense.

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To download a PDF handbook of today's seminar, scan the QR code or visit parsonsbehle.com/idaho-seminar

Thank You

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Quiz Game: Test Your Knowledge of Recent Legal Developments

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October 23, 2024 | Boise Centre East

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Digital Handbook of Today's Seminar

You can scan the following QR code or visit parsonsbehle.com/idaho-seminar to download a PDF handbook of today's seminar.

2

2

Legal Disclaimer

This presentation is based on available information as of Oct. 23, 2024, 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.

3

3

It's game time!

Here's a quiz game to test your knowledge of recent legal developments . . .

4

4

There will be prizes . . .

5

5

EEOC publishes enforcement guidance on harassment

6

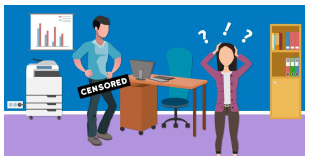
NEW EEOC enforcement guidance on harassment

On April 29, 2024, the EEOC published its final "**Enforcement Guidance on Harassment in the Workplace**."

- Found here:

https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace

- Why now? EEOC says between 2016-2022, more than a third of all EEOC charges included harassment allegations.



7

Workplace harassment

2024 study on sexual harassment and gender-based discrimination findings:

- 83.5% of respondents agreed that sexual harassment and gender-based discrimination are problems.
- 82.3% disagreed that people make a bigger deal out of these two issues than is warranted.
- The findings suggest many are uncertain of what to do if they experience or see others experience sexual harassment and other types of gender-based discrimination.

8

Harassment policy updates: race-based mistreatment

Race-based harassment can be complex, any may include situations that expressly tied, or limited to, to "race."

Definitions of race-based harassment should include the following from the EEOC's guidance:

- Racially-motivated harassment "can include harassment based on traits or characteristics linked to an individual's race, such as the complainant's name, cultural dress, accent or manner of speech, and physical characteristics, including appearance standards (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups)."

9

Harassment policy updates: race-based mistreatment (continued)

- Harassment can be based on a misperception, for example, mistakenly harassing a Hispanic employee based on a belief the person is Pakistani.
- "Associational discrimination" also is prohibited, for example, bias against a white employee because they are married to a black person.

10

Harassment policy updates: sexual orientation and gender identity

Sex harassment includes mistreatment based on an individual's sexual orientation and/or gender identity. As a result, harassment can include:

- Epithets regarding sexual orientation or gender identity
- Outing (disclosure of an individual's sexual orientation or identity without their permission).
- Repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering).
- Mistreating an individual who does not present in a manner that would stereotypically be associated with that person's sex.
- Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

11

Harassment policy updates: remote work and virtual meetings

Update your policies to conform to the post-pandemic remote work environment.

Consider the following policy addition from the EEOC: "As with a physical work environment, conduct within a virtual work environment can contribute to a hostile work environment. This can include, for instance, sexist comments made during a video meeting, ageist or ableist comments typed in a group chat, racist imagery that is visible in an employee's workspace while the employee participates in a video meeting, or sexual comments made during a video meeting about a bed being near an employee in the video image."

12

Harassment policy updates: harassment that takes place outside work, and after hours.

The EEOC instructs that harassment by a supervisor may heighten severity due to supervisory power. Due to this power, **a supervisor's harassment outside the workplace may be actionable!**

13

Case Study: liability for harassment that takes place online, outside work and after hours.

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14

Case Study: *Okonowsky v. Garland* (9th Circuit, July 25, 2024)

Lindsay Okonowsky worked as a psychologist for a federal prison.

Her coworker, Steven Hellman, was a supervisor, but did not supervise Lindsay.

Instagram "suggested" that Lindsay follow Steven's page, "8_and_hitthe_gate."

15

Steven's posts were awful

Steven's posts were "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" that expressly or impliedly referred to the prison's employees and inmates.

Yet, Steven's page was followed by more than 100 prison employees, including supervisors and even the HR Manager!

Lindsay was shocked to see several posts that vaguely referred to her, the "psychologist," including one post where Steven implied that he wanted to shoot Lindsay and an inmate.

16

When Lindsay complained, the prison was dismissive.

Lindsay complained to Robert Grice, Acting Safety Manager.

Robert dismissed Lindsay's concerns, telling her that he was:

"Sorry, not sorry."

Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace.

17

As a result, Steven's behavior got worse.

Steven's posts became "sexually debasing" toward Lindsay.

He threatened Lindsay. And he posted a meme, with the caption: "Tomorrow's forecast, hot enough to melt a snowflake."

Lindsay was eventually transferred to another prison. And she filed a sexual harassment claim against the prison.

18

Ninth Circuit drops the gavel

The Court held that "even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

19

Ninth Circuit added…

"Social Media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [Steven] was or what *he* was doing when he made his posts, [coworkers] who followed the page were free to, and did, view, 'like,' comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their 'likes,' and could be seen at any time or at any place—including from the workplace."

20

EEOC publishes final PWFA regulations

21

Pregnant Workers Fairness Act

On **December 22, 2022**, Congress passed the Pregnant Workers Fairness Act (PWFA)

On **April 15, 2024**, the EEOC issued its final regulations on PWFA enforcement.

22

Pregnant Workers Fairness Act

PWFA requires that employers with at least 15 employees must provide reasonable accommodations for pregnant applicants and employees that are needed for pregnancy, childbirth and related medical conditions.

- PWFA became effective June 27, 2023.
- On Aril 15, 2024, the EEOC issued its final regulations about its enforcement of the PWFA—a mere 408 pages long!

https://www.eeoc.gov/newsroom/eeoc-issues-final-regulation-pregnant-workers-fairness-act

23

PWFA Final Regulations

The final regs make clear that the EEOC takes a broad view of the meaning of pregnancy, childbirth, or related medical conditions.

- Among other things, the non-exhaustive definition includes pregnancy, lactation, use of birth control, infertility, menstruation, endometriosis, postpartum depression, miscarriages, **and abortions**.
- 17 states (including Utah) filed a lawsuit in federal court challenging the EEOC's authority to issue regulations with respect to abortion.
- In June 2024, days before the regulations took effect, the federal court dismissed the lawsuit, concluding that the states lacked standing to challenge the rule.

24

PWFA Final Regulations

Unlike the ADA, the PWFA provides an express timeline for accommodation:

- essential job functions must be modified or eliminated on temporary basis, "generally 40 weeks" (absent showing of undue hardship).

25

PWFA Final Regulations

Unlike the ADA, the PWFA rules identify four accommodations that should be granted in almost every circumstance:

- (1) keeping water near and drinking as needed; (2) extra time for bathroom breaks; (3) to sit or stand as needed; and (4) extra breaks to eat and drink as needed.
- Employers are ***NOT*** allowed to get health care provider confirmation that an employee needs these four accommodations.

Although other types of accommodations may allow medical certification, when there is a known limitation and obvious need for accommodation, no medical certification may be requested.

26

Basic PWFA policy example

[Employer] provides reasonable accommodations needed for pregnancy, childbirth, or related conditions unless doing so would cause undue hardship. Depending upon the circumstances and as allowed under applicable law, [Employer] may require a medical certification from the employee's healthcare provider concerning the need for accommodation. However, [Employer] will not require a medical certification for simple accommodations such as (1) keeping water near and drinking as needed; (2) extra time for bathroom breaks; (3) to sit or stand as needed; and (4) extra breaks to eat and drink as needed. Employees who require accommodations for pregnancy, childbirth or related conditions should contact Human Resources.

27

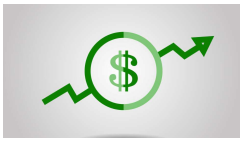
FLSA salary threshold increase for executive, administrative, and professional (EAP) exemptions.

28

Increase of the FLSA salary threshold

Recall that to qualify for an exemption to the FLSA overtime requirements under the executive, administrative, or professional tests, employers must have met a minimum salary basis test of $684 per week ($35,568 per year).

A relaxed job duties test applies to "highly compensated employees" who earned $107,432 per year.



On April 23, 2024, the DOL published its final rule raising the salary threshold for the executive, administrative, professional exemptions.

https://www.dol.gov/agencies/whd/overtime/rulemaking

29

Rolling increases in 2024, 2025, and beyond.

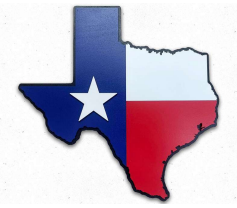
July 1, 2024: the salary threshold increased to **$844** per week (**$43,888** per year) for EAP exemptions; and **$132,964** per year for highly compensated exemption.

January 1, 2025: salary threshold increases to **$1,128** per week (**$58,656** per year) for EAP exemptions; and **$151,164** per year for highly compensated exemption.

July 1, 2027, and every three years: threshold for EAP exemption will be reevaluated to align with **35th percentile** of weekly earnings of full-time salaried workers based on lowest-wage census data; and **85th percentile** for highly compensated exemption.

30

Texas sues, challenging DOL's authority to increase the salary threshold.



- The State of Texas sued the DOL in a federal court in Texas, arguing that DOL exceeded its authority when it increased the salary threshold.
- A week before the July 1 implementation date, the federal court agreed with Texas and issued an injunction prohibiting enforcement of the new salary threshold….in TEXAS.
- **13 red state AGs have now joined Texas, calling on the same federal court to strike down the rule nationwide (note, Utah was not one of those states).**

31

Policy Takeaways

The FLSA salary hike presents you with two policy choices: (1) increase salaries to comply with the new thresholds; or (2) reclassify workers making less than the new thresholds as non-exempt.

This change also provides a ready excuse for you to analyze your exemptions. If you've claimed an exemption for a position that only loosely fits the job duties requirements, take the opportunity to reclassify!

32

U.S. Supreme Court Lowers the Bar for Establishing "Adverse Action" in Employment Discrimination Cases.

