10th Annual Parsons Behle & Latimer
Idaho Employment Law Seminar

for corporate counsel, business owners & human resource professionals

OCTOBER 5, 2022 | BOISE CENTRE EAST | BOISE, IDAHO

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10th Annual **Idaho Employment Law Seminar**

Privacy in the Workplace: How Much Snooping Is Legal and Proper?

Christina M. Jepson
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PARSONS BEHLE & LATIMER

Christina M. Jepson

Shareholder | Diversity, Equity & Inclusion Director | Salt Lake City

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PARSONS BEHLE & LATIMER

For the past 27 years, Christina has partnered with large and small companies to solve their labor and employment issues. She assists clients with the full spectrum of employment matters, including daily management of employment issues as well as litigation.

Capabilities

Employment & Labor

Employment Litigation

Trade Secret Litigation

Biography

For the past 27 years, Christina has partnered with clients to solve their labor and employment issues. She assists clients with the full spectrum of employment matters, including daily management of employment issues as well as litigation. Christina served as the chair of the firm's Labor and Employment Department for 10 years and is the past chair of the Labor and Employment Section of the Utah State Bar. She is the director of Diversity, Equity and Inclusion (DE&I) director for the firm and regularly speaks in client and community forums on that topic. With her experience as an employment lawyer and as the Director of Diversity, Equity and Inclusion, Christina has the expertise to help clients build DE&I plans, implement plans and address issues.

Christina is recognized in:

- *Utah Business Magazine,* ranked as a "Legal Elite" in Employment and Labor Law, 2012 - 2021
- *Intermountain States Super Lawyers:* Ranked as one of the "Top 50 Women Lawyers," 2019 - 2022; also ranked as top attorney in Employment & Labor: Employer; and Employment Litigation: Defense, Business Litigation 2013-

2014, 2016-2022

- *Best Lawyers in America*, ranked as a "Best Lawyer" in Employment Law - Management, 2014 - 2023
- *Chambers and Partners USA*, "Notable Practitioner" and Band 2 ranking, Labor & Employment Law, 2019 – 2022

Christina is also a member of the national and local Society for Human Resource Management (SHRM) and has spoken at multiple SHRM events.

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

- Diversity and inclusion plans
- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- ADA, disability and employee medical issues
- Wrongful termination
- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, collective actions and wage issues
- Independent contractor issues
- Drug and alcohol testing
- FMLA and other leave issues
- Terminations and unemployment
- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees
- Benefits and ERISA
- COVID-19 issues including leave, safety, back to work plans and positive tests

Christina is an adjunct professor of law at the University of Utah S.J. Quinney College of Law. She has taught a litigation skills class for more than 14 years in the Juris Doctor program. She also teaches Labor and Employment Law in the Master of Legal Studies program. She is the past president of the University of Utah S.J. Quinney College of Law Board of Trustees.

Prior to joining Parsons Behle & Latimer, Christina served as a judicial law clerk to the Honorable David K. Winder, then Chief Judge of the United States District Court for the District of Utah, and the Honorable Stephen H. Anderson at the Tenth Circuit Court of Appeals. She graduated first in her class from the University of Utah S.J. Quinney College of law, where she also served on the *Utah Law Review* and competed for the National Moot Court Team.

Christina is a member of the American Bar Foundation Fellows.

Accomplishments

Academic

University of Utah, S.J. Quinney College of Law (J.D., 1995)

- Graduated 1st in the class
- Order of the Coif
- Named Outstanding Woman Law Graduate
- William H. Leary Scholar
- Winner of Law School Moot Court Competition
- Member of National Moot Court Team
- Best Brief and Best Oralist at Regional Moot Court Competition
- Member of *Utah Law Review*

University of Utah (B.S., 1992)

- *Magna Cum Laude*
- Phi Kappa Phi, Golden Key, and Pi Sigma Alpha Honor Societies

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Professional

Best Lawyers in America, Employment Law Management, 2014 - 2023

Intermountain States Super Lawyers: Ranked as one of the "Top 50 Women Lawyers," 2019 - 2022; also ranked as top attorney in Employment & Labor: Employer; and Employment Litigation: Defense, Business Litigation 2013-2014, 2016-2022

Defense Research Institute (DRI), Utah Contributor to Fifty State Compendium, 2019 - 2020

Chambers and Partners USA, "Notable Practitioner" and Band 2 ranking, Labor & Employment Law, 2019 – 2022

Utah Business Magazine, "Legal Elite," Labor & Employment, 2012 - 2022

Parsons Behle & Latimer

Director, Diversity, Equity & Inclusion Department, 2020 - present

Chair, Employment & Labor Practice Group, 2011 - 2020

Served on:

- Lateral Hiring Committee
- Web Design Committee
- Wellness Committee
- Opinion Letter Committee
- Recruiting Committee

Associations

Professional

Utah State Bar Leadership and Boards

- Chair, Utah State Bar Labor and Employment Section, 2014 - 2015
- Vice-Chair, Utah State Bar Labor and Employment Section, 2013 - 2014
- Treasurer, Utah State Bar Labor and Employment Section, 2012 -2013
- Secretary, Utah State Bar Labor and Employment Section, 2011 - 2012
- Member, Utah State Bar Character and Fitness Committee, 2001 - 2010
- Member, Utah State Bar Association Summer Convention Committee 2015
- Member, Utah State Bar Association Spring Convention Committees 2013 - 2015

Society for Human Resource Management (SHRM)

Co-Chair, Development Committee, UCLI 2022

Pro Bono Attorney for Domestic Violence Victims, 2000 - 2010

Pre-Litigation Chair, Department of Professional Licensing, 2003 - 2005

Judge Pro Tempore, Third District Court Small Claims Court, 1997 - 2007

Community

University of Utah S.J. Quinney College of Law

- Past president, Board of Trustees, 2021 - 2022
- President, Board of Trustees, 2019 - 2021
- President-elect, Board of Trustees, 2017 - 2019
- Member, Board of Trustees, 2008 - present
- Chair, Alumni Relations Committee, 2015 - 2017
- University of Utah Law School Search Committee for Career Development Director
- University of Utah Law School Search Committee for Dean of Academic Affairs

Adjunct Professor of Law, University of Utah Law S.J. Quinney College of Law, 2007 to present

Labor and Employment Law in Masters of Legal Studies Program

- Pre-Trial Practice in JD Program, 2007 - present

Adjunct Faculty Service Award 2022

University of Utah Alumni Association Board of Directors Member, 2005 - 2008

- Chair and Member, Community Service Committee, 2006 - 2008
- Member, Development Committee, 2007 - 2008
- Member, Scholarships and Awards Committee, 2006 - 2007
- Member, Legislative Affairs Committee, 2005 - 2006
- Member, Athletics Advisory Council, 2005

Member, Visit Salt Lake Human Resource & Compensation Committee, 2021 - present

Member, Board of Directors, LiveOn.org, currently

Member of Board of Trustees, Visit Salt Lake, 2014 - 2018

Member, Board of Directors, Ballet West, 2012 - 2015

Pro Bono Clients

Utah Film Center

Girls on the Run

Megan Blues Studios

Salt Lake City Arts Council

Political

Member Utah Trafficking in Persons Taskforce Legal Subcommittee, 2016 - present

Democratic Party Sexual Harassment Committee, 2018 - 2019

Articles

Wage and Hour Laws: Utah **July 28, 2022**

Employment Law Update, July 15, 2022 **July 15, 2022**

The Impaired Mobile Employee: What are the CMD's Options?
April 30, 2022

Drug Testing Laws: Utah **February 7, 2022**

Tenth Circuit Court of Appeals Rules that Computer Log-in Time for Certain In-Office Workers is Compensable Under Fair Labor Standards Act **January 11, 2022**

Workers' Compensation Laws: Utah **2021**

DRI Employment Law Compendium, Utah Section
February 17, 2021

Employment Claims in Release Agreements: Utah
2014 to present

Leave Policy Language: Utah **November 2020**

Salt Lake County Extends Face Covering Order to Aug. 20, 2020
July 7, 2020

Salt Lake County and Summit County Require Individuals to Wear Face Coverings **July 1, 2020**

Leave Policy Language: Utah **June 2020**

FLSA Requirements for Part-time Telecommuters: When Must Employers Pay For Time Spent Commuting? **June 23, 2020**

Industry-Specific Guidelines for Re-Opening Construction and Manufacturing Businesses in Utah (June 2) **June 2, 2020**

Industry-Specific Guidelines for Re-Opening Restaurants in Utah **June 2, 2020**

Industry-Specific Guidelines for Re-Opening Retail Establishments in Utah **June 2, 2020**

Industry-Specific Guidelines for Re-Opening the Hospitality Industry in Utah **June 2, 2020**

Industry-Specific Guidelines for Re-Opening Construction and Manufacturing Businesses in Utah **May 26, 2020**

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

What to Do with Employees at High Risk for Serious COVID 19 Illness: The ADA and Return to Work **May 12, 2020**

What Utah Employers Need to Know About Governor Herbert's Order Moving the COVID-19 Public Health Status from Red to Orange **May 5, 2020**

The U.S. Department of Labor Cracks Down on Employers not Providing Sick Leave Under the Families First Coronavirus Response Act **April 28, 2020**

COVID-19: Employers' Rights and Duties When Pandemic Spurs Protected Concerted Activity **April 21, 2020**

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

What Employers Need to Know About the CDC's Recent Recommendation to Wear Cloth Facemasks **April 14, 2020**

New Guidance From The Department of Homeland Security Allows Some Employers To Confirm Employees' I-9 Information Remotely During "National Emergency" **April 7, 2020**

Utah COVID-19 Restrictions as they Impact Employers **March 30, 2020**

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

Terminations, Layoffs and WARN Notices in the COVID-19 Crisis **March 19, 2020**

Working During Crisis: Telecommuting Policies During the COVID-19 Pandemic **March 17, 2020**

Utah Section of New Employment Law 2020 **March 5, 2020**

Going Green—Deciding to Not Test Applicants for Marijuana **December 18, 2019**

Federal Government Raises Threshold Salary for Employees to Qualify for Exempt Status **October 3, 2019**

Wage and Hour Laws: Utah **2014 to present**

Hiring Requirements: Utah **2014 to present**

Employee Privacy Laws: Utah **2014 to present**

Ground Rules: Three Major Employment Law Changes That May Impact Your Business **January 27, 2017**

Background Check Law: Utah **2014 to present**

Independent Contractors: Utah **2014 to present**

Drug Testing Laws: Utah **2014 to present**

Anti-discrimination Laws: Utah **2014 to present**

Leave Laws: Utah **2014 to present**

Presentations

Common Mistakes and Horror Stories **August 31, 2022**

Independent Contractors or Employees **June 16, 2022**

The Impaired Mobile Employee: What Is the CMD's Options? **April 30, 2022**

Political Speech in the Workplace **October 27, 2021**

Political Speech in the Workplace **September 22, 2021**

Political Speech in the Workplace **August 25, 2021**

Onboarding Talent Through Wellbeing and Inclusive Practices **May 26, 2021**

Trends in Diversity, Equity & Inclusion Programs **November 10, 2020**

Women in Business **June 16, 2020**

Webinar: Employment Issues and The Pandemic **May 22, 2020**

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

What Every Employer Should Know Before Resuming Business in Utah **May 12, 2020**

Back in Business: Information Every Idaho Employer Should Know **May 11, 2020**

Getting Utah Back to Business **May 7, 2020**

Employer Considerations To Successfully Reopen A Business - May 5, 2020 **May 5, 2020**

Families First Coronavirus Response Act: What It Does and How To Respond **March 23, 2020**

Utah Employment Legal Update **November 21, 2019**

Telecommuting and Working Remotely **October 17, 2019**

Telecommuting: Legal Issues and Solutions **October 10, 2019**

ADA and the FMLA: Managing Intermittent Leave
September 22, 2017

Religion in the Workplace: Walking on Eggshells
September 20, 2017

To Compete or Not To Compete... That is the Legislation
May 26, 2016

Pregnancy Discrimination Panel **April 1, 2016**

Employment Law Compliance/Point and Counterpoint
August 1, 2015

Social Media in the Workplace **August 7, 2013**

Social Media in the Workplace **March 15, 2013**

Effective Use of Paralegals **November 1, 2007**

Women in Law **September 1, 2007**

Trends and Corrections in the Utah Courts of Appeals
July 1, 2007

Credentials

Licensed

Utah

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

U.S. Court of Appeals, 10th Circuit

U.S. Supreme Court

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Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Introduction

We will cover key privacy laws

- Idaho Laws
- Federal Laws

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Employers as Unintended Audiences

- Employers' rights to monitor employee's electronic communications in full focus in sexting case taken up by United States Supreme Court
- A police officer used work pager to send explicit messages to his wife (also a police officer) and to his mistress (a police dispatcher)
- On employer's account
- Any concerns as an employer?

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Employers as Unintended Audiences

- The police department reviewed the texts as part of an investigation regarding excessive texting in the department
- All three of the individuals—along with others—sued the department, saying the texts were confidential.
- Supreme Court ruled against the employee.
- *City of Ontario v. Quon*, 560 U.S. 746 (2010)

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Employers as Unintended Audiences

- Employer had a written policy warning employees that they have no guarantee of privacy in using office computer and other electronics
- However, the Court did not rule on whether the employee had reasonable expectations of privacy in sending messages on the pager.
- Instead, the Court held only that even if the officer had a reasonable expectation of privacy, the "search" (review of the texts) was reasonable under the Fourth Amendment.

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Employers as Unintended Audiences

- "The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications."
- "As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether [the police officer's] overages were the result of work-related messaging or personal use."
  - Only requested and reviewed two months worth of messages.
  - Redacted all messages the police officer sent while off duty.

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Employee Privacy and Freedom

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Privacy and Freedom

- Tension between the Employer's desire to control the workplace and control its image versus
- The Employee's desire to make his/her own choices and not be subject to Employer's control
- Really at issue recently with protests, insurrections, political fights
- Private life v. public life
- Cancel culture

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Privacy and Freedom

- Do employees have a right to privacy?
  - Public employers are “state actors” and therefore are limited by the Constitution
  - For example, public employers may not conduct a search and seizure without probable cause
  - Private employers are not “state actors” and therefore are not limited by the Constitution
  - There is not a Constitutional right to privacy against private employers
  - But there is a common law concept of rights to privacy and seclusion—tort law

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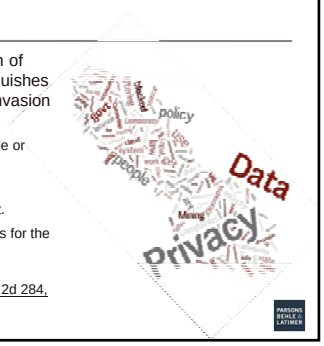
Privacy Torts

- Idaho courts recognize the tort of invasion of privacy. The Idaho Supreme Court distinguishes four categories of action constituting an invasion of privacy:
  - Intrusion into the plaintiff's seclusion or solitude or into the plaintiff's private affairs.
  - Public disclosure of private facts.
  - Publicity that places the plaintiff in a false light.
  - Appropriation of the plaintiff's name or likeness for the defendant's advantage.

Jensen v. State, 72 P.3d 897, 902 (Idaho 2003); *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284, 287 (Idaho 1961)



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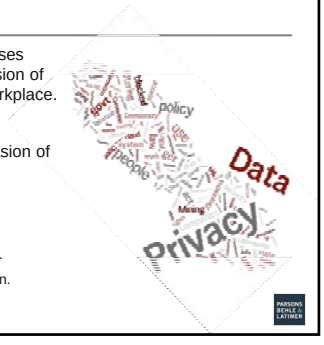
Privacy Torts

- There are no reported Idaho appellate cases where an employee prevailed on an invasion of privacy claim based on conduct in the workplace.
- **Employer Defenses**
- Consent is a complete defense to an invasion of privacy claim *Jensen*, 72 P.3d at 902
- **Reasonable Expectation of Privacy**
- The right of privacy is both:
  - Measured by the reasonable person standard.
  - Determined by the norm of the ordinary person.



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Privacy and Freedom

- Key for employers—informing employees that they do not have right of privacy in computers, emails, public places, etc.
- Need policies

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Workplace Monitoring

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Workplace Monitoring

- Why conduct monitoring?

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Workplace Monitoring

- Why conduct monitoring?
  - Limiting liability—catch misconduct
  - Managing performance
  - Protecting trade secrets
  - Stopping theft, violence
  - Ensuring safety
  - Protecting image

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Workplace Monitoring

- Types of monitoring
  - Emails on employer's systems
  - Personal emails accessed by employer's computer systems
  - Websites access by employer's computer systems
  - Social media posts
  - Time spent on internet while at work
  - Blocking access to websites
  - Tracking keystrokes
  - Video surveillance
  - GPS surveillance
  - Tracking movement (ID cards, smartcards, codes)
  - Recording calls with customers
  - Google alerts

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Workplace Monitoring

- What are the risks?
  - Federal Wiretap Act
  - Stored Communications Act
  - State Wiretapping Laws
  - State Privacy Laws
  - Data Privacy and Security Laws
  - NLRA

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Workplace Monitoring

- Expectation of privacy
  - Reasonable expectation of privacy when the invasion would be offensive to a reasonable person
  - Cowles Pub. Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs, 144 Idaho 259, 265, 159 P.3d 896, 902 (2007) – employee had no reasonable expectation of privacy in e-mails sent from employer's system when public employer's policy clearly stated the e-mails were considered public record, would be subject to disclosure, and would be monitored.

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Wire Interception

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Interception of Communications

- In Idaho, there are no statutes governing employer monitoring of employee electronic communications.
- **Interception and Disclosure of Wire, Electronic, or Oral Communications Prohibited: Idaho Code § 18-6702**
- **Protected Activity**
- It is unlawful for anyone, including an employer, to intercept, procure, use, or disclose any contents of a wire, electronic, or oral communication (Idaho Code § 18-6702).
- Need policies!

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Interception of Communications

- **Unlawful Possession of Wire, Electronic, or Oral Communication Intercepting Devices: Idaho Code § 18-6703**
- **Protected Activity**
- It is unlawful for anyone, including an employer, to have or sell any electronic, mechanical, or other device with the intention of rendering it primarily useful for the illegal interception of wire, electronic, or oral communications (Idaho Code § 18-6703).

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Off Duty Conduct

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Off-duty Conduct

- Idaho law does not protect an employee's off-duty conduct
- But beware of other states that protect lawful off-duty conduct including speech
  - California
  - Colorado
  - Louisiana
  - New York
  - North Dakota
- Capitol rioters? Confederate flag? Abortion rights?

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Employee Free Speech

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Free Speech

- What rights do employees have to free speech?

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Free Speech

- Generally, there is not “free speech” for employees
- Exceptions
  - Public sector employees
  - NLRA Section 7 rights
  - Anti-discrimination complaints and support

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Free Speech

- Public sector
  - First Amendment applies when employees speak on matters of public concern
  - Weighed against public employer's interest in efficiently providing public services

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Background Checks

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Background checks

- Why conduct background checks?
- Do you have to conduct background checks?
- Two major concerns
  - Fair Credit Reporting Act
  - Title VII Discrimination (EEOC Guidance)

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Background checks

- Why conduct background checks?
  - Industry requirements (example: nursing homes, charter schools)
  - Contractual requirements
  - Public expectancy
  - Reduce liability
  - Reduce theft and violence
  - Confirm job history and credentials
- Liability—Idaho recognizes negligent hiring and negligent supervision but has never applied these to failure to conduct background checks

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Background checks

- Do you have to conduct background checks?
  - If a statute requires
  - If a government regulation requires
    - Example: Idaho Admin. Code R. 16.05.06.001 – requires employers to conduct background checks on potential employees "who provide care or services to children or vulnerable adults"
  - If a contract requires
  - Otherwise, no

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Fair Credit Reporting Act

- If you use a third party to obtain information about an applicant, FCRA applies
  - Credit companies
  - Criminal background check companies
  - Investigators
  - Internet services
- Requires obtaining consent from applicant or employee
- Requires providing information to applicant or employee if adverse action will be taken based on information

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EEOC Guidance

- Issued in 2012
  - Not precedential and not controlling
  - But you should probably follow it
  - Criminal background checks disproportionately exclude black and Latino men—what is this called?
  - White men 2.6% incarcerated
  - Latino men 7.7%
  - Black men 16.6%
  - Regardless of level of committing crimes

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EEOC Guidance

- Arrest should generally not be considered (although conduct can be)
- Criminal convictions
  - Nature and gravity
  - Amount of time that has passed
  - Nature of job
- Conduct an individualized assessment to determine if excluding applicant is job related and consistent with business necessity

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Drug Testing

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Drug Testing

- Typically addressed by state law
- We will look at Idaho's drug and alcohol testing statute

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Drug Testing

- If employer choose to conduct drug testing, the employer must list the types of tests an employee may be subject to in a written policy. Employers can test in the following circumstances (among others)
  - As a condition of employment
  - At random;
  - Before returning to duty;
  - As a follow-up to previous testing;
  - Upon reasonable suspicion.

Idaho Code Ann. 72-1705

Should you test for marijuana?????

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Drug Testing

- Federal Court determined no implied right to private action for non-compliance with Idaho Private Employer Alcohol and Drug–Free Workplace Act
  - Anderson v. Thompson Creek Min. Co., No. 4:11-CV-639-BLW, 2013 WL 1867349, at *3 (D. Idaho May 2, 2013)

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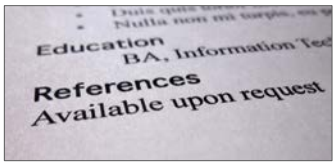

Employment References

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Employment References

- Saying nothing—potential liability for allowing dangerous employee to be rehired
- Giving a referral—potential liability for defamation
- Hiring without checking referrals—potential liability for negligent hiring
- What is an employer to do?

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Employment References

- Idaho law provides immunity in civil cases to employers who in good faith provide "information about the job performance, professional conduct, or evaluation of a former or current employee to a prospective employer of that employee, at the request of the prospective employer of that employee, or at the request of the current or former employee." Idaho Code Ann. § 44-201 (2).
- It is assumed that the employer is acting in good faith unless the employee or former employee can provide clear and convincing evidence that the employer acted with actual malice (i.e. knew that the information was false or acted with reckless disregard of the truth) or with deliberate intent to mislead.

