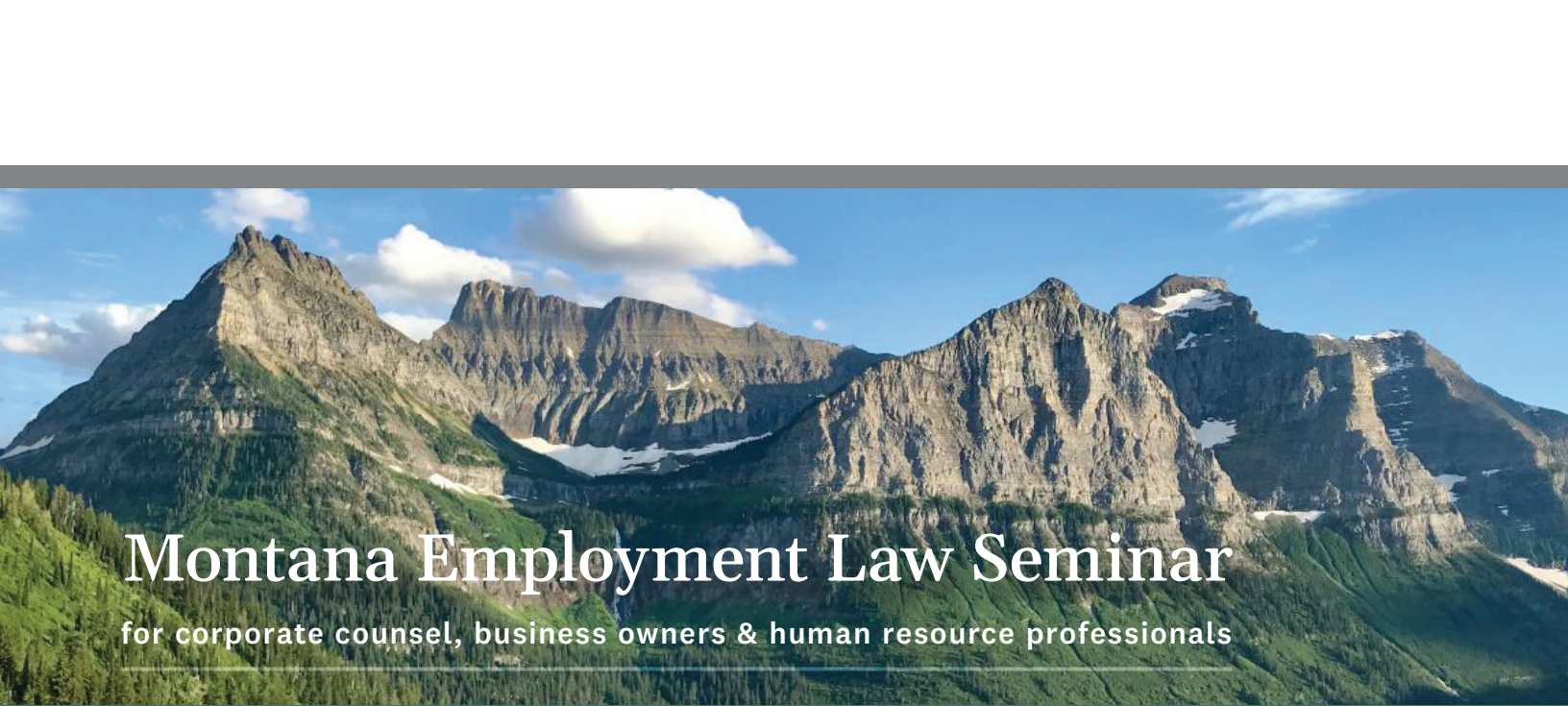




Montana Employment Law Seminar

for corporate counsel, business owners & human resource professionals

SEPTEMBER 15, 2026 | RESIDENCE INN DOWNTOWN

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Presentations:

Social Media, Free Speech and Employer Liability

Mark D. Tolman and Leah Trahan

“Don’t Be the Test Case” - Developments in Accommodation Requirements Under the ADA, Title VII and the PWFA

Liz M. Mellem and Susan Baird Motschieder

Non-Competes on the Brink of Extinction: How HR Teams Keep IP and Relationships Safe in a Populist Era

Michael Judd and Christina M. Jepson

The logo for Parsons Behle & Latimer, consisting of the firm's name in white, all-caps, sans-serif font, stacked vertically within a dark blue square.

Montana Employment Law Seminar

Social Media, Free Speech and Employer Liability

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Social Media, Free Speech and Employer Liability

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Sept. 15, 2026 | Residence Inn Downtown

Legal Disclaimer and PDF Handbook

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



Thanks to social media, who recognizes this guy?

How about now?



A SKY FULL OF SPARKS Tech CEO Andy Byron and HR chief spotted 'all over each other' moments before being caught on kiss cam at Coldplay gig



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3

Employees Going Viral



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4

Employees Going Viral

California healthcare workers fired after TikTok video mocking patients goes viral



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5

What can a social media policy do for you?

- Define prohibited conduct:
 - Disclosing confidential information.
 - Using social media during working time.
 - Bullying and abuse, including discrimination, harassment, and retaliation.
- Set expectations for employees who post online content about the company:
 - Disclose affiliation.
 - Disclaim that “Opinions are my own.”

Consult counsel and consider trusted sources like SHRM

<https://www.shrm.org/topics-tools/tools/policies/social-media-workplace-policy-template>

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6

Social Media Landmines: where do employers step in it?

- Public sector: Failing to address an employee's First Amendment speech rights.
- Private sector: Failing to provide context that a social media policy does not restrict "concerted activity" under NLRA Section 7 (i.e., the right of employees to complain together about work).
- Ignoring state-specific speech protections.
- Believing that off-duty social media misbehavior does not need to be addressed, i.e., adhering to the misnomer that if employee misconduct doesn't occur at work, it is none of the employer's business.

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First Amendment (public sector only)

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NEWS

Free speech lawsuits mount after Charlie Kirk assassination

FEBRUARY 12, 2026 · 5:00 AM ET

HEARD ON MORNING EDITION



Martin Kaste

A REUTERS SPECIAL REPORT

The Charlie Kirk purge: How 600 Americans were punished in a pro-Trump crackdown

Two months after Charlie Kirk's assassination, a government-backed campaign has led to firings, suspensions, investigations and other action against more than 600 people. Republican officials have endorsed the punishments, saying that those who glorify violence should be removed from positions of trust.

By **Raphael Satter** and **A.J. Vicens**

November 19, 2025 4:00 AM MST · Updated November 19, 2025



9

**Darren V Michael**
September 10 at 5:06 PM · 🌐

News Article ⓘ

Charlie Kirk Says Gun Deaths 'Unfortunately' Worth it to Keep 2nd Amendment

PUBLISHED APR 06, 2023 AT 05:39 PM EDT

UPDATED APR 07, 2023 AT 08:44 AM EDT



University to Pay \$500,000 to Professor It Fired Over Charlie Kirk Post

Austin Peay State University in Tennessee also reinstated Darren Michael, a tenured acting professor whose post about Mr. Kirk's killing inflamed conservatives.

10

Public Employers Must be Mindful of First Amendment Issues

To prevail on a First Amendment retaliation claim, a public employee must show:

- (1) their speech was not made pursuant to their **official duties**
- (2) their speech was on a matter of **public concern**
- (3) the **government's interests** in promoting the efficiency of the public services it provides do not outweigh the **plaintiff's free speech interests**
- (4) the plaintiff's speech was a **substantial or motivating factor** in the adverse employment action taken against them
- (5) the government would not have reached the **same employment decision** absent the plaintiff's speech



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Hook v. Rave, 4:25-CV-04188 (D.S.D.)



VS



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Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- Phillip Michael Hook, tenured professor of art at the University of South Dakota
- Hook posted on Facebook about the Charlie Kirk assassination:
 - Okay. I don't give a flying f*** about this Kirk person. Apparently he was a hate spreading Nazi. I wasn't paying close enough attention to the idiotic right fringe to even know who he was. I'm sorry for his family that he was a hate spreading Nazi and got killed. I'm sure they deserved better. Maybe good people could now enter their lives. But geez, where was all this concern when the politicians in Minnesota were shot? And the school shootings? And Capitol Police? I have no thoughts or prayers for this hate spreading Nazi. A shrug, maybe.
- Three hours later, he removed his post and made a second one:
 - Apparently my frustration with the sudden onslaught of coverage concerning a guy shot today led to a post I now [sic] regret posting. I'm sure many folks fully understood my premise but the simple fact that some were offended, led me to remove the post. I extend this public apology to those who were offended. Om Shanti.