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33

Job Transfers – Lowering the Bar

What Counts as an "Adverse Employment Action" These Days?

Muldrow v. City of St. Louis
(issued Apr. 17, 2024)


The New York Times

Supreme Court Leans Toward Police Officer in Job Bias Case

The officer, Jatonya Muldrow, said she had been transferred to a less desirable position based on her sex. Lower courts said that she had not shown concrete harm.

34

Job Transfers – Lowering the Bar for Adverse Employment Actions in Discrimination Cases

On April 17, 2024, the US Supreme Court issued a decision in *Muldrow v. City of St. Louis*.

The case resets the standard for determining when job reassignment is an adverse employment action—expanding employee protections in reassignment cases and possibly beyond.

35

Adverse Action Backdrop

Three decades ago, Vernet Boone, a black woman working at NASA was reassigned—to work in a literal wind tunnel.

Boone sued, arguing that her reassignment to a more stressful job constituted discrimination.

A federal appeals court disagreed, ruling that Title VII discrimination claims require an "adverse employment action" that is significant, e.g., discharge, demotion, changes that impact pay, promotional opportunities, etc.

Mere reassignment, even to a wind tunnel, didn't qualify.

"Significant" or "material" adverse action has been the standard since—until the *Muldrow* decision.

36

Muldrow v. City of St. Louis

Jatonya Muldrow alleged that the St. Louis Police Department transferred her to a less desirable role, with less action and more administrative duties because of her gender.

Lower courts ruled against Muldrow, finding her reassignment was not materially adverse because her pay and rank were unchanged.

The Supreme Court reversed.

Muldrow didn't need to show a "significant employment disadvantage" to sustain a Title VII claim—she only needed to show "**some harm from a forced transfer**."

37

Muldrow v. City of St. Louis

Takeaways

Employees no longer need to show that reassignment impacts pay or promotional opportunities—or that reassignment otherwise resulted in "significant" or "material" adverse impacts.

"Some harm" is all that is required for a transfer to be deemed adverse, which can be shown through evidence of diminished responsibilities, perks, and schedule.

"Some harm" now likely is the standard for other types of discrimination and retaliation claims too, e.g., discipline and counseling.

Retaliation claims already are the most frequently filed EEO claim. That's only going to increase.

Be proactive—train your supervisors to document the legitimate non-discriminatory, non-retaliatory business motivations for all their employment decisions, including transfers.

38

Inclusion and belonging efforts

39

Students for Fair Admissions v. Harvard/UNC

In *Students for Fair Admissions v. Harvard/UNC*, the Supreme Court struck down race-based college admissions programs that considered minority status as a "**plus factor**" for enrollment.

The Court relied on Title VI of the Civil Rights Act of 1964, which forbids organizations that receive federal funding from denying benefits on the grounds of race.

But it is Title VII, not Title VI, that governs employment discrimination.

And under Title VII, it's already understood that employers may *not* consider race or other protected classes as a "plus factor."

40

Drafting compliant DEI policies

Affirmational statements about diversity, equity, and inclusion are fine (for now).

However, policies should make clear the initiatives that will, and will not, be undertaken to achieve affirmational goals about DEI. For example, emphasize that your DEI program is about:

- Training.
- Efforts to help employees feel included.
- Expansion of job posting outreach to increase applicant pool diversity.

Make clear that protected classes will never be considered in hiring and promotional decisions and that the company always will hire and promote based on merit.

41

New NLRB crackdown.

42

Non-supervisory employes have a *right to complain*

Section 7 of the NLRA guarantees employees, among other things, the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

43

What does the NLRB have to say about complaining?

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities." (NLRA, Section 7.)

44

Definition Time

Is the activity concerted?

- Generally…
  - Two or more non-manager employees
  - Acting together
  - To improve wages or working conditions.
- But the action of a ***single employee*** may be considered concerted if…
  - The employee involves co-workers before acting, or
  - Acts on behalf of others

45

In other words . . .

Does the action seek to benefit other employees?

Will the improvements sought benefit more than just the employee taking action (protected)?

Or is the action more along the lines of a personal gripe (not protected)?

Is the action carried out in a way that causes it to lose protection?

Reckless or malicious behavior—e.g, sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets—may cause concerted activity to lose its protection.

46

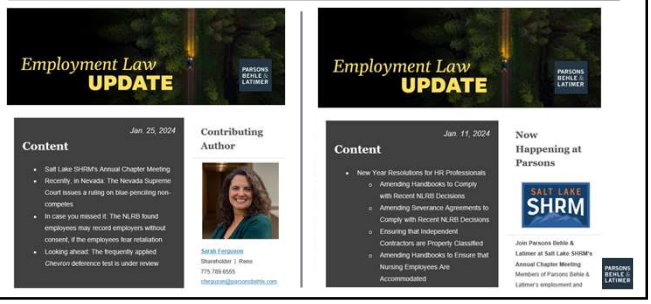
Give me some more examples

An employee, without involving any coworkers, blurts out during an all-hands meeting to discuss COVID-19 protocols, "We shouldn't be working!" (The employee also voiced concerns about the employer's lack of proper precautions.)

An employee states that workers did not "give a f***" about a cross-training program and telling his manager to "shove it up his f***in' ass!"

47

Semi-Monthly Employment Law Update (email newsletter)



48

To download a PDF handbook of today's seminar, scan the QR code or visit parsonsbehle.com/idaho-seminar

Thank You

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October 23, 2024 | Boise Centre East

1

Digital Handbook of Today's Seminar

You can scan the following QR code or visit parsonsbehle.com/idaho-seminar to download a PDF handbook of today's seminar.

2

2

Legal Disclaimer

This presentation is based on available information as of Oct. 23, 2024, 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.

3

3

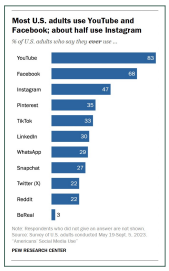
A note about content

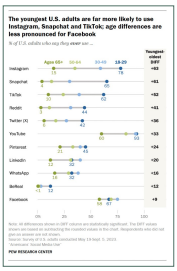
Note: Digging into real-life cases helps us polish our skills as HR specialists. But the details of some of those cases—like the details of many of the disputes you all encounter every day—can be distasteful and even upsetting.

Our apologies, in advance, for a little rudeness to come.

4

Everyone seems to be using social media . . .





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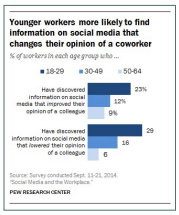
. . . even coworkers.

The Journal of Social Media in Society recently published an article titled "Where and Why Coworkers Connect on Social Media." Highlights from the abstract include:

"[P]articipants were mainly connected to coworkers using Facebook (89.7%), LinkedIn (77.6%), and Instagram (69.5%)."

"[N]o difference was found in employees' motivation to connect via social media whether they are working in-person, remotely, or in a hybrid format."

"[P]articipants had two main motivations for using personal social media accounts to connect with coworkers: a) sharing and obtaining personal information, and b) communicating about work and nonwork issues."



6

What does that mean for you?

Lessons from recent caselaw

- What happens on the internet stays on the internet, right?
- Hostile-work-environment claims must involve severe or pervasive conduct.
- Harassment must be based on protected class.

Guidance from the NLRB

- Implications for Section 7.
- An employee's right to sound off on social media—sometimes.
- Updating employment policies to reflect the regulatory landscape.

7

Case Study 1: Trolls at work.

8

Case Study 1: *Okonowsky v. Garland*

Lindsay Okonowsky worked as a psychologist for a federal prison.

Her coworker, Steven Hellman, was a supervisor, but did not supervise Lindsay.

Instagram "suggested" that Lindsay follow Steven's page, "8_and_hitthe_gate."

9

Steven's posts were awful.

Steven's posts were "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" that expressly or impliedly referred to prison employees and inmates.

Yet, Steven's page was followed by more than 100 prison employees, including supervisors and even the HR Manager!

Lindsay was shocked to see several posts that vaguely referred to her, the "psychologist," including one post where Steven implied that he wanted to shoot Lindsay and an inmate.

10

Quiz Time: Round 1

Lindsay complained to the prison's Active Safety Manager and, eventually, HR.

11

Lindsay's complaints are dismissed.

The prison's Acting Safety Manager dismissed Lindsay's concerns, telling her:

"Sorry, not sorry."

Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace.

12

As a result, Steven's behavior got worse.

Steven's posts became "sexually debasing" toward Lindsay.

He threatened Lindsay. And he posted a meme, with the caption: "Tomorrow's forecast, hot enough to melt a snowflake."

Lindsay was eventually transferred to another prison. And she filed a sexual harassment claim against the prison.

13

The Ninth Circuit dropped the gavel.

The Court held that "even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

14

The Ninth Circuit wasn't done.

"Social Media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [Steven] was or what *he* was doing when he made his posts, [coworkers] who followed the page were free to, and did, view, 'like,' comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their 'likes,' and could be seen at any time or at any place—including from the workplace."

15

Takeaways

Just because conduct occurs offsite does not mean it cannot be the basis for a harassment claim.

Employee social-media pages allow coworkers to interact with content at any time, from anywhere.

If conduct affects an employee's working environment, there may be trouble.

16

Case Study 2: A (slightly) more nuanced picture of online harassment and the modern workplace.

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17

Case Study 2: *Chinery v. Am. Airlines*

Melissa Chinery worked as a flight attendant for American Airlines.

She ran for presidency of the local union chapter, on a platform disagreeing with the existing union contract, but lost the election.

After her election loss, she said other flight attendants began harassing her online.

18

Wingnuts . . . the Facebook group

"Chinery claims that a large group of American flight attendants, and four specific flight attendants, harassed her during and after the election campaign through posts they made to several Facebook groups, including a group called Wingnuts.