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Genetic Information

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Genetic Information

- **Genetic Information Nondiscrimination Act (GINA)**
- **Genetic Testing Privacy Act: Idaho Code §§ 39-8301 to 39-8304**
  - Employers may not, regarding a hiring, promotion, retention, or other related decision:
    - Access or otherwise consider private genetic information about an individual.
    - Request or require an individual to consent to a release for accessing private genetic information about the individual.
    - Request or require an individual or blood relative to submit to a genetic test.
    - Inquire into the fact that an individual or blood relative has taken or refused to take a genetic test.
- Idaho Code § 39-8303
- Pooping at work case

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

Thank You

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For more information, contact:

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10th Annual **Idaho Employment Law Seminar**

The ADA and Bosses Behaving Badly

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J. Kevin West

Healthcare Practice Area Chairperson | Shareholder | Boise

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PARSONS BEHLE & LATIMER

Kevin West is a shareholder and chairperson of the firm's Health Law department. He is a trusted attorney who represents healthcare providers in a broad variety of legal matters such as audits, investigations, regulatory compliance and licensure discipline. He also is experienced in employment matters and litigation.

Capabilities

Healthcare

Employment Litigation

Employment & Labor

Business & Commercial Litigation

Biography

Kevin West is a senior healthcare attorney with extensive experience representing healthcare providers. He has been a trusted advocate for providers in more than 1,000 cases involving audits, investigations, medical malpractice and licensure board disciplinary matters. Kevin's practice also emphasizes employment law as well as trial work, particularly in the areas of employment, commercial litigation, professional malpractice, personal injury and insurance litigation. Mr. West also advises and represents companies regarding business and employment matters.

In 1981, Mr. West graduated with honors from Brigham Young University with a B.A. in English. In 1984, he graduated from the BYU Law School with honors. During law school, Mr. West served as Editor-in-Chief of the *BYU Journal of Legal Studies*. He authored "Utah Products Liability Law" in the *BYU Journal of Legal Studies*.

Following law school, Mr. West had the privilege of serving as a law clerk for Chief Judge Marion J. Callister, U.S. District Judge for the District of Idaho. Mr. West began practicing law in 1986 after completing this two-year clerkship with the federal trial bench.

Mr. West is a member of the Idaho, Utah and Washington State Bar Associations and is admitted to practice before all state courts in those states as well as in federal courts in Idaho and Utah. He is also admitted to the Ninth Circuit Court of Appeals and the United States Supreme Court.

Mr. West is a frequent lecturer on healthcare and employment matters. He has been a presenter in numerous seminars directed toward both non-lawyer and lawyer groups on both a local and national level. Mr. West is the author of four nationally marketed publications in the healthcare field: *Medicare Compliance: A Training Program for Podiatrists and Their Staff* (2002), published by Data Trace Publishing; *The APMA HIPAA Privacy Manual* (2002) and *The APMA HIPAA Security Manual* (2003), both published by the American Podiatric Medical Association; and *HIPAA Training, Forms and Policies* (2003, co-author), published by Data Trace Publishing.

Experience

National expert on HIPAA, Medicare audits and investigations

Consultant to the United States' largest insurer of podiatrists on HIPAA, Medicare audit and investigations; supervise defense attorneys hired by the insurer in hundreds of cases.

Obtained a Jury verdict for McDonald's Corporation in hot coffee spill case

Defended McDonald's in the only other hot coffee jury trial since the Stella Lybeck case. Opposing counsel was the attorney who had won a large verdict against McDonald's in the Lybeck case. The jury ruled in favor of McDonald's. Parsons' attorney J. Kevin West was invited to make a presentation to all of McDonald's defense counsel at a national meeting in Chicago.

Taco Bell restaurant acquisition

Represented Taco Bell franchisee in the acquisition of 30 Taco Bell restaurants from Taco Bell Corp. in $30 million transaction spanning 6 months; transaction involved real estate, physical and intangible assets and personnel.

Accomplishments

Academic

Brigham Young University, J. Reuben Clark Law School

Graduated *cum laude*

Professional

Best Lawyers in America, 2010-2023 edition, in the specialties of health care law, insurance law, commercial litigation, litigation - labor and employment

Best Lawyers in America 2017 "Lawyer of the Year," Healthcare Law, Boise

Best Lawyers in America 2021 "Lawyer of the Year," Insurance Law, Boise

Best Lawyers in America 2022 "Lawyer of the Year," Insurance Law, Boise

Mountain States Super Lawyers, Healthcare, 2019-2022

Martindale-Hubbell, AV® Preeminent™ rated

Chambers USA, Labor & Employment Law, 2012 - 2022

Author of over 40 articles in the fields of health care law and employment law

Speaker in over 175 programs and seminars in the fields of health care law and employment law

FACULTY APPOINTMENTS

Adjunct Faculty, Boise State University, Health Care Law and Ethics

Associations

Professional

Idaho Association of Defense Counsel
President
(2005 - 2006)

Idaho Health Law Section
Chair
(2009 - 2011)

Community

Rotary International
Rotarian and Board Member
(1993 - Present)

Women's and Children's Alliance
Board of Directors
(2001 - 2010)

Idaho Shakespeare Festival
Board of Directors
(2016 - present)

Articles

The New Information Blocking Rule: What it Means for Healthcare Providers **August 10, 2021**

The Reprieve for Healthcare Providers Is Over: CMS to Resume Medicare Audits **July 22, 2020**

Relief Fund Payments to Healthcare Providers Under the CARES Act **April 23, 2020**

The Dual Dimensions of HIPAA – What Employers Need to Know **January 29, 2020**

APMA HIPAA Privacy Manual and APMA HIPAA Security Manual

Presentations

The ADA and Bosses Behaving Badly **June 16, 2022**

Medical Billing and Revenue - Fundamentals in Healthcare Law **June 15, 2022**

Medicaid in Idaho - Fundamentals in Healthcare Law
April 20, 2022

Medicare Basics - Fundamentals in Healthcare Law
March 16, 2022

HIPAA Privacy and Security - Fundamentals in Healthcare Law
January 19, 2022 I 8:30 - 9:30 a.m.

ADA Issues Arising from the COVID-19 Pandemic
October 27, 2021

ADA Issues Arising from the COVID-19 Pandemic
September 22, 2021

Patient Care - Fundamentals in Healthcare Law
September 15, 2021

Mental Health Accommodations: A Growing ADA Problem
November 10, 2020

Medicare Secondary Payer Update **May 27, 2020**

Strings Attached: What Doctors Need to Know About the CARES Act Provider Relief Fund Payments **May 13, 2020**

Current ADA Developments **October 10, 2019**

Credentials

Licensed

Idaho

Utah

Washington

U.S. Dist. Court, Eastern Dist. of Washington

U.S. Dist. Court, Western Dist. of Washington

U.S. Court of Appeals, 9th Circuit

U.S. Dist. Court, Central Dist. of Illinois

Utah Supreme Court

U.S. Court of Appeals, 9th Circuit

U.S. Supreme Court

10th Annual Idaho Employment Law Seminar

PARSONS BEHLE & LATIMER

The ADA and Bosses Behaving Badly

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October 5, 2022 | Boise Centre East

A Different LEGAL PERSPECTIVE

parsonsbehle.com

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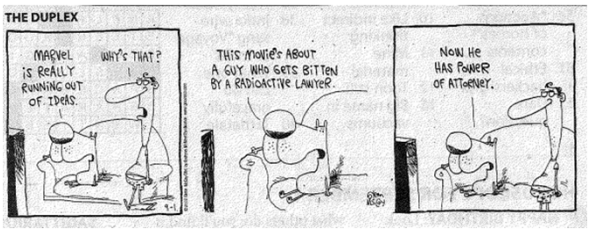

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Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Some context …

- The EEOC received 61,331 private individual complaints in FY2021 (9% less than 2020)
  - ❖3,631 (6%) alleged discrimination re: COVID
  - ❖ 22,843 (37.2%) for disability discrimination

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Some context …

- Of the 116 lawsuits filed by the EEOC in 2021 against employers, over 1/3 (40) involved disability discrimination
- Work from home continues to dramatically impact the ADA, especially on the issue of reasonable accommodation

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Some context …

- 240 total EEOC/UHRC filings in Utah for 2021 (.4% of U.S.)
- 49 total EEOC/IHRC filings in Idaho (.1% of U.S.)

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Top 10 ADA Pitfalls (in no particular order)

1. Asking for too much information
2. Failing to recognize/acknowledge disabilities
3. Lack of job descriptions
4. Failing to engage in the interactive process
5. Failing to accommodate legitimate disabilities
6. Inappropriate pre-offer inquiries/testing

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Top 10 ADA Pitfalls

7. Over and under accommodating
8. Retaliating
9. Violating employee privacy
10. Failing to get medical records/Failing to get an IME (when appropriate)

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Examples of Bosses Behaving Badly

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1. Bell vs. O'Reilly Auto Parts

"A 'Ticking' Time Bomb"

- Employee with Tourette Syndrome
- Excessive work hours led to escalation of Tourette symptoms (i.e. physical tics like twitching or jerking)
- Employer refused to accommodate by assigning normal work hours

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2. Berling vs. Gravity Diagnostics

"It's My Party and I'll Cry if I Want To. . . ."

- Employee with anxiety disorder and panic attacks
- Employee told manager he did not want a birthday party because it would trigger a panic attack
- A surprise birthday party occurs
- Employee terminated for reacting badly to the party

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3. Mary Jones (not real name) vs. Optum Health

"Loose Lips Sink Ships"

- After allowing employees to work from home for 2 years, employer suddenly required in-person attendance and vaccination.
- Employee declined vaccination for health and religious reasons
- Employee's boss sent out an email to co-workers explaining employee was ressigning because she was not and refused to get vaccinated

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4. Bartee vs. Michelin No. America

"A Wheel Life Event"

- Employee had chronic hip and ankle conditions
- Employee requested 4-wheel golf cart; employer allowed only a 3-wheel golf cart (which was more physically demanding and uncomfortable)
- Employee asked for less physically demanding job; employer transferred him to a more physically demanding job

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5. Dilley vs. SuperValu, Inc

"He Ain't Heavy (Lifting), He's My Employee"

- Employee truck driver with bad back asked for a different driving route with less lifting demands
- Employer instead offered a lower paying job, but refused to consider a lateral transfer to a route with less lifting

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6. EEOC vs. BNSF Railway

"Perception Rejection"

- Employee had previously his injured back, but after examinations, his doctor and the company doctor both said he could do his job
- Nevertheless, employer required employee to get an MRI of back at his cost
- Employee could not afford an MRI, so employer fired him based on a perceived disability

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7. Hutchins vs. DirectTV

"Gut Reaction"

- Employee had irritable bowel syndrome and requested accommodation
- Employee complained to the IHRC, and at its request attempted to get witness statements from co-workers
- Employer fired employee for allegedly "harassing and intimidating" co-workers by requesting witness statements

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8. Velasco vs. Artic Circle

"It's All in Your Head"

- Employee, a maintenance worker for a fast-food restaurant, had an organic brain disorder
- He complained of discrimination to the IHRC
- Employer subsequently reduced his hours and job responsibilities

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9. EEOC vs. Florida Commercial Security Services

"A Very Disarming Smile"

- Employee had a prosthetic arm, mostly for cosmetic, not functional purposes; he could perform most physical tasks without a problem
- Employer operated a commercial security service with unarmed security officers
- At time of hiring, Employer never presented employee with a job description or inquired about what physical activities he could or could not do; did not require a physical exam

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EEOC vs. Florida Commercial Security Services

- Employee was assigned to patrol a residential community; on his first shift he did not wear his prosthetic arm
- Residential community president called the Employer to complain, saying that assigning a one-armed person as a security guard was a "joke"
- Employer said Employee was a "fool" for not wearing the arm and claimed he could not perform his job, but never did an assessment of Employee's actual abilities
- Employee was terminated

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EEOC vs. Florida Commercial Security Services

- The court's decision noted:
  - "FCSS (the employer) has a security guard who is 'great and customers ask for her' that is 'a little frail and a little old.' FCSS has also employed a pregnant security guard. FCSS also employs a deaf person as a 'gopher'."
- Without irony, the court engages in an extensive discussion of the job duties of "unarmed security guards" at FCSS!

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10. EEOC vs. Hill Country Farms

- *"My Boss is a Real Turkey!"*

- Employer operated a turkey processing plant where it employed both disabled and non-disabled people on the processing line
- During a period of 30 years, Employer paid the disabled employees $65/month – far less than the non-disabled employees, even though the disabled employees were just as productive
- The company gave the disabled workers room and board on company property near the processing plant, but deducted certain expenses from their pay; the company housing had a leaky roof and was bug-infested

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Bosses Behaving Beautifully

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Some good examples….

1. Fast-food employer who accommodated an autistic worker
2. Ophthalmology practice who accommodated in multiple ways an employee injured on the job
3. Elledge vs. Lowe's Home Centers—employer offered multiple accommodations that the employee rejected
4. Perdue vs. Sanofi Aventis—employer offered multiple accommodations to an autoimmune employee (improved company car, work-sharing, hotel stays during long drives etc..)

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Ongoing Challenges and Controversies

1. Leave as a reasonable accommodation – required or not?
2. Return to work anxiety (due to COVID fears)
3. Use of private investigators and surveillance
4. Requesting medical records and second opinions

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

Thank You

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For more information, contact:

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Attachment A

U.S. Equal Employment Opportunity Commission

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number:

EEOC-NVTA-2022-2

Concise Display Name:

The ADA and AI: Applicants and Employees

Issue Date:

05-12-2022

General Topics:

Disability, Essential Functions, Hiring, Monitoring, Reasonable Accommodation, Screen Out, Technology

Summary:

This technical assistance document discusses how existing ADA requirements may apply to the use of artificial intelligence (AI) in employment-related decision making and offers promising practices for employers to help with ADA compliance when using AI decision making tools.

Citation:

ADA, 29 CFR Part 1630 & app.

Document Applicant:

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

Previous Revision:

No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias. However, the use of these tools may disadvantage job applicants and employees with disabilities. When this occurs, employers may risk violating federal Equal Employment Opportunity ("EEO") laws that protect individuals with disabilities.

The Questions and Answers in this document explain how employers' use of software that relies on algorithmic decision-making may violate existing requirements under Title I of the Americans with Disabilities Act ("ADA"). This technical assistance also provides practical tips to employers on how to comply with the ADA, and to job applicants and employees who think that their rights may have been violated.

The Equal Employment Opportunity Commission ("EEOC" or "the Commission") enforces, and provides leadership and guidance on, the federal EEO laws prohibiting employment discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (over 40) and genetic information. This publication is part of an ongoing effort by the EEOC to educate employers, employees, and other stakeholders about the application of EEO laws when employers use employment software and applications, some of which incorporate algorithmic decision-making.

Background

As a starting point, this section explains the meaning of three, central terms used in this document--software, algorithms, and artificial intelligence ("AI") —and how, when used in a workplace, they relate to each other.

- Software: Broadly, "**software (https://www.access-board.gov/ict/#E103-definitions)** " refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function. "**Application software (https://www.access-board.gov/ict/#E103-definitions)** " (also known as an "application" or "app") is a type of software designed to perform or to help the user perform a specific task or tasks. The United States Access Board is the source of these definitions.

  There are many different types of software and applications used in employment, including: automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.

- Algorithms: Generally, an "algorithm" is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

- Artificial Intelligence ("AI"): Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. In the **National Artificial Intelligence Initiative Act of 2020 at section 5002(3) (https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210)** , Congress defined "AI" to mean a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." In the employment context, using AI has typically meant that the developer relies partly on the computer's own analysis of data to determine which criteria to use when making employment decisions. AI may include

machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, ***Towards a Standard for Identifying and Managing Bias in Artificial Intelligence*** **(https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf)** .

Employers may rely on different types of software that incorporate algorithmic decision-making at a number of stages of the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test. Each of these types of software may include AI.

ADA Basics

1. What is the ADA and how does it define "disability"?

The ADA is a federal civil rights law. Title I of the ADA prohibits employers, employment agencies, labor organizations, and joint labor-management committees with 15 or more employees from discriminating on the basis of disability. Other parts of the ADA, not discussed here, ensure that people with disabilities have full access to public and private services and facilities.

The ADA has a very specific definition of a current "disability." A physical or mental impairment meets the ADA's definition of a current "disability" if it would, when left untreated, "substantially limit" one or more "major life activities." Major life activities include, for example, seeing, reaching, communicating, speaking concentrating, or the operation of major bodily functions, such as brain or neurological functions. (There are two other definitions of "disability" that are not the subject of this discussion. For more information on the definition of "disability" under the ADA, see **EEOC's Questions and Answers on the ADA Amendments Act**

(https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008).

A condition does not need to be permanent or severe, or cause a high degree of functional limitation, to be "substantially limiting." It may qualify as substantially limiting, for example, by making activities more difficult, painful, or time-consuming to perform as compared to the way that most people perform them. In addition, if the symptoms of the condition come and go, the condition still will qualify as a disability if it substantially limits a major life activity when active. Many common and ordinary medical conditions will qualify.

2. How could an employer's use of algorithmic decision-making tools violate the ADA?

The most common ways that an employer's use of algorithmic decision-making tools could violate the ADA are:

- The employer does not provide a **"reasonable accommodation"** that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm. (See **Questions 4–7** below.)
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally **"screens out"** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation. "Screen out" occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. A disability could have this effect by, for example, reducing the accuracy of the assessment, creating special circumstances that have not been taken into account, or preventing the individual from participating in the assessment altogether. (See **Questions 8–12** below.)
- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on **disability-related inquiries and medical examinations**. (See **Question 13** below.)

An employer's use of an algorithmic decision-making tool may be unlawful for one of the above reasons, or for several such reasons.

3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.

Algorithmic Decision-Making Tools and Reasonable Accommodation

4. What is a reasonable accommodation?

A reasonable accommodation is a change in the way things are done that helps a job applicant or employee with a disability apply for a job, do a job, or enjoy equal benefits and privileges of employment. Examples of reasonable accommodations may include specialized equipment, alternative tests or testing formats, permission to work in a quiet setting, and exceptions to workplace policies. These are just examples—almost any change can be a reasonable accommodation—although an employer never has to lower production or performance standards or eliminate an essential job function as a reasonable accommodation.

5. May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a

reasonable accommodation. Doing so is a "**promising practice**" to avoid violating the ADA.

6. When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?

If an applicant or employee tells the employer that a medical condition may make it difficult to take a test, or that it may cause an assessment result that is less acceptable to the employer, the applicant or employee has requested a reasonable accommodation. To request an accommodation, it is not necessary to mention the ADA or use the phrase "reasonable accommodation."

Under the ADA, employers need to respond promptly to requests for reasonable accommodation. If it is not obvious or already known whether the requesting applicant or employee has an ADA disability and needs a reasonable accommodation because of it, the employer may request supporting medical documentation. When the documentation shows that a disability might make a test more difficult to take or that it might reduce the accuracy of an assessment, the employer must provide an alternative testing format or a more accurate assessment of the applicant's or employee's skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called "undue hardship").

For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant's knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant's knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology. Employers must give

individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant's or employee's personnel file.

7. Is an employer responsible for providing reasonable accommodations related to the use of algorithmic decision-making tools, even if the software or application is developed or administered by another entity?

In many cases, yes. As explained in **Question 3** above, an employer may be held responsible for the actions of other entities, such as software vendors, that the employer has authorized to act on its behalf. For example, if an employer were to contract with a software vendor to administer and score on its behalf a pre-employment test, the employer likely would be held responsible for actions that the vendor performed—or did not perform—on its behalf. Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities

8. When is an individual "screened out" because of a disability, and when is screen out potentially unlawful?

Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required.[1] **Questions 9 and 10** explain the meaning of "screen out" and **Question 11** provides

examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

9. Could algorithmic decision-making tools screen out an individual because of a disability? What are some examples?

Yes, an algorithmic decision-making tool could screen out an individual because of a disability if the disability causes that individual to receive a lower score or an assessment result that is less acceptable to the employer, and the individual loses a job opportunity as a result.

An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their "conversation" with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

Another kind of screen out may occur if a person's disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants' speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant's speech impediment resulted in a low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.

10. Some algorithmic decision-making tools may say that they are "bias-free." If a particular tool makes this claim, does that mean that the tool will not screen out individuals with disabilities?

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be "bias-free," it typically means that they have taken steps to prevent a type of discrimination known as "adverse impact" or "disparate impact" discrimination under Title VII, based on race, sex, national origin, color, or religion. This type of Title VII

discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.**[2]**

To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference.

The steps taken to avoid that kind of Title VII discrimination are typically distinct from the steps needed to address the problem of disability bias.**[3]** If an employer or vendor were to try to reduce disability bias in the way described above, doing so would not mean that the algorithmic decision-making tool could never screen out an individual with a disability. Each disability is unique. An individual may fare poorly on an assessment because of a disability, and be screened out as a result, regardless of how well other individuals with disabilities fare on the assessment. Therefore, to avoid screen out, employers may need to take different steps beyond the steps taken to address other forms of discrimination. (See **Question 12**.)

11. Screen out because of a disability is unlawful if the individual who is screened out is able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. If an individual is screened out by an algorithmic decision-making tool, is it still possible that the individual is able to perform the essential functions of the job?

In some cases, yes. For example, some employers rely on "gamified" tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.

Even an algorithmic decision-making tool that has been "validated" for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been "validated"**[4]** means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

An algorithmic decision-making tool also may sometimes screen out individuals with disabilities who could do the job because the tool does not take into account the possibility that such individuals are entitled to reasonable accommodations on the job. Algorithmic decision-making tools are often designed to predict whether applicants can do a job under typical working conditions. But people with disabilities do not always work under typical conditions if they are entitled to on-the-job reasonable accommodations.

For example, some pre-employment personality tests are designed to look for candidates who are similar to the employer's most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder ("PTSD") might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual's PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA. Some individuals who may test poorly in certain areas due to a medical condition may not even need a reasonable accommodation to perform a job successfully.