13



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- Two days later, the **South Dakota Speaker of the House** shared a screenshot of Hook's first post and included the following message:
 - "Yesterday, I was made aware of these **hateful and vile** comments made by a University of South Dakota professor regarding the death of Charlie Kirk and Charlie's family. I am **disgusted** by his remarks, and think they are unbecoming of someone who works for and represents our University. Yesterday, after seeing the post, I **immediately reached out to USD President** Sheila Gestring and **called on the professor to be fired.**"

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Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- A few hours later, South Dakota's **Governor** also shared a screenshot of Hook's first post and included the following message:

“When I read this post, I was **shaking mad**. The Board of Regents intends to **FIRE** this University of South Dakota professor, and I'm glad.”

15



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- The school sent Hook a letter putting him on **administrative leave** and stating its **intent to terminate** his employment
- Hook sued alleging First Amendment retaliation
- He moved for a temporary restraining order or “TRO” preventing the school from “retaliating against him” and “continuing his administrative leave”

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Hook v. Rave, 4:25-CV-04188 (D.S.D.)

The court granted the Professor's TRO (i.e., it put a hold on his termination), finding that the University had failed to put on evidence that Hook's "speech had an adverse impact on the efficiency of the University's operations."

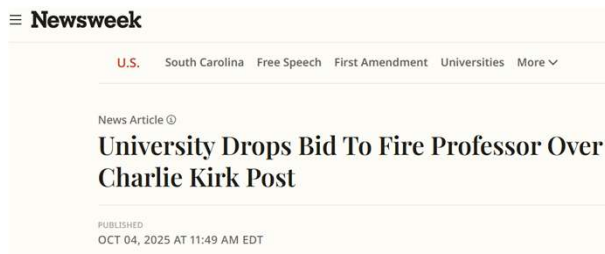
- Defendants allege that in the days following Hook's post, hundreds of calls and messages were made to the Board of Regents and/or the University of South Dakota commenting negatively regarding the comment or calling for the removal of Professor Hook. ***But mere allegations that speech disrupted the workplace or affected morale, without evidentiary support, are insufficient.***

17



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

And now the rest of the story...



Hook commented, "I am thrilled that I can continue teaching my students at the University of South Dakota. . . . **I hope that the state now understands that the First Amendment prohibits it from punishing anyone for speech about public issues—no matter how much State or national leaders or others disagree with it.**"

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Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)



VS



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Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Plaintiff was an anthropology professor at the University of Tennessee
- She commented on someone else's social media post about Charlie Kirk:
 - "The world is better off without him in it. Even those who are claiming to be sad for his wife and kids....like, his kids are better off living in a world without a **disgusting psychopath** like him and his wife, well, she's a sick f*** for marrying him so I don't care about her feelings."



20

Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Robby Starbuck, a political activist, discovered the post and shared it publicly with his hundreds of thousands of followers
- At least two elected representatives, **U.S. Rep.** Tim Burchett and **Tennessee Rep.** Jack Zachary, reached out to the University to express concern about Plaintiff's comment
- The university **terminated** Shirinian's employment. She sued and sought a temporary restraining order (TRO)

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Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Employees' rights must be balanced against "the effective functioning of the public employer's enterprise."
- If, as here, "an employee's speech 'substantially involves matters of public concern,' an employer may be required to make a **particularly strong showing** that the employee's speech interfered with workplace functioning."

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Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

The court denied the Professor's TRO (i.e., it did not halt her termination), concluding that the University **could** make the "particularly strong showing" of disruption:

- The comment was **shared broadly** on social media and "at least two (2) elected representatives" contacted the University to express concerns
- The comment caused the school's chancellor to assess that the Professor did "**not have the competencies** necessary to be an effective instructor"
- The chancellor also determined that the Professor's comment "**negatively impacted the academic environment** and increased the risk of violence on our campus"
- And the chancellor believed that the Professor's comment "brought the University into **disrepute**" and "adversely affected the University."

But remember what the court said in *Hook* case?

"Mere allegations that speech disrupted the workplace or affected morale, without evidentiary support, are insufficient."

23



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

And now the rest of the story....

Tennessee university to pay professor \$1.9M after calling Charlie Kirk a 'disgusting psychopath'

By Rachel del Guidice | FOX News | Tennessee | Published July 2, 2026 12:48 PM CDT [↗](#)

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Concerted Activity (private sector only)

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National Labor Relations Board

What is the NLRB?

- An independent federal agency charged with enforcing the National Labor Relations Act (NLRA)
- Members are political appointees and tend to reflect the party ideology of the President who appoints them

From the NLRB: “The law we enforce gives employees the right to act together to try to improve their pay and working conditions or fix job-related problems, **even if they aren't in a union.**”

Section 7 of the NLRA

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to **engage in other concerted activities for the purpose of...mutual aid or protection....**” - [Sec. 7, NLRA](#)

Key phrase = concerted activities

Section 7 violation occurs when:

1. The employee **engaged** in concerted activity
2. The employer **knew** of the concerted activity
3. Hostility toward the activity was a **motivating factor** to take adverse action

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What has the NLRB said about concerted activity that occurs on social media?

“You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media.”

“But just individually griping about some aspect of work is not ‘concerted activity’”

Social media “activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer’s products or services without relating your complaints to any labor controversy.”

<https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/social-media-0#:~:text=Federal%20law%20protects%20your%20right%20to%20use,%20Seeking%20help%20to%20form%20a%20union>

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NLRB Case Study

Gwen complained on Facebook about her supervisor—she called him a “scumbag.” Several co-workers posted supportive responses leading to more negative remarks by Gwen about her supervisor. Employer terminated Gwen’s employment because she disparaged her supervisor.

Did the employer violate Section 7?

Yes. The NLRB concluded that the name-calling was not malicious and unaccompanied by any physical threats.

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NLRB Case Study

Jane told another employee, Sarah, that her performance was lacking and that they should take the issue up with their supervisor. Before the supervisor meeting, Sarah complained on Facebook about Jane and asked her co-workers for input. Four co-workers weighed in. Several posts were sarcastic. Some were even profane.

Employer terminated Sarah and the four other employees who participated in the Facebook exchange.

Did the employer violate Section 7?

Yes. NLRB called this a textbook example of concerted activity. Sarcasm and swearing was not malicious.

30



NLRB Case Study

Joe, a bartender, posted disparaging remarks about the bar (his employer) on Facebook—he said that he had not received a raise in five years and that the bar’s customers were “rednecks.” None of his co-workers responded. The employer terminated his employment.

Did this employer violate Section 7?

No. The NLRB concluded that this employee was merely griping about work and did not attempt to engage any coworkers in a conversation about the terms and conditions of work.

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Policy Solution

Avoid broad statements that could chill Section 7 activity, like this: “You may not post content online that harms the reputation of the Company.”

Instead, provide context for the social media behaviors you want to regulate, like this: “Communicate professionally when engaging online on behalf of the Company.”

Or this, “You may not post content online about the Company that is knowingly and deliberately false.”

Add a Section 7 Disclaimer, like this: “Nothing about this policy prohibits you from engaging in activity protected by Section 7 of the National Labor Relations Act, including engaging with your coworkers to improve working conditions.”

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State Restrictions

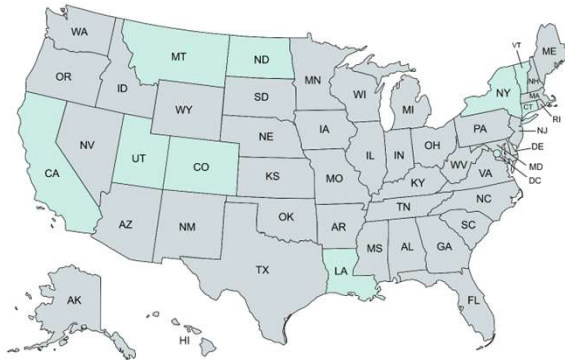
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State Laws Protecting Political Speech

Several states have laws that protect after hours employee speech, including on social media.