Wingnuts's membership is composed primarily of American flight attendants based out of Philadelphia who use the page to communicate about work-related issues such as scheduling, layovers, and flight operations. American did not create the Wingnuts Facebook group and does not monitor it."

19

The Harassing Posts

Melissa's claims of harassment were based on posts by four different men in the "Wingnuts" Facebook group.

First Poster: Posted a photograph of a broken record, which Melissa believes was harassing, and about her, because she had previously complained to HR about the poster.

Second Poster: Made no gender-based comments about Melissa, but Melissa viewed the poster as part of a bullying effort that occurred during her union-leadership campaign.

20

The Harassing Posts

Third Poster: During the union election, a third poster posted on Wingnuts:

> **"This is war. [The incumbent union leaders] are my friends. If you f**k with my friends you f*** with me and I don't like being f***ked with :(."**

Melissa believed this statement was gender-related because she did not believe he would have said that if she were a male candidate.

21

The Harassing Posts

Fourth Poster: The final poster was more prolific—and demeaning.

- He made several posts that contained sexualized, belittling puns.
- He made several references to that Melissa believed were veiled digs at her (including posting a picture of a "bedazzled vagina").
- He made disparaging references to the appearances of union opponents
  - **"Have any of them LOOKED in a mirror? Tuck your shirt in fat ass ... Fix your hair ... How bout [sic] a tie? A little lipstick? Maybe a smile and a HELLO when a passenger steps aboard."**
- He engaged in name-calling, including calling those opposed to the union contract "cavalier harpies" and "shrews of misinformation."

22

Quiz Time: Round 2

Melissa reported these posts to HR, invoking a company social-media policy.

23

What did American Airlines do?

American Airlines determined that Melissa's claims were meritless.

Melissa complained that the investigator failed to adequately address her concerns and that American could have enforced its social-media policy against the flight attendants at issue but chose not to.

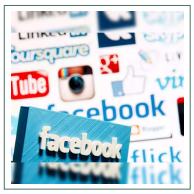
24

The court dismisses harassment claims.

Melissa raised disparate treatment, hostile work environment, and retaliation claims.

American moved for summary judgment, and the district court granted that motion in full.

With respect to her hostile work environment claim, the Court concluded that no reasonable trier of fact could find that the Facebook posts were "so objectively severe or pervasive that [they] would unreasonably interfere with an employee's work performance."



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The Third Circuit affirms.

"It is clear that the alleged instances of harassment were not so objectively severe or pervasive to give rise to a cause of action . . . the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . A court must analyze the alleged harassment by looking at all the circumstances . . . Looking at all of the complained of behavior objectively, even that which does not appear connected to gender and instead appears to be related to Chinery's stance on union issues, the behavior does not amount to severe or pervasive sexual harassment."

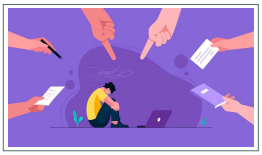
26

The Third Circuit affirms.

"[I]nsults in the workplace do not constitute discrimination merely because the words used have sexual content or connotations . . . . [T]he posts, if directed at Chinery, appear juvenile and unprofessional, particularly when referring to a colleague . . . [but] Title VII is not a general civility code."

27

Takeaways



Online harassment—like any other harassment—must be severe or pervasive to constitute a hostile work environment.

Of course, even if this conduct does not violate the law, it may well violate your internal policies and be grounds for discipline.

28

Case Study 3: *Varieties* of online harassment.

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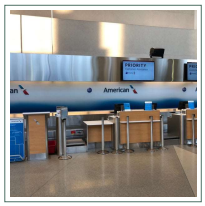
29

Case Study 3: *Koslosky v. Am. Airlines*

Colleen Koslosky worked as a customer-service agent for American Airlines at the Philadelphia International Airport.

In 2017, she made a series of racially insensitive posts on Facebook, and those posts went viral.



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The posts in question

"If I were Black in America, I think I'd get down on my knees every day and thank my lucky stars that my ancestors were brought over here as slaves, because when you look at the amazing rights, privileges, and benefits that come along with U.S. citizenship, and then compare that to the relentless poverty, violence, and suffering in Africa, it's like winning the Super Lotto a hundred times over. But I guess I'm old-fashioned that way, believing as I do in the importance of gratitude, humility, and respect."

"We are losing Blue Eyed People. Too many are reproducing with Brown Eyed People. It is true. Blue Eyed People ... UNITE!"

31

The posts went viral. Complaints rolled in.

An American employee in Ft. Lauderdale reported that customers and employees as far away as Seattle were discussing Colleen's posts.

Employees both in Philadelphia and elsewhere complained to the company through various channels, including to the company's CEO. American passengers also complained.

However, for a company as large as American, Colleen was not (of course) the only employee posting inflammatory things online.

32

Quiz Time: Round 3

American's HR team faced a challenge. Did Colleen's inflammatory posts create special concerns that would justify sterner treatment?

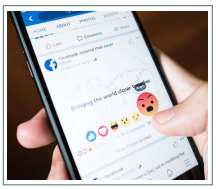
33

American acts. Colleen sues.

American decided Colleen's posts *did* merit termination, and it fired her.

Colleen sued. According to Colleen, another American Airlines employee had also made controversial Facebook posts, and that employee was male.

Therefore, Colleen argued, the company's decision to terminate her employment—when it did not terminate the employment of the male comparator—was sex-based discrimination.



34

But the court looked closely at those posts.

The "comparator" employee had posted sharp *political* commentary.

As the court pointed out, the other employee "posted inflammatory social media comments to Facebook, but his comments tended to be critical of President Trump and his supporters. These comments included '[g]et rid of ignorant rednecks,' and 'Trump supporter [equals] Nazi sympathizer [equals] stay away from me.'"

Political Affiliation ≠ Protected Class

35

Moreover . . . no one raised complaints.

"Although Mr. Doersam had a Facebook account that identified himself as an American employee, no one complained to the company about his comments. American never disciplined Doersam for violating its policies. . . Ms. Koslosky offers no evidence that anyone ever reported Mr. Doersam's posts to American. Therefore, American could not have treated the two differently because, without knowing about his posts, it had no basis to take any action against Mr. Doersam."

36

Colleen's posts *were* different.

"Colleen Koslosky learned first-hand the danger of social media posts while working for American Airlines in 2017. Over a short period of time, she made several posts on her Facebook account containing inflammatory and racially insensitive sentiments that went viral. The posts created a firestorm. American's employees complained, as did some of its customers. So American fired her. In this lawsuit, she claims that American's decision to terminate her employment was discriminatory . . . because it was a pretext for some discriminatory intent . . . She does not have the evidence to support her claims, though. Instead, the evidence points to one conclusion: American fired her for her posts on social media."

37

Takeaways

Online harassment—like other harassment—must generally be keyed to a protected class to be actionable.

Complaints and investigations still play a critical role.

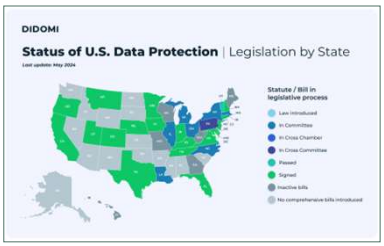
Much of the harassment landscape remains built on the same principles—even if the venue is now sometimes online.

38

Wait. What about employee privacy?

39

Most states have social-media privacy laws.



40

But Idaho is not one of them.

Still, what should employers consider when employee social-media use becomes an issue?

41

"We don't have a workplace union, so the NLRB doesn't care what goes on here . . . right? Right?!"

42

Consider one more hypothetical . . .

HR becomes aware of an employee complaining about the company on Facebook. Upset with conditions at the office, he targets his manager specifically, calling him a "nasty mother f***er," then adds, "f*** his mother and his entire f***ing family."

43

Quiz Time: Round 4

How should HR respond to that social media post?

44

Most employes have a *right to complain*.

Section 7 of the NLRA guarantees non-supervisory employees, among other things, the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

45

The NLRB's view on complaining.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to **engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities." (NLRA, Section 7.)

Key phrase = acting in concert

46

Definition time: what's "concerted activity," anyway?

Is the activity concerted?

- Generally…
  - Two or more non-manager employees
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  - To improve wages or working conditions.
- But the action of a ***single employee*** may be considered concerted if…
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Will the improvements sought benefit more than just the employee taking action (protected)?

Or is the action more along the lines of a personal gripe (not protected)?

Is the action carried out in a way that causes it to lose protection?

Reckless or malicious behavior—e.g, sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets—may cause concerted activity to lose its protection.

48

Give me some more examples.

Recall our opening hypothetical: an employee posts on Facebook, in connection with complaints about working conditions, that his manager is a "nasty mother f***er" and "f*** his mother and his entire f***ing family."

An employee, without involving any coworkers, blurts out during an all-hands meeting to discuss COVID-19 protocols, "We shouldn't be working!" (The employee also voiced concerns about the employer's lack of proper precautions.)

An employee states that workers did not "give a f***" about a cross-training program and telling his manager to "shove it up his f***in' ass!"

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Takeaways

What can an employer do when (non-supervisory) employees speak ill of the workplace, the company, or their coworkers or managers?

Mere griping, without involvement or solicitation of co-workers, is not protected by the NLRA.

But when two or more employees are talking about work—even in a negative way and even when the rest of the world can see it on social media—tread lightly.

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The key answers, the answer key.

The NLRB tells us the key to regulating social media conduct: **CONTEXT.**

Your communications with employees should avoid sweeping bans on social media conduct.

Refer your employees to your conduct-based policies – e.g., your anti-harassment policy.

Always make clear that communications with coworkers about their working conditions are allowed.

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To download a PDF handbook of today's seminar, scan the QR code or visit parsonsbehle.com/idaho-seminar

Thank You!

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12th Annual **Idaho Employment Law Seminar**

FMLA in Real Life: a Caselaw Discussion

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FMLA in Real Life: A Caselaw Discussion

Christina Jepson
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October 23, 2024 | Boise Centre East

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Legal Disclaimer

This presentation is based on available information as of Oct. 23, 2024, 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.