12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

First, if an employer is deciding whether to rely on an algorithmic decision-making tool developed by a software vendor, it may want to ask the vendor whether the tool was developed with individuals with disabilities in mind. Some possible inquiries about the development of the tool that an employer might consider include, but are not limited to:

- If the tool requires applicants or employees to engage a user interface, did the vendor make the interface accessible to as many individuals with disabilities as possible?
- Are the materials presented to job applicants or employees in alternative formats? If so, which formats? Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?
- Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?

If an employer is developing its own algorithmic decision-making tool, it could reduce the chances of unintentional screen out by taking the same considerations into account during its development process. Depending on the type of tool in question, reliance on experts on various types of disabilities throughout the development process may be effective. For example, if an employer is developing pre-employment tests that measure personality, cognitive, or neurocognitive traits, it may be helpful to employ psychologists, including neurocognitive psychologists, throughout the development process in order to spot ways in which the test may screen out people with autism or cognitive, intellectual, or mental health-related disabilities.

Second, regardless of whether the employer or another entity is developing an algorithmic decision-making tool, the employer may be able to take additional steps during implementation and deployment to reduce the chances that the tool

will screen out someone because of a disability, either intentionally or unintentionally. Such steps include:

- clearly indicating that reasonable accommodations, including alternative formats and alternative tests, are available to people with disabilities;
- providing clear instructions for requesting reasonable accommodations; and
- in advance of the assessment, providing all job applicants and employees who are undergoing assessment by the algorithmic decision-making tool with as much information about the tool as possible, including information about which traits or characteristics the tool is designed to measure, the methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results or cause screen out.

Taking these steps will provide individuals with disabilities an opportunity to decide whether a reasonable accommodation may be necessary. For example, suppose that an employer uses an algorithm to evaluate its employees' productivity, and the algorithm takes into account the employee's average number of keystrokes per minute. If the employer does not inform its employees that it is using this algorithm, an employee who is blind or has a visual impairment and who uses voice recognition software instead of a keyboard may be rated poorly and lose out on a promotion or other job opportunity as a result. If the employer informs its employees that they will be assessed partly on the basis of keyboard usage, however, that same employee would know to request an alternative means of measuring productivity—perhaps one that takes into account the use of voice recognition software rather than keystrokes—as a reasonable accommodation.

Another way for employers to avoid ADA discrimination when using algorithmic decision-making tools is to try to ensure that no one is screened out unless they are unable to do the job, even when provided with reasonable accommodations. A promising practice is to only develop and select tools that measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation. For example, an employer who is hiring cashiers might want to ensure that the chatbot software it is using does not reject applicants who are unable to stand for long periods. Otherwise, a chatbot might reject an applicant who uses a wheelchair and may be entitled to a lowered cash register as a reasonable accommodation.

As a further measure, employers may wish to avoid using algorithmic decision-making tools that do not directly measure necessary abilities and qualifications for performing a job, but instead make inferences about those abilities and qualifications based on characteristics that are correlated with them. For example, if an open position requires the ability to write reports, the employer may wish to avoid algorithmic decision-making tools that rate this ability by measuring the similarity between an applicant's personality and the typical personality for currently successful report writers. By doing so, the employer lessens the likelihood of rejecting someone who is good at writing reports, but whose personality, because of a disability, is uncommon among successful report writers.

Algorithmic Decision-Making Tools and Disability-Related Inquiries and Medical Examinations

13. How could an employer's use of algorithmic decision-making tools violate ADA restrictions on disability-related inquiries and medical examinations?

An employer might violate the ADA if it uses an algorithmic decision-making tool that poses "disability-related inquiries" or seeks information that qualifies as a "medical examination" before giving the candidate a conditional offer of employment.**[5]** This type of violation may occur even if the individual does not have a disability.

An assessment includes "disability-related inquiries" if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with disability. It qualifies as a "medical examination" if it seeks information about an individual's physical or mental impairments or health.

An algorithmic decision-making tool that could be used to identify an applicant's medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are "disability-related inquiries or medical examinations," however. For example, a personality test is not posing "disability-related inquiries" because it asks whether the individual is "described by friends as

being 'generally optimistic,'" even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

Note, however, that even if a request for health-related information does not violate the ADA's restrictions on disability-related inquiries and medical examinations, it still might violate other parts of the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder ("MDD") answers those questions negatively and loses an employment opportunity as a result, the test may "screen out" the applicant because of MDD. As explained in **Questions 8–11** above, such screen out may be unlawful if the individual who is screened out can perform the essential functions of the job, with or without reasonable accommodation.

Once employment has begun, disability-related inquiries may be made and medical examinations may be required only if they are legally justified under the ADA.

For more information on disability-related inquiries and medical examinations, see ***Pre-Employment Inquiries and Medical Questions & Examinations*** **(https://www.eeoc.gov/pre-employment-inquiries-and-medical-questions-examinations)**, and ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*** **(https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees)**.

Promising Practices for Employers

14. What can employers do to comply with the ADA when using algorithmic decision-making tools?

- As discussed in **Questions 4–7** above, employers must provide reasonable accommodations when legally required. Promising practices that may help employers to meet this requirement include:
    - Training staff to recognize and process requests for reasonable accommodation as quickly as possible, including requests to retake a test in an alternative format, or to be assessed in an alternative way, after the individual has already received poor results.

- Training staff to develop or obtain alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation because of a disability.
- If the algorithmic decision-making tool is administered by an entity with authority to act on the employer's behalf, such as a testing company, asking the entity to forward all requests for accommodation promptly to be processed by the employer in accordance with ADA requirements. Alternatively, the employer could seek to enter into an agreement with the third party requiring it to provide reasonable accommodations on the employer's behalf, in accordance with the employer's obligations under the ADA.

- Employers should minimize the chances that algorithmic decision-making tools will disadvantage individuals with disabilities, either intentionally or unintentionally. Promising practices include:
  - Using algorithmic decision-making tools that have been designed to be accessible to individuals with as many different kinds of disabilities as possible, thereby minimizing the chances that individuals with different kinds of disabilities will be unfairly disadvantaged in the assessments. User testing is a promising practice.
  - Informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities, and providing clear and accessible instructions for requesting such accommodations.
  - Describing, in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.
- Employers may also seek to minimize the chances that algorithmic decision-making tools will assign poor ratings to individuals who are able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. Promising practices include:
  - Ensuring that the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation.

  - Ensuring that necessary abilities or qualifications are measured directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.

- Before purchasing an algorithmic decision-making tool, an employer should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual's physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation. (The ADA permits an employer to request reasonable medical documentation in support of a request for reasonable accommodation that is received prior to a conditional offer of employment, when necessary, if the requested accommodation is needed to help the individual complete the job application process.)

Promising Practices for Job Applicants and Employees Who Are Being Assessed by Algorithmic Decision-Making Tools

15. What should I do to ensure that I am being assessed fairly by algorithmic decision-making tools?

If you have a medical condition that you think might qualify as an ADA disability and that could negatively affect the results of an evaluation performed by algorithmic decision-making tools, you may want to begin by asking for details about the employer's use of such tools to determine if it might pose any problems related to your disability. If so, you may want to ask for a reasonable accommodation that allows you to compete on equal footing with other applicants or employees.

For example, if an employer's hiring process includes a test, you may wish to ask for an accessible format or an alternative test that measures your ability to do the job in a way that is not affected by your disability. To request a reasonable accommodation, you need to notify an employer representative or official (for example, someone in Human Resources) or, if the employer is contracting with a software vendor, the vendor's representative or the employer, that you have a

medical condition, and that you need something changed because of the medical condition to ensure that your abilities are evaluated accurately.

Note that if your disability and need for accommodation are not obvious or already known, you may be asked to submit some medical documentation in support of your request for accommodation. To find out more about asking for reasonable accommodations, see *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, available at **https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada)**.

If you only discover that an algorithmic decision-making tool poses a problem due to your disability after the evaluation process is underway, you should notify the employer or software vendor as soon as you are aware of the problem and ask to be evaluated in a way that accurately reflects your ability to do the job, with a reasonable accommodation if one is legally required.

If you have already received a poor rating generated by an employer's use of an algorithmic decision-making tool, you should think about whether your health condition might have prevented you from achieving a higher rating. For example, might a disability have negatively affected the results of an assessment, or made it impossible for you to complete an assessment? If so, you could contact the employer or software vendor immediately, explain the disability-related problem, and ask to be reassessed using a different format or test, or to explain how you could perform at a high level despite your performance on the test.

16. What do I do if I think my rights have been violated?

If you believe that your employment-related ADA rights may have been violated, the EEOC can help you decide what to do next. For example, if the employer or software vendor refuses to consider your request for a reasonable accommodation to take or re-take a test, and if you think that you would be able to do the job with a reasonable accommodation, you might consider filing a charge of discrimination with the EEOC. A discrimination charge is an applicant's or employee's statement alleging that an employer engaged in employment discrimination and asking the EEOC to help find a remedy under the EEO laws.

If you **file a charge of discrimination (https://www.eeoc.gov/how-file-charge-employment-discrimination)**, the EEOC will conduct an investigation. Mediation, which is an informal and confidential way for people to resolve disputes with the help of a neutral mediator, may also be available. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. It is unlawful for an employer to retaliate against you for contacting the EEOC or filing a charge.

If you would like to begin the process of filing a charge, go to our Online Public Portal at **https://publicportal.eeoc.gov (https://publicportal.eeoc.gov)**, visit your local EEOC office (see **https://www.eeoc.gov/field-office (https://www.eeoc.gov/field-office)** for contact information), or contact us by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

For general information, visit the EEOC's website (**https://www.eeoc.gov (https://www.eeoc.gov/)**).

This information is not new policy; rather, this document applies principles already established in the ADA's statutory and regulatory provisions as well as previously issued guidance. The contents of this publication do not have the force and effect of law and are not meant to bind the public in any way. This publication is intended only to provide clarity to the public regarding existing requirements under the law. As with any charge of discrimination filed with the EEOC, the Commission will evaluate alleged ADA violations involving the use of software, algorithms, and artificial intelligence based on all of the facts and circumstances of the particular matter and applicable legal principles.

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[1] To establish a screen out claim, the individual alleging discrimination must show that the challenged selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities. *See* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a). To establish a defense, the employer must demonstrate that the challenged application of the criterion is "job related and consistent with business necessity," as that term is understood under the ADA, and that "such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. §§ 1630.10(a), 1630.15(b); 29 C.F.R. pt. 1630 app. §§ 1630.10, 1630.15 (b) and (c). A different defense to a claim that a

selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities is available when the challenged selection criterion is safety-based. *See* 2 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

[2] 42 U.S.C. § 2000e-2(a)(2), (k).

[3] When applying the tool to current employees or other subjects, there will generally be no way to know who has a disability and who does not.

[4] When employers or vendors claims that a tool designed to help employers decide which job applicants to hire has been "validated," or that such a tool is a "valid predictor" of job performance, they may mean that there is evidence that the tool measures a trait or characteristic that is important for the job, and that the evidence meets the standards articulated in the Uniform Guidelines on Employee Selection Procedures ("UGESP"), 29 C.F.R. §§ 1607.5–9. UGESP articulates standards for compliance with certain requirements under Title VII. UGESP does not apply to disability discrimination. 29 C.F.R. pt. 1630 app. § 1630.10 (a) ("The Uniform Guidelines on Employee Selection Procedures . . . do not apply to the Rehabilitation Act and are similarly inapplicable to this part.").

[5] Note, however, that the ADA permits employers to request reasonable medical documentation in support of a request for reasonable accommodation, when necessary. This may be done prior to a conditional offer of employment if the request is for a reasonable accommodation that is needed to help the individual complete the job application process.

10th Annual **Idaho Employment Law Seminar**

Every Case Really is a Story: Four State and Federal Caselaw Stories and Lessons

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

Capabilities

Antitrust & Competition

Appeals

Business & Commercial Litigation

Employment & Labor

Biography

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

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

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

Accomplishments

Academic

University of Iowa, J.D.

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

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

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Professional

Utah Legal Elite, Civil Litigation 2022

Mountain States Super Lawyers, Rising Stars, 2019-2022

Associations

Professional

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

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

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Community

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

Credentials

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Utah

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A seasoned attorney with nearly four decades of experience, Michael partners with employers in many industries to prevent and solve employment problems. He represents news media organizations in all aspects of the law related to newsgathering and distribution. He also serves as a mediator to help resolve employment and media law disputes.

Capabilities

Employment & Labor

Employment Litigation

Biography

Employment Law:

Michael partners with employers in many industries to prevent and solve employment problems.

He works with the local and national Society for Human Resource Management (SHRM) and has served as the legal and legislative director for Utah SHRM and Salt Lake SHRM. For such services, National SHRM honored him with its prestigious Capital Award, which was given annually to one of SHRM's 300,000 members worldwide. Utah SHRM has given him its Award for Professional Excellence.

Michael counsels employers on how to minimize and manage risks, including those involving: civil rights, discrimination, the Americans With Disabilities Act (ADA), sexual harassment, other harassment, retaliation, the Fair Labor Standards Act (FLSA), payment of wages, overtime pay and exemptions, employee benefits, drug and alcohol testing, workplace violence, the Family and Medical Leave Act (FMLA), the Equal Employment Opportunity Commission (EEOC), affirmative action, unemployment compensation, employee misconduct, investigations, unions, unfair labor practices, the National Labor Relations Board (NLRB), employment contracts, noncompetes, defamation, torts, wrongful discharge, mediation and arbitration.

He represents employers when disputes become lawsuits.

He has successfully handled hundreds of cases before administrative agencies, trial courts, juries, arbitrators, mediators and appeals courts.

Michael works with clients regarding preventive employment law activities, such as investigations, supervisor and employee training, policy and handbook reviews, job descriptions, human resource audits and counseling on day-to-day employee problems.

He has published numerous articles on employment law topics.

He is a popular public speaker, often addressing the news media and local and national employer groups on various employment law trends and issues.

Michael serves as amediator in employment law disputes.

Media and First Amendment Law:

Michael assists news and publishing organizations in obtaining access to places and records (FOIA and Utah GRAMA), and in minimizing risks (and responding to claims) of defamation, invasion of privacy, tort and other matters related to publishing. He also represents the news media at the Utah Legislature and elsewhere as needed, working to preserve and strengthen Utah's open government laws.

He has represented many media clients including The Salt Lake Tribune, CNN, the Deseret News, the Associated Press, the Newspaper Agency Corporation, Newsweek, the Society of Professional Journalists, KUTV News, the Utah Media Coalition and KSL-TV and radio.

He is a member of, and has received "sunshine" and freedom of information awards from, the Society of Professional Journalists and the National Association of Broadcasters.

Michael is co-editor of the *Utah Media Law Handbook* published by the Utah Headliners Chapter of the Society of Professional Journalists.

Accomplishments

Academic

University of Utah, J.D., 1986

- Harry S. Truman Scholar
- Utah Law Review, Member, 1984-1985 and Executive Editor, 1985-1986

University of Notre Dame, B.A., Government/Theology, 1983

Professional

AV Rating Martindale-Hubbell

Highest ratings, Chambers USA, Labor & Employment, 2003-present

Employment Lawyer of the Year, Utah State Bar, 2001

Human Resources Executive, Nation's Most Powerful Employment Lawyers In America, 2010 to present

Mountain States Super Lawyers, 2007-present

Utah Business Magazine, Legal Elite, 2006-present

Best Lawyers in America, "Salt Lake City Best Lawyers Employment Law Lawyer of the Year," 2011-2012, 2014

Best Lawyers in America, First Amendment Law, Labor And Employment Law, 2005-present

Best Lawyer's 2019 Lawyer of the Year for Employment Law

Associations

Professional

Utah State Bar Association and American Bar Association, Employment Sections

Society for Human Resources Management, national and local

University of Utah S.J. Quinney College of Law Board of Trustees, 2019-present

Community

Judge Memorial High School Board President, 2016-present

Media

Utah Media Coalition

Articles

Employment Law Update, June 29, 2022 **June 29, 2022**

A Utah father's tribute to his 'velveteen daughter'
June 19, 2022

Employment Law Update May 31, 2022 **May 31, 2022**

Ep 98. Michael O'Brien, Monastery Mornings **February 6, 2022**

Remembering the Christmas Eve We Were Helped by a Savior in Cowboy Boots **December 12, 2021**

'Mormon Land': Utahn Reflects on His Visits to an Unlikely Monastery in LDS Zion and His Life among Saints and Monks
July 28, 2021

Presentations

Employment Law Challenges of a Remote Workplace
June 16, 2022

2022 Legislative and Regulatory Update **June 16, 2022**

Credentials

Licensed

Utah

1

Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

2

Is Making a Face Retaliatory?

3

Fisher v. Bilfinger Industrial Services Inc.—Fifth Circuit (2021)

Is making a face retaliatory?

- Keonta Fisher alleged that his bosses—Tommy Coutee and Kendall Martin—racially harassed him.
- Fisher also alleged two forms of retaliation.
  - (1) Fisher was told he would be fired for complaining about harassment, and
  - (2) Fisher's boss made "faces at him."

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Fisher v. Bilfinger Industrial Services Inc.—First Circuit

Is making a face retaliatory?

Elements of a retaliation claim:

1. An employee engages in protected conduct.
2. The employee suffers a material adverse action.
3. The protected conduct and the adverse action are causally connected.

> proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). To establish a prima facie case of retaliation, Fisher must establish: "(1) he engaged in conduct protected by Title VII; (2) he suffered a materially adverse action; and (3) a causal connection exists between the protected activity and the adverse action." *Cabral v. Brennan*, 853 F.3d 763, 766-67

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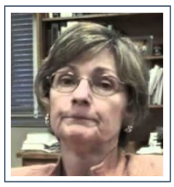
Fisher v. Bilfinger Industrial Services Inc.—First Circuit

Is making a face retaliatory?

- Threats of firing are not an adverse action.
- Making faces "amounts to a frivolous claim that does not implicate Title VII."



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What Do I Do When Employees Fight Online?

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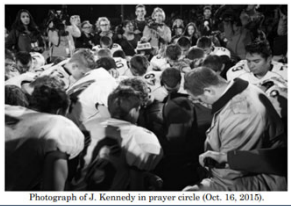
7

Kennedy v. Bremerton School District—U.S. Supreme Court

What about that praying football coach case?

- Coach Joseph Kennedy was fired for a practice of praying on the field after high school football games.
  - Court wrote that Kennedy "offered his prayers quietly while his students were otherwise occupied."
- But the First Amendment tension in this case (between the Establishment Clause the Free Exercise Clause) doesn't come into play for private employers.
- Private employers' religious-accommodation obligations come from Title VII instead.



Photograph of J. Kennedy in prayer circle (Oct. 16, 2015).

8

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Carter v. Transportation Workers Union—N.D. Texas

What do I do when my employees fight online?

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

What does Title VII require?

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

9

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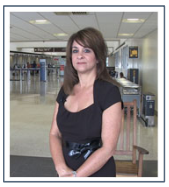
Carter v. Transportation Workers Union—N.D. Texas

What do I do when my employees fight online?

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



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Carter v. Transportation Workers Union—N.D. Texas

What do I do when my employees fight online?

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

11

Carter v. Transportation Workers Union—N.D. Texas

What do I do when my employees fight online?

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

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

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

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Carter v. Transportation Workers Union—N.D. Texas

What do I do when my employees fight online?

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

What could Southwest have done differently?

13

13

Do We Have to Pay Employees for Their Boot-Up Time?

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14

Peterson v. Nelnet—Tenth Circuit

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

What if it only takes them a few minutes to boot up?

15

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Peterson v. Nelnet—Tenth Circuit

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?

16

16

Peterson v. Nelnet—Tenth Circuit

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.*

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Peterson v. Nelnet—Tenth Circuit

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.

18

18

Peterson v. Nelnet—Tenth Circuit

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 note 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.

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Is the ADA Lurking in our Office Disciplinary Decisions?

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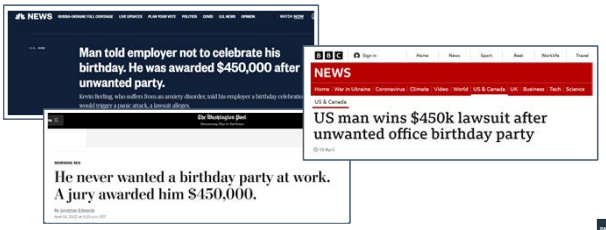
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?



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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- Kevin Berling worked at Gravity for 10 months as a lab accessioner.

22

Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- Berling had anxiety disorder.
- He experienced panic attacks related to his birthday because his parents announced their divorce to him on his birthday when he was a kid.
- Gravity typically celebrated employee birthdays by placing the date on a breakroom calendar and purchasing a dessert or cake.
- And everyone would sign a card and often sing “Happy Birthday.”

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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- On the Friday before his birthday, Berling asked Gravity's chief of staff, Allison Wimmers to make sure the company did not celebrate his birthday.
- He said his birthday dredged up negative feelings from his parents' divorce.
- But… it was the weekend and Wimmers forgot to relay the message to Lauren Finn who coordinated b-days.
- Thus, Berling's coworkers wished him a happy birthday and put up a banner in the breakroom.
- Berling grabbed his lunch, went to his car and had a panic attack.

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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- Berling complained to Wimmers, who was out of town, so he met with Wimmers' supervisor, Amy Blackburn along with senior director Ted Knauf.
- The meeting was not smooth:
  - Berling became very red;
  - Closed his eyes;
  - Clenched his fists.
- When Blackburn asked is he was ok, he "commanded silence."
- Blackburn testified that she was worried Berling would strike her.

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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- Blackburn and Knauf told the CEO they felt unsafe, so the company decided to terminate Berling's employment.
- Berling sued, claiming he was denied a reasonable accommodation and discriminated against based on a disability.

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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

- Gravity argued that management did not know he was disabled.
- And that it had a legitimate and non-discriminatory reason for termination—that its employees felt unsafe.
- Ultimately, the judge disagreed and sent the matter to the jury.

