33rd Annual Parsons Behle & Latimer

Employment Law Seminar

FOR CORPORATE COUNSEL, BUSINESS OWNERS & HUMAN RESOURCE PROFESSIONALS

OCTOBER 27 – 28, 2021 | 8 A.M. – NOON

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

NATIONAL EXPERTISE. REGIONAL LAW FIRM. parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY

PARSONS BEHLE & LATIMER

Table of Contents

PARSONS BEHLE & LATIMER

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

ADA Issues Arising from the COVID-19 Pandemic

J. Kevin West
208.562.4908 | kwest@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

J. KEVIN WEST

Healthcare Chair
Shareholder

800 West Main Street, Suite 1300
Boise, Idaho 83702
Main 208.562.4900
Direct 208.562.4908
kwest@parsonsbehle.com

BIOGRAPHY

Kevin West is a senior healthcare attorney with extensive experience representing healthcare providers. He has been a trusted advocate for providers in over 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.

Mr. West graduated with honors from Brigham Young University in 1981 with a B.A. in English. He graduated from the BYU Law School with honors in 1984. During law school, Mr. West served as editor in chief of the *BYU Journal of Legal Studies*. In addition, he was the author of "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. After completing this two-year clerkship with the federal trial bench, Mr. West began practicing law in 1986.

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.

PRACTICE AREAS

Healthcare
Employment Litigation
Employment & Labor
Business & Commercial Litigation
Insurance Litigation

LICENSED/ADMITTED

Idaho
Utah
Washington
U.S. Dist. Court, Eastern Dist. of Washington
U.S. Dist. Court, Western Dist. of Washington
U.S. Dist. Court, Central Dist. of Illinois
Utah Supreme Court
Idaho Supreme Court
Washington Supreme Court

ACCOMPLISHMENTS

Academic

Brigham Young University, J. Reuben Clark Law School

Graduated *cum laude*

Professional

Best Lawyers in America, 2010 - 2022 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 - 2021

Martindale-Hubbell, AV® Preeminent™ rated

Chambers USA, Labor & Employment Law, 2012 - 2021

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)

LICENSED/ADMITTED (cont.)

U.S. Court of Appeals, 9th Circuit

U.S. Supreme Court

PRESENTATIONS

"ADA Issues Arising from the COVID-19 Pandemic," 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 27, 2021)

"ADA Issues Arising from the COVID-19 Pandemic," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

Co-presenter: "Patient Care," Fundamentals in Healthcare Law Webinar Series (September 15, 2021)

"Mental Health Accommodations: A Growing ADA Problem," 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

"Medicare Secondary Payer Update," Parsons Behle & Latimer Webinar (May 27, 2020)

"Strings Attached: What Doctors Need to Know About the CARES Act Provider Relief Fund Payments," Parsons Behle & Latimer Webinar (May 13, 2020)

"Current ADA Developments," 7th Annual Parsons Behle & Latimer Idaho Employment Law Seminar (October 10, 2019)

"Current ADA Developments," 31st Annual Parsons Behle & Latimer Employment Law Seminar (May 22, 2019)

PUBLICATIONS

"The Reprieve for Healthcare Providers is Over: CMS to Resume Medicare Audits," Parsons Behle & Latimer Healthcare Update (July 22, 2020)

"Relief Fund Payments to Healthcare Providers Under the CARES Act," Parsons Behle & Latimer Response Resources (April 23, 2020)

"The Dual Dimensions of HIPAA – What Employers Need to Know," Parsons Behle & Latimer Legal Briefings (January 29, 2020)

"Court Orders HHS to Eliminate the Huge Backlog of Appeals," Parsons Behle & Latimer Healthcare Update (November 20, 2018)

"APMA HIPAA Privacy Manual and APMA HIPAA Security Manual," *American Podiatric Medical Association*

REPRESENTATIVE MATTERS

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.

Expert regarding the Medicare Secondary Payer Act (MSPA)

National consultant and advisor to insurance companies regarding their compliance with the Medicare Secondary Payer Act; author of articles and national speaker on the Medicare Secondary Payer Act.

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

ADA Issues Arising from the COVID-19 Pandemic

J. Kevin West
208.562.4908 | kwest@parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY parsonsbehle.com

1

ADA OVERVIEW

PARSONS BEHLE & LATIMER

2

ADA OVERVIEW

- "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

3

3

ADA OVERVIEW

- Imposes duty on employers to provide reasonable accommodations when requested by disabled employees unless the employer can show a reasonable accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5).
- Imposes duty to segregate and safeguard confidential health information that arises from medical inquiries or examinations. 42 U.S.C. § 12112(d).

4

4

ADA OVERVIEW—Reasonable Accommodations

- "The term 'reasonable accommodation' may include—
  - (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
  - (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9).
- "The term 'undue hardship' means an action requiring significant difficulty or expense . . . ." 42 U.S.C. § 12111(10)(A).

5

5

ADA OVERVIEW—Reasonable Accommodations

- Interactive Process
  - ADA does not require precise accommodation; it requires a reasonable accommodation.
  - Employers have an obligation upon learning of an employee's disability to engage in a meaningful dialogue with the employee to find the best means of accommodation.

6

6

ADA OVERVIEW—Safeguarding Health Information

- The prohibition against discrimination applies equally to medical examinations and inquiries. 42 U.S.C. § 12112(d)(1).
  - "A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A).

7

7

ADA OVERVIEW—Safeguarding Health Information

- According to the United States Equal Employment Opportunity Commission ("EEOC"):
  - An inquiry is "disability-related" if it is likely to elicit information about a disability.
  - A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.
- All health information obtained through disability-related inquiries or medical examinations must be kept confidential.

8

8

ADA OVERVIEW—Safeguarding Health Information

- Hiring and Onboarding
  - Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical examinations are generally prohibited.
  - Disability-related inquiries and medical examinations are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same category.
  - During employment, disability inquiries and medical examinations are prohibited unless job related.

9

9

The ADA and the COVID-19 Pandemic

10

The ADA and the COVID-19 Pandemic

- The ADA may impact employers during the COVID-19 pandemic in three major ways:
  1. Employers may not exclude individuals with disabilities from the workplace for health or safety reasons unless they pose a 'direct threat' (i.e., a significant risk of substantial harm even with reasonable accommodation).
  2. Employers must limit disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.
  3. Employers must make reasonable accommodations for individuals with disabilities (absent an undue hardship).

11

11

The ADA and the Pandemic—"Direct Threat"

- Factors to consider in determining whether an employee poses a direct threat in the workplace:
  - The duration of the risk;
  - The nature and severity of the potential harm;
  - The likelihood that potential harm will occur; and
  - The imminence of the potential harm.
- The CDC determined in March 2020 that COVID-19 meets the direct threat standard.

12

12

The ADA and the Pandemic—Inquiries

- Because an individual with COVID-19 poses a "direct threat" to the health of others, employers may make certain inquiries to determine if employees *entering the workplace* have COVID-19.
  - Permissible inquiries:
    - whether employees are experiencing symptoms of COVID-19;
    - whether employees have been in contact with anyone diagnosed with COVID-19; but not whether family members have been diagnosed with COVID-19;
    - whether employees have traveled to certain areas known to be associated with higher transmission rates or variants;
    - why an employee was absent from work.

13

13

The ADA and the Pandemic—"Medical Examinations"

- Because an individual with COVID-19 poses a "direct threat" to the health of others, employers may require certain screening examinations to determine if employees *entering the workplace* have COVID-19.
  - Permissible examinations:
    - employee temperature checks;
    - mandatory COVID-19 testing; but not antibody testing;

14

14

The ADA and the Pandemic—Hiring and Onboarding

- The standards applicable before COVID remain the same.
  - After an employer makes a conditional offer of employment, so long as employer does so for all entering employees, an employer may:
    - screen applicants for COVID symptoms;
    - conduct medical examinations like temperature checks;
  - An employer may delay the start date of an applicant who had COVID-19 symptoms; and
  - An employer may withdraw a job offer if the applicant must start immediately but the applicant has COVID-19 or symptoms of COVID-19.

15

15

The ADA and the Pandemic—Protective Measures

- Requiring hand washing and other hygienic etiquette does not implicate ADA.
- Employers may require employees to wear personal protective equipment ("PPE") including face masks, gloves, or gowns.
  - Accommodations, absent undue hardship, should be made for a disabled employee who cannot wear PPE.

16

16

The ADA and the Pandemic—Protective Measures

- Vaccines
  - Employers may ask if an employee received the COVID-19 vaccine.
    - If an employee did not receive the COVID-19 vaccine, the employer cannot ask why because follow-up inquiry is likely to illicit information of a disability.
  - Employers may distribute information on COVID-19 vaccine and offer incentives to employees who elect to receive COVID-19 vaccine.
  - Information about an employee's COVID-19 vaccination status is confidential.
  - Employers may mandate vaccines; however, exceptions must be made for those who cannot receive the vaccine because of a disability or sincerely held religious belief.

17

17

The ADA and the Pandemic—Protective Measures

- Employers considering mandating vaccinations should take the following steps:
  - Conduct a risk assessment;
  - Determine parameters of vaccination policy;
  - Create a communication strategy;
  - Plan verification process for vaccination status; and
  - Prepare a process for exemption requests.

18

18

The ADA and the Pandemic—Reasonable Accommodations

- Recognize when ADA is triggered:
  - when a request for work-related adjustment is for an employee's own medical condition;
  - associated limitations (example: squatting may be an associated limitation if someone suffers from amputation, arthritis, or other leg impairments);
  - COVID-19 linked circumstance (example: record of medical impairment that puts employee at high risk for developing serious illness from COVID-19, if infected).
- Mere exposure to COVID-19 or fear of contracting COVID-19 does not constitute an impairment implicating an employer's duty to accommodate.
- During a pandemic, whether an employee has a disability should be judged by the totality of the circumstances, including the heightened risk of an impairment caused by COVID-19.

19

19

The ADA and the Pandemic—Reasonable Accommodations

- US Department of Health and Human Services and the US Department of Justice recently issued guidance on "long COVID."
  - Long COVID can be a disability under ADA.
    - Long COVID is a physical or mental impairment.
    - Long COVID can substantially limit one or more major life activities.
  - An employee with long COVID is entitled to the same protections under the ADA as other known disabilities.
  - Employers should engage in individualized assessment.

20

20

The ADA and the Pandemic—Reasonable Accommodations

- Engaging in the interactive process: *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020).
  - Employee who suffered from moderate asthma requested telework but was denied because the employer "expect[ed] all managers to work from the office."
  - The court focused on the employer's lack of engagement in the interactive process.
  - Because the employer failed to engage in the interactive process with employee, the court held employee was likely to succeed on the merits of employee's failure to accommodate claim and granted injunctive relief for employee.

21

21

The ADA and the Pandemic—Reasonable Accommodations

- Employers may ask the following questions when engaging in the interactive process:
  - how the disability creates a limitation;
  - how the requested accommodation will effectively address the limitation;
  - whether another form of accommodation could affectively address the issue; and
  - how a proposed accommodation will enable the employee to continue performing fundamental job functions.
- The interactive process may be expedited or foregone altogether during a pandemic to provide accommodations to employees who are at greater risk due to a pre-existing disability or an employee whose disability is exacerbated by the pandemic.

22

22

The ADA and the Pandemic—Reasonable Accommodations

- Certain circumstances that would not pose an undue hardship to an employer prior to the pandemic may now be considered an undue hardship.
  - Accommodation might be significantly more difficult because it is more difficult to acquire certain items and deliver such items during pandemic.
  - Accommodation might be significantly more expensive due to loss of an employer's income stream.

23

23

The ADA and the Pandemic—"Associational Discrimination"

- Associational discrimination is a type of employment discrimination that is prohibited by the ADA—"excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).
- An employee must provide facts of the following for a claim of associational discrimination under the ADA:
  - Employee qualified for job at time of adverse employment action;
  - Employee was subjected to adverse employment action;
  - Employee was known at that time to have a relative or associate with a disability; and
  - The adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.

24

24

The ADA and the Pandemic—"Associational Discrimination"

- Associational discrimination: *Ham v. ICL Bronx House Institute for Community Living*, 1:21-CV-3910 (LTS), 2021 WL 2651945 (S.D.N.Y. June 28, 2021).
  - Employee was primary caretaker of elderly grandfather.
  - Employee was terminated from work after being denied telework accommodation out of concern she might infect her elderly grandfather.
  - Employee's complaint failed to allege facts showing employee's grandfather was disabled within the meaning of the ADA, that her employer was aware of that fact, or that the employee's termination was because of that fact.
  - Although employee's complaint was dismissed as alleged, court granted employee leave to amend complaint suggesting associational discrimination claims can survive based on disability or susceptibility to COVID-19 of those an employee is associated with.

25

25

The ADA and the Pandemic—Returning to the Workplace

- Employers should make information available in advance to all employees about who to contact—if they elect to—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return.
- Employers may begin discussing requests for reasonable accommodations that will be needed once employees return to the workplace and may acquire all information to decide although priority should be given to requests for reasonable accommodations needed while teleworking.

26

26

The ADA and the Pandemic

- Sources to address employer questions related to COVID-19 and the workplace:
  - Center for Disease Control—CDC.gov/coronavirus
  - Equal Employment Opportunity Commission—EEOC.gov/coronavirus
  - Job Accommodation Network—https://askjan.org/topics/COVID-19.cfm

27

27

ADA/COVID Q&A

28

QUESTION—Disability-Related Inquiries

1. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19?

29

29

ANSWER

Yes. Employers may ask all employees who will be physically entering the workplace if they COVID-19 or symptoms associated with COVID-19.

30

30

QUESTION—Disability-Related Inquiries

2. May an employer ask only one employee questions designed to determine if the employee has COVID-19 or symptoms of COVID-19?

31

31

ANSWER

No. But an employer may seek information from a single employee if the employer has a reasonable belief based on objective evidence that the employee has COVID-19.

32

32

QUESTION—Disability-Related Inquiries

3. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19?

33

33

ANSWER

- **No.** An employer may not ask if a *family member* has COVID-19 of symptoms of COVID-19.
- An employer may ask whether an employee has been in contact with anyone diagnosed with COVID-19, anyone who had symptoms of COVID-19, or if the employee has been to any COVID-19 hotspots.

34

34

QUESTION—Medical Examinations

4. May an employer require an employee not physically present in the workplace to take a COVID-19 test?

35

35

ANSWER

No. An employer may require employees physically entering the workplace to take a COVID-19 test.

36

36

QUESTION—Reasonable Accommodations

5. If an employee has COVID-19 then fully recovers, does employee have a disability under the ADA.

37

37

ANSWER

No.

38

38

QUESTION—Reasonable Accommodations

6. If an employee has COVID-19 then recovers but with some persistent symptoms, does employee have a disability?

39

39

ANSWER

Maybe. The existence of a disability will depend on satisfying traditional standards.

40

40

QUESTION—Reasonable Accommodations

7. Absent undue hardship, how would you accommodate an employee who, due to a preexisting disability, is at a higher risk from COVID-19 if the employee's job can only be performed in the workplace?

41

41

ANSWER

- Possible accommodations:
  - Reduce contact with others by designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum social distancing.
  - Temporary job restructuring of marginal job duties or temporary transfers to a different position.
  - Modifying work schedule or shift assignment.

42

42

QUESTION—Reasonable Accommodations

8. What may an employee request from an employee seeking a reasonable accommodation?

43

43

ANSWER

Employers may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA and to determine whether the employee's disability necessitates an accommodation.

44

44

QUESTION—Reasonable Accommodations

9. If an employee receives a reasonable accommodation in the workplace but all employees are currently teleworking, is the employer required to provide the same accommodations from the workplace to the employee teleworking?

45

45

ANSWER

- **It depends.** Sometimes an accommodation needed in the workplace is not necessarily needed in the confinement of an employee's home. Considerations must also be given to constraints on the availability of certain items or on the ability of an employer to assess the accommodation.
- Employers and employees should be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home.

46

46

QUESTION—Reasonable Accommodations

10. If telework was implemented for all employees to slow the spread of COVID-19, is an employer required to grant an accommodation request to telework when employees return to the workplace?

47

47

ANSWER

- **No.** Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation.
- If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation.
- If there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternate to telework.

48

48

QUESTIONS?

49

49

Thank You

- **J. Kevin West**
  208.562.4908
  kwest@parsonsbehle.com

50

50

Attachment A

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

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

OLC Control Number:

EEOC-NVTA-2009-3

Concise Display Name:

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

Issue Date:

10-09-2009

General Topics:

ADA/GINA

Summary:

This document provides information about the ADA and pandemic planning in the workplace.

Citation:

ADA, Rehabilitation Act, 29 CFR Part 1630

Document Applicant:

Health Care Providers, Employees, Employers, Applicants, HR Practitioners

Previous Revision:

No

I. INTRODUCTORY INFORMATION

A. PURPOSE

This technical assistance document provides information about Titles I and V of the **Americans with Disabilities Act (https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada)** (ADA) and Section 501 of the Rehabilitation Act and pandemic planning in the workplace.[(1) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#1)]

***This document was originally issued in 2009, during the spread of H1N1 virus, and was re-issued on March 19, 2020 and revised thereafter, to incorporate updates regarding the COVID-19 pandemic.** It identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning such as:

- How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce when an influenza or coronavirus pandemic appears imminent?
- When may an ADA-covered employer take the body temperature of employees during a pandemic?
- Does the ADA allow employers to require employees to stay home if they have symptoms of the pandemic influenza or coronavirus?
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

In one instance, to provide a complete answer, this document provides information about religious accommodation and Title VII of the Civil Rights Act of 1964.

B. BACKGROUND INFORMATION ABOUT PANDEMIC INFLUENZA AND OTHER PANDEMICS

A "pandemic" is a global "epidemic."[(2) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#2)] The world has seen **four** influenza pandemics in the last century. The deadly "Spanish Flu" of 1918 was followed by the milder "Asian" and "Hong Kong" flus of the 1950s and 1960s. While the SARS coronavirus outbreak in 2003 was considered a pandemic "scare,"[(3) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#3)] the H1N1 influenza outbreak in 2009 rose to the level of a pandemic.[(4) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#4)]

***On March 11, 2020, the coronavirus disease (COVID-19) was also declared a pandemic.**

The U.S. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), and the World Health Organization (WHO) are the definitive sources of information about pandemics. The WHO decides when to declare a pandemic.[(5) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#5)] Pandemic planning and pandemic preparedness include everything from global and national public health strategies to an individual employer's plan about how to continue operations.[(6) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#6)]

***The new information added to this EEOC technical assistance document in 2020 about COVID-19 focuses on implementing these strategies in a manner that is consistent with the ADA and with current CDC and state/local guidance for keeping workplaces safe during the COVID-19 pandemic. This document recognizes that guidance from public health authorities will change as the COVID-19 situation evolves.**

II. RELEVANT ADA REQUIREMENTS AND STANDARDS

The ADA, which protects applicants and employees from disability discrimination, is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities.[(7) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-

disabilities-act#7). Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation).[8] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#8) Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.[9] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#9)

This section summarizes these ADA provisions. The subsequent sections answer frequently asked questions about how they apply during an influenza or coronavirus pandemic. The answers are based on existing EEOC guidance regarding disability-related inquiries and medical examinations, direct threat, and reasonable accommodation.[10] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#10)

A. DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances, as set forth below.[11] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#11)

1. Definitions: Disability-Related Inquiries and Medical Examinations

An inquiry is **"disability-related"** if it is likely to elicit information about a disability.[12] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#12) For example, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS.[13] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#13) By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.

A **"medical examination"** is a procedure or test that seeks information about an individual's physical or mental impairments or health.[14] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#14) Whether a procedure is a medical examination under the ADA is determined by considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.

2. ADA Standards for Disability-Related Inquiries and Medical Examinations

The ADA regulates disability-related inquiries and medical examinations in the following ways:

- **Before a conditional offer of employment:** The ADA prohibits employers from making disability-related inquiries and conducting medical examinations of applicants before a conditional offer of employment is made.[15] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#15)
- **After a conditional offer of employment, but before an individual begins working:** The ADA permits employers to make disability-related inquiries and conduct medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations.[16] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#16)
- ***NOTE: New questions 16-19 below address specific questions about hiring during the COVID-19 pandemic.***
- **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with

business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

An employee's ability to perform essential job functions will be impaired by a medical condition; or

An employee will pose a direct threat due to a medical condition.[17] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#17)

This reasonable belief "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination."[18] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#18)

All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept **confidential**.[19] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#19) Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.

B. DIRECT THREAT

A **"direct threat"** is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[20] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#20) If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities.[21] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#21) The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.[22] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#22)

DIRECT THREAT AND PANDEMIC INFLUENZA, COVID-19, AND OTHER PUBLIC HEALTH EMERGENCIES

Direct threat is an important ADA concept during an influenza or coronavirus pandemic.

Whether pandemic influenza or coronavirus rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza or coronavirus is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

***Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and other public health authorities have acknowledged that COVID-19 is highly contagious and potentially fatal. Due to the community spread of COVID-19 in the United States, these authorities have issued precautions to slow the spread, such as urging significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion or instituted masking requirements in public places. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.**

C. REASONABLE ACCOMMODATION

A **"reasonable accommodation"** is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[(23) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#23)]

An accommodation poses an **"undue hardship"** if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.[(24) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#24).] If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.[(25) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#25)]

Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities.[(26) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#26)]

III. ADA-COMPLIANT EMPLOYER PRACTICES FOR PANDEMIC PREPAREDNESS

The following Questions and Answers are designed to help employers plan how to manage their workforce in an ADA-compliant manner before and during a pandemic.

A. BEFORE A PANDEMIC

HHS advises employers to begin their pandemic planning by identifying a "pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning."[(27) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#27).] This team should include staff with expertise in all equal employment opportunity laws.[(28) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#28).] Employees with disabilities should be included in planning discussions, and employer communications concerning pandemic preparedness should be accessible to employees with disabilities.

When employers begin their pandemic planning, a common ADA-related question is whether they may survey the workforce to identify employees who may be more susceptible to complications from pandemic influenza or coronavirus than most people.

1. **Before an influenza or coronavirus pandemic occurs, may an ADA-covered employer ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza or coronavirus?**

No. An inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability.[29] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#29) The ADA does not permit such an inquiry in the absence of objective evidence that pandemic symptoms will cause a direct threat. Such evidence is completely absent before a pandemic occurs.

2. Are there ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic?

Yes. Employers may make inquiries that are not disability-related. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of "yes" or "no" to the whole question without specifying the factor(s) that apply to him. The answer need not be given anonymously.

Below is a sample ADA-compliant survey that can be given to employees to anticipate absenteeism.

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of an influenza or coronavirus pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES_____ , NO_____

3. May an employer require *new entering employees* to have a post-offer medical examination to determine their general health status?

Yes, if all entering employees in the same job category are required to undergo the medical examination[30] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#30) and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on

separate forms and in separate medical files and is treated as a confidential medical record.

Example A: An employer in the international shipping industry implements its pandemic plan when the WHO and the CDC confirm that a pandemic may be imminent because a new influenza or coronavirus is infecting people in multiple regions, but not yet in North America. Much of the employer's international business is in the affected regions. The employer announces that, effective immediately, its post-offer medical examinations for all entering international pilots and flight crew will include procedures to identify medical conditions that the CDC associates with an increased risk of complications from the pandemic influenza or coronavirus. Because the employer gives these medical examinations post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

4. May an employer rescind a job offer made to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts her at increased risk of complications from the pandemic influenza or coronavirus?

No, unless the applicant would pose a direct threat within the meaning of the ADA. A finding of "direct threat" must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence such as objective information from the CDC or state or local health authorities. The finding must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk. Before concluding that an individual poses a direct threat, the employer must determine whether a reasonable accommodation could reduce the risk below the direct threat level.

Example B: The same international shipping employer offers a financial position at its U.S. headquarters to Steve. This position does not involve regular contact with flight crew or travel to the affected WHO region. Steve's post-offer medical examination (which is the same examination given to all U.S. headquarters employees) reveals that Steve has a compromised immune system due to recent cancer treatments. Given the fact that the position does not involve regular contact with flight crew or travel, and that the virus has not spread to North America, Steve would not face a significant risk of contracting the virus at work and does not pose a "direct threat" to himself or others in this position. Under the ADA, it would be discriminatory to rescind Steve's job offer based on the possibility of an influenza or coronavirus pandemic.

B. DURING AN INFLUENZA OR CORONAVIRUS PANDEMIC

The following questions and answers discuss employer actions when the WHO and the CDC report an influenza or coronavirus pandemic.

5. May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. *__Applying this principle to current CDC__

guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.

6. During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

***Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Currently these symptoms include, for example, fever, chills, cough, shortness of breath, or sore throat.**

7. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

However, employers should be aware that some people with influenza - including the 2009 H1N1 virus* - **or with COVID-19** do not have a fever.

***Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.**

8. When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.[(31)] **(https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#31)**

***Similarly, with respect to the current COVID-19 pandemic, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons.**

9. During a pandemic, may an ADA-covered employer ask employees *who do not have influenza or coronavirus symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza or coronavirus complications?

No. If pandemic influenza or coronavirus is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA.[(32) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#32)] However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.[(33) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#33)]

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza or coronavirus complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza or coronavirus complications. Many disabilities do not increase this risk *(e.g.* vision or mobility disabilities).

If an influenza or coronavirus pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza or coronavirus.[(34) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#34)] Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza or coronavirus complications.

10. May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?

Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation.[(35) (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#35)]

In addition, employees with disabilities that put them at high risk for complications of pandemic influenza or coronavirus may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

11. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

12. During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza or COVID-19 vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense).

Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).[(36)] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#36)

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

See Section K., "Vaccinations," in "**What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K)** ."

14. During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza or coronavirus pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

Example C: An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed.

All employees with disabilities whose responsibilities include management during a pandemic must receive reasonable accommodations necessitated by pandemic conditions, unless undue hardship is established.

Example D: A manager in a marketing firm has a hearing disability. A sign language interpreter facilitates her communication with other employees at the office during meetings and trainings. Before the pandemic, the employer decided to provide video phone equipment and video relay software for her at home to use for emergency business consultations. (Video relay services allow deaf and hearing impaired individuals to communicate by telephone through a sign language interpreter by placing a video relay call.[(37)] (https://www.eeoc.gov/fact-sheet/pandemic-preparedness-workplace-and-americans-disabilities-act#37)) During a pandemic, this manager also is part of the employer's emergency response team. When she works from home during the pandemic, she uses the video relay services to participate in daily management and staff conference calls necessary to keep the firm operational.