- Prohibition on adverse action based on political speech and affiliation
- Prohibition on adverse action based on off duty conduct
- Prohibition on adverse action based on exercise of free speech

State Laws Protecting Political Speech



Created with [magschat.se](http://www.magschat.se)



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State Laws Protecting Political Speech

- **California** (Cal. Labor Code §§ 98.6, 1101, and 1102) (participation in politics, political activity, and political affiliation)
- **Colorado** (4 Colo. Code Regs. § 801-1:9) (political affiliation)
- **Connecticut** (Conn. Ge. Stat. § 31-51q) (first amendment)
- **District of Columbia** (D.C. Code § 2-14022.11; 4 D.C. Mun. Regs. § 515) (political affiliation)
- **Louisiana** (La. R.S. § 23:961) (employer with 20 or more employees no rule prohibiting engaging or participating in politics)
- **Montana** (Mont. Code Ann. § 39-2-904) (free speech)
- **New York** (N.Y. Labor Law § 201-d (McKinney)) (political activities)
- **North Dakota** (N.D.C.C. § 14-02.4-03) (lawful conduct during nonworking hours)
- **Utah** (Utah Code Ann. 34A-5-112) (religious, moral, or political conviction)
- **Vermont** (21 V.S.A. § 1726(a)(7)) (political affiliation)



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Montana Law

- An **employer may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate** against an employee or job applicant for:
 - (a) not complying with a request or demand by the employer that violates this section [on access]; or
 - (b) **legal expressions of free speech by the employee or job applicant**, as protected in 39-2-904, **made on personal social media**.

These provisions do not apply if “employee or job applicant **violates an employer’s written policy**” 39-2-307(4)-(5).

37



Montana Law

- A discharge is wrongful if “the employer terminated the employee **solely based on the employee's legal expression of free speech**, including but not limited to statements made on social media.” Mont. Code Ann. 39-2-904(1)(d).

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Policy Takeaways

- In handbook, carve out traditional expressive activity.
 - Employees may engage in lawful expression or expressive activity outside of the workplace regarding their views, unless the expression is in direct conflict with the essential business-related interests of the Company (e.g., the Company's policies against discrimination and harassment).
- For discipline, you want to be specific about what on social media will result in discipline and tie that to business interests
- Make sure any discharge is based on business considerations not only speech

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Harassment

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Okonowsky v. Garland (9th Cir. 2024)

Lindsay Okonowsky worked as a psychologist for a federal prison.

Steven Hellman was a corrections Lieutenant in the same facility.

Instagram “suggested” that Lindsay follow Steven’s page, “8_and_hitthe_gate.”



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Steven’s posts were awful



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Steven’s hundreds of posts were “overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes” that expressly or impliedly referred to the prison’s employees and inmates.

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

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

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When Lindsay complained, the prison was dismissive.



Lindsay complained to Robert Grice, Acting Safety Manager.

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

"Sorry, not sorry."



Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace. He also said the memes were "funny."

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As a result, Steven's behavior got worse.

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

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

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



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Ninth Circuit drops the gavel.

A district court sided with the prison, concluding that all the conduct “occurred entirely outside of the workplace.”

But the Ninth Court reversed, holding that **“even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee’s working environment.”**



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Bonus post-script: *what happened at trial?*

7	UNITED STATES DISTRICT COURT	
8	CENTRAL DISTRICT OF CALIFORNIA	
9		
10	LINDSAY OKONOWSKY,	Case No. 2:21-cv-07581-MCS-AS
11	Plaintiff,	VERDICT FORM
12		
13	v.	
14	MERRICK GARLAND,	
15	Defendant.	
16		
17		

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Bonus post-script: *what happened at trial?*

1 VERDICT
2 We, the jury in the above-entitled action, unanimously answer the following
3 questions submitted to us:
4
5 **QUESTION NO. 1:**
6 Was Plaintiff Lindsay Okonowsky subjected to sexual advances, requests for sexual
7 conduct, or other verbal or physical conduct of a sexual nature?
8 ☒ Yes
9 ☐ No
10 *If your answer to Question No. 1 is yes, then answer Question No. 2. If your answer*
11 *to Question No. 1 is no, stop here and have the presiding juror sign and date this form*
12 *below.*
13
14 **QUESTION NO. 2:**
15 Was the conduct unwelcome to Plaintiff Lindsay Okonowsky?
16 ☒ Yes
17 ☐ No
18 *If your answer to Question No. 2 is yes, then answer Question No. 3. If your answer*
19 *to Question No. 2 is no, stop here and have the presiding juror sign and date this form*
20 *below.*
21 *///*

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Bonus post-script: *what happened at trial?*

1 **QUESTION NO. 3:**
2 Was the conduct sufficiently severe or pervasive to alter the conditions of Plaintiff
3 Lindsay Okonowsky's employment and create a sexually abusive or hostile work
4 environment?
5 ☐ Yes
6 ☒ No
7 *If your answer to Question No. 3 is yes, then answer Question No. 4. If your answer*
8 *to Question No. 3 is no, stop here and have the presiding juror sign and date this form*
9 *below.*
10

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Policy Solution

“You may not post content online that violates the Company’s policies against discrimination, harassment, and retaliation.”

And don’t say, “Sorry, not sorry” when an employee reports that they are being harassed by coworkers online.

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Thank You



Mark D. Tolman

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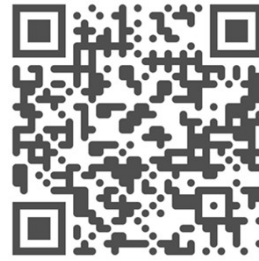
Leah Trahan

ltrahan@parsonsbehle.com

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today's seminar.



Thank you for attending

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Montana Employment Law Seminar

“Don’t Be the Test Case” - Developments in Accommodation Requirements Under the ADA, Title VII and the PWFA

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“Don’t Be the Test Case” -- Developments in Accommodation Requirements under the ADA, Title VII, and the PWFA

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Sept. 15, 2026 | Residence Inn Downtown

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parsonsbehle.com/montana-seminar
to download a PDF handbook of
today’s seminar.



ADA Accommodation – the Basics

- The Americans with Disabilities Act requires reasonable accommodations as they relate to three aspects of employment: (1) ensuring equal opportunity in the application process; (2) enabling a qualified individual with a disability to perform the essential functions of a job; and (3) making it possible for an employee with a disability to enjoy equal benefits and privileges of employment
- It does not have to be the employee's preferred accommodation
- The employer is required to engage with the employee to find a **reasonable** accommodation that allows the employee to perform the essential functions of the job and does not constitute an **undue hardship** on the employer

3



ADA Accommodation – the Basics

- An accommodation is not required if it will cause the employer an "undue hardship"
- A showing of undue hardship requires more than generalized conclusions
- Undue hardship must be based on an individualized assessment of current circumstances that show that a specific accommodation would cause **significant difficulty or expense**

4



ADA Accommodation – the Basics

- Undue hardship focuses on the **resources** and circumstances of the particular employer in relationship to the **cost or difficulty** of providing a specific accommodation
- Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business
- Decided on a case by case basis
- Put yourself on the jury – a bunch of people who hate their boss – would they think the accommodation as unreasonable or an undue burden

5



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- Angel Tudor was a school teacher with a long **history of post-traumatic stress disorder (PTSD)** and anxiety that allegedly arose from sexual harassment and assault at a former workplace
- Tudor asserted that her disability caused problems with neurological function, a stutter, severe nightmares and impaired ability to perform daily tasks
- She claimed that the workplace was a trigger for her symptoms and had **sought and received an accommodation** allowing her to **leave** the school's campus **during her prep periods**, twice a day, **once in the morning for 15 minutes and once in the afternoon for 15 minutes**
- Tudor would use this off-campus time to collect herself and manage her symptoms

6



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- After a **change** in **school administration**, teachers were **prohibited from leaving campus during prep periods**
- Tudor **did so anyway** and was **disciplined for insubordination**
- After a period of FMLA leave, the school allowed Tudor one morning break off-campus and an additional break in the afternoon—provided that a librarian could cover her absence

7



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- Eventually, Tudor's **schedule changed** to include a morning prep period and an afternoon study hall, but **no other employee was available to cover** her afternoon study hall during her 15-minute break away from school.
- Tudor **took the breaks anyway** but said that knowing she was violating school policy worsened her anxiety
- She **brought suit** against the school district under the ADA for **failure to accommodate** her disability

8



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- During the discovery phase of the case, **Tudor admitted that she was able to perform the essential functions of her job regardless of whether she received an accommodation**, although “under great distress and harm”
- The District filed a **motion for summary judgment**, arguing that Tudor’s ability to do her job without accommodation was fatal to her failure to accommodate claim
- The district court agreed and **granted the school district’s motion**

9



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- On appeal, the Second Circuit disagreed, holding: “A straightforward reading of the ADA confirms that **an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation. Ability to perform the essential functions of the job is relevant to a failure-to-accommodate claim, but it is not dispositive**”
- The court noted that other circuit courts had arrived at the same conclusion (including the Ninth Circuit, which has jurisdiction over Montana)

10



What if the Accommodation is Not Necessary to Perform the Job?