GRAVITYDIAGNOSTICS™

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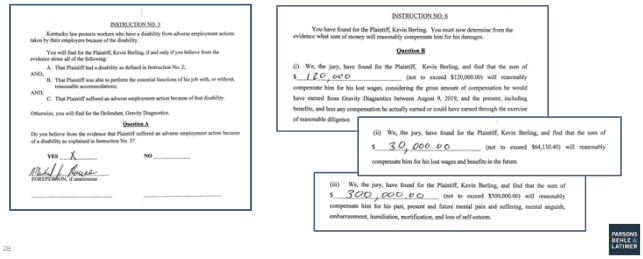
Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?



INSTRUCTION NO. 3

Kentucky law protects workers who have a disability from adverse employment actions taken by their employers because of the disability.

You will find for the Plaintiff, Kevin Berling, if and only if you believe from the evidence alone all of the following:

A. That Plaintiff had a disability as defined in Instruction No. 2;

AND,

B. That Plaintiff was able to perform the essential functions of his job with, or without, reasonable accommodations;

AND,

C. That Plaintiff suffered an adverse employment action because of that disability.

Otherwise, you will find for the Defendant, Gravity Diagnostics.

Question A

Do you believe from the evidence that Plaintiff suffered an adverse employment action because of a disability as explained in Instruction No. 3?

YES X NO

FOREPERSON, if unanimous

INSTRUCTION NO. 6

You have found for the Plaintiff, Kevin Berling. You must now determine from the evidence what sum of money will reasonably compensate him for his damages.

Question B

(i) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 120,000 (not to exceed $120,000.00) will reasonably compensate him for his lost wages, considering the gross amount of compensation he would have earned from Gravity Diagnostics between August 9, 2019, and the present, including benefits, and less any compensation he actually earned or could have earned through the exercise of reasonable diligence.

(ii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 30,000.00 (not to exceed $64,130.40) will reasonably compensate him for his lost wages and benefits in the future.

(iii) We, the jury, have found for the Plaintiff, Kevin Berling, and find that the sum of $ 300,000.00 (not to exceed $500,000.00) will reasonably compensate him for his past, present and future mental pain and suffering, mental anguish, embarrassment, humiliation, mortification, and loss of self-esteem.

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Berling v. Gravity Diag.—Kenton Ky. Circuit Court

Is the ADA lurking in our office disciplinary decisions?

What could this employer have done differently?

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What Makes Alcoholism Different from Drunk Misconduct?

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

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

How should an employer respond?

What considerations may come into play?

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

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

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

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

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

- Dennis sued under ADA claiming he was discriminated against for having the disability of alcoholism.
- To win on a disability case, plaintiff must identify some affirmative evidence that his disability was a "determining factor" in his termination.
- Evidence of comments about his disability or a close temporal proximity to the employer learning about the disability may give rise to an inference of discrimination.
- District court sided with the Sheriff, saying that the plaintiff couldn't prove that the termination was based on the officer's alcoholism but rather on his conduct.

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

- According to the court, Dennis offered no affirmative evidence. Instead, the record showed:
  - Sheriff promoted him to detective after learning of negative incidents associated with drinking.
  - Sheriff knew of his alcoholism for over a year before taking action in response to Dennis's conduct.

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Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

Principles

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

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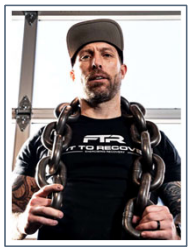
Dennis v. Fitzsimons—D. Colo.

What makes alcoholism different from drunk misconduct?

Takeaways

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



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

Thank You

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10th Annual **Idaho Employment Law Seminar**

New Sharks in the Water: FLSA Collective Actions

Sean A. Monson
801.536.6714 | smonson@parsonsbehle.com

PARSONS BEHLE & LATIMER

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

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PARSONS BEHLE & LATIMER

Sean Monson is the chairperson of the firm's Employment, Labor & Immigration Law practice teams. He defends employers against discrimination and wrongful termination claims, represents clients in non-compete cases and advises clients regarding best practices to avoid litigation in the future.

Capabilities

Business & Commercial Litigation

Banking & Financial Services

Employment & Labor

Employment Litigation

Biography

Sean A. Monson focuses his practice in employment counseling and litigation and real estate litigation and transactions. He has represented several large and small Utah businesses in litigation matters involving claims for wrongful termination, discrimination, covenants not to compete, WARN Act disputes, OSHA infractions, and labor disputes. He has represented title companies, businesses and individuals in real property transactions and litigation matters involving boundary, ownership, title insurance and priority of interest lawsuits. He has also represented companies in multimillion dollar real estate purchase and sale transactions as wells as lending, development and leasing agreements. He has appeared before planning commissions and city councils on behalf of real estate developers regarding entitlement and zoning disputes throughout the Wasatch Front. He is the current chair of the Bountiful City planning commission.

Experience

Defended Against Claims of Discrimination

Represented an Israeli company against claims of religious discrimination, disability discrimination and violations of the Fair Labor Standards Act, among other claims.

Sale of Golf Course and Subdivision Ground Lease

Represented client in the sale of a golf course ground lease and surrounding subdivision.

Represented Foreign Bitcoin Mining Company in Recovering Cryptocurrency and Company Assets

Successfully pursued a former employee who misappropriated more than $1 million in stolen cryptocurrency and who misappropriated other company assets. Successfully dismissed multiple counter-claims asserted by the former employee relating to alleged ownership interests in the company and obtained injunctive relief to assist the company in retrieving its stolen cryptocurrency.

Accomplishments

Academic

University of Michigan Law School (J.D., 1995)

Brigham Young University (B.A., summa cum laude, 1992)

Professional

Recognized as member of Utah's Legal Elite by Utah Business magazine for multiple years in both employment and real estate.

Associations

Professional

Chair, Real Estate Section of the Utah State Bar

Member, Executive Committee, Litigation Section of the Utah State Bar

Community

Member of Board of Directors, Davis County Citizens Committee Against Violence

Volunteer, Davis County Attorney's Office Protective Order Project

Articles

Black Lives Matter, My Body My Choice, Make America Great Again: The Thorny Path of Navigating Political Speech at Work
September 6, 2022

Employment Law Update May 2022 **May 19, 2022**

Is COVID-19 a Disability Under the ADA? It Depends.
February 8, 2022

U.S. Court of Appeals for the Sixth Circuit Lifts Stay of Vaccine Mandate; OSHA Extends Compliance Deadline
December 20, 2021

Utah Responds to the Federal Vaccine Mandate: The New State Rule **November 12, 2021**

New Federal Mandates Regarding COVID-19 Vaccination and Testing Are Coming **September 10, 2021**

See the Latest EEOC Guidance For Employee Covid-19 Vaccinations In A "Utah Business Magazine" Article by Labor And Employment Department Chair Sean Monson **July 29, 2021**

EEOC Issues Updated Guidance Regarding COVID-19 Vaccinations and the Workplace **May 28, 2021**

Vaccines: Mandatory or Voluntary for Employees?
February 4, 2021

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

Dealing With "Remote" Teleworking Employees: Best Practices for Teleworking **September 15, 2020**

Treasury Department Clarifies Payroll Tax Deferral Executive Order **September 9, 2020**

A Portion of Payroll Taxes May Be Deferred for the Vast Majority of Workers Beginning Sept. 1, 2020, and Continuing Through Dec. 31, 2020 **August 29, 2020**

Supreme Court Limits Protections for Employees Working for Religious Schools **July 14, 2020**

Salt Lake County Extends Face Covering Order to Aug. 20, 2020 **July 7, 2020**

Salt Lake County and Summit County Require Individuals to Wear Face Coverings **July 1, 2020**

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

Title VII Covers LGBQT Employees **June 30, 2020**

PPP Loan Program Modified – More Time to Spend, Fewer Restrictions on Spending **June 5, 2020**

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

What to Do with Employees at High Risk for Serious COVID 19 Illness: The ADA and Return to Work **May 12, 2020**

Liabilities When Re-Opening: Steps to Minimizing the Risks **April 28, 2020**

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

You've Had a Chance to Catch Your Breath, Now What? Five Things Employers Should be Thinking About Right Now
April 9, 2020

CARES Act PPP Loans Interim Final Rule Released **April 3, 2020**

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

Response Act Poster, Leave Policies and Shelter in Place Notices
March 30, 2020

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

COVID-19 Leave and Sick Pay Statute Enacted **March 19, 2020**

COVID-19, Family Medical Leave Act and Paid Time Off – Employer Questions Answered **March 17, 2020**

EEOC Reverses Course Regarding the Ministerial Exception in Employment Discrimination Cases **February 27, 2020**

The Utah Supreme Court Delivers a Haymaker to the Implied Covenant of Good Faith and Fair Dealing in Employment Cases
December 18, 2019

Federal Government Raises Threshold Salary for Employees to Qualify for Exempt Status **October 3, 2019**

Presentations

Common Mistakes and Horror Stories **August 31, 2022**

Everything You Want to Ask Your Lawyer But Are Afraid to Ask
June 16, 2022

Employment Arbitration Agreements: What Are The Good For?
June 16, 2022

Webinar -- New Vaccination Rule: What Does it Mean for Employers with More Than 100 Employees? A Lot!
November 10, 2021

Hot Employment Topics Session #2 **October 28, 2021**

Hot Employment Topics Session #1 **October 27, 2021**

Hot Employment Topics Session #2 **September 22, 2021**

Hot Employment Topics Session #1 **September 22, 2021**

Hot Employment Topics **August 25, 2021**

The Coronavirus "Response Act" – COVID-19 Relief and Tax Benefit Opportunities in 2021 **January 14, 2021**

Independent Contractor vs. Employee: The Devil's Bargain
November 10, 2020

Trends in Employment Law Cases Related to COVID-19
November 10, 2020

PPP Loans: The CARES Act & Flexibility Act - What we Know to Date About Loan Forgiveness **July 14, 2020**

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

COVID-19: Returning to Work **May 13, 2020**

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

What Every Employer Should Know Before Resuming Business in Utah **May 12, 2020**

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Employer Considerations To Successfully Reopen A Business - May 5, 2020 **May 5, 2020**

Reopening Your Business: Meeting Opportunities and Challenges To Come Back Stronger **April 28, 2020**

Families First Coronavirus Response Act: What It Does and How To Respond **March 23, 2020**

Credentials

Licensed

Utah

1

Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

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The FLSA

- Federal statute governing minimum wage and overtime
- Applies to any employer (there is no employee count threshold)
- Exemptions
  - Salary AND, emphasize again, AND
  - Job Duty Requirements
    - Executive
    - Administrative
    - IT work

* NOTE: some exemptions do not require the employee to be paid a salary

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Claims Under the FLSA – The Past

- Historically single "one off" claims
- Employee says they were not paid for certain hours or worked overtime and did not get 1 ½ pay rate
- Employee attorney writes a demand letter
- Employer pays employee $250, attorney $3,000.00

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Claims Under the FLSA – the Present

- Single employee brings a collective action under the FLSA
- And a class action under state wage law
- Potential recovery is in the hundreds of thousands or millions
- Notice goes out to the entire workforce
- Penalties – if violate FLSA, pay the wages owed, plus that amount in penalties
- Statute of limitations for FLSA – two or three years
- Attorneys fees to employees if they win (but not you if you win)

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What is a Class Action?

- Class action – an action brought on behalf of number of individuals who have similar claims against a defendant
  - Products liability (Roundup)
  - Bank fraud (Wells Fargo)
  - Securities actions
- There is a "named" plaintiff(s)
- Plaintiff's lawyers seek to certify a class to bring the claims
- Why bring them? Because they are broken slot machines for lawyers

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What is a Class Action – Employment?

- Employees have brought claims as class actions
  - Anti-discrimination statutes – Title VII, ADA, ADEA, etc.
    - Generally brought against very large employers who have many employees (need a number of ***similarly situated*** employees to make up the class)
  - State law wage claims
    - Brought in conjunction with FLSA "collective actions"

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What is a Collective Action?

- The Fair Labor Standards Act has a special mechanism for these types of cases
- Instead of a class action, an employee brings a collective action
- Difference is more than just nomenclature
- In a class action, if the court allows it to go forward, all employees in the class are covered by any settlement agreement unless they "opt out"
- In a collective action, employees have to "opt in" to participate

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FLSA Collective Actions

- These types of claims historically were brought in California or Texas
- They are exploding in the Intermountain area
- You see billboard advertising
- Our firm is currently handling two and has handled several in the past

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Ad Examples

CLASS ACTION .COM

INDEPENDENT CONTRACTOR MISCLASSIFICATION LAWSUITS

Workers who feel they're wrongly classified as independent contractors don't have to sit idly by and wait for the government to intervene on their behalf.

Although regulatory agencies are cracking down on companies that abuse the independent contractor business model, workers can take matters into their own hands by filing a class action lawsuit against their employer. A class action lawsuit allows workers who are misclassified to seek compensation for unpaid wages, business expenses, and other employee benefits from their employer. It's also possible to file an individual worker misclassification lawsuit.

Learn all your legal options and how a lawsuit can help during a free case review from ClassAction.com

FREE CASE REVIEW

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FLSA Collective Actions

- Why are they exploding
  - Lucrative – attorney fees provision
  - Easier to prove to establish liability – there are generally no "intent" issues to prove
    - In unlawful discrimination cases, the employee generally has to prove directly, or indirectly, that there was intent on the part of the employer to discriminate
    - In FLSA, you just have to prove that the employee worked and were not paid – objective, not subjective inquiry into intent

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FLSA Collective Action Types

- Compensable time
  - Pre-shift and post-shift activities
    - Donning and doffing
    - Cleaning equipment
    - Going through security
    - COVID 19 testing
  - Performing work during unpaid meal breaks
  - Attending work related lectures/conventions
  - Working from home

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FLSA Collective Action Types

- Compensable time (cont.)
  - Traveling for work
  - Waiting for work
  - Time reduced by supervisor

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FLSA Collective Action Types

- Misclassification
  - Improperly claimed exemption (executive, administrative, professional, computer professional, etc.)
  - Independent contractor versus employee
  - Volunteer versus employee

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FLSA Collective Actions – It's a Big Deal

- Potential impact -- huge
- Many small bricks make up a huge building
- If you have hundreds (or thousands) of employees not being paid 10-15 minutes a day
- Can add up really fast
- Statute of limitations is two years – unless the employee(s) can show the violation was willful in which case it is three years
- Whatever the back pay award is – it will be doubled unless the employer can show that the violation was made in good faith

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FLSA Collective Actions – It's a Big Deal

- Employee(s) attorney gets their fees and costs paid
- Workplace class/collective action lawsuits are the most common type of class actions, according to the results of the 2019 Carlton Fields Class Action Survey (responses from general counsel or senior legal officers at 395 large companies)
- According to the report, organizations spent a collective $2.46 billion in 2018 defending class/collective actions
- Labor and employment cases accounted for 26.1% of spending
- Carlton Fields found, and companies reported that wage and hour matters were "their top concern in this category"

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FLSA Collective Actions – It's a Big Deal

- In 2020, organizations spent nearly $295 million to settle wage and hour class action claims
- Reason for concern on wage and hour issues – telework
- Very rare before COVID 19
- More likely work and life to blend
- Without proper time keeping structures, more likely time is not being kept accurately – burden is on employer to make sure time is tracked accurately

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FLSA Collective Actions

- Slaying the beast

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FLSA Collective Actions – Preparing Your Defenses

- Compensable time
  - Policies prohibiting off the clock work
  - Policies providing employees clock time while computer is booting
    - Nelnet decision – computer boot up time is compensable; left window open for work at home
  - Have employees verify all hours work each pay period
  - Time clocking app on phone
  - Traditional time clock
  - Policies prohibiting work while on unpaid break – instruction to record time if break interrupted

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FLSA Collective Actions – Preparing Your Defenses

- Compensable time (cont.)
  - Policies prohibiting work from home and instructions to record time if work from home—emails, phone calls, text messages

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FLSA Collective Actions – Preparing Your Defenses

- Misclassification
  - Thorough review of FLSA exemptions
    - Salary is not enough for most exemptions, salary + (duties)
  - Through review of contractors
    - Multitude of tests/federal and state
    - Rule differences between federal/state and even within the same state (workers compensation v. unemployment insurance)
  - Building the Castle Wall
    - Let them work for others
    - Don't control when, where, and how work is performed

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FLSA Collective Actions – Preparing Your Defenses

- Misclassification (cont.)
  - Building the castle wall (cont.)
    - Don't provide benefits
    - Don't use contractors for core business functions
    - Employ on a project basis
    - Pay on a project-completed basis, NOT hourly
    - Don't include as part of company bulletins/newsletters, etc.

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Collective and Class Action Waivers

- The United States Supreme Court in 2018, in a 5-4 decision, recognized the enforceability of collective/class action waivers
- Found that employers could require workers to arbitrate disputes individually, waiving their right to class or collective actions

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Why Execute Collective or Class Action Waivers?

- Significantly decreases number of employees filing or joining litigation
- This eliminates the low hanging fruit for the employee(s) lawyers – have to work harder for their money by bringing hundreds/thousands of individual claims
  - Most eligible employees participate in class action cases:
    - Between 2014 and 2018, the **opt out** rate for class action settlements below $20 million was only 2.1%. - Natlawreview.com
  - But most employees will not take affirmative steps to initiate or join litigation:
    - **Opt-in** rates for FLSA cases is typically only 10 to 30 percent.

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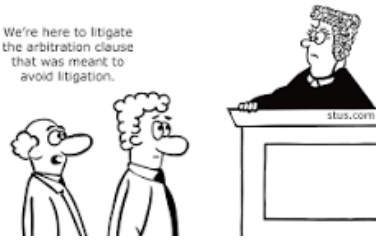
Arbitration Agreements



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What is an Arbitration Agreement?

- Arbitration agreements are agreements between two parties to resolve their disputes outside of the court system
- The case is decided by one (or three or more) retired judges, attorneys, or even company executives
- The process is usually handled by a third-party organization such as the American Arbitration Association or JAMS
- Instead of filing in court, you file with AAA or JAMS
- The arbitrator receives evidence, considers motions, and reaches a decision about who wins

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How Does Arbitration Differ from Mediation?

- Arbitration is binding – a decision from the arbitration is just as binding as a decision from a court
- A mediator does not reach a "decision" – rather, any decisions are made by the parties, to settle or not settle
- Mediation is voluntary – a party can end the mediation process at any time (the 30-minute mediation)
- A party cannot decide to end the arbitration process when they want – the process will continue until a decision is reached by the arbitrator

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How Does Arbitration Differ from Mediation?

- Mediation generally lasts one or two days
- Arbitrations are usually multi-day affairs, and can include several months of work

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Why Arbitrate?

- Keeps disputes less publicly visible – no public record of arbitrations that are filed or the results of those arbitration
- Can lower costs
- Can shorten length of disputes
- More flexibility in timing – depends on parties' calendars, not crowded court docket
- Arbitrators generally are more amenable to the parties' suggestions regarding how a case is managed (after all, the parties are their customers)

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Why Not Arbitrate?

- Discovery may be limited, depending on how the agreement is drafted
- Have to pay "administrative" costs to the AAA or JAMS
- Have to pay the arbitrator's fees
- Arbitrators seem more likely to issue "split the baby" decisions
- No appeal rights – if you lose at trial you have lost for good, unless:
  - You can show that the arbitrator failed to disclose a conflict of interest or
  - Completely misunderstood the law (this is a very high burden)

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Arbitration Provisions and Class Action Waiver are Generally Enforceable

- "Federal courts have a 'liberal federal policy favoring arbitration agreements.'" Reeves v. Enter. Prod. Partners, LP, 17 F.4th 1008, 1011 (10th Cir. 2021)
- The United States Supreme Court has recognized their enforceability in the employment context

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Test for Enforceability

Federal courts ask three questions before enforcing an arbitration provision

1. Whether the parties had a valid contract (applies general state contract law)
2. Whether an exception to the Federal Arbitration Act applies (the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce). 9 U.S.C.A. § 1
3. Whether the particular arbitration agreement violates a public policy

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Exception -- "class of workers engaged in foreign or interstate commerce"

- Southwest Airlines Co. v. Saxon – June 6, 2022
  - Employees who load and unload cargo from planes are within "class of workers engaged in foreign or interstate commerce."
  - **But** not all airline employees fit this description.

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Violating Public Policy

- In the Ninth Circuit, the public policy exception invalidates arbitration agreements between employers and employees where the employee is required to pay a portion of the arbitration costs.
- So, arbitration agreement must provide that employer will pay the arbitration costs
- If your arbitration agreement fails this test, a severance clause might still save it—if there is any provision in the agreement that could be interpreted as requiring the employer pay the costs

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Arbitrating Under State Laws

- In addition to the FAA, states have their own arbitration statutes.
- Many arbitration agreements use these state laws—which apply different rules.
- Some states this is not an option in employment cases
  - The state arbitration statutes in Arizona and Idaho expressly do not apply to contracts between employers and their employees.

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But FAA Can Save the Day

- The FAA preempts any state laws that treat arbitration agreements differently than any other contract.
  - Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (FAA preempts Montana statute that required specific notice for arbitration clause to be valid)
  - Tallman v. Eighth Jud. Dist. Ct., 131 Nev. 713, 723, 359 P.3d 113, 120 (2015) (FAA preempts Nevada statute that "requires any agreement that includes an arbitration provision to also include a specific authorization for that provision—or the provision is void").

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Employers Must Take Care

- State law is not preempted by the FAA when the arbitration agreement specifically utilizes state law rather than the FAA.
  - Volt Info. Sci., Inc. v. Bd. of Tr., 489 U.S. 468, 470, 109 S.Ct. 1248, 1251, 103 L.Ed.2d 488, 494 (1989) (California law not preempted by the FAA because arbitration agreement applied California state law)
  - If concerned about state law, **make sure to specifically incorporate the FAA in the arbitration agreement**.

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Arbitration Agreements – Contract Principles

- Supported by consideration
  - New employment
  - Continued employment likely works
    - Does not work in some states
- Scope of what is being arbitrated
- Rules governing arbitration

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Risks of Arbitration Agreements and Class Action Waivers

- If Agreement is deemed unenforceable, only increases costs
- No meaningful right to appeal
- Can be costly for employers

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Cautionary Tale

- Door Dash's $11 Million Nightmare
  - Enforceable Arbitration and Class Action Waiver
  - 5,000+ Potential Class Members
  - Potential Class Members file 5,000 arbitration individual arbitration demands using same short template
  - Door Dash asks Court not to enforce arbitration and class action provision
  - Court says be careful what you wish for – enforces provisions

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DoorDash Court's Concluding Remarks

- "For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, **thus taking away their right to go to court,** and forced class-action waivers upon them too, **thus taking away their ability to join collectively to vindicate common rights**. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions**. The irony,** in this case, **is that the workers wish to enforce the very provisions forced on them** by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. **The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause.** No doubt, DoorDash never expected that so many would actually seek arbitration. **Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order**."