***The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.**

15. During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

Example E: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.

*HIRING DURING THE COVID-19 PANDEMIC

***16. If an employer is hiring, may it screen applicants for symptoms of COVID-19?**

***Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule allowing post-offer (but not pre-offer) medical inquiries and exams applies to all applicants, whether or not the applicant has a disability.**

***17. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**

***Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.**

***18. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**

***Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.**

***CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.**

***19. May an employer withdraw a job offer when it needs the applicant to start immediately, but the individual has COVID-19 or symptoms of it?**

*Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer if the employee is unable to work or would need to work in a location where the employee's presence could endanger others through exposure to COVID-19.

C. AFTER A PANDEMIC

20. May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the influenza or coronavirus pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local

clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

IV. EEOC AND RELATED RESOURCES

Employers are encouraged to consult the following EEOC publications for further information about the **Americans with Disabilities Act (https://www.eeoc.gov/disability-discrimination)** , as well as other agency materials regarding COVID-19.

- **Disability-Related Inquiries and Medical Examinations**:
  - *Disability-Related Inquiries & Medical Examinations of Employees Under the ADA* (2000) at **https://www.eeoc.gov/policy/docs/guidance-inquiries.html (https://www.eeoc.gov/policy/docs/guidance-inquiries.html)** ;
  - *Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures* (2001) at **https://www.eeoc.gov/facts/evacuation.html (https://www.eeoc.gov/fact-sheet/fact-sheet-obtaining-and-using-employee-medical-information-part-emergency-evacuation)** ;
  - Enforcement Guidance: *Preemployment Disability-Related Questions & Medical Examinations* (1995) at **https://www.eeoc.gov/policy/docs/preemp.html (https://www.eeoc.gov/policy/docs/preemp.html)** .
- **Reasonable Accommodation and Undue Hardship**: Enforcement Guidance: *Reasonable Accommodation and Undue Hardship under the ADA* (as revised 2002) at **https://www.eeoc.gov/policy/docs/accommodation.html (https://www.eeoc.gov/policy/docs/accommodation.html)** .
- **Telework as a Reasonable Accommodation**: *Work at Home/Telework as a Reasonable Accommodation* (2003) at **https://www.eeoc.gov/facts/telework.html (https://www.eeoc.gov/fact-sheet/work-hometelework-reasonable-accommodation)** .
- **Centers for Disease Prevention and Control: www.cdc.gov (http://www.cdc.gov)**
  - **CDC Guidance for Employers and Workplaces on COVID-19: https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)**
- **U.S. Department of Labor**
  - **Occupational Safety and Health Administration https://www.osha.gov/ (https://www.osha.gov/)**

    "Preparing Workplaces for COVID-19," https://www.osha.gov/Publications/OSHA3990.pdf (https://www.osha.gov/Publications/OSHA3990.pdf)
  - **Wage and Hour Division**

    "COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act" https://www.dol.gov/agencies/whd/fmla/pandemic (https://www.dol.gov/agencies/whd/fmla/pandemic)

Endnotes

1. 42 U.S.C. §§ 12111–12117, 12201–12213. EEOC is revising its ADA regulations to comply with the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, which was effective on January 1, 2009. 74 Fed.Reg. 48,431 (Sept. 23, 2009). While the Amendments expand ADA coverage, they do not change the ADA requirements concerning disability-related inquiries and medical examinations; the requirement of reasonable accommodation barring undue hardship; or the analysis of direct threat.

2. An "epidemic" is an outbreak of disease that occurs suddenly in numbers significantly greater than normal, but which spreads only within communities, states, or a limited number of countries. **http://www.flu.gov/glossary/#E (http://www.flu.gov/glossary/#E)** . Such an outbreak usually occurs when a pathogen mutates, allowing it to evade the human immune system. **http://www.flu.gov/individualfamily/about/index.html (http://www.flu.gov/individualfamily/about/index.html)** .

3. U.S. Dep't of Health & Human Servs., Pandemics and Pandemic Scares of the 20th Century, **https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html (https://www.cdc.gov/flu/pandemic-resources/basics/past-pandemics.html)** (last visited Sept. 22, 2009). The most severe influenza pandemic in the last century was the Spanish Flu Pandemic of 1918-1919, which killed 675,000 people in the United States and 50 million people worldwide at the end of World War I. The Spanish Flu targeted young, healthy adults and was often fatal within a few days. This virus caused the immune system to attack the respiratory system, which explains why young adults with vigorous immune systems were especially vulnerable. David M. Morens & Jeffery K. Taubenberger, *1918 Influenza: The Mother of all Pandemics*, 12 Emerging Infections Diseases 15 (2006), **https://wwwnc.cdc.gov/eid/article/12/1/05-0979_article (https://wwwnc.cdc.gov/eid/article/12/1/05-0979_article)** .

4. *World facing global A(H1N1) flu pandemic, announces UN health agency*, UN News Service, June 11, 2009, **http://www.un.org/apps/news/story.asp?NewsID=31106&Cr=h1n1&Cr1 (http://www.un.org/apps/news/story.asp?NewsID=31106&Cr=h1n1&Cr1)** (also noting that H1N1 tends to infect people under 25 years old, with approximately two percent of cases resulting in severe or life-threatening symptoms).

5. The WHO defines the following specific pandemic phases worldwide:

- **Phase 1**: No new influenza virus subtypes have been detected in humans. An influenza virus subtype that has caused human infection may be present in animals. If present in animals, the risk of human disease is considered to be low.
- **Phase 2**. No new influenza virus subtypes have been detected in humans. However, a circulating animal influenza virus subtype poses a substantial risk of human disease.
- **Phase 3**. Human infection with a new subtype, but no human-to-human spread, or at most rare instances of spread to a close contact.
- **Phase 4**. Small cluster(s) with limited human-to-human transmission but spread is highly localized, suggesting that the virus is not well adapted to humans.
- **Phase 5**. Larger cluster(s) but human-to-human spread of the virus still localized, suggesting that the virus is becoming increasingly better adapted to humans, but may not yet be fully transmissible (substantial pandemic risk).
- **Phase 6**. Pandemic phase: increased and sustained transmission in general population.

6. *See* Ctrs. for Disease Control & Prevention, Guidance for Businesses and Employers to Plan and Respond to the 2009-2010 Influenza Season (2009), **http://www.pandemicflu.gov/professional/business/guidance.pdf (http://www.pandemicflu.gov/professional/business/guidance.pdf)** ; Ctrs. for Disease Control & Prevention, Resources for Businesses and Employers – COVID-19, **https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** .

7. 42 U.S.C. § 12112(d)(4)(A); *Conroy v. New York State Dep't of Corr. Servs*., 333 F.3d 88, 94-95 (2d Cir. 2003); *Fredenburg v. Contra Costa County Dep't of Health Servs*., 172 F. 3d 1176, 1182 (9th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc*., 124 F.3d 1221, 1229 (10th Cir. 1997)*; see also* Equal Employment Opportunity Comm'n, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations § B.1 (1995), **https://www.eeoc.gov/policy/docs/preemp.html (https://www.eeoc.gov/policy/docs/preemp.html)** .

8. 42 U.S.C. §§ 12111(3), (8); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2).

9. 42 U.S.C. § 12112(b)(5); *see also* § 12111(3); 29 C.F.R. § 1630.2(r).

10. These ADA standards apply to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).

11. 42 U.S.C. § 12112(d). Equal Employment Opportunity Comm'n, **Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (https://www.eeoc.gov/policy/docs/guidance-inquiries.html)** , § B of "General Principles" (2000), **https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4 (https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4)** [hereinafter Inquiries and Exams].

12. Inquiries and Exams, *supra* note 11, at § B.1 of "General Principles." *See also Conroy*, 333 F.3d at 95-96 (citing ADA and relevant EEOC guidance and holding that an employer's request for a "general diagnosis" from employees returning from sick leave absence is a disability-related inquiry regulated by the ADA because it "tend[ed] to reveal a disability").

13. *See* Am. Cancer Soc'y, Should Cancer Patients Get a Flu Shot? (Oct. 17, 2008), **https://www.cdc.gov/cancer/flu/basic-info.htm (https://www.cdc.gov/cancer/flu/basic-info.htm)** (noting that "[i]t is common for people during cancer treatment to have weakened immune systems"); *see also* Ctrs. for Disease Control & Prevention, Basic AIDS/HIV Information (Sept. 3, 2008), **http://www.cdc.gov/hiv/topics/basic/ (https://www.cdc.gov/hiv/basics/whatishiv.html)** (reporting that "HIV . . . attacks the immune system . . .[and] [h]aving AIDS means that the virus has weakened the immune system").

14. Inquiries and Exams, *supra* note 11, at § B.2 of "General Principles."

15. 42 U.S.C. § 12112(d)(2)(A).

16. 42 U.S.C. § 12112(d)(3)(A); *see also* 29 C.F.R. § 1630.14(b).

17. Inquiries and Exams, *supra* note 11, at § A.5 of "Job-Related and Consistent with Business Necessity;" *see also Conroy*,333 F.3d at 97.

18. *See* Inquiries and Exams*, supra* note 11, at § A.5 of "Job-Related and Consistent with Business Necessity."

19. Medical information on employees or applicants is confidential with the following exceptions: (1)supervisor[s] and managers may be told about necessary restrictions on work duties and about necessary accommodations; (2) first aid and safety personnel may be told if the disability might require emergency treatment; (3) government officials may access the information when investigating compliance with the ADA; (4) employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation insurance carriers in accordance with state workers' compensation laws; and (5) employers may use the information for insurance purposes. 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b).

20. 29 C.F.R. § 1630.2(r).

21. *Id.*; 29 C.F.R. pt. 1630 app. § 1630.2(r).

22. *Id.*

23. 29 C.F.R. pt. 1630 app. § 1630.2(o); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 416 (2002) (citing the Appendix).

24. 42 U.S.C. § 12111(10); *see also* 29 C.F.R. § 1630.2(p) (including factors to consider when determining undue hardship); 29 C.F.R. pt. 1630 app. § 1630.2(p) (providing a more detailed analysis and examples of where a requested reasonable accommodation would pose an undue hardship).

25. 42 U.S.C. § 12112(b)(5)(A); *see also* Equal Employment Opportunity Comm'n, Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act (2002), **https://www.eeoc.gov/policy/docs/accommodation.html#undue (https://www.eeoc.gov/policy/docs/accommodation.html#undue)** [hereinafter Reasonable Accommodation Guidance].

26. 42 U.S.C. § 12112(b)(5)(A).

27. *See* U.S. Dep't of Health and Human Servs., Business Pandemic Influenza Planning Checklist: Item 1.1, **http://www.pandemicflu.gov/professional/business/businesschecklist.html (http://www.pandemicflu.gov/professional/business/businesschecklist.html)** (last visited Sept. 22, 2009).

28. *See* Job Accommodation Network,Considering the Needs of Employees with Disabilities During a Pandemic Flu Outbreak (2009), **https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in- (https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm)** (the Job Accommodation Network is a service of the U.S Department of Labor's Office of Disability Employment Policy).

29. Inquiries and Exams, *supra* note 11, at § B.1, "General Principles."

30. 42 U.S.C. § 12112(d)(3).

31. *See infra* Q & A 16 for a discussion of when an employer may require a medical release as a condition of returning to work.

32. Asking employees if they are immuno-compromised or have a chronic condition is a disability-related inquiry subject to the ADA's restrictions. When pandemic influenza symptoms only resemble those of seasonal influenza, they do not provide an objective basis for a "reasonable belief" that employees will face a direct threat if they become ill. Therefore, they do not justify disability-related inquiries or medical examinations.

33. *See also* Ctrs. for Disease Control, *supra* note 5, at 7. ADA-covered employers may receive requests for reasonable accommodation from individuals with disabilities that place them at risk of influenza or coronavirus complications.

34. *Id.* at 10–11.

35. Telework (i.e., working from an alternative location) is an example of "social distancing," which public health authorities may require in the event of a pandemic. "Social distancing" reduces physical contact between people to minimize disease transmission by, for example, avoiding hand-shakes and keeping a distance from others in public places. Other social distancing practices that may be implemented during a pandemic include: "closing schools; canceling public gatherings; planning for liberal work leave policies; . . . voluntary isolation of [pandemic infection] cases; and voluntary quarantine of household contacts." Ctrs. for Disease Control & Prevention, Pandemic Influenza Mitigation, **https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/community-mitigation.html (https://www.cdc.gov/flu/pandemic-resources/planning-preparedness/community-mitigation.html)** (last visited Sept. 22, 2009). Employees with disabilities may request telework as a reasonable accommodation, even if the employer does not have a policy allowing it. *See* Equal Employment Opportunity Comm'n, Work at Home/Telework as a Reasonable Accommodation (Oct 27, 2005), **https://www.eeoc.gov/facts/telework.html (https://www.eeoc.gov/fact-sheet/work-hometelework-reasonable-accommodation)** .

36. Equal Employment Opportunity Comm'n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), **https://www.eeoc.gov/policy/docs/religion.pdf**

(https://www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/religion.pdf) .

37. For general information about video relay service, see Fed. Commc'ns Comm'n, Video Relay Services (Oct. 21, 2008), **https://www.fcc.gov/consumers/guides/video-relay-services (https://www.fcc.gov/consumers/guides/video-relay-services)** .

Attachment B

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on May 28, 2021.

INTRODUCTION

- *All EEOC materials related to COVID-19 are collected at* ***www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)*** *.*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available

on EEOC's **disability page (https://www.eeoc.gov/disability-discrimination)** .

- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the **guidelines and suggestions made by the CDC or state/local public health authorities (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** This includes evolving guidance found in the CDC publication, "**Interim Public Health Recommendations for Fully Vaccinated People (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)** ." Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "**General Business Frequently Asked Questions (https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html)** ."

- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act)** [**PDF version (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)**]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.

- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** . The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic

publication includes a **separate section (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB)** that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

*The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity. See CDC guidance, including the CDC's "**Interim Public Health Recommendations for Fully Vaccinated People. (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.htm)** " The EEOC monitors CDC publications.*

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1) , or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

A.3. When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic? *(3/17/20)*

Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

A.4. Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19? *(3/17/20)*

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.

A.5. >When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty? *(3/17/20)*

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee’s initial or continued

presence in the workplace? *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if **employees entering the workplace have COVID-19 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.2)** because **an individual with the virus will pose a direct threat (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1)** to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard.

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review **information (https://www.fda.gov/medical-devices/emergency-situations-medical-devices/faqs-diagnostic-testing-sars-cov-2)** from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control

practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Note: Question A.6 and A.8 address screening of employees generally. See Question A.9 regarding decisions to screen individual employees.

A.7. CDC said in its Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html) that antibody test results "should not be used to make decisions about returning persons to the workplace." In light of this CDC guidance, under the ADA may an employer require antibody testing before permitting employees to re-enter the workplace? *(6/17/20)*

No. An antibody test constitutes a medical examination under the ADA. In light of CDC's **Interim Guidelines (https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html)** that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are **permissible under the ADA (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6)** .

The EEOC will continue to closely monitor CDC's recommendations, and could update this discussion in response to changes in CDC's recommendations.

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 1)*

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a **current list of symptoms (https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html)** .

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to the health or safety of others. However, for those employees who are teleworking and are not physically interacting with coworkers or others (for example, customers), the employer would generally not be permitted to ask these questions.

A.9. May a manager ask only one employee—as opposed to asking all employees—questions designed to determine if she has COVID-19, or require that this employee alone have her temperature taken or undergo other screening or testing? *(9/8/20; adapted from 3/27/20 Webinar Question 3)*

If an employer wishes to ask only a particular employee to answer such questions, or to have her temperature taken or undergo other screening or testing, the ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms. In addition, the ADA does not interfere with employers following **recommendations by the CDC (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html)** or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

A.10. May an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms associated with COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 4)*

No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members. GINA, however, does not prohibit an employer from asking employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease. Moreover, from a public health perspective, only asking an employee about his contact with family members would unnecessarily limit the information obtained about an employee's potential exposure to COVID-19.

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about

whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? *(9/8/20; adapted from 3/27/20 Webinar Question 2)*

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed; this is discussed in Question G.7.

A.12. During the COVID-19 pandemic, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? *(9/8/20; adapted from Pandemic Preparedness Question 6)*

Due to the COVID-19 pandemic, at this time employers may ask employees who work on-site, whether regularly or occasionally, and report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why he or she has been absent from work? *(9/8/20; adapted from Pandemic Preparedness Question 15)*

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to ask questions about where the person has traveled? *(9/8/20; adapted from Pandemic Preparedness Question 8)*

No. Questions about where a person traveled would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal.

B. Confidentiality of Medical Information

With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.

B.1. May an employer store in existing medical files information it obtains related to COVID-19, including the results of taking an employee's temperature or the employee's self-identification as having this disease, or must the employer create a new medical file system solely for this information? *(4/9/20)*

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this **confidential information (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q9)** . An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

B.2. If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results? *(4/9/20)*

Yes. The employer needs to maintain the confidentiality of this information.

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? *(4/9/20)*

Yes (https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html) .

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? *(4/9/20)*

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? *(9/8/20; adapted from 3/27/20 Webinar Question 5)*

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and

managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

B.6. An employee who must report to the workplace knows that a coworker who reports to the same workplace has symptoms associated with COVID-19. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? *(9/8/20; adapted from 3/27/20 Webinar Question 6)*

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

B.7. An employer knows that an employee is teleworking because the person has COVID-19 or symptoms associated with the disease, and that he is in self-quarantine. May the employer tell staff that this particular employee is teleworking without saying why? *(9/8/20; adapted from 3/27/20 Webinar Question 7)*

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then disclosure that the employee is teleworking without saying why is permissible. Also, if the employee was on leave rather than teleworking because he has COVID-19 or symptoms associated with the disease, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that the individual is on leave.

B.8. Many employees, including managers and supervisors, are now teleworking as a result of COVID-19. How are they supposed to keep medical information of employees confidential while working remotely? *(9/8/20; adapted from 3/27/20 Webinar Question 9)*

The ADA requirement that medical information be kept confidential includes a requirement that it be stored separately from regular personnel files. If a manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. But to the extent that is not feasible, the supervisor still must safeguard this information to

the greatest extent possible until the supervisor can properly store it. This means that paper notepads, laptops, or other devices should not be left where others can access the protected information.

Similarly, documentation must not be stored electronically where others would have access. A manager may even wish to use initials or another code to further ensure confidentiality of the name of an employee.

C. Hiring and Onboarding

Under the ADA, prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.

C.1. If an employer is hiring, may it screen applicants for symptoms of COVID-19? *(3/18/20)*

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

C.2. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam? *(3/18/20)*

Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

C.3. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it? *(3/18/20)*

Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

C.4. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it? *(3/18/20)*

Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

C.5. May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19? *(4/9/20)*

No. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. An employer has the discretion to choose among effective accommodations. Where a requested accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship. In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website for types of accommodations, ***www.askjan.org (http://www.askjan.org/)*** *. JAN's materials specific to COVID-19 are at* ***https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)*** *.*

D.1. If a job may only be performed at the workplace, are there reasonable accommodations (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general) for individuals with disabilities, absent undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue) , that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? *(4/9/20)*

There may be reasonable accommodations that **could offer protection to an individual whose disability puts him at greater risk from COVID-19**

(https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17) and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already on hand or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/index.html)** or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

D.2. If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he now be entitled to a reasonable accommodation (absent undue hardship)? *(4/9/20)*

Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic.

As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

D.3. In a workplace where all employees are required to telework during this time, should an employer postpone discussing a request from an employee

with a disability for an accommodation that will not be needed until he returns to the workplace when mandatory telework ends? *(4/9/20)*

Not necessarily. An employer may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but the employer may begin discussing this request now. The employer may be able to acquire all the information it needs to make a decision. If a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

D.4. What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation? *(4/9/20)*

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he **uses in the workplace (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q20)** . The employer **may discuss (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

D.5. During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may an employer still request information to determine if the condition is a disability? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA (a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment).

D.6. During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed? *(4/17/20)*

Yes, if it is not obvious or already known, an employer may ask questions or request **medical documentation (https://www.eeoc.gov/transcript-march-27-2020-**

outreach-webinar#q17) to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. **Possible questions (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

D.7. If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation? *(4/17/20)*

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed in D.5 and D.6., above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process—and devise end dates for the accommodation—to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This **could also apply (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.2)** to employees who have disabilities exacerbated by the pandemic.

Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? *(4/17/20; updated 9/8/20 to address stakeholder questions)*

Yes. Employers may inform the workforce that employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. This is discussed in greater detail in Question G.6. If advance requests are received, employers may begin the "interactive process" – the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed. If an employee chooses not to request accommodation in advance, and instead requests it at a later time, the employer must still consider the request at that time.

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "**undue hardship (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#undue)** ," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

D.10. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic? *(4/17/20)*

An employer may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations, considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

D.11. What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic? *(4/17/20)*

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time—when considering other expenses—and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

D.12. Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers (https://www.cdc.gov/coronavirus/2019-ncov/downloads/Essential-Critical-Workers_Dos-and-Donts.pdf) " or "essential critical workers (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html) " by the CDC? *(4/23/20)*

Yes. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act, or any other equal employment opportunity law. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees falling in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the worker is an individual with a disability, and whether there is a reasonable accommodation that can be provided absent undue hardship.

D.13. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? *(6/11/20)*

No. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or

harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.

For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

D.14. When an employer requires some or all of its employees to telework because of COVID-19 or government officials require employers to shut down their facilities and have workers telework, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? *(9/8/20; adapted from 3/27/20 Webinar Question 20)*

If such a request is made, the employer and employee should discuss what the employee needs and why, and whether the same or a different accommodation could suffice in the home setting. For example, an employee may already have certain things in their home to enable them to do their job so that they do not need to have all of the accommodations that are provided in the workplace.

Also, the undue hardship considerations might be different when evaluating a request for accommodation when teleworking rather than working in the workplace. A reasonable accommodation that is feasible and does not pose an undue hardship in the workplace might pose one when considering circumstances, such as the place where it is needed and the reason for telework. For example, the fact that the period of telework may be of a temporary or unknown duration may render certain accommodations either not feasible or an undue hardship. There may also be constraints on the normal availability of items or on the ability of an employer to conduct a necessary assessment.

As a practical matter, and in light of the circumstances that led to the need for telework, employers and employees should both be creative and flexible about what can be done when an employee needs a reasonable accommodation for telework at home. If possible, providing interim accommodations might be

appropriate while an employer discusses a request with the employee or is waiting for additional information.

D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework as a reasonable

accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.

D.17. Might the pandemic result in excusable delays during the interactive process? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Yes. The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if circumstances created by the pandemic prevent an agency from meeting this timeline? *(9/8/20; adapted from 3/27/20 Webinar Question 19)*

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline that an agency has adopted in its internal reasonable accommodation procedures.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

E.1. What practical tools are available to employers to reduce and address workplace harassment that may arise as a result of the COVID-19 pandemic? *(4/9/20)*

Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their **national origin, race (https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19)** , or other prohibited bases.

Practical anti-harassment tools provided by the EEOC for small businesses can be found here:

- Anti-harassment **policy tips (https://www.eeoc.gov/employers/small-business/harassment-policy-tips)** for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
    - **report (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** ;
    - **checklists (https://www.eeoc.gov/select-task-force-study-harassment-workplace#_Toc453686319)** for employers who want to reduce and address harassment in the workplace; and
    - **chart (https://www.eeoc.gov/chart-risk-factors-harassment-and-responsive-strategies)** of risk factors that lead to harassment and appropriate responses.

E.2. Are there steps an employer should take to address possible harassment and discrimination against coworkers when it re-opens the workplace? *(4/17/20)*

Yes. An employer may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

E.3. How may employers respond to pandemic-related harassment, in particular against employees who are or are perceived to be Asian? *(6/11/20)*

Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All employers covered by Title VII should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools—regardless of whether employees are in the workplace, teleworking, or on leave—and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers or clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be **instructed (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#E.2)** to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated, and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

E.4. An employer learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker. What actions should the employer take? *(6/11/20)*

The employer should take the same actions it would take if the employee was in the workplace. Employees may not harass other employees through, for example, emails, calls, or platforms for video or chat communication and collaboration.

F. Furloughs and Layoffs

F.1. Under the EEOC's laws, what waiver responsibilities apply when an employer is conducting layoffs? *(4/9/20)*

Special rules apply when an employer is offering employees severance packages in exchange for a general release of all discrimination claims against the employer. More information is available in EEOC's **technical assistance document on severance agreements (https://www.eeoc.gov/laws/guidance/qa-understanding-waivers-discrimination-claims-employee-severance-agreements)** .

F.2. What are additional EEO considerations in planning furloughs or layoffs? *(9/8/20; adapted from 3/27/20 Webinar Question 13)*

The laws enforced by the EEOC prohibit covered employers from selecting people for furlough or layoff because of that individual's race, color, religion, national origin, sex, age, disability, protected genetic information, or in retaliation for protected EEO activity.

G. Return to Work

G.1. As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace? *(4/17/20)*

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety.

Direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

For example, this may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) **of all those entering the workplace**. Similarly, the CDC recently posted **information (https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html)** on return by certain types of critical workers.

Employers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.

G.2. An employer requires returning workers to wear personal protective gear and engage in infection control practices. Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests? *(4/17/20)*

An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols).

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

G.3. What does an employee need to do in order to request reasonable accommodation from her employer because she has one of the medical conditions (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that CDC says may put her at higher risk for severe illness from COVID-19? *(5/5/20)*

An employee—or a third party, such as an employee's doctor—must **let the employer know (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** that she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing.

While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, she may do so.

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may **ask questions or seek medical documentation (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.6)** to help decide if the individual has a disability and if there is a reasonable accommodation, barring **undue hardship (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D)** , that can be provided.