3

Overview of the FMLA

- The Family Medical Leave Act ("FMLA") requires (1) "covered employers" to provide (2) "eligible employees" up to 12 weeks of unpaid leave for (3) FMLA qualifying reasons
- Employers are prohibited from interfering, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right
- Employers may not discriminate or retaliate against an employee or prospective employee, for exercising or attempting to exercise any FMLA right

4

4

Covered Employers

- A private employer is a covered employer if it employs 50 or more employees in 20 or more weeks during the last or current calendar year
- Once an employer becomes a "covered employer" it remains a covered employer until an entire calendar year passes in which it has fewer than 50 employees

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Employee Eligibility

- An employee of a covered employer is eligible for FMLA leave if the employee:
  - Has been employed for at least 12 months (which need not be consecutive): and
  - Worked at least 1,250 hours in the last 12 months immediately preceding the leave request

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Qualified FMLA Leave

- A covered employee must provide an eligible employee up to twelve weeks of unpaid leave during any 12 months for any of the following reasons:
  - Birth of a child;
  - Adoption of a child or placement of a child in an employee's home for foster care;
  - Care for a spouse, child, or parent of an employee during a serious health condition;
  - During a serious health condition of an employee which renders them unable to function on the job;
  - To care for a family member injured in active-duty military service; or
  - To assist a family member regarding certain qualifying exigencies when called to active duty.

7

7

Certification of Serious Health Condition

- An employer may request that an employer provide a certification of a serious health condition. A certification is a document or form completed by the employee and, as appropriate, a health care provider.
  - The employer notifies the employee that a certification is required
  - The employee must provide a completed certification within 15 days unless unusual circumstances are present.
    - An employer may deny FMLA leave if no certification is provided.
    - After receiving the notification an employer may: (1) identify in writing any deficiencies and ask the employee to provide corrected information within 7 calendar days; (2) contact the health care provider to clarify and/or authenticate the certification; (3) request a second medical opinion, at the employer's expense, if the employer is concerned about the validity of the certification; (4) request a third medical opinion, at the employer's expense, if the first and second opinion differ.

8

8

Certification of Serious Health Condition

- After receiving the certification and conducting any of the follow-up identified above an employer must notify the employee in writing if the leave will or will-not be FMLA protected

(DOL, The Employer's Guide to the Family and Medical Leave Act)

9

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Causes of Action

- There are three types of claims that an employee can make against an employer under the FMLA:
  - Interference – An employer refuses to authorize leave under the FMLA or takes action to avoid their responsibilities under the FMLA
  - Retaliation – Where an employee opposes an unlawful practice under the FMLA and the employer retaliates against the employee
  - Discrimination – Where an employer takes an adverse action against an employee because the employee exercises rights to which they are entitled under the FMLA

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Case Study #1: Requesting FMLA Leave

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- Elizabeth Cerda worked for Blue Cube Operations from 2006 to 2020
- In 2017, Cerda suffered a rotator cuff injury and took twelve weeks of FMLA leave
- In 2018, when Cerda returned to work, she told her supervisor that she was going to visit her sick father during her 30-minute lunch breaks to ensure he took his medicines and had something to eat---Is this qualifying?
- Cerda regularly took longer than 30 minutes to visit her father
- WHAT SHOULD THE EMPLOYER DO AT THIS POINT?

12

Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- After Cerda had been visiting her father for several months, her supervisor suggested she speak to HR about her eligibility for FMLA leave to care for him
- Cerda approached Human Resources manager, Michelle Mulligan, as Mulligan was leaving a meeting and briefly expressed her desire about "possibly getting FMLA for her dad"—WHAT SHOULD HR HAVE DONE NEXT?

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13

Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- Cerda never discussed the matter with HR again and continued to exceed her lunch break time without reporting her absences
- Cerda's co-workers complained and following an internal investigation, Blue Cube determined Cerda had been paid for at least 99 hours she did not work
- During the investigation, Cerda missed worked due to Covid-19. Blue Cube required her to use personal sick leave to cover this time. Cerda threatened to come into work and infect her co-workers the next time she was sick.
- Blue Cube terminated Cerda's employment on April 21, 2020 for the 99 hours she did not work and for threatening to infect others
- Prior FMLA leave for rotator cuff, "requested" leave, COVID
- What do you think?

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- Cerda sued Blue Cube asserting FMLA interference and retaliation
- The district court granted summary judgment in favor of Blue Cube and the Fifth Circuit Court of Appeals upheld the summary judgment
- The court upheld summary judgment because Cerda failed to provide adequate notice of her need or intent to take leave noting that "[e]ven when an employee is in all respects eligible for FMLA leave, the employee must give his employer notice of his intention to take leave in order to be entitled to it."

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- The court explained that "[w]hen giving notice, an employee need not expressly invoke the FMLA. The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition. But while an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant."
- In addition, the court noted that "employers may condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances, and discipline resulting from the employee's failure to do so does not constitute interference with employee's FMLA's right."
- Take aways? Who do you want to make sure you have?

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- Although Cerda sought to meet with Mulligan about potential eligibility for FMLA leave that this was "insufficient to put Blue Cube on notice that Cerda *intended to take leave* and that leave qualified for FMLA coverage."
- "Cerda knew how to obtain leave, as she had successfully done so in the past, and she indisputably did not comply with Blue Cube's internal procedures for requesting FMLA leave." DO YOU HAVE PROCEDURES?
- Even if it assumed that Cerda's discussion with her manager regarding her need to care for her father triggered an obligation to provide additional FMLA information, the manager fulfilled this obligation by referring her to Mulligan.

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- In this case, the court found there was no evidence of pretext, and that Blue Cube fired Cerda for earning wages for time she did not work and for threatening to infect her co-workers with Covid-19
- While Cerda noted that other co-workers had also taken long lunch breaks and were never punished, the court explained that there was no evidence other employees had done so to the same extent or threatened their co-workers

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Cerda v. Blue Cube Operations, LLC, 95 F.4th 996 (5th Cir. 2024)

- Takeaways
  - Consider training supervisors and managers to recognize situations when employees should be referred to human resources to begin the FMLA process
  - The FMLA does not require an employee to use magic words. However, when an employer has procedural requirements, employers may generally require employees to comply with them. Employers should consider implementing clear internal procedures by which an employee may provide notice and request leave under the FMLA.

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Case Study #2: Requesting FMLA Leave Part II

PARSONS BEHLE & LATIMER

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- In May 2018, Polina Milman was hired as an attorney at Fieger & Fieger, P.C.
- Set number of PTO days each year. As of March 2020, Milman had two paid off days remaining for the year.
- On Friday, March 13, 2020, the federal government declared a state of emergency related to Covid-19. Schools and childcare facilities were immediately closed.
- The firm sent an email assigning attorneys and staff to work from home one day a week to test its feasibility. Milman was assigned to work from home on Wednesday, March 18.

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- On Saturday, March 14, 2020, Milman emailed James Harrington, a partner at the firm, asking to work from home on Monday, March 16 and Tuesday, March 17 because of her son's daycare closure. Is this FMLA covered?
- On Sunday, March 15, 2020, Milman emailed Harrington again stating she was concerned about her son's vulnerability to Covid-19 because of a previous case of RSV which had resulted in his hospitalization for five days. Is this FMLA covered?
- Harrington replied that she should make the request directly to owner Fieger. Harrington said that if she could not work from home, she could take PTO on those days. She had two days left.
- The morning of Monday, March 16, Milman spoke to Fieger and he denied her request to work from home. Milman used the two days of PTO she had remaining to take off March 16 and March 17.
- What do you think?

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- On Tuesday, March 17, Milman's supervisor, Marc Berlin, called to ask if she would be coming into work on Thursday (recall that Milman had been assigned to work at home on Wednesday, March 18). Milman said that she was still planning on coming in but that she was concerned about her son's daycare situation and that her son may be developing Covid symptoms. Is this FMLA qualifying?
- Milman worked from home on Wednesday, March 18, but her son's symptoms worsened. Berlin called again to ask if she would be in on Thursday, March 19 and Milman said she would.
- On Thursday, March 19, Milman's son's condition had not improved and she became worried about going into the office.

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- Milman contacted HR "stating that her son's symptoms were not any better and that she had major concerns about working in the office because of her son's condition" and she "offered to take unpaid leave, if necessary to stay out of the office." Is this FMLA qualifying? Is a request for unpaid leave a request for FMLA?
- HR did not address her offer of unpaid leave and instead emailed her back stating that she could work home the remainder of the week. Milman worked with her supervisor normally throughout the day.
- At the end of the day, HR sent an email to Milman signed by Fieger terminating her employment immediately: "You failed to come in to work on Monday and Tuesday and indicated that you were taking personal time off. You assured your supervisor ... that you were going to come in on Thursday. Today, Thursday, you did not come into work and indicated that your child had a minor cold .... Today will be your last day on our payroll."
- Any issues?

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- On March 23, 2020, Milman requested her personnel file
- On March 24, 2020, Fieger sent another termination letter stating that "Milman made it clear by her activity that she had no intention of coming into work, she refused to work because her child had a cold, and at that point it was clear she had quit."
- Milman sued alleging FMLA retaliation (not failure to grant). The district court dismissed her FMLA retaliation claim for failure to state a claim. The court explained that "Milman failed to argue whether she was entitled to leave" and that, even if she had, she failed to allege facts that her son suffered from a "serious health condition" under the FMLA.
- Can you allege FMLA retaliation even if you do not qualify for FMLA?

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- The Sixth Circuit reversed the dismissal. The court explained that under the FMLA to prove retaliation a plaintiff must establish that "
  - (1) she was engaged in protected activity;
  - (2) her employer knew she was engaged in protected activity;
  - (3) her employer took an adverse action employment action against her; and
  - (4) there was a casual connection between the protected activity and adverse employment action." In this case, the first two elements were at issue.
- What is the protected activity?