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Non-Arbitrable Claims

- Arbitration clauses cannot prevent employee from filing a charge or complaint with a federal, state, or local administrative agency charged with investigating and/or prosecuting complaints under any applicable federal, state, or municipal law or regulation including, but not limited to, the state Labor Commission and/or the federal Equal Employment Opportunity Commission or National Labor Relations Board.
- The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act – March 2022
- Different states have additional claims that cannot be arbitrated

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

9 U.S.C.A. § 402

So, what does this mean?

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act cont.

- Can't enforce an agreement to arbitrate sexual assault or sexual harassment disputes in advance.
- The Act does not prohibit employees from agreeing to arbitrate a sexual assault of sexual harassment dispute after the claim has arisen. But the employer cannot pressure the employee to do so.
- The Act does not apply to any other claims – including sexual discrimination or general assault or harassment claims.

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Potential Problems in Enforcing

- Morgan v. Sundance, Inc. – U.S. Supreme Court, May 23, 2022
  - Court clarifies that the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. Arbitration agreement must just be treated like any other contract.
  - Several Circuits had adopted an arbitration-preferring procedural rule by requiring an employee to prove prejudice when claiming that employer has waived arbitration agreement by not timely raising the issue in litigation.
  - Supreme Court eliminates the prejudice element of waiver test.

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So, Should You Require Employees to Arbitrate?

- Considerations – pro arbitration agreement
  - Large employers (targets for collective actions)
  - Historic issues with time keeping
  - Donning and doffing (clothing/equipment)
  - Computer start up time – have to log into time keeping software
  - Use independent contractors that are not independent contractors
- If you do decide to use one, put it in a separate agreement/document

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So, Should You Require Employees to Arbitrate?

- Employee handbooks are not contracts
- Arbitration, mediation, non-compete/confidentiality/non-solicitation covenants, intellectual property assignments – separate agreements, **NOT** employee handbooks

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What About Mandatory Mediation Provisions?

- Arbitration agreements sometimes contain mandatory mediation provisions
- Reminder
  - Mediation is a settlement process with a third party – free to walk away at any time
  - No decision is reached by the mediator
- For discrimination claims, likely not necessary
- Before someone can file a lawsuit for discrimination, or even arbitration if you have an arbitration provision – have to file charge

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What About Mandatory Mediation Provisions?

- Charge is filed with the EEOC/UALD
- Once the charge is filed, both agencies will push for early mediation
- In response to the charge, the employer is required to file a document explaining its position and filing relevant documents
- In the past couple of years, the UALD has been pushing for early mediation – before the employer even files its response and/or provides documents

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What About Mandatory Mediation Provisions?

- Consider it as it relates to FLSA claims breach of employment contract claims
- Have to pay mediator expense and expense to file position statement
- If one party is not interested in settling, mandatory mediation may not be effective

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

Thank You

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10th Annual **Idaho Employment Law Seminar**

Employee Discipline and Termination: Avoiding Problems with Effective Communication and Documentation

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PARSONS BEHLE & LATIMER

Liz M. Mellem

Office Managing Shareholder | Shareholder | Missoula | Helena | Salt Lake City

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PARSONS BEHLE & LATIMER

Liz Mellem is the managing shareholder of Parsons' Missoula office and a skilled litigator. Her experience with an array of complex commercial issues, including significant employment counseling and litigation, helps guide her clients toward effective and satisfactory resolutions both in and out of court.

Capabilities

Business & Commercial Litigation

Employment & Labor

Employment Litigation

Securities Litigation

Biography

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

- Trade secret misappropriation claims
- Sexual harassment investigations
- Employee wrongful termination claims
- Ownership disputes
- Breach of contract claims

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

An original member of Parsons Behle & Latimer's COVID-19 Response Team, Liz has been active since the onset of COVID-19 guiding her clients and the firm through the shifting landscape caused by the global pandemic and the related unique business and employment circumstances. Every business is being conducted differently in recent times, and Liz's practice is no exception. She holds the distinction of being lead counsel on the first virtual federal trial in Utah, conducted remotely through an online platform.

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

Experience

Nonsolicitation or Noncompete Contracts

Successfully resolved numerous cases alleging violations of non-solicitation and non-competition contract provisions.

Employee Handbooks

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

Wrongful Termination

Successfully defended company in alleged wrongful termination case.

Accomplishments

Academic

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

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

Professional

Admissions:

Utah State Bar, 2010

United States District Court, District of Utah, 2010

State Bar of Montana, 2013

United States District Court, District of Montana, 2014

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

Associations

Professional

Utah State Bar Labor & Employment Section
Chair
(2017 - 2018)

American Bar Association
Member
(2010 - Present)

Community

Humane Society of Western Montana
Board of Directors
Member
(2017 - present)
President of Board
(2020 - present)

Run Wild Missoula
Member
(2013 - present)

Articles

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

Montana Face Coverings Mandates **July 21, 2020**

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

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

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

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

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

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

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

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

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

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

Parental Leave Policies – What to Know and What to Consider
October 31, 2019

Presentations

Hot Employment Topics Session #2 **October 28, 2021**

Hot Employment Topics Session #1 **October 27, 2021**

Hot Employment Topics Session #2 **September 22, 2021**

Hot Employment Topics Session #1 **September 22, 2021**

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

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

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

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

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

Credentials

Licensed

Utah

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

Montana

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

1

Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

2

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At Will Employment Doctrine

- In Idaho, the default for all employees is that they are employed "at-will." This means that either the employer or the at-will employee may terminate the employment relationship at any time, with or without advance notice, and for any reason or no reason at all.
- Although the at-will employment doctrine is alive and well in Idaho, employers who rely on it do so at their peril.
- There are many federal and state exceptions to at-will employment!

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Exceptions to At-Will Employment

- State and federal laws prohibit employment discrimination on the basis of certain protected characteristics, including:
- race, color, religion, age (40 and over), pregnancy, sex, gender, disability, national origin, ethnic background, sexual orientation, gender identity, genetic information (including of a family member), military service, and citizenship.

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Exceptions to At-Will Employment

- Be mindful of timing issues to avoid a **retaliation** claim.
- Courts will infer a retaliatory intent when an employer takes adverse employment action soon after (e.g., within about 3 months) an engages in protected activity (e.g., complaining about discrimination or harassment).
- In such cases, the burden will shift to the employer to rebut the retaliatory presumption with evidence of its legitimate, non-retaliatory intent.

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Exceptions to At-Will Employment

Other federal laws limit employer rights to terminate employees too, including:

- Section 7 of the National Labor Relations Act
- A framework of whistleblower laws (e.g., the Occupational Safety and Health Act and the Sarbanes-Oxley Act).
- For a full list of federal whistleblower laws, go to www.whistleblowers.gov/statutes

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Exceptions to At-Will Employment

- Idaho has an exception to the at-will employment doctrine: "**termination in violation of public policy**" that occurs when an employer terminates an employee in a way that violates an important public policy (found in state statutes).
- Common fact patterns:
  - Employee alleges they were fired in retaliation for reporting a workplace injury or filing a workers compensation claim.
  - Employee alleges they were fired in retaliation for reporting a suspected violation of law to their employer or to the authorities.

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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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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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Who Else Cares About Documentation?

- Documentation also really matters to the agencies that enforce anti-discrimination and anti-retaliation employment laws:
  - State Agencies (UALD; Montana Human Rights Bureau; Idaho Human Rights Commission)
  - EEOC
  - DOL
- Service of a Charge or Complaint is always accompanied by a Request for Information

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Excerpt from UALD Request for Information

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Documents Requested in Every UALD Charge

- 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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Good Documentation Is Critical at 3 points:

- Performance Evaluations and Appraisals
- Discipline
- Termination

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"Golden Rule" of Documentation

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

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"Golden Rule" of Documentation

What happens when you
have not documented?

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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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Excerpts from Federal Employee Evaluations

- "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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AVOIDING LEGAL TROUBLE

Discipline and Termination: How Good Communication and Documentation with All Employees Can Help You

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How Terminations Often Go

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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
- Outline the ideal way to communicate performance expectations and document C.A.P. along the way

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Event – Documentation Outline

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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Event – Documentation Outline

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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Event – Documentation Outline

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

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Event – Documentation Outline

HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
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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Event – Documentation Outline

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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Event – Documentation Outline

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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Event – Documentation Outline

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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Event – Documentation Outline

HIRE / EVENT	DOCUMENTATION/ COMMUNICATION
Discharge ↓	Here is the main goal of the whole process: anyone who might try to second guess you should conclude there was clear **explanation of expectations, notice of problems** and a **documented chance to improve** before discharge. HR involvement should ensure company-wide consistency and that the written record supports the termination decision.

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Event – Documentation Outline

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

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Thank You

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10th Annual **Idaho Employment Law Seminar**

Breaking HR Law News: Legislative & Regulatory Update

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PARSONS BEHLE & LATIMER

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PARSONS BEHLE & LATIMER

A seasoned attorney with nearly four decades of experience, Michael partners with employers in many industries to prevent and solve employment problems. He represents news media organizations in all aspects of the law related to newsgathering and distribution. He also serves as a mediator to help resolve employment and media law disputes.

Capabilities

Employment & Labor

Employment Litigation

Biography

Employment Law:

Michael partners with employers in many industries to prevent and solve employment problems.

He works with the local and national Society for Human Resource Management (SHRM) and has served as the legal and legislative director for Utah SHRM and Salt Lake SHRM. For such services, National SHRM honored him with its prestigious Capital Award, which was given annually to one of SHRM's 300,000 members worldwide. Utah SHRM has given him its Award for Professional Excellence.

Michael counsels employers on how to minimize and manage risks, including those involving: civil rights, discrimination, the Americans With Disabilities Act (ADA), sexual harassment, other harassment, retaliation, the Fair Labor Standards Act (FLSA), payment of wages, overtime pay and exemptions, employee benefits, drug and alcohol testing, workplace violence, the Family and Medical Leave Act (FMLA), the Equal Employment Opportunity Commission (EEOC), affirmative action, unemployment compensation, employee misconduct, investigations, unions, unfair labor practices, the National Labor Relations Board (NLRB), employment contracts, noncompetes, defamation, torts, wrongful discharge, mediation and arbitration.

He represents employers when disputes become lawsuits.

He has successfully handled hundreds of cases before administrative agencies, trial courts, juries, arbitrators, mediators and appeals courts.

Michael works with clients regarding preventive employment law activities, such as investigations, supervisor and employee training, policy and handbook reviews, job descriptions, human resource audits and counseling on day-to-day employee problems.

He has published numerous articles on employment law topics.

He is a popular public speaker, often addressing the news media and local and national employer groups on various employment law trends and issues.

Michael serves as amediator in employment law disputes.

Media and First Amendment Law:

Michael assists news and publishing organizations in obtaining access to places and records (FOIA and Utah GRAMA), and in minimizing risks (and responding to claims) of defamation, invasion of privacy, tort and other matters related to publishing. He also represents the news media at the Utah Legislature and elsewhere as needed, working to preserve and strengthen Utah's open government laws.

He has represented many media clients including The Salt Lake Tribune, CNN, the Deseret News, the Associated Press, the Newspaper Agency Corporation, Newsweek, the Society of Professional Journalists, KUTV News, the Utah Media Coalition and KSL-TV and radio.

He is a member of, and has received "sunshine" and freedom of information awards from, the Society of Professional Journalists and the National Association of Broadcasters.

Michael is co-editor of the *Utah Media Law Handbook* published by the Utah Headliners Chapter of the Society of Professional Journalists.

Accomplishments

Academic

University of Utah, J.D., 1986

- Harry S. Truman Scholar
- Utah Law Review, Member, 1984-1985 and Executive Editor, 1985-1986

University of Notre Dame, B.A., Government/Theology, 1983

Professional

AV Rating Martindale-Hubbell

Highest ratings, Chambers USA, Labor & Employment, 2003-present

Employment Lawyer of the Year, Utah State Bar, 2001

Human Resources Executive, Nation's Most Powerful Employment Lawyers In America, 2010 to present

Mountain States Super Lawyers, 2007-present

Utah Business Magazine, Legal Elite, 2006-present

Best Lawyers in America, "Salt Lake City Best Lawyers Employment Law Lawyer of the Year," 2011-2012, 2014

Best Lawyers in America, First Amendment Law, Labor And Employment Law, 2005-present

Best Lawyer's 2019 Lawyer of the Year for Employment Law

Associations

Professional

Utah State Bar Association and American Bar Association, Employment Sections

Society for Human Resources Management, national and local

University of Utah S.J. Quinney College of Law Board of Trustees, 2019-present

Community

Judge Memorial High School Board President, 2016-present

Media

Utah Media Coalition

Articles

Employment Law Update, June 29, 2022 **June 29, 2022**

A Utah father's tribute to his 'velveteen daughter'
June 19, 2022

Employment Law Update May 31, 2022 **May 31, 2022**

Ep 98. Michael O'Brien, Monastery Mornings **February 6, 2022**

Remembering the Christmas Eve We Were Helped by a Savior in Cowboy Boots **December 12, 2021**

'Mormon Land': Utahn Reflects on His Visits to an Unlikely Monastery in LDS Zion and His Life among Saints and Monks
July 28, 2021

Presentations

Employment Law Challenges of a Remote Workplace
June 16, 2022

2022 Legislative and Regulatory Update **June 16, 2022**

Credentials

Licensed

Utah

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PARSONS BEHLE & LATIMER

Elena T. Vetter is a member of Parsons Behle & Latimer's Litigation practice team. Elena focuses her practice on complex litigation matters and advises clients on issues related to employment law, antitrust and competition, commercial litigation, First Amendment and intellectual property disputes.

Capabilities

Antitrust & Competition

Appeals

Business & Commercial Litigation

Employment & Labor

Biography

Elena defends employers in cases involving discrimination, harassment, civil rights, wage and overtime pay, and wrongful discharge claims arising under state and federal law, including claims involving the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA) and others. Elena also advises employers with compliance, helping them develop proactive, preventative employment policies.

Elena represents clients involved in complex business disputes and litigates claims arising out of breach of contract and contract interference, non-competition and non-solicitation agreements, and other competitive issues. Elena's intellectual property experience includes trademark issues, copyright claims and infringement.

In her First Amendment practice, Elena assists organizations and individuals seeking to obtain public records and litigates records-access disputes arising under statutes like the Government Records Access and Management Act (GRAMA).

Accomplishments

Academic

University of Utah S.J. Quinney College of Law

Executive Articles Editor of the *Utah Law Review*

Director of the Street Law Legal Clinic

CALI Award for the highest grade in an advanced legal writing seminar and a law and biomedical sciences class

William H. Leary Scholar

Emory University, B.A., summa cum laude, English and Sociology

Minor in Economics

Professional

2022 Utah Business Magazine's Thirty Women to Watch Recipient

Associations

Professional

Judicial Clerk, Judge Ryan M. Harris, Utah Court of Appeals (2020)

Articles

Employment Law Update, July 29, 2022 **July 29, 2022**

Presentations

2022 Legislative and Regulatory Update **August 31, 2022**

2022 Legislative and Regulatory Update **June 16, 2022**

Credentials

Licensed

Utah

10th Annual Idaho Employment Law Seminar

PARSONS BEHLE & LATIMER

2022 Legislative and Regulatory Update

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October 5, 2022 | Boise Centre East

A Different LEGAL PERSPECTIVE

parsonsbehle.com

1

Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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What have we seen from the Biden/Harris Administration over the last two years?

(and the Democrat majority-controlled Congress)

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Minimum Wage Hike for Federal Contractors

On April 27, 2021, by an executive order that impacts hundreds of thousands of workers, President Biden increased the minimum wage paid to employees of federal contractors to $15/hour.

The increase was not immediately effective. Instead, the order requires all federal agencies to incorporate a $15 minimum wage in all contract solicitations starting January 30, 2022 and into all newly signed contracts by March 30, 2022.

The new minimum wage rates apply for contracts are renewed on or after March 30, 2022.

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Raising the $7.25 Minimum Wage?

Although the April 27, 2020 Executive Order applies only to federal contractors, watch for ripple effects when other employers have to compete with federal contractors for employees.

The Biden Administration's initial efforts to increase the $7.25 minimum wage for all workers to $15/hour failed, though it's possible that a more modest increase of the minimum wage could succeed. Even some moderate Senate Republicans have expressed interest in a more conservative increase to the minimum wage, e.g., to $10/hour.

The non-partisan Congressional Budget Office has estimated that an increase to $15/hour would reduce the workforce by approximately 1.4 million workers.

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Ban on Non-Competition Agreements?

On July 9, 2021, Pres. Biden signed an Executive Order that calls on the Federal Trade Commission (FTC) to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

The EO does not actually change the law on non-competes—not yet. The FTC still needs to engage in rulemaking to adopt rules restricting the use of non-compete agreements.

We don't know if the FTC will ban non-compete clauses outright, or only the "unfair use of non-compete clauses."

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No More Forced Arbitration of Sexual Harassment Claims

On February 10, 2022, Congress passed the **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**. The law has immediate effect and applies retroactively (except for pending claims).

This law amends the Federal Arbitration Act (FAA) and renders *pre-dispute* employment arbitration agreements unenforceable as applied to claims of sexual assault and sexual harassment.

Pre-dispute agreements that waive an employee's right to a jury trial and that waive an employee's right to participate in a class, joint, or collective action also are unenforceable as applied to sexual assault/harassment claims.

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7

What about the Vaccine Mandates?

OSHA ETS for employers with 100+ employees? Dead.

Federal Contractor Mandate? Stayed.

Healthcare employers who receive Medicare/Medicaid reimbursement? Alive.

8

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CDC
CENTERS FOR DISEASE CONTROL AND PREVENTION

Updated CDC Guidelines

9

What Precautions Should an Employee Take After Exposure?

Latest CDC Guidance (August 11, 2022)

What to Do If You Were Exposed to COVID-19

Updated Aug. 11, 2022 Español | Other Languages Print

After Being Exposed to COVID-19

START PRECAUTIONS
Immediately

Wear a mask as soon as you find out you were exposed
Start counting from Day 1

- Day 0 is the day of your last exposure to someone with COVID-19
- **Day 1 is the first full day** after your last exposure

10

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CONTINUE PRECAUTIONS
10 Full Days

You can still develop COVID-19 up to 10 days after you have been exposed

Take Precautions

Wear a high-quality mask or respirator (e.g., N95) any time you are around others inside your home or indoors in public[1]

- Do not go places where you are unable to wear a mask, including travel and public transportation settings.

Take extra precautions if you will be around people who are more likely to get very sick from COVID-19.

More about how to protect yourself and others >

Watch for symptoms

- fever (100.4°F or greater)
- cough
- shortness of breath
- other COVID-19 symptoms

If you develop symptoms

- isolate immediately
- get tested
- stay home until you know the result

If your test result is positive, follow the isolation recommendations.

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GET TESTED
Day 6

Get tested at least 5 full days after your last exposure

Test even if you don't develop symptoms.

If you already had COVID-19 within the past 90 days, see specific testing recommendations.

IF YOU TEST
Negative

Continue taking precautions through day 10

- Wear a high-quality mask when around others at home and indoors in public

You can still develop COVID-19 up to 10 days after you have been exposed.

IF YOU TEST
Positive

Isolate immediately

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How Long Should an Employee Isolate if they Feel Sick and Suspect Covid or Test Positive?

Latest CDC Guidance (August 11, 2022)

Isolation and Precautions for People with COVID-19

Updated Aug. 11, 2022 Español | Other Languages Print

When to Isolate

Regardless of vaccination status, **you should isolate from others when you have COVID-19. You should also isolate if you are sick and suspect that you have COVID-19 but do not yet have test results.** If your results are positive, follow the full isolation recommendations below. If your results are negative, you can end your isolation.

IF YOU TEST
Negative
You can end your isolation

IF YOU TEST
Positive
Follow the full isolation recommendations below

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When you have COVID-19, isolation is counted in days, as follows:

If you had no symptoms

- **Day 0 is the day you were tested** (not the day you received your positive test result)
- **Day 1 is the first full day** following the day you were tested
- If you develop symptoms within 10 days of when you were tested, the **clock restarts at day 0 on the day of symptom onset**

If you had symptoms

- **Day 0 of isolation is the day of symptom onset**, regardless of when you tested positive
- **Day 1 is the first full day** after the day your symptoms started

Isolation

If you test positive for COVID-19, stay home for at least 5 days and isolate from others in your home. You are likely most infectious during these first 5 days.

- **Wear a high-quality mask** if you must be around others at home and in public.
- Do not go places where you are unable to wear a mask, including travel and public transportation settings.
- Stay home and separate from others as much as possible.
- Use a separate bathroom, if possible.
- Take steps to improve ventilation at home, if possible.
- Don't share personal household items, like cups, towels, and utensils.
- Monitor your symptoms. If you have an emergency warning sign (like trouble breathing), seek emergency medical care immediately.
- Learn more about what to do if you have COVID-19.

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Ending Isolation

End isolation based on how serious your COVID-19 symptoms were.

If you had no symptoms

You may end isolation after day 5.

If you had symptoms

You may end isolation after day 5 if:

- You are fever-free for 24 hours (without the use of fever-reducing medication)
- Your symptoms are improving

If you still have fever or your other symptoms have not improved, continue to isolate until they improve.

If you had moderate illness (if you experienced shortness of breath or had difficulty breathing), or severe illness (you were hospitalized) due to COVID-19-, or you have a weakened immune system, you need to isolate through day 10.

If you had severe illness or have a weakened immune system, consult your doctor before ending isolation. Ending isolation without a viral test may not be an option for you.

If you are unsure if your symptoms are moderate or severe or if you have a weakened immune system, talk to a healthcare provider for further guidance.