G.4. The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? *(5/7/20)*

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee—or take any other adverse action—*solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under **29 C.F.R. section 1630.2(r) (https://www.ecfr.gov/cgi-bin/text-idx?SID=28cadc4b7b37847fd37f41f8574b5921&mc=true&node=pt29.4.1630&rgn=div5#se29.4.1630_12)** (regulation addressing direct threat to health or safety of self or others). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability

in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

G.5. What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? *(5/5/20)*

Accommodations (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1) may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be

elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (**www.askjan.org (http://www.askjan.org/)**) also may be able to assist in helping identify possible accommodations. As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? *(6/11/20)*

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the **interactive process (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.8)** . An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees

with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 **CDC guidance (https://www.cdc.gov/coronavirus/2019-ncov/community/high-risk-workers.html?deliveryName=USCDC_2067-DM29601)** that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? *(6/11/20)*

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a **disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.5)** and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is **available under Title VII (https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace)** .

H. Age

H.1. The CDC has explained (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html) that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? *(6/11/20)*

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable **accommodation for their disability (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D.1)** as opposed to their age.

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? *(9/8/20; adapted from 3/27/20 Webinar Question 12)*

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

I. Caregivers/Family Responsibilities

I.1. If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations? *(6/11/20)*

Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have **caretaking responsibilities (https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities)** for children.

J. Pregnancy

J.1. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html) ? *(6/11/20)*

No. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

J.2. Is there a right to accommodation based on pregnancy during the pandemic? *(6/11/20)*

There are two federal employment discrimination laws that may trigger **accommodation for employees based on pregnancy (https://www.eeoc.gov/laws/guidance/legal-rights-pregnant-workers-under-federal-law)** .

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to

work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

K. Vaccinations

The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also ***Section J, EEO rights relating to pregnancy****).*

This section was originally issued on Dec. 16, 2020, and was clarified and supplemented on May 28, 2021. The May 2021 updates are consistent in substance with the original technical assistance and also address new subjects. (See, e.g., discussion of vaccine incentives under the ADA (starting at K.16) and under GINA (starting at K.18)). Also note that the Centers for Disease Control and Prevention (CDC) issued ***guidance (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)*** *for fully vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of three COVID-19 vaccines. These three vaccines were granted Emergency Use Authorizations (EUA) by the FDA. It is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach. Individuals seeking more information about the legal implications of EUA or the FDA approach to vaccines can visit the ***FDA's EUA page*** **(https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained)** *. The EEOC's jurisdiction is limited to the federal EEO laws as noted above.*

Indeed, other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the Safer Federal Workforce Task Force for additional guidance on agency operations during the COVID-19 pandemic.

The EEOC questions and answers provided here only set forth applicable EEO legal standards, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

The technical assistance on vaccinations below was written to help employees and employers better understand how federal workplace discrimination laws apply during the COVID-19 pandemic caused by the SARS-CoV-2 virus and its variants. The technical assistance here is based on and consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance. Analysis of how it applies in any specific instance should be conducted on an individualized basis.

COVID-19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? *(5/28/21)*

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below**. These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination

than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? *(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated without violating the EEO laws, especially the ADA and GINA? *(5/28/21, updated 6/28/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Also, under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines, as discussed in **K.16 – K. 21**. As of May 2021, the federal government is providing vaccines at no cost to everyone ages 12 and older.

There are many resources available to employees seeking more information about how to get vaccinated:

- The federal government's online **vaccines.gov (https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **https://www.vacunas.gov (https://www.vacunas.gov)** for Spanish). Individuals also can text their zip code to "GETVAX" (438829) – or "VACUNA" (822862) for Spanish – to find three vaccination locations near them.

- Employees with disabilities (or employees**'** family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The U.S. Dept. of Health and Human Services/Administration for Community Living has launched a hotline to assist individuals with disabilities in obtaining such help. The Disability Information and Assistance Center (DIAL) can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing **DIAL@n4a.org**.

- CDC's website offers a link to a listing of **local health departments (https://www.cdc.gov/publichealthgateway/healthdirectories/index.html)**, which can provide more information about local vaccination efforts.

- In addition, the CDC offers **background information for employers about workplace vaccination programs (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html)**. The CDC provides a complete communication "tool kit" for employers to use with their workforce to educate people about getting the COVID-19 vaccine. (Although originally written for essential workers, it is useful for all workers.) *See* **CDC's Essential Workers COVID-19 Toolkit (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html#anchor_1612717640568)**. Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance or to ensure nondiscrimination for an employee who is pregnant.

- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no or limited English and find it difficult to make an appointment for a vaccine over the phone. The CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.

- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources available in their community serving vaccination sites and offer time-off for vaccination, particularly if transportation is not readily available outside regular work hours.

General

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? *(5/28/21)*

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(12/16/20, updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r) (https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml)** . This determination can be broken down into two

steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(12/16/20, updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know **how to recognize an accommodation request from an employee with a disability (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website (https://www.askjan.org)** as a resource for different types of accommodations. JAN's materials about COVID-19 are available at **https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)**. Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources (https://www.osha.gov/SLTC/covid-19/)**. Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations (https://www.cdc.gov/coronavirus/2019-ncov/)** when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42)** or **to retaliate against an employee for requesting an accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19)** .

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? *(12/16/20, updated 5/28/21)*

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)** is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and

consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5**.) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? *(12/16/20, updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 – 17**.) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Under the ADA, is it a "disability-related inquiry" for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? *(12/16/20, updated 5/28/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to

disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA's rules about such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*12/16/20*, *updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible

for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(12/16/20, updated 5/28/21)*

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the manifestation of disease or disorder in a family member (which is referred to as "family medical history") and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? *(12/16/20, updated 5/28/21)*

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee's genetic information, such as asking about the employee's family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-

19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC's Pre-vaccination Checklist (https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a doctor, pharmacy, health agency, or another health care provider in the community? *(12/16/20, updated 5/28/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a doctor, pharmacy, or other third party is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? *(5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received

in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? *(5/28/21)*

Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? *(5/28/21)*

Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent? *(5/28/21)*

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? *(5/28/21)*

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her

medical conditions. If these requirements are met, GINA permits the collection of genetic information.

Table of Contents

Attachment C

The Rising Tide: Momentum Building for Mandatory Vaccination Policies - Key Considerations for Employers

USA | August 12 2021

With the highly-infectious B.1.617.2 ("Delta") variant circulating, and the national **vaccination** rate at only approximately 51% fully vaccinated, many employers have been forced to reconsider and often delay their return-to-work plans. Now, many employers are exploring **mandatory vaccination** programs, which have become more feasible in recent months with the wide scale availability of vaccines and impending vaccine approval by the Food and Drug Administration ("FDA"). At the same time, although large heath care systems initially led the way in early adoption of **mandatory vaccination** policies, a wave of recent announcements of similar policies by major employers across a wide variety of industries is causing many businesses to do likewise, or at least consider doing so.

Before implementing **mandatory vaccination** policies, it is critical that employers have a "game plan" to address several key areas of consideration. Such a game plan should include risk assessment, the development of clearly-defined policies, strategic communications, protocols for collecting documentation, and processes for reviewing exemption requests. These issues and more will be thoroughly detailed as part of Quarles & Brady's upcoming September 8 webinar, "COVID-19: Critical Fall Planning and Management Issues for Employers," with registration opening soon.

At minimum, employers currently considering the possibility of requiring employee **vaccination** should take the following steps before implementing or expanding their **vaccination** programs (or deciding not to do so):

Conduct a Risk Assessment. A threshold question for any employer considering a **mandatory vaccination** program is whether such a policy would benefit the business. To answer this question, employers should assess several factors, starting with the percentage of the workforce that is fully vaccinated. If employers do not currently know the rate at which their workforce is vaccinated, they should start by collecting that information from their employees so that they can best evaluate their current risk profile and what measures are most appropriate for their workplace. A common misconception is that asking about **vaccination** status is somehow "prohibited" on medical or privacy grounds. That is not currently the case anywhere in the United States (although employers should be alert for any new prohibitions in light of the evolving politicization of the **vaccination** issue). The *safe* question is any version of whether the person is currently or will shortly be fully vaccinated, with just a "yes" or "no" answer—with no explanation, follow-up questions, etc.

Other important initial factors employers should consider include whether state or local law prohibits **mandatory vaccination** policies, whether state or local law provides any liability immunity for employers that have taken COVID-19 precautions (e.g., mandating vaccines), rates of community transmission, applicable industry standards, the type of business operation, level of employee interaction (internally and externally), etc.

Determine the Parameters of Your Policy. Employers who have not already implemented measures to encourage employees to receive the COVID-19 vaccine and want to increase their rate of **vaccination** should start by taking steps such as: circulating updated educational materials regarding COVID-19 (and the increased risks employees face from the Delta variant), actively supporting and encouraging **vaccination** (often from the top down), providing local **vaccination** sites, facilitating **vaccination** (e.g. time off, offering vaccines onsite), and providing financial or other incentives.

If an employer has already taken steps to encourage or incentivize vaccination, they may want to consider escalating their approach in order to increase the percentage of their workforce who is fully vaccinated. Such approaches may include:

- **Mandatory** vaccinations ***as a condition of employment*** - This approach requires employers to terminate employees who do not become fully vaccinated (or receive an approved exemption) by a specified date. Although this is the most stringent approach, employers who implement this option provide the maximum workforce protection from COVID-19. Employers facing worker shortages have been reluctant to take this path for fear of losing existing employees and further reducing the pool of candidates who are interested and eligible for hire. Whether and how this concern evolves remains an open question.
- Vaccinations as a ***requirement to return to the workplace or attend work-related events*** - While this approach means an employer will not achieve a 100% **vaccination** rate among their entire workforce, those operating within the business's brick and mortar locations will all be fully vaccinated. This reduces the risk of liability and allows the employer to potentially loosen some of their COVID-19 protocols.

Along these same lines, some employers may extend this limitation to include all work-related events as well. For example, an employer may choose to enforce a policy that states employees who are not fully vaccinated against COVID-19 will be prohibited from participating in certain business affairs, such as attending networking events, traveling to trade shows, or visiting with clients.

- Vaccinations as an ***exemption or reduction from some COVID-19 safety measures*** - Some employers may take inspiration from the recent move made by the federal government (as announced by the Biden Administration on July 29, 2021) and disincentivize being unvaccinated by enhancing safety measures such as requiring unvaccinated employees to wear a facial covering in the workplace *at all times*, maintain social distancing, submit to COVID-19 testing on a regular basis, be barred from certain areas or amenities (e.g. cafeteria, break room), etc. While this approach leaves the decision whether to become vaccinated up to the employees, the strong disincentives imposed by the employer may be enough to drive up **vaccination** rates among the workforce.

Create a Communication Strategy. Employers must determine how and when they will deliver their new or updated **vaccination** policy to their workforce. With respect to timing, employers will need to account for the fact that some employees will have not received either shot of the COVID-19 vaccine and may require up to 4-5 weeks to become “fully vaccinated” as defined by the CDC, depending on which vaccine they receive.

As far as *how* employers should inform their workforce that changes to the employer's **vaccination** policy are coming, employers should: articulate the reason for enforcing such policy; explain how employees will demonstrate compliance; be clear what the consequences are for noncompliance; offer support to employees who have concerns; and explain that reasonable accommodations are available for qualified individuals based on medical needs or religious beliefs. Employers should consult their local Quarles & Brady employment counsel to develop an effective communication strategy.

Plan How to Verify Vaccination Status. Integral to a **mandatory vaccination** program is verification of **vaccination** status. To confirm whether employees have been vaccinated, employers should require their workers either to: (1) attest their **vaccination** status, or (2) submit proof of vaccination.

For employers that opt to require attestation of vaccination, employers should generate attestation forms that clearly communicate the employer's **vaccination** policy and any potential penalties for dishonestly or non-compliance. A strong sample of such an attestation form is the federal government's Certification of **Vaccination**, which was recently implemented for all federal employees.

For employers that instead opt to seek proof of vaccination, the following are acceptable documents to substantiate **vaccination** status: a vaccine card issued by the Centers for Disease Control and Prevention ("CDC"), formal documentation from the healthcare provider or health department that issued the vaccination, or a digital vaccine certificate. Proof of **vaccination** should be confidentially maintained separately from personnel records, and employers should refrain from requesting any medical information apart from proof of vaccination—so as not to run afoul of the Americans with Disability Act ("ADA").

Regardless of whether an employer requires its employees to attest their **vaccination** status or submit documentation of vaccination, employers should maintain all vaccine-related records and continually monitor workplace **vaccination** rates. For further guidance on how to safely navigate the **vaccination** verification process, contact your local Quarles & Brady counsel or join us for the upcoming webinar.

Prepare a Process for Exemption Requests. As we have explained in prior alerts, employers that implement a **mandatory vaccination** program must provide a way for employees to seek exemptions to **vaccination** requirements for those with certain medical and religious objections.

Specifically, the ADA requires covered employers to provide reasonable accommodations to qualified applicants and employees with a "disability," unless they can demonstrate that doing so would create an "undue hardship" or pose a "direct threat." In addition, Title VII of the Civil Rights Act of 1964 ("Title VII") requires covered employers to accommodate an employee's "sincerely held" religious belief, unless doing so would cause "undue hardship." It can be confusing and frustrating to employers to learn that although the basis for requesting exemption use the same "undue hardship" language, the standards for applying those tests are not the same.

To ensure that all disability-related or religious-based objections to a **mandatory** vaccine policy are handled in a non-discriminatory, confidential, and compliant manner, employers should establish a clear procedure for requesting and evaluating exemption requests. Because medical and religious exemption requests and the related determinations of what constitutes a "sincerely held" religious belief, a "disability," a "direct threat" and "undue hardship" require careful consideration, employers should confer with counsel to determine how to best respond to **mandatory vaccination** policy objections. Additionally, this important and multi-layered topic will be covered in-depth during the upcoming webinar.

Quarles & Brady LLP - Otto W. Immel, Lindsey W. Davis , Kaitlin M. Phillips and Brenna M. Wildt

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Hot Employment Topics Session #1

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Sean A. Monson
801.536.6714 | smonson@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

LIZ M. MELLEM

Shareholder

127 East Main Street, Suite 301
Missoula, Montana 59802
Main 406.317.7220
Direct 406.317.7240
amellem@parsonsbehle.com

BIOGRAPHY

Liz Mellem is a Parsons Behle & Latimer shareholder who concentrates her practice on complex commercial litigation and employment law. She 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 one of the first virtual federal trials 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.

ACCOMPLISHMENTS

Academic

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

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

Professional

Utah State Bar, 2010

United States District Court, District of Utah, 2010

State Bar of Montana, 2013

PRACTICE AREAS

Business & Commercial Litigation
Employment & Labor
Employment Litigation
Securities Litigation

LICENSED/ADMITTED

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

United States District Court, District of Montana, 2014

Mountain States 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)

PRESENTATIONS

Co-Presenter: "Hot Employment Topics Session #2," 33rd Annual Parsons Behle & Latimer Employment Law Seminar (October 28, 2021)

Co-Presenter: "Hot Employment Topics Session #1," 33rd Annual Parsons Behle & Latimer Employment Law Seminar (October 27, 2021)

Co-Presenter: "Hot Employment Topics Session #2," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

Co-Presenter: "Hot Employment Topics Session #1," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

Co-Presenter: "COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All," Parsons Behle & Latimer Virtual CLE (February 10, 2021)

"Remote Working Considerations in the ERA of COVID-19" 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

Co-Presenter: "Strategies on Acing the SBA's New PPP Loan Forgiveness Application," Parsons Behle & Latimer Webinar (May 20, 2020)

Co-Presenter: "Back in Business: Information Every Idaho Employer Should Know," Human Resource Association of Treasure Valley (May 13, 2020)

Co-Presenter: "Moving Forward: Resuming Business in a Changed Environment," Missoula Economic Partnership (May 7, 2020)

Co-Presenter: "Idaho's Stay Healthy Order: What Employers Should Know for a Successful Transition," Idaho Restaurant, Lodging and Retailers Associations (May 6, 2020)

Co-Presenter: "Employer Considerations to Successfully Reopen a Business," Parsons Behle & Latimer Webinar (April 29, 2020)

"Considerations For Implementing A Parental Leave Policy," Parsons Behle & Latimer 7th Annual Idaho Employment Law Seminar (October 10, 2019)

"Considerations For Implementing A Parental Leave Policy," Utah SHRM Crossroads Conference (September 24, 2019)

"Considerations For Implementing A Parental Leave Policy," Parsons Behle & Latimer 31st Annual Employment Law Seminar (May 22, 2019)

PUBLICATIONS

Co-author: "New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes," Parsons Behle & Latimer COVID-19 Response Resources (December 23, 2020)

"Montana Face Coverings Mandates," Parsons Behle & Latimer COVID-19 Response Resources (July 21, 2020)

Co-author: "Strategies on Acing the SBA's New PPP Loan Forgiveness Application," Parsons Behle & Latimer COVID-19 Response Resources (May 18, 2020)

"Montana Civil Cases Can Resume, But With Significant Restrictions," Parsons Behle & Latimer COVID-19 Response Resources (May 18, 2020)

Co-author: "Beware the Whistleblower: Avoiding Fraud Liability Under The PPP," Parsons Behle & Latimer COVID-19 Response Resources (May 12, 2020)

"Montana's Employers Can Open for Business – Sort of," Parsons Behle & Latimer COVID-19 Response Resources (April 28, 2020)

Co-author: "Re-Opening for Business: Employers Should Begin Planning Now," Parsons Behle & Latimer COVID-19 Response Resources (April 14, 2020)

Co-author: "Top Nine Takeaways From New FFCRA Regulations," Parsons Behle & Latimer COVID-19 Response Resources (April 3, 2020)

Co-author: "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?" Parsons Behle & Latimer COVID-19 Response Resources (March 30, 2020)

"Montana's 'Stay at Home' Directive From Governor Bullock," Parsons Behle & Latimer COVID-19 Response Resources (March 30, 2020)

"CARES Act: Emergency Appropriations," Parsons Behle & Latimer COVID-19 Response Resources (March 27, 2020)

"The Current State of Court Operations in Montana," Parsons Behle & Latimer COVID-19 Response Resources (March 24, 2020)

Co-author: "Emerging Questions for Employers Under the Families First Coronavirus Response Act and Other Coronavirus Employment Issues,' Parsons Behle & Latimer COVID-19 Response Resources (March 24, 2020)

"The Current State of Court Operations in Montana," Parsons Behle & Latimer COVID-19 Response Resources (March 17, 2020)

"Parental Leave Policies – What to Know and What to Consider," Parsons Behle & Latimer Legal Briefings (October 31, 2019)

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

SEAN A. MONSON

Employment & Labor Chair
Shareholder

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6714
smonson@parsonsbehle.com

BIOGRAPHY

Sean A. Monson is the current department chair of Parsons' Employment & Labor practice group. He 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.

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

PRACTICE AREAS

Business & Commercial Litigation
Banking & Financial Services
Employment & Labor
Employment Litigation
Real Estate
Real Estate Litigation

LICENSED/ADMITTED

Utah

PRESENTATIONS

Co-Presenter: "Hot Employment Topics Session #2," 33rd Annual Parsons Behle & Latimer Employment Law Seminar (October 28, 2021)

Co-Presenter: "Hot Employment Topics Session #1," 33rd Annual Parsons Behle & Latimer Employment Law Seminar (October 27, 2021)

Co-Presenter: "Hot Employment Topics Session #1," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

Co-Presenter: "Hot Employment Topics Session #2," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

"Hot Employment Topics," Parsons Behle & Latimer Utah County Employment Law Seminar (August 25, 2021)

Co-Presenter: "The Coronavirus 'Response Act' – COVID-19 Relief and Tax Benefit Opportunities in 2021," Parsons Behle & Latimer Virtual CLE (January 14, 2021)

Co-Presenter: "Trends in Employment Law Cases Related to COVID-19," 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

"Independent Contractor vs. Employee: The Devil's Bargain," 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

Co-presenter: "PPP Loans: The Cares Act & Flexibility Act - What We Know to Date About Loan Forgiveness," Webcast with First Utah Bank and Tanner Company (July 14, 2020)

Co-presenter: "Strategies on Acing the SBA's New PPP Loan Forgiveness Application," Parsons Behle & Latimer Webinar (May 20, 2020)

May 20, 2020 Co-presenter: "Back in Business: Information Every Idaho Employer Should Know," Human Resource Association of Treasure Valley (May 13, 2020)

Co-presenter: "COVID-19: Returning to Work," Generals' Club (May 13, 2020)

Co-presenter: "What Every Employer Should Know Before Resuming Business in Utah," Visit Salt Lake (May 12, 2020)

Co-presenter: "Back in Business: Information Every Idaho Employer Should Know," Idaho Technology Council (May 11, 2020)

Co-presenter: "Reopening Utah's Restaurants: What Owners Need to Know," Salt Lake Area Restaurant Association (May 7, 2020)

Co-presenter: "Idaho's Stay Healthy Order: What Employers Should Know for a Successful Transition," Idaho Restaurant, Lodging and Retailers Associations (May 6, 2020)

Co-presenter: "Employer Considerations to Successfully Reopen a Business," South Valley Chamber (May 5, 2020)

Co-presenter: "Employer Considerations to Successfully Reopen a Business," Parsons Behle & Latimer Webinar (April 29, 2020)

Co-presenter: "Reopening Your Business: Meeting Opportunities and Challenges to Come Back Stronger," Webcast with First Utah Bank, Traeger Grills and Parsons Behle & Latimer (April 28, 2020)

Co-presenter: "CARES Act and Families First Coronavirus Response Act - What the Acts Means to Your Business and How to Respond," Family-Owned Business Alliance Webinar (FOBA) (April 2, 2020)

Co-presenter: "Families First Coronavirus Response Act," Webinar - WTC Utah (March 27, 2020)

Co-presenter: "Families First Coronavirus Response Act," Parsons Behle & Latimer Webinar (March 23, 2020)

"Employment Basics for Small Businesses and Start Ups," Utah SHRM Crossroads Conference, Layton, Utah, September 25, 2019

"Employment Basics for Small Businesses and Start Ups," Parsons Behle & Latimer Utah County Employment Law Seminar, Lehi, Utah, August 28, 2019

"Employment Basics for Small Businesses and Start Ups," Parsons Behle & Latimer 31st Annual Employment Law Seminar, Salt Lake City, Utah, May 22, 2019

PUBLICATIONS

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

"Vaccinations and the Workplace: What Does the EEOC Have to Say?" Utah Business Magazine, July 29, 2021

"EEOC Issues Updated Guidance Regarding COVID-19 Vaccinations and the Workplace," Parsons Behle & Latimer COVID-19 Response Resources, May 28, 2021

"Vaccines: Mandatory or Voluntary for Employees?," Parsons Behle & Latimer COVID-19 Response Resources, February 4, 2021

Co-author: "New COVID Relief Statute: Second Round of PPP Loans, Extension of FFCRA Leave Rights, and Tax Code Changes," Parsons Behle & Latimer COVID-19 Response Resources, December 23, 2020

"Dealing With 'Remote' Teleworking Employees: Best Practices for Teleworking," Parsons Behle & Latimer COVID-19 Response Resources, September 15, 2020

"Treasury Department Clarifies Payroll Tax Deferral Executive Order," Parsons Behle & Latimer COVID-19 Response Resources, 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," Parsons Behle & Latimer COVID-19 Response Resources, August 29, 2020

Co-Author: "Supreme Court Limits Protections for Employees Working for Religious Schools," Parsons Behle & Latimer COVID-19 Response Resources, July 14, 2020

Co-Author: "Salt Lake County Extends Face Covering Order to Aug. 20, 2020," Parsons Behle & Latimer COVID-19 Response Resources, July 7, 2020

Co-Author: "Salt Lake County and Summit County Require Individuals to Wear Face Coverings," Parsons Behle & Latimer COVID-19 Response Resources, July 1, 2020

Co-author: "Looking Forward: How to Manage Your Workforce in 2020 and Beyond," Parsons Behle & Latimer COVID-19 Response Resources, June 30, 2020

"Title VII Covers LGBTQ Employees," Parsons Behle & Latimer Employment Update, June 30, 2020

Co-author: "PPP Loan Program Modified – More Time to Spend, Fewer Restrictions on Spending," Parsons Behle & Latimer COVID-19 Response Resources, June 5, 2020

Co-author: "Strategies on Acing the SBA's New PPP Loan Forgiveness Application," Parsons Behle & Latimer COVID-19 Response Resources, May 18, 2020

Co-author: "What to do With Employees at High Risk for Serious COVID-19 Illness: The ADA and Return to Work," Parsons Behle & Latimer COVID-19 Response Resources, May 12, 2020

Co-author: "Liabilities When Reopening: Steps to Minimizing the Risks," Parsons Behle & Latimer COVID-19 Response Resources, April 28, 2020

Co-author: "Re-Opening for Business: Employers Should Begin Planning Now," Parsons Behle & Latimer COVID-19 Response Resources, April 14, 2020

"You've Had a Chance to Catch Your Breath, Now What? Five Things Employers Should be Thinking About Right Now," Parsons Behle & Latimer COVID-19 Response Resources, April 9, 2020

Co-author: "CARES Act PPP Loans Interim Final Rule Released," Parsons Behle & Latimer COVID-19 Response Resources, April 3, 2020

"Response Act Poster, Leave Policies and Shelter in Place Notices," Parsons Behle & Latimer COVID-19 Response Resources, March 30, 2020

Co-author: "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?" Parsons Behle & Latimer COVID-19 Response Resources, March 30, 2020

Co-author: "Emerging Questions For Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues," Parsons Behle & Latimer COVID-19 Response Resources, March 24, 2020

Co-author: "Covid-19 Leave and Sick Pay Statute Enacted," Parsons Behle & Latimer COVID-19 Response Resources, March 19, 2020

Co-author: "Covid-19, Family Medical Leave Act and Paid Time Off – Employer Questions Answered," Parsons Behle & Latimer COVID-19 Response Resources, March 17, 2020

"EEOC Reverses Course Regarding the Ministerial Exception in Employment Discrimination Cases," Parsons Behle & Latimer Legal Briefings, February 27, 2020

"The Utah Supreme Court Delivers a Haymaker to the Implied Covenant of Good Faith and Fair Dealing in Employment Cases," Parsons Behle & Latimer Legal Briefings, December 18, 2019

Co-author: "Federal Government Raises Threshold Salary for Employees to Qualify for Exempt Status," Parsons Behle & Latimer Employment Law Alert, October 3, 2019

"Dynamex Decision Codified – California is a Land of Employees, Not Independent Contractors," Parsons Behle & Latimer Legal Briefings, September 27, 2019

Co-author: "Waving Goodbye to a Great Defense: Don't Do It," Parsons Behle & Latimer Legal Briefings, June 26, 2019

"An Escrow Agent's Duty to Disclose Fraud," Parsons Behle & Latimer Legal Briefings, May 31, 2019

"Proper Inquiries to Job Applicants," Parsons Behle & Latimer Legal Briefings, May 31, 2019

"2019 Utah Legislative Update – Dodging A Bullet," Parsons Behle & Latimer Legal Briefings, March 22, 2019

"Employment Practices Liability Insurance – Is it Worth It?" Parsons Behle & Latimer Legal Briefings, February 27, 2019

"Commute Time in Company Vehicles: Don't Work and Drive," Parsons Behle & Latimer Legal Briefings, January 23, 2019

"Beware of the Independent Contractor Trap," Parsons Behle & Latimer Legal Briefings, December 6, 2018

REPRESENTATIVE MATTERS

Represented foreign bitcoin mining company in recovering cryptocurrency and company assets.