■ Takeaways:

- Employers are faced with the question – If an accommodation is not necessary to perform the essential functions of the job, how can you determine whether an employee is entitled to it
- This decision suggests that the **reasonableness** of the requested accommodation is the most important factor in determining whether it must be provided
- Employers should still prepare job descriptions for every position (even though necessity may become a secondary factor in the reasonableness analysis)
- You want to be able to argue that “x” or “y” is an essential function of the job and if an employee can’t perform the essential function with accommodation, they can be let go

11



ADA Accommodation – Our Old Friend, Work from Home

- On February 11, 2026, the EEOC and the Office of Personnel Management (OPM) published a guidance document entitled *Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities* (the Guidance)
- The Guidance was created specifically for federal employers to help them comply with the Americans with Disabilities Act (ADA) and Rehabilitation Act as they implement President Trump’s directive for all federal workers to return to the office full time
- Although the Guidance was prepared with federal sector employers in mind, it nevertheless provides useful reminders for private sector employers grappling with return-to-office mandates

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ADA Accommodation – Our Old Friend, Work from Home

- For example, the EEOC emphasizes the need for an individualized assessment for each employee who has requested or received a telework accommodation, rather than a “blanket approach”
 - An employer’s reasonable accommodation obligations are highly fact-specific; what is required or effective for one employee with a disability may not be the same for another. Observing this, the EEOC urges federal employers to take the time needed to address each employee’s situation individually.
- Relatedly, the Guidance speaks to the role of medical documentation in the interactive process, and what can be asked of the employee’s health care provider
- It further advises that an employer need not ignore evidence contradicting an employee’s claimed need for accommodation, but “should take care to base its decisions on the best available evidence. An agency should give due weight to contradictory evidence that is reliable. And it should discount contradictory evidence that is not reliable”
- The Guidance cautions, however, that “this is not a license to engage in fishing expeditions to undermine an employee’s request for accommodation”

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ADA Accommodation – Our Old Friend, Work from Home

- The Guidance allows for previously-issued telework accommodations to be continued, modified or rescinded based on the facts involved
- It also recommends periodically revisiting a telework accommodation to ensure that it is still effective or required, explaining that “reevaluation and modification of a reasonable accommodation are important steps in the interactive process”
- Accommodations may also be reevaluated when material changes occur, such as “a change in the employee’s condition, a change in job requirements, a change in operational needs, a change in law, etc.”

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ADA Accommodation – Our Old Friend, Work from Home

- Finally, the Guidance addresses a few questions that will be familiar: What if an employee claims that in-person work causes them anxiety? What if they say their disability prevents them from making a lengthy or difficult commute?
- On the first question, the EEOC says that the law does not “create a general right to be free from all discomfort and stress in the workplace, including anxiety. Instead, the Act entitles disabled employees to a fair shot to do their jobs and enjoy the benefits and privileges of those jobs on comparable footing as their non-disabled peers”
- The question is “whether the symptoms impose a material barrier to the employee’s ability to work in the office or enjoy a benefit or privilege of employment,” and “common anxiety, without more, is unlikely to impose a material barrier”

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ADA Accommodation – Our Old Friend, Work from Home

- On the second question, the Guidance notes that “where the length and means of the commute are outside the employer’s control, it is unreasonable to require the employer to excuse the employee from commuting”
- Usually, it is not the employer’s job to help an employee with a disability get to and from work, “assuming the employer does not offer such help to employees without disabilities”
- However, while eliminating the commute altogether may not be required, an employer may need to provide other accommodations, “such as flexible workplace scheduling, to enable the employee to accomplish their commute and access the worksite,” or telework for a limited period to allow the employee to relocate or find other means for their commute

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ADA Accommodation – Can an Employer Force an Employee to Take an Accommodation

- Hypothetical:

- An employee is having problems performing the job
- Upon inquiry, the employer learns that the employer has recently become dependent on a pain medication for a recent shoulder surgery
- Can the employer tell the employee or force the employee to get help

17



Remember *Muldrow*?

- Historically under Title VII (and all the federal anti-discrimination statutes), a plaintiff had to prove that their employer took “material” or “significant” adverse action against them based on their protected class
 - Discharge
 - Demotion
 - Other decisions that impacted employee pay and promotional opportunities

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Remember *Muldrow*?

- Less **severe adverse actions** that did not significantly change employment status (e.g., reassignment) **did not usually qualify** as adverse action
- That changed in 2024 in the case *Muldrow v. City of St. Louis* decision, the U.S. Supreme Court expanded employee protections in Title VII discrimination cases by redefining what “adverse” employment action means
- Adverse action in Title VII discrimination cases includes all employment decisions that cause “**some harm**” on an employee
- Court said that reassignment tied to diminished responsibility and prestige was sufficiently adverse because it imposed “some harm” on the employee

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Muldrow Creep: the standard articulated in *Muldrow* has crept into the ADA

- On July 21, 2025, the U.S. Tenth Circuit Court of Appeals applied the *Muldrow* **some-harm standard to a disability discrimination claim** arising under the ADA and Rehabilitation Act
- In *Scheer v. Sisters of Charity of Leavenworth Health System, Inc.*, an employee (Sheer) with job performance problems disclosed that she was experiencing “personal issues” and suicidal ideation
- The employer revised a Performance Improvement Plan (PIP) to include a **mandatory referral to the company’s employee assistance program** (EAP) for counseling

20



Muldrow Creep, cont.

- Sheer refused to receive EAP counseling and was discharged
- Sheer then sued
- The court, applying pre-Muldrow precedent, granted summary judgment to the employer because mandatory counseling did not cause a “significant change” to Sheer’s employment and therefore was not adverse action

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Muldrow Creep, cont.

- On appeal, the 10th Circuit joined its sister circuits (1st, 5th, 6th and 11th) in holding that “**Muldrow’s some-harm standard** applies not only to Title VII claims, but also to **ADA claims**”
- The court **reversed and remanded** to the district court to evaluate Sheer’s claims under that lower standard

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Ancillary Lesson from *Scheer v. Sisters of Charity*

- Sisters was too charitable
 - **Two rules** of employment law: (1) If it is not in writing, it did not happen; (2) No good deed of an employer goes unpunished
 - Scheer worked from 2014 to 2019
 - Within the first four years of employment she had **seven** corrective actions – all based on the same misconduct – failure to hit productivity targets
 - This the **easiest types of termination** – multiple purely **objective** failures
 - Decided to put her on a PIP
 - The day before the PIP was drafted, Scheer told other employees she was having suicide ideations

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Ancillary Lesson from *Scheer v. Sisters of Charity*

- Sisters was too charitable
 - That prompted the PIP to include going to counseling, which was the whole basis of the lawsuit – she was fired for refusing to agree to get counseling
 - If Sisters had done the PIP or the termination after **maybe the second or third disciplinary action**, it unlikely a lawsuit would have arisen
 - Related to this (maybe a third rule of employment law) – **poor performing employees rarely become high performing employees**

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Religious Accommodation – The Basics

- Under Title VII, an employer is required “to make reasonable accommodations to the religious needs of employees” unless doing so would create “undue hardship on the conduct of the employer’s business”
- Examples of accommodation could include modifications of clothing requirements, giving certain breaks during the day for prayer, not requiring an employee to work on days of worship
- And then 2021 happened
- An explosion of demands/lawsuits that requiring COVID-19 vaccines or masking violated religious beliefs

25



EEOC Takes Aim

- In August of 2025, EEOC issues press release – “200 Days of EEOC Action to Protect Religious Freedom at Work”
- “Title VII recognizes the reality that religious freedom is a fundamental right that transcends workplace policies,” said EEOC Chair Andrea Lucas. “During the previous administration, workers’ religious protections too often took a backseat to woke policies. Under my leadership, the EEOC is restoring evenhanded enforcement of Title VII—ensuring that workers are not forced to choose between their paycheck and their faith”

26



EEOC Takes Aim – COVID-19 Mandates

- “To date, the EEOC has recovered over \$55 million for workers impacted by these mandates—most recently, this week’s \$1 million settlement with Mercyhealth. During the Biden Administration, almost all of the agency’s important work enforcing Title VII in the wake of COVID-19 vaccine mandates happened both silently and too slowly. No longer. Under the Trump Administration, the EEOC is taking bold and aggressive steps to remedy the widespread civil rights harms during the pandemic”