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- Milman never actually took leave, she only made a request for leave." Thus, the court clarified that the question was "whether the FMLA protects the right of an employee to inquire about and request leave even if it turns out that she is *not* entitled to such leave."
- The court held "the scope of protected activity starts with the first step contemplated under the Act's procedures; a request made to the employer. That request, moreover, need not lead to entitlement in order to be protected."
- "Milman made a request to her employer for unpaid leave – following the first step of the FMLA process . . .. Milman's action was grounded in a legitimate exercise of the FMLA's procedural framework and was therefore protected under the FMLA."

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- "Suppose that an employee, intending to exercise her FMLA rights, meets with her employer and asks questions concerning her FMLA rights, then is fired for doing so. Concluding that no FMLA violation could occur if it turns out that the employee is not entitled to leave would render the employee unprotected during the step required to initiate the FMLA's process. Without protection, employees would be discouraged from taking authorized initial steps—including preparing or formulating a request—to access FMLA benefits. We are not to impose nonsensical readings of a statute if alternative interpretations consistent with the legislative purpose are available."

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- The court also rejected the firm's argument that the second element of a retaliation claim – that her employer knew she was engaged in protected activity – was not satisfied because it did not have notice she was seeking FMLA leave.
- The court explained that "[a]n employee does not have to expressly assert his right to take leave as a right under the FMLA to trigger its protection. But the employee must provide enough information for the employer to know that the leave she has requested reasonably might fall under the FMLA. In addition, where leave is needed to care for a family member, the employee must so indicate."

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- "In general, if an employer lacks sufficient information about the employee's reason for taking leave it should inquire further to ascertain whether the employee's leave was potentially FMLA-qualifying."
- "The Firm had notice that Milman sought leave to care for her son who had recently been hospitalized with RSV, suffered continuing symptoms from that condition and, potentially, had contracted COVID-19. This knowledge gave rise to a duty for the Firm to, at minimum, engage in the communication required by the statute. The Firm neither sought to clarify Milman's request nor did it attempt to obtain [an FMLA certification]. Instead, the Firm offered a work-from-home arrangement—which Milman accepted—and then terminated her after the first day for failing to 'come into work, indicating that her 'child had a minor cold.' The Firm, thus, failed to exhaust any of its obligations in responding to Milman's request."

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Milman v. Fieger & Fieger, PC, 58 F.4th 860 (6th Cir. 2023)

- Takeaways
  - An employee's request for FMLA leave is protected even if the employee may not eventually qualify. Accordingly, an employer should avoid retaliation (or the appearance of retaliation) in response to a request even if it appears that it may be outside the FMLA.
  - In addition, an employee's request may be considered an FMLA request even if it doesn't specifically mention the FMLA.
  - In both cases, an employer should make further inquiries to determine whether the request for leave is FMLA qualifying.

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Case Study #3: Performance While on FMLA

PARSONS BEHLE & LATIMER

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- Marianne Wayland was employed by OSF Healthcare System
- Wayland supervised 30 employees in OSF's Institute of Learning which integrated newly acquired hospitals
- From 2017 to 2018, OSF expanded significantly increasing the workload
- The Institute struggled with this workload. However, Wayland's supervisor, Brandy Fisher, gave her positive reviews in 2017 and 2018
- Any concerns with positive reviews?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- In October 2018, Wayland requested intermittent FMLA leave
- Wayland was granted up to one month of continuous leave and then the ability to take one to two days off a week.
- Despite being granted time off, OSF told Wayland that she had "no choice" but to meet OSF's accelerated workload
- Due to her FMLA leave, Wayland and the Institute struggled
- Wayland discussed these concerns with Fisher but was told that she needed to complete all of her projects under the increased goals
- Any concerns? Can't we hold employees to goals?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- In May 2019, Wayland stopped taking FMLA leave. Wayland was then put on a PIP.
  - Wayland was told the plan was not because of her performance but instead was to help with the Institute's deadlines and organization.
  - Fisher said that she didn't know if the deadlines could be met but offered to provide Wayland with a mentor to assist. However, none was ever provided.
  - Wayland was also told the plan was informal and that Wayland need not sign anything or document any conversations.
  - Wayland was not warned that if she performed poorly under the plan that she would be fired.
- ANY ISSUES HERE?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- Wayland met all of her deadlines under the PIP except for those that required outside entities to coordinate with her. Nonetheless, in July 2019, she was fired, two months after her leave started and a month after the start of the PIP. Issues?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- Wayland filed suit alleging FMLA interference and retaliation. A district court granted summary judgment in favor of OSF and Wayland appealed.
- The Seventh Circuit reversed holding that summary judgment was inappropriate

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- The court held that summary judgment was inappropriate because the amount of FMLA time off that Wayland took was disputed
- Why would that matter?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- The court held that summary judgment was inappropriate because the amount of FMLA time off that Wayland took was disputed.
  - Wayland stated that she took leave for 20% of the FMLA time off available while OSF stated that she only took 7% of the FMLA time off available.
  - This was significant because "a jury could reasonably find that when an employee is available for work only 80% of a full-time schedule, and the reason for the 20% shortfall is because she takes protected leave, the employer must adjust its expectations to comply with the Act."

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- The court explained that the FMLA "does not require an employer to adjust its performance standards for the time an employee is on the job. But the [FMLA] can require that performance standards be adjusted to avoid penalizing an employee for being absent during approved leave."
- Thus, the court noted, that it in the past it "had vacated summary judgment under the FMLA when an employer has applied full-time standards to justify firing a leave taking employee."
- What does it mean that you do not have to adjust standards when on the job?

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- In this case, the court held that "a jury could find that OSF interfered with or retaliated against Wayland's use of leave by holding her to standards that were at least as demanding as when she worked full time, and then firing her for falling short . . ..
- "This evidence of unadjusted performance standards, despite her approved absence for 20% of full-time work would allow a jury to conclude that OSF both interfered with her leave-taking rights and retaliated against her by firing her."

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Wayland v. OSF Healthcare System, 94 F.4th 654 (7th Cir. 2024)

- Takeaways
  - Employers may need to adjust performance expectations for employees on approved intermittent FMLA leave.
  - PIPs need to documented, signed, and include clear consequences

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Case Study #4: Termination at the End of Leave

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***Murillo v. City of Granbury*, 2023 WL 6393191 (5th Cir. Oct 2, 2023)**

- Jessica Murillo was employed in the City of Granbury's public works department
- In 2020, due to Covid-19, Congress passed expanded FMLA laws for Covid-related reasons
- Murillo applied for FMLA leave under this expansion because she had lost childcare due to Covid-19
- Granbury's Human Resources Coordinator, Tracie Sorrells, approved twelve weeks of leave running from April 1, 2020 to late June 2020

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***Murillo v. City of Granbury*, 2023 WL 6393191 (5th Cir. Oct 2, 2023)**

- During her leave, several employees contacted Murillo about returning to work—Is this a good idea?
  - A coworker periodically visited Murillo to ask when she would be returning to work
  - Another coworker called her on behalf of the head of Granbury's public works department, Rick Crownover, to inform her she needed to return to work
- Separately, the City's policy required Murillo to check in with her supervisor. In early 2020, Murillo emailed Crownover who responded "Jessica, are you coming back to work?"

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Murillo v. City of Granbury, 2023 WL 6393191 (5th Cir. Oct 2, 2023)

- Murillo called Crownover to follow up on the email
  - Murillo alleged that Crownover was angry and demanded that she return to work immediately before the end of her FMLA leave
  - Crownover disputed this characterization and said that during the call Murillo stated she did not intend to return to work. Murillo denied this claim.
- Murillo then reached out to Sorrells about the call. Sorells assured Murillo that her job was not under threat. Sorrells also informed Murillo that her FMLA leave expired on June 23 and that she was expected to return to work on June 24.
- What happens next?

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Murillo v. City of Granbury, 2023 WL 6393191 (5th Cir. Oct 2, 2023)

- On June 22, Murillo asked Sorrells if she could use her vacation to time to extend her leave. Sorrells responded no. Murillo then to asked to use her accumulated vacation time or for an explanation for why that wouldn't be permitted. No one from Granbury responded. Can you use PTO to extend leave?
- Murillo did not come into work on June 24. Minutes after Murillo's shift started, Crownover emailed Sorells that "Jessica was not there," to which Sorrells responded, "Great! I was hoping she wouldn't come in. Let's term her."
- Murillo's termination letter stated that due to her failure to come in she had been fired for job abandonment. Prior to this, there had been no issues with Murillo's job performance, and she had never come in late.

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Murillo v. City of Granbury, 2023 WL 6393191 (5th Cir. Oct 2, 2023)

- The court also rejected Granbury's claim that job abandonment was a legitimate nonretaliatory reason for Murillo's termination. Specifically, the court noted a jury could find this was pretextual because:
  - Evidence that Granbury had wanted her to return work early from her FMLA leave
  - Sorrells (her supervisor) said she was "hoping" Murillo would not come into work, suggested firing her after only nine minutes into her shift, and terminated her later that day.
  - Murillo's termination did not meet the definition of job abandonment in the Granbury's personnel manual.
  - Murillo's termination was not consistent with the progressive discipline policy in Granbury's personnel manual.
  - Murillo's termination was not consistent with Crownover's ordinary reaction to unexpected absences

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Murillo v. City of Granbury, 2023 WL 6393191 (5th Cir. Oct 2, 2023)

- Takeaways
  - Employers should be careful in their communications with one another as they will likely be discovered in litigation
  - Employers should follow the procedures set forth in their policy manuals. Here the court found evidence of pretext in the fact that Murillo's termination for job abandonment did not meet the definition in Granbury's manual and did not follow the manual's progressive discipline procedure.