Reduced wage penalty under FLSA audit.

Successfully defended against wrongful termination claim claiming damages of several millions of dollars.

Successfully defended against claims for discrimination.

Obtained significant concessions for zoning request.

Successfully completed sale of large office buildings.

Successfully obtained title insurance coverage for client.

REPRESENTATIVE DECISIONS

Myler v. Blackstone, 2014 UT App 187

Beddoes v. Giffin, 158 P.3d 1102 (Utah 2007)

Taylor v. Smith's Food & Drug Centers, Inc., 2005 U.S. App. LEXIS 3298 (10th Cir. 2005)

Kourianos v. Smith's Food & Drug Centers, Inc., 65 Fed. Appx. 238 (10th Cir. 2003)

St. Jeor v. Patterson Dental Supply, Inc., 19 Fed. Appx. 803 (10th Cir. 2001)

Jones v. TCI Cablevision of Utah, Inc., 2000 U.S. App. LEXIS 18670 (10th Cir. 2000)

Bodell Construction Company v. Stewart Title Guaranty Company, 945 P.2d 119 (Utah Ct. App. 1997)

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

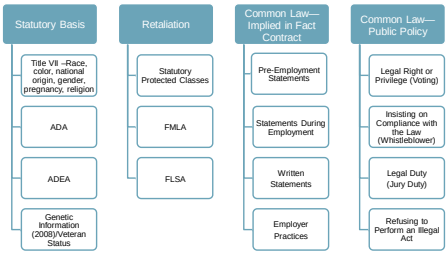
Hot Employment Topics – Session 1

Liz M. Mellem
406.317.7240
amellem@parsonsbehle.com

Sean A. Monson
801.536.6714
smonson@parsonsbehle.com

1

85% of Employment Law Claims



2

2

Sexual Harassment – What is It?

- Quid Pro Quo – “a favor or advantage granted or expected in return for something.”
- Supervisor or someone with the ability to impact the terms and conditions of the victim’s employment.
- A promise of promotion, transfer, pay raise, time off etc. in return for some sexual favor.

3

3

Sexual Harassment – What is It?

- Hostile Work Environment – sexual conduct or gender-based hostility that is sufficiently severe or pervasive that it creates an intimidating, hostile or offensive work environment.
- Examples of sexual harassment:
  - Sending suggestive letters, notes, or e-mails.
  - Displaying inappropriate sexual images or posters in the workplace.

4

4

Sexual Harassment – What is It?

- Examples of Sexual Harassment (cont.)
  - Telling lewd jokes or sharing sexual anecdotes.
  - Making inappropriate sexual gestures.
  - Staring in a sexually suggestive or offensive manner, whistling.
  - Making sexual comments about appearance, clothing, or body parts.
  - Inappropriate touching, including pinching, patting, rubbing, or purposefully brushing up against another person.

5

5

Sexual Harassment – What is It?

- Examples of Sexual Harassment (cont.)
  - Asking sexual questions, such as questions about someone's sexual history or sexual orientation.
  - Making offensive comments about someone's sexual orientation or gender identity.

6

6

LGBTQ+ Discrimination

- On June 15, 2020, the Supreme Court of the United States issued Bostock v. Clayton County -- held that the prohibition against sex discrimination in Title VII includes employment discrimination against an individual on the basis of sexual orientation or transgender status.
- Client or customer preference does not permit discrimination.
  - An employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way) **because customers or clients would prefer not to work** with people who have a different sexual orientation or gender identity.
  - Employers also are not allowed to segregate employees based on **actual or perceived customer preferences**. (For example, it would be discriminatory to keep LGBTQ+ employees out of public-facing positions, or to direct these employees toward certain stores or geographic areas.)

7

7

LGBTQ+ Discrimination

- Can't discrimination because EE does not conform to sex-based stereotypes.
  - For example, employers are not allowed to discriminate against men whom they perceive to act or appear in stereotypically feminine ways, or against women whom they perceive to act or appear in stereotypically masculine ways.

8

8

LGBTQ+ Discrimination

- Can't require transgender EEs to dress according to sex assigned at birth.
  - Prohibiting a transgender person from dressing or presenting consistent with that person's gender identity would constitute sex discrimination.
- Bathroom usage is based on identity, not sex assigned at birth.
  - If an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities.

9

9

LGBTQ+ Discrimination

- Misuse of pronouns can be harassment
  - Unlawful harassment includes unwelcome conduct that is based on gender identity.
  - Severe or pervasive creating hostile work environment.
  - Accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII.
  - Intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.
    - Him instead of her; her instead of him; him or her instead of they

10

10

Sexual Harassment Investigations

- Respond to all complaints.
- Explain the process, and emphasize retaliation is prohibited
- Set expectations
- Start by showing willingness to believe and then listen
- Separate alleged victim and harasser pending investigation – different shifts, administrative leave.

11

11

Sexual Harassment Investigations

- DOCUMENT, DOCUMENT, DOCUMENT
  - Step one – Get the victim's story
    - Ask the victim -- what happened, who did it, where did it happen, and when did it happen.
    - Were there any witnesses? If yes, who?
    - Have the victim sign a statement – you do not want the story to change.
  - Step two – Get the witnesses' story
    - Ask the witness – what did you see or hear, when and where did you see or hear it, who else was present.
    - Have the witness sign a statement.

12

12

Sexual Harassment Investigations

- Step Three – Confront the harasser
  - Confront the harasser with the allegations.
  - Give him or her a chance to respond.
- Step Four – Make a decision
  - Make a decision regarding the extent to which you believe that the victim was subject to unlawful harassment.
  - You will have to decide whose testimony is more credible – the victim and witnesses or the alleged harasser.
  - The alleged harasser is not going to admit the behavior that he or she is accused of committing.

13

13

Sexual Harassment Investigations

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

14

14

Independent Contract v. Employee – the Devil's Bargain

- Paying people as independent contractors is very tempting
  - Tax savings (they pay the employer's portion of FICA)
  - No overtime
  - No workers' compensation
  - No unemployment insurance
  - No minimum wage – FLSA claims
  - No discrimination or harassment claims – generally not protected under Title VII, ADA, ADEA etc.

15

15

Independent Contract v. Employee – the Devil's Bargain

- But doing so is very dangerous
  - Penalties, back taxes, back insurance premiums, overtime, minimum wage
- Studies estimate that between 10 to 30 percent of workers are misclassified costing billions annually in lost payroll taxes

16

16

Tests

Different tests exist:

- Workers' compensation
- Unemployment insurance
- Tax liability
- Fair Labor Standards Act
- Title VII/ADA/ADEA
- Common law

17

17

Tests

Because there are different tests, the same person could be an employee in one context and an independent contractor in another context.

Between federal and state law issues (taxes v. workers compensation)

Between state v. state issues (unemployment insurance v. workers compensation)

18

18

IRS 20-Factor Test

1. Instructions
2. Training
3. Integration
4. Services rendered personally
5. Hiring, supervising and paying assistants
6. Continuing relationship
7. Set hours of work
8. Full time required
9. Doing work on employer's premises
10. Order or sequence set
11. Oral or written reports
12. Payment by hour, week, month
13. Payment of business and/or traveling expenses
14. Furnishing of tools and materials
15. Significant investment
16. Realization of profit or loss
17. Working for more than one company
18. Making services available to general public
19. Right to discharge
20. Right to terminate

19

19

Post-1996 IRS Approach

Behavioral control

A worker is an employee when the business has the right to direct and control the work performed by the worker, even if that right is not exercised. Behavioral control categories are:

- Type of instructions given, such as when and where to work, what tools to use or where to purchase supplies and services. Receiving the types of instructions in these examples may indicate a worker is an employee.
- Degree of instruction, more detailed instructions may indicate that the worker is an employee. Less detailed instructions reflects less control, indicating that the worker is more likely an independent contractor.
- Evaluation systems to measure the details of how the work is done points to an employee. Evaluation systems measuring just the end result point to either an independent contractor or an employee.
- Training a worker on how to do the job -- or periodic or on-going training about procedures and methods -- is strong evidence that the worker is an employee. Independent contractors ordinarily use their own methods.

20

20

Post-1996 IRS Approach (cont'd.)

Financial control

Does the business have a right to direct or control the financial and business aspects of the worker's job? Consider:

- Significant investment in the equipment the worker uses in working for someone else.
- Unreimbursed expenses, independent contractors are more likely to incur unreimbursed expenses than employees.
- Opportunity for profit or loss is often an indicator of an independent contractor.
- Services available to the market. Independent contractors are generally free to seek out business opportunities.
- Method of payment. An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time even when supplemented by a commission. However, independent contractors are most often paid for the job by a flat fee.

21

21

Post-1996 IRS Approach (cont'd.)

Relationship of the worker and the firm

The type of relationship depends upon how the worker and business perceive their interaction with one another. This includes:

- Written contracts which describe the relationship the parties intend to create. Although a contract stating the worker is an employee or an independent contractor is not sufficient to determine the worker's status.
- Benefits. Businesses providing employee-type benefits, such as insurance, a pension plan, vacation pay or sick pay have employees. Businesses generally do not grant these benefits to independent contractors.
- The permanency of the relationship is important. An expectation that the relationship will continue indefinitely, rather than for a specific project or period, is generally seen as evidence that the intent was to create an employer-employee relationship.
- Services provided which are a key activity of the business. The extent to which services performed by the worker are seen as a key aspect of the regular business of the company.

22

22

FLSA – Employee or Contractor -- Guidance from DOL

In July of 2015, the DOL Wage and Hour Division issued guidance (Administrator's Interpretation No. 2015-1) for employers to follow in determining who is an employee and who is an independent contractor.

In a nutshell, the guidance makes clear that the proper test is the "economic realities" test.

The Wage and Hour Division enforces claims for minimum wage and overtime under the Fair Labor Standards Act.

23

23

FLSA -- Guidance from DOL

- The economic reality of the worker's relationship with the employer determines whether the worker is economically dependent on the employer (and therefore, an employee) or is in business for himself or herself (and therefore, an independent contractor).

24

24

FLSA -- Guidance from DOL (cont'd.)

- No single "economic realities" factor determines whether a worker is an employee or an independent contractor
- What matters is whether the totality of the circumstances indicates the worker is an employee or independent contractor

25

25

FLSA -- Guidance from DOL

The Wage and Hour division generally considers the following factors when determining if a worker is an employee or independent contractor:

1. Is the work an integral part of the employer's business?
2. Does the worker's managerial skill affect his or her opportunity for profit and loss?
3. Relative investments of the worker and the employer
4. The worker's skill and initiative
5. The permanency of the worker's relationship with the employer
6. Employer control of employment relationship

26

26

FLSA -- Guidance from DOL

- Work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.
- If the work performed is integral to the employer's business, the worker is more likely economically dependent on the employer.

27

27

FLSA -- Guidance from DOL

- For example, the work of a carpenter is integral to the operation of a construction company because the company is in the construction business and the carpenter performs the construction on behalf of the company.
- On the other hand, a worker engaged by the construction company to repair its copier is not performing work that is integral to its business.

28

28

FLSA -- Guidance from DOL

- Managerial skill
- This factor should focus on the worker's managerial skill and whether this skill affects the worker's profit and loss.
- The issue is not whether the worker possesses skills, but whether the skills are managerial and suggest that the worker is operating as an independent business.

29

29

FLSA -- Guidance from DOL

- Managerial skills that suggest independent contractor status include the ability to make independent business decisions, such as deciding to make business investments or hire helpers.
- Deciding to work more jobs or longer hours is not such a business decision.
- When analyzing this factor, it is also important to consider whether the worker faces a *possible loss* as a result of these independent business decisions.

30

30

FLSA -- Guidance from DOL

- Relative investment
- The worker must make some investment (and undertake some risk for a loss) to indicate he or she is an independent business.
- Merely purchasing tools to perform a particular job is not a sufficient investment to indicate an independent business.
- The worker's investment must also *compare favorably* with the employer's investment to suggest the worker is an independent contractor.

31

31

FLSA -- Guidance from DOL

- A worker's investment compares favorably when:
  - The investment is substantial and
  - The investment is used for the purpose of sustaining a business beyond the job or project the worker is performing.

32

32

FLSA -- Guidance from DOL

- Worker's skill
- Both employees and independent contractors may be skilled, even highly skilled, workers.
- Specialized skills, such as computer programming, do not necessarily indicate independent contractor status.
- To suggest the worker is an independent contractor, the skills should demonstrate that the worker exercises independent business judgment or initiative.

33

33

FLSA -- Guidance from DOL

- Permanency of relationship
- A permanent or indefinite relationship with the employer suggests the worker may be an employee.
- However, the absence of a permanent or indefinite relationship does not automatically indicate the worker is an independent contractor.

34

34

FLSA -- Guidance from DOL

- What matters is whether the impermanence is a result of:
  - *The worker's choice* (which suggests independent contractor status) or
  - *The structure of that particular industry or employer* (which may indicate the worker is an employee).

35

35

FLSA -- Guidance from DOL

- Right of control
- An independent contractor typically works relatively free from control by an employer (or anyone else, including the employer's clients).
- This factor includes who controls:
  - Hiring and firing,
  - The amount of pay,
  - The hours of work, and
  - How the work is performed.

36

36

FLSA -- Guidance from DOL

- The employer's lack of control does not automatically indicate the worker is an independent contractor.
- An employer can still exercise control over the worker *even if* the worker teleworks or works offsite.

37

37

FLSA -- Guidance from DOL

- To be considered an independent business, the worker must also *exercise* control over *meaningful aspects* of the work.

38

38

Gig Economy Workers

- Lawsuits have exploded across the country by Gig Economy workers – Uber and Lyft are most well known but there are hundreds.
- State legislatures and courts are trying to respond – trend is toward employee classification
- More and more workers working from home with COVID
- Temptation is to classify them as independent contractors because not as connected to office space
- If you try, make sure you change the fundamentals of the relationship

39

39

2018 Field Assistance Bulletin

- In 2018, the Department of Labor issued Field Assistance Bulletin No. 2018-4 (the "Bulletin") which "provides guidance to Wage and Hour Division (WHD) field staff to help them determine whether home care, nurse, or caregiver registries (registries) are employers under the Fair Labor Standards Act (FLSA)." Bryan Jarret, Field Assistance Bulletin No. 2018-4, U.S. DEP'T OF LAB (July 13, 2018), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2018-4.

40

40

2018 Field Assistance Bulletin

- The Bulletin states "[a] registry is an entity that typically matches people who need caregiving services with caregivers who provide the services, usually nurses, home health aides, personal care attendants, or home care workers with other titles (collectively, caregivers)."
- The Bulletin notes: "Consistent with WHD's longstanding position, a registry that simply facilitates matches between clients and caregivers—even if the registry also provides certain other services, such as payroll services—is not an employer under the FLSA. A registry that controls the terms and conditions of the caregiver's employment activities may be an employer of the caregiver and therefore subject to the requirements of the FLSA."

41

41

2018 Field Assistance Bulletin

- Further, the Bulletin states: "A registry often performs payroll-related functions for its clients. These functions include, for example, calculating the amount of wages owed based on the hours worked and the previously determined rate of pay, making the appropriate tax deductions, administering benefits that the caregiver has requested and for which the caregiver pays, and issuing a check or electronic deposit. If the client provides the funds directly or via an escrow account, the registry's performance of such payroll services does not indicate that the registry is the caregiver's employer."
- Finally, the Bulletin notes: "Unlike investments in office space or payroll systems, investments in the tools necessary for the caregiver to perform his or her services may indicate that the registry is acting as the caregiver's employer, instead of simply a referral service."

42

42

2019 Opinion Letter re Gig Workers

- As many as 55 million people in the United States were gig workers - or 34% of the workforce - in 2017, according to the International Labor Organization, and the total was projected to rise to 43% in 2020.
- In 2019, the Department of Labor issued Opinion Letter FLSA 2019-6 (the "2019 Opinion Letter").
- The 2019 Opinion Letter addressed the question: "Whether service providers working for a virtual marketplace company (VMC) are employees or independent contractors under the [FLSA]?"

43

43

2019 Opinion Letter re Gig Workers

- The DOL concluded that the virtual marketplace company "empowers service providers to provide services to end-market consumers" and provides a referral service between the service providers and the end-market consumers.
- According to the 2019 Opinion Letter, "as a matter of economic reality, [the service providers] are working for the consumer," not the company providing the platform.
- The 2019 Opinion Letter concluded that the service providers were independent contractors, not employees.

44

44

2019 Opinion Letter re Gig Workers

- The 2019 Opinion Letter noted that the service providers on the virtual marketplace, among other things, were free to work when, where and for whom they wanted and were free to work for competitors of the virtual marketplace company.
- They could "exit" the virtual marketplace when they chose and had the ability to negotiate the prices paid by the consumer for the services they performed.
- On May 5, 2021, the Department of Labor withdrew the opinion.

45

45

2019 Opinion Letter re Gig Workers

- On January 26, 2021, the Department of Labor proposed a new rule governing the economic realities test which would rely on five factors
  - degree of control
  - opportunity for profit or loss
  - amount of skill required for the work
  - degree of permanence of the working relationship, and
  - whether the work is a component of the company's integrated production process, but which would emphasize the first two factors – the degree of control and the opportunity for profit or loss.

46

46

2019 Opinion Letter re Gig Workers

- On May 5, 2021, the Department of Labor withdrew the rule.
- Takeaway
  - The Trump administration wanted to allow companies to classify Gig Economy workers as independent contractors.
  - The Biden administration appears to be trending in the opposite direction.
  - "We are looking at it but in a lot of cases gig workers should be classified as employees... in some cases they are treated respectfully and in some cases they are not and I think it has to be consistent across the board." Secretary of Labor, Marty Walsh.
  - States are also becoming more aggressive in finding Gig Economy workers to be employees.

47

47

Cunningham v. Lyft

- 2020 WL 2616302
- Federal District Court of Massachusetts
- Motion for Preliminary Injunction that Lyft drivers are employees, not contractors under a state wage statute
  - A request for interim ruling – Lyft drivers moved for an interim order saying that they were employees -- have to show that you are "likely to succeed" in your claims if the case goes to trial
- Motion was denied -- court found that they were likely to succeed but that the harm to them was not irreparable

48

48

Cunningham v. Lyft

- Under relevant state wage statute, in order to be considered an independent contractor, three factors had to be met:
  - (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and
  - (2) the service is performed outside the usual course of the business of the employer; and,
  - (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.
- Court found that Lyft failed to show that (2) was met
  - Determining whether the services provided are outside the employer's usual course of business included two different inquiries – establishing what services are performed by the worker, and establishing the "usual course of business of the employer."

49

49

Cunningham v. Lyft

- Lyft argued that its core business was a "platform service," connecting drivers and riders.
- In its Terms, Lyft states that it "does not provide transportation services and Lyft is not a transportation carrier."
- Lyft said it was like other "placement services," such as those providing health care workers or babysitters
- Lyft said its business should be viewed as an improvement to a "taxi stand, rather than as a taxi company."

50

50

Cunningham v. Lyft

- The Court disagreed:
  - Based on the record in front of the court, the court finds a substantial likelihood of success on the merits that, despite Lyft's careful self-labeling, the realities of Lyft's business – where riders pay Lyft for rides – encompasses the transportation of riders. The "realities" of Lyft's business are no more merely "connecting" riders and drivers than a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics. Instead, focusing on the reality of what the business offers its customers, the business of a grocery stores is selling groceries, the business of a car repair shop is repairing cars, and Lyft's business – from which it derives its revenue – is transporting riders.

51

51

Cunningham v. Lyft

- As to what services the driver provide, Lyft argued that drivers do not provide services to Lyft but rather receive a service from Lyft by "using Lyft's service to provide transportation services to riders."
- Lyft also argued, based on its contention that its business is only "connecting" riders and drivers, that "drivers perform[ ] work that is outside the usual course of Lyft's business."
- The Court disagreed
  - But Lyft ignores that the drivers are "provid[ing] transportation services to riders," and that service, as detailed above, is the service for which Lyft is being paid by riders.

52

52

O'Connor v. Uber Technologies, Inc.

- 82 F.Supp.3d 1133 (2015)
- Federal District Court of Northern California
- Uber brought a claim for summary judgment that its drivers were independent contractors, not employees under a California wage statute
- The Federal District Court of Northern California disagreed

53

53

O'Connor v. Uber Technologies, Inc.

- Uber argued that its drivers provide no service to Uber.
- Uber's contented that it is not a "transportation company," but instead is a pure "technology company" that merely generates "leads" for its transportation providers through its software.
- Using this framing, Uber argued that were simply its customers who bought dispatches that may or may not result in actual rides.
- The Court that the argument was "fatally flawed"

54

54

O'Connor v. Uber Technologies, Inc.

- "First, Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane."

55

55

Case Law Takeaway

- Integrated operations doctrine is an important factor in many independent contractor versus employee tests
- Cases were not final decisions but indicate those courts' initial takes were different than the Trump administration's opinion letter that workers in a service platform framework can be classified as independent contractors

56

56

Thank You

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

57

57

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Political Speech in the Workplace

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

CHRISTINA M. JEPSON

Shareholder, Employment Law
Diversity, Equity and Inclusion Director

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6820
cjepson@parsonsbehle.com

BIOGRAPHY

For the past 25 years, Christina has partnered with clients to solve their labor and employment issues. She assists clients with the full spectrum of employment issues, including daily management of employment issues as well as litigation. Christina served as the chair of the firm's Labor and Employment Department for more than 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) 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 D&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 - 2021
- *Best Lawyers in America*, ranked as a "Best Lawyer" in Employment Law, 2013 - 2022
- *Chambers and Partners USA*, "Notable Practitioner" ranking, Labor & Employment Law, 2019 - 2021

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:

- COVID-19 issues including leave, safety, back to work plans and positive tests
- Diversity and inclusion plans
- Sex discrimination and sexual harassment
- Age discrimination
- Religious discrimination
- ADA, disability and employee medical issues
- Wrongful termination

PRACTICE AREAS

Employment & Labor
Employment Litigation
Trade Secret Litigation

LICENSED/ADMITTED

Utah
U.S. Dist. Court, Dist. of Utah
U.S. Court of Appeals, 10th Circuit
United States Supreme Court

- Employment contracts and compensation
- Non-compete, confidentiality, and non-solicitation agreements
- Handbooks
- Social media in the workplace
- Fair Labor Standards Act (FLSA), overtime, exemptions, and wage issues
- Independent contractor issues
- Drug and alcohol testing
- 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

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 10 years in the Juris Doctor program. She also teaches Labor and Employment Law in the Master of Legal Studies program. She is currently the 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

Professional

Best Lawyers in America, Employment Law Management, 2014 - 2022

Intermountain States Super Lawyers, “Top 50 Women Lawyers,” 2019 - 2021

Intermountain States Super Lawyers, Employment Defense, 2019 - 2020
Intermountain States Super Lawyers, Employment and Labor, 2013 - 2018; 2021
Defense Research Institute, Utah Contributor to Fifty State Compendium, 2019 - 2020
Chambers and Partners USA, "Notable Practitioner," Labor & Employment 2019 - 2021
Chambers and Partners USA, Labor & Employment, 2017 - 2018
Utah Business Magazine, "Legal Elite," Employment and Labor Law, 2012 - 2021

Parsons Behle & Latimer

Chairperson, Diversity and Inclusion Department, 2020
Chairperson, Employment & Labor Department, 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)
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

President, University of Utah S.J. Quinney College of Law Board of Trustees, 2019 - 2020
Member, Board of Trustees, University of Utah College of Law, 2008 - present
President-Elect, 2017 - 2019
Chair, Alumni Relations Committee, 2015 - 2017
Pre-Trial Adjunct Professor of Law, University of Utah Law School, 2007 - present
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

University of Utah Law School Search Committee for Career Development Director

University of Utah Law School Search Committee for Dean of Academic Affairs

Member, Visit Salt Lake Quarterly Human Resource & Compensation Committee

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

PRESENTATIONS

"Political Speech in the Workplace," 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 27, 2021)

"Political Speech in the Workplace," Parsons Behle & Latimer Ninth Annual Boise Employment Law Seminar (September 22, 2021)

"Political Speech in the Workplace," Parsons Behle & Latimer Utah County Employment Law Seminar (August 25, 2021)

"Onboarding Talent Through Wellbeing and Inclusive Practices," Utah State Bar (May 26, 2021)

"Trends in Diversity, Equity and Inclusion Programs," Parsons Behle & Latimer 32nd Annual Employment Law Seminar - Virtual (November 10, 2020)

"Women in Business," South Valley Chamber of Commerce Webinar (June 16, 2020)

"Employment Issues and the Pandemic," University of Utah, S.J. Quinney College of Law Webinar (May 22, 2020)

Co-Presenter: "Back in Business: Information Every Idaho Employer Should Know," Human Resource Association of Treasure Valley (May 13, 2020)

Co-Presenter: "What Every Employer Should Know Before Resuming Business in Utah," Visit Salt Lake (May 12, 2020)

Co-Presenter: "Back in Business: Information Every Idaho Employer Should Know," Idaho Technology Council (May 11, 2020)

Co-Presenter: "Getting Utah Back to Business," Utah Manufacturers Association (May 7, 2020)