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EEOC Takes Aim – Dress

- “The EEOC filed a lawsuit against CEMEX Construction Materials Florida after the company failed to accommodate to a mixture truck drivers request to wear a skirt. The employee, an Apostolic Christian, wore close-fitting skirts over her work pants and was in compliance with company policy; however, the company forced the employee to choose between wearing a skirt or losing her job”

28



EEOC Takes Aim – Social Media

- “The EEOC sued The Rock Snowpark after an employee was fired over faith-based social media posts which made no mention of the workplace or coworkers. Acting Chair Andrea Lucas previously stated, ‘While employers must remain alert to potential harassment in the workplace, religious statements made outside of work that do not reference or impact anyone in the workplace do not constitute unlawful harassment’”

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Religious Accommodation – Bona Fide Religious Belief

- A bona fide religious belief is one that (1) is religious within the plaintiff's own scheme of things, and (2) is sincerely held
- Employers should not inquire whether those beliefs "derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible"
- A belief qualifies even if the belief is not textually mandated by the plaintiff's religion
- An employee's belief or practice can also be religious under Title VII even if the employee is affiliated with a religious group that does not recognize or share that individual's particular belief or practice

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Religious Accommodation – Bona Fide Religious Belief

- Religious beliefs include not only theistic convictions but also non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views"
- Courts in the 9th Circuit have consistently stated that "religion includes "all aspects of religious observance and practice, as well as belief" but that "Title VII does not protect secular preferences such as medical, political, and social preferences." *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998).

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Religious Accommodation – Bona Fide Religious Belief

- The EEOC has identified several factors that, singly or in combination, may undermine an employee's assertion that the belief is sincerely held: (a) the employee behaves in a manner markedly inconsistent with the professed belief; (b) the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; (c) the timing of the request is suspicious (e.g., follows a prior request for the same benefit on secular grounds); and (d) the employer otherwise has reason to believe the accommodation is not sought for religious reasons

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What Information Can an Employer Ask for to Test the Veracity of the Religious Belief?

- Written materials describing the religious belief or practice – texts, statements from leaders
- The employee's own explanation of sincerely held religious beliefs and practices -- when the individual adopted the belief or practice and how he or she has adhered to the belief or practice
- Information from third parties about how the employee has adhered to the belief or practice from a religious leader, other believers, family members, friends, neighbors (those who have observed)

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Bona Fide Religious Belief, Not so Fast My Friend

- Sherry Detwiler was employed at a medical center in Oregon
- When the Center required their employees to vaccinate, Detwiler requested a religious accommodation
- But the accommodations offered by the Center – that Detwiler wear PPE and submit to weekly nasal swab testing – did not satisfy Detwiler
- She claimed the substance used to sterilize the swabs was carcinogenic
- As a Christian, Detwiler said, she was required to protect her body from “defilement” because her “body was a temple” according to a Biblical passage and confirmed by prayer
- But when Detwiler and the Center ultimately could not arrive at an alternative accommodation, Detwiler was terminated
- Detwiler sued, claiming the Center failed to accommodate her religious belief

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Bona Fide Religious Belief, Not so Fast My Friend

- The Ninth Circuit concluded Detwiler's stated beliefs were not enough to allow the case to proceed
- The court explained that a complaint for religious discrimination "must connect the requested exemption with a truly religious principle" through more than "broad, religious tenets"
- In Detwiler's case, while her belief that her body is a temple might be a sincere religious belief, her belief that the testing swab contained carcinogenic material was "premised on her interpretation of medical research" and "far too attenuated" from the broad religious belief to recognize it as requiring protection under Title VII

35



Bona Fide Religious Belief, Not so Fast My Friend

- Other courts examining similar cases have viewed things differently
- For example, the Sixth Circuit has found that an employee need only plausibly explain that the refusal to vaccinate was an "aspect" of "religious observance," "practice," or "belief."
- The Seventh Circuit found that religious vocabulary used may be sufficient to connect a medical concern with religious beliefs

36



Religious Accommodation – Undue Hardship

- Historically, employer had to show that the requested religious accommodation would impose “more than a de minimis cost”
- Pretty low burden and certainly lower than the required showing under the ADA
- Then in 2023 *Groff v. DeJoy* is decided
- The standard changes
- Employer must show that accommodating the worker’s religious beliefs would impose “substantial increased costs” in relation to the conduct of its business

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Religious Accommodation – Undue Hardship

- Groff was a postal worker who did not want to deliver mail on Sunday because of his religious beliefs
- Post office ultimately denied the request because other employees were complaining that they had to keep on covering for Groff
- The Third Circuit said post office met its “more than de minimis” burden because not making Groff work on Sundays imposed a burden “on his coworkers, disrupted the workplace and workflow, and diminished employee morale.”

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Religious Accommodation – Undue Hardship

- The Supreme Court disagreed, stating that the “more than de minimis” standard was wrong and that employers had to show that requested accommodation would impose “substantial increased costs” in relation to the company’s operations
- The Court did not discount that effects on coworkers might be an appropriate consideration in weighing whether an accommodation imposes undue hardship, “but a court cannot stop its analysis” without examining whether the impact on coworkers has ramifications for the conduct of the employer’s business”

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Post Groff – What Are We Seeing

- *Bordeaux v. Lions Gate Ent., Inc.*, (9th Cir.), a film production company’s assertion that exempting an employee from COVID-19 vaccination would risk a ten-day shutdown and \$1.5 to \$3 million increase in production costs met the new standard of “substantial increased costs”
- *Smith v. City of Atlantic City*, (3rd Cir.), firefighters request to keep beard on religious grounds would not create an undue hardship because individuals in firefighter’s position had not been called to fight fires in several decades and granting accommodation would not compromise city’s ability to fight fires.
- *Hebrew v. Texas Dep’t of Justice* (5th Cir.), court rejects prison’s assertions that letting guard keep beard was a substantial cost because the beard could be used to hide contraband or could be grabbed by a prisoner in a fight – court notes that the prison “nowhere identifies any actual costs it will face—much less ‘substantial increased costs’ affecting its entire business” and the prison “simply identifies its security and safety concerns without regard to costs”)

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PWFA: it's not just about disabilities anymore—pregnancy must be accommodated too.

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Pregnant Workers Fairness Act



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

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

Pregnant Workers Fairness Act

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

- PWFA became **effective June 27, 2023**.



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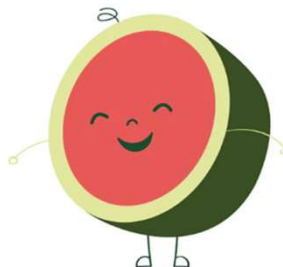
Duration of Leave and other Accommodations Under the PWFA

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

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

**40
WEEKS**

Your baby is as big
as a... WATERMELON!



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PWFA Medical Certifications

You cannot require a medical certification, and must grant, the following four accommodations:

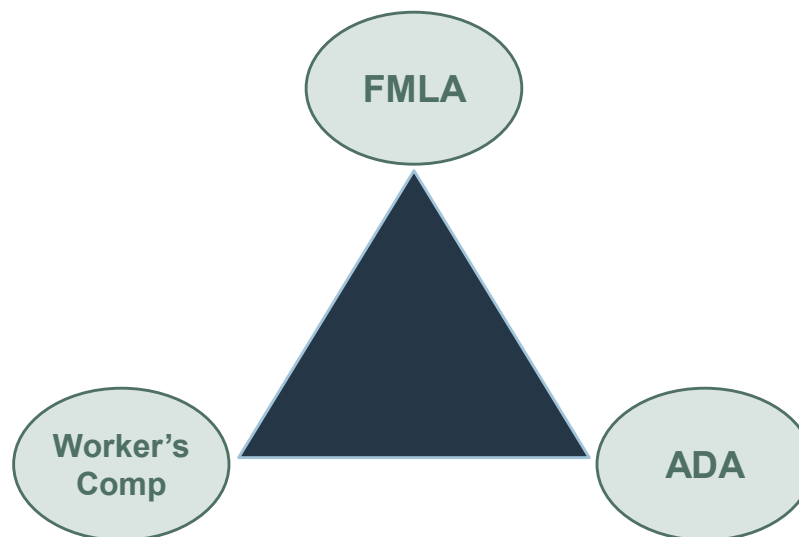
- (1) keeping water near and drinking as needed; (2) extra time for bathroom breaks; (3) to sit or stand as needed; and (4) extra breaks to eat and drink as needed.