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Case Study # 5: Termination after FMLA

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Mark Snyder worked for U.S. Bank as a financial director
- In February 2017, Snyder was arrested following an incident with his ex-girlfriend involving a gun and eventually pleaded guilty to attempted confinement
- Snyder did not inform U.S. bank of his arrest or conviction and when he missed work for probation, he told U.S. Bank it was for a "personal situation"

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Snyder then began using cocaine
- In October 2017, Snyder was arrested and charged with possession of drugs and operating a vehicle under the influence
- Snyder requested FMLA leave due to a "health condition" which U.S. Bank granted
- On October 23, 2017, Snyder suffered a stroke

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- In January 2018, Snyder returned to work and received his 2017 performance review which was positive
- Subsequently, Brian Henson, one of Snyder's employees, reported to Johnnie Carroll, Snyder's supervisor that he felt unsafe around Snyder. Henson also informed Carroll of Snyder's previous gun charge.
- Snyder was combative and confrontational during the investigation but was allowed to continue to work

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Carroll also received other unsolicited complaints about Snyder from co-workers and a customer
- U.S. Bank gave Snyder an official warning detailing Snyder's behavioral issues and failure to notify U.S. bank of his real reasons for missing work
- The warning also stated that if Snyder failed to meet certain outlined work expectations, he would be subject to discipline, including termination
- Can you do this when someone has just been on FMLA?

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- On June 4, 2018, Snyder had a confrontation with his assistant which caused Carroll to send an email to HR stating that Snyder's behavior "is consistent with his issue of attempting to intimidate people" and "I no longer think Synder's situation is redeemable and feel I need to act"
- Caroll asked for "guidance on next steps" – How should HR have responded?

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Later that night, Snyder had a nervous breakdown at a casino and was hospitalized
- Snyder requested FMLA leave which was granted
- On June 22, eighteen days later, Carroll and HR contacted Snyder and informed Snyder that he was being terminated
- On June 27, U.S. bank sent a letter informing Snyder his termination would become final at the end of his FMLA leave
- Any issues?

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Snyder sued U.S. Bank for FMLA interference and retaliation
- The district court granted summary judgment on both claims and Snyder appealed
- The appellate court upheld the summary judgment. The court found that while Snyder had established a prima facie case of interference, his claim failed because U.S. Bank had legitimate reasons to fire him that were not pretextual – the multiple complaints about his behavior, their knowledge of his arrests, and his confrontation with another employee.

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Snyder had failed to establish a prima facie case of retaliation.
- Snyder argued that because he had been fired in close proximity to the time he took FMLA leave that he had established a prima facie case.
- The court rejected this argument, explaining that temporal proximity alone cannot establish a prima facie of retaliation.
- The court further noted that even if Snyder could establish a prima facie case of retaliation that U.S. bank still had a legitimate reason to fire him that was not pretextual, *i.e.*, the numerous complaints about his behavior

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Snyder v. U.S. Bank Nat'l Ass'n, 2022 WL 17330172 (6th Cir. Nov 29, 2022)

- Takeaways
  - While employers should be careful about terminating employees who have requested or are taking FMLA leave, employers can do so if they have a legitimate reason, have followed their procedures, and have proper documentation

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12th Annual **Idaho Employment Law Seminar**

Drugs and Alcohol in the Workplace

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PARSONS BEHLE & LATIMER

12th Annual Parsons Behle & Latimer
Idaho Employment Law Seminar

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Drugs and Alcohol in the Workplace

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October 23, 2024 | Boise Centre East

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Legal Disclaimer

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Informal Audience Survey

- Do you have a drug testing policy?
  - Written
  - Signed by Employee
- Do you **not** have a drug testing policy?
  - Do you test anyway?
- Do you not test for marijuana?
  - Industrial work force?
- Have you had an increase in the past 5 years of drug or alcohol use impacting the workplace?
- Which causes more problems in the workplace: marijuana, alcohol, or other

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Evolution of Marijuana Legalization:1996

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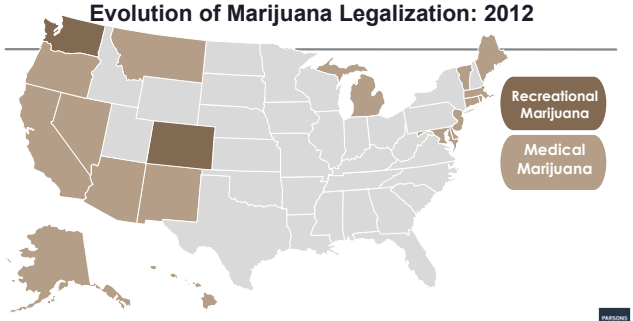
Evolution of Marijuana Legalization: 2012



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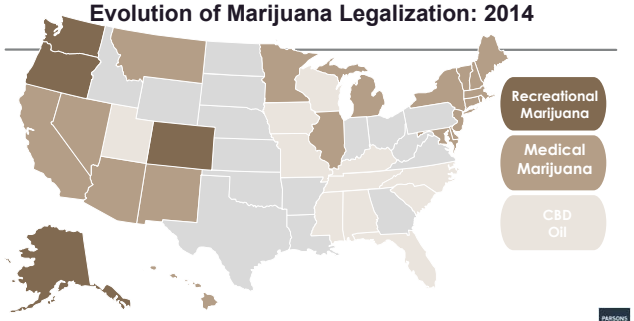
Evolution of Marijuana Legalization: 2014



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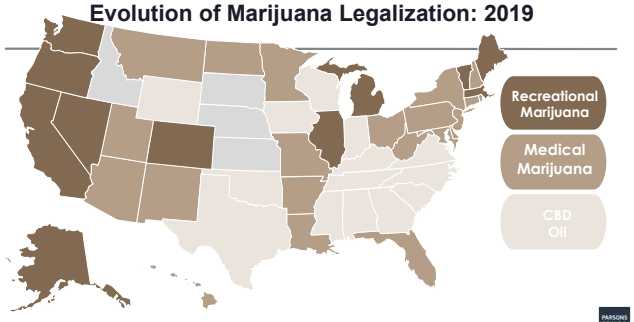
Evolution of Marijuana Legalization: 2019



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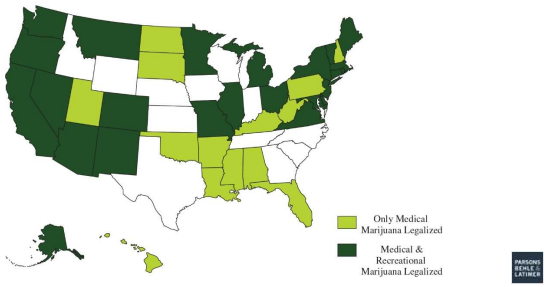
Were is Marijuana Legal Today?



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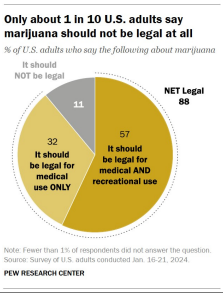
Current Opinions on Marijuana in the U.S.



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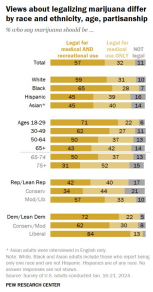
Current Opinions on Marijuana in the U.S.



- 50.3% of U.S. adults say they have used marijuana at least once, ever
- 84.1% of U.S. adults say they have consumed alcohol at least once, ever
- 23.0% of adults have used marijuana in the past year
- 15.9% of adults have used marijuana in the past month
- Of adults who drink alcohol:
  - 69% had a drink within the last week
  - 32% had a drink within the last 24 hours

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Trends in Marijuana and the Workplace

- NYC ban on employer preemployment drug testing, April 2019.
- Only Half of CO Employers Will Fire for a Single Pot Test, *Denver Post*, March 2019.
- Quest Diagnostics Study, May 15, 2024:
  - Over the past five years, marijuana positivity has increased by 45.2% (3.1% in 2019 versus 4.5% in 2023).
  - In the past nine years, post-accident marijuana positivity increased 114.3%.
  - Marijuana positivity increased in industries associated with office work but has decreased in the federally mandated, safety sensitive workspace.

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Trends in Court Cases and Marijuana and the Workplace

- Judicial interpretation trending more favorably to employees
  - Before 2017 (outside of workers' compensation and unemployment), employers won each case brought based on alleged violation of right to use medical marijuana.
    - *Washburn v. Columbia Forest Products, Inc.*, (Or. 2006)
    - *Ross v. RagingWire Telecomms., Inc.* (Cal. 2008)
    - *Johnson v. Columbia Falls Aluminum Co., LLC* (Mont. 2009)
    - *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries* (Or. 2010)
    - *Roe v. Teletech Customer Care Mgmt. LLC* (Wash. 2011)
    - *Casias v. Wal-Mart Stores, Inc.* (6th Cir. 2012) (construing Mich. law)
    - *Savage v. Maine Pretrial Services, Inc.* (Me. 2013)
    - *Coats v. Dish Network, LLC, 350 P.3d 849* (Colo. 2015)

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Trends in Court Cases and Marijuana and the Workplace

- **After 2017**, employers have **lost** almost every such case.
  - *Callaghan v. Darlington Fabrics Corp.* (R.I. Superior Ct. 2017)

    The judge started the opinion with the Beatles song quote "I get high with a little help from my friends.
  - *Barbuto v. Advantage Sales & Marketing, LLC* (Mass 2017)
  - *Noffsinger v. SSC Niantic Operating Co., LLC* (D. Conn. 2017)
  - *Chance v. Kraft Heinz Food's Co.* (Del. Superior Ct. 2018)
  - *Wild v Carriage Funeral Holdings, Inc.* (N.J. App. Div. 2019)

    But see Cotto v. Ardagh Glass Packaging, (D.N.J. 2018)

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Trends in Court Cases and Marijuana in the Workplace

- Several recent federal cases interpreting ADA favor employers:
  - *Skoric v. Marble Valley Reg'l Transit Dist.* (D. Vt. Feb. 14, 2024)
    - ADA does not protect medical marijuana usage in the workplace.
  - *See also Snow v. Autozoners*, LLC (D. Utah Sept. 5, 2023).