Co-Presenter: "Idaho's Stay Healthy Order: What Employers Should Know for a Successful Transition," Idaho Restaurant, Lodging and Retailers Associations (May 6, 2020)

Co-Presenter: "Utah Businesses Reopen: What Employers Should Know for a Successful Transition," Park City Chamber of Commerce (May 6, 2020)

Co-Presenter: "Employer Considerations to Successfully Reopen a Business," South Valley Chamber (May 5, 2020)

Co-Presenter: "Employer Considerations to Successfully Reopen a Business," Parsons Behle & Latimer Webinar (April 29, 2020)

Co-Presenter: "CARES Act and Families First Coronavirus Response Act - What the Acts Means to Your Business and How to Respond," Family-Owned Business Alliance Webinar (FOBA) (April 2, 2020)

Co-Presenter: "Families First Coronavirus Response Act," Webinar - WTC Utah (March 27, 2020)

Co-Presenter: "Families First Coronavirus Response Act," Parsons Behle & Latimer Webinar (March 23, 2020)

"Utah Employment Legal Update," IPMA-HR Utah Annual Conference (November 21, 2019)

"Telecommuting and Working Remotely," Southeast Idaho Chapter of SHRM Employment Law Update (October 17, 2019)

"Telecommuting: Legal Issues and Solutions," Parsons Behle & Latimer Boise Employment Law Seminar (October 10, 2019)

"Telecommuting: Legal Risks and Solutions," Utah SHRM Crossroads Conference (September 24, 2019)

"Telecommuting: Legal Risks and Solutions," Parsons Behle & Latimer Utah County Employment Law Seminar (August 28, 2019)

"Flexible Work Arrangements," Parsons Behle & Latimer 31st Annual Employment Law Seminar (May 22, 2019)

"Sexual Harassment in the MeToo Era," Women's Giving Circle Presentation at Dorsey & Whitney - Panel Speaker (May 2, 2019)

"ADA and the FMLA: Managing Intermittent Leave," SHRM Utah Human Resources State Council Crossroads Conference (September 2017)

"Religion in the Workplace: Walking on Eggshells," SHRM Utah Human Resources State Council Crossroads Conference (September 2017)

"To Compete or Not To Compete... That is the Legislation," Utah State Bar Litigation Section (May 26, 2016)

"Pregnancy Discrimination Panel," Idaho Law Review Symposium (April 1, 2016)

"Employment Law Compliance/Point and Counterpoint," 2015 Summer Convention - Utah State Bar, Sun Valley, Idaho (August 2015)

"Social Media in the Workplace," Utah State Bar CLE Course (August 7, 2013)

"Social Media in the Workplace," Utah State Bar Spring Convention (March 15, 2013)

"Effective Use of Paralegals," Utah State Bar Fall Forum (November 2007)

"Women in Law," University of Utah College of Law (September 2007)

"Trends and Corrections in the Utah Courts of Appeals," Utah State Bar Annual Convention (July 2007)

PUBLICATIONS

"DRI Employment Law Compendium, Utah Section," DRI Employment and Labor Law Committee (February 17, 2021)

Co-Author: "Salt Lake County Extends Face Covering Order to Aug. 20, 2020," Parsons Behle & Latimer COVID-19 Response Resources (July 7, 2020)

Co-Author: "Salt Lake County and Summit County Require Individuals to Wear Face Coverings," Parsons Behle & Latimer COVID-19 Response Resources (July 1, 2020)

Co-author: "FLSA Requirements for Part-Time Telecommuters: When Must Employers Pay for Time Spent Commuting?" Parsons Behle & Latimer COVID-19 Response Resources (June 23, 2020)

Co-author: "Industry-Specific Guidelines for Re-Opening Construction and Manufacturing Businesses in Utah," Parsons Behle & Latimer COVID-19 Response Resources (June 2, 2020)

Co-author: "Industry-Specific Guidelines for Re-Opening Retail Establishments in Utah," Parsons Behle & Latimer COVID-19 Response Resources (June 2, 2020)

Co-author: "Industry-Specific Guidelines for Re-Opening Restaurants in Utah," Parsons Behle & Latimer COVID-19 Response Resources (June 2, 2020)

Co-author: "Industry-Specific Guidelines for Re-Opening the Hospitality Industry in Utah," Parsons Behle & Latimer COVID-19 Response Resources (June 2, 2020)

Co-author: "OSHA Issues New Enforcement Policies Regarding Workplace Inspections and Employer Recording Requirements for COVID-19," Parsons Behle & Latimer COVID-19 Response Resources (May 22, 2020)

Co-author: "What to Do With Employees at High Risk for Serious COVID-19 Illness: The ADA and Return to Work," Parsons Behle & Latimer COVID-19 Response Resources (May 12, 2020)

Co-author: "What Utah Employers Need to Know About Governor Herbert's Order Moving the Covid-19 Public Health Risk Status From Red To Orange," Parsons Behle & Latimer COVID-19 Response Resources (May 5, 2020)

Co-author: "The U.S. Department of Labor Cracks Down on Employers Not Providing Sick Leave Under the Families First Coronavirus Response Act," Parsons Behle & Latimer COVID-19 Response Resources (April 28, 2020)

Co-author: "COVID-19: Employers' Rights and Duties When Pandemic Spurs Protected Concerted Activity," Parsons Behle & Latimer Legal COVID-19 Response Resources (April 21, 2020)

Co-author: "Re-Opening for Business: Employers Should Begin Planning Now," Parsons Behle & Latimer COVID-19 Response Resources (April 14, 2020)

Co-author: "What Employers Need to Know About the CDC's Recent Recommendation to Wear Cloth Facemasks," Parsons Behle & Latimer COVID-19 Response Resources (April 14, 2020)

Co-author: "New Guidance from the Department of Homeland Security Allows Some Employers to Confirm Employees' I-9 Information Remotely During 'National Emergency'" Parsons Behle & Latimer COVID-19 Response Resources (April 7, 2020)

"Utah COVID-19 Restrictions as They Impact Employers," Parsons Behle & Latimer COVID-19 Response Resources (March 30, 2020)

Co-author: "Emerging Questions for Employers Under the Families First Coronavirus Response Act and Other Coronavirus Employment Issues," Parsons Behle & Latimer COVID-19 Response Resources (March 24, 2020)

Co-author: "Terminations, Layoffs and Warn Notices in the COVID-19 Crisis," Parsons Behle & Latimer COVID-19 Response Resources (March 19, 2020)

"Working During Crisis: Telecommuting Policies During the COVID-19 Pandemic," Parsons Behle & Latimer COVID-19 Response Resources (March 17, 2020)

"Utah Section of New Employment Law 2020," *DRI 2020 New State Employment Laws Compendium* (March 5, 2020)

"Going Green—Deciding to Not Test Applicants for Marijuana," Parsons Behle & Latimer Legal Briefings (December 18, 2019)

Co-Author: "Federal Government Raises Threshold Salary for Employees to Qualify for Exempt Status," Parsons Behle & Latimer Employment Law Alert (October 03, 2019)

"What Employers Can Do About Mass Shootings," Parsons Behle & Latimer Legal Briefings (August 29, 2019)

Co-Author: "Waving Goodbye to a Great Defense: Don't Do It," Parsons Behle & Latimer Legal Briefings (June 26, 2019)

Co-Author: "Updates on the EEOC's EEO-1 Form Reporting Requirements," Parsons Behle & Latimer Legal Briefings (June 26, 2019)

Co-Author: "DOL Releases Proposed Salary Increase for Exempt Status," Parsons Behle & Latimer Legal Briefings (March 22, 2019)

"Valentine's Day and Romance in the Workplace," Parsons Behle & Latimer Legal Briefings (February 27, 2019)

"Ground Rules: Three Major Employment Law Changes That May Impact Your Business," Utah Business (January 27, 2017)

"Workers' Compensation Laws: Utah," *Practical Law* (2014 to present)

"Employment Claims in Release Aggreements: Utah 2021," *Practical Law* (2014 to present)

Co-Author: "Leave Policy Language: Utah," *Practical Law* (2014 to present)

"Employee Privacy Laws: Utah," *Practical Law* (2014 to present)

"Wage and Hour Laws: Utah," *Practical Law* (2014 to present)

"Hiring Requirements: Utah," *Practical Law* (2014 to present)

Co-Author: "Drug Testing Laws: Utah," *Practical Law* (2014 to present)

"Employment Claims in Release Agreements: Utah," *Practical Law* (2014 to present)

"Anti-discrimination Laws: Utah," *Practical Law* (2014 to present)

"Leave Laws: Utah," *Practical Law* (2014 to present)

"Background Check Law: Utah," *Practical Law* (2014 to present)

Co-Author: "Independent Contractors: Utah," *Practical Law* (2014 to present)

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Political Speech in the Workplace

Christina M. Jepson
801.536.6820 | cjepson@parsonsbehle.com

1

Political Speech in the Workplace

- 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, engage in political expression and not be subject to Employer's control
- Really at issue recently with heated elections, protests, Black Lives Matters movement, insurrections, political fights, cancel culture, masks, vaccines
- Work life v. Public life v. Private life

2

2

Political Speech and Freedom

- How might this come up for an employer
  - Employee's conduct leads to a cancel movement directed at the Employer
  - Employee's conduct leads to public scrutiny or customer scrutiny
  - Employee's conduct or discussions in the workplace offend others or cause disruption

3

3

First Amendment

- Does an employee have freedom of speech?

4

4

First Amendment

- Does an employee have freedom of speech?
- "Congress **shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."
- Similar state constitutional provisions

5

5

Freedom of Speech

- Do employees have freedom of speech?
  - 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, may not limit free speech in all circumstances
  - Private employers are not "state actors" and therefore are not limited by the Constitution
  - There is not a Constitutional right to free speech against private employers
  - But . . . .

6

6

Exceptions

- State law
  - States such as California, Colorado, New York, and North Dakota prohibit adverse action against an employee based on political expression and/or lawful, off-duty activity
  - Utah also has a "free speech" statute
  - Employers need to check with state law
- Federal Discrimination Statutes
- National Labor Relations Act

7

7

Utah Anti-Discrimination Act

- Applies to employers with 15 or more employees
- The Great Compromise
- Protects employees from discrimination regarding sexual orientation and sexual identity
- In return, protects employees' free speech regarding these matters
- Is a compromise still required?

8

8

Utah Anti-Discrimination Act

- 35A-5-112 Religious liberty protections—Expressing beliefs and commitments in workplace—Prohibition on employment actions against certain employee speech

9

9

Utah Anti-Discrimination Act

- (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 interest** of the employer.

10

10

Utah Anti-Discrimination Act

- (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.

11

11

Can an Employer Make You Remove these from Your Car?

12

12

Exception: Discriminatory Conduct

- Even if an employee's political affiliation or activities are not protected by law, employers must be careful not to engage in prohibited discriminatory conduct to the extent other protected classes are implicated, such as race, religion, or sex.

13

13

Anti-Harassment Policies

- Political talk can offend others, particularly because comments and opinions on topics like race, gender, sexual orientation, and religion tend to permeate these discussions.
- Because these conversations are likely to seep into the workplace, it is important for employers to have in place an **anti-harassment policy** that communicates the employer's expectations about appropriate workplace behavior and contains a complaint procedure for employees to report uncomfortable situations.

14

14

Risk of Discrimination Claims

- Political conversations can often lead to discussions about gender, race, religion, etc. (Title VII)
- Such comments sometimes can result in claims of discrimination or retaliation in which it is alleged that “my supervisor is biased against [women/non-Christians/Hispanics], as shown by his/her comments
- Or, my boss punished me because I disagreed with him about a social issue implicating gender, nationality, or religion
- Employees also have “free speech” with respect to making complaints related to these statutes and participating in investigations

15

15

Exception: NLRA

- National Labor Relations Act (NLRA)
  - National Labor Relations Board (NLRB), enforces NLRA, restricts an employer's right to limit workers' communications about wages, hours and the terms or conditions of employment
  - Importantly, many of the NLRB's provisions are applicable to non-union employers and protect even workers who do not belong to a union

16

16

Exception: NLRA

- Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities for the purpose of** collective bargaining or **other mutual aid and protection**" or to refrain from all such activities

17

17

Exception: NLRA

- Employee communications about pay, benefits and workplace safety are "protected concerted activity" if doesn't disrupt business
- NLRA/NLRB – generally confined to topics with a nexus to the workplace (i.e. terms, conditions, wages, healthcare, etc.)

18

18

No Politics Policies

- Many private employers simply elect to minimize such controversies and potential liabilities by prohibiting any "politics" at work
- Make sure it complies with the exceptions
- Is this realistic?

19

19

Practical Tip: No political activity policy

- Some companies may want to prepare and implement a strong "no political activity" policy with appropriate exceptions for NLRA and applicable state laws

20

20

Practical Tip: Social Media Policies

- Individuals are increasingly turning to social media to express their political views, and these posts can become heated and hostile.
- Employers should consider implementing policies to help prevent employees from using social media or the employer's IT resources to harass their colleagues or attribute personal political opinions to the employer.
- However, employers must be careful not to restrict or chill employees' Section 7 rights under the NLRA.

21

21

Practical Tips

- If employer's policy does permit some workplace discussions of candidates or issues:
  - Remind employees that political discussions must also comply with existing workplace policies
  - Periodically remind employees that company insists on respectful treatment of all personnel, does not tolerate discrimination, harassment or retaliation, etc.
  - If you limit political expression, limit only the types of expression that might harm productivity in the workplace, impact customers, clients, vendors or similar relationships or otherwise disrupt work
  - Enforce "political activity" policy even-handedly

22

22

Practical Tips

- May want to implement a non-solicitation policy that prohibits all forms of solicitation – including political campaigning – during working time

23

23

Practical Tips

- Remind managers and supervisors to avoid political conversations or discussions with their subordinates
  - Consider company policy language

24

24

Practical Tips

- Remind managers to report employee complaints, even if complained-of conduct has political overtones.

25

25

Practical Tips

- Remind managers to evenhandedly enforce dress code and non-solicitation policies
- Enforcement should not be influenced by an employee's political views or activities

26

26

Practical Tips

- Communicate with supervisors regularly during campaign and election season to ensure that they understand the importance of creating a respectful work environment

27

27

Practical Tips

- Seek counsel before disciplining any employee for his/her political activities, including missing work to attend a political rally
- Seek counsel so workplace handbooks and policies are properly written to comply with various laws

28

28

Scenario

- Mountain Sports is a Utah sporting goods company. Its customers tend to be politically to the left and the Company is careful about its image to ensure that its customers keep coming back. Mountain Sports has a high-level employee named George Freemason. George is not so politically left. He loves politics and he is Q Anon curious. Shortly after the Capitol attack on January 6, 2021, George's supervisor, Amy, sees photos on CNN that appear to show George at the Capitol riot and smashing a glass door at the Capitol building. She alerts HR.

29

29

Scenario

- While HR is mulling this over, several of Mountain Sports' customers contact the company and threaten to "cancel" the Company if it does not immediately fire George.
- HR and Amy talk to George and he denies that he was at the riot. He says he was hunting that day.
- Other employees start emailing to each other and customers other photos that appear to be of George at the riot. They add the caption "Traitor in our Midst." George hears about this and threatens to sue the company for defamation.

30

30

Scenario

- HR begins an investigation and learns that prior to the riots, George was making a lot of interesting comments in the workplace about his political views and how Q Anon was fighting immorality. George hates immorality.
- HR also learns that George has been posting interesting posts on FaceBook, Twitter and Parlor about Q Anon conspiracies. HR does a search of George's emails, texts sent on his company supplied phone and social media posts that are open to the public. HR is shocked to find out how much time George was spending on these activities at work.

31

31

Scenario

- IT tells HR that it can probably use George's phone to determine if he was near DC on January 6th.
- Some of George's social media posts are "private" but co-workers who are social media friends bring in copies of the posts. They show that George supported the Capitol riots.
- As George hears more about this investigation, he gathers several of his co-workers who share his views, and they start talking about the company's repression of their First Amendment Rights.

32

32

Scenario

- During the investigation, one co-worker says that she researched George on the internet and found out that he had a criminal record for assault with a gun. HR had done a criminal background check when he was hired but apparently this arrest or conviction happened a year after he started at the Company.

33

33

Scenario

- HR cannot figure out what to do. You are an HR consultant, so they hire you. The Company says to you “please help us with this mess.”

34

34

Thank You

- **Christina M. Jepson**
  801.536.6820
  cjepson@parsonsbehle.com

35

35

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Conducting an Effective Internal Investigation

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

SUSAN BAIRD MOTSCHIEDLER

Of Counsel

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6923
smotschiedler@parsonsbehle.com

BIOGRAPHY

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

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

- 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, and wage issues
- Independent contractor issues
- Drug and alcohol testing
- FMLA and other leave issues
- Terminations and unemployment

PRACTICE AREAS

Employment & Labor
Employment Litigation
Business & Commercial Litigation

LICENSED/ADMITTED

Utah
U.S. Court of Appeals, 10th Circuit

- Union issues
- Investigations
- UALD and EEOC charges and audits
- Training for management and employees

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

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

ACCOMPLISHMENTS

Academic

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

Rhodes College (B.A., 1994)

Major: Anthropology/Sociology

Major: German

Universität Tübingen, Germany (1992-1993)

Professional

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

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

ASSOCIATIONS

Professional

Utah State Bar, Ethics Advisory Committee, Member

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

David K. Watkiss Sutherland II Inn of Court, Member

Salt Lake County Bar Association, Member

PRESENTATIONS

"Conducting an Effective Internal Investigation," 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 27, 2021)

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

Co-Presenter: "COVID-19 Vaccinations in the Workplace: Mandatory, Voluntary or None at All," Parsons Behle & Latimer Virtual CLE (February 10, 2021)

Co-Presenter: "Trends in Employment Law Cases Related to COVID-19," 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

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

Co-Presenter: "What Every Employer Should Know Before Resuming Business in Utah," Visit Salt Lake (May 12, 2020)

Co-Presenter: "Moving Forward: Resuming Business in a Changed Environment," Missoula Economic Partnership (May 7, 2020)

Co-Presenter: "Utah Businesses Reopen: What Employers Should Know for a Successful Transition," Park City Chamber of Commerce (May 6, 2020)

Co-Presenter: "Employer Considerations to Successfully Reopen a Business," South Valley Chamber (May 5, 2020)

Co-Presenter: "Employer Considerations to Successfully Reopen a Business," Parsons Behle & Latimer Webinar (April 29, 2020)

Co-Presenter: "CARES Act and Families First Coronavirus Response Act - What the Acts Means to Your Business and How to Respond," Family-Owned Business Alliance Webinar (FOBA) (April 2, 2020)

Co-Presenter: "Families First Coronavirus Response Act," Webinar - WTC Utah (March 27, 2020)

Co-Presenter: "Families First Coronavirus Response Act," Parsons Behle & Latimer Webinar (March 23, 2020)

"Performance Reviews and Evaluations: Risks and Solutions," Parsons Behle & Latimer 7th Annual Idaho Employment Law Seminar (October 10, 2019)

"Performance Reviews and Evaluations," Utah SHRM Crossroads Conference (September 24 and 25, 2019)

"Performance Reviews and Evaluations: Risks and Solutions," Parsons Behle & Latimer 31st Annual Employment Law Seminar (May 22, 2019)

PUBLICATIONS

Co-author: "Looking Forward: How to Manage Your Workforce in 2020 and Beyond," Parsons Behle & Latimer COVID-19 Response Resources (June 30, 2020)

Co-author: "OSHA Issues New Enforcement Policies Regarding Workplace Inspections and Employer Recording Requirements for COVID-19," Parsons Behle & Latimer COVID-19 Response Resources (May 22, 2020)

Co-author: "Re-Opening for Business: Employers Should Begin Planning Now," Parsons Behle & Latimer COVID-19 Response Resources (April 14, 2020)

Co-Author: "Top Nine Takeaways from New FFCRA Regulations," Parsons Behle & Latimer COVID-19 Response Resources, April 3, 2020

Co-author: "Emerging Questions For Employers Under The Families First Coronavirus Response Act And Other Coronavirus Employment Issues," Parsons Behle & Latimer COVID-19 Response Resources, March 24, 2020

Co-author: "Covid-19 Leave and Sick Pay Statute Enacted," Parsons Behle & Latimer COVID-19 Response Resources, March 19, 2020

Co-author: "Covid-19, Family Medical Leave Act and Paid Time Off – Employer Questions Answered," Parsons Behle & Latimer COVID-19 Response Resources, March 17, 2020

"Weinstein Trial and Rape Conviction Offers Cautionary Tale and Reminder to Companies About Employee Harassment, Title VII Liability and the Tone Leadership Sets," Parsons Behle & Latimer Legal Briefings (February 27, 2020)

"Responses to the #MeToo Movement," Parsons Behle & Latimer Legal Briefings (April 29, 2019)

"Utah's New .05 Blood Alcohol Limit Will Become Effective During the 2018-2019 Holiday Season," Parsons Behle & Latimer Legal Briefings (December 6, 2018)

"EEOC and UALD Filings Update," Parsons Behle & Latimer Legal Briefings (November 7, 2018)

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Conducting an Effective Internal Investigation

Susan Baird Motschiedler
801.536.6923 | smotschiedler@parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY parsonsbehle.com

1

Agenda

A. Critical Investigation Triggers
B. Scope of Investigations: What to Consider
C. Legal Best Practices for Interviews and Evidence Collection
D. Memorializing and Preserving Investigation Evidence
E. Legally and Efficiently Remedying the Problem

2

2

Critical Investigation Triggers

3

Critical Investigation Triggers

- When Should you Investigate?
- When you become aware of employee conduct that, if true, could create legal exposure for the company, like
  - Unlawful discrimination – race, color, religion, sex, national origin, citizenship, age, disability, veteran status, retaliation, etc.
  - Unlawful harassment – same types
  - Violations of other statutory/legal obligations – securities, financial fraud, insider trading, espionage, government funds, etc.

4

4

Critical Investigation Triggers

- When you become aware of employee conduct that is creating problems within the company, including:
  - Employee theft
  - Employee sabotage
  - Workplace accidents
  - Workplace violence
  - Drug & alcohol use
  - Others

5

5

Critical Investigation Triggers

- Come to Company's Awareness Through:
  - Own observation or analysis of data
  - Anonymous complaint hotline
  - Employee complaint/report
  - Customer complaint
  - Rumor
  - Any other way you learn of a possible problem

6

6

Scope of Investigations: What to Consider

7

Scope of the Investigation

- What is the goal of every investigation?
  - Uncover the truth
  - Prepare a legal defense
  - Preservation of evidence
  - Stop illegal or bad conduct
  - Correct problems

8

8

Scope of the Investigation

- How do you reach the truth?
  - Gather enough evidence
  - Interview enough people
  - Remain impartial until you finish gathering facts
  - Carefully compare and analyze everything you gathered to determine what the weight of the evidence says

9

9

Scope of the Investigation

- Consider each of these goals in your investigation plan to determine what to look at in three categories:
  - Witnesses
  - Documents
  - Things

10

10

Witnesses

- Witnesses
  - Make a list of everyone likely to have seen or heard details
  - Sort it into two categories:
    1) those likely to have personal knowledge of the most critical facts (personal face to face interviews will be done); and
    2) others (emails or phone calls may suffice)

  Note - Your list may change as you go

  - Keep notes as to the decisions you make along the way

11

11

Documents

- Documents
  - Make a list of all documents likely to be relevant
  - Documents might include, for example:
    - Policies and procedures
    - Statements or notes taken about the incident
    - Personnel file of accuser
    - Personnel file of accused
    - Incident files involving prior complaints by the accuser or against the accused

12

12

Documents

Documents (cont.)

- Manager's notes and files about employees involved or work area implicated
- Personnel files of other critical witnesses
- Logs and diaries
- Timecards or security badge readings
- Expense reports and receipts
- Texts, emails, social media posts, phone logs
- **Note - your list may change as you go**

13

13

Things and Locations

- Things and Locations
  - Make a list of everything that might help you understand what happened or help prove or disprove an allegation
  - This might include, for example:
    - A worksite visit to the location (for context or evidence)
    - Injuries
    - To understand the physical layout
    - A surveillance tape
    - A phone recording
  - **Note - Your list may change as you go**

14

14

Legal Best Practices for Interviews and Evidence Collection

15

Interviews and Evidence Collection

- Interview Witnesses or Gather Evidence First?
  - Nature of the investigation subject
    - *i.e.*, allegations of harassment/assault vs. allegations of ongoing fraud
    - Do witnesses need immediate attention?
- Concerns regarding spoliation?
- Identify tools at your disposal
  - IT
  - Backups of data
  - Outside forensic company

16

16

Outlines and Order of Witnesses

- Prepare an interview outline for each witness to be personally interviewed
- Include standard comments and questions plus witness-specific ones
- Use the format that works best for you:
  - Specific questions
  - Broader topics
  - Some combination of those
  - Open-ended questions elicit information
- Signed witness statements?

17

17

Order of Witnesses

- Interview Complainant first and promptly (perhaps before planning most of the investigation and before witness outlines complete)
  - Shows the Complainant you are taking it seriously
    - Complainant may otherwise complain to coworkers; governmental agencies
    - Problem may get worse
  - There may be immediate corrective action to take
  - Informs the scope and order of witnesses
  - Informs the documents needed

18

18

Order of Witnesses

- Interview other witnesses
  - Separately
  - Never as a group
  - Update witness outlines/questions as needed
- Interview accused last
  - Otherwise, is a risk that the accused will try to influence testimony of others.
- Re-interview witnesses as needed for clarification/confrontation of different facts.

19

19

Topics to Cover

- Topics to cover:
  - Introductory comments
    - Upjohn Warning
    - Confidentiality
  - Witness background
  - Witness credibility
    - Bias – friendship; brown-nosing
    - Basis for information

20

20

Topics to Cover

- Topics to cover (cont.)
  - The incident
  - Witness documentation
  - Other witnesses
  - Closing comments
    - Confidentiality
    - Retaliation concerns
    - Contact information
- After interview, edit witness outlines as needed

21

21

Evidence Collection

- Document Hold
  - Suspend automatic destruction/deletion
  - Notify custodians
  - Make copies of employee accounts/computers
  - Ask witnesses for relevant documents
  - Document what you have done
- Retain all documents relevant to the investigation
  - Keep references of witnesses who can authenticate
  - Maintain by custodian
  - Make copies for the interviews – do not write on originals!