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

45



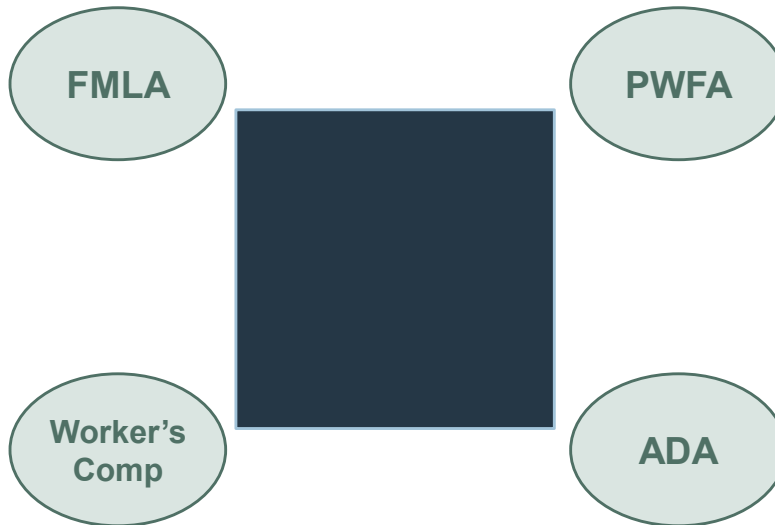
Leave Requests – the Bermuda Triangle of Employment Law



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The Bermuda Square?



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Thank You



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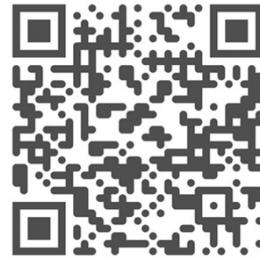
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Thank you for attending

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Montana Employment Law Seminar

Non-Competes on the Brink of Extinction: How HR Teams Keep IP and Relationships Safe in a Populist Era

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Non-Competes on the Brink of Extinction: How HR Teams Keep IP and Relationships Safe in a Populist Era

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Sept. 15, 2026 | Residence Inn Downtown

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Non-Compete History: National Level

- **January 2023 – FTC proposes rule:** Bans most non-compete clauses nationwide
- **April 23, 2024 – FTC issues final rule:** Adopts final rule banning most non-competes nationwide. Includes retroactive invalidation. Effective date: September 4, 2024
- **May 2024 – Multiple lawsuits filed**
- **August 20, 2024 – Nationwide block:** Texas Court issues order setting aside / enjoining the rule nationwide
- **October 18, 2024 – FTC appeals**
- **September 5, 2025 – FTC dismisses appeal and abandons the rule**
- **Why did FTC change its mind?**



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Non-Compete History: National Level

- **Just because the FTC dropped its appeal and its rule, it doesn't mean the government agency is no longer targeting non-competes**
- FTC has said that it has moved away from rulemaking and instead focusing on case-by-case enforcement
- On January 27, the Federal Trade Commission (FTC) held a workshop entitled, "Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements"
- In his opening remarks, FTC Chairman Andrew Ferguson announced that noncompetes with an "anticompetitive purpose" will attract enforcement

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FTC Enforcement

- **Rollins, Inc. (2026):** The FTC ordered major pest-control parent company Rollins, Inc. (and brands like Orkin) to stop enforcing non-compete restrictions against more than 18,000 employees nationwide. The company had required nearly all workers—regardless of role or pay—to sign agreements barring them from working in the industry for two years.
- **Adamas (2025):** The FTC targeted building services provider Adamas over anticompetitive "no-hire" agreements that restricted employee mobility and limited building owners from switching service providers.
- **Gateway Services, Inc. (2025):** The FTC brought an enforcement action and consent order against the pet cremation company for requiring roughly 1,800 employees across the country to sign one-year nationwide non-competes.

5



Non-Compete History: State Level

Numerous states ban virtually all non-competes: **California, North Dakota, Minnesota, and Oklahoma**

Others set significant restrictions

- **Maine:** No non-competes allowed for workers earning at or below 400% of the federal poverty level.
- **New Hampshire:** No non-competes allowed for workers earning at or below 200% of the minimum wage.
- **Rhode Island:** No non-competes allowed for workers earning at or below 250% of the federal poverty level.
- **Maryland:** No non-competes allowed for workers earning at or below 150% of the minimum wage.
- **Virginia:** No non-competes allowed for workers earning less than the average weekly wage in the state.
- **Illinois:** No non-competes allowed for workers earning less than \$75,000.
- **Colorado:** No non-competes allowed for workers earning less than \$123,750.
- **Oregon:** No non-competes allowed for workers earning less than \$100,533.
- **Washington:** No non-competes allowed for employees earning less than \$120,559.99 or contractors earning less than 301,399.98.
 - Will join the "**full ban**" list at the end of June 2027; retroactive (duty to notify current and former employees that existing non-competes are void)

6



Non-Compete History: Montana

- What about in **Montana**?
- Montana Code 28-2-703: Contracts in restraint of trade are generally void
- **Strictly Limited Exceptions:** Non-competes are permitted when selling the goodwill of a business or dissolving a partnership, and they must be limited in time and location.
- **Healthcare Ban:** Montana has strict total bans on non-competes for licensed physicians, nurses, and various mental health or behavioral health professionals.
- **Limited Judicial Exceptions:** Outside of specific statutory exemptions, courts historically void full restraints on trade, though narrow and reasonable restrictions to protect trade secrets have occasionally faced different scrutiny



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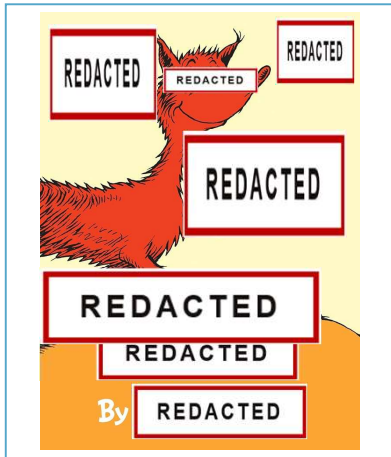
7

Restricted Covenants That (Might!) Work

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Oh the Places You'll Go . . .

. . . in violation of your new restrictive covenants.



Look sir. Look sir. Mr. Knox sir.
Let's do tricks with docs and sheets, sir.
Let's do tricks with non-competes, sir.
First, I'll make a slick trick lax deal.
Then I'll make a slick trick max deal.

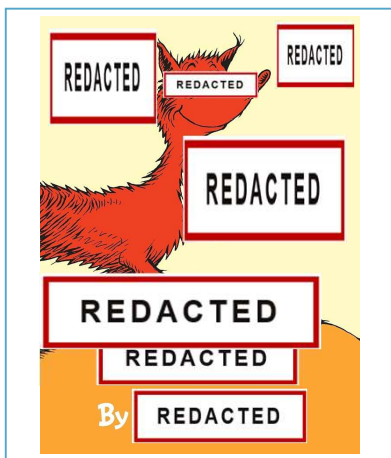
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Oh the Places You'll Go . . .

. . . in violation of your new restrictive covenants.



I get all the quicky lax deals
Mixed up with the sticky max deals.
I can't do it, Mr. Knox, sir.
I'm so sorry, Mr. Knox, sir.

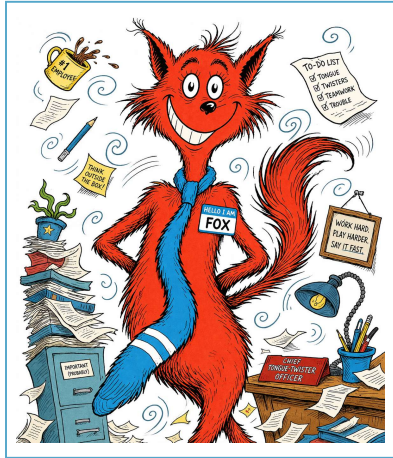
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10

First Things First: *Why?*

If we start wrong, we end wrong.



11

Question 1. When we impose restrictive covenants, we start by asking *what we're trying to protect*.

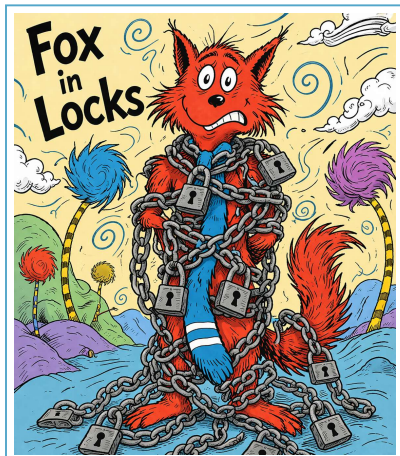
Question 2. Once we have a decent answer to the first question, we then ask, "How do I tailor the restriction to that goal?"

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Start Easy: Confidentiality

If we start wrong, we end wrong.