Because medical marijuana remains illegal under federal law, an ADA discrimination claim is not available for individuals who claim that they suffered discrimination based on their use of medical marijuana.

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How Does this Affect You?

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Must Employers Accommodate Medical Marijuana?

- Under Federal Law, Marijuana remains **illegal**.
- Under Idaho Law, Marijuana remains **illegal**.
- Nearly all neighboring states have some level of legality:
  - Washington, Oregon, Montana, and Nevada: medicinal and recreational;
  - Utah: medicinal;
  - Wyoming: illegal.

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Drug-Testing Considerations for Current and Prospective Employees

- How is Marijuana different from Alcohol?
- Problem with testing for Marijuana/THC:
  - Does not test for impairment
  - THC stays in the system for a long time after use
    - Long term users can test positive for up to 30 days after last use
    - One-time users can test positive for up to 3 days after use
  - So: the user can test positive but not be impaired
    - Same with cocaine, amphetamines, prescription drugs, but has a much longer half life in the body
    - Testing sensitivity varies wildly

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Drug-Testing Considerations for Current and Prospective Employees

- May not always differentiate between THC and CBD
- Tests are getting more practical:
  - Portable (testing "in the field")
  - Detect level of THC and can determine impairment levels, similar to a breathalyzer or BAC test
  - Some states are identifying THC thresholds: 5ng/mL
- Not necessarily widely available
- Some are marketed as medical devices for medical marijuana users

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Drug-Testing Considerations for Current and Prospective Employees

- Legal and Practical Considerations:
  - Federally Regulated Employees:
    - DOT- mandated testing
    - Federal Contractors and Grant Recipients
  - Workplace Safety: Federal or State MSHA and OSHA
  - Other Workplace Enforcement Concerns
    - Public Policy
    - Policing Outside-of-Work Activities
  - At-will vs. For-Cause (employment agreements) vs. Just Cause (Collective Bargaining Agreements)

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Drug-Testing Considerations for Current and Prospective Employees

- Workers' Compensation
- Unemployment Benefits
- Issues with types of drug testing:
  - Pre-employment v. post-hire
  - Random
  - Suspicion of Impairment
  - Post Accident
- Market Forces
- Company Culture

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Drug-Testing Considerations for Current and Prospective Employees

Drug Free Workplace Act (federal contractors/grant recipients)

- Develop and publish a written policy that prohibits manufacture, use, distributions in the workplace; ensure that employees read and consent to it as condition to employment.
- Establish a drug-free awareness program to educate employees of the dangers of drug abuse.
- Require notifications from employees within 5 days of a criminal drug conviction.
- Notify the federal contracting agency within 10 days of any covered violation.
- **Does not require drug tests and does not prohibit drug use OUTSIDE of the workplace.**

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Drug-Testing Considerations for Current and Prospective Employees

Department of Transportation:

- The Omnibus Transportation Employee Testing Act **requires** DOT Agencies to implement drug & alcohol testing of safety-sensitive transportation employees.
- DOT-regulated drug testing is not changed by state laws permitting medical marijuana.
- Medical Review Officers will still treat as positive test.

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Drug-Testing Considerations for Current and Prospective Employees

OSHA General Duty Clause

- Employers can still expect employees to work to the required standards.
  - Marijuana laws do not diminish need for a safe, productive workplace.
- But off-duty use is not a violation of the OSHA general duty clause.
- Post-incident drug testing policies must be consistent or will be considered retaliatory.
- OSHA allows Injury Illness Prevention Programs to address Medical Marijuana

P. Gillespie's Article: *State Medical Marijuana Legalization and OSHA Anti-Retaliation Rules: Post Accident Drug Testing Consideration for Employers* (SciTech Lawyer, Vol 13 No. 3, 2017).

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

- Some states specifically protect legal medical marijuana users **under the state's disability act**—but not under Federal law
- Don't have to allow possession on the job
- Don't have to allow influence or impairment on the job
- Safety sensitive positions or tasks, such as heaving machine operators, driving, handling medicine or regulated chemicals, or working in high or confined spaces
- Where may constitute negligence, professional negligence, or professional misconduct.

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

Legal Considerations:

- Federal Law Enforcement has decreased enforcement.
- Many states have signaled they will not enforce federal laws and have none/have modified/do not enforce possession and use.
- U.S. public sentiment towards marijuana usage has changed.

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Disciplining and Terminating Medical Marijuana Users: Current Legal Perspectives

Practical Considerations:

- There is a worker shortage.
- Some good workers use medical marijuana.
- Consider business needs/culture – drivers, operators, safety, image.
- Are you a multi-state employer in a state that has different laws?
- Consider testing and disciplining for other drugs, but not marijuana.
- Rely on fitness for duty and objective criteria to measure impairment on the job.

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Recognizing Impairment on the Job

- Reasonable Suspicion:
  - A belief based on specific and articulable facts and/or inferences from those facts regarding a specific individual that would lead a reasonable person to suspect that the individual is impaired
    - More than a hunch, a feeling, or other unparticularized suspicion
  - Based on observations
  - Contemporaneous to the work period
  - Based on senses: what supervisor sees, hears, smells
  - Objective and documented criteria
  - Capable of being expressed as signs of possible drug/alcohol use

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Recognizing Impairment on the Job

Marijuana and Other Drugs:

- **Personality Changes**
  - Personality changes are the most difficult to specify/articulate
  - Be alert to changes in the employee's usual personality traits or expression
  - Personality changes due to drug use often are sudden and dramatic
- **Speech Patterns**
  - Stimulants create rapid, pressured speech patterns
  - Narcotics produce slow, thick, slurred speech
  - Hallucinogens may produce nonsense, fantasy speech

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Recognizing Impairment on the Job

Marijuana and Other Drugs:

- **Social Interaction Changes:**
  - Changes in social interaction are not specific to drug use
  - Varies from person to person
  - Be alert to changes in the employee's usual patters of interacting
- **Psychomotor Changes:**
  - Marijuana delays reaction times, impairs eye-hand coordination and creates unsteadiness
  - Sedatives or narcotics slow down motor function and may cause a person to stagger, move very slowly, be unsteady when walking

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Recognizing Impairment on the Job

- **Physical signs of drug use**
  - Changes in physical appearance
  - Worsening personal hygiene
  - Impaired reaction times
  - Slurred speech
  - Impaired awareness
  - Sudden incapacity
  - Restricted mobility
  - Distorted hearing or vision

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Recognizing Impairment on the Job

- **Psychological signs of drug use**
  - Lack of memory
  - Limited judgment
  - Unusual irritability or aggression
  - Tendency to become confused
  - Sudden mood changes

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Recognizing Impairment on the Job

- **Behavioral signs of drug uses:**
  - Poor job performance (bad time-keeping, errors, lowered ability to successfully carry out everyday tasks)
  - Greater levels of absence through short-term sickness
  - Worsening relationships with management, colleagues or customers
  - Dishonesty and theft
  - Atypical or erratic behavior
  - Reduced levels of perception and coordination
  - Big fluctuations in energy or concentration
  - Lack of reasoning

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- To benefit from the Idaho Employer Alcohol and Drug-Free Workplace Act, employers must have written policy on drugs and/or alcohol testing (I.C. § 72-1705).
- Must identify what type of testing you will do:
  - Baseline, preemployment, post-accident, random, return to duty, follow-up, reasonable suspicion.
- Must state that a violation of drug testing policy may result in termination due to misconduct
- Must give written notice of positive test result
- Must allow a retest requested within 7 days

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- Consider reasonable suspicion/post accident testing instead of mandatory or random.
- Make clear the policy for usage among on-call employees.
  - Does the type of position matter?
    - IT after hours help vs. EMT or ER MD
- Consider reasonable suspicion instead of mandatory.
  - Train how to recognize impairment
- Use/possession at work grounds for termination.

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Creating Drug and Alcohol Policies That Leave No Room for Interpretation

- Keep drug and alcohol policy updated.
  - Be specific; e.g., clarify federal and state law, not just "legally prescribed."
  - Address prescription medication that may affect ability to work.
  - Define impairment based on observable characteristics.
  - Consequences for refusal to submit to testing.
- Know handbook and policies.
  - Apply uniformly.
  - Publicize your policy and train supervisors.
  - Sign receipt of the policy.
- Consider accommodation process.

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Thank You

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12th Annual **Idaho Employment Law Seminar**

Documents are an Employer's Best Friend – How to Properly Document Employee Interactions with HR

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3

Documentation Basics

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Communication and Documentation

- Two pillars of good employee performance management and risk management
- 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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"Golden Rule" of Documentation

IF IT IS NOT IN WRITING,
IT DIDN'T HAPPEN!

6

How will documentation help limit risk?

- In a case that goes to a jury trial, we never want to rely on testimony alone because the jury gets to pick who to believe
  - Spoiler Alert: They tend to believe the employee more often than the employer!
- Documents help to establish **intent** and show:
  - Decisions were performance or business based
  - Decisions were not motivated by discriminatory, retaliatory, or other unlawful intent

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Other reasons for documenting?

- Show that you did everything you were supposed to do in furtherance of the employee's rights, such as:
  - ADA accommodation process
  - Investigated and corrected promptly any claims of discrimination or retaliation

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Who Else Cares About Documentation?