22

22

Memorializing and Preserving Investigation Evidence

PARSONS BEHLE & LATIMER

23

Interview Notes

- Take notes however best suits you
  - Legal pad, spiral notebook, lab notebook
  - Computer
- Review notes immediately after interview:
  - Number your pages (1 of 10, 2 of 10, etc.)
  - Fill in gaps
  - Clarify cryptic notes
  - Make notes on credibility (worthwhile to have separate credibility determination)
  - Follow up immediately with company personnel on any issue that needs immediate attention

24

24

Preservation of Investigation Notes

- At end of each interview (cont.):
  - Determine additional questions for other witnesses
  - Edit other witness outlines
  - Determine if additional documents are needed for witnesses
  - Make copies of any documents you have received
    - Keep originals separate
    - Make notes on your copies
- Convert notes to electronic format (scan as pdf or dictate and have typed) and store as part of the investigation file.
- Save under each witness

25

25

Preservation of Investigation Notes

- To record or not to record:
- Pros:
  - Transparent and open investigations
  - Protects against potential prejudice or overreach of investigator
- Cons:
  - If record one, must record all
  - Can become evidence in other, unrelated matters
  - Does not fully record details upon which credibility may be based
  - Allows for additional scrutiny of credibility determinations

26

26

Documents

- Document your system for keeping files separate and secure
- Document how you obtained the document
  - IT, outside vendor, witness, etc.
  - Document the custodian of the document
- Preserve the original document –
  - Preserve metadata of ESI
  - Do not write on a paper document!
- Make Copies of documents for interviews
  - Interviewee set
  - Interviewer set (perhaps one per witness; notes on document)
- Mark documents with attorney notes as “Attorney Work Product”

27

27

Witness Statement Documents

- Decide whether to create witness statements for each witness:
  - One per witness (all or none; unless compelling reason)
  - Succinct write-up of relevant facts and information
  - Written shortly after interview
  - Reviewed and signed by witness
  - Any changes should be noted, initialed
    - Review any changes with the witness to make sure you understand the testimony and reasons for the change
    - If changes are significant, this warrants a re-interview
    - Do your own witness statement with signature describing the change in story and why you do or do not believe it

28

28

Investigation Report

- View investigation report as free-standing document
- Destroy any working drafts of report
- Investigation report should identify:
  - Investigator
  - Company
  - Dates of Investigation
  - Every document, witness, physical item and physical location examination
  - Dates of witness interviews or site visits

29

29

Investigation Report

- Investigation report should include:
  - A summary of the issues raised
  - Relevant facts
  - Methodology used to conduct the investigation
  - Scope of the investigation
  - Applicable law
  - Findings and facts that support the findings
  - Any recommendations

30

30

Investigation Report Best Practices

- Investigation Report Best Practices:
  - Explain the basis for your determinations about credibility of witnesses or documents where there are conflicts in the evidence;
  - When you are reaching and explaining your credibility decisions and ultimate conclusions, identify and deal head on with problems in the evidence – do not bury or ignore troubling facts.

31

31

Investigation Report Best Practices

- When you are reaching credibility decisions and ultimate conclusions, you must be able to convincingly explain why you are choosing what evidence to believe.
- If your explanations and conclusions are not convincing, they are either poorly written or they are wrong.
- If your conclusions aren't convincing, reexamine the evidence, reexamine credibility determinations, and re-think conclusions before re-drafting the section.

32

32

Legally and Efficiently Remedying the Problem

33

Remedying the Problem

- Remedial measures should be implemented or considered:
  - Disciplinary actions, such as reprimands, warnings, last chance warnings, suspension, demotion, salary freeze or termination of personnel
  - Measures to prevent recurrence
  - New compliance procedures
  - New internal controls
  - New training/different training
  - Appointment of new personnel overseeing compliance, finances, or accounting
  - New chains of command that would help reveal misconduct
  - Additional or new auditing procedures

34

34

Remedying the Problem

- Remedial measures (cont'd) :
  - Enhanced **periodic reporting** to senior management, the audit committee, or the board of directors
  - Appointment of **additional compliance** personnel, such as regional or in-country compliance officers, to supplement existing compliance personnel
  - Reviewing **internal controls** from a cross-disciplinary team that includes personnel from the finance, internal audit, legal, and audit departments

35

35

Thank You

- **Susan Baird Motschiedler**
  801.536.6923
  smotschiedler@parsonsbehle.com

36

36

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Hot Employment Topics Session #2

Liz M. Mellem
406.317.7240 | amellem@parsonsbehle.com

Sean A. Monson
801.536.6714 | smonson@parsonsbehle.com

Please see section 2 for Liz and Sean's attorney biographies.

PARSONS BEHLE & LATIMER

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Hot Employment Topics – Session 2

Liz M. Mellem
406.317.7240
amellem@parsonsbehle.com

Sean A. Monson
801.536.6714
smonson@parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY parsonsbehle.com

1

Marijuana Legalization

PARSONS BEHLE & LATIMER

2

States Where Marijuana is Legal

3

3

Marijuana Policies in the Workplace

- Remember: Marijuana/Cannabis is still **illegal** on a federal level
- Different laws in different states – where are your employees?
- Reasonable accommodations for medical marijuana use
- Best practices with policies:
  - No marijuana use on the job (*i.e.*, treat it like alcohol use)
  - Train managers to spot signs of impairment
  - Review/revise your drug testing policies – stay on top of current technology to use best test for your workplace
  - Have your attorney review before setting policies and testing rules
    - testing policies may need to be different in different states
    - Some jurisdictions have specific laws re pre-employment testing for marijuana
  - Educate employees about company marijuana-use policy and the repercussions for failed tests, including random, post-accident or reasonable suspicion tests
    - Signed acknowledgement from employee that knows, understands, and will comply with policy

4

4

Shifting to COVID . . .

5

Where We Are: Current State of COVID-19

- 1st Reported COVID-19 Case in the United States: **January 20, 2020**
- 1st Reported COVID-19 Death in the United States: **February 6, 2020** (confirmed by autopsy April 2020)
- 45,316,210 total cases in US
- 733,834 total deaths in US

*All information current as of 10/24/2021

*Sources: New England Journal of Medicine (March 5, 2020); Center for Infectious Disease Research and Policy (April 22, 2020); CDC COVID Data Tracker

6

6

"Remote Work" in the COVID Era

7

Challenges of Remote Work

- Remote working presents various challenges for companies and their management
- Some of the "soft" issues that can arise are:
  - Loss of social connectedness and loneliness for many employees, which can negatively affect performance and commitment to organizational goals
  - Increased risk among employees for substance abuse and addiction
  - Companies might need to begin/alter employee assistance programs and hire staff trained to recognize mental health issues
  - Possible development of new performance management and appraisal systems for remote-working employees
  - Expectation/fear from employees that company will institute new modes of surveillance now that employees are not in the office
- Also presents numerous legal issues

8

8

Legal Issues to Consider When Allowing Remote Work

- There are various legal issues that a company must consider if it is allowing/encouraging remote work
  - Drafting a remote work policy
  - Exempt v. Non-Exempt employees
  - Safety of employees working from home
  - Multi-state presence
  - Remote work expenses
  - Terminating a remote employee
  - Drafting a remote-work agreement
- Following slides are a **brief** overview of the issues/considerations

9

9

Draft and Implement a Remote Working Policy

- Establish a policy that:
  - Gives criteria for deciding whether specific position is appropriate for remote work / telecommuting
  - Provides guidelines for management/HR to respond to requests for permission to work remotely
  - Eliminates subjectivity from decisions to grant/deny remote work
  - Manages attendance, hours tracking, expenses and productivity measurements
  - Reinforces company's policies overall including drug/alcohol policies
  - May need different policies for different departments/groups of employees

10

10

Exempt v. Non-Exempt Remote Employees

- **FLSA applies** to all employees regardless of where they work
- Employees are **entitled to be paid for all hours** they work regardless of whether they work in an office or at home and regardless of any policy that requires employer approval before working overtime
- Telecommuters work on an **honor system** since they don't punch a clock
- Employers must emphasize the importance of timely and accurate **recordkeeping** of hours worked
- Non-exempt telecommuters are entitled to the same **meal and rest** period as office employees, again on an honor system
- Employers should be careful when crafting a telecommuting arrangement that the agreement does not contain any terms that could **destroy the employee's exempt status**
  - Examples include terms requiring specific working hours or limiting an exempt employee's discretion in certain decisions

11

11

Working From Home Safely

- From a worker's compensation point of view, **employers remain liable** for workers' injuries even when the injury occurs in a home office, as long as the injury arose in the "course and scope" of employment
- Employers should **check with their workers' compensation carriers** and ensure that the carrier provides the same coverage for work-related injuries at remote locations as it does for injuries sustained in the main office
- Strategies to limit liability:
  - asking telecommuters to **designate one room** of their house as a home office
  - **restricting hours** the telecommuter is allowed to work
  - A signed acknowledgement from the employee that injuries which occur outside the designated location, or outside the designated hours, will not be covered through workers compensation

12

12

Employees in Multiple States/Jurisdictions

- Employees working from home in various states can present several challenges:
  - Tax issues (e.g., You may have to withhold and pay taxes for both states)
  - Things can get tricky when, say, an employee who's on the payroll of a Utah Company works from his/her home in Idaho
  - State laws are often very specific about such things as methods of tax withholding, workers' compensation coverage, unemployment and the like
  - Even zoning laws can come into play--some jurisdictions prohibit home offices in certain areas

13

13

Employees in Multiple States/Jurisdictions cont.

- In general, employees are covered by the **labor laws of the state in which they perform work**, regardless of where the company's offices are located
  - Remember: MT is ***not*** an at-will state
- This means that an employer may have to learn a whole new set of laws if it allows an employee living in a different state to telecommute
- For instance, employer is in Idaho, but the employee works in California, the employer will have to familiarize itself with both Idaho and California law

14

14

Home Office Expenses

- **Tax laws regarding home office deductions** for the employee are complex and somewhat unclear
- Employees should be encouraged to **check with their own tax consultant** before assuming that the home office deduction will be allowed, especially for those employees who have an office available to them full-time at their employer's location but are working in a remote location voluntarily
- If applicable, Employers should clearly establish that they are **not responsible for the tax consequences** associated with a telecommuting arrangement and that the arrangement is being requested by, and is for the benefit of, the employee
- Be familiar with whether your state requires employers to pay for certain home expenses related to work performed for the employer

15

15

Termination of Employee Working From Home

- "Security will escort you out"
  - One thing to **change a password** so the former employee can no longer access the employer's computer system and database, it is quite another to **gain access to an employee's own computer** hard drive to retrieve work-related files saved there
  - May be difficult to **retrieve computers and other equipment** which have been provided to the telecommuting employee
  - An employer has **no legal right to enter an employee's private residence** even if it is to retrieve company property
  - The employer **cannot hold an employee's final paycheck** "hostage" pending return of all company-issued equipment

16

16

Telecommuting Agreement

- One way to address the legal issues is to have a **telecommuting agreement**
  - Expectations—specific schedule at home, specific schedule at work, duties
  - Whether the employee's employment will change due to participation in a telecommuting program, including such terms as compensation and work responsibilities
  - Arrangement may be terminated or amended – it is not a contract
  - Application of company policies at home, including schedule and time-keeping
    - What about dress code?
  - Require recording of sick days, overtime, vacation, leave
  - Establish obligation to communicate at regular intervals, attend face-to-face meetings at times
  - Property checklist (all hardware and equipment provided to employee by company)
  - Expense reimbursement policy (beware of FLSA violation)
  - Privacy policies

17

17

Beware of Discrimination Claims

- Telecommuting for only a portion of employees can lead to discrimination claims
  - Certain employees may claim discrimination if not allowed to work remotely → **Do not assign/allow remote work based on a protected classification** (*e.g.* allowing only women to work from home)
  - Avoid discriminating against those who are working remotely (*e.g.* lack of promotions/raises)
  - A lack of consistency can lead to discrimination claims
  - Solution: written policy; legitimate, objective business standards, etc.

18

18

Common Mistakes

- Avoid these common mistakes when allowing remote work:
  - Failing to provide meal/rest breaks
  - Ignoring (not prioritizing) employee morale and cohesion among team members
  - Not maintaining worker's compensation insurance on remote employees
  - Assuming HQ's state's law applies
  - Ignoring physical security of company property in employee's home
  - Failing to consider cyber security at employee's home
  - Assuming all remote employees are exempt
  - Failing to have (and implement) a telecommuting policy
  - Not tracking employees' time accurately

19

19

Masks – Policy or No Policy?

20

CDC Guidance on Masks

- Currently, the Centers for Disease Control and Prevention recommends if an individual is not fully vaccinated and is aged 2 or older, the individual wear a mask in indoor public places
- If a person is fully vaccinated, wear a mask indoor public places in locations of "high transmission"
  - Ada County is currently (as of 9/6/21) an area where "community transmission is High"
- Generally, masks not recommended outdoors unless in a place where social distancing is not possible
- "Best practice" for your company will be based on many factors

21

21

To *Require* Masks, or not?

- Generally, it is up to each employer whether to require employees to wear masks while working
  - EEOC says you can require masks
  - If you choose to require masks, best practice is to provide masks to employees
- Have option to require masks if employees are not vaccinated (thus, incentivizing vaccinations)
  - More on this in a little bit
- But remember if your employees are in MT, you cannot treat employees differently based on vaccination status = ALL or NONE
- Guidance (and laws) are changing constantly, so be aware of what is happening in each location where you have employees!

22

22

Drafting a Face Mask Policy

- Check CDC, OSHA, EEOC, state and local rules/policies
- Be flexible! Everything is changing quickly.
- The policy should include
  - Description/explanation of COVID-19 and facts about how wearing a mask reduces spread of the virus
  - Instructions/training on wearing, maintaining, and cleaning mask properly
  - Details about when/where masks should be worn (i.e., in the break room? Only in public areas? What about individual offices when alone?)
  - Where to get a mask from Employer and what type of masks are acceptable if employee is providing their own (Tip: check local requirements to verify whether you are required
  - How to clean/dispose of mask
  - Consequences of not complying with policy
  - Employee signature acknowledging read/reviewed/understand policy + date of signing

23

23

Masking Exemptions

- In some instances, an employee may reasonably refuse to wear a mask:
  - Mask interferes with performance of employee's job (e.g., fogging and unable to see)
  - Mask creates a workplace hazard (OSHA regulations note that respirators can sometimes be a hazard = where impedes hearing or smelling a hazard, or risk mask may get caught in machinery)
  - Mask aggravates a medical condition
- If employee seeks exemption due to medical or religious reasons, engage in interactive dialogue (will explain this more in vaccination section)

24

24

COVID-19 Vaccines – Accommodation Required?

25

NEVER ENDING COVID -- VACCINATIONS

- **EEOC** has said that employers can mandate vaccinations – can require proof of vaccination
- Some states are mandating that state employees or health care workers be vaccinated by October 18, 2021
- Disability Exemption
  - ADA Disabilities
  - Medical Certification
    - Disability
    - COVID 19 vaccine is contraindicated by disability

26

26

NEVER ENDING COVID -- VACCINATIONS

- If demonstrate disability, then accommodation
  - Accommodation cannot pose a safety risk to employee, co-workers, customers, or cause an undue burden
- Religious exemption – Title VII
  - Sincerely held religious belief
  - Really "squishy" -- courts have not historically been able to give good definition
  - Dreaded "case by case" analysis

27

27

NEVER ENDING COVID -- VACCINATIONS

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

28

28

NEVER ENDING COVID -- VACCINATIONS

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

29

29

NEVER ENDING COVID -- VACCINATIONS

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

30

30

NEVER ENDING COVID -- VACCINATIONS

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

31

31

NEVER ENDING COVID -- VACCINATIONS

- Religious Accommodation – Information Supporting Belief
  - Documentation regarding religious belief
  - Statement from religious leader

32

32

NEVER ENDING COVID -- VACCINATIONS

33

33

NEVER ENDING COVID -- VACCINATIONS

- Church of the Flying Spaghetti Monster -- Pastafarianism
- The central creation myth is that an invisible and undetectable Flying Spaghetti Monster created the universe "after drinking heavily".
- According to these beliefs, the Monster's intoxication was the cause for a flawed Earth.
- Further, according to Pastafarianism, all evidence for evolution was planted by the Flying Spaghetti Monster in an effort to test the faith of Pastafarians.

34

34

NEVER ENDING COVID -- VACCINATIONS

- When scientific measurements such as radiocarbon dating are taken, the Flying Spaghetti Monster "is there changing the results with His Noodly Appendage.“
- The Pastafarian conception of Heaven includes a beer volcano and a stripper (or sometimes prostitute) factory.
- The Pastafarian Hell is similar, except that the beer is stale and the strippers have sexually transmitted diseases.

35

35

NEVER ENDING COVID -- VACCINATIONS

- Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held.
- Rather, religion typically concerns “ultimate ideas” about “life, purpose, and death.”

36

36

NEVER ENDING COVID -- VACCINATIONS

- "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs."

37

37

NEVER ENDING COVID -- VACCINATIONS

- "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance," although "[e]vidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity."

38

38

NEVER ENDING COVID -- VACCINATIONS

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

39

39

NEVER ENDING COVID -- VACCINATIONS

- Accommodation
  - Not required if:
    - Would pose a direct threat to EE
    - Would pose a direct threat to co-workers
    - Would pose a direct threat to customers/clients
    - Causes an undue burden to the employer
  - Direct threat factors -- (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

40

40

NEVER ENDING COVID -- VACCINATIONS

- Additionally, the assessment of direct threat should take account of the type of work environment:
  - whether the employee works alone or with others or works inside or outside;
  - the available ventilation;
  - the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees;
  - the number of partially or fully vaccinated individuals already in the workplace;
  - whether other employees are wearing masks or undergoing routine screening testing;
  - the space available for social distancing.

41

41

NEVER ENDING COVID -- VACCINATIONS

- If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat.
- Potential reasonable accommodations could include:
  - requiring the employee to wear a mask
  - work a staggered shift
  - making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees)
  -

42

42

NEVER ENDING COVID -- VACCINATIONS

- Potential reasonable accommodations could include (Cont.)
  - permitting telework if feasible
  - reassigning the employee to a vacant position in a different workspace.

43

NEVER ENDING COVID -- VACCINATIONS

- Undue Hardship
  - Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship.
  - ADA -- undue hardship is an action requiring **significant difficulty or expense** as it relates to the individual business.
  - Title VII -- undue hardship is an action **having more than minimal cost or burden** on the employer.
    - This is an easier standard for employers to meet than the ADA's undue hardship standard.

44

NEVER ENDING COVID -- VACCINATIONS

- Undue Hardship Factors
  - Normally
    - Size of business
    - Number of employees
    - Financial resources of ER
    - Cost of accommodation
  - COVID 19 Vaccination Context
    - the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown

45

NEVER ENDING COVID -- VACCINATIONS

- Interactive Process
  - Be flexible
  - Consider all options

46

46

NEVER ENDING COVID -- VACCINATIONS

- Keep vaccination information confidential
  - Separate from personnel file
  - Limited access
- Policy
  - Create a vaccination policy – explain mandatory or encouraged
    - Pay for time to get vaccine if mandatory
  - Explain exemptions
  - Provide forms for employees to request exemptions

47

47

NEVER ENDING COVID -- VACCINATIONS

- Incentives
  - If ER is administering vaccine – constraints on size of incentive to ensure is not coercive in forcing employees to provide medical information
  - If administered by third parties – does not appear to be constraint on size
  - Alternatives for the EEs claiming exemptions

48

48

Montana's Exception: HB 702

- Montana's 2021 Legislature expanded the Montana Human Rights Act and made "vaccination status" a protected class
- The new law makes it unlawful for an employer to **"discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status . . ."**
  - Effectively bans mandatory vaccination policies in MT (some exceptions for hospitals, long term care facilities)
  - Applies to ALL vaccines, not just COVID-19
  - Can *ask* if an employee is vaccinated but MT employee is not required to answer
- Tension: protects individual liberties *but* burdens businesses

49

49

Thank You

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

50

50

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Utah's Non-Compete Statute – The Five-Year Anniversary

Derek Langton
801.536.6704 | dlangton@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

DEREK LANGTON

Shareholder

201 South Main Street, Suite, 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6704
dlangton@parsonsbehle.com

BIOGRAPHY

Derek Langton is a shareholder at Parsons Behle & Latimer, past chair of the firm's Litigation practice group, and is also a member of the firm's Employment Law practice group. The primary emphasis of his practice is in the areas of non-compete and non-solicitation agreements, confidentiality and non-disclosure agreements, and the protection of trade secrets. He is also actively involved in other areas of employment law, as well as in business, commercial and real property litigation.

Mr. Langton has been with Parsons Behle & Latimer for more than 30 years. During that time, he has litigated numerous cases involving non-compete agreements, non-solicitation agreements, and confidentiality (or non-disclosure) agreements, and the protection of trade secrets. He frequently advises both employers and employees regarding such agreements. He has also represented employers in a variety of employment discrimination, wrongful termination, and sexual harassment matters. In addition, Mr. Langton has extensive experience in complex commercial and contract litigation, and in real property litigation, including road access issues, easements, boundary disputes, and condemnation or eminent domain.

Mr. Langton is a skilled trial lawyer and has tried numerous cases during his career involving, among other things, disputes in the areas of employment, non-compete agreements, trade secrets, contracts, real property, condemnation, and complex commercial matters. He holds an AV® rating through the *Martindale-Hubbell* rating service. He has served as a bar examiner for the Utah State Bar for approximately 25 years, and he is the longstanding chairperson of the contracts committee of bar examiners. He also previously served as the chairperson of the Labor and Employment Law Section of the Utah State Bar.

ACCOMPLISHMENTS

Academic

University of Utah College of Law (J.D., 1983)

Staff Member, *Utah Law Review*, (1982 - 1983)

William H. Leary Scholar

PRACTICE AREAS

Business & Commercial Litigation
Employment & Labor
Employment Litigation
Real Estate Litigation
Trade Secret Litigation

LICENSED/ADMITTED

Utah
U.S. Court of Appeals, 9th Circuit
U.S. Court of Appeals, 10th Circuit

University of Utah (B.A., 1978)

Honors: *Magna Cum Laude*

Professional

Listed in Utah Legal Elite by *Utah Business* Magazine (multiple years)

AV® Preeminent™ rated through *Martindale-Hubbell*

Formerly active in the Boy Scouts of America

ASSOCIATIONS

Professional

Utah State Bar, Member, Labor & Employment Section,
Chair, Contracts Committee of Bar Examiners, Bar Exam Grader

American Bar Association, Member (1983 - Present)

Salt Lake County Bar Association, Member (1983 - Present)

Federal Bar Association, Member

PRESENTATIONS

"Utah's Non-Compete Statute - The Five-Year Anniversary," 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 28, 2021)

"Sex? Drugs? Guns? Travel Time? Ensure Your Employment Policies are Up-to-Date," 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

"Essential Tips for Avoiding Discrimination Claims," Parsons Behle & Latimer Boise Employment Law Seminar (October 10, 2019)

"Essential Tips for Avoiding Discrimination Claims," Utah SHRM Crossroads Conference (September 24 and 25, 2019)

"Essential Tips for Avoiding Discrimination Claims," Parsons Behle & Latimer 31st Annual Employment Law Seminar (May 22, 2019)

PUBLICATIONS

Co-Author: "Trade Secrets: Utah," *Practical Law* (March 2014)

Co-Author: "Non-compete Laws: Utah," *Practical Law* (March 2014)

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Utah's Non-Compete Statute – The Five-Year Anniversary

Derek Langton
801.536.6704 | dlangton@parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY parsonsbehle.com

1

What We Know

PARSONS BEHLE & LATIMER

2

The Post-Employment Restrictions Act

- The Act was enacted during the 2016 legislative session
- It has an effective date of May 10, 2016, and it only applies to non-compete agreements entered into on or after May 10, 2016
- The most significant aspect of the Act is that a non-compete provision covered by the Act cannot last more than one year "from the day on which the employee is no longer employed by the employer." (Utah Code § 34-51-201(1))
- Importantly, a non-compete covenant "that violates this subsection is void." (*Id.*)

3

3

The Post-Employment Restrictions Act

The Act defines "Post-Employment Restrictive Covenant" as follows:

> "Post-Employment Restrictive Covenant," also known as a covenant not to compete" or "noncompete agreement," means an agreement, written or oral, between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes, or services that are similar to the employer's products, processes, or services.

(Utah Code § 34-51-102(4)(a))

4

4

The Post-Employment Restrictions Act

The key provision in the Act states that

> … ***in addition to any requirements imposed under the common law***, for a post-employment restrictive covenant entered into on or after May 10, 2016, an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. …

(Utah Code § 34-51-201(1) (emphasis added))

5

5

The Post-Employment Restrictions Act

Importantly, the Act states that the term "'Post-Employment Restrictive Covenant' does ***not*** include nonsolicitation agreements or nondisclosure or confidentiality agreements." (Utah Code § 34-51-102(4)(b) (emphasis added))

6

6

The Post-Employment Restrictions Act

The Act also contains a section entitled "Exceptions," which contains two subparts:

- "This chapter does not prohibit a reasonable severance agreement mutually and freely agreed upon in good faith at or after the time of termination that includes a post-employment restrictive covenant. …"
- "This chapter does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business."

(Utah Code § 34-51-202(1) & (2))

7

7

The Post-Employment Restrictions Act

The Act defines the term "sale of a business" to mean "a transfer of the ownership by sale, acquisition, merger, or other method of the tangible or intangible assets of a business entity, or a division or segment of the business entity." (Utah Code § 34-51-102(5))

8

8

The Post-Employment Restrictions Act

The Act also provides that "[i]f an employer seeks to enforce a post-employment restrictive covenant through arbitration or by filing a civil action and it is determined that the post-employment restrictive covenant is unenforceable, the employer is liable for the employee's:

(1) costs associated with arbitration;

(2) attorney fees and court costs; and

(3) actual damages."