12

Confidentiality provisions. The better you can define your confidential information, the better. Will this last forever? Think: Have you already made this information available? Could employee have brought any of this information?

What about non-disparagement? In some cases, this may be a primary concern.

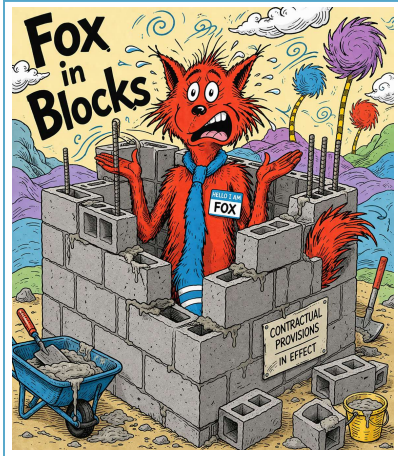
What would enforcement look like here?

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Next Up: Non-Solicitation (Pt. 1)

Contractual protection against a mass exodus?



13

Employee non-solicitation. Think, first: What do we even mean by solicitation? (Direct v. indirect, “bring with” v. “take away,” etc.) Who’s covered? For how long?

Competitive issues. Give some thought to industry sensitivity.

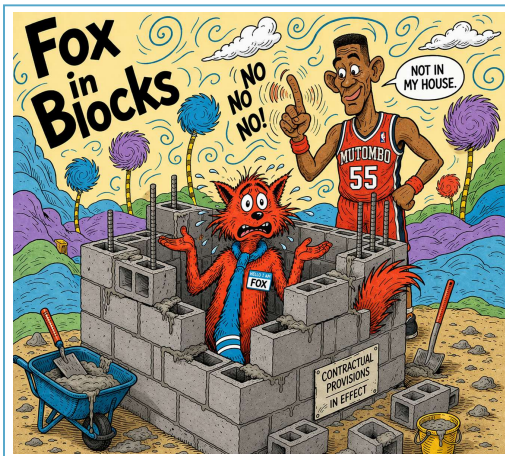
Do we have a damages problem here?

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Next up: Non-Solicitation (Pt. 2)

Who owns a client? Says who?



14

Client non-solicitation. General or specific? Can they be identified? How do *clients* feel about this? What about clients that are brought or developed by the departing employee?

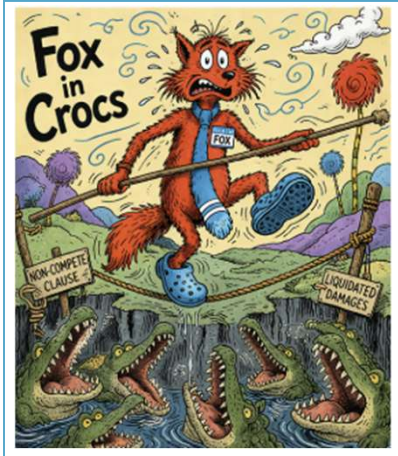
Competitive issues. Industry structure must be a consideration here as well. Is this a de facto non compete?

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A Highwire Act: Non-Compete Provisions

Chomp chomp chomp chomp.



15

Goodwill or information. Everyone has an explanation—is yours believable?

How special is this employee? How much harm could they really do? What have you given over to justify this restriction?

Geographic scope. What could this even mean in 2026?

Industry. Is this even allowed? Is it taboo?

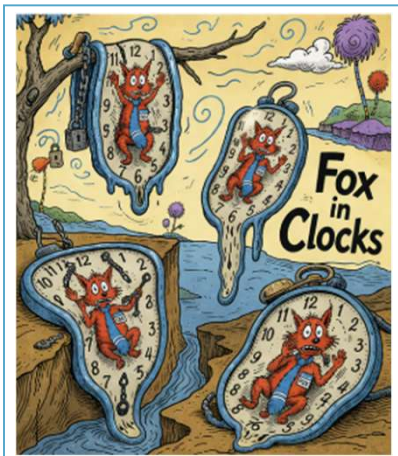
Enforceable if terminated?

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How Much Time Do I Get?

Well, that depends.



16

Think in-term and out-of-term.

Term must be reasonable. Increasingly, statutes dictate what that means. (Utah: One-year non-competes. Non-solicits often stretch for two—but what if it's a non-complete in non-solicit clothing?)

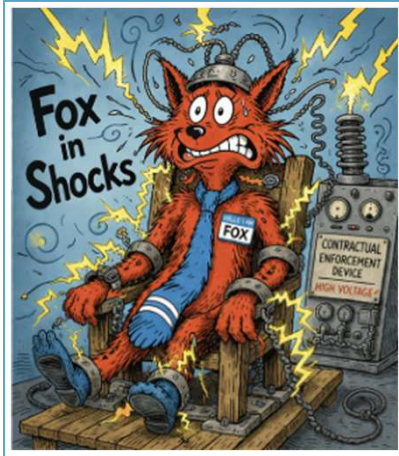
Garden leave. Are you willing to pay for time?

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Parallel Cover and Fallback Plans

Boilerplate? Not if you're smart. (See also: "We're all hungry. We're gonna get to our hotplates soon enough.")



Trade-secret protections. Consider overlap between contractual and statutory protections.

Multi-state issues. Maybe it's allowed here. But how state-specific is your workforce, really?

Blue penciling?

Non-waiver?

Presumption of harm?

Evidentiary challenges?

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Takeaways

So. How are we feeling?



And this mess is so big
And so deep and so tall,
We cannot pick it up.
There is no way at all!

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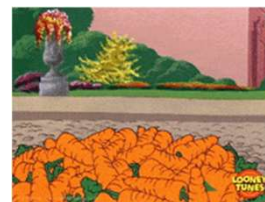
Alternatives to Non-Competes

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Alternatives to Non-competes

■ Retention / Protection strategies:

- Carrots
- Sticks
- Culture



Deferred Compensation

- Signing bonuses paid over time
- Performance bonuses paid over time (e.g., 2–4 year vesting)
- Warning: Watch out for Section 409A issues!



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Equity / Ownership Structures

- Stock options, RSUs, profit interest
 - Vesting schedules



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Contractual/Policy Alternatives to Non-Competes

- Non-Solicitation Agreements
- Confidentiality & Trade Secret Protection
- NDAs
- Trade secret policies
- Repayment / Clawback Provisions
 - Signing bonuses
 - Training/Educational costs
- Garden Leave Provisions
 - With employment agreement or severance package
 - Require notice period where employee is paid but inactive
 - Gives employer time to transition and protect information



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Cultural Changes to Improve **Employee** Retention

- **Competitive compensation packages:** Regularly review salary to ensure pay remains competitive in the market
- **Career advancement opportunities:** Implement programs for professional development, mentorship, training, and leadership development
- **Strong company culture:** Utilize recognition / reward programs, inclusive culture initiatives, and good / transparent communication (especially with HR)
- **Work-life balance support:** Ensure reasonable workloads, respect for personal time, and policies that support employee well-being



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Cultural Changes to Improve **Customer** Retention

- How often does losing an employee mean losing customers?
- **Forbes article:**

Three Out Of Four Customers Are More Loyal To Your Employee Than Your Business

1. I trust the people at the business and their capabilities (61%).
2. The employees know my preferences (57%).
3. I know what to expect from the services (57%).
4. I enjoy the social rapport (49%).
5. I get discounts and/or promotions for being a loyal customer (44%).

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Cultural Changes to Improve Customer Retention

- **Standardize the Customer Experience:** Create a uniform experience across all touchpoints; ensure consistent service (regardless of employee)
- **Build a Strong Brand Identity:** Shift the focus from individual charisma to the company's mission, values, and reputation
- **Rotate Employee-Client Assignments:** Periodically transition the management of accounts to other employees to ensure the customer builds a relationship with the organization
 - Consider: Sabbatical programs
- **Develop Team-Based Support:** Have multiple people who are familiar with a client's needs; client gets to know (and become comfortable with) multiple people



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Non-Competes in Practice (Mike)

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Primer: *England?* Or *Vendr?*

England Logistics v. Kelle's Transport Serv., 2024 UT App 137, 559 P.3d 45

Vendr v. Tropic Techs., No. 2:23-cv-165, 2023 WL 3851838 (D. Utah June 6, 2023)



England Logistics. A competitor hired away a handful of executives and England Logistics sued to immediately halt the move.

Vendr. A competitor hired away a young SaaS sales executive and Vendr sued to immediately halt the move.

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England Covenants . . . Seem to Work

England Logistics v. Kelle's Transport Serv., 2024 UT App 137, 559 P.3d 45



England Logistics. “The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant.