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Regardless of when you end isolation, avoid being around people who are more likely to get very sick from COVID-19 until **at least day 11**. Remember to wear a high-quality mask when indoors around others at home and in public and not go places where you are unable to wear a mask until you are able to discontinue masking (see below).

Loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation.

Removing Your Mask

After you have ended isolation, when you are feeling better (no fever without the use of fever-reducing medications and symptoms improving),

- Wear your mask through day 10.

OR

- If you have access to antigen tests, you should consider using them. With two sequential negative tests 48 hours apart, you may remove your mask sooner than day 10.

Note: If your antigen test results' are positive, you may still be infectious. You should continue wearing a mask and wait at least 48 hours before taking another test. Continue taking antigen tests at least 48 hours apart until you have two sequential negative results. This may mean you need to continue wearing a mask and testing beyond day 10.

After you have ended isolation, if your COVID-19 symptoms recur or worsen, restart your isolation at day 0. Talk to a healthcare provider if you have questions about your symptoms or when to end isolation.

[1] As noted in the Food and Drug Administration labeling for authorized over-the-counter antigen tests, negative test results do not rule out SARS-CoV-2 infection and should not be used as the sole basis for treatment or patient management decisions, including infection control decisions.

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Should (Idaho) Employers Require a COVID-Positive Employee to Test Negative Before Returning to Work?

David Fram - 1st
ADA Speaker-- VIRTUAL & In-Person/ Speaking Coach/Author
18m

CDC's latest guidance raises a perplexing question for EVERY employer: You have an employee who has had COVID. After 5 days, he wants to return because he reports that he has no symptoms. You (like many employers) want to require that he get tested before coming back to the worksite. Can you still do that?

Prior to last week, I thought the answer was a clear YES. This is because I've always believed that this type of test meets the ADA medical exam standard of being "job-related and consistent with business necessity" (meaning, in this case, there's a legitimate concern about "direct threat.") BUT, CDC's new guidance, which does NOT contain a recommendation for a post-COVID test, is apparently based on their expert opinion that the risk of transmissibility is statistically negligible in this situation.

So, the CDC guidance supports the argument that there's no longer a legitimate concern about direct threat after 5 days if there aren't symptoms. What do you think?

"Prior to last week, I thought the answer was a clear YES. This is because I've always believed that this type of test meets the ADA medical exam standard of being "job-related and consistent with business necessity" . . . BUT, CDC's new guidance, which does NOT contain a recommendation for a post-COVID test, is apparently based on their expert opinion that the risk of transmissibility is statistically negligible in this situation."

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Must an Employer Pay an Employee for Time Spent Waiting on a COVID Test?

The Wage and Hour Division of the U.S. Department of Labor has answered this question, in its Q&A (no. 7-8).

https://www.dol.gov/agencies/whd/flsa/pandemic#8

DOL basically says "IT DEPENDS"
but the answer really is **YES**!

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Paying for Time Spent Waiting on a COVID Test: DOL Q&A 7-8

Absolutely Yes: when you require testing on the premises during normal working hours.

Maybe: when you require testing on the employee's day off.

For testing on an employee's day off, you need to pay for this time if the testing is necessary for the employee to perform their job safely and effectively during the pandemic.

But note: EEOC says you can only test if job-related and consistent with business **necessity**.

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Recall Idaho's Immunity Statute

Signed into law on August 27, 2020

Effective until July 1, 2023

(Idaho Code Ann. § 6-3401, *et seq*.)

PROTECTION AGAINST COVID-19-RELATED CLAIMS

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Idaho's Immunity Statute

- "… [A] person is immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus."
- "Person" includes "any entity recognized in [Idaho]" including "an individual, corporation, limited liability company, partnership . . .."
- Immunity does not apply to "acts or omissions that constitute an intentional tort or willful or reckless misconduct . . .."

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EEOC

U.S. Equal Employment Opportunity Commission

Updated EEOC COVID Guidelines

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Do We Need to Provide Reasonable Accommodations to Employees Infected With COVID as Part of an ADA Accommodation?

- On December 14, 2021, the EEOC updated its guidance to clarify when COVID-19 may be an ADA-protected disability.

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Is COVID an ADA-Qualifying Disability?

You'll find this new information in section "N" of the EEOC's COVID guidance.

The EEOC starts with this premise:

An employee who suffers only mild COVID symptoms, or who is asymptomatic, does not have a disability under the ADA and is, therefore, not entitled to an ADA accommodation.

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Is COVID an ADA-Qualifying Disability?

However, the EEOC clarified that employees with the following COVID experiences may have an ADA-covered disability that entitles them to a reasonable accommodation.

- Individuals who experience ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating.

- Individuals who receive supplemental oxygen for breathing difficulties and have shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last, for several months;

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Is COVID an ADA-Qualifying Disability?

Examples of COVID-related ADA disabilities (continued):

Individuals who experience heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are expected to last, for several months; and

Individuals with "Long-Covid" who experience COVID-19 related symptoms "for many months, even if intermittently.

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May Employers Require COVID-19 Testing?

- With the increase in COVID-19 positivity rates across the United States amidst the prevalence of Omicron subvariant BA.5, employers may be considering a mandatory testing policy.
- Remember: there is a critical distinction between a viral screening test, which is permissible under appropriate circumstances, and an antibody test, which is prohibited.
- Viral screening tests may be imposed by employers, requiring testing prior to an employee entering a workplace, if the test is "job-related and consistent with business necessity."
- Employers can satisfy this standard if the testing policy is consistent with guidance from the Centers for Disease Control and Prevention ("CDC"), Food and Drug Administration ("FDA"), and/or state and local public health authorities that is current at the time of testing.
- This requires ongoing monitoring, because guidance periodically changes. Additionally, the EEOC has provided some factors to consider.

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When is Testing a Business Necessity?

Balance a number of factors:

- the level of community transmission;
- the vaccination status of employees;
- the accuracy and speed of processing for different types of COVID-19 viral tests;
- the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;
- the ease of transmissibility of the current variant(s);
- the possible severity of illness from the current variant;
- what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (*g.*, working with medically vulnerable individuals); and
- the potential impact on operations if an employee enters the workplace with COVID-19.

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Where to Go From Here

- Start by reviewing local and federal guidance
- Consult transmission levels in your area
- Follow the CDC's lead
- Designate—and train—decision-makers
- Communicate with employees

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Equal Employment Opportunity Commission Enforcement Update

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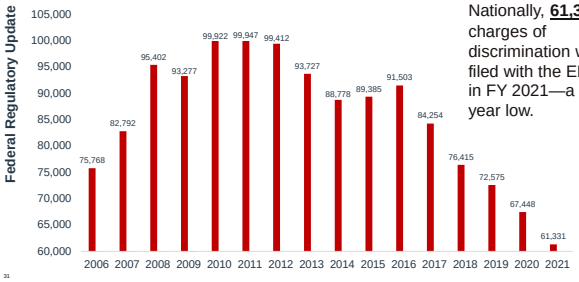
EEOC Charge Statistical Report (March 2022)

Federal Regulatory Update



Nationally, **61,331** charges of discrimination were filed with the EEOC in FY 2021—a 16-year low.

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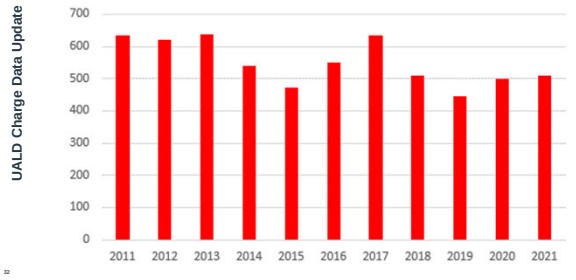
Charges Filed

UALD Charge Data Update



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EEOC/UALD Charge Statistics

Federal Regulatory Update

www.eeoc.gov/statistics/enforcement-and-litigation-statistics

In 2021, the top 5 charges of discrimination **nationally** were:	In 2021, the top 5 charges of discrimination in **Utah** were:
Retaliation (56%)	Retaliation (62%)
Disability (37%)	Disability (50%)
Race (34%)	Sex (28%)
Sex (30%)	Age (20%)
Age (21%)	Race (18%)

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What To Expect From The NLRB?

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The NLRB's General Counsel, also Appointed by the President, is a Particularly Influential Role and Drives the Agenda of Cases That go to the NLRB for Adjudication

On July 22, 2021, Jennifer A. Abruzzo began serving as General Counsel for the National Labor Relations Board.

- Abruzzo has signaled a more pro-labor agenda. On August 12, 2021, she issued a ten-page memorandum to field offices outlining her intent to revisit recent employer-friendly NLRB decisions, including (among many others):
  - The standard for assessing the lawfulness of employer handbook rules;
  - The lawfulness of confidentiality provisions in workplace investigations, separation agreements, and arbitration agreements;
  - What types of worker activity are protected under Section 7 of the NLRA, including the use of employer e-mail systems for union organizing purposes; and
  - The standard for independent contractor status.

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What Comes Next For Handbook Rules

- **Trump Era Rule:** NLRB will consider two factors when evaluating a facially neutral policy: (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate business justifications associated with the rule. Certain categories of rules are always lawful to maintain.
- **Obama Era Rule:** Workplace policies violate the NLRA if an employee could "reasonably construe" the language to prohibit Section 7 rights, i.e., the right to engage in "concerted activity" to improve working conditions.

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What Comes Next For Handbook Rules

NLRB Action: On January 6, 2022, the Board issued a notice and invitation to the parties in *Stericycle, Inc.* 371 NLRB 48 (2021), and to *amici*, to submit briefs regarding "whether the Board should adopt a new legal standard to determine whether employer work rules violate Section 8(a)(1) of the NLRA," and, if so, what that standard should be.

- Specifically, should the Trump Era rule set forth in *Boeing Co.* be continued?
- If not, in what ways should it be modified to "better ensure" that employees' economic dependence on employers is accounted for, employee rights and legitimate employer interests are properly balanced, and the burden of proof is proper?
- Should some categories of employer rules always be lawful to maintain?

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Recent Unionization Efforts

- Amazon Staten Island warehouse votes to unionize in early April 2022
- Yet, union lost a similar vote at second Staten Island Warehouse in early May 2022

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Idaho has not been immune to recent unionization efforts

- Workers at more than 100 Starbucks locations (and similar stores) have petitioned to unionize (see: https://www.eater.com/22925565/starbucks-union-wave-explained)
- Traditionally, Idaho has had low union membership. In 2021, according to the Bureau of Labor Statistics, 4.7% of wage and salary workers in Idaho were unionized compared to 10.3 nationally.
- Yet, unionization efforts have gained momentum with a Starbucks location in Twin Falls, Idaho expressing an interest in unionizing.

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IDAHO LEGISLATIVE UPDATE

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Idaho Legislative Update

COVID-19 Legislation:

H0444 – Extended the sunset provision of the Coronavirus Limited Immunity Act from July 1, 2022 to July 1, 2023. As discussed previously, the act provides that a person is immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus **PASSED**.

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0444/

H0464 and H0593 - Covid-19 Vaccination Related Accidents or Injuries. Both bills provide that if an employer requires an employee to receive a COVID-19 vaccination in the course of employment or a condition of hiring any accident or injury caused by the vaccination is compensable. **FAILED**.

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0464.pdf

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0593/

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Idaho Legislative Update

COVID-19 Legislation:

H0514 – Prohibition of Mask Mandates. Prohibits the state, political subdivision, or a state official from mandating that an individual use a face mask, face shield, or face covering for the purpose of preventing or slowing the spread of a contagious disease. Any recommendation to wear a mask from such individuals must include a notice that the recommendation is not mandatory. **FAILED**.

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0514/

H0577 – Free Exercise of Religion Related to Covid Vaccination. If an employer denies an employee's request for a religious exemption from a coronavirus vaccination the employer must prove that the denial is essential to further a compelling interest and the least restrictive means of furthering that interest. Employee may bring a cause of action against their employer for a denial of a religious exemption and obtain attorney's fees and costs if they prevail. **FAILED**.

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0577/

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Idaho Legislative Update

Minimum Wage Legislation:

H0458 – Minimum Wage Increase.

Idaho law prohibits political subdivisions of the state from enacting a minimum wage higher then than the state minimum wage. This bill removed this prohibition. **FAILED**.

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0458.pdf

H0497 and S1129 – Minimum Wage Increase.

H0497 raised the Idaho minimum wage to $10 on July 1, 2022 and $15 on July 1, 2024 adjusted annually for inflation. S1129 raised the minimum wage to $15 adjusted annually for inflation. Both bills also allowed cities and counties to enact a minimum higher than the state minimum wage. **FAILED**.

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0497/

https://legislature.idaho.gov/sessioninfo/2022/legislation/S1229/

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Idaho Legislative Update

Other bills:

H0440 – Prohibiting Discrimination Based on Gender Identity and Sexual Orientation

Idaho law prohibits discrimination in employment based on certain protected characteristics including race, color, religion, sex, national origin or disability. This bill would have added gender identity and sexual orientation to those protected characteristics. **FAILED**.

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0440.pdf

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Idaho Legislative Update

Other bills (cont.):

H0447 – Idaho Paid Family Leave Act

Adds the Idaho Paid Family Leave Act to existing law. Include definitions and provides for three (3) months of paid maternity leave; twelve (12) months of paid parental leave; six (6) months of paid caregiving leave to care for a seriously ill or injured minor family member; six (6) months of paid caregiving leave to provide end-of-life care for a family member; and three (3) months of paid caregiving leave to care for a seriously ill or injured adult family member. Leave would be paid at up to 2/3rds of regular wage and funded by a 2% payroll tax with 1% paid for by the employer and 1% paid for by the employee. **FAILED**.

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/H0447.pdf

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Idaho Legislative Update

Other bills (cont.):

H0491 – Personal Medical Information

Provides that an employer cannot "in connection with hiring, promotion, demotion, retention, disciplinary action, or other related decisions, request of require the release or revelation of a person's private medical information." However, this would not prohibit an employer from requiring or performing drug testing in compliance with company policy. Personal Medical Information was broadly defined as "any information related to or revealing specific or details of a person's medical or dental condition, diagnosis, treatment, operation, procedure, medication, vaccination, immunization, genetic modulation, or inoculation or any other similar or related information. **FAILED**.

https://legislature.idaho.gov/sessioninfo/2022/legislation/H0491/

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Idaho Legislative Update

Other bills (cont.):

S1294 – Use of Accrued Sick Leave

Prohibits employers from (1) counting any sick leave "taken in accordance with the employer's written sick leave policy" as "an absence that results in discipline or any other adverse action" and (2) restricting an employee's use of sick leave leave "for the employee's illness, injury, health condition, or need for medical diagnosis." **FAILED**.

https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2022/legislation/S1294.pdf

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

Thank You

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10th Annual **Idaho Employment Law Seminar**

Everything You Want to Ask Your Lawyer But Are Afraid to Ask

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PARSONS BEHLE & LATIMER

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

Capabilities

Appeals

Employment & Labor

Employment Litigation

Healthcare

Biography

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

Mark also represents employer group health plans and their administrators in connection with litigation arising under the Employee Retirement Income Security Act (ERISA) and Mental Health Parity and Addition Equity Act.

Accomplishments

Academic

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

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

Professional

Utah Legal Elite, Labor and Employment, 2022

Recognized in *Chambers USA*, Labor & Employment - Utah

Associations

Professional

Member, Society for Human Resource Management (SHRM)

Director of Legal Affairs, Utah State SHRM Council

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

Community

Weber State University Business Advisory Council

Articles

Employment Law Update, June 29, 2022 **June 29, 2022**

Presentations

Common Mistakes and Horror Stories **August 31, 2022**

2022 Legislative and Regulatory Update **August 31, 2022**

Key Employment Laws Every New HR Professional Must Know
August 30, 2022

Everything You Want to Ask Your Lawyer But Are Afraid to Ask
June 16, 2022

The ADA, FMLA and Other Leave Essentials **June 16, 2022**

Emerging Employment Law Issues and Trends for Municipal Employers **June 3, 2022**

Credentials

Licensed

Utah

Idaho

Wyoming

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PARSONS BEHLE & LATIMER

Sean Monson is the chairperson of the firm's Employment, Labor & Immigration Law practice teams. He defends employers against discrimination and wrongful termination claims, represents clients in non-compete cases and advises clients regarding best practices to avoid litigation in the future.

Capabilities

Business & Commercial Litigation

Banking & Financial Services

Employment & Labor

Employment Litigation

Biography

Sean A. Monson focuses his practice in employment counseling and litigation and real estate litigation and transactions. He has represented several large and small Utah businesses in litigation matters involving claims for wrongful termination, discrimination, covenants not to compete, WARN Act disputes, OSHA infractions, and labor disputes. He has represented title companies, businesses and individuals in real property transactions and litigation matters involving boundary, ownership, title insurance and priority of interest lawsuits. He has also represented companies in multimillion dollar real estate purchase and sale transactions as wells as lending, development and leasing agreements. He has appeared before planning commissions and city councils on behalf of real estate developers regarding entitlement and zoning disputes throughout the Wasatch Front. He is the current chair of the Bountiful City planning commission.

Experience

Defended Against Claims of Discrimination

Represented an Israeli company against claims of religious discrimination, disability discrimination and violations of the Fair Labor Standards Act, among other claims.

Sale of Golf Course and Subdivision Ground Lease

Represented client in the sale of a golf course ground lease and surrounding subdivision.

Represented Foreign Bitcoin Mining Company in Recovering Cryptocurrency and Company Assets

Successfully pursued a former employee who misappropriated more than $1 million in stolen cryptocurrency and who misappropriated other company assets. Successfully dismissed multiple counter-claims asserted by the former employee relating to alleged ownership interests in the company and obtained injunctive relief to assist the company in retrieving its stolen cryptocurrency.

Accomplishments

Academic

University of Michigan Law School (J.D., 1995)

Brigham Young University (B.A., summa cum laude, 1992)

Professional

Recognized as member of Utah's Legal Elite by Utah Business magazine for multiple years in both employment and real estate.

Associations

Professional

Chair, Real Estate Section of the Utah State Bar

Member, Executive Committee, Litigation Section of the Utah State Bar

Community

Member of Board of Directors, Davis County Citizens Committee Against Violence

Volunteer, Davis County Attorney's Office Protective Order Project

Articles

Black Lives Matter, My Body My Choice, Make America Great Again: The Thorny Path of Navigating Political Speech at Work
September 6, 2022

Employment Law Update May 2022 **May 19, 2022**

Is COVID-19 a Disability Under the ADA? It Depends.
February 8, 2022

U.S. Court of Appeals for the Sixth Circuit Lifts Stay of Vaccine Mandate; OSHA Extends Compliance Deadline
December 20, 2021

Utah Responds to the Federal Vaccine Mandate: The New State Rule **November 12, 2021**

New Federal Mandates Regarding COVID-19 Vaccination and Testing Are Coming **September 10, 2021**

See the Latest EEOC Guidance For Employee Covid-19 Vaccinations In A "Utah Business Magazine" Article by Labor And Employment Department Chair Sean Monson **July 29, 2021**

EEOC Issues Updated Guidance Regarding COVID-19 Vaccinations and the Workplace **May 28, 2021**

Vaccines: Mandatory or Voluntary for Employees?
February 4, 2021

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

Dealing With "Remote" Teleworking Employees: Best Practices for Teleworking **September 15, 2020**

Treasury Department Clarifies Payroll Tax Deferral Executive Order **September 9, 2020**

A Portion of Payroll Taxes May Be Deferred for the Vast Majority of Workers Beginning Sept. 1, 2020, and Continuing Through Dec. 31, 2020 **August 29, 2020**

Supreme Court Limits Protections for Employees Working for Religious Schools **July 14, 2020**

Salt Lake County Extends Face Covering Order to Aug. 20, 2020 **July 7, 2020**

Salt Lake County and Summit County Require Individuals to Wear Face Coverings **July 1, 2020**

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

Title VII Covers LGBQT Employees **June 30, 2020**

PPP Loan Program Modified – More Time to Spend, Fewer Restrictions on Spending **June 5, 2020**

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

What to Do with Employees at High Risk for Serious COVID 19 Illness: The ADA and Return to Work **May 12, 2020**

Liabilities When Re-Opening: Steps to Minimizing the Risks **April 28, 2020**

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

You've Had a Chance to Catch Your Breath, Now What? Five Things Employers Should be Thinking About Right Now
April 9, 2020

CARES Act PPP Loans Interim Final Rule Released **April 3, 2020**

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

Response Act Poster, Leave Policies and Shelter in Place Notices
March 30, 2020

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

COVID-19 Leave and Sick Pay Statute Enacted **March 19, 2020**

COVID-19, Family Medical Leave Act and Paid Time Off – Employer Questions Answered **March 17, 2020**

EEOC Reverses Course Regarding the Ministerial Exception in Employment Discrimination Cases **February 27, 2020**

The Utah Supreme Court Delivers a Haymaker to the Implied Covenant of Good Faith and Fair Dealing in Employment Cases
December 18, 2019

Federal Government Raises Threshold Salary for Employees to Qualify for Exempt Status **October 3, 2019**

Presentations

Common Mistakes and Horror Stories **August 31, 2022**

Everything You Want to Ask Your Lawyer But Are Afraid to Ask
June 16, 2022

Employment Arbitration Agreements: What Are The Good For?
June 16, 2022

Webinar -- New Vaccination Rule: What Does it Mean for Employers with More Than 100 Employees? A Lot!
November 10, 2021

Hot Employment Topics Session #2 **October 28, 2021**

Hot Employment Topics Session #1 **October 27, 2021**

Hot Employment Topics Session #2 **September 22, 2021**

Hot Employment Topics Session #1 **September 22, 2021**

Hot Employment Topics **August 25, 2021**

The Coronavirus "Response Act" – COVID-19 Relief and Tax Benefit Opportunities in 2021 **January 14, 2021**

Independent Contractor vs. Employee: The Devil's Bargain
November 10, 2020

Trends in Employment Law Cases Related to COVID-19
November 10, 2020

PPP Loans: The CARES Act & Flexibility Act - What we Know to Date About Loan Forgiveness **July 14, 2020**

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

COVID-19: Returning to Work **May 13, 2020**

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

What Every Employer Should Know Before Resuming Business in Utah **May 12, 2020**

Back in Business: Information Every Idaho Employer Should Know **May 11, 2020**

Reopening Utah's Restaurants: What Owners Need to Know **May 7, 2020**

Employer Considerations To Successfully Reopen A Business - May 5, 2020 **May 5, 2020**

Reopening Your Business: Meeting Opportunities and Challenges To Come Back Stronger **April 28, 2020**

Families First Coronavirus Response Act: What It Does and How To Respond **March 23, 2020**

Credentials

Licensed

Utah

1

Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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Why Do Employees Leave?