(Utah Code § 34-51-301)

9

9

The Post-Employment Restrictions Act

The Act was amended in 2018 to address post-employment restrictive covenants involving employees in the broadcasting industry

Pursuant to the amendments, a post-employment restrictive covenant ("PERC") between a broadcasting employee and a broadcasting company is valid only if (a) the employee is an exempt employee under the FLSA, (b) the PERC "is part of a written employment contract of reasonable duration, based on industry standards, the position, the broadcasting employee's experience, geography, and the parties' unique circumstances[,]" and (c) the employee is discharged for cause or for breaching the employment contract (Utah Code § 34-51-201(2)(a))

10

10

The Post-Employment Restrictions Act

The 2018 amendments also provide that a PERC between a broadcasting employee and a broadcasting company is enforceable for no longer than the earlier of (1) one year after the day on which the employee is no longer employed by the broadcasting company, or (2) the day on which the original term of the employment contract containing the PERC ends (Utah Code § 34-51-201(2)(b))

Also, a PERC between a broadcasting employee and a broadcasting company that does not comply with the applicable subsection of the Act is void (Utah Code § 34-51-201(2)(c))

11

11

The Post-Employment Restrictions Act

- In the more than five years since the Act went into effect, not even a single case has been decided, either in Utah state or federal court, in which the court has interpreted the meaning of any of the provisions of the Act
- In fact, I have not found a single case anywhere in the country citing to the Utah statute

12

12

What We Don't Know

13

Questions About the Act

- Is there any circumstance under which an employer can enter into a valid non-compete agreement with an employee that would extend for more than one year after the end of the employee's employment?

14

14

Questions About the Act

Let's look again at the specific language of the "Exceptions" section:

- "This chapter does not prohibit a reasonable severance agreement mutually and freely agreed upon in good faith at or after the time of termination that includes a post-employment restrictive covenant. …"
- "This chapter does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business."

(Utah Code § 34-51-202(1) & (2))

15

15

Questions About the Act

Let's look again at the critical language in the key provision of the statute:

> "[F]or a post-employment restrictive covenant entered into on or after May 10, 2016, ***an employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer***. …

(Emphasis added)

16

16

Questions About the Act

- How do we reconcile the fact that the title of the particular section is "Exceptions"? That's got to account for something, right?
- Not necessarily – the U.S. Supreme Court has explained that the title of a statutory provision cannot limit the plain meaning of the text, and instead can only be used when it sheds light on some ambiguous word or phrase (*See Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *see also State v. Gallegos*, 2007 UT 81, ¶ 16, 171 P.3d 426 (2007) ("The title of a statute is not part of the text of a statute, and absent ambiguity, it is generally not used to determine the statute's intent."))

17

17

Questions About the Act

Importantly, there is nothing in the ***text*** of the two subparts in the "Exceptions" section – or, for that matter, anywhere else in the Act – that says that you can have a valid post-employment restrictive covenant that lasts more than one year from the last day of employment

> Put another way, there is no language in the ***text*** of the Act that says that if a post-employment restrictive covenant falls within one of the "Exceptions," the one-year limitation does not apply

18

18

Questions About the Act

- What if the company's non-solicitation-of-customers provision goes beyond merely prohibiting solicitation of customers? For example, what if the provision says that a departing employee cannot do business, or enter into any agreements, with any of the company's customers?
- Some lawyers have argued that, if the non-solicitation-of-customers provision goes beyond merely prohibiting solicitation of customers, then it is effectively a non-compete provision, and is thus void

19

19

Questions About the Act

What if, in connection with the termination of an employee's employment, the company has the employee sign a settlement and release agreement containing a post-employment restrictive covenant, and containing a provision to repurchase (or redeem) some shares of stock in the company that the employee owns?

Would the redemption of the stock fall within the "Exceptions" provision involving a post-employment restrictive covenant "related to or arising out of the sale of a business"?

20

20

Questions About the Act

Let's look again at the Act's definition of the term "sale of a business," which is defined to mean "a transfer of the ownership by sale, acquisition, merger, or other method of the tangible or intangible assets of a business entity, or a division or segment of the business entity." (Utah Code § 34-51-102(5))

21

21

Best Practices

22

Best Practices

1. If a non-solicitation-of-customers provision (along with a confidentiality/non-disclosure provision) would be sufficient to protect your business, then don't require employees to sign a non-compete
2. If your non-solicitation-of-customers provision prohibits more than solicitation of customers (*e.g.*, diverting, doing business with, providing services or products to, etc.), then you should consider limiting the provision to one year
3. Make sure your agreements are well-drafted

23

23

Recent Cases

24

Thank You

- **Derek Langton**
  801.536.6704
  dlangton@parsonsbehle.com

25

25

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

Professional Work Visa Options

Jacob T. Muklewicz
801.536.6896 | jmuklewicz@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

JACOB T. MUKLEWICZ

Shareholder

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6896
jmuklewicz@parsonsbehle.com

BIOGRAPHY

Mr. Muklewicz counsels and advises large multinational corporations, local businesses, individual investors and professionals in areas involving employment-based immigration law. Specifically, Mr. Muklewicz provides the following legal services to business clients:

- Advises companies and foreign nationals in connection E, H-1B, H-2B, H-3, L-1, TN, O, P, and R non-immigrant visa petitions.
- Assists foreign nationals seeking permanent residence (green cards).
- Consults with clients regarding the labor certification (PERM) process.
- Advises multinational managers, foreign nationals with extraordinary ability, and outstanding professors and researchers in connection with I-140 immigrant petitions.
- Counsels and advises immigrant investors with EB-5 cases
- Represents foreign medical graduates with J-1 status seeking waivers of the two-year home residence requirement through state Conrad 30 programs as well as the Delta Regional Authority and Appalachian Regional Commission.
- Counsels foreign medical graduates seeking permanent residence through the National Interest Waiver process.
- Works with employers to develop, maintain and improve employment verification procedures in compliance with I-9 and E-Verify requirements and conducts internal I-9 audits to ensure compliance with federal and state laws.
- Provides training to managers and Human Resources staff regarding proper I-9 completion, re-verification, and compliance with E-Verify requirements.

PRACTICE AREAS

Corporate
Employment & Labor
Immigration Law
Mergers & Acquisitions

LICENSED/ADMITTED

Utah
Ohio, Inactive

ACCOMPLISHMENTS

Academic

The Ohio State University College of Law (J.D. and Certificate in International Trade and Development, 2001)

- 1999 Pulaski Scholarship Award in Law – Board of Cuyahoga County Commissioners
- Foreign Language Area Studies Fellow – Russian (1999 – 2000)

Brigham Young University, (B.A., International Relations, minor in Russian, 1998)

Professional

Mountain States Super Lawyers Rising Star: Immigration (2013)

Southwest Super Lawyers Rising Star: Immigration (2012)

ASSOCIATIONS

Professional

American Immigration Lawyers Association

Community

Past President and Past Member of Board of Directors, Razem Utah, charitable, cultural, and fraternal organization for Utah's Polish community (May 2016 – September 2020)

PRESENTATIONS

Professional Work Visa Options, 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 28, 2021)

Professional Work Visa Options, Parsons Behle & Latimer Utah County Employment Law Seminar (August 25, 2021)

Immigration Policies/Issues During COVID-19 Pandemic and Immigration Issues in Corporate Mergers and Acquisitions, Generals' Club (Feb. 25, 2021)

Potential Changes To 2021 U.S. Immigration Policy, World Trade Center Utah (Jan. 28, 2021)

Assault on the H-1B: No, It's Not the Latest Hollywood Action Movie, American Immigration Lawyers' Association Annual Conference – Co-Presenter (June 22, 2019)

PUBLICATIONS

Cap-Subject H-1B Visa Petitions in Fiscal Year 2022, *Parsons Behle & Latimer Client Alert*, Feb. 19, 2021

Closing of Northern and Southern Borders, March 24, 2020

DHS Announces Flexibility in Requirements Related to Form I-9 Compliance, March 23, 2020

E-Verify Extend Timeframe for Taking Action to Resolve Tentative Non-Confirmations, March 23, 2020

Keep Legal Immigrants Legal: Maintain USCIS' Rule Providing Job Flexibility for High-Skilled Workers, *Utah Business*, May 11, 2017

U.S. Companies Will Hire More Foreigners This Year, Survey Says, *Forbes*, February 17, 2017

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

Professional Work Visa Options

Jacob T. Muklewicz
801.536.6896 | jmuklewicz@parsonsbehle.com

1

Professional Work Visa Categories

- H-1B
- H-1B1
- TN
- E-3

2

Overview of H-1B Requirements

- To petition for the H-1B visa classification:
  - The petitioner must be a US employer.
  - The position must be eligible.
  - The worker must be eligible.
  - H-1B visas must be available
  - U.S. Department of Labor (DOL) must certify the petitioning employer's Labor Condition Application.
  - U.S. Citizenship and Immigration Services (USCIS) must approve H-1B visa petition.

3

Specialty Occupation Workers

- The H-1B visa classification is the most common work visa category. Unlike most other visa categories, it applies broadly to different types of:
  - Employers.
  - Industries.
  - Foreign nationals.
  - Jobs.

4

4

Specialty Occupation Workers

- Employers may sponsor foreign nationals for H-1B status if both:
  - The employer offers the worker a job in the U.S. that requires a bachelor's or higher degree in a field related to the job.
  - The worker holds at least the minimum education required.

5

5

H-1B Petitioner Requirements

- The company must be a U.S. employer that:
  - Hires a person to work in the US.
  - Has an employer-employee relationship with the worker evidenced by the employer's right to take the following actions in relation to the worker:
    - hire;
    - pay;
    - fire;
    - supervise; or
    - control the worker's work.
  - Has a FEIN issued by IRS.

6

6

H-1B Petitioner Requirements

- A U.S. employer may be any of the following:
  - Person
  - Firm
  - Corporation
  - Contractor
  - Association
  - Other organization

7

7

Nature of H-1B Jobs

- H-1B status is available to workers offered employment in a specialty occupation. To qualify as a specialty occupation, the position must require both:
  - The application of a highly specialized body of knowledge.
  - A minimum education requirement of at least a bachelor's degree or its equivalent in a field related to the position.

8

8

Education Required for H-1B Jobs

- The minimum education requirement for H-1B-eligible jobs may be either:
  - Normal for entry to the position.
  - Common to the industry in parallel positions at organizations similar to the petitioner.
  - Necessary for the position because it is so specialized, complex, or unique that it can only be performed by someone with the required degree.
  - Normal for the employer hiring for the position.

9

9

Qualifications of the H-1B Worker

- To qualify for the H-1B visa classification, foreign workers must show they meet the minimum academic credentials of the offered position by showing that they have any of the following:
  - A U.S. bachelor's or higher degree from an accredited college.
  - A foreign degree that is equivalent to a US bachelor's or higher degree.

10

10

Qualifications of the H-1B Worker

- Education, training, or progressively responsible experience, or any combination of education, training, and experience, in the specialty that is equivalent to completing a U.S. bachelor's or higher degree in the required field proved by:
  - Evaluation by official with authority to grant college-level credit;
  - Successful completion of a recognized college-level equivalency exam;
  - Evaluation by reliable credentialing evaluation service;
  - Certification by a nationally recognized professional association; or
  - Determination by USCIS that submitted evidence of the worker's skills and knowledge are sufficient to show that the worker has equivalent degree.

11

11

H-1B Cap

- There is a total annual supply of 85,000 new H-1Bs. That supply is divided as follows:
  - Generally, the number of people who can be granted new H-1Bs each fiscal year is limited to 65,000. Of that number, 6,800 visas are reserved for citizens of Singapore and Chile, who may be granted H-1B1 status (see below) under free-trade agreements with those countries.
  - There is an additional pool of 20,000 new H-1Bs available only to foreign nationals who have earned a U.S. master's or higher degree (called the master's cap, or the advanced degree exemption).
- The government's fiscal year runs from October 1 to September 30.

12

12

H-1B Cap Exemptions

- Employers exempt from the H-1B cap and ACWIA fees are:
  - Governmental research organizations, including federal, state, and local government research entities.
  - Nonprofit entities related to or affiliated with institutions of higher education, including nonprofits:
    - connected or associated with an institution of higher education through shared ownership or control by the same board or federation;
    - operated by an institution of higher education;
    - attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
    - having written affiliation agreements with institutions of higher education when the nonprofit's fundamental activity directly contributes to the research or education mission of the institution.

13

13

H-1B Cap Exemptions

- An employee who is not directly employed by a cap-exempt organization may still qualify for a cap-exempt H-1B if the H-1B worker:
  - Will spend the majority of work time performing job duties at a qualifying organization, AND
  - Performs job duties that directly and predominantly further the essential purpose of the qualifying organization (higher education, nonprofit research, or government research).

14

14

Timeline for H-1B Cap Petitions

- Any H-1B petition can be filed up to six months before the requested validity period.
- When new H-1B visas are available, employers can file the petitions at any time, with an initial effective date of up to six months in the future.
- Once the H-1B cap is met, employers may only file new H-1B petitions six months before the next fiscal year begins.
- Because the federal government's fiscal year begins on October 1st, H-1B cap petitions may be filed no earlier than the preceding April 1 or the first business day of April if April 1 falls on the weekend.

15

15

H-1B Cap Registration and Selection

- The limited availability of H-1B visas results in a rush of petition filings that exhausts H-1B availability early in the initial filing period.
- Consequently, the pool of H-1B visas is exhausted six months before their initial validity period.
- This process caused both employers and USCIS to expend great time, effort, and money in preparing and filing H-1B petitions, on the one hand, and processing enormous amounts of paper files on the other.

16

16

H-1B Cap Registration and Selection

- On January 31, 2019, DHS published a rule amending immigration regulations covering the filing and selection processes for cap-subject H-1B petitions.
- The new rule requires an employer seeking to file a cap-subject H-1B petition for a foreign worker to electronically register its intended petition with USCIS.

17

17

H-1B Cap Registration and Selection

- Under the registration system:
  - USCIS announces the initial registration period on the USCIS website at least 30 days before the initial registration period. The initial registration period lasts at least 14 days and will begin at least 14 days before the earliest date on which cap-subject petitions may be filed (typically April 1st, 2nd, or 3rd).
  - Employers may submit only one registration for each foreign worker. If selected, the employer may only submit a petition for the named foreign worker.
  - Effective December 9, 2019, each registration requires a $10 fee.

18

18

H-1B Cap Registration and Selection

- When the initial registration period ends, USCIS determines whether it has received sufficient registrations to satisfy the regular H-1B cap. If it:
  - has, USCIS randomly selects from valid registrations received during the entire initial registration period to identify the registrations needed to satisfy the regular cap; and
  - has not, USCIS continues to accept registrations until the day it has received enough registrations to satisfy the regular H-1B cap (called the final registration date), randomly selecting from the valid registrations received on the final registration date to identify the registrations needed to satisfy the regular cap.

19

19

H-1B Cap Registration and Selection

- After determining that the regular cap is met, USCIS then determines if it has received enough (previously unselected) registrations to satisfy the master's cap. If it:
  - has, USCIS randomly selects from valid registrations received during the initial registration period and not previously selected under the regular cap selection process to identify the registrations needed to satisfy the master's cap; and
  - has not, USCIS continues to accept registrations until the day it has received enough registrations to satisfy the H-1B master's cap (also called the final registration date), randomly selecting from the valid registrations received on the final registration date to identify the registrations needed to satisfy the master's cap.

20

20

H-1B Cap Registration and Selection

- USCIS electronically notifies an employer:
  - that its registration for a named foreign worker is selected; and
  - the filing period during which the employer may submit its H-1B petition. The filing period runs at least 90 days.
- USCIS randomly selects from the unselected registrations if additional H-1B cap-subject numbers are available after the initial registration period. USCIS may reopen the registration period when the number of registrations is insufficient to satisfy either the regular or master's caps.

21

21

Labor Condition Application

- Employers must receive a certified Labor Condition Application (LCA) from DOL before filing an H-1B petition with USCIS.
- The LCA may be filed up to six months before the employment will begin and may be certified for a validity period of up to three years.
- An LCA may be certified for multiple openings of the same occupation and for multiple work locations.
- A copy of the certified LCA must be provided to the H-1B worker.
- DOL processing times for LCAs is up to seven business days.

22

22

Labor Condition Application

- The LCA must identify:
  - The occupation offered to the foreign worker by both the employer's job title and the standard occupational classification (SOC) code for the occupation.
  - The number of nonimmigrants that may be sought using the LCA.
  - The gross wage rate to be paid to each nonimmigrant or the range of wage rates that may be paid to nonimmigrant workers covered by the LCA.
  - The expected validity period, which may begin no more than six months after the LCA is filed.
  - The place or places of intended employment.
  - The prevailing wage and details about the source of the prevailing wage determination.

23

23

LCA Attestations

- All employers make four attestations on the LCA:
  - **Attestation 1: Wages -** The employer will pay the H-1B worker the higher between employer's actual wage and the DOL's prevailing wage.
  - **Attestation 2: Working Conditions –** The employer will offer the same working conditions to the H-1B worker provided to U.S. workers.
  - **Attestation 3: No Labor Dispute –** The employer is not employing the H-1B worker to replace striking or locked out U.S. workers.
  - **Attestation 4: Notice –** Within 30 days of filing the LCA, the employer has given notice to the union bargaining representative if the job offered to the H-1B worker is represented by a union or to all employees if the position is not unionized.

24

24

Filing H-1B Petition with USCIS

- After DOL certifies the LCA, the employer may file H-1B petition with USCIS.
- The H-1B petition is filed on USCIS Form I-129, Petition for a Nonimmigrant Worker, with the relevant supplements and supporting documentation.
- An H-1B petition must generally be filed with the USCIS office with jurisdiction over the geographical location of the employer's primary office, unless an exception applies to the petition.

25

25

H-1B Petition Documents

- Documents that must be included in the H-1B petition include:
  - The registration selection notice for a cap-subject H-1B petition.
  - Form I-129, Petition for Nonimmigrant Worker, and the H status supplement form.
  - Certified LCA for the job offered to the worker at the worksite indicated on the petition.
  - Detailed description of the job offered to the worker, describing the duties and responsibilities to be performed and the specific minimum academic credentials required to fill the position.
  - Explanation of the worker's qualifications.

26

26

H-1B Petition Documents

  - Copy of the worker's academic credentials showing he is qualified for the job, including:
    - Diploma or other confirmation that the required degree has been conferred on the worker;
    - Transcript of completed courses; and
    - Evaluation assessing equivalency to a US bachelor's or higher degree, if necessary.
  - Itinerary or employment contracts, if required (see Agents as Petitioners and Practice Note, US Immigration Sponsorship and Third-Party Worksites: Documenting the Employer-Employee Relationship).

27

27

H-1B Petition Documents

- If a license is required for the occupation, proof that the employee has the license, or that the state requires proof of employment authorization before granting the license.
- Copy of the worker's passport biographic information page.
- If the worker is in the U.S. in valid nonimmigrant status and requesting an extension or change of nonimmigrant status (such as a cap-gap change of status), documents showing the worker's lawful admission and status.

28

28

Acquiring H-1B Status

- The H-1B petition must be approved before the worker can acquire H-1B status.
- If the worker is outside the US when the H-1B petition is filed and approved, the worker must:
  - Use the H-1B petition approval notice to apply for an H-1B visa in the worker's passport.
  - Travel to the US, where the worker is:
    - inspected by a US Customs and Border Protection (CBP) officer; and
    - admitted in H-1B status.

29

29

Validity Period of H-1B Approval

- An H-1B petition may be granted for up to three years. There must be an underlying valid LCA for the entire duration of the H-1B petition approval.
- Grace Periods
  - Nonimmigrants in H-1B status may receive grace periods of up to ten days either:
    - Before their petition validity (or other authorized validity period) begins.
    - After the validity period ends.

30

30

Validity Period of H-1B Approval

- In addition, USCIS may authorize a grace period of up to 60 days for foreign workers in H-1B (or E-1, E-2, E-3, H-1B1, L-1, O-1, and TN) classification while they are between jobs. This grace period may run for 60 consecutive days or until the individual's current validity period ends, whichever is sooner, and may only be granted once per each authorized nonimmigrant validity period.
- Individuals may not work during a grace period but may apply for and obtain an extension or change of status (if otherwise eligible). Finally, H-1B workers in a grace period may qualify to begin employment under H-1B portability (if otherwise eligible).

31

31

Maximum Period of H-1B Stay

- H-1B workers are limited to a total of six years in any one or a combination of the following statuses: H-1B, H-1B1, H-3, or L-1 status.
- H-1B workers who reach their maximum time in H-1B status must leave the U.S. for at least one year before they may qualify for a new six-year period of H-1B status.

32

32

Maximum Period of H-1B Stay

- The American Competitiveness in the Twenty-First Century Act (AC21) allow for extensions of H-1B status beyond the six-year maximum for certain nonimmigrants sponsored for employment-based permanent residence (known also as green card processing).
- The extension may be granted either:
  - For one year, if the labor certification (PERM) or immigrant visa petition (Form I-140) was filed at least 365 days before the H-1B expiration. The worker is ineligible for this extension if she fails to file an application for adjustment of status (Form I-485) or immigrant visa consular processing within one year after an immigrant visa is authorized for issuance.

33

33

Maximum Period of H-1B Stay

- For three years, if:
  - the labor certification, if required, and immigrant visa petition are approved; and
  - the worker cannot complete the final application because he is subject to immigrant visa backlogs

34

34

Family Members of H-1B Workers

- Accompanying dependent family members are entitled to hold H-4 nonimmigrant status. Dependent family members are:
  - A spouse.
  - Unmarried children up to the age of 21 years.
- Family members may live in the US and attend school.

35

35

Family Members of H-1B Workers

- Beginning May 26, 2015, certain H-4 spouses of H-1B workers seeking green card status through employment may apply for employment authorization in the U.S.
- To be eligible under this rule, the individual must be in H-4 status as the dependent spouse of an H-1B nonimmigrant who is either:
  - The beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker.
  - Granted H-1B extensions beyond the 6-year limit under AC21.

36

36

H-1B1 Free Trade Professional: Chile or Singapore

- To qualify for H-1B1 work visa, the foreign national must:
  - Work full-time or part-time for a petitioning U.S. employer.
  - Be a Chilean or Singaporean citizen.
  - Work in a specialty occupation requiring at least a bachelor's degree in related field.
  - Have a U.S. or foreign equivalent degree, or equivalent combination of education or experience, or both.
  - Show ties to home country and intent to return abroad.
- The U.S. employer must obtain LCA certification from DOL.

37

37

H-1B1 Validity Period and Maximum Stay

- H-1B1 visa and status valid up to 18 months.
- LCA must be valid for duration of visa validity.
- H-1B1 worker may extend status in 18-month increments.
- Maximum H-1B1 stay is six years, including all time in H-1B, H-1B1, H-3, and L-1 status.

38

38

TN Visa for Canadian and Mexican Professionals

- The TN nonimmigrant visa classification may be granted when the worker:
  - Is a citizen of Canada or Mexico.
  - Has prearranged business activities in the US for a US entity (but the worker may not be self-employed).
  - Will perform business activities in the U.S. in a NAFTA-authorized occupation.
  - Possesses the minimum professional qualifications required under NAFTA.
  - Intends to remain in the U.S. temporarily without intending to immigrate.

39

39

Advantages of TN Visa Category

- The TN classification is favored by U.S. companies for its expediency.
  - A TN applicant does not need prior USCIS petition approval.
    - Canadians may apply for TN admission at Canadian airports with U.S. immigration preflight inspections offices or at ports of entry at land borders.
    - Mexicans may apply for TN travel visas at U.S. consular posts in Mexico.
    - **Keep in mind that international travel restrictions due to the ongoing COVID-19 pandemic may significantly delay TN visa processing.**
- No LCAs are required.
- There is no annual cap limiting the number of available TN visas.

40

40

Supporting Documents for TN Status

- Regardless of the entry process required, all workers seeking TN status must supply the following documents:
  - Proof of Canadian or Mexican citizenship.
  - Letter by the prospective US employer that includes:
    - Title of the position offered in the US and a brief job description explaining what professional activities are entailed in the job;
    - Rate of pay for the occupation and whether the job is full-time or part-time; and
    - Expected length of stay in the U.S. (up to 3 years)

41

41

Supporting Documents for TN Status

- Evidence of the worker's professional qualifications including:
  - Degrees, certificates, or diplomas (those received from educational institutions outside U.S., Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service specializing in evaluating foreign educational qualifications);
  - Professional licenses or membership in a professional organization; and
  - Letters from former employers confirming the details of the employment including the occupation performed and duration of employment. (Applicants who gained qualifying experience through self-employment should submit business records proving the details of the self-employment.)

42

42

TN Validity Period

- TN status is initially granted for up to three years and may be extended in increments up to three years.
- TN extensions may be approved for up to three years.
- There is no maximum limit on the amount of time a foreign national may spend in the U.S. in TN status. However, TN workers must always maintain nonimmigrant intent and may be denied admission to the U.S. by a CBP officer if the officer believes the TN worker intends to permanently live or work in the U.S.

43

43

Family Members of TN Workers

- The spouse and unmarried children under 21 years may accompany the TN worker to the U.S. by obtaining Trade Dependent (TD) status.
- TD status is granted for the duration of the principal TN's stay.
- Dependents in TD status may not accept employment in the US.

44

44

E-3 for Australian Specialty Occupation Workers

- E-3 sponsorship requires that the employer and employee meet several factors. To qualify for the E-3 visa classification:
  - The worker must be an Australian citizen.
  - The position must be eligible.
  - The worker must be qualified.
  - E-3 visas must be available.
  - The petitioning employer must obtain a certified LCA.

45

45

E-3 for Australian Specialty Occupation Workers

- The E-3 category is something of a hybrid visa classification, created solely for Australian citizens. It contains elements of both:
  - The H-1B specialty occupation visa classification, the most commonly used work status, in terms of what the job requirements are and how the worker must qualify. For more information, see Practice Note, The H-1B Nonimmigrant Visa Classification.
  - The E-1 treaty trader and E-2 treaty investor visa classifications in terms of how the worker obtains classification. Unlike the E-1 and E-2 visa categories, however, there is no requirement that the sponsoring employer have Australian nationality.

46

46

Nature of E-3 Jobs

- E-3 status is available to Australian workers offered employment in a specialty occupation. A specialty occupation is an occupation that requires:
  - Theoretical and practical application of a highly specialized body of knowledge.
  - A minimum education requirement of at least a bachelor's degree or its equivalent in a field related to the position.