. . .

“[G]iven the nature of this company and its wide-ranging operations, the geographic restrictions were reasonable.”

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Vendr Covenants . . . Do Not

Vendr v. Tropic Techs., No. 2:23-cv-165, 2023 WL 3851838 (D. Utah June 6, 2023)



Vendr. “Utah law does not permit an employer to restrict a conventional employee through a noncompete agreement.” . . .

“Sanders held a junior position during his employment with Vendr. As one of forty buyers, Sanders does not appear to have a unique position. . . . Vendr, however, requires all its employees to sign noncompete agreements. . . . Such a practice appears to be against Utah law.”

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Playbook for Our Group Exercise

Takeaways

- As *England* reflects, Utah courts remain willing to enforce even broad non-competes
- But that analysis is intensely fact-specific, and if an employer wants quick relief, evidence needs to be gathered almost immediately
- Factors to consider: employee seniority, scope of prohibition, scope (both time and geography), definition of competitor, access to confidential company information



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Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

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Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

Our client manager.

Paid \$5,000 /mo.

Shadow-trained for two days and watched a video

Employed for less than two years



Our industry.

Major clients, major deals.

Intense rivalry between competing firms, but limited client movement.

Low-level personnel have only *local* client contact.

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Exercise: Let's Meet a "Client Manager"

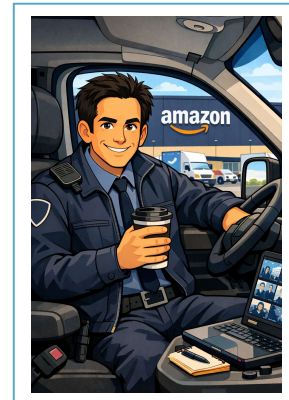
Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

Contract package. Non-compete, employee non-solicit. Confidentiality provision. Notification provision.

Posture. Employee may have been constructively terminated. Employer sends letter—likely a form. Attorneys secure affirmation affidavit.

Alarm sounds. Employee (in term) emails himself "confidential information." One co-worker conversation.

Attempt to honor covenants. Employee spends several months looking for non-competing work.



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Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

There is no evidence suggesting that Miner's position in any way involves competition with Allied Universal for clients or employees. Nor is there any evidence that Inter-Con has any interest in competing with Allied Universal in Utah.⁹ Miner's own employment history with Allied Universal shows that it is possible to work in the security industry without having any need or facing any pressure to leverage relationships or information from a previous employer. Miner Test; Blanchette Test. In fact, Miner's current employment situation undermines any suggestion that he is likely to solicit any of Allied Universal's clients inasmuch as Inter-Con hired Miner for the exclusive purpose of managing the operations of Inter-Con's pre-existing client Amazon. Likewise, Miner's

We don't love this start, friends.



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Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

Evidentiary hurdles. Recall that to win cases like this, employers likely need good information, and need it quick. Is that even possible? What are you willing to pay to win one of these?

552 F.3d 1203, 1210 (10th Cir. 2009). Miner has affirmed under oath that, since leaving Allied Universal, he has never solicited or serviced its customers, solicited its employees, or misused its confidential information. Miner Aff. at 3–4. He further affirms that he has no intent to commit these prohibited activities. *Id.* The court finds these representations credible, and Plaintiffs have no concrete evidence suggesting otherwise.⁸



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Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

Damages problem. A "presumption of harm" provision is no silver bullet.

Even if Miner's work for Inter-Con harms Allied Universal by adding value to a competitor in a competitive national market, this downstream economic harm is much too attenuated and speculative to support a finding of damages. See *Mahmood v. Ross*, 990 P.2d 933, 938 (Utah 1999) (describing the requirements for a party to recover consequential damages).

"De facto non-compete." If you're ultimately trying to chill competition, the court will see that.

Insofar as the notification requirement is subject to *Allen's* requirement of providing "no greater restraint ... than is reasonably necessary" to protect legitimate business interests, it too may be unenforceable. 237 P.2d at 826. This requirement may in practice function as an unreasonable de facto non-compete that allows Allied Universal to use the threat of litigation to chill prospective competitors from hiring its former employees.



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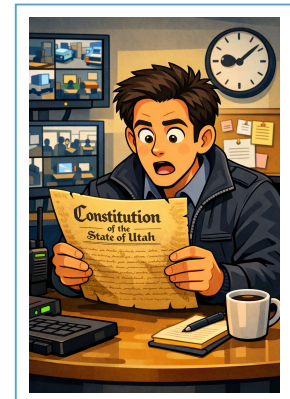
Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

Gulp. What does it mean when a court calls out the public's interest in "economic competition and against the unreasonable restraint of trade"?

Double gulp. Is it a good sign when our contract-enforcement action prompts the court to muse about the Utah Constitution promoting a "free market system" and the "general welfare of all the people"?

Defendants stress, the public also has an interest in favor of economic competition and against the unreasonable restraint of trade. See Def.'s Mem. in Opp'n. at 17-18; *MedSpring Grp., Inc. v. Feng*, 368 F. Supp. 2d 1270, 1280 (D. Utah 2005) (emphasizing the "public's interest in encouraging competition and supporting an individual's right to exploit his own skill and knowledge"). Indeed, the Utah Constitution declares that "[i]t is the policy of the state of Utah that a free market system shall govern trade and commerce in [Utah] to promote the dispersion of economic and political power and the general welfare of all the people" and prohibits "restraint[s] of trade or commerce." Utah Const. art. XII, § 20. See also *Golding v. Schubach Optical Co.*, 70 P.2d 871, 875 (Utah 1937) (affirming that Utah citizens have an inalienable "right ... to sell [their] time and [their] talents").



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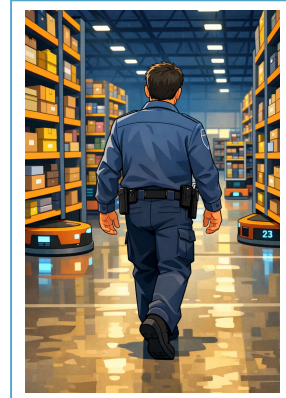
Exercise: Let's Meet a "Client Manager"

Museum of Nat. History v. Larry Daley, No. 2:25-cv-999, 2025 WL 3022644 (D. Make-Believe Oct. 29, 2025)

The Utah Supreme Court has held that "[c]ovenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable." *Robbins v. Finlay*, 645 P.2d 623, 627 (Utah 1982). This means that non-competes designed to prevent employees from leveraging their "[g]eneral knowledge or expertise acquired through employment in a common calling" with a future employer are unenforceable. *Id.* at 628. There is a strong argument that the non-compete here falls under this description and is primarily designed to prevent Miner from using his general knowledge as a manager in the security industry with Allied Universal's competitors. As Defendants argue, the specific factors listed in *Robbins* appear to support this conclusion insofar as Miner did not receive any "extraordinary investment in ... [his] training or education" and had relatively limited duties and access to confidential information. *Id.* at 627; Def's Mem. in Opp'n at 12–13.

More broadly, covenants not to compete are only enforceable when they are "carefully drawn to protect only the legitimate interests of the employer." *Id.* at 627. *Id.* See also *Allen v. Rose Park Pharmacy*, 237 P.2d 823, 826 (Utah 1951) (emphasizing that restrictive covenants, including non-competes, generally must be "necessary for the protection of the business for the benefit of which the covenant was made and no greater restraint is imposed than is reasonably necessary to secure such protection"). The facts of this case suggest that this non-compete is neither carefully drawn nor reasonably necessary to protect Allied Universal's legitimate interests. If Inter-Con is simply servicing a pre-existing client and has no intent to compete with Allied Universal in Utah for its employees and clients, there appears to be no legitimate reason for Allied Universal to prevent Miner from working with Inter-Con—or to even require him to give Allied Universal notice of his employment. Regardless of Inter-Con's actual plans, the mere fact that Miner's employment would be prohibited in these circumstances speaks to the non-compete's overbreadth. It appears that Allied Universal would be able to adequately protect its legitimate interests through other contractual provisions, such as the bans on solicitation and the misuse of confidential information, that would do far less to restrain its former employees from making a living.

We're only giving you this much text because we care.



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What to Know. What to Tell Your C-Suite.

Takeaways

- Restrictive covenants remain common, but that doesn't mean they're safe.
- Bad facts make bad law. But bad contract provisions lose cases, too. Fix your contracts!
- One size won't fit all. Measure twice, cut once.
- Litigating restrictive covenants is hard work, even for the well-prepared.
- Depending on your goals, think hard about alternative approaches—the carrot, not the stick.



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Thank You



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