- Better salary and benefits
- Feel that they are overworked/unsupported/not appreciated
- Ceiling on advancement
- Better work-life balance
- Lack of recognition
- Bored at work – not feeling challenged
- Unhappiness with management
- Concerns about the company's direction or financial health
- Dissatisfaction with the company culture
- The desire to make a change
- More desirable opportunities at other companies

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Why Do Employees Leave?

- Concerns about company's direction or financial health
- Concerns about company culture

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Worker Shortage is Real

- In 2021, according to the U.S. Bureau of Labor Statistics, over 47 million Americans voluntarily quit their jobs — an unprecedented mass exit from the workforce, spurred on by Covid-19, that is now widely being called the Great Resignation
- But, from 2009 to 2019, the average monthly quit rate increased by 0.10 percentage points each year
- In 2020, because of the uncertainty brought on by the Covid-19 pandemic, the resignation rate slowed as workers held on to their jobs in greater numbers. That pause was short-lived. In 2021, as stimulus checks were sent out and some of the uncertainty abated, a record number of workers quit their jobs, creating the so-called Great Resignation. But that number included many workers who might otherwise have quit in 2020 had there been no pandemic.

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Worker Shortage is Real

- In 2021, as stimulus checks were sent out and some of the uncertainty abated, a record number of workers quit their jobs, creating the Great Resignation
- But that number included many workers who might otherwise have quit in 2020 had there been no pandemic
- In short, this is a long-term problem for employers – workforce is retiring and no help seems to be on the way

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How To Hold Onto Workers

- Business suggestions
  - Effective onboarding that teaches new employees not only about the job but also about company culture and how they can contribute to and thrive in it
  - Mentorship programs
  - Competitive salary
  - Perks
  - Wellness benefits
  - Honest and timely feedback
  - Recognition

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How To Hold Onto Workers

- Business suggestions
  - Flexibility and work-life balance
- Legal support of those
  - Telecommuting policies
    - Time recording
    - Confidentiality
    - Safe work environment
  - Diversity, Equity, & Inclusion Policies

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Marijuana in the workplace

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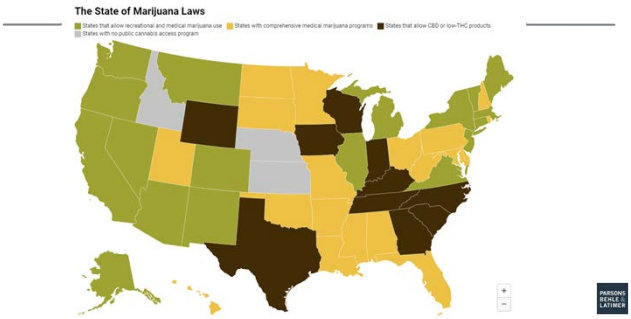
Marijuana law varies wildly state-to-state.



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Variety of approaches to medical cannabis

- All states allow employers to prohibit impairment in the workplace.
- Some states give employers wide discretion on whether to accommodate medical cannabis (e.g., Utah for the private sector).
- Some states prohibit employers from taking adverse action against medical cannabis users, absent evidence of impairment while working (e.g., Arizona).
- Some places (e.g., New York City) don't even allow pre-employment drug screening for cannabis.

Tip: take advantage of your SHRM membership by using its web-based multi-state law comparison tool available at www.shrm.org.

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May we look the other way on marijuana use, including recreational use?

Yes! And many employers do by treating off-duty marijuana use like off-duty alcohol use.

SHRM: "Employers that drug test typically use a five-panel screen that includes amphetamines, cocaine, marijuana, opiates and [PCP]. Some employers, however, have dropped marijuana from the panel."

www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/can-employers-still-test-for-marijuana.aspx

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Diversity and Inclusion

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What are Diversity and Inclusion?

- **Diversity**: Characteristics that distinguish individuals from one another; e.g.:
  - Age
  - Citizenship status
  - Cognitive abilities
  - Cultural differences
  - Education
  - Ethnicity
  - Family
  - Gender
  - Gender expression
  - Geographical location
  - Ideologies
  - Income
  - Language
  - Marital status
  - Morals
  - Neurodiversity
  - Parental status
  - Physical abilities
  - Political beliefs
  - Privilege
  - Race
  - Religious beliefs
  - Skills
  - Social roles
  - Socio-economic status
  - Sexual orientation
  - Upbringing
  - Work experiences

  Bailey Reiners, *What is Diversity?*, BUILTIN (Aug. 28, 2019), https://builtin.com/diversity-inclusion/diversity.
- **Workplace diversity**: the idea that your workplace should reflect the makeup of greater society

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What are Diversity and Inclusion?

- **Inclusion**: "the deliberate effort to create an environment where everyone is respected and empowered to contribute equally and supported with access to the same resources and opportunities, regardless of individual demographics and dissimilitude."

  Bailey Reiners, *How to Build an Inclusive Environment*, BUILTIN (Aug. 23, 2019), https://builtin.com/diversity-inclusion/inclusion.

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Sample Policy -- SHRM

- [Company Name] is committed to fostering, cultivating and preserving a culture of diversity, equity and inclusion.
- Our human capital is the most valuable asset we have. The collective sum of the individual differences, life experiences, knowledge, inventiveness, innovation, self-expression, unique capabilities and talent that our employees invest in their work represents a significant part of not only our culture, but our reputation and company's achievement as well.

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Sample Policy -- SHRM

- We embrace and encourage our employees' differences in age, color, disability, ethnicity, family or marital status, gender identity or expression, language, national origin, physical and mental ability, political affiliation, race, religion, sexual orientation, socio-economic status, veteran status, and other characteristics that make our employees unique.

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Sample Policy -- SHRM

- [Company Name's] diversity initiatives are applicable—but not limited—to our practices and policies on recruitment and selection; compensation and benefits; professional development and training; promotions; transfers; social and recreational programs; layoffs; terminations; and the ongoing development of a work environment built on the premise of gender and diversity equity that encourages and enforces:

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Sample Policy -- SHRM

- Respectful communication and cooperation between all employees.
- Teamwork and employee participation, permitting the representation of all groups and employee perspectives.
- Work/life balance through flexible work schedules to accommodate employees' varying needs.
- Employer and employee contributions to the communities we serve to promote a greater understanding and respect for the diversity.

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Sample Policy -- SHRM

- All employees of [Company Name] have a responsibility to treat others with dignity and respect at all times. All employees are expected to exhibit conduct that reflects inclusion during work, at work functions on or off the work site, and at all other company-sponsored and participative events. All employees are also required to attend and complete annual diversity awareness training to enhance their knowledge to fulfill this responsibility.

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Sample Policy -- SHRM

- Any employee found to have exhibited any inappropriate conduct or behavior against others may be subject to disciplinary action.
- Employees who believe they have been subjected to any kind of discrimination that conflicts with the company's diversity policy and initiatives should seek assistance from a supervisor or an HR representative.

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DEI Policies – Additions?

- Mentoring
- Hiring decisions?
- Promotions?

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DEI – Hiring Practices

- Hiring Practices
  - Minority status and sex can be considered as part of outreach and recruiting efforts, but employment decisions cannot be made based on those circumstances
  - Title VII provides a limited exception to its discrimination laws for bona fide occupational qualifications (BFOQs)
  - The employer must show that its stated preference for a certain characteristic is reasonably necessary for the job

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DEI – Hiring Practices

- Consider whether individuals lacking certain characteristics can perform the job
- **Hiring goals are okay, but quotas and preferential treatment are not allowed**

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DEI – Hiring Practices

- Voluntary Affirmative Action
  - According to the guidelines, a voluntary affirmative action program complies with Title VII if:

    (1) an analysis reveals that existing or contemplated employment practices are likely to cause an actual or potential adverse impact;

    (2) a comparison between the employer's workforce and the appropriate labor pool reveals that it is necessary to correct the effects of previous discriminatory practices; and

    (3) a limited labor pool of qualified minorities and women for employment or promotional opportunities exists due to historical restrictions by employers, labor organizations, or others

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DEI – Hiring Practices

- Federal Contractors with at least 50 or more employees and at least one contract of $50,000 or more are required to have a written affirmative action plan detailing how they will take proactive steps to recruit and advance qualified minorities, women, individuals with disabilities, and protected veterans.

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DEI – Hiring Practices

- How can you ensure diversity without explicitly stating a preference for it?
  - Reach outside of your normal advertising sources and target sources where diverse candidates congregate.
  - Be cognizant of where and to whom you are posting job openings.
  - Advertising the same way and in the same places may exclude certain groups, including advertising primarily by word-of-mouth if your workforce predominantly includes members of a particular class.
  - Beware the wording of your job opening & application.

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DEI – Hiring Practices

- Identify the essential functions of the position & ensure that any requirements that may have a disparate impact (e.g. ability to lift 50 pounds) are actually necessary
- Avoid suggesting non-BFOQ preferences (e.g. using he/she, waiter/waitress)
- Make sure your applications are available in several mediums (i.e. online and in-print), and that all questions reasonably relate to the job
- Consider employee referral programs
- Offer internships or scholarships to target groups

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"Canceling" Employees

- Beware Utah Code Ann. § 34A-5-112:
- (1) "An employee may express the employee's religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer"

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"Canceling" Employees

- Beware Utah Code Ann. § 34A-5-112:
- (2)"an employer may not discharge, demote, terminate, or refuse to hire any person, or retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against any person otherwise qualified, for lawful expression or expressive activity outside of the workplace regarding the person's religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer."

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“Canceling” Employees

- Also beware privacy concerns for disclosing the reason for firing an employee. This can be mitigated if the reason behind the firing has been made public, but it is still a concern.

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NLRB - the new sheriff in town

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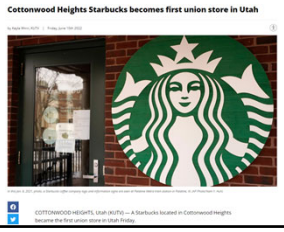
Heightened unionization efforts

- Workers at more than 100 Starbucks locations (and similar stores) have petitioned to unionize (see: https://www.eater.com/22925565/starbucks-union-wave-explained), including stores in Utah, a traditionally union-light state.



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The NLRA Applies Even When Unions Are not Present

- The National Labor Relations Act (NLRA) doesn't just protect the right to unionize—**Section 7** of the NLRA guarantees the right of employees to engage in other protected "**concerted activity**."
- Most private sector employers are covered by the NLRA, even if their employees are not part of a union.
  - Retail employers are covered if they have a gross annual volume of business of $500,000 or more.
  - Non-retailer employers are covered if they do $50,000 in annual interstate business, e.g., by purchasing supplies out-of-state ("outflow") or selling services out-of-state ("inflow").
  - Plus, other special coverage situations explained here: www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards

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What is concerted activity?

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**."

What does it mean to act in concert?

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What is concerted activity?

Concerted activity occurs when two or more employees (but not supervisors) act for their mutual aid or protection regarding the terms and conditions of employment.

A single employee may also engage in concerted activity if they are acting on authority of other employees, bringing group complaints to the employer's attention, or trying to induce group action.

However, employees lose protection by:

- saying or doing something **egregiously offensive or knowingly and maliciously false**, or
- by **publicly disparaging** their employer's products or services **without relating their complaints to a labor controversy.**

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What is concerted activity?

Examples of concerted activity include when an employee(s):

- Talks with one or more co-workers about wages and benefits, unsafe conditions, or other working conditions (as a result, policies prohibiting these discussions also violate Section 7).
- Joins with co-workers to talk directly to their employer about the terms or conditions of employment.
- Joins with co-workers to talk directly to a government agency or to the media about problems in the workplace.

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How does the NLRA limit an employer's reaction to concerted activity?

Employers may **not** discharge, discipline, threaten, or coercively question an employee about concerted activity.

Remedies for wrongful termination claims arising under Section 7 include, but are not limited to, "make whole" relief:

- Backpay
- Reinstatement
- Posting a notice (e.g., in a breakroom) disclosing that the employer committed an unfair labor practice and educating employees about their NLRA rights.

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

Thank You

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10th Annual **Idaho Employment Law Seminar**

Common Mistakes Employers Make

Kelsie A. Kirkham
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PARSONS BEHLE & LATIMER

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PARSONS BEHLE & LATIMER

Kelsie Kirkham is of counsel in Parsons' Litigation, Trials & Appeals practice group. Her sophisticated litigation practice focuses on medical malpractice defense and employment law.

Capabilities

Employment & Labor

Employment Litigation

Insurance Litigation

Business & Commercial Litigation

Biography

Kelsie is a trusted advocate in healthcare law and employment law. Her practice includes defending medical malpractice and licensure board disciplinary matters that involve physicians, hospitals, nurses and other healthcare providers. Kelsie also represents companies in employment law and commercial issues, including litigation and counseling in a variety of areas, such as:

- Employment and termination agreements
- Employee handbooks
- FMLA, ADA, Title VII, and other discrimination laws
- Wrongful termination claims
- Breach of contract claims
- Sexual harassment investigations

Kelsie is experienced in handling all aspects of litigation, and she helps clients obtain favorable outcomes in both state and federal court. Kelsie has tried several cases before juries and judges and also represents clients in administrative proceedings and before executive agencies. She particularly enjoys working collaboratively with her clients to provide strategic, commercial advice in furtherance of her clients' best interests.

Kelsie was an aspiring attorney at age 16, after being sexually assaulted and experiencing the judicial system through the prosecution of that assault. Following law school, she had the privilege of serving as a law clerk for Judge David Gratton in the Idaho Court of Appeals before serving as a deputy prosecuting attorney, where she passionately prosecuted crimes of domestic violence and sexual assault. She continues to volunteer her time helping and supporting local non-profit organizations that address sexual assault and domestic violence.

Kelsie is a board member for the local Society for Human Resource Management (SHRM) and has spoken at several SHRM events. She is also a speaker on sexual assault and domestic violence, primarily in educational settings.

Kelsie is recognized in *Best Lawyers in America* 2021 and 2022 as "One to Watch" and was nominated by members in her community as "Best Lawyer" in the Post Register Readers' Choice 2021.

Accomplishments

Academic

University of Idaho College of Law (J.D., 2014)

- *Idaho Law Review*, Lead Articles Editor
- Student Bar Association, Vice President
- D. Craig Lewis Trial Team, Top Participant Award
- Spirit of the Class Award nomination recipient

Idaho State University (B.S., 2011)

- Political Science Major

Professional

Best Lawyers in America™ "Ones to Watch," Litigation - Employment & Labor 2021 -2023

Idaho Court of Appeals (2014–2015)

Associations

Professional

Idaho State Bar (2014–present)

- Employment and Labor Law Section
- Health Law Section
- Litigation Section

American Bar Association (2019–present)

Idaho Women Lawyers Association (2017–present)

Court Appointed Special Advocates (CASA)

Volunteer Attorney (2017–present)

Community

Society for Human Resource Management (SHRM), Southeast Idaho Chapter

Board Member (2018–present)

Domestic Violence and Sexual Assault Center

Board Member (2019–present)
Liaison (2015–present)

District 91 Education Foundation

Board Member (2018–present)

Articles

Watch Out for Scope Creep in Flexible Work Arrangements
April 12, 2022

Presentations

Physicians and Practices - Fundamentals in Healthcare Law
July 20, 2022

Commercial Insurance - Fundamentals in Healthcare Law
May 18, 2022

Regulation of Hospitals - Fundamentals in Healthcare Law
December 15, 2021

Medical Malpractice in Idaho - Fundamentals in Healthcare Law
October 20, 2021

Social Media in the Workplace **September 22, 2021**

Employment Eligibility Verification Compliance
October 10, 2019

Credentials

Licensed

Idaho

U.S. Dist. Court, Dist. of Idaho

Utah

10th Annual Idaho Employment Law Seminar

PARSONS BEHLE & LATIMER

Common Mistakes Employers Make

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October 5, 2022 | Boise Centre East

A Different LEGAL PERSPECTIVE

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Legal Disclaimer

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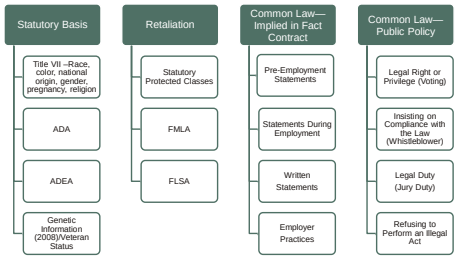
Employment Litigation Framework



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Employee Handbooks

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Employee Handbooks

- Primary purpose: make it clear and explicit that employees are at-will -- information not aspiration
- Describes policies using discretionary language regarding the employer -- "May" or "At its discretion"
- Describes policies using mandatory language regarding the employee -- "Shall" "Will" or "Must"
- Contents: EEO Policies, Sexual Harassment Policies, Drug and Alcohol Testing Policies, FMLA Leave Policy, AT-WILL ACKNOWLEDGMENT
  - Current and consistent application

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At-Will Acknowledgments -- Disclaimers

- Most important part of handbook
- ***MUST BE CLEAR AND CONSPICUOUS***
- Separately sign and collect acknowledgments
- Prevent the creation of implied in fact contracts
- Eliminate previously created implied in fact contracts
- Eliminate expressly created employment contracts

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Contemporaneous Documenting

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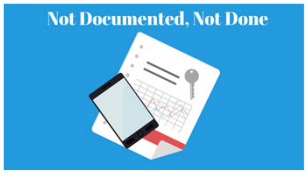
Employee Personnel File



- Personnel file contains: (i) application; (ii) I-9 form; (iii) W-4; (iv) acknowledgments (at-will, handbook and policies receipt); (v) employee performance; (vi) disciplinary actions
- Diligently maintain employee files & document performance issues
- Documentation is key to good human resource risk management—if it is not documented, it did not happen
- CONSISTENCY, CONSISTENCY, CONSISTENCY

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Documenting Employee Performance

- Employee file becomes the key to any employment defense
- Failure to document employee performance issues (or, conversely, inflating performance evaluations) creates risk for employers
- Failing to apply consistent objective criteria creates risk
- Being nice to an employee – by not bringing up performance issues – does not help the employee and creates risk
- Heed the adage “no good deed goes unpunished;” giving employees too many chances can come back to bite you
- Avoid impermissible scope creep

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Documenting Employee Discipline

- Written discipline has 100x the value of an oral reprimand
- Even when oral reprimand is given, it is best to document that oral reprimand was given
- Documentation should include the basis for the discipline
- Upon termination, state the reason for the termination in a termination letter; it does not matter that Idaho is an employment at-will state

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Documenting Employee Discipline

- What if you want to terminate the employee but haven't documented earlier discipline?
  - Create a written summary at time of termination and communicate it to the employee
- Contemporaneous documentation records our legitimate, non-discriminatory intent
- Foresight is the new hindsight – anticipate what documents you would want to have in your defense if the employee filed a complaint

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Internal Investigations

- Respond to <u>all</u> complaints with <u>contemporaneous documenting</u>
- Conduct a prompt, thorough, documented investigation
  - Interviews: complainant, accused, witnesses
    - Who, What, When, Where, Why, How
  - Written statement, signed by complainant
  - Involve trained, competent, investigator (i.e., supervisor; HR department)
- Document decision making process and basis for actions taken
- Disciplinary action goes in the personnel file of accused
- Interviews, notes, statements, and summaries go in separate file

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Scenarios

- An employer prepared a termination memorandum after it received a charge of discrimination, backdating it to the date of termination. Then, years later in litigation, it was asked to produce metadata that would show the document creation date.
- Employee complained about safety issues at the plant. Employer terminated employee for reasons X, Y, Z, unrelated to complaint. Reason X was documented; reasons Y and Z were not. Employee filed a charge with EEOC for retaliation. Employer told EEOC in position statement that employee was terminated for X, Y, and Z.

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Scenarios

- Employee had submitted a reference letter for a promotion. When HR checked the reference, it learned that the reference letter had been forged. Without interviewing the employee, the HR manager immediately terminated the employee for dishonesty.
- Employer investigated a sexual harassment complaint, determined it to be non-meritorious and terminated the complaining party. The documentation of the investigation left the employer vulnerable to accusations regarding the sufficiency of the investigation as well as claims of discrimination.

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Classification Errors

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Employee v. Independent Contractor

- Employers often want to classify their workers as independent contractors as opposed to employees
- By doing so, the employer avoids paying the employer portion of FICA taxes, workers compensation insurance, unemployment insurance, overtime, and minimum wage for the worker
- Misclassifying can lead to payment of back taxes and significant penalties to the employer
- Information that provides evidence of the degree of control and independence must be considered

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Independent Contractor

- IRS generally looks at three factors:
  - Behavioral: Does the paying entity control or have the right to control what the worker does and how the worker does his or her job?
  - Financial: Are the business aspects of the worker's job controlled by the paying entity? (these include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
  - Type of Relationship: Are there written contracts or employee type benefits (i.e., pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the paying entity's business?
- Worker or entity can file Form SS-8 with IRS for determination

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Overtime Exemptions

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Overtime

7 Days in a Week
24 Hours in a Day
168 Hours in a Week

- The Fair Labor Standards provides that every worker who works more than 40 hours a week is entitled to overtime pay (1 ½ times the regular pay rate) for any hour worked over 40 hours in a week.
- An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods.

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Overtime Exemptions

- For an employee to be treated as "exempt," the employer must be able to show the employee meets two criteria:
- 1) Minimum Salary Test
  - The threshold for most of the exemptions is that the employee be paid $684 per week (annual salary of $35,568.00)
  - Nondiscretionary bonuses and incentive payments, including commissions, may be used to satisfy up to 10% percent of the salary requirement.
- 2) The Duties Test
  - Executive, Administrative, and Professional are most common and have detailed criteria

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Overtime Exemptions

- Executive. The employee's primary duty must be managing the enterprise or a department or subdivision of the enterprise. The employee must customarily and regularly direct the work of at least two employees and have the authority to hire or fire workers.
- Administrative. The employee's primary duty must be office or nonmanual work that is directly related to the management or general business operations of the employer or the employer's customers. The employee's primary duty also must include the exercise of discretion and independent judgment with respect to matters of significance.
- Professional. The employee's primary duty must be work requiring advanced knowledge in a field of science or learning that is customarily acquired by prolonged, specialized, intellectual instruction and study.