- Documentation also really matters to the agencies that enforce anti-discrimination and anti-retaliation employment laws:
  - State Agencies (e.g. UALD)
  - EEOC
  - DOL
- Service of a Charge or Complaint is always accompanied by a Request for Information

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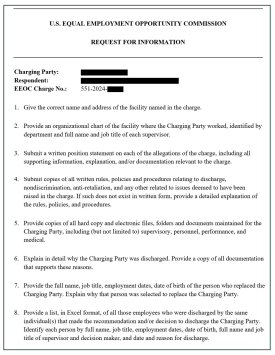
Excerpt from EEOC Request for Information



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REQUEST FOR INFORMATION

Charging Party: [redacted]
Respondent: [redacted]
EEOC Charge No.: 551-2024-[redacted]

1. Give the correct name and address of the facility named in the charge.
2. Provide an organizational chart of the facility where the Charging Party worked, identified by department and full name and job title of each supervisor.
3. Submit a written position statement on each of the allegations of the charge, including all supporting information, explanation, and/or documentation relevant to the charge.
4. Submit copies of all written rules, policies and procedures relating to discharge, nondiscrimination, anti-retaliation, and any other related to issues deemed to have been raised in the charge. If such does not exist in written form, provide a detailed explanation of the rules, policies, and procedures.
5. Provide copies of all hard copy and electronic files, folders and documents maintained for the Charging Party, including (but not limited to) supervisory, personnel, performance, and medical.
6. Explain in detail why the Charging Party was discharged. Provide a copy of all documentation that supports these reasons.
7. Provide the full name, job title, employment dates, date of birth of the person who replaced the Charging Party. Explain why that person was selected to replace the Charging Party.
8. Provide a list, in Excel format, of all those employees who were discharged by the same individual(s) that made the recommendation and/or decision to discharge the Charging Party. Identify each person by full name, job title, employment dates, date of birth, full name and job title of supervisor and decision maker, and date and reason for discharge.

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Documents Relevant to Investigations

- All documents relating to any disciplinary actions taken by Respondent against Charging Party in the past five years.
- All documents related to the Charge.
- A copy of Charging Party's job description at the time he/she left their employment or at the time you received this charge of discrimination as well as any minimum requirements of the position.
- All documents that explain the reason(s) why Charging Party is no longer employed by Respondent. (If Charging Party is still employed by Respondent you do not need to answer this question.)

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Stainsby v. Oklahoma Healthcare Authority

- Stainsby, a 55-year-old woman, was Director of Office of Public Communications for 20 years
- Zumwalt became her supervisor in 2019
- Over Zumwalt's first two weeks as supervisor, she observed several instances of failure to adhere to deadlines or poor quality work
  - Stainsby had been disciplined for failure to follow deadlines in 2014, but overall had "exceeds standards" ratings on reviews
  - No other documentation of performance issues
  - Zumwalt did not document the issues contemporaneously

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Stainsby, continued

- Zumwalt terminated Stainsby and Stainsby sued, claiming age discrimination
- The district court allowed the case to go to the jury
  - Oklahoma Healthcare Authority had shown legitimate business reasons for terminating Stainsby
  - But lack of contemporaneous documentation left whether reason was pretextual disputed
  - Jury would have to decide whose account to credit
- As public entity, Oklahoma Healthcare Authority decided to settle instead of spending money on litigating the issue.

Stainsby v. Oklahoma ex rel. Oklahoma Health Care Auth., No. CIV-21-1073-D, 2023 WL 1825099, at *7 (W.D. Okla. Feb. 8, 2023)

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Diaz v. Tesla, Inc.

- Section 1981 Claim for Hostile Work Environment Based on Race
- State law claim for hostile work environment

Diaz v. Tesla, Inc., 598 F. Supp. 3d 809 (N.D. Cal. 2022) (Order on Judgment as a Matter of Law)

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Diaz's Allegations

- Diaz was a forklift driver at a Tesla factory
- He alleged n-word "thrown around the factory" a lot
  - 8-10 employees calling names, including supervisors
- Only a few specific reports of allegations documented
- Diaz reported verbal altercation with co-worker who used racist slurs:
  - No documentation of investigation
  - "Muddled" testimony regarding the incident
  - No written discipline in evidence

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Diaz Incident with Supervisor (Martinez)

- Diaz also alleged supervisor called him n-word and physically threatened him.
- Diaz reported altercation by e-mail, but did not specify the n-word was used; although he claimed he had verbally told company that supervisor called him n-word regularly
- Martinez also reported altercation, claiming Diaz was not "professional"
- Company determined no "formal investigation" needed
  - Apparently did not take notes of discussions with Diaz and Martinez
  - Did not review video footage of incident
  - Did not interview witnesses
  - Issued both Diaz and Martinez verbal warnings

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Additional Incident Involving Martinez

- Racist cartoon based on "Caveman Inki" drawn at factory
- Company suspended Martinez and allegedly gave written warning
- Company witness testified did not remember whether anyone recommended terminating Martinez
- Company witness did not recall whether he saw the written warning he allegedly gave to Martinez

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Verdict and Takeaways

- Jury awarded:
  - $6.9 million compensatory damages; $130 million punitive damages (though later reduced)
- Incidents were reported to different individuals; more thorough documentation could have helped illustrate a pattern of behavior and resulted in escalating action, if necessary
- If Diaz was inflating the number or severity of incidents (as Tesla argued), more complete documentation could have been more compelling to make that case to the jury.
  - Spotty documentation and witnesses with memory gaps call into question Tesla's credibility to claim nothing else occurred.

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Diaz Takeaways, continued

- Ultimately, Tesla was unable to convince judge or jury it had taken reasonable remedial action in response to complaints of harassment.
- Better documentation could have supported Tesla's defense by acting as memory-aid for some of the gaps in testimony and better illustrating Tesla's decision-making process and action.

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Documenting throughout employment

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Best Practices

- 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
  - Termination of employment relationship

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Employee Lifecycle Documentation

HIRE / EVENT	WHAT A SUPERVISOR SHOULD BE DOING
HIRE DATE ↓	Employee gets a written job description giving fair notice of his/her job duties and performance expectations and goals.

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Employee Lifecycle Documentation

HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
90 Days Later ↓	Supervisor checks in with employee after "orientation" period to verify adequate performance and good job fit. Thereafter, supervisor provides regular oversight, coaching, etc.

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Employee Lifecycle Documentation

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
Additional Problems ↓	Further discussions and coaching, HR involvement and perhaps discipline, maybe written warnings—depending on how serious the problem is. Repeat clear objectives and measurements of the same.

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Employee Lifecycle Documentation

HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
Performance Reviews ↓	Conduct a truthful and accurate review of employee's performance during full relevant period (e.g., one year). Note if problems exist and include discussion of relevant job actions (e.g., warnings or discipline, successes, etc.).

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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

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Employee Lifecycle Documentation

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. HR involvement should ensure company-wide consistency and that the written record supports the termination decision.

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Employee Lifecycle Documentation

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. Remember this will be "Exhibit A" in any post-termination dispute, so do it properly.

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Documenting Misconduct

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Documenting Misconduct

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

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

Is this helpful documentation?

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Documenting Misconduct

A proper signed write-up might look like this:

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

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Documenting Misconduct

Is this helpful documentation of misconduct?:

"Wally Witness told me Jerry Janitor pushed and shoved a couple other guys in the hallway. Jerry was yelling about something. One of the guys fell."

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Documenting Misconduct

Compare with:

"9/15/2021, 2:20 p.m.: Called Wally Witness to my office. He said he saw Jerry Janitor push and shove Andy Annoyance and Prickly Pete in the west service hallway. Jerry was yelling at Andy and Pete about spilled grease. Andy fell down but got right back up and did not appear to be hurt. I asked Wally to write up a statement."

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Common Mistakes in Disciplining

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

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Documenting Misconduct

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

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Guidelines for Corrective Actions

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

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Guidelines for Corrective Actions

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

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Guidelines for Corrective Actions

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

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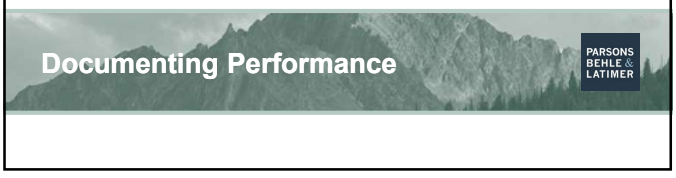

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AVOIDING LEGAL TROUBLE

- Performance Evaluations, Reviews, and Appraisals
  - Should address: C.A.P.
  - **C**ONDUCT
  - **A**TTENDANCE
  - **P**ERFORMANCE
- Be Courageously Honest
- But Not About Non C.A.P. Issues!

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BAD Excerpts from Federal Employee Evals

- "Since my last report, this employee has reached rock-bottom and has started to dig."
- "I would not allow this employee to breed."
- "Works well when under constant supervision and cornered like a rat in a trap."
- "When she opens her mouth, it seems that it is only to change feet."
- "This young lady has delusions of adequacy."
- "He sets low personal standards and then consistently fails to achieve them."
- "This employee should go far, and the sooner he starts, the better."
- "He would argue with a signpost."
- "He brings a lot of joy whenever he leaves the room."
- "If you give him a penny for his thoughts, you'd get change."

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Be Smart About Documentation

Terms used in a female employee's evaluation:

- "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"

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (gender stereotyping)

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Characteristics of Bad Evaluation Ratings

Central Tendency – supervisor avoids rating employees either very high or very low. Reviews are clustered in the middle of the rating scale for all employees.

Leniency – supervisor gives high ratings to all employees.

Strictness – supervisor gives low ratings to all employees.

Similar-to-Me – supervisor gives high ratings only to employees who share similar thinking, personality, background.

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Characteristics of Good Evaluation Ratings

- Addresses C.A.P. (Conduct, Attendance, Performance)
- Provides same or similar review/ratings to same or similar Conduct, Attendance, Performance
- Connected to Job Duties and Description
- Looks at entire performance period; notes trends
- Supports employment decisions
  - Ask: Should this person be promoted? Should this person be on a PIP?
- Avoids stereotypes and personal attacks

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How Terminations Often Go

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Common Mistakes in Termination

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

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Thank You

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