47

47

Education Required for E-3 Jobs

- To be eligible for E-3 status, the position offered to the foreign worker must have a minimum educational requirement of a bachelor's degree in a related field. The minimum education requirement for E-3-eligible jobs may be:
  - Normal for entry to the position.
  - Common to the industry in parallel positions at organizations similar to the petitioner.
  - Necessary for the position because it is so specialized, complex, or unique that it can only be performed by someone with the required degree.
  - Normal for the employer hiring for the position.

48

48

Qualifications of E-3 Worker

- To qualify for the E-3 visa classification, foreign workers must be Australian citizens and show:
  - A US bachelor's or higher degree from an accredited college.
  - A foreign degree that is equivalent to a US bachelor's or higher degree.
  - Equivalency based on the combination of education, experience, or training may be proved by:
    - Evaluation by an official with authority to grant college-level credit;
    - Successful completion of a recognized college-level equivalency exam in the specialty;
    - Evaluation by a reliable credentialing evaluation service;

49

49

Qualifications of E-3 Worker

- Certification by a nationally recognized professional association that regularly certifies competence in the specialty; or
- Determination by USCIS that submitted evidence of the worker's skills and knowledge are sufficient to show that the worker has the equivalent degree.

50

50

E-3 Cap

- The number of people who can be granted new E-3s each fiscal year is limited to 10,500.
- The E-3 cap has never been reached.
- The government's fiscal year runs from October 1 to September 30.

51

51

Labor Condition Application

- The first step of the E-3 sponsorship process is the LCA identifying the job offered to the foreign worker and the locations where the work is performed.
- This must be done before the Australian worker submits an E-3 visa application at a US embassy or consulate, or the employer files the petition requesting an extension, amendment, or change of nonimmigrant status with USCIS.
- LCA attestations are the same as those for H-1B and H-1B1 visa petitions.

52

52

Required Documents for E-3 Status

- All workers seeking E-3 status must supply the following documents:
  - Proof of Australian citizenship. A passport is typically required for entry to the US and offers proof of citizenship.
  - Certified LCA.
  - Detailed description of the job offered to the worker, describing the duties and responsibilities to be performed and the specific minimum academic credentials required to fill the position.
  - Explanation of the worker's qualifications.

53

53

Required Documents for E-3 Status

  - Copy of the worker's academic credentials showing he is qualified for the job, including:
    - Diploma or other confirmation that the required degree has been conferred on the worker;
    - Transcript of completed courses; and
    - Evaluation assessing equivalency to a U.S. bachelor's or higher degree, if necessary.
    - If a license is required for the occupation, proof that the employee has the license, or that the state requires proof of employment authorization before granting the license.

54

54

Applying for E-3 Visa at U.S. Embassy/Consulate

- E-3 workers must present documents showing their eligibility for E-3 status during a visa application at a U.S. embassy or consulate.
- The worker is not limited to the U.S. embassy and consulates in Australia and may apply at any U.S. embassy or consulate that accepts jurisdiction over the worker (typically, in a country in which the worker is lawfully located, although some consular posts may require the worker to be resident in the country).
- After the visa is issued to the worker, the worker may travel to the US, where the worker is:
  - Inspected by a US Customs and Border Protection (CBP) officer.
  - Admitted in E-3 status.

55

55

Filing E-3 Petition with USCIS

- Employers may file a petition with USCIS for an E-3 worker if the worker is lawfully present in the US and is requesting:
  - An extension of existing E-3 status to continue in the same employment.
  - An amendment of existing E-3 status for a change in existing employment (such as moving from full-time to part-time employment), a new job, or a new or additional employer.
  - A change of nonimmigrant status to E-3 status, if the foreign worker is present in the US in a status that permits a change of status.

56

56

E-3 Validity Period

- E-3 status is initially granted for up to two years and may be extended in increments of up to two years.
- There must be an underlying valid LCA for the entire duration of the E-3 petition approval.
- There is no maximum limit on the amount of time a foreign national may spend in the US in E-3 status. However, E-3 nonimmigrant workers must always maintain nonimmigrant intent and may be denied a visa or admission to the U.S. if the officer believes the E-3 worker intends to seek permanent residence.

57

57

E-3 Grace Periods

- Nonimmigrant workers in E-3 status may receive grace periods of up to ten days either:
  - Before their petition validity (or other authorized validity period) begins.
  - After the validity period ends.
- In addition, USCIS may authorize a grace period of up to 60 days for foreign workers in E-3 (or E-1, E-2, H-1B, H-1B1, L-1, O-1, and TN) classification while they are between jobs. This grace period may run for 60 consecutive days or until the individual's current validity period ends, whichever is sooner, and may only be granted once for each authorized nonimmigrant validity period.

58

58

E-3 Grace Periods

- Individuals may not work during a grace period but may apply for and obtain an extension or change of status (if otherwise eligible). Grace periods are authorized on a discretionary, case-by-case basis by USCIS or CBP officers.

59

59

Family Members of E-3 Australian Workers

- Accompanying dependent family members are entitled to hold E-3 nonimmigrant status. Dependent family members are:
  - A spouse.
  - Unmarried children up to the age of 21 years.
- Family members may live in the US and attend school.
- A spouse in E-3 status may seek an Employment Authorization Document (EAD) in the US by filing an Application for Employment Authorization, Form I-765, with USCIS.

60

60

Thank You

- **Jacob T. Muklewicz**
  801.536.6896
  jmuklewicz@parsonsbehle.com

61

33rd Annual Parsons Behle & Latimer

Employment Law Seminar

FLSA and Regular Rate of Pay Calculations

Mark A. Wagner
801.536.6776 | mwagner@parsonsbehle.com

PARSONS BEHLE & LATIMER

PARSONS BEHLE & LATIMER

National Expertise.
Regional Law Firm.

parsonsbehle.com

MARK A. WAGNER

Shareholder

201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Main 801.532.1234
Direct 801.536.6776
mwagner@parsonsbehle.com

BIOGRAPHY

Mark A. Wagner concentrates his practice in employment law, homeowners association law and health care law.

In his employment practice, Mr. Wagner counsels and represents clients in virtually all aspects of the employment relationship. He represents companies in employment-related aspects of business purchases and sales; employment agreements; incentive compensation plans and employee benefits; employment handbooks, policies, and procedures; discrimination, harassment, and retaliation; internal investigations; training; legal compliance; and protection of intellectual property, confidential information, and trade secrets. He also routinely represents employers in audits, investigations, and other proceedings before federal and state agencies, including DOJ, DOL, EEOC, OSHA, and UALD, and in litigation in state and federal court.

Mr. Wagner also has experience representing homeowners associations, housing authorities, and other real property owners, landlords, and managers in a wide range of disputes and in administrative and judicial proceedings. He also counsels and represents physicians and health care practices in health-care law compliance, including HIPAA, the Stark Law, the Anti-kickback Statute, and physician credentialing.

Mr. Wagner served as Law Clerk to the Honorable David K. Winder, Chief Judge of the United States District Court for the District of Utah.

Before joining Parsons Behle & Latimer as a shareholder, he practiced law at Parr, Waddoups, Brown, Gee & Loveless as both an associate and a shareholder; at Van Cott, Bagley, Cornwall & McCarthy as a shareholder and chair of its Employee and Employee Benefits practice group; and at Prince, Yeates & Geldzahler as a shareholder and as chairs of that firm's Employment and Labor practice group and Technology Committee.

PRACTICE AREAS

Employment & Labor
Employment Litigation
Mergers & Acquisitions
Healthcare
Construction Litigation

LICENSED/ADMITTED

Utah
U.S. Dist. Court, Dist. of Utah
U.S. Court of Appeals, 10th Circuit

ACCOMPLISHMENTS

Academic

S.J. Quinney College of Law, University of Utah (J.D., Order of the Coif, 1992)

Managing Editor, *Utah Law Review*, 1991-1992

Judicial extern, Chief Justice Michael Zimmerman, Utah Supreme Court, 1991-1992

University of Utah (B.S., Business Management, *cum laude*, 1988)

Professional

Martindale-Hubbell, Peer Reviewed AV Preeminent, 2008-present

Named to *Utah Business* magazine's list of Utah's Legal Elite in Labor and Employment, each year since 2008

Selected to Mountain States Super Lawyers® for 2012-2019 in Employment and Labor

Selected for The Best Lawyers in America® for 2010-2022 in Labor and Employment Law (2012 as Salt Lake City Lawyer of the Year for Employment Law-Individuals)

ASSOCIATIONS

Professional

Society for Human Resource Management, 2004-present

Salt Lake Society for Human Resource Management, 2004-present

Utah State Bar Association, Section of Labor and Employment Law, 2000-present; Section of Health Law, 2015-present

American Bar Association, 1992-present

Community

Utah Labor Commission's Employment Advisory Council for Antidiscrimination & Labor Division, January 2017-present

Salt Lake Society for Human Resource Management, Board of Trustees/Legislative Affairs Director, 2005-2012

KCPW Public Radio (88.3 & 105.3 FM), Board of Trustees, 2000-2015

Holy Cross Ministries, Board of Trustees, 2006-2010

PRESENTATIONS

FLSA and Regular Rate of Pay Calculations, 33rd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (October 28, 2021)

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

Employee Privacy in a Post-COVID-19 World, 32nd Annual Parsons Behle & Latimer Employment Law Seminar - Virtual (November 10, 2020)

Co-Presenter: Utah Businesses Reopen: What Employers Should Know for a Successful Transition, Park City Chamber of Commerce (May 6, 2020)

Co-Presenter: Employer Considerations to Successfully Reopen a Business, Parsons Behle & Latimer Webinar (April 29, 2020)

Co-Presenter: CARES Act and Families First Coronavirus Response Act - What the Acts Means to Your Business and How to Respond, Family-Owned Business Alliance Webinar (FOBA) (April 2, 2020)

Co-Presenter: Families First Coronavirus Response Act, Webinar - WTC Utah (March 27, 2020)

Co-Presenter: Families First Coronavirus Response Act, Parsons Behle & Latimer Webinar (March 23, 2020)

Marijuana and the Workplace, Utah SHRM Crossroads Conference (September 25, 2019)

Weed and the Workplace: Navigating New Marijuana Laws, Parsons Behle & Latimer Utah County Employment Law Seminar (August 28, 2019)

PUBLICATIONS

Co-author: "Re-Opening for Business: Employers Should Begin Planning Now," Parsons Behle & Latimer COVID-19 Response Resources (April 14, 2020)

"CARES Act Provides Dramatically Expanded Unemployment Benefits in Time of Need," Parsons Behle & Latimer COVID-19 Response Resources (March 30, 2020)

"Testing Employees for COVID-19," Parsons Behle & Latimer COVID-19 Response Resources (March 24, 2020)

Co-author: "Terminations, Layoffs and Warn Notices in the COVID-19 Crisis," Parsons Behle & Latimer COVID-19 Response Resources (March 19, 2020)

Co-author: "COVID-19 Leave and Sick Pay Statute Enacted," Parsons Behle & Latimer COVID-19 Response Resources (March 19, 2020)

"Employers Beware: Tips Are Always the Property of Tipped Employees," Parsons Behle & Latimer Legal Briefings (December 18, 2019)

"The Law of Unpaid Internships," Parsons Behle & Latimer Legal Briefings (October 31, 2019)

"Drug Testing in the Age of Medical Marijuana: Proceed With Caution," Parsons Behle & Latimer Legal Briefings (August 29, 2019)

"Question Corner," Parsons Behle & Latimer Legal Briefings (August 29, 2019)

"Employment Law by the Numbers," Parsons Behle & Latimer Legal Briefings Newsletter (June 26, 2019)

33rd Annual Employment Law Seminar

OCTOBER 27 & 28, 2021 | MULTI-DAY WEBINAR

PARSONS BEHLE & LATIMER
A Professional Law Corporation

FLSA and Regular Rate of Pay Calculations

Mark A. Wagner
801.536.6776 | mwagner@parsonsbehle.com

BOISE | HELENA | IDAHO FALLS | LEHI | MISSOULA | RENO | SALT LAKE CITY parsonsbehle.com

1

General Background

PARSONS BEHLE & LATIMER

2

Not Just an Employee-Protection Statute

- The Fair Labor Standards Act of 1938 (**FLSA**) originated in President Franklin Roosevelt's New Deal
  - Getting the country out of the Great Depression
  - Giving employers an economic incentive to spread work around
    - Banning child labor (under 16 – with exceptions)
    - Establishing a maximum hours standard
    - Mandating overtime pay for work in excess of maximum hours
  - A hodge-podge of politics and legal hoops had to be considered
  - Result: specific rules to follow but lack of consistency

3

3

Statutory Mandate

4

Overtime Pay Requirement

(1) Except as otherwise provided in this section, no employer shall employ any . . . employees . . . for a workweek longer than ***forty hours*** unless such employee receives compensation for [all hours over forty] at a rate not less than ***one and one-half times*** the ***regular rate*** at which he is employed.

FLSA § 7(a) (29 U.S.C. § 207(a))

5

5

What Is the "Regular Rate?"

6

Regular Rate -- Includes:

All remuneration paid to, or on behalf of, the employee ***for work performed*** during the week, including:

- Wages
- Salary
- Commissions
- Non-discretionary bonuses

FLSA § 7(e) (29 U.S.C. § 207(e))

7

7

Regular Rate -- Includes:

- Also includes non-cash payments in the form of goods or facilities
  - Must include in the regular rate the reasonable cost to the employer or fair value of such goods or facilities.

8

8

Regular Rate -- Excludes:

1. Gifts
2. Pay for occasional periods of no work, such as paid vacation and sick leave; expense reimbursements; and other "similar payments" that are ***not made as compensation for hours of employment***
3. Discretionary bonuses; payments from profit-sharing or savings plan; and talent fees
4. Benefit plan contributions and payments to certain profit-sharing plans
5. The "premium" portion of premium pay for more than 8 hours in a day, more than 40 hours in a week, or more than employees' normal/regular working hours
6. The "premium" portion of premium pay for work on a Saturday, Sunday, holiday, or regular day of rest where the rate is at least 1.5 times the rate for work in non-overtime hours on other days
7. The "premium" portion of premium pay for work outside regular hours established by a contract as the regular workday (not over 8 hours) or workweek (not over 40 hours) where the rate is at least 1.5 times the rate for work within the regular workday or workweek
8. Certain stock-related income

FLSA § 7(e)(1)-(8) (29 U.S.C. § 207(e)(1)-(8))

9

9

Exclusions - Gifts

Q: When is a "gift" a "gift?" **A**: When it's really a gift.

- Must meet three requirements:
  - Must not be paid under a contract or agreement (express or implied);
  - Must not be measured by or dependent on hours worked, production, or efficiency; and
  - Must not be so large an amount that employees would consider it part of their wages.

10

10

Exclusions – Pay Not for Hours of Work

- Vacation pay, sick pay, PTO, etc. (including buy-backs)
- Payments for occasional periods when the employer fails to provide sufficient work (e.g., machinery break-downs, inclement weather, etc.)
  - Reporting or "show-up" pay
- Longevity bonuses not made pursuant to a CBA or a city ordinance or policy
- Sign-on bonuses without clawback provisions
  - Note: to be excluded as a gift, the bonus payment must not be paid pursuant to a contract and must not be so substantial that it can be assumed that employees consider it a part of the wages for which they work.

11

11

Exclusions – Pay Not for Hours of Work (cont'd)

- "Call-back" pay
  - Extra compensation paid to an employee for responding to a call from the employer to perform extra work that was unanticipated by the employer.
  - Such pay is in addition to the compensation for the time actually worked, so it may be excluded from the regular rate provided the call-back was not prearranged. (Payments may be considered prearranged if the scheduling issue that necessitated the payment was anticipated and could have been reasonably scheduled in advance.)

12

12

Exclusions - Reimbursements

Reimbursement of the actual or reasonably approximate amount of expenses that an employee incurs while furthering the employer's interests may be excluded from the regular rate. Examples include:

- Business supplies, materials, or tools
- Cell phone plans
- Membership dues in a professional organization
- Credentialing exam fees
- Travel expenses

13

13

Exclusions – Pay Not for Hours of Work (cont'd)

- "Perks" that have no connection to hours worked, job performance, or other criteria linked to quality or quantity of work
  - On-the-job medical care and on-site treatment from specialists such as chiropractors, massage therapists, personal trainers, physical therapists, counselors, or EAPs
  - Recreational facilities, such as gym access, gym memberships, and fitness classes
  - Wellness programs, such as health risk assessments, vaccination clinics, nutrition and weight loss programs, smoking cessation, financial counseling, mental health wellness programs, etc.
  - Employee discounts
  - Parking benefits and spaces
  - Tuition payments, regardless of whether made to the employee, an education provider, or a student-loan repayment program
  - Adoption assistance

14

14

Exclusions – Discretionary Bonuses

- To be considered discretionary, a bonus must meet three statutory requirements.
  - The employer must have sole discretion, until at or near the end of the period that corresponds to the bonus, to determine ***whether*** to pay the bonus;
  - The employer must have sole discretion, until at or near the end of the period that corresponds to the bonus, to determine the ***amount*** of the bonus; and
  - The bonus payment must not be made according to any prior contract, agreement, or promise causing an employee to expect such payments regularly.

15

15

Examples of Discretionary Bonuses

- Bonuses for overcoming a challenging or stressful situation;
- Bonuses to employees who made unique or extraordinary efforts not awarded according to pre-established criteria;
- Employee-of-the-month bonuses;
- Severance bonuses; and
- Referral bonuses to employees not primarily engaged in recruiting activities (subject to additional criteria).
  - employee participation is strictly voluntary;
  - the employee's recruitment efforts do not involve significant time; and
  - the activity is limited to after-hours solicitation done only among friends, relatives, neighbors and acquaintances as part of the employee's social affairs.

16

16

Examples of NONdiscretionary Bonuses

- Bonuses based on a predetermined formula, such as individual or group production bonuses;
- Bonuses for quality and accuracy of work;
- Bonuses announced to employees to induce them to work more efficiently;
- Attendance bonuses; and
- Safety bonuses (i.e., number of days without safety incidents).

17

17

Exclusions – Payments for Non-FLSA Overtime

The "premium" portion of premium pay for certain hours worked

- in excess of 8 hours per day or 40 hours in a workweek (or in excess of the employee's normal working hours);
- on Saturdays, Sundays, holidays, or regular days of rest—if the premium rate is at least 1.5 times the regular rate for work on other days; and
- Outside the hours established by contract or agreement as the normal or regular workday (up to 8 hours) or workweek (up to 40 hours)—if the premium rate is at least 1.5 times the regular rate for work during the regular workday or workweek.

- ***This*** extra compensation may be creditable toward overtime pay under the FLSA

18

18

Other Types of Pay – On-Call Pay

- Employees are paid at a flat rate equal to four hours at $10/hour per day when required to be on standby and available for recall.

Q: Included in the regular rate?

A: Yes.

- It is part of the renumeration paid to employees for their employment
- It does not fall within one of the 8 statutory exclusions listed in section 207(e).

Q: Counted as hours worked for overtime calculation purposes?

A: It depends.

19

19

Other Types of Pay – On-Call Pay (cont'd)

- If it is actually worked (employees are called in), the worked portion **IS** counted as hours worked for overtime calculation purposes.
- If it is **NOT** actually worked (employees are NOT called in), then the answer depends on how restrictive the accompanying requirements are.
  - If the affected employees' personal activities are significantly restricted during that time, then the hours covered by that time must be counted in determining an employee's entitlement to overtime pay. (29 CFR §§ 778.223 and 785.17.)
  - If the affected employees' personal activities are not significantly restricted during the on-call time, then the hours do not need to be counted as hours worked for determining eligibility for overtime pay.
- In either event, the pay is included within the calculation of the regular rate (along with any other pay to the employee for working the subject hours.

20

20

Calculating the Regular Rate

21

General Principles

- Overtime pay is calculated on a workweek basis, and averaging hours over two or more weeks is not permitted.
- An employee may be paid on a piece-rate, salary, commission, or some other basis, but all earnings (except the statutory exclusions) must be totaled and converted to an hourly rate (the regular rate).
- The regular rate is typically calculated by dividing the total pay in a given workweek by the total number of hours actually worked that week.
- Unless specifically noted, payments that are excluded from the regular rate may not be credited towards overtime compensation due under the FLSA

22

22

Hypothetical 1

John earns $10 an hour. John receives no other compensation.

This week, John worked 45 hours. To how much is John entitled for this week?

23

23

Answer to Hypothetical 1

John is entitled to **$475**.

- John's total straight-time earnings are $450 ($10/hour x 45 hours).
- Because John has no other compensation includable in the regular rate, his hourly rate is the same as his regular rate ($450 total straight-time earnings ÷ 45 hours worked = $10/hour regular rate).
- John's overtime compensation is $25 ($10/hour regular rate x 0.5 x 5 overtime hours).
  - Remember: the straight-time earnings have already been calculated for all hours worked (45), so the additional amount for each overtime hour (the overtime premium) is 1/2 the regular rate of pay.

24

24

Answer to Hypothetical 1 (cont'd)

John's total pay for the week is $475 or:

- $450 total straight-time earnings; plus
- $25 additional half-time earnings (overtime premium).

25

25

Hypothetical 2

Ashley is a nonexempt salesclerk employed by Diamond Jewelry. She is paid $20/hour, plus commissions. This week, Ashley worked 50 hours and earned $500 in commissions. She also received an annual (discretionary) gift from Ruby Jewelry worth $500.

To how much is Ashley entitled?

26

26

Answer to Hypothetical 2

Ashley's total compensation for the week is $2,150.

- Ashley's hourly rate and commissions are included in her regular rate, but the (discretionary) annual gift is not.
- Ashley's total straight-time earnings are $1,500 or:
  - $1,000 weekly salary ($20/hour x 50 total hours worked); plus
  - $500 commissions for the week.

27

27

Answer to Hypothetical 2 (cont'd)

- Ashley's regular rate of pay is $30/hour ($1,500 total straight-time earnings ÷ 50 hours worked).
- Ashley's overtime compensation is $150 ($30/hour regular rate x 0.5 x 10 overtime hours).
- Ashley's total compensation for the week is $2,150 or:
  - $1,000 straight-time earnings ($20/hour x 50 hours worked);
  - $150 additional half-time earnings (overtime premium);
  - $500 weekly commissions; plus
  - $500 gift.

28

28

Hypothetical 3

Joe is a nonexempt employee. He earns a weekly salary of $1,000. Joe and his employer agree that his salary is intended to cover 40 hours per week, the employer's normal workweek.

This week, Joe worked 44 hours. To how much is Joe entitled for the week?

29

29

Answer to Hypothetical 3

Joe's total compensation for the week is $1,150.

- Joe's total straight-time earnings are $1,100 or:
  - $1,000 weekly salary.
  - $1,000 weekly salary ÷ 40 hours that salary is intended to cover = $25 hourly rate.
  - 44 total hours worked x $25 hourly rate = $1,100 base salary plus additional straight-time earnings.

30

30

Answer to Hypothetical 3 (cont'd)

- Joe's regular rate of pay is $25 an hour ($1,100 total straight-time earnings ÷ 44 hours worked).
- Joe's overtime compensation is $50 ($25/hour regular rate x 0.5 x 4 overtime hours).
- Joe's total compensation for the week is $1,150 or:
  - $1,100 total straight-time earnings; plus
  - $50 additional half-time earnings (overtime premium).

31

31

Hypothetical 4

- Employees have a regularly scheduled workweek of 8 hours/day, Monday through Saturday (48 hours).
- Employees are paid $24/hour in straight-time pay.
- Employee Handbook states that employees who report to work on a day they are scheduled and are sent home because of lack of work will be paid 4 hours of straight-time pay.
- Employee works the following schedule:
  - Monday: reports to work and is sent home without being given any work
  - Tuesday - Saturday: works 8 hours per day, for a total of 40 hours actually worked.
- To how much is the employee entitled?

32

32

Answer to Hypothetical 4

Employee's total compensation for the week is $1,056.

- Employee's total straight-time earnings are $1,056 or:
  - 40 hours worked x $24/hour = $960.
  - 4 hours of show-up pay x $24/hour = $96.
  - Because the show-up pay is not regarded as compensation for hours worked, the employee's regular rate remains $24/hour.
  - 40 hours worked x $24 ($960) plus 8 hours show-up pay ($96) = $1,056.

33

33

Two or More Jobs at Different Rates of Pay

- Default rule: weighted average calculation of regular rate. (29 CFR § 778.115.)
  - Earnings from all rates during a week are added and the total divided by the hours worked in all roles.
  - Example: Laurie works 27 hours as a factory superintendent at $37/hour and 13 hours as a trainer at $42/hour.
    - The weighted average is $38.63 (rounded up), calculated as follows: 27 hours x $37 = $999; 13 hours x $42 = $546; $999 + $546 = $1,545; $1,545 ÷ by 40 = $38.625).
- As the default method, this method may always be used.

34

34

Two or More Jobs at Different Rates of Pay (cont'd)

Alternative method: regular rate of job being performed when overtime occurs

- Requirements:
  - (1) the employee must perform two or more kinds of work;
  - (2) the employer must establish a bona fide hourly rate for those different kinds of work;
  - (3) the compensation must be paid pursuant to an agreement or understanding arrived at between the employer and the employee before the work is performed; and
  - (4) the compensation must be computed at rates not less than one and one-half times such rates applicable to the same work when performed during nonovertime hours.

35

35

Two or More Jobs at Different Rates of Pay (cont'd)

Alternative method first requirement: two or more kinds of work

- The jobs must be truly different and not just the same job on a different shift for which a premium is paid.
  - Satisfied when nurses worked different shifts that involved substantially different amounts of work that was "qualitatively different."
  - Satisfied when employees whose regular jobs included bookkeeper, butcher, and maintenance person cut grass and picked up paper at their employer's plant on weekends.
  - Satisfied where employee worked roles of firefighter and fire inspector where only a "minor overlap" existed between the duties in each role.

36

36

Two or More Jobs at Different Rates of Pay (cont'd)

Alternative method third requirement: advance agreement

- Does not have to be in writing so long as the employee is aware of it before performing the work; e.g.,
  - Employees are orally informed of the different pay rates before they perform the jobs
  - Employee asks to work different role because the pay rate is higher
- The advance agreement ***should be*** in writing, with the writing signed by the employee.

37

37

Questions?

PARSONS BEHLE & LATIMER

38

38

Thank You

- **Mark A. Wagner**
  801.536.6776
  mwagner@parsonsbehle.com

39

39