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Miscellaneous Mistakes

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National Labor Relations Act

- Ensure your policies do not prohibit discussion of wages, benefits, and other terms and conditions of employment
- Do not discipline employees for discussing wages, benefits, and other terms and conditions of employment
- Do not tell employees that they must keep their rate of pay confidential
- Update your handbook on evolving NLRB rulings

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Scenarios

- We have been asked to review and revise many employee handbooks and employment agreements. Often, we see policies and provisions about not discussing wages.
- NLRB charge filed after employee talked to co-workers about the unfairness of a disciplinary notice she received.
- NLRB charge filed after employer terminated an employee for "insubordination" after the employee wrote an email to all members of management, copying all of his coworkers, and argued he and his coworkers deserved more pay and recognition.

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Other Mistakes to Avoid

- Deducting pay without written prior authorization
- Trying to enforce unenforceable non-compete covenants
- Acting without legal counsel when answering an IHRC/EEOC complaint or denying an ADA accommodation or FMLA leave
- Mis-designation of an employee's leave under the FMLA or incorrectly handling intermittent leave

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

Thank You

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10th Annual **Idaho Employment Law Seminar**

Social Media: What's Not to Like About Social Media in the Workplace?

Paul R. Smith
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PARSONS BEHLE & LATIMER

Paul R. Smith

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Paul focuses his practice on helping companies manage two of their most valuable resources: their workforce and their intellectual property (IP). Managing these resources involves two key phases—planning and protecting. Paul assists companies with both.

Capabilities

Employment & Labor

Employment Litigation

Trademark and Trade Dress Litigation

Copyright Litigation

Biography

Planning how to manage a company's workforce and IP can take many forms. From a workforce standpoint, Paul works with companies to ensure they have appropriate terms, conditions, and policies governing their employees. This often takes the form of reviewing, drafting, and revising employee handbooks and employment agreements, including non-solicitation and non-compete agreements. Paul also frequently provides trainings for HR managers, supervisors—and employees at every level—on various topics, including harassment, workplace civility, and conflicts of interest.

To assist companies in managing their IP—for example, proprietary concepts and ideas, confidential information, and brand recognition—Paul performs IP portfolio audits, first investigating the protective strategies the companies are currently employing and then recommending alternative or additional measures to be implemented. Paul has years of experience in obtaining federal registrations for trademarks and copyrights, and developing strategies to protect trade secrets.

While planning is a crucial step in managing workforce and IP, it's not enough by itself—companies must also protect themselves. In the employment arena, Paul regularly defends companies against discrimination, retaliation, and wrongful termination claims brought under the ADA, FMLA, ADEA, USERRA, Title VII, and state law. Sometimes this means simply responding to demand letters; other times it's participating in administrative investigations brought by the EEOC and its state counterparts; often it's defending against claims brought in state or federal court. Paul has experience at every stage of defense. But sometimes the best defense is a good offense. When former employees violate their non-solicitation or non-compete obligations, Paul can assist companies in enforcing those obligations—from drafting cease and desist letters to filing and prosecuting lawsuits.

The need for protective action also arises in the IP context. Paul regularly litigates trademark, trade-dress, patent, and copyright infringement cases and trade secret misappropriation cases in state and federal court. Sometimes companies find themselves enforcing their IP rights in an offensive position —as the plaintiff in a lawsuit—other times they have to enforce their rights from a defensive posture. Paul is experienced in representing IP plaintiffs and defendants.

Paul's experience includes representing companies in other litigation contexts, ranging from general commercial and contractual disputes, to enforcing creditors' rights in the bankruptcy context. Paul acts as legal counsel to the Special Master of two general adjudications of water rights in the State of Utah. While Paul has years of experience litigating at the trial-court level in state and federal court, he also has considerable experience at the appellate level, briefing and arguing cases before the Tenth Circuit Court of Appeals, the Utah Court of Appeals, and the Utah Supreme Court.

Accomplishments

Academic

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

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

Professional

Business Editor, Arizona State Law Journal

Utah Legal Elite, Civil Litigation, 2022

Associations

Professional

Utah State Bar

Federal Bar Association

American Bar Association

Society for Human Resource Management (SHRM)

Board Member, Jefferson Academy

Articles

Employment Law Update, August 16, 2022 **August 16, 2022**

Presentations

Key Employment Laws Every New HR Professional Must Know
August 30, 2022

Social Media: What's Not to Like About Social Media in the Workplace? **June 16, 2022**

Credentials

Licensed

Utah

10th Annual Idaho Employment Law Seminar

PARSONS BEHLE & LATIMER

Social Media: What's Not to Like About Social Media in the Workplace?

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October 5, 2022 | Boise Centre East

A Different LEGAL PERSPECTIVE

parsonsbehle.com

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Legal Disclaimer

This presentation is based on available information as of Oct. 5, 2022, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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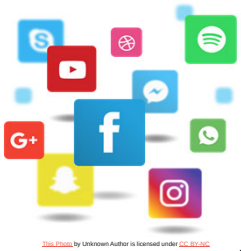
There's a lot to Like About Social Media in the Workplace

- New avenue to market and promote your business
- Effective recruiting tool
- Opportunities for interaction and networking

- **But there's a lot not to like too…**



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Social Media Landmines

Employees create some social media landmines…

- Drain on productivity
- Avenue for harassment and discrimination
- Risk of disclosure of confidential information
- Platform for disparagement

Employers do too…

- Inappropriate screening tool
- Discipline for online disparagement
- Theater for sock puppetry

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Agenda

Today we'll discuss the two main ways employers tend to use social media…

And also two classic movies…

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How do employers use social media?

1. To find hidden treasures about job applicants and employees

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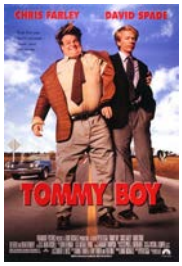
How do employers use social media?

2. To get people to buy what they're selling



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Part 1—Goonies: with treasure comes booby traps

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How do employers use social media?

When it comes to applicants and employees, employers tend to use social media in two ways:

- A tool for **screening** job applicants
- A tool for **monitoring** employee conduct

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Social Media as a Screening Tool

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Social Media as a Screening Tool

- It's tempting because there are so many hidden treasures online:
  - Evidence of good/bad judgment
  - Details about experience/education
- And it's common practice.
  - 70% of employers use social media to screen candidates
  - 43% of employers use social media to check on current employees

(2018 CareerBuilder survey)

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Social Media as a Screening Tool

But maybe it shouldn't be such a common practice….

…because there are so many booby traps!

- How you enter
- What you find
- How you use it

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How you access an applicant's social media may violate federal and state law

- Under federal and state laws, it's illegal to access electronic communications—if the communication is accessed intentionally without authorization.
  - Criminal penalties (including felonies) and civil liability (including attorney's fees) at stake.
- **So, if it's private and you don't have permission….don't go in!**
  - And no—sending a friend request from a fake social-media account isn't a viable workaround.

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How you access an applicant's social media may violate federal and state law

- It's dangerous to even ask permission…
- Several states prohibit employers from asking employees/applicants to disclose usernames or passwords to internet accounts
- They also prohibit retaliation…
  - Employers can't take any adverse action against an employee or applicant who refuses an employer's request for access to his or her "personal internet accounts."
- **So, if it's private…don't even ask to go in!**

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Social-media screening can land you in court

Ehling v. Monmouth Ocean Hosp. Serv. Corp. (D.N.J. May 30, 2012).

- Plaintiff nurse posted critical comments on Facebook about medics who treated a white supremacist after a shooting at the National Holocaust Museum…
  - She urged security guards at the museum to "go to target practice."
- Plaintiff alleged her employer forced a coworker (Plaintiff's Facebook friend) to allow management to view and copy her Facebook posts.
- The employer notified the NJ licensing authorities about Plaintiff's Facebook activity—expressed concern about her disregard for public safety.
- Plaintiff sued her employer for "invasion of privacy" and the federal court permitted the claim to go forward
- The court: "Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. "

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Beware entering the cave of social media…

- Again, if it's private…
  - Don't go in—could violate Stored Communication Act
  - If it's private, don't even ask to go in—could violate state laws
- But even if it's public…be careful what treasures you grab…

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Social-media screening can cause GINA problems

- The Federal Genetic Information Nondisclosure Act (GINA) prohibits employers from acquiring genetic information.
- People post genetic information on social media all the time.
  - E.g., an applicant/employee may discuss a family history of cancer or other illness.
- So if you find yourself searching through an applicant's public social media account…don't even touch information covered by GINA

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Social-media screening can cause EEO headaches

- When you are defending against a discrimination charge, ignorance is bliss
- Social media sites may reveal protected characteristics: race, religion, color, national origin, pregnancy, sexual orientation, gender identity, disability, age, military status, etc.

"I had a great job interview today! Maybe I can finally get insurance benefits to care for my illness."

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Consider this recent case:

- A job applicant was denied employment and filed an age discrimination charge.
- The applicant's age was identified on his LinkedIn profile. And he could see that an employee of this prospective employer had viewed his LinkedIn profile.
- The age discrimination case was dismissed because the employer had legitimate, nondiscriminatory reasons for its hiring decisions.
- But the charge may never have been filed if no one accessed the applicant's social media profile.

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Social Media Screening Policy Options

- **Option 1:** Just don't do it
  - Employers survived (and hired well) for years without relying on social media to screen applicants and keep up on employees. You can too.

But if you just can't resist…

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Social Media Screening Policy Options

Option 2: Develop and implement a well thought out policy

- **Who:** Someone other than the person making the hiring decision
- **When:** Later in the process; maybe coupled with background checks
- **What Sources:** Don't just look at Facebook, YouTube, Instagram, and Twitter…they have lower participation rates among Latinos and African Americans
- **What Information:** Create a list of questions—only info that's **job-related**—e.g., education, work history (etc.) important to the position
- **Which Positions:** Public-facing only? Management only? Everyone?
- **BE CONSISTENT! RETAIN DOCUMENTATION!**

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What about your employees' social media?

- What if you're looking at your *employees'* social media?
  - Is that okay?
- The same rules apply as to applicants: don't access private accounts and be careful what information you gather.
- But there are even more booby traps related to your employees' online behavior….

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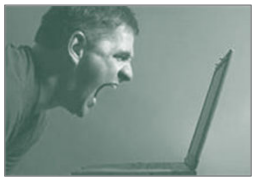

Limiting Disruptive Behavior

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Limiting Disruptive Behavior

uly 13, 2010

Rogeet and 4 others like this.

Jesica drugs are bad ryan.
July 16, 2010 at 7:05am

Gabriel i agree
August 12, 2010 at 8:57pm

Andy A direct occupational healthy and safet violation....give me a good reason not to fire you first thing Monday morning....
August 13, 2010 at 7:29pm · 1 person

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Limiting Disruptive Behavior

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Limiting Disruptive Behavior

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Limiting Disruptive Behavior

- So…what do you do if the "treasure" you stumble across is your employee doing something you don't like?
- Are there any booby traps you should worry about?

Uh…yeah…

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Limiting Disruptive Behavior

What are the governing principles?

It depends…

- Are you a public employer or a private employer?
- Is there a collective bargaining agreement (CBA) in play?

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Limiting Disruptive Behavior

Let's start with private employers….

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Limiting Disruptive Behavior

What can an employer do when employees speak ill of the workplace, the company, their coworkers or managers?

- ***It depends*** . . .
  - Is the employee engaged in behavior that is protected by the National Labor Relations Act (NLRA)?
- *Note: this protection is generally not available to managers (or public-sector employees)*

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Limiting Disruptive Behavior

The National Labor Relations Board (NLRB) has provided guidance for when an employee's social media behavior is protected by the NLRA and when an employer's social media policies run afoul of the NLRA.

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National Labor Relations Board

What is the NLRB?

- An independent federal agency like the EEOC
- Members are political appointees and tend to reflect the party ideology of the President who appoints them

What does it do?

- For our purposes, it mainly enforces the NLRA

NLRB: "The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, even if they aren't in a union."

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Section 7 of the NLRA

"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**…**mutual aid or protection**…." - Sec. 7, NLRA

Key phrase = concerted activities

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Section 7 of the NLRA

So what must be shown to establish a Section 7 violation?

1. The employee **engaged** in concerted activity
2. The employer **knew** of the concerted activity
3. Causal **connection** between the two

Note: **No** mention of **unions** here….

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Concerted Activity

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

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Concerted Activity

Does the action seek to benefit other employees (i.e., improving wages or working conditions)?

- 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)

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Losing Section 7 Protection

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

Statements or conduct that are…

- Egregiously offensive,
- Knowingly and maliciously false, or
- Disparaging about an employer's products or services that don't relate to any labor controversy

Can lose their Section 7 protection.

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NLRB: Concerted activity on social media is protected—even though its open to the whole world

Case Study:

- Jane tells another employee, Sarah, that her performance is lacking and that they should take the issue up with their supervisor. Before the supervisor meeting, Sarah takes to Facebook to complain about Jane and to ask her co-workers for input. Four co-workers weigh in. Several posts are sarcastic and even profane.
- Employer terminates Sarah and the four other employees who participated in the Facebook exchange.
- Did the employer violate Section 7?

Yes. NLRB called this a textbook example of concerted activity. Sarcasm and swearing was not malicious.

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Case Study:

- Gwen takes to Facebook to complain about her supervisor – she calls him a "scumbag." Gwen does not seek input from her co-workers, but she gets it – her post drew several supportive responses from co-workers, which led to more negative remarks by the employee about her supervisor. Employer terminated Gwen's employment because she disparaged her supervisor.
- Did the employer violate Section 7?

Yes. The NLRB concluded that the name-calling was not malicious and unaccompanied by any physical threats.

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Case Study:

- Joe, a bartender, posted a few disparaging remarks about the bar (his employer) on his Facebook page—he said that he had not received a raise in five years and that the bar's customers were "rednecks." None of his co-workers respond. The employer terminates his employment.
- Did this employer violate Section 7?

No. The NLRB concluded that this employee was merely griping about work and did not attempt to engage any coworkers in a conversation about the terms and conditions of work.

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What about EEO obligations?

But what if the "concerted activity" takes the form of harassing conduct?

EEOC: "It is critical that employers are able to take **corrective action** as soon as they have notice of **harassing conduct**—even if the harassing conduct has not yet risen to the level of a hostile work environment…This is because if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the **employer may face liability**. The primary objective of Title VII is not to **provide redress** but to **avoid harm**."

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Conflicting Obligations

VS

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Squaring conflicting obligations

2020 Ruling from the NLRB: "Absent evidence of discrimination against Section 7 activity, we fail to see the merit of finding violations of federal labor law against employers that act in good faith to maintain **civil**, **inclusive**, and **healthy workplaces** for their employees.…We read nothing in the [NLRA] as intending any protection for **abusive conduct** from **nondiscriminatory discipline**, and accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.

Here's the test: Would the employer have taken the same action even in the absence of the Section 7 activity?

But if you can avoid even getting to this question…do it!

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Limiting Disruptive Activity Without Impinging on Concerted Activity

- Now back to our question: **What can an employer do when employees speak ill of the workplace, the company, their coworkers or managers?**
- **NLRB Takeaways**:
- 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—you should tread lightly.

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Managing social-media misbehavior without impinging on concerted activity

- NLRB tells us the key to regulating social media conduct:

Context

- **Here are some guidelines:**
  - **Do** make it clear that communications with coworkers about their working conditions is **allowed**.
  - **Don't** punish employees for engaging in concerted activity
    - **But do** refer your employees to your conduct-based policies—e.g., your anti-harassment policy.

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A few more policy suggestions…

- **Don't** require employees to identify themselves by their **real name** when discussing the company on social media (imposes significant burden on Section 7 rights).
  - **But do** require employees who choose to speak on social media about the company to make it clear that: (1) they are affiliated with the company, but (2) they don't speak on behalf of the company—more on this in a minute…
- **Don't** restrict employees from disclosing "employee information" on social media, such as contact information—as opposed to personal and medical information.
- **Don't** have sweeping bans on social media conduct.
  - NLRB: the mere existence of an overly broad policy exposes the employer to an unfair labor practice charge—even if no disciplinary action is taken against an employee.

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Limiting Disruptive Behavior

What about public employers?

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Limiting Disruptive Behavior —Public Employers Edition

- Public-sector employees are excluded from NLRA coverage
- Does that mean public employers can limit their employees' online behavior with impunity?

Nope!

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Limiting Disruptive Behavior—Public Employers Edition

Public-sector employers don't have to worry about the NLRA

But they **do** have to worry about something a bit bigger…

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Be aware of public-sector employees' First Amendment rights

Public-sector employees can assert First Amendment retaliation claims.

- Must show that
  - The speech is protected
  - An adverse employment action is taken
  - Causation between the two
- Most of the action surrounds the first element—is the speech protected.

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Be aware of public-sector employees' First Amendment rights

Is the speech protected?

- Was the employee speaking as a **private citizen** or as an **employee**?
- Does the speech pertain to matter of **public concern** (e.g., social, political, or community matter)
- Does the interest in speaking **outweigh** the government employer's interest in efficiently fulfilling its public services?

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Be aware of CBA provisions

Regardless of whether you're a public employer or private employer…

- See whether a CBA is in place
- Familiarize yourself with its provisions before you take any action

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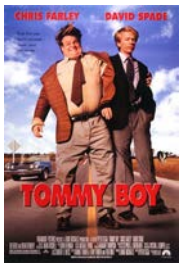
How do companies use social media?

To get people to buy what they're selling



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Part 2—Tommy Boy: Control Your Messaging

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Telling people what you're offering

- Social media is a great way to reach a lot of people and tell them about how great your company is.
- But it's also an easy way to get into trouble…
  - Don't lose **control** of your social-media accounts
  - Don't get in **trouble** with the Federal Trade Commission (FTC) by pretending to be something you're not

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Don't lose control of your social-media accounts

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Control your social-media accounts

When it comes to your company's social-media accounts, there are three key things to think about:

- Access
- Control
- Ownership

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Who has access to your social-media accounts

Who is going to have access to the back-end of your company's social-media accounts?

- HINT: It shouldn't be everyone!
- Be careful who you trust

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Control what gets posted on your accounts

Document the rules for posting to the social media accounts:

- Establish what **can** and **can't** be posted about
- Protect **confidential** information
- Prohibit violation of **EEO** laws
- Consider establishing an **internal review process** to ensure posts are consistent with the company's branding

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Establish ownership

Some suggestions regarding ownership and control….

- Document that the **company** owns the social media accounts.
- Document what happens to the account when the employee **leaves** the company.
  - You don't want an employee leaving the company and trying to take followers, logins, or passwords with them
  - It can lead to a bit of a hostage situation…

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Employee Imposters

Don't let your employees pretend to be something they're not while posting on social media

In other words…

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No Sock Puppets at Work!

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What is an online "sock puppet"?

- Online sock puppetry: Creating a fake online identity to praise, defend, or create the illusion of support for oneself or company.
  - For example: An employee poses as independent/unaffiliated third party and leaves positive reviews or comments online about his/her employer.
- Sock puppetry can land you in hot water with the Federal Trade Commission (FTC) and lead to hefty fines.

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An example…

Legacy Learning Systems – sold DVD guitar lessons online

- Affiliate marketers falsely posed as ordinary consumers and/or independent reviewers who endorsed Legacy's products on blogs or articles, with links to Legacy's website. These marketers were paid for every sale they generated. But of course, they made no mention of this bias in their reviews and endorsements.
- Legacy had to pay a $250,000 fine to the FTC.

  http://www.ftc.gov/opa/2011/03/legacy.shtm

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A much more embarrassing example…

John Mackey, CEO of Whole Foods as "Rahodeb"

- As "Rahodeb," he posted more than 1,000 comments on a Yahoo Finance message board over seven years, championing his own company and attacking his competitor, Wild Oats Market. Once, he even wrote: "I like Mackey's haircut. I think he looks cute!"
- Whole Foods later acquired Wild Oats and many, including the FTC, thought Mackey's sock puppetry crossed the line.

  http://www.nytimes.com/2007/07/12/business/12foods.html?_r=0
- For this and other reasons, the FTC filed a lawsuit against Whole Foods to block its acquisition of Wild Oats. After a costly battle, much of the acquisition was unwound.

  http://www.ftc.gov/opa/2009/03/wholefoods.shtm

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A much more embarrassing example…

- This example should make you say….

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FTC Targets Sock Puppets in its Guidelines

"Material connections" must be disclosed to the consumer in online advertising. For example:

- Affiliate bloggers who receive pay for an endorsement.
- Employees who make statements about products on social media.

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Managing to prevent sock puppets

- Employees **should**…
  - Be open about their affiliation with the company
- Employees **should not**…
  - Represent themselves as a **spokesperson** for the company—unless they really are the spokesperson.

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Managing to prevent sock puppets

- Employees **should**…
  - Be clear that their views do not represent those of the company—unless they really are the authorized, pre-approved views of the company.
- Consider requiring a disclaimer like this one for a blog or social-media post:

"The postings on this site are my own and do not necessarily reflect the views of my employer."

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Wrap-up: Looking for Social-Media Treasure

- **For applicants' social-media info…**
  - Don't peak into private accounts
  - Don't touch forbidden information—e.g., GINA
  - Don't use EEO-type information
- **For employees' social-media info…**
  - Don't take adverse action against private-sector concerted activity
  - Don't infringe on public-employee First Amendment rights
  - Pay attention to CBAs

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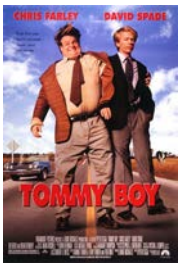
Wrap-up: Sharing Your Message



- Be careful who you **trust** with the company's social-media accounts and set up clear guidelines for **control** and **ownership**
- Avoid **socket puppets** by requiring clear identification about employee affiliation

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

Thank You

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For more information, contact